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ANNOTATED

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Judicial Committee of the Privy Council, Viscount Haldane, Lords Buckmaster and Dunedin, and Duff, J. October 21, 1919.

MINES AND MINERALS (§ II B—53)—MINING LEASE—PROVISIONS AS TO FORFEITURE—RIGHTS OF LESSOR—EXERCISE OF SUCH RIGHTS—FAILURE OF LESSEE TO COMPLY WITH PROVISIONS.

A mining lease embodying provisions as to forfeiture on the failure of the lessee to fulfil certain obligations is not void when such failure occurs, but voidable at the option of the lessor. A lease which is part of an undertaking authorized by a special statute must be construed with and governed by such statute.

Statement.

APPEAL from the British Columbia Court of Appeal (1918), 42 D.L.R. 476, 25 B.C.R. 476. Affirmed.

The judgment of the Board was delivered by

Lord Buckmaster

LORD BUCKMASTER:—The question in this case is whether certain leases, granted by the Government of the Province of British Columbia to the Cariboo Hydraulic Mining Co., are valid and subsisting leases; or whether, as the appellants contend, the terms for which they were granted have come to an end.

It is not suggested that the terms have expired by reason of effluxion of time, but upon the ground that first, the respondents, who are entitled to the benefit of such leases if subsisting, have failed to take out a free miner's certificate as required by the Placer-mining Act, R.S.B.C. 1911, ch. 165; and secondly, that the conditions upon which the leases were granted have not been satisfied and that they have consequently become void.

The appellants' position in the dispute is due to the fact that they are entitled to the benefit of 7 placer mining leases granted on January 13, 1916, by the Gold Commissioner for the Quesnel Mining Division of the Province of British Columbia, pursuant to the powers vested in him under the Placer-mining Act already mentioned. These leases cover the same ground as the leases under which the respondents claim and if these latter leases are for any reason no longer subsisting, there is no question as to the appellants' title.

Before examining the provisions of the Placer-mining Act, it is desirable to consider the circumstances in which the leases for

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which the respondents are entitled were originally granted. Before 1894, the land in question was held under placer mining leases issued, under a statute similar to that of 1911 (ch. 165) to a company known as the Cariboo Hydraulic Mining Co., Ltd., through which company the respondents claim. In April, 1894, this company presented a petition asking for an Act confirming them in the property already acquired by them, and in the words of the petition "consolidating the several placer-mining claims and other properties now held by them into one, with a more lasting and secure title thereto than they now have;" and, accordingly, a statute was passed by the Legislative Assembly of the Province of British Columbia in 1894, which declared that it should be lawful for the Lieutenant-Governor in Council to demise to the company and their assigns for 25 years the properties which were described in the schedule, with power to work, extract, remove and retain to their own use all mines and minerals, including the precious metals therein contained at a yearly rental of $300 per annum, and also granting the privilege of renewal at a rental to be agreed or fixed by arbitration.

It was provided that the lease to be granted under this statute should contain a covenant that the company should spend a sum not less than $500,000 a year in developing, and also that they would not employ a Chinese or Japanese person in or about the property and the works connected therewith, and by secs. 3 and 4 power was also conferred to demise lands immediately adjoining those in the principal lease, not exceeding 250 acres, for a term of 25 years, and also so much of the waters of Six-Mile Creek and Morehead Lake, not exceeding in the aggregate 3,000 miner's inches, as defined by the Placer-mining Act, 1891, as might be necessary for any purposes connected with the undertaking.

A mining lease was granted consequent upon this statute, dated May 16, 1894, but it did not comply in exact terms with the conditions above referred to, and in particular it modified the provisions with regard to the employment of Chinese or Japanese.

Without further legislation, therefore, this lease would have been outside the powers conferred by the statute; and, in order that the position might be validated, a further Act was passed in 1895, containing extended terms with regard to the water rights and the construction of dams, and providing by sec. 5 that the

lease granted on May 16, 1894, "a copy of which is contained in the schedule of this Act, be, and the same is hereby declared to be, valid and binding."

This lease granted the full right to take all mines and minerals including precious metals, excepting such as were held by free miners on the date of the lease, and it contained the provisions as to avoidance of the lease in certain events, in the following terms:

Provided, always, that if the said lessee or its assigns shall cease for the space of two years to carry on mining operations upon such premises or to do any work which shall conduce to the facility of carrying on such mining operations as aforesaid or shall completely abandon the said premises for the space of one year then this demise shall become absolutely forfeited and these presents and the term hereby created, and all rights, privileges and authorities hereby granted and conferred or intended so to be, shall, *ipso facto*, at the expiration of the times aforesaid cease and be void as if these presents had not been made.

It is the failure to comply with the conditions of this proviso, that is one of the reasons why it is alleged that the lease has come to an end.

Leases were also granted pursuant to the powers in secs. 3 and 4, dated respectively March 3, 1896, and October 31, 1896, but these leases did not repeat the provisions as to cesser contained in the lease of May 16, 1894, already referred to. The respondents or their predecessors took out free mining certificates up to May 31, 1912; but they then ceased to renew them, and contend that, for the purpose of working the mines under the rights conferred by the lease of May 16, 1894, such renewal was unnecessary.

With regard to the failure to comply with the proviso as to working, MacDonald, C.J.A., before whom the case was heard, held that there had been no complete abandonment; but, on the other hand, he decided that mining operations of any kind ceased for a much longer period than the two years, and that there were no mining operations carried on at the time when the staking took place by the parties who obtained the leases under which the appellants now claim.

For this reason, and also because he regarded the possession of a free mining certificate as essential for the preservation of the right conferred by the leases he decided in favour of the appellants; but his judgment was overruled by the unanimous judgment of the Court of Appeal of British Columbia and from their judgment this appeal has been brought.

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The point as to forfeiture of the lease by breach of the proviso may be conveniently dealt with first. In order for the appellants to succeed upon this point, it is necessary for them to shew that the failure to work rendered the lease void, without any option on the part of the lessor. According to their contention, therefore, upon the expiration of the period during which no work had taken place, the lease must automatically have ended, and if any indulgence had been shewn by the Crown it must have been in the form of a new lease and not by continuation of the old. If the covenant does not effect this, then, although the words used are void, the meaning is void at the option of the lessor, or in other words voidable.

Their Lordships have no hesitation in saying that that is the true meaning of the covenant. Substantial obligations are imposed upon the lessee under the terms of the lease; and it would not be consistent with the ordinary rules of construction applicable to such a document to hold that these obligations could be completely avoided by the lessee omitting to perform any work. It is of course possible so to frame a lease that this must be the effect, and it would result that the term was then a term which ended on the happening of a condition solely in the power of a lessee. This, however, is not the language used in the lease. The words are that the demise should become "absolutely forfeited" and upon this follow the provisions that the term shall *ipso facto* cease and be void as if these presents had not been made; but these latter words only give emphasis to the phrase as to forfeiture and this is the forfeiture of a right held by the lessee back to the lessor.

In their Lordships' opinion this clause, though strongly expressed, is nothing but a condition of forfeiture of which the lessor is not bound to take advantage, and they think that the Judges of the Court of Appeal were quite right in the expression of their opinion that in the circumstances of this case no act was done by the Crown to establish the forfeiture, and that, until such an act took place, the term was not ended. In addition to the authority of *Davenport* v. *The Queen* (1877), 3 App. Cas. 115, the more recent case of *The New Zealand Shipping Co., Ltd.* v. *Société des Ateliers et Chantiers de France* (1918), L.J., 87,

K.B. 746, shews that this decision is in agreement with well-known rules of construction.

With regard to the omission to obtain a free mining certificate, after the very full and careful judgment of the Judges of the Court of Appeal, their Lordships think that there is but little that can be profitably added. It will be sufficient if they indicate what appears to them to be a conclusive argument in favour of the view at which these Judges had arrived. The Placer-mining Act refers to a special form of mining. The lease in question does not purport to be made under this or any corresponding Act; it places no limitation on the character of the mining or on the minerals to be won, and contains no reference to the statute from beginning to end, except the reference to the computation of water rights and the exception of rights held by free miners at the date of the grants. As pointed out by Martin, J.A., there are a number of fundamental differences between this lease and the rights that would have been conferred under a placer-mining lease. Further, as again pointed out by the Judge, the lease in question embraces four distinct classes of mining property, some of which are quite outside the statute and the leases of the adjoining lands, so that the lease cannot be related to the power conferred by the Placer-mining Act, which covers only a part of the thing demised. Indeed, the first statute recited the petition asking that all the different rights and privileges might be consolidated with a more lasting and secure title, upon such terms as may seem just; those terms were the ones that were defined in the statute and ultimately incorporated in the lease, and were not the terms under the Placer-mining Act.

The section of the Placer-mining Act which imposes the penalty for omission to take out the certificate is in these terms:

> No person or joint stock company shall be recognised as having any interest in or to any placer claim mining lease, etc . . . or in or to any water right mining ditch, etc. . . . unless he or it shall have a free miner's certificate.

The mining lease there referred to is, in their Lordships' opinion, a mining lease under the statute and not any mining lease, however granted. They do not think that in this connection they could do better than sum up the position in the words used by Martin, J.A.:—

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The truth is, and the situation becomes perfectly clear when it is thoroughly studied, that this whole undertaking and the statute which authorised and assisted it must be taken, construed and given effect to as a thing complete in itself, and which it is impossible to work out in connection with any one or all of the said three mining statutes without dismembering it and defeating the whole scheme. After a most careful examination of it I do not hesitate to affirm that there is not one section in the whole Placer-mining Act of 1891 which applies to the situation created by the said special Act, and it can only properly be worked out by entirely disregarding the same.

This statement, with which their Lordships are in entire agreement, disposes of the whole question.

For these reasons they think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly. *Appeal dismissed.*

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THE KING v. VANCOUVER LUMBER Co.

Judicial Committee of the Privy Council, Viscount Haldane and Lords Dunedin and Parmoor, October 23, 1919.

PUBLIC LANDS (§ I B—5)—VALIDITY OF LEASE—APPROVED BY ORDER-IN-COUNCIL—AMENDMENTS—APPROVAL BY MINISTER—SIGNATURE—NO SUBSEQUENT ORDER-IN-COUNCIL—VALIDITY.

A lease of Crown land made between a corporation and a minister acting on behalf of the Crown, and approved by order-in-council, must have the indenture containing amendments to the same duly approved by order-in-council otherwise such indenture is a nullity.

[The decision of the Supreme Court of Canada affirming *The King* v. *Vancouver Lumber Co.*, (1914), 41 D.L.R. 617, affirmed.]

Statement.

APPEAL from a judgment of the Supreme Court of Canada, which dismissed an appeal from the Exchequer Court of Canada, 41 D.L.R. 617, in an action to set aside a lease of Deadman's Island, in the harbour of Vancouver. Affirmed.

The judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—This is an appeal from a judgment of the Supreme Court of Canada, which dismissed an appeal from the Exchequer Court of that Dominion (1914), 41 D.L.R. 617. What had been decided by the Exchequer Court was that an indenture varying the terms of a lease and purporting to have been made between Her Majesty, the then Queen, acting through the Minister of Militia and Defence in Canada, and the appellants, on April 14, 1900, was a nullity.

By an indenture made a little over a year previously to that in question, namely, on February 14, 1899, the Crown in right of the Dominion, acting through the same Minister, had demised Deadman's Island, situated in Coal Harbour in Burrard Inlet

near the City of Vancouver, to the appellants, to be used as a lumbering location. The demise was for 25 years "renewable," to be computed from March 1, 1899, and to be ended at the expiration of the term or on earlier notice which might be given as and for the purposes in the lease mentioned. The appellants covenanted to pay an annual rent of $500, and entered into various further covenants for payment of taxes and otherwise as in the deed specified. The grant of this lease was made, not under the Great Seal of Canada, but under a statutory authority, conferred by 57 and 58 Vict. (Canada), ch. 26, which provided that the Governor-in-Council might authorise the sale or lease of any lands vested in Her Majesty which were not required for public purposes, and for the sale or lease of which there was no other provision in the law. It is obvious that this provision made it necessary that the requisite authority should be conferred by an Order-in-Council.

The Order so required was made on February 16, 1899, two days after the execution of the lease. No question has been raised as to its retrospective validity, and it is of course possible that the deed was not delivered until after it was made. Its terms were as follows:—

> On a Memorandum, dated 10th February, 1899, from the Minister of Militia and Defence, recommending that authority be given him to lease Deadman's Island, situated in Coal Harbour, Burrard Inlet, British Columbia, to the Vancouver Lumber Company, of Vancouver City, British Columbia, for a term of twenty-five years, at an annual rental of five hundred dollars.
>
> The Committee submit the same for your Excellency's approval.

It appears that the approval of the Governor-General was duly given.

Subsequently to this Order-in-Council the appellants, through their legal adviser, *Mr. Macdonell*, opened negotiations at Ottawa with Sir Frederick Borden, the then Minister of Militia, and with the Deputy Minister, Col. Macdonald. *Mr. Macdonell* desired to obtain for his clients certain variations of the terms of the lease which will presently be referred to. He said in his evidence that he submitted his suggested amendments to the Minister, who shortly afterwards informed him that he had laid the matter before the Council, and that the Council wished for the opinion of the Deputy Minister of Justice upon them. *Mr. Macdonell* went on to say that he then had a consultation with the Deputy

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Minister of Justice and Col. Macdonald, and that the amendments and the terms of the requisite Order in Council were agreed on. He added that a day or two after, on April 3, 1900, the Minister told him an Order-in-Council had been passed approving of the amendments. A few days later the original lease, with the new terms which varied it endorsed on it, was, he said, sent to him after he had left Ottawa. In cross-examination the witness said that he was not sure where it was that Sir Frederick Borden told him that the Order-in-Council had been made; it was immediately after the latter had attended the Council, and it might have been at his office or it might have been at the Rideau Club in Ottawa. He thought that Col. Macdonald was present.

An indenture containing the amended terms was endorsed on the old indenture. It was under seal like the original document, and it proceeded on the recital that it was deemed advisable to modify the original lease by removing the proviso giving power to determine it by notice in writing, and by adding a provision that "the said lease, at the expiration of the first term of 25 years, and from time to time at the end of each renewal term of 25 years, shall be renewed for a further term or terms of 25 years," at a rental for each renewal term to be determined in case of difference by arbitration.

Sir Frederick Borden as Minister appears to have executed the indenture thus endorsed, and to have affixed to it his seal as Minister of Militia and Defence, and Col. Macdonald witnessed it.

The question is whether there actually was made an Order in Council authorising these new terms which embodied very substantial concessions to the appellants. Their Lordships have quoted the statements of *Mr. Macdonell*, the legal adviser of the appellants, as to what he alleges to have been said by Sir Frederick Borden and the two officials who took part in the discussions on behalf of the Government of Canada. The deed was duly executed by Sir Frederick Borden. But that is obviously not sufficient in the absence of the Order in Council that was requisite. It is impossible to speculate as to what really happened. He may have executed the deed before any Order in Council had actually been obtained, anticipating wrongly that this would prove to be a mere formality. Was such an Order actually passed? *Mr. Macdonell* says that Sir Frederick Borden told him so, but his

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statement as to what Sir Frederick Borden and also the other two officials said is obviously not evidence, especially in the absence of proof that they could not be called as witnesses. Now no such proof was offered. So far as appears there is therefore no evidence that the Order in Council was ever made. No doubt there is the fact that the second indenture was duly executed. But although that would afford some ground for presuming that the Minister had authority, it is not conclusive.

However the matter does not rest here. For the Crown important evidence was called to shew that no Order-in-Council was ever made. The Clerk of the Privy Council of Canada, Rudolph Boudreau, was called. He swore that there was no record in the office of such an Order. He was not cross-examined on behalf of the appellants. Again the Secretary of the Department of Militia and Defence, Ernest F. Jarvis, was called for the Crown. He said that any modification of the original Order-in-Council would be based on a recommendation from the Department, and that there was no record of any such recommendation. Upon this point he was not cross-examined. Coupling the evidence so given with the fact that the appellants did not call as witnesses either Sir Frederick Borden or the two officials who are said to have taken part in the transaction, their Lordships are unable to come to any other conclusion than that the appellants have wholly failed to prove that the Order-in-Council in question ever existed. They regard this issue of fact, moreover, as one on which there is a concurrent finding by the two Courts below. There is no other point of substance in the case, and their Lordships only desire to add the observation that the question on which the appeal turns is of such a nature as to render the opinion arrived at by the Courts in Canada an opinion from which they would be reluctant to differ.

They will humbly advise His Majesty that the appeal should be dismissed with costs. *Appeal dismissed.*

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CRAIG v. LAMOUREUX.

Judicial Committee of the Privy Council, Viscount Haldane and Lords Buckmaster and Dunedin. October 21, 1919.

WILLS (§ I D—38)—ESTATE BEQUEATHED TO HUSBAND—ALLEGED UNDUE INFLUENCE—BURDEN OF PROOF—ONUS ON PARTY ALLEGING.

When it is proved that a will has been properly executed by a person of competent understanding, and apparently a free agent, the burden of proving undue influence rests on the party alleging this. It must be shewn that a person having the power to overbear the will of the testator duly exercised such power, and by means of the same, obtained the will. [*Parfitt* v. *Lawless* (1872), 2 L.R.P. & D. 462, referred to; *Baudains* v. *Richardson*, [1906] A.C. 169, followed.]

Statement. APPEAL from the Supreme Court of Canada (1914), 17 D.L.R. 422. Reversed.

The judgment of the Board was delivered by

Viscount Haldane. VISCOUNT HALDANE:—This is an appeal from the Supreme Court of Canada (1914), 17 D.L.R. 422, which reversed, the Chief Justice dissenting, a judgment of the Court of King's Bench for the Province of Quebec (1913), 14 D.L.R. 399. That Court, in its turn, had reversed the judgment of the Superior Court for the Province (1912), 2 D.L.R. 148, delivered in an action which was brought to set aside a will. The claim was made against the appellant as defendant, and was based on the contention that as the appellant, who was the husband of the testatrix, was the sole beneficiary under the will and had been instrumental in preparing it, the *onus* lay on him to shew that he had not procured its execution by undue influence and misrepresentation, and that this *onus* he had failed to discharge.

Their Lordships feel bound to express their regret at the course which the litigation has taken. The amount of the testatrix's estate is small, and the costs of determining the issue raised must be out of all reasonable proportion to the sum at stake. But the judgments given have been successively reversed, and there is no course open to this Board but to deal with the matter without regard to consequences.

The respondent, the plaintiff, was an unmarried sister of the testatrix. The latter had been married to the appellant for twenty-four years, and the husband and wife had lived together through that period in the house of the appellant's father near Montreal. They were married with a contract providing for separation of property, under which the surviving spouse would not on intestacy take any interest in the property of the pre-

deceasing spouse, a situation which they had, according to the evidence, only realised immediately before the death of the wife.

The events which have given rise to the controversy between the parties are shortly as follows:—The testatrix was seized with a serious illness on Saturday, July 1, 1911. Doctors who were called in thought her condition one of danger. The trained nurse, who was in attendance, finally suggested to the testatrix that she should see the parish priest, and he was summoned accordingly by the husband's father, Joseph Craig. The latter had heard the appellant and the testatrix talking with the idea that the survivor of them would succeed to the property of the other, and having doubts whether they realised that, from the nature of their marriage contract, this could not be without a will, he spoke first to his son, and then to the priest. The priest, after administering the rites of his Church to the testatrix, mentioned the point to her, but, according to his evidence, without suggesting that she should leave her property to her husband. When the priest had left her, the testatrix told the nurse to ask her husband to come to her room, as she had something to say to him. He came, and the nurse left the room. According to the husband's testimony, his wife asked him how it was that their affairs were not in order as she had always been told by him, and she requested him to get them arranged so that, as they had always agreed when she was in health, the property should go to the survivor. The husband then went to his brother, who lived in the house, and who was a lawyer. The latter wrote out a will in the following words:—

Par mesure de prudence, et sans me croire nullement dangereusement malade, je prends à tout évènement les présentes dispositions: Je donne et lègue, sans restrictions, à mon époux, Isaie Craig, tous mes biens tant immeubles que meubles, sauf les cadeux qu'il jugera à propos de faire à mes proches comme souvenirs.

The husband read this will to his wife, who asked him, according to his account, if he could do something for her own family, for her father had always asked her to think of these others if it was at all possible, as far as she would like to do so, and she said to him that she would like that he should do this if he could. The husband then went back to his brother and asked him to add a clause to the will. The brother re-drew it in the old terms, but with the following addition at the end:—

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Suivant les recommendations de mon défunt père, je lui recommande de même de ne donner ou léguer ces dits biens à nul autres qu'aux membres de ma famille.

The husband and wife had had no children, and the wife's legal heiresses, apart from the operation of the will, were the respondent and her sister. She had inherited a substantial amount of property from her deceased father. What has been stated appears to their Lordships to represent the substance of what was proved by the witnesses on balance of testimony.

The wife was asleep after an injection of morphine when this second document was prepared. It was taken to her by her husband later on, between five and six o'clock in the afternoon of the same day (Wednesday, July 5), and was read over to her by the husband. She tried to sign her name to it, but the signature was illegible. The document was subsequently signed by three witnesses whose names appear on it, but as they did not sign in the presence of the testatrix, as required by the law, the execution was apparently invalid. It is not, however, necessary to go into this question, because when it was shewn to the brother he pronounced this will valueless because of the illegible character of the signature, and it was in consequence superseded. The husband, who says he was under the impression that this was so, informed his wife of it. She then, according to him, asked him to bring her the first will which he had read over to her in the morning. According to the testimony of Madame Amyot, an intimate friend of the wife who was with her, there elapsed only a brief interval between the signature of the second will and the signature of that first prepared and for which she had finally asked. Madame Amyot says that the husband offered to read it over again to her, and that she said that she did not desire this to be done, adding that it was not necessary, for she was going to sign it at once. This she did by putting her mark in the form of a cross. At the end of this will the words had been added:—"Et je déclare ne pouvoir signer"; the cross was marked underneath, and three witnesses attested the document in the testatrix's presence as being so executed. Their Lordships think that no question can be successfully raised as to the validity of this will so far as formalities are concerned. Nor do they think that it was shewn that the testatrix was other-

wise than capable of understanding what she did. The evidence of the nurse, who was one of the three attesting witnesses, supports this view. Miss Craig, a lady of mature age, who was also present when the testatrix put her mark to the will, and was one of the witnesses, says that the testatrix asked for her spectacles, and that she was in full possession of her faculties. The doctor, who had seen her twice that day, was not called to contradict this.

The action was tried before Bruneau, J., without a jury. The learned Judge found against the first will, that finally signed with a cross. He held that the true intention of the testatrix was expressed in the other or second will, which had been put aside on the representation that it was inoperative because of the illegible signature, and that she was led to sign her first will only because of this misrepresentation of the law.

The husband appealed to the Court of King's Bench, where judgment was given by Archambeault, C.J., on behalf of himself and Lavergne, Cross, Carroll and Gervais, JJ. The judgment of Bruneau, J., was reversed, and the action dismissed for reasons given very fully by the learned Chief Justice. In his judgment he makes a close examination of the evidence. With his conclusions as to what really happened their Lordships are entirely in agreement, and to the reasons he gives for rejecting the conclusion come to by Bruneau, J., they have little to add. The Chief Justice points out the fallacious character of the argument that because of the departure from the second will being based on a mistaken idea about the law relative to the illegibility of the signature, the will signed in its place was therefore bad. For whether or not the testatrix was misled by this idea, she knew what she was doing when she finally signed her mark to the first will. She did not ask that it should be altered. She adopted it as it stood. Moreover, as the Chief Justice points out, if she had not done so she might have died intestate, inasmuch as the second will was not validly attested by the witnesses, and she would have defeated her purpose, which was that her surviving husband should take her property. The judgment does not proceed on presumptions of law. It simply weighs the evidence apart from such presumptions, and arrives at the conclusion that so regarded the plaintiff had failed to make out any case for upsetting a will which the testatrix must be taken to have elected to make with full consciousness of what she was doing.

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The plaintiff appealed to the Supreme Court of Canada, where, unfortunately as their Lordships think, the majority of the Judges, notwithstanding the dissent of the Chief Justice there, were much influenced by the view that the validity of the will in such a case as the present depended on whether the husband had discharged a burden which they held to be on him of proving that his wife, in making a will in his favour, had such complete appreciation of the consequences of her action as probably nothing short of independent advice could have given her. They applied what they took to be a principle of universal application, that a person who is instrumental in framing a will under which he obtains a bounty is placed in a different position in law from ordinary legatees who are not called on to support by evidence of its honourable and clearly comprehended character the transaction as regards their legacies. In their case they thought that it is enough that the will should be read over to the testator, and that he should be of sound mind and capable of understanding it. But they considered that there was a further burden resting on those who take for their own benefit after having been instrumental in framing or obtaining the will. For they have thrown on them the burden of proving the righteousness of the transaction. This they considered that the husband had not done in the present case, and in the light of the principle so laid down they reviewed the evidence and decided against the will.

No doubt a principle such as that relied on by the majority of the Judges in the Supreme Court of Canada is one which is very readily applied in cases of gifts *inter vivos*. But, as Lord Penzance pointed out in *Parfitt* v. *Lawless* (1872), 2 L.R.P. & D. 462, it is otherwise in cases of wills: When once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this. It may well be that in the case of a law agent, or of a stranger, who is in a confidential position, the Courts will scan the evidence of independent volition closely, in order to be sure that there has been thorough understanding of consequences by the testator whose will has been prepared for him. But even in such an instance a will, which merely regulates succession after death, is very different from a gift *inter vivos*,

which strips the donor of his property during his lifetime. And the Courts have in consequence never given to the principle to which the Judges refer the sweeping application which they have made of it in the present case. There is no reason why a husband or a parent, on whose part it is natural that he should do so, may not put his claims before a wife or a child and ask for their recognition, provided the person making the will knows what is being done. The persuasion must of course stop short of coercion, and the testamentary disposition must be made with comprehension of what is being done.

As was said in the House of Lords when *Boyse* v. *Rossborough* (1856), 6 H.L. Cas. 2, was decided, in order to set aside the will of a person of sound mind, it is not sufficient to shew that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shewn that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean. And the relationship of marriage is one where it is, generally speaking, impossible to ascertain how matters have stood in that regard.

It is also important in this connection to bear in mind what was laid down by Sir James Hannen in *Wingrove* v. *Wingrove* (1885), 11 P.D. 81, and quoted with approval by Lord Macnaghten in delivering the judgment of this Board in *Baudains* v. *Richardson*, [1906] A.C. 169, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shewn that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained.

Their Lordships are of opinion that the majority in the Supreme Court did not sufficiently bear in mind what is the true principle in considering the evidence in the present case. They appear to have applied another principle which was not relevant in the inquiry, and to have thrown a burden of proof on the appellant which was not one which he was called upon to sustain. Their Lordships agree with the course taken and the conclusions come

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to as the result in the judgment of the Court of King's Bench. They think that the judgment under appeal must be reversed, and that the respondent must bear the costs here and in the Courts below of an action which was misconceived. They will humbly advise His Majesty accordingly. *Appeal allowed.*

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CALGARY AND EDMONTON R. Co. v. SASKATCHEWAN LAND AND HOMESTEAD Co.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 10, 1919.

ARBITRATION (§ IV—46)—AWARD—COSTS TAXED MORE THAN AWARD—EFFECT OF RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 199.

Under R.S.C. 1906, ch. 37, sec. 199, the taxable costs, incurred on an arbitration, are a debt recoverable by action, and the expropriated party is liable for such costs even though they may exceed the compensation awarded.

The Judge who taxes these costs acts as *persona designata*, and no appeal lies from his decision.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1919), 46 D.L.R. 357, 14 Alta. L.R. 416, reversing the judgment of the trial Judge, Ives, J. (1918), 44 D.L.R. 133, and dismissing the appellant's, plaintiff's, action with costs. Reversed.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Frank Ford, K.C., for the respondent.

Idington, J.

IDINGTON, J. (dissenting):—This appeal must depend on the construction of sec. 199 of the Railway Act, R.S.C. 1906, ch. 37, which reads as follows:—

> 199. If by any award of the arbitrators or of the sole arbitrator made, under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.
>
> 2. The amount of the costs, if not agreed upon, may be taxed by the Judge.

Had the intention been to give unlimited costs there was no object or sense in adding to what would have given that, subject to taxation, the words "and be deducted from the compensation."

When using language which would without these words have given the right of action insisted upon some meaning must be given thereto.

The most reasonable interpretation seems to imply a limitation of the amount of costs and the most direct method of asserting the method and right of recovery.

It is an illustration of the rule that "where the Legislature has passed a new statute giving a new remedy that remedy alone can be followed."

Of course the Judge taxing the costs can only allow such as can be so recovered.

The appeal should be dismissed with costs.

DUFF, J. (dissenting):—The compensation awarded the respondents is much less than the amount of the taxed costs. In these circumstances the question arises whether the appellant company has a right of action against the respondents for the amount by which the costs exceed the compensation.

The proceedings for determining compensation are prescribed in secs. 192 *et seq.* of the Railway Act. By sec. 193, the notice to treat is, among other things, to contain a declaration of readiness to pay a named sum as compensation; and by sec. 195, if the "opposite party" is absent from the county or district in which the lands lie or if he cannot be found, authority is given to a Judge to order that the notice to treat may be delivered by publication in a newspaper published in the district or county or, if no newspaper is published therein, then in a newspaper published in some adjacent district or county. Then by sec. 196, if within ten days after the service of the notice to treat or within one month after the first publication of it, the "opposite party" does not give notice to the company that he accepts the sum offered, the Judge shall, on the application of the company or of the "opposite party," appoint an arbitrator for determining the compensation. Sec. 199, upon which the point in dispute turns, is in the following words:—

> 199. If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.
>
> 2. The amount of the costs, if not agreed upon, may be taxed by the Judge.

The effect of this enactment, according to the construction for which the appellant company contends, is that any person

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whose lands have been taken by a railway company and who does not within the time mentioned in sec. 195, as above mentioned, give notice to the railway company accepting the company's offer of compensation, becomes, if that offer prove to have been sufficient, liable to pay the whole of the costs of the proceedings for determining the amount of compensation, even though the costs should exceed the compensation itself; and this although the person whose lands are taken may never have heard of the proceedings.

The penalty seems an extreme one. Cases must not infrequently happen in which some investigation is required in order to determine within reasonable limits the extent of the damage the owner is likely to suffer and it truly is a little difficult to understand even in cases where the notice is actually served upon the owner personally why his failure to notify acceptance of compensation should expose him, however reasonable his conduct may have been, not only to the penalty of having his compensation applied in payment of costs but should subject him to personal liability as well. I repeat, it seems an extreme penalty.

And in the case where the owner has never heard of the proceedings and through no fault of his own the proceedings are taken behind his back such a penalty could hardly be characterised otherwise than as a palpable injustice.

There are two principles of construction which may properly be applied. 1. The principle resting on the presumption that Parliament will not impose a palpably unjust burden upon the subject, the best example, perhaps, of the application of this principle being the *River Wear Commissioners* v. *Adamson* (1876), 1 Q.B.D. 546; (1877), 2 App. Cas. 743, where the Court of Appeal and the House of Lords agreed that unqualified language must be qualified in order to give effect to this presumption. The second is that the enactment to be construed should be read as a whole.

It is quite true that sec. 199 plainly evinces an intention that, in some degree at all events, the owner may have the compensation awarded him, however reasonable his conduct may have been, applied towards payment of the costs incurred by the railway company in connection with the arbitration. The justice of this may well be doubted; but up to this point the language is clear. It is quite clear also that the section not only appropriates the

compensation in payment of costs but may further subject the owner who has heard nothing of the proceedings and through no fault of his own, to a personal liability?

Coming to the language of sec. 199—it is clearly enough an admissible view of this section that it does not contemplate cases in which the costs exigible at the instance of the company exceed the amount of the compensation awarded, it is possible that is to say, to read the phrase "borne by the opposite party" as explained by what follows; and, having regard to the considerations just mentioned, I think that it is the better construction.

It certainly is not a satisfactory mode of arriving at the meaning of a compound phrase to sever it into its several parts and to construe it by the separate meaning of each of such parts when severed. *Mersey Docks & Harbour Board* v. *Henderson*, (1888), 13 App. Cas. 595 at 599, 600.

I have not overlooked the argument of Counsel for appellant that this construction has the effect of deleting the words "shall be borne by the opposite party." As the section stands in its present form this is perhaps so but I incline to think an explanation of these words is afforded by the history of the section, an explanation which would meet the objection. I will not go into that but merely say that redundancy even tautology of expression is so common in Dominion Statutes and especially in Railway legislation as to deprive this argument of much of the weight it otherwise might have.

The appeal should be dismissed.

ANGLIN, J.—I am, with great respect, of the opinion that sec. 199 of the Railway Act created a debt on the part of the respondent for the taxable costs incurred by the appellant on the arbitration. I can attach no other meaning to the words "shall be borne by the opposite party." They must have a purport and effect corresponding to that of the preceding words "shall be borne by the company."

Anglin, J.

The ordinary remedy when Parliament creates an obligation to pay is by action. *The Queen* v. *The Hull & Selby R. Co.* (1844), 13 L.J.Q.B. 257; *Booth* v. *Trail* (1883), 12 Q.B.D. 8. That remedy is open unless it is taken away or some other exclusive remedy is given. *Hutchinson* v. *Gillespie* (1856), 11 Exch. 798, 25 L.J. Ex. 103, *per* Martin, B. Do the added words "and be deducted from the compensation" provide an exclusive remedy? If they do the statute is to be construed either as if the words

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"they shall be borne by the opposite party," were deleted from it, or as if it read "they shall be borne by the opposite party (to the extent of) and be deducted from the compensation." Is there justification for such deletion or for the interpolation of the bracketed words? I think not, having regard to "the provisions and object of the enactment" *Vallance* v. *Falle* (1884), 13 Q.B.D. 109, at 110.

The general rule certainly is that

where an Act of Parliament creates a right and points out a remedy, no other remedy exists.

But is the provision for deduction from the compensation intended as a remedy? I doubt it. Its purpose may well have been to require the company to resort to the compensation money as the fund for payment of its cost until exhausted and to restrict its right to maintain suit and to levy execution to any balance of the costs not thus satisfied. As a remedy for the realisation of the debt expressly created by the preceding clause it would sometimes, as in the present case, prove grossly inadequate. It does not cover the whole right. The fact affords a *primâ facie* indication that it was not intended to be exclusive or subconstitutional. *Shepherd* v. *Hills*, (1855), 11 Exch. 55; *Vestry of St. Pancras* v. *Batterbury* (1857), 2 C.B. (N.S.) 477, at 487; *Atkinson* v. *Newcastle and Gateshead Waterworks* (1877), 2 Ex. D. 441. The giving of a special remedy does not always take away the remedy by action. *Batt* v. *Price* (1876), 1 Q.B.D. 264, at 269, *per* Lush, J. I agree with the trial Judge and McCarthy, J., that in this case the right of action is not taken away either expressly or by implication as to so much of the taxed costs as cannot be satisfied out of the compensation.

I am also of the opinion that the Judge who approved the taxation acted as *persona designata* and that we cannot review the allowances made on the grounds pressed by *Mr. Ford* without in fact entertaining an appeal from the taxation. So far as the right of the appellant to certain items allowed depended upon findings of fact, it was within the jurisdiction of the Judge to make such findings and they cannot be reviewed for the purpose of establishing that in making the allowance he exceeded his jurisdiction.

I would allow the appeal and restore the judgment of the trial Judge with costs here and in the Appellate Division.

Brodeur, J.

BRODEUR, J.:—We have to construe in this case sec. 199 of the Railway Act, R.S.C. 1906, ch. 37, which reads as follows:

199. If, by any award of the arbitrators or of the sole arbitrator made, under this Act, the sum awarded exceeds the sum offered by the company the costs of the arbitration shall be borne by the company, but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

Several years ago, the appellant railway company desired to expropriate a piece of land belonging to the respondent company. An offer of $733.05 was made by the railway company; but the offer was not accepted by the Saskatchewan Land Co. which, on the other hand made a claim of $339,000. The award was for $733.05 only and what appears to be the exorbitant claim of the Saskatchewan Land Company was dismissed. Now the railway company sues for its costs, which have been taxed by Simmons, J., at $5,116.20.

The trial Judge maintained the action (1919), 44 D.L.R. 133; but the Appellate Division (1919), 46 D.L.R. 357, 14 Alta. L.R. 416, McCarthy, J., dissenting, reversed this judgment and dismissed the action on the grounds that the company could not recover more costs than the amount which had been awarded.

In view of the large amount which had been claimed by the respondent company on the arbitration proceedings, it is no wonder that the costs incurred by the railway company were much larger than the amount awarded. But it is no concern of ours since, by sub-sec. 2 of sec. 199, those costs have been duly taxed. The provisions of sec. 199 seem to me to be clear as enunciating that the railway company having offered a certain sum of money if the offer is not accepted, the company will be bound to pay the costs if the amount which is later on granted exceeds the sum offered; but if otherwise, if the amount which is granted is not in excess of the amount offered, then the costs shall be borne by the opposite party, with the additional right however for the railway company to deduct the costs from the award. In such a case, the railway company might, of course, not avail itself of the privilege of deducting those costs and take an independent action to recover the whole amount. But if the railway company wants to deduct those costs from the award, the statute entitles it to make such deduction; but such a deduction will not affect its right to recover by a direct action the balance which might be due.

There is no doubt, I think, in view of the decision in *Metropolitan District Railway Company* v. *Sharpe* (1880), 5 App. Cas.

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425, that the provision that the costs shall be borne by one or the other of the parties creates a debt recoverable by action.

It has been contended by the respondent in this case that the decision of the Judge who is *persona designata* taxing the costs is subject to review in a case where he would have exceeded his jurisdiction. I could have understood such a contention; but it cannot be said that in the present case the Judge has exceeded his jurisdiction in taxing the costs but he has simply exercised a discretion which he had under the statute.

Brodeur, J.

For those reasons, I am of the opinion that the appeal should be allowed with costs of this Court and of the Court below and the judgment of the trial Judge restored.

Mignault, J.

MIGNAULT, J.—Two questions arise on this appeal:

1. Can the costs of an arbitration under the Railway Act to fix compensation for the taking of land exceed the amount of the arbitrators' award where the costs are borne by the owner?

2. Can the taxation of such costs by a Judge be revised?

The first question involves the construction of sec. 199 of the Railway Act, which is as follows:

199. If by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

2. The amount of the costs, if not agreed upon, may be taxed by the Judge.

The whole question is as to the meaning of the words:

but if otherwise they (the costs) shall be borne by the opposite party and be deducted from the compensation.

I think it is impossible to deny that when the statute says that the costs shall be "borne" by a party a right of action exists against that party to recover the same, and obviously the whole of the costs can be recovered in such an action.

The construction which the respondent places on sec. 199 is equivalent to striking out the words "shall be borne by the opposite party."

For if the costs can only be deducted from the compensation, all that would be necessary would be to say "but if otherwise they (the costs) shall be deducted from the compensation."

I cannot think that the intention of Parliament was to render the company liable for all costs when its offer was below the amount awarded, and to limit the liability for costs of the opposite

party to an amount not exceeding the compensation, when the offer of the company equalled or was higher than the award. Were that the case, the costs would not be borne by the opposite party, or only indirectly so, but would be borne or paid out of the amount awarded.

Giving therefore to each word in this section its proper and natural meaning, my opinion is that the liability for costs of the opposite party is not restricted to the amount of the compensation.

It follows that the judgment of the Appellate Division cannot be sustained on this part of the case, and that the judgment of the trial Judge should be restored.

The second question should, in my opinion, be answered in the negative. The Judge under sec. 199 acts as *persona designata* when he taxes costs, and no appeal lies from his decision, *Canadian Pacific R. Co.* v. *Little Seminary of Ste. Thérèse* (1889), 16 Can. S.C.R. 606.

This rule was not disputed by the Counsel for the respondent, but he contended that, although there was no appeal, when the Judge in taxing the costs acted according to a wrong principle of law, his order could and should be set aside by the Court.

On due consideration of the reasons adduced by the respondent as constituting a wrong principle of law for the taxation of the costs of the arbitration, I think that while they might be proper grounds of appeal, they would not come under the rule which the respondent asks us to apply, and as to which it is unnecessary to express an opinion.

The appeal should be allowed with costs.

Appeal allowed.

FLETCHER v. FLETCHER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.

DIVORCE AND SEPARATION (§ II—5)—JURISDICTION OF COURT OF KING'S BENCH—EFFECT OF 20-21 VICT. 1857 (IMP.) CH. 85.

The law of England as established by the Divorce Act, 20-21 Vict. 1857 (Imp.) ch. 85, forms part of the substantive law of Saskatchewan, and all rights arising under this Act may be dealt with by the Court of King's Bench.

[*Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, applied.]

Statement.

APPEAL from the trial judgment (1918), 42 D.L.R. 733, 11 S.L.R. 391, in an action for divorce. Reversed.

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FLETCHER v. FLETCHER.

Haultain, C.J.S.

E. B. Jonah, for appellant.

No one *contra*.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The appellant in this case brought proceedings in the King's Bench for dissolution of marriage on the usual statutory grounds as known in England. The trial Judge held that the law of England relating to divorce as established by the Divorce Act, 20 & 21 Vict. 1857 (Imp.), ch. 85, was not part of the law existing in this Province, and that the Court of King's Bench consequently had no jurisdiction in the matter. He also found on the evidence that otherwise the plaintiff would have been entitled to the relief asked for.

This appeal only deals with the first part of the decision. On the authority of the case of *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, recently decided by the Judicial Committee of the Privy Council, it must now be taken as settled law that the law of England as established by the Divorce Act of 1857 forms part of the substantive law of this Province, and that any right which was introduced into the law of the Province under that Act may be enforced in the Court of King's Bench.

The appeal should therefore be allowed, and as there has been no formal judgment entered, the case will be referred to the trial Judge to make such order or decree as the plaintiff may be entitled to in view of this decision and the finding on the evidence below.

Appeal allowed.

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Re MORROW.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. October 31, 1919.

APPEAL (§ I B—5)—RIGHT OF APPEAL—ORDER OF SURROGATE COURT JUDGE—CONDITIONS OF ORDER—PERSONA DESIGNATA—SURROGATE COURTS ACT, SECS. 34 AND 69.

An order made by a Surrogate Court Judge under the provisions of the Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 69(7) directing an action to be brought in the Supreme Court is made by him as *persona designata*, and there is no right of appeal therefrom.

Statement.

APPEAL by Robert James Morrow, the executor of the will of Mary Jane Morrow, deceased, from an order of the Judge of the Surrogate Court of the County of Lennox and Addington, made under the provisions of sec. 69, sub-sec. (7), of the Surrogate Courts Act, R.S.O. 1914, ch. 62, upon the application of the executor, directing that Daniel Henry Morrow, a claimant against the

estate of the deceased, whose claim was contested by the executor, should bring an action in the Supreme Court of Ontario to establish his claim and recover the amount thereof, upon the conditions, however, that the executor and the estate should bear and pay the extra costs occasioned by the application and by proceeding by action in the Supreme Court, instead of proceeding in the Surrogate Court, in any event of the action, and that the action should be brought on for trial at the next sittings at Napanee, which was a sittings for the trial of actions without a jury.

The order being made upon the executor's application, his appeal was against only the part of the order imposing the conditions. Appeal quashed.

J. C. Thomson, for the appellant.

H. S. White, for the claimant, respondent.

MIDDLETON, J.:—Appeal by the executor of the late Mary Jane Morrow from an order of the Judge of the Surrogate Court of the County of Lennox and Addington, made on the 22nd September, 1919, under the provisions of sec. 69, sub-sec. (7), of the Surrogate Courts Act, R.S.O. 1914, ch. 62, directing that Daniel H. Morrow, a claimant against the estate for the sum of $2,985, whose claim is contested by the executor, do bring an action in the Supreme Court for the recovery or establishment of his claim, upon certain terms in the order set out. Middleton, J.

Preliminary objection was taken that under the provisions of the statute no appeal lies to this Court. The provisions of sec. 69 relate to the contestation of claims against the estate; and the contention is that the provisions of this section establish a complete code of procedure with respect to the matter dealt with, and that there is no appeal save that given by the section itself, in sub-sec. (6), which provides that if the amount of the claim, or the part of it which is contested, exceeds $200, an order of the Judge dealing with the claim shall be subject to appeal as provided by sub-sec. (5) of sec. 34, that is, an appeal to a Judge of the Supreme Court in like manner as from the report of a Master under a reference directed by the Supreme Court. A careful consideration of the statute convinces me that this contention is correct.

Where a claim is made against the estate of a deceased person which is deemed unjust by the personal representative, he may serve the claimant with a notice in writing contesting it (sec. 69,

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sub-sec. 1); and "the claimant may thereupon apply to the Judge of the Surrogate Court" for "an order allowing his claim and determining the amount of it," and the Judge, upon hearing the parties and their witnesses, may determine the validity of the claim (sub-sec. 2). If the amount of the claim is not more than $100 and is otherwise within the jurisdiction of the Division Court, the application shall be made to a Judge of a Division Court, who shall determine the claim, unless both parties consent to the Judge of the Surrogate Court dealing with the matter (sub-sec. 3). If the Judge allows the claim, his order, when filed in the County Court of the county, shall, irrespective of the amount of the claim, become and be enforced as a judgment of that Court (sub-sec. 6), unless the claim has been dealt with by a Judge of the Division Court, in which case the decision is to be enforced in like manner as a judgment of the Division Court (sub-sec. 8).*

By an amendment to this section, 9 Geo. V. ch. 27, sec. 2, provision is made for allowing the Judge dealing with the matter to direct the issue of a commission to take the evidence of a witness out of Ontario, or to make an order to take the evidence of a sick or infirm witness, *de bene esse*, and also providing that a subpœna may issue to enforce the attendance of witnesses within Ontario, and that the Rules of the Supreme Court so far as applicable shall apply to the issue of a commission and its execution, and the Judge is empowered to award the costs of these proceedings according to the tariff of the County Courts.

All these provisions, it will be observed, would be quite unnecessary if the proceeding under sec. 69 is to be regarded as a proceeding in the Surrogate Court, for the Surrogate Court Rules make adequate provision with respect to all matters of practice.

It is particularly significant that upon the determination of the claim the judgment does not become a judgment of the Surrogate Court, but becomes a judgment of either the County Court or the Division Court. All this points to the Judge being *persona designata* for the purpose of determining the validity of the claim.

*Sub-section 7 is as follows: "Where the claim, or the part of it which is contested, amounts to $800 or more, instead of proceeding as provided by this section, the Judge shall, on the application of either party, or of any of the parties mentioned in sub-section 5, direct the creditor to bring an action in the Supreme Court for the recovery or the establishment of his claim, on such terms and conditions as the Judge may deem just."

It is argued that there is a right of appeal to a Divisional Court under sec. 34 (1) of the Surrogate Courts Act; but the appeal there contemplated is from "an order, determination or judgment of a Surrogate Court," which is sharply contrasted with the right given by sub-sec. (5) to appeal "from any order, decision or determination of the Judge of a Surrogate Court, on the taking of accounts."

The fact that a right of appeal is given by sec. 69, sub-sec. (6), from the order of the Judge dealing with the claim upon its merits, and that no further or other right of appeal is given, precludes the idea that it was the intention of the Legislature that there should be an appeal from merely interlocutory orders.

The appeal here is not from the order directing the bringing of an action in the Supreme Court for the establishment of the claim, for the making of such an order is obligatory when it is desired by either party, but it is from the terms and conditions which the Judge has seen fit to impose. As there is no right of appeal, it will not be proper to discuss the propriety of the terms imposed.

The appeal, therefore, fails for lack of jurisdiction, and should be quashed, with costs to be paid by the appellant to the respondent.

RIDDELL, J., agreed with MIDDLETON, J. Riddell, J.

LATCHFORD, J.:—Under sec. 69 (7) of R.S.O. 1914, ch. 62, the Judge was bound to direct the creditor to bring an action in the Supreme Court, on such terms and conditions as to him might seem just. Latchford, J.

The executor has no objection to the order directing the bringing of the action; but he contends that the term as to costs imposed is beyond the discretion which the Judge might properly exercise, and on this point appeals, basing his right to appeal on sec. 34 of the same Act.

Mr. White raises the preliminary objection that an appeal does not lie, in the circumstances.

Section 69 deals with the contestation of claims against an estate.

When a claim is contested by a notice in writing, the claimant, within 30 days after receiving the notice, is, on 7 days' notice to the persons interested, entitled to apply for an order allowing his

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claim. Should he not so apply within 30 days, his claim is deemed to be abandoned and is forever barred. If the claim is in excess of $100, the application is to the Judge of the Surrogate Court out of which probate or letters of administration issued. If it amounts to not more than $100, the application is to be made to a Judge of a Division Court in which an action for the recovery of the claim might be brought. The claim shall then be heard by the Judge at a sittings of such Court unless the claimant and the representatives of the estate consent that the application be made to the Judge of the Surrogate Court.

If the amount of the claim exceeds $200, an order of the Judge, manifestly an order allowing or dismissing the claim, is, by sec. 69 (6), "subject to appeal as provided by sub-section 5 of section 34"—"as provided," I take to mean, "in the manner provided."

"The Judge," where the amount of the claim exceeds $100, is the Judge of the Surrogate Court out of which probate or letters of administration issued—in this case the Judge making the order which is in part appealed from.

Turning now to sec. 34 (1), provision is found for appeal from an order, determination, or judgment of a Surrogate Court to a Divisional Court.

The order now appealed from is not an order of the Surrogate Court, but an order of the Judge of that Court as *persona designata*.

The provision of sec. 34 (5) is, that "an appeal shall lie from any order . . . of the Judge of a Surrogate Court, on the taking of accounts in like manner as from the report of a Master under a reference directed by the Supreme Court, and the practice and procedure, upon and in relation to the appeal, shall be the same as upon an appeal from such a report."

However, the order appealed against, while an order of a Surrogate Court Judge, is not an order made on the taking of accounts, and, if it were, an appeal could not be made from it to a Divisional Court, but to a single Judge in Court.

It, therefore, seems evident that no appeal lies from the order made.

The motion should be dismissed with costs.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (dissenting):—In my opinion, each of Mr. Thomson's contentions is well-founded; whilst that of Mr. White is ill-founded. I would therefore allow this appeal, leaving

the parties untrammelled in the exercise of their common law rights of resort, in the ordinary way, to the Courts of law of the Province for a determination of the matters in question between them.

The respondent claims, from the estate in the hands of the appellant as executor, a large sum of money—about $3,000—for board and lodging, among other things, said to have been supplied by the respondent to the testatrix of the estate in question in her lifetime. The respondent, in the performance of his duty as such executor, disputes the claim in all respects: so that, unless the boast that the doors of the Courts of law of the Province are open to all alike is not true, the respondent must take the ordinary course of bringing an action in this Court for the purpose of establishing and enforcing his claim; unless indeed the respondent consents to a determination of it in some other way; and that he has not done, but, on the contrary, insists upon making his defence in an action in this Court in the ordinary way if the respondent invoke the aid of the law to enforce his claim.

It is not now contended that the respondent can proceed in any way but in an action in this Court; but he has obtained, in a Surrogate Court, an order purporting to hamper the appellant, as defendant in such an action, in depriving him of all his ordinary rights of trial by jury, and not only depriving him of his ordinary rights in respect of his own costs, but, beforehand, compelling him to pay the costs of the respondent as plaintiff in that action, whatever the result of it may be; and thus also depriving the Supreme Court of Ontario of its powers in these respects, which, for very obvious reasons, it should be in an incomparably better position to consider during the progress of the litigation, than the Surrogate Court Judge can be beforehand, or, indeed, than any one could with any degree of reason consider him to be.

I cannot believe that the learned Judge of the Surrogate Court could have quite seen the effect of the order, in so far as it is appealed against, when directing that it should issue. Such things are quite possible anywhere: the mind may be occupied with minor matters, such as matters of detail, or indeed of irritation at the course of the argument on one side or the other.

The unvarnished effect of the order is: if you will not try this case before me, I shall deprive you of your right to require a

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trial by jury, and make you pay the costs of the action even if you are successful: the latter alone a burden which would very likely compel the person upon whom it is put to abandon his right of trial in the ordinary way: a right which it was said was considered of so much moment as, with other momentous matters, to necessitate a somewhat important meeting near the reeds of Runnymede: and incidentally to tie the hands of the trial Judge in the Supreme Court of Ontario—unless he should treat the order as invalid because unauthorised by the Act—from directing a trial by jury, and as to costs, matters which are so proper for his consideration that the law gives him ordinarily an almost uncontrolled discretion regarding them.

I should therefore have thought that, if in the Surrogate Court there were any power to make it, it should not have been made, and should be promptly discharged.

And I am also of opinion that there was no power to make it.

The very nature and effect of it should indicate that there is not: it should need plain legislation to warrant it; and the legislation relied upon makes it plain to my mind that it is unwarranted.

Section 69 of the Surrogate Courts Act is the only legislation relied upon as conferring it.

That section was enacted for the purpose of better enabling the accounts of an estate to be taken in a Surrogate Court, in so far as they properly might be taken there, thus avoiding any great need for taking such accounts in Chancery, as often they were. But the Legislature has been very careful to preserve ordinary rights of litigation, and not to give compulsory jurisdiction to any Court in an amount beyond its ordinary jurisdiction.

When a claim is made against an estate which the personal representative deems unjust, he is to give the claimant notice that he contests it. These proceedings are entirely out of Court.

Then the claimant may apply for an order allowing it.

If the claim does not amount to more than $100, and is otherwise within the jurisdiction of a Division Court, the application is to be made to a Judge of such a Court, and the claim is to be heard and determined at a sittings of that Court, unless the personal representatives consent to a trial in the Surrogate Court. Thus the common right of trial is preserved to the estate in regard to such minor claims as are within the jurisdiction of a Division Court.

Then claims up to $800, that is, within the widest compulsory jurisdiction of a County Court, are to be dealt with as the Judge of the Surrogate Court may direct. That is, in effect: that cases within the jurisdiction of a County Court are to be under the power of the Surrogate Court Judge, who is also Judge of the County Court; and who may, on the claimant's application before mentioned, "make such order on the application as he may deem just;" including no doubt trial by jury; thus making the combined Surrogate and County Court Judge master in his own house: but plainly, as we shall see, without authority in the upper house.

Then, if the amount be $800 or more, under sub-sec. (7), if any one concerned in the trial demand it, the Surrogate Court Judge shall, on the application made by the claimant under sub-sec. (2), "direct the creditor to bring an action in the Supreme Court for the recovery or the establishment of his claim, on such terms and conditions as the Judge may deem just."

Thus again preserving the open doors of the Courts to those who desire to enter for the purpose of having their rights determined in the ordinary way.

And in no way imposing any obligation upon, or putting any impediment in the way of, a personal representative having any claim, against the estate, determined, against his will, in any but the ordinary course of law.

The provisions of sub-sec. (7), regarding the imposition of terms and conditions, are relied upon as conferring power upon a Surrogate Court Judge to impede and burden a defendant's right of defence in the Supreme Court, in which he has the clearest legal right to have his case dealt with, to any extent that he may please; even to the extent of compelling him to abandon that right. But what excuse could there be for any such legislation? And what excuse for holding that there is?

It is the creditor who is to bring the action, upon such terms and conditions as may seem just: how then can the terms and conditions be imposed on a defendant? His right is absolute to demand a trial in the ordinary course of law; no terms or conditions are put upon that right: it is the bringing of the action that is to be subject to just terms and conditions: such, for instances, as security for costs by one who according to the ordinary practice

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should give security; and limiting the time within which the action shall be brought, so that the winding-up of the estate may not be delayed by an unjust claim made in the hope of getting some settlement of the claim to avoid the costs and delay of defending it. All this without encroaching upon the province of the Supreme Court, encroachment as needless as improper—both in the superlative degree.

I am therefore clearly of the opinion: (1) that there was no power to impose the "terms and conditions" in question; and (2) that, if there had been, they ought not to have been imposed: indeed I have not yet heard any excuse for imposing them.

But Mr. White contends that there is no right of appeal against the order in question: that is, that a defendant may be deprived of such important rights as those in question wrongfully without redress: and it follows that, if that be so, no appeal would lie even though the Judge of the Surrogate Court, in defiance of the defendant's plain right and in disregard of his statute-imposed duty, had refused to "direct the creditor to bring an action;" or had imposed "conditions" so onerous upon the legal representative as indirectly to deprive him of his common law and statute rights.

His appeal to sub-sec. (6), which provides for an appeal, in certain cases, as if from a Master of the Supreme Court in taking accounts, and his contention, based upon it, that an appeal to this Court in such a case as this would be anomalous, lose all force when attention is directed to the fact that the appeal under sub-sec. (6) applies to cases similar to those which arise in "taking accounts in a Master's office," appeals which always have been in the first place to a single Judge and from him to this Court; matters often really more for an accountant than for a Judge; whilst the order in question really strikes at the vitals of the rights of litigants, including untrammelled rights of entry to the ordinary Courts of the Province and trial there. A right which may be of great importance in this case, in which there is likely to be a conflict of testimony, and in which everything is likely to depend upon the credibility of the witnesses, and so it is a case which the trial Judge may very well think should be tried by a jury of the county in which the parties live, and who should be the best judges of the truthfulness and untruthfulness of the witnesses:

but cannot give effect to his judgment because the inferior court Judge has tied his hands.

That there should be a right of appeal in this case is very plain; and that there is, I should have thought equally plain.

Section 34 of the Surrogate Courts Act is the section which governs the rights of appeal under the Act; and its first sub-section provides that: "Any person who deems himself aggrieved by an order . . . of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court . . ."

The next sub-section provides that "no such appeal shall lie unless the value of the property to be affected by such order . . . exceeds $200."

And the fifth sub-section provides that: "An appeal shall also lie from any order . . . of the Judge of a Surrogate Court, on the taking of accounts in like manner as from the report of a Master under a reference directed by the Supreme Court . . ."

The order in question is in form and in substance an order of the Surrogate Court, made in a matter in that Court—In the matter of the estate of Mary Jane Morrow, deceased; and the value of the property of the estate affected by it is almost $3,000; for, if the respondent succeed in enforcing his claim, the property of the estate to that amount or value must be taken to satisfy it—whilst the costs alone, on both sides, which the order compels the estate to pay in any event, cannot but amount to more than twice $200.

A Surrogate Court can make orders and judgments only through its one judicial officer, the Surrogate Court Judge: and the Surrogate Court Judge can make orders such as that in question only in and as representing the Court.

Let me take at random an instance or two by which this may be tested. Section 25 provides that where the Judge of a Surrogate Court is an applicant, in his own county, for probate or letters of administration, the application, and any subsequent proceedings in the matter of the estate, may be made to and taken before the Judge of the Surrogate Court of an adjoining county. Is that Judge not a Judge, but only *persona designata*, against whose orders and judgments, even an order and judgment upon the question of the validity of the will, there is no appeal? Again, under sec. 37, the Judge of a Surrogate Court may make an order

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staying all further proceedings on an application for probate or letters of administration. Could it be contended that in that he acts as *persona designata*, and not as the Judge of the Court performing its duties and exercising its powers?

Mr. White seems to me to have been led astray through not observing that the taking of accounts in the Surrogate Court is really more in the nature of an accountant's, than of judicial, work: that it is really, generally, that which in the marginal note to sub-sec. (5) of sec. 34 is termed an audit—"Appeal from audit of accounts;" and therefore is taken out of the general right to appeal direct to this Court, so widely given in sub-sec. (1) in regard to all things judicial.

Upon the argument of the appeal these things seemed plain to me, as I am bound to say they still do; and I was and am, therefore, in favour of allowing this appeal and discharging the order in question in so far as it is appealed against: but the other members of the Court are of opinion that no appeal lies to this Court in this case; and, therefore, the appeal must be quashed with costs. *Appeal quashed.*

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BENNEFIELD v. BIRDSELL.

Alberta Supreme Court, Walsh, J. November 19, 1919.

ATTACHMENT (§ I B—10)—WRIT ISSUED—RECOVERY OF DEBT—GOODS SEIZED—APPEAL—RULE 666—EFFECT OF LAND TITLES ACT, 6 EDW. VII. (ALTA.) CH. 24.

A writ of attachment against the goods of the defendant will be granted in an action for the recovery of a debt under rule 666, provided that the judgment is not obtained on the personal covenant in an agreement of sale of land. Execution cannot be issued on such a judgment according to the provisions of the Land Titles Act, 6 Edw. VII. (1906) ch. 24, sec. 62, as amended by 9 Geo. V. (1919), ch. 37, sec. 1.

Statement.

MOTION to the Alberta Supreme Court to set aside a writ of attachment. Motion fails.

A. U. G. Bury, for the motion.

A. S. Watt, contra.

Walsh, J.

WALSH, J.:—The defendant moves to set aside an *ex parte* order of Ives, J., for a writ of attachment against his goods and to set aside the writ and the seizure made by the sheriff under it. Although a careful reading of the material has led me to modify somewhat the opinion which I expressed at the close of the argument as to the defendant's conduct I still think that there was

ample ground for the plaintiff's belief of the defendant's intention to abscond from Canada and of his attempt to dispose of his property with intent to defraud her and therefore that if the action is one in which a writ of attachment can be issued this writ was properly issued. The plaintiff's solicitor, Mr. Shortreed, has had no opportunity to meet the affidavits of the defendant and Madsen which I allowed to be filed on the hearing of the motion and so it would not be fair to criticise the stand that he is said to have taken with reference to the offer of the defendant to satisfy the plaintiff's claim. All that I can say is that if the facts are as sworn to by these men he should have shewn a better disposition towards their attempts to settle this dispute than he did.

The real questions for my decision are (a) whether or not the plaintiff's claim is for the recovery of a debt so as to bring it within r. 666 and (b) if it is whether or not the issue of the writ of attachment in this action is prohibited by sub-sec. 3 of sec. 62 of the Land Titles Act as amended by ch. 37, sec. 1, Alta. Stats. 1919.

The defendant agreed to buy certain land from the plaintiff and to pay for it out of the crops grown upon it from year to year. He was to deliver at the elevator or in cars in their joint names all grain grown on the said land during the currency of the agreement which was to be sold as agreed upon in writing. One-half of the proceeds was to be paid to the defendant who was to pay out of the same the interest on the purchase money. The other half was to be paid to the plaintiff free and clear of all encumbrances and to be by her applied as payment of principal only. The defendant sold of this year's crop grain to the value of $1,650.17, and received the proceeds of the same. There is a dispute between the parties as to whether or not this grain was marketed with the plaintiff's consent but for my present purpose I think that immaterial. She unquestionably and admittedly was entitled to one-half of it, $825.08, and this the defendant did not pay over to her but has admittedly used it for his own purposes. She sues to recover this sum. Is her claim for the recovery of a debt? for it is only in an action for the recovery of a debt that a writ of attachment can issue under our practice. In my opinion it is. Whether or not the defendant had the right to take this grain to market and sell it the plaintiff unquestionably was entitled to one-half of the money resulting from its sale. It was money had and received by him for

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her use which was one of the counts in what under the old style of pleading were called the common counts, or common *indebitatus* counts in an action of debt. If the defendant had no right to sell the grain the plaintiff might have sued for damages for conversion but she was not bound to do that for she could waive the tort and sue for money had and received. Her share of this money was a definite ascertained sum which belonged to her, which in the defendant's hands constituted a sum of money owing by him to her and which therefore was in my opinion a debt.

Then it is said that the above quoted section of the Land Titles Act, 6 Edw. VII. 1906, Alta. ch. 24, as amended by 9 Geo. V. 1919, ch. 37, is in the plaintiff's way. Sub-sec. 2 of sec. 62 provides that no execution to enforce a judgment upon the personal covenant contained in an agreement of sale of land shall issue until sale of the land. Then comes sub-sec. 3, which says that as long as execution cannot issue the payment of money secured by an agreement for sale of land shall not be enforced by attachment or garnishment. The land covered by the contract in question has not yet been sold. The question is, if the plaintiff recovers a judgment in this action for this money can she issue an execution upon it at once or must she wait until the land has been sold? If she cannot issue an execution she unquestionably had no right to issue this attachment and the defendant's motion must succeed. I think that she will be able to issue her execution as soon as she gets her judgment. This action is not brought upon what is called in the statute the personal covenant contained in the agreement of sale. That of course is the covenant under which the purchaser binds himself to pay the purchase money and interest. Though it is based upon the agreement, it arises out of something dehors the contract entirely, something which the contract gave the defendant the opportunity but not the right to do. The money when received by her will of course go in reduction of the purchase money but that does not make the action to recover it one upon the personal covenant. The statute goes very far in the protection of purchasers but I do not think it goes far enough to compel me to hold that when a purchaser has under cover of his contract got into possession the money of his vendor which if turned over to her will reduce the amount owing by him under it for purchase money he cannot be made to pay it to her until she has sold the land.

I think that this objection must also fail. The motion also was to set aside a garnishee summons on the same grounds and it of course must fail too. The costs of the motion will be in the cause. Rule 669 gives the defendant the right to have his goods returned to him upon giving sufficient security for or paying into Court an amount equal to its appraised value. I have nothing before me to shew what that appraised value is but unless it is very much in excess of the plaintiff's claim he ought to be able to pay it, for in his last affidavit he swore that he offered to pay off the chattel mortgage held by her on his horses and to pay her claim of $825 in this action and $25 for costs. In the hope of enabling these people to settle a matter about which there seems to be very little room for dispute I would suggest that the defendant pay the plaintiff's claim and costs and if he does that the plaintiff has absolutely no right to insist as the defendant swears her solicitor did that he also give her a quit claim of hi[illegible]nterest in the lands.

Motion fails.

CANADIAN NORTHERN R. Co. v. SPRINGFIELD.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. December 1, 1919.

TAXES (§ III F—146)—TAX SALE—VALIDITY.

In Manitoba a tax sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold.

[Review of legislation.]

Statement.

APPEAL from the judgment of Macdonald, J., in an action to recover the amount of money and costs paid under protest to a municipality to prevent the issue of a certificate of title on a sale for taxes. Reversed.

O. H. Clarke, K.C., for appellant; *H. M. Hannesson*, for respondent.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—This action is brought to recover the sum of $494.68 made up of $184.80 taxes for 1910 and percentages; $174.73, taxes for 1911 with percentages, and $135.15 costs of tax application in respect of certain lands, paid to the defendant municipality by the plaintiff company under protest to prevent the issue of a certificate of title. A case was stated for the opinion of the Court and the facts appear in the judgment of Macdonald, J. The lands were sold for taxes for the years 1910 and 1911 on

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November 1, 1912. For the former year the taxes were admitted to have been properly imposed and the defendant municipality paid into Court the sum of $192.35, being the taxes for 1911 and percentages and interest, but denied liability for the $135.15 costs of application. Macdonald, J., gave the plaintiff company judgment for the $192.35 and costs up to the date of the payment into Court but awarded the defendant municipality the costs subsequent thereto. The plaintiff company appeals from this judgment on the ground that it was entitled to repayment of the costs of application. It is contended that the sale was invalid *in toto* and reliance was placed on the wording of sec. 199 of the Municipal Assessment Act, R.S.M. 1913, ch. 134.

Section 199 is as follows:—

199. Upon the expiration of two years from the day of sale, and thereafter unless and until the land is redeemed, the tax purchaser or his assigns shall, in all suits or proceedings wherein such tax sale is questioned, be *primâ facie* deemed to be the owner of the land.

(2) Upon the expiration of said period of two years the treasurer's return to the district registrar hereinafter provided for shall in any proceedings in any Court in this Province, and for the purpose of proving title under the Real Property Act, be, except as hereinafter provided, conclusive evidence of the validity of the assessment of the land, the levy of the rate, the sale of the land for taxes and all other proceedings leading up to such sale and that the land was not redeemed at the end of said period of two years; and, notwithstanding any defect in such assessment, levy, sale or other proceedings, no such tax sale shall be annulled or set aside except upon the following grounds and no other; that the sale was not conducted in a fair and open manner, or that the taxes for the year or years for which the land was sold had been paid, or that the land was not liable to taxation for the year or years for which it was sold.

In the Revised Statutes of 1891, ch. 101, sec. 191, the words setting forth the grounds on which, and no other, a tax sale could be set aside were these:—

That the sale has not been conducted in a fair and open manner: or that there were no taxes due and in arrear upon such land at the time of said sale for which the same could be sold.

The issue of tax sale deeds by municipalities was abolished and a new method of making title to land sold at tax sales by application to the District Registrar was instituted in 1894 by 57 Vict. ch. 21, sec. 5. The District Registrar was authorised and bound to proceed in the manner therein prescribed, and issue a certificate of title unless it was shewn to his satisfaction that the land was not liable for "the taxes or any portion of the taxes for which the same was sold." This last mentioned section

was repealed by 60 Vict. 1897, ch. 21, sec. 1, and a new set of sections substituted. By sub-sec. (9) of said sec. 1 the District Registrar was bound to issue a certificate unless it was shewn to him that the land was not liable for "any portion of the taxes for which the same was sold." This latest mentioned section was in its turn repealed by sec. 12, ch. 35, 63-64 Vict. 1900 and another series of sub-sections substituted, and in sub-sec. (16), there are set out the only grounds upon which a tax sale can be annulled or set aside in these words:—

> That the sale was not conducted in a fair and open manner, or that the taxes for the year or years for which the land was sold had been paid or that the land was not liable for taxation for the year or years for which it was sold.

These words were carried into the 1902 revision, ch. 117, sec. 202, and appear in the revision of 1913, sec. 199, ch. 134, as above quoted. It appears therefore that the words of sec. 199 on which the solution of the question before us depends have been on the statute book only since 1900. Decisions of our Courts on the validity of tax sale proceedings prior to that time have, therefore, little application. Apparently if the legislation above referred to enacted in 1894 or in 1897 had remained in force, there could have been no question as to the validity of the sale before us. But the wording of sec. 199 is different, and no doubt designedly so, and it is now open to an owner to impeach a tax sale on the ground that the land was not liable to taxation during the year or years for which it was sold. It was sold for taxes for the years 1910 and 1911, and it was not liable to taxation for those years, but only for one of them.

Sec. 152 of ch. 134, R.S.M. 1913, provides that:

> Whenever the whole or any portion of any tax on any land has been due and unpaid for more than one year, after the thirty-first day of December of the year in which the rate was struck, such land shall be liable to be sold for arrears of taxes unpaid thereon up to the time of the making up of the list for sale, and the costs of advertising.

This provision is clear. The right to sell arises as soon as any taxes, or the taxes for any year, are unpaid for more than a year, and thereupon the municipality has the right to sell for the whole amount of the taxes in arrears at the time the list is made up. It is on the basis of this aggregate amount that the treasurer offers the lands for sale (sec. 165) and the treasurer is authorised to give his certificate, in the form given in sec. 175, that he has

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Cameron, J.A.

sold the land "for arrears of taxes and costs." The owner of the land is given the right of redemption at any time within two years by paying or tendering to the treasurer "the amount of arrears and costs, for which the same was advertised and sold," together with the prescribed percentages.

It is clear, therefore, that lands are made liable to be sold for all taxes in arrear at the time of preparing the lists, provided that some portion of them is in arrear for more than one year. After the list is made up the municipality deals with all the arrears as one amount, and they are the foundation of the sale proceedings and of the title to the purchaser. It is impossible to find any suggestion that the municipality may offer for sale or sell lands for an amount which includes a sum in excess of that lawfully due. If that be so, and I see no escape from the conclusion, it seems to me that the general rule applies that, "if land is sold for taxes, a part of which are legal and a part illegal, the sale is void *in toto*." Black on Tax Titles, par. 230, and the cases there cited.

The decisions generally recognise the following fundamental rules: That a tax sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold.

37 Cyc. 1287. This door of relief, closed by previous legislation, is now thrown open to the owner. I think the words in sec. 199: "for the years for which it was sold" mean: "For all the years for which it was sold," and that as the land was not liable for taxation for both the years for which it was sold, the sale was for all purposes invalid.

There were some other matters discussed on the argument, such as the failure of the company to make the prescribed return of this land to the treasurer, but, in my opinion, they have no real bearing on the question before us. I would answer the question in the case as follows:—

Plaintiff is entitled to recover the whole amount paid to redeem, less the 1910 taxes and percentages.

I would allow the appeal and enter judgment accordingly. The plaintiff company must have the costs of action as well subsequent as prior to the payment into Court, and the costs of this appeal. *Appeal allowed.*

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 16, 1919.

HABEAS CORPUS (§ I C—10)—JURISDICTION—HABEAS CORPUS—SUPREME COURT ACT, R.S.C., CH. 139, SECS. 39 (c), 48—AMENDMENT 8-9 GEO. V., CH. 7, SEC. 3—EFFECT OF PERSON BEING AT LARGE.

An appeal to the Supreme Court of Canada from the Court of final resort in any province except Quebec in the case of *habeas corpus* will not lie under sec. 39 (c) of the Supreme Court Act unless the case comes under sec. 48, as amended by 8-9 Geo. V. ch. 7, sec. 3.

And when the person, the legality of whose custody was in question, has been released by the Court below and is at large, the right of appeal given by sec. 39 (c) does not exist.

[*Mitchell* v. *Tracey & Fielding* (1919), 46 D.L.R. 520, 58 Can. S.C.R. 640; *Cox* v. *Hakes* (1890), 15 App. Cas. 506, followed (1). See also annotation 13 D.L.R. 722.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia (1919), 47 D.L.R. 538, reversing the judgment of the trial Judge, Murphy, J., allowing an application for a writ of *habeas corpus* and ordering that the respondent should be accorded his liberty and freed from the order for deportation issued by the Board of Enquiry under the Immigration Act, 9-10 Edw. VII., 1910, ch. 27, sec. 33, sub-sec. 7. Quashed.

A motion was made to quash the appeal on three grounds: (1) That the right of appeal is taken away by sec. 48 of the Supreme Court Act, R.S.C. 1906, ch. 139, as amended by 8-9 Geo. V., ch. 7, sec. 3; (2) That the proceedings for *habeas corpus* arise out of a criminal charge and are therefore not within clause (c) of sec. 39 of the Supreme Court Act; (3) That the fact that the respondent was at large under an order for his discharge precludes any right of appeal.

Sir Charles Tupper, K.C., for the motion.

R. V. Sinclair, K.C., *contra*.

Davies, C.J.

DAVIES, C.J.:—We were all of the opinion at the close of the argument on this motion that it must succeed.

The appeal sought to be quashed clearly does not come within any of the classes of enumerated cases stated, in sec. 48 of the Supreme Court Act as amended, within which an appeal as of right to this Court is given, and as no special leave to appeal as provided for in sub-sec. (e) of that section was obtained, we were clearly without jurisdiction to hear the appeal.

This objection being, in my opinion, a fatal one, I do not discuss the other important points raised at the hearing of that motion.

(1) Reporter's Note—See also Fraser v. Tupper (1880), Coutlee's Dig 104.

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As to the question of allowing costs, we were of the opinion that, as the case was not one within the rules requiring a notice of motion to quash to be given within the definite time prescribed by r. 4 of the Supreme Court Rules (it being a *habeas corpus* appeal in which no security is required), the motion was in order; the applicant was not in fault or default, and was entitled to costs of his motion.

The order of the Court, therefore, is to grant the motion to quash the appeal for want of jurisdiction, with costs, both of the appeal and of the motion to quash.

Idington, J.

IDINGTON, J.:—Under and by virtue of the amendment of sec. 48 of the Supreme Court Act it seems to me hopeless to contend that, without leave, this case is appealable. The appeal should, therefore, be quashed for want of jurisdiction, with costs.

The suggestion of Mr. Sinclair to let the case stand on the docket until the Crown had applied to the Court of Appeal for British Columbia to allow an appeal, seems at first sight, in view of what we have done in some cases, plausible, but after due consideration of all the facts leading up to this appeal and to the hearing of this motion, and no attempt having been made to invoke the sanction of the Court of Appeal, until now, I think we should not encourage such neglect or even suggest that it is a proper case for now giving leave to appeal.

Duff, J.

DUFF, J.:—A fatal objection to the jurisdiction arises out of the provisions of the recent amendment of sec. 48, the appeal clearly not coming within any of the classes enumerated in that section and leave to appeal not having been granted; but it is desirable, I think, to deal with another exception to the jurisdiction of this Court, taken by Sir Charles Tupper, which appears to be well founded. Sec. 48 is a negative section which prescribes essential conditions, but it does not in any way dispense with the conditions prescribed by other provisions of the Act. A ground for jurisdiction must therefore be found under the enabling sections and the provision to which appeal is made 39(c). It is argued that the proceedings in this case arise out of a criminal charge but it is plain enough that "criminal charge" in this provision means a charge preferred before a tribunal authorised to hear such a charge either finally or by way of preliminary investigation. The board which directed the deportation of Jeu Jang How is clearly not a tribunal of that description.

Another objection, however, is advanced by counsel for the respondent, to which I think effect must be given, and that is that the right of appeal given by sec. 39(c) in cases of *habeas corpus* does not exist where the Court below has ordered the release of the person, the legality of whose custody was in question in the Court below and that person is at large. In *Barnardo* v. *Ford*, [1892] A.C. 326, it was held unanimously by the House of Lords that an order directing the issue of a writ of *habeas corpus* to test the right to the custody of a child was an order within the meaning of sec. 19 of the Judicature Act of 1873, 36 & 37 Vict. (Imp.), ch. 66, and as such appealable to the Court of Appeal. This view of sec. 19 that orders and judgments in matters of *habeas corpus* were appealable under that section, was not considered incompatible with the decision of the House of Lords in *Cox* v. *Hakes*, 15 App. Cas. 506, to the effect that under the same section no appeal would lie to the Court of Appeal from an order in *habeas corpus* proceedings discharging a detained person from custody.

The decision last mentioned was based upon two grounds which are best expressed in the judgments of Lord Herschell and Lord Halsbury.

Sec. 19 gives to the Court of Appeal general jurisdiction and power to hear appeals from "any judgment or order." It was not denied that an order for the discharge of a person in custody was *primâ facie* an order to which the section applied, but it was held that the provision following this general provision (a provision which has its analogue in sec. 39 of the Supreme Court Act) is obviously intended to make the power of review complete and effectual by furnishing the means of enforcing it. As in such a case—when the person in custody has been discharged—the order made by the High Court could not be effectively interfered with by the Court of Appeal, it was considered that such an order did not belong to the class of orders within the intendment of sec. 19 in respect of which a right to hear and determine appeals is given.

The other reason for the decision was that the granting of the right of appeal in such cases would, to adopt the language of Lord Halsbury, amount to a sudden reversal of the policy of centuries in regard to the summary determination of the right of personal freedom and that such a reversal of policy ought not to be inferred from general language which, having regard to the context, was reasonably open to another view as to its effect.

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Anglin, J.

These reasons appear to me to govern the construction of sec. 39(c).

ANGLIN, J.:—A Board of Enquiry proceeding under sec. 33, sub-sec. 7, of the Immigration Act, 9 & 10 Edw. VII., 1910, ch. 27, ordered the deportation of the respondent and an appeal by him to the Minister of Immigration and Colonization was unsuccessful. Thereupon he applied for a writ of *habeas corpus* which was refused him by Murphy, J. On appeal the Court of Appeal of British Columbia granted the writ and ordered the prisoner's discharge, 47 D.L.R. 538. He is now at large in the Province of Alberta. The Crown and the Controller of Immigration at Vancouver appeal to this Court from the judgment of the Court of Appeal.

The respondent moves to quash the appeal on three grounds:—

(1) That the right of appeal is taken away by sec. 48 of the Supreme Court Act, as amended by 8 & 9 Geo. V. ch. 7, sec. 3; (2) That the proceedings for *habeas corpus* arise out of a criminal charge and are therefore not within clause (c) of sec. 39 of the Supreme Court Act; (3) That the fact that the respondent is at large under an order for his discharge precludes any right of appeal.

On the opening of the motion counsel for the appellant admitted (very properly, having regard to our recent decision in *Mitchell* v. *Tracey and Fielding*, (1919), 46 D.L.R. 520, 58 Can. S.C.R. 640, that sec. 48 presents a fatal obstacle to the appeal unless leave to appeal can be obtained from the British Columbia Court of Appeal and he asked that the motion to quash and the hearing of the appeal should be adjourned to permit of his making application for such leave. While it is not unusual to grant this indulgence, before doing so the Court should be satisfied that in the event of leave being granted the appeal would lie. It therefore becomes necessary to consider the second and third objections taken by counsel for the respondent.

I am satisfied that the proceedings for the writ of *habeas corpus* do not arise out of a criminal charge. The respondent could not have been convicted on the proceeding before the Board of Enquiry of any criminal offence. Provision for that purpose is made by sec. 7(b) of the Chinese Immigration Act, R.S.C. 1906, ch. 95, as amended by 7-8 Geo. V., 1917, ch. 7.

But I think the third ground on which counsel for the respondent claims that the appeal should be quashed is well taken. The principle of *Cox* v. *Hakes* (1890), 15 App. Cas. 506, would seem to

me to be applicable to sec. 39(c) of the Supreme Court Act. I concur in what my brother Duff has said on this aspect of the case.

Since, therefore, leave to appeal if obtained would be futile, the application to adjourn the motion to quash and the hearing of the appeal to permit of such leave being asked for should be refused and the motion to quash should now be granted.

Brodeur, J.

BRODEUR, J., concurs with Davies, C.J.

Mignault, J.

MIGNAULT, J.:—I would not care to say that in my opinion the principle laid down in *Cox* v. *Hakes* (1890), 15 App. Cas. 506, and especially in the passage from Lord Herschell's judgment at p. 527, quoted in the decision of this Court *In re Charles Seeley* (1908), 41 Can. S.C.R. 5, has the effect of restricting or cutting down the generality of the terms of sec. 39(c) of the Supreme Court Act. This section, which is not found in any English statute that I know of, gives (subject of course to the other sections of the Supreme Court Act) a right of appeal from the judgment in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge. But the policy of the law seems to me to be clearly against interfering with an order of discharge or release obtained by means of the writ of *habeas corpus*. On that ground I concur in the judgment quashing the appeal, which of course must be quashed in view of sec. 48 of the Supreme Court Act, without suspending our adjudication so as to permit the appellant to apply for leave to appeal. Had the appellant applied to this Court for leave to appeal, I would not, under the circumstances of this case, have granted him leave, and had he obtained leave from the Court of Appeal, for the reason I have stated, I would not have interfered with the judgment discharging the respondent. I therefore simply concur in the judgment quashing this appeal in view of the terms of sec. 48 of the Supreme Court Act.

Appeal quashed.

BELL v. CHARTERED TRUST AND EXECUTOR Co.
CHARTERED TRUST AND EXECUTOR CO. v. BELL AND BURSEY

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 10, 1919.

LANDLORD AND TENANT (§ II D—31)—ORAL AGREEMENT FOR LEASE—POSSESSION—SURRENDER—ASSIGNMENT BY TENANT FOR BENEFIT OF CREDITORS—PRIORITY—FRAUD—INTENT—CLAIM OF LANDLORD FOR POSSESSION.

A tenant who, being in possession of premises under an agreement for a lease not in writing, surrenders the lease prior to making an assignment

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Statement

Meredith, C.J.O.

for the benefit of creditors, has not made a fraudulent preference or parting with property in fraud of creditors, and the surrender made is sufficient to give the landlord possession of the premises in question, as against the assignee.

APPEAL from the judgment of Logie, J. (1919), 49 D.L.R. 113. Reversed.

J. M. Ferguson, for the appellant.

W. Laur, for the trust company, respondent.

At the conclusion of the argument the judgment of the Court was delivered by

MEREDITH, C.J.O.:—We are of opinion that the appeal must be allowed.

The case made by the respondent is that there was a verbal arrangement for a lease from the appellant, of the premises in question, to Bursey, for a term of 5 years, at a rental of $90 a month, payable in advance; and that possession had been taken under the agreement sufficient to get rid of any difficulty created by the Statute of Frauds. Bursey made an assignment to the respondent, the Chartered Trust and Executor Company.

Two actions have been brought, one by the appellant to recover possession of the premises, and the other by the respondent, the Chartered Trust and Executor Company, for specific performance of the agreement for the lease.

The position of the appellant is that there was no final agreement upon any terms; and that, even if there had been, the Statute of Frauds would be an answer because there was no possession sufficient to take the case out of the statute; that, if that contention failed, Bursey had, before the assignment, executed a surrender of the lease; and the answer to that by the respondent company is, that the surrender was in effect a fraudulent preference, or a fraud upon creditors, and was therefore void as against it.

We listened to very learned arguments upon all these questions, but we think it is unnecessary to determine some of them, because, assuming that there was an agreement for a lease and possession sufficient to get rid of the provisions of the Statute of Frauds, the surrender, if it stands, is a complete answer to the respondent company's contention.

Whatever the tenancy was, that tenancy was surrendered. The evidence establishes that the surrender was executed the day before the assignment became effective; it is said that it and the

assignment were drawn on the same day and signed by Bursey on the same day, but the assignment did not become effective until assented to by the company, and its assent was not given until the following day after the surrender had been signed; and, therefore, the surrender preceded the making of the assignment.

The learned Judge determined that a case had been made for specific performance, and that the surrender was not valid by reason of the provision against fraudulent preferences. We think the learned Judge came to a wrong conclusion as to the fraudulent preference; indeed it is not a case of preference at all, but of an alleged parting with property in fraud of creditors. It is plain that there was no intention on the part of Bursey to prefer the appellant or to defeat, delay, hinder, or defraud his creditors. He was anxious to get rid of the lease; the appellant was desirous of his keeping it, and endeavoured to dissuade him from giving it up, but he insisted upon doing so.

Meredith, C.J.O.

The result therefore is that the case of the respondent company fails.

The appeal is allowed in both cases; the action of the company is dismissed with costs; and judgment will go in the appellant's case for possession with costs. *Appeal allowed.*

NICHOL v. PEDLAR AND JOHNSTON.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. October 22, 1919.

EXECUTION (§ I—3)—SALE OF LANDS BY SHERIFF—SUBJECT TO MORTGAGE—GROWING CROPS—RIGHT TO SAME BY PURCHASER.

Growing crops upon lands sold by the sheriff under execution, which are not cut at the time of completion and confirmation of the sale, pass with the lands to the purchaser.

[*Brady* v. *Keenan* (1875), 6 P.R. (Ont.) 262; *Gaviller* v. *Beaton* (1862), 12 U.C.C.P. 519, referred to.]

Statement.

APPEAL from the judgment of District Court Judge barring plaintiff's claim as purchaser of certain land to the crops thereon as against the defendants as execution creditors. Reversed.

W. M. Blain, for appellant; *W. A. Adams*, for respondents.

Newlands, J.A.

NEWLANDS, J.A., concurs with Elwood, J.A.

Lamont, J.A.

LAMONT, J.A., (dissenting):—In 1917, Horatio Nichol, being a registered owner of the south half of 18-20-15 W. 2nd, mortgaged the same to the Canadian Mortgage Association to secure the

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repayment of $3,000 and interest thereon. On November 19, 1914, an execution was filed in the Land Titles office against Nichol at the instance of the Beaver Lumber Co. On July 31, 1915, the defendants herein registered another execution against Nichol. On December 15, 1917, Nichol took a lease of the said land from the mortgage association, which had entered into possession, for ten months, agreeing to pay the association as rent the sum of $378.50. On July 17, 1918, during the currency of this lease, the said land was sold by the sheriff under the execution of the Beaver Lumber Co. to one John King, but "subject to the mortgage of the association." The sale was duly confirmed. On September 2, King sold and transferred the land to Olive B. Nichol, wife of the said Horatio Nichol, and title was issued to her, subject to the said mortgage.

The crop on the land was put in by Horatio Nichol during the spring of 1918. On September 10, 1918, the sheriff seized the said crop while it was still uncut, under the defendants' execution. Olive B. Nichol claimed the crop, contending that it had passed with the sale of the land to King and from King to herself. The sheriff took interpleader proceedings and an issue was directed. On the trial of the issue the District Court Judge barred the claim of Olive B. Nichol, holding that the mortgagees in the full exercise of their rights had entered into possession of the land and had made a lease thereof, that the land had been sold subject to the mortgage, and therefore the mortgagees' right to possession by their tenant had not been interfered with, and consequently, Nichol's possession was valid as against the purchaser. From that judgment the claimant appeals.

In my opinion the trial Judge was right in the conclusion at which he arrived. The validity of the lease was not questioned before us. That a mortgagee who has entered into possession of mortgaged premises may make a valid lease of the same to the mortgagor was held by the Court *en banc* in *Rollefson Bros.* v. *Olson* (1915), 21 D.L.R. 671, 8 S.L.R. 143.

The sale of the land to King was made "subject to a mortgage made by Horatio Nichol to the Canadian Mortgage Association for $3,000." Selling land subject to a mortgage means selling it subject to all the rights which the mortgagee may lawfully exercise under his mortgage, and this includes any right which

he has already lawfully exercised. One right that the mortgagee in this case had exercised, prior to the sale to King, was entering into possession and making a valid lease of the land. How then can a purchaser who has purchased subject to the mortgagees' rights under the mortgage interfere with a lease made in the exercise of those rights? The validity of the lease not being questioned, the purchaser, in my opinion, took the land subject to the lease. Had the mortgagees on entering into possession put in the crop themselves, or by their agent, it would not have been open to the purchaser to claim the crop. Had any such claim been made by King, the mortgagee could successfully have answered,

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You bought subject to our rights, and we are entitled, having entered into possession, to crop the land either ourselves or by our tenant.

Any such claim put forward by King must, in my opinion, have failed, and the claimant is in no better position than King.

I would dismiss the appeal, with costs.

ELWOOD, J.A.:—On November 19, 1914, an execution was filed in the proper Land Titles Office in an action wherein the Beaver Lumber Co. was plaintiff and H. Nichol was defendant. On July 31, 1915, an execution was filed in the same Land Titles Office in an action wherein the respondents were plaintiffs and the said H. Nichol was defendant. On May 8, 1918, an execution was filed in the said Land Titles Office in an action wherein the Cockshutt Plow Co. was plaintiff and the said H. Nichol was defendant. On December 15, 1917, said H. Nichol, (who at that time was indebted to the Canadian Mortgage Association under a mortgage from the said H. Nichol to the said Canadian Mortgage Association, dated June 29, 1911, upon the south half of sect. 19, Tp. 20, in Range 15, West of the 2nd Mer. in the Province of Saskatchewan) entered into a lease of said lands from the said Canadian Mortgage Association as lessor to the said H. Nichol as lessee for the term of ten months from the said December 15, 1917, upon terms therein mentioned. Said lands were bound by all of said executions, subject to said mortgage. On July 17, 1918, the sheriff of the proper judicial district, under said execution of the Beaver Lumber Co. against the said Nichol, sold said land to John King, and on August 22, 1918, executed to the said John King a transfer of the said land under such sale, subject to said mortgage, and which transfer and sale were duly

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confirmed on September 5, 1918. On or about September 2, 1918, the said John King sold said land and executed a transfer of the same to the appellant, who is the wife of the said H. Nichol. Subsequently, a certificate of title to said land issued to the appellant. On or about September 10, 1918, said sheriff seized the crop then on said land, some of which was cut and some of which was not cut. Said crop had been sown by said H. Nichol prior to said sale of said land by said sheriff to the said King, but at the time of such sale to said King and also at the time of such sale by said King to the appellant, no part of said crop was cut. In consequence of such seizure by the sheriff, the appellant claimed to be entitled to said crop, an interpleader issue was directed, which was tried by a Judge of the District Court who held that, as against the respondents, the crop was the crop of H. Nichol at the time of the seizure. The appellant contends that the sale by the sheriff to King carried with it all of the crop then on the land and uncut. On the other hand the respondents contend that, as H. Nichol at the time of the sale of the land held the land under a lease from the mortgagees, his interest as lessee of the land was not disposed of by the sale by the sheriff; that growing crops could only be sold under an execution against goods, and that growing crops are chattels.

It is quite true that under our rules the sheriff may seize growing crops under an execution against goods, and that, for some purposes, growing crops are treated as chattels. I am, however, of opinion that when land is sold by the sheriff under execution, and, at any rate, when at the time of the completion of the sale and the confirmation thereof, these crops have not been severed from the land, they pass with the land to the purchaser of it. That is the case here.

My attention has not been directed to any authority exactly in point, but it seems to me that the case is very similar to what would occur on an ordinary sale of land where there is no stipulation as to who is entitled to the crops.

In Dart on Vendors & Purchasers, 7th ed. vol. 1, p. 289, the author says this:—

> Up to the time fixed for completion, the vendor is, in the absence of special stipulation, entitled to the crops, and other ordinary rents and profits of the land and must bear all expenses and outgoings; he would not, however, it is conceived, be entitled to take crops in an immature state, or otherwise than in due course of husbandry.

See also *Brady* v. *Keenan* (1875), 6 P.R. (Ont.) 262. And in *Gaviller* v. *Beaton* (1862), 12 U.C.C.P. 519, Draper, C.J., says at p. 521:—

I have no doubt but that although a sheriff's deed has relation back to the day of sale for the purpose of defeating or overriding any intermediate proceedings or conveyance; yet the sheriff's vendee cannot bring or maintain ejectment until he has obtained the sheriff's deed.

Does the fact that the execution debtor while holding the legal estate to the land also held title as lessee from the mortgagee, prevent the sheriff from conveying all of the estate which the execution debtor held? I do not think it does. No consideration of the rights or interests of the mortgagee can effect the question, because I apprehend that, under an execution against the goods of the tenant, no matter whether the tenant were the holder of the legal estate or not, the tenant's interest in the land should be seized and sold by the sheriff. In the case at bar, so far as the rights of the execution creditors are concerned, the execution debtor's title as lessee merged in his title to the freehold; once the sheriff had the right, under the execution under which he sold, to sell the land in question, he had the right to sell all of the execution debtor's interest in that land. The order confirming the sale directed the registrar to issue a title to said land free from all right, title or interest on the part of the said H. Nichol, subject only to said mortgage and the taxes and seed grain liens, if any.

Sec. 149, sub-sec. (3) of the Land Titles Act, 1917, Sask. Stats. (2nd sess.) ch. 18, which is the same as sub-sec. (3) of sec. 118 of ch. 41 R.S. Sask. 1909, is as follows:—

(3) From and after the receipt by the registrar of such copy, no certificate of title shall be granted and no transfer, mortgage, incumbrance, lease or other instrument executed by the execution debtor of such land shall be effectual, except subject to the rights of the execution creditor under the writ while the same is legally in force.

In my opinion the effect of the above provision is to prevent the execution debtor from in any way dealing with the land except subject to the execution filed. If he could not make a lease of the land, I am of the opinion that he could not accept a lease, except subject to the rights of the execution creditor.

In my opinion, therefore, the appeal should be allowed with costs, and the claim of the appellant to the goods seized allowed. The respondents should pay the appellant's costs of the interpleader proceedings below. *Appeal allowed.*

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DOMINION REDUCTION Co. Ltd. v. PETERSON LAKE SILVER COBALT MINING CO. LTD.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. June 17, 1919.

MINES (§ II A—34)—DEPOSIT OF "TAILINGS" ON PRIVATE LANDS—PERMISSION OF OWNER—PROPERTY IN "TAILINGS."

"Tailings" from ore reduction deposited on the private lands of a company by another company, with the permission of the former, but with no agreement as to removal, become the property of the first mentioned company.

[(1918), 46 D.L.R. 724, affirmed.]

Statement. APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1918), 46 D.L.R. 724, 44 O.L.R. 177 in an action to determine the ownership of tailings from a reduction mill, discharged on private property. Affirmed.

W. Nesbitt, K.C. and *A. G. MacKay*, K.C. for appellant.

I. F. Hellmuth, K.C. and *McG. Young*, K.C. for respondent.

Davies, C.J. DAVIES, C.J.:—I concur with Anglin, J.

Idington, J. IDINGTON, J.:—The respondent has owned since July 5, 1907, under a patent of that date, a lake covering over 200 acres and by a grant of about two years later date a strip 33 feet in width round said lake.

The appellant claims the tailings resulting from the mining and reduction operations carried on by a succession of owners of a mine and mill hereinafter referred to which were deposited from time to time in the said lake, belonged to respondent.

The Nova Scotia Silver Cobalt Mining Co., Ltd., had acquired a mining property of 29 acres lying 66 feet from said lake and erected a mining reduction mill thereon in 1909 or 1910 and began to operate it in 1910.

The tailings from that mill were deposited in said lake by said Nova Scotia Co. until it assigned for the benefit of its creditors in May, 1912.

The respondent's managers gave no written authority for this being done.

A witness who was secretary for each of said respective companies tries to establish some understanding between them in regard to the terms upon which such deposits were made. But there is really nothing tangible in what he says which would support any title such as alleged in the Nova Scotia Co.

And seeing that his memory evidently failed him as to the time over which that dual position extended on which he seems to rely for his obtaining the understanding, I doubt if it is to be trusted

beyond this, that the parties were all friendly and probably someone for respondent assented to the Nova Scotia Co. dumping its seemingly useless rubbish into the lake.

I am quite sure no one then concerned ever dreamed at that time of that deposit ever being or becoming worth taking away.

The assignee of said Nova Scotia Co. evidently thought so also, for he failed in his conditions of sale to refer to the refuse or rubbish, or aptly to describe it. And hence there is a difficulty in tracing any title to it in appellant by means of the documents before us.

The appellant therefore fails to obtain or shew any title to so much of the material in question as resulted from the operations of the Nova Scotia Co. and thereby, or coincident therewith, lost, as it seems to me, any right to claim anything of evidential value in favour of itself in the said secretary's story as having a bearing helpful to the appellant in this case, for his serving, at least in a dual capacity, ceased in 1912.

Curiously enough stress is laid on the story as being something which can be used in a possibly connective way to support the alleged title of successive owners and operators of the said mill.

It is only to shew how worthless it is in favour of third parties strangers thereto that I have considered and referred to it at all.

Then again the transfer from the purchaser to the company, formed to take over this business, and now appellant, seems to fall short of expressing what one would expect in evidence herein if such an asset were ever thought of.

No schedule of what it purported to assign is in the case. Indeed the purchaser transferred to the appellant only what he got and that was nothing touching the title to what is now in dispute.

There is in short as it seems to me nothing tangible in support of the claim made by appellant unless and until the transaction of May, 1913, to which the trial Judge has given effect.

I cannot read that, or aught connected with it, or leading up to it, as containing a re-grant to the appellant of property, which, according to law, on such a state of facts as presented and as I interpret them had, from day to day as deposited, become the property of the respondent.

I cannot see why, when it dawned on someone interested in the appellant that this *quandum* rubbish heap might be made

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DOMINION REDUCTION CO. LTD. v. PETERSON LAKE SILVER COBALT MINING CO. LTD.

productive of wealth, that he and others shrank from putting their claim in plain language if designed to make the title of their company clear, unless perhaps it had dawned on respondent at or about the same time and hence it would be useless to set up such pretension.

It would have been interesting to have had a little more enlightenment on the progress of scientific discovery which made it manifest that there were possibilities in the rubbish heap, and the date when that became known to those concerned in this litigation.

Idington, J.

I think the cases cited do not help appellant and that the law has been properly applied by the Courts below to such facts as appear to me in this case.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The material facts of this case appear in the opinions of the trial Judge (1917), 41 O.L.R. 182, and of Meredith, C.J.O., who delivered the unanimous judgment of the Appellate Divisional Court (1918), 46 D.L.R. 724, 44 O.L.R. 177.

The ownership by the appellant of, and its right to remove the tailings deposited in the arm of Peterson Lake owned by the respondent after July 2, 1915, is conceded. That there was no transfer to it of any right to the tailings deposited by the Nova Scotia Silver Cobalt Mining Co. prior to May 20, 1912, seems equally clear, if indeed the Nova Scotia Co. possessed that right.

The ownership of the tailings deposited between May 20, 1912, and July 2, 1915, is more debatable. That they were deposited with the consent of the respondent company is admitted. It is reasonably clear that until July 2, 1915, there was no agreement as to any right of removal. Where was the ownership of these tailings on that date? If it was in the respondent there was no consideration for any transfer of it to the appellant.

On the whole evidence I find no satisfactory proof of any intention prior to July, 1915, that the appellant company should retain title to this material which at the time of its deposit had no present commercial value. Determining the question of title as of July 1, 1915—which I think is the proper course—in the light of all the evidence, including the subsequent correspondence, my conclusion is that on that date title to the tailings then in the lake had vested

in the respondent company; and I find nothing which divested it. The resolution of the Peterson Lake directors, the letter of that company's secretary of July 2, 1915, written in answer to the request contained in the letter of the appellant's solicitors of May 14, and the terms of that letter itself are quite consistent with the consent to removal given by the resolution being intended to apply to tailings thereafter deposited. If title to the tailings theretofore deposited had already vested in the respondent company there would, as already stated, be no consideration to support the re-transfer of it to the appellant. The resolution and the letter of July 2, would be quite insufficient for that purpose. Neither do they, in my opinion, afford any evidence that it had been theretofore intended that the title to tailings deposited before July 2, 1915, should remain in the appellant company. On the contrary, taken with the letter of May 14, they rather indicate the conferring on that company of a right of removal in regard to future deposits which it did not enjoy in regard to those already made. If the inference of abandonment and accretion (using these words in a non-technical sense) unanimously drawn by the Judges below was not clearly right, as I incline to think it was, the evidence at all events falls short of what would be necessary to enable us to say that it was wrong.

Anglin, J.

I would dismiss the appeal.

BRODEUR, J.:—I concur with my brother Anglin.

Brodeur, J.

Appeal dismissed.

FORESTREET WAREHOUSE CO. v. VAN DER LINDER.

ALTA.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. December 6, 1919.

SOLICITORS (§ II B—25)—AUTHORITY OF PLAINTIFF'S SOLICITOR TO BRING ACTION—APPLICATION TO DISMISS BY DEFENDANT—NOTICE OF MOTION TO PLAINTIFF.

An application by the defendant to dismiss an action on account of the alleged lack of authority to bring the same on the part of the plaintiff's solicitor, cannot succeed when proper notice of the motion is not served on the plaintiff.

APPEAL from the order of the Master, dismissing an application for the dismissal of an action on the ground that the plaintiff's solicitor had no authority to bring it. Affirmed.

Statement.

C. F. Adams, K.C., for appellant; *Millican and Millican*, for respondent.

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FORESTREET WAREHOUSE CO. v. VAN DER LINDER.

Harvey, C.J.

The judgment of the Court was delivered by

HARVEY, C.J.:—This is an appeal, referred by Walsh, J., from an Order of the Master dismissing an application of the defendants for the dismissal of the action on the ground that the solicitor had no authority to bring it, and for an order that the solicitor be ordered to pay the costs.

The evidence on which the defendant found his application is the statement of the solicitor that he had no direct instructions from the plaintiffs but received his instructions from solicitors in Ontario, and certain statements made by the plaintiffs' secretary on examination for discovery expressing ignorance of the action and certain proceedings.

Before the Master made the order there was produced to him a cable message purporting to come from the plaintiffs stating that the board of directors approved of the action, and in the appeal to the Judge there was produced what purported to be a copy of a resolution of the board of directors confirming, ratifying and approving of the solicitor's course in bringing the action and instructing him to proceed with it. I have examined all the authorities cited by counsel and some others, but I have failed to find any case similar to the present one. In most of the cases the application has been by the party for whom the solicitor assumed authority or on evidence of the party repudiating the authority. In *Standard Construction Co.* v. *Crabb* (1914), 7 S.L.R. 365, the solicitor had acted on the instructions of the managing director, but the other directors and a majority of the shareholders disapproved of the proceedings and repudiated his authority. I can see no reason why even if the action were begun without authority the act of the solicitors, like that of any other agent, could not be adopted and approved by the principals. It is urged that evidence should not be received on an appeal and that in any event it is not disclosed what material the board of directors had before them, so that we cannot tell whether they ratified with full knowledge. The latter point, it seems to me, is one entirely between the plaintiffs and the solicitor. For the express purpose of assuming the burdens as well as the benefits of the litigation, they have adopted the action and they could not say as against the defendant that they did not have full knowledge, and it is therefore no concern of the defendant whether they had.

There were several other points discussed on the argument but it appears to me that the application could not be granted for want of notice without considering anything further. Mr. Bennett argued the case for the defendant. Mr. Clarke appeared to oppose it. When he was asked whom he represented, he said he was instructed by the solicitors. If he appeared for the plaintiffs it was because the solicitors had authority to retain him for the plaintiffs, in other words had authority to conduct the action. If otherwise, the plaintiffs were not represented. The notice of motion is directed to the plaintiffs as well as to the solicitors but it is dated May 21, and was returnable on June 6, while the plaintiffs are, and are described in the style of cause as, of London, England. It is quite clear, therefore, that it was not served on them otherwise than upon the solicitors. While the defendant's ground for the application is that the solicitor is not his solicitor.

To say that the solicitor must prove his authority when it is questioned, even if a correct statement, does not take away the fact that the plaintiff has something at stake when an application is made to dismiss an action which purports to be his action. The solicitor might fail to prove his authority even though it existed. If the action is dismissed, it is on the ground that the solicitor has no authority, and the notice to him quite clearly cannot be deemed to be a notice to the plaintiffs' whom the notice alleges he does not represent.

The case is quite different from one in which the application is made by or with the approval of the principal who repudiates the solicitor's authority.

In such a case as this, the plaintiff is entitled to notice, and the defendant for the purpose of notice treated the solicitor as the plaintiffs' solicitor.

I think the application could quite properly have been refused on this ground alone, and I would dismiss the appeal with costs.

Appeal dismissed.

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GOWANS v. CROCKER PRESS Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. October 31, 1919.

BILLS AND NOTES (§ IV B—96)—PROMISSORY NOTE FOR $200—SUIT IN COUNTY COURT—NOTE DEPOSITED IN BANK—NOT PAID—PROTESTED BY BANK—UNNECESSARY—NOTARIAL FEES—BILLS OF EXCHANGE ACT, SEC. 109—COMPETENCE OF DIVISION COURT—COSTS—SET-OFF—COSTS OF APPEAL.

Under sec. 109 of the Bills of Exchange Act, the makers of a note are bound without protest, and so a notice of protest forwarded to them by the holder's agent is unnecessary. Notarial fees for such protest cannot be added to the amount of the note on suit so as to bring it within County Court jurisdiction.

Statement.

APPEAL by defendants from the judgment of a County Court Judge in an action to recover the amount of a promissory note. Reversed.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The material facts of this case are very few and very simple.

The plaintiff received from the defendants a promissory note for $200, of which all of the defendants were makers. The Dominion Bank being the plaintiff's bank, the note was made payable at that bank; the plaintiff placed it in that bank "to collect it" for him, "just to receive" the money—he did not discount or place it to his account or borrow money on it—but did endorse it in blank. When the note became due, the bank had it protested, sending notice to the plaintiff as well as the defendants. This action to recover the amount of the note, interest, and the notarial fees, was brought in the County Court of the County of York, and the defence set up was an agreement to extend the time for payment by renewal, etc.

During the trial, before His Honour Judge Coatsworth without a jury, the learned Judge asked why the action was not brought in a Division Court, and counsel said, "The protest fees attached to it."

Both the merits and the jurisdiction were argued; and the learned Judge held explicitly against the defendants on the merits. On the question of jurisdiction he gave no specific decision; but, after reserving judgment, he directed judgment to be entered for the plaintiff for the amount of the note, interest, and notarial fees, "and costs on the County Court scale." It does not appear that he was exercising a discretion to award

County Court costs in a Division Court case; but it is clear that he thought that the plaintiff could not have sued in the Division Court.

G. T. Walsh, for the appellants.

G. E. Newman, for the plaintiff, respondent.

RIDDELL, J. (after setting out the facts as above):—We reserved judgment to consider if there was any possible ground upon which the judgment could be sustained. I can find none.

On the merits indeed (except as to the notarial fees) there can be no question—"hope springs eternal in the human breast," and nothing but a statute making such a course a crime punishable by imprisonment will prevent clients and their solicitors pleading a contemporary oral agreement in variance with the terms of the note. The long line of cases like *Abrey* v. *Crux* (1869), L.R. 5 C.P. 37, many of which are collected in Maclaren's Bills Notes and Cheques, 5th ed., pp. 45, 46, is not sufficient to deter such pleading—but these cases do prevent the Court from giving effect to it.

As to the notarial fees, those notified were the defendants and the plaintiff—the defendants are all makers of the note, and consequently are in the same case as acceptors of a bill—Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 186 (2)—and they are bound without protest: sec. 109; *Treacher* v. *Hinton* (1821), 4 B. & Ald. 413: *Smith* v. *Thatcher* (1821), 4 B. & Ald. 200.

The bank was simply the agent of the plaintiff to collect the money on the note—it could not, by having the possession of the note, make him liable to the bank; he was not liable on the note at all, but was its owner. It would be an absurdity to give notice to the owner of a note for the pretended purpose of making him liable. Liable to whom? To himself of course. The note must be considered as though it had remained in the plaintiff's possession instead of being handed by him to his agent.

Protest then was wholly unnecessary. That the bank did—if it did—charge these fees to the plaintiff is of no consequence—the plaintiff cannot, by paying a wholly baseless claim, make the defendants his debtors for the amount paid.

The appeal should be allowed as to the notarial fees.

As to costs, the defendants raised and argued the point in the trial Court; they were forced to come here to obtain their legal

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Riddell, J.

rights, and they should have the costs of the appeal. As to costs below, the plaintiff should have brought his case in the Division Court; but the defendants should not have set up the untenable defence they did—justice will be done if we award the plaintiff Division Court costs below, without a set-off.

I do not overlook the reason assigned before us for suing in the County Court, viz., that the plaintiff had a large note obtained in the same transaction, and brought this action as a test case. Even supposing that that would be a good reason, which I wholly deny, the Division Court would be as good as the County Court. A judgment on the present note could be useful in an action in the Supreme Court, only on the principle of *res adjudicata*, "estoppel by matter of record"—the judgment of a Division Court operates as effectively in this way as that of the Supreme Court of Canada.

Latchford, J. Middleton, J.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Upon the argument of this appeal judgment was reserved, at my instance, because, if the facts were as they were said to be, the awarding to the plaintiff notarial fees would be unaccountable; and the fact that the note was endorsed by the payee, who is the plaintiff, was a circumstance which indicated that the facts were not accurately understood and stated when it was said that the plaintiff had never parted with his property in, or his legal possession of, the note.

A perusal of the evidence shews that at the conclusion of his testimony the plaintiff did say that the bank was only his agent for the collection of the note. I state the substance of his testimony, not his words: there was nothing more; and what was said was said at the end of the testimony in a rather long trial upon the merits of the defence to the action.

It may be that, if the plaintiff's statement that the bank was merely his agent had been followed up, it might have been proved that the note had been legally transferred to the bankers as holders in due course for value—that the note was really discounted, the amount of it being placed to the credit of the plaintiff in his current account with the bank, as is usual, and so the protest would have been proper and necessary. But no one seems to have observed any significance in that evidence; and nothing more was said on the subject.

And that is plainly the reason why the amount of the notarial

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charges was added to the amount of the note and interest in the judgment. Attention was not sufficiently called or directed to the point. It is true that the point was mentioned, but it was only mentioned, and might easily have been overlooked in dealing with the substantial question, which was tried, that is: whether the defendants were at all liable, in this action, to the plaintiff on the note.

The plaintiff's testimony therefore being: that he never parted with the note, or any of his rights under it; that the bank was merely his agent for the collection of it; there can be no contention that the defendants were rightly made liable for notarial charges: and the appeal must therefore be allowed, and with costs, because, though the amount of the notarial charges is small, it made the difference between a case within Division Court jurisdiction and one beyond it: a question involving a considerable amount in costs.

The judgment must be reduced by the amount of the notarial charges: the plaintiff is entitled to costs on the Division Court scale: but the defendants should not have any set-off of costs. The note is one of two—the other for a much larger amount—the two said to be quite alike as to liability; so that the defendants have had the benefit of a consideration of their defence, and have failed upon it, at a small cost; though the plaintiff might have sued on both notes, when both became payable, and have had his costs on the Supreme Court scale. *Appeal allowed.*

GOAD v. NELSON.

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*Saskatchewan Court of Appeal, Haultain, *C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.*

PEDLERS (§ I—1)—HAWKER'S AND PEDLER'S ACT, 2 GEO. V., 1912, SASK., CH. 37—SAMPLES AND PATTERNS—CONVICTION—APPEAL ON STATED CASE.

A salesman carrying goods which were neither "samples" nor "patterns" but merely to shew the class of work done by his firm, cannot be convicted for a breach of the Hawkers and Pedlers Act, 2 Geo. V., Sask., ch. 37.

Statement.

APPEAL from the judgment or order of a Justice of the Peace on a stated case arising from a conviction under the Hawkers and Pedler's Act, 2 Geo. V. 1912, Sask., ch. 37. Reversed.

J. F. Frame, K.C., for appellant.

H. E. Sampson, K.C., for respondent.

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From a Judgment or Order, made by J. W. McLennan, Justice of the Peace, in and for the Province of Saskatchewan, in the matter of an Appeal, by way of Stated Case, from a certain Conviction, or Order made by J. W. McLennan, one of His Majesty's Justices of the Peace, in and for the Province of Saskatchewan, wherein, the appellant hereinafter named, upon the information of T. Nelson, of Kamsack, Saskatchewan, hereinafter named, was ordered to pay the sum of $37.00, being a fine in the sum of $25.00, and costs in the sum of $12.00, and in default thirty (30) days in Regina Jail.

Haultain, C.J.S.

HAULTAIN, C.J.S. (dissenting):—The following is stated for the opinion of the Court:

1. On August 23, 1919, Corporal T. Nelson, of Kamsack, Saskatchewan, a police corporal, of the detachment of the Provincial Police at Kamsack, Saskatchewan, laid an information before me, charging L. F. Goad, that he, the said L. F. Goad, on or about August 23, 1919, at or near Kamsack, in the Province of Saskatchewan, did go from house to house, carrying or exposing samples or patterns of goods, wares, or merchandise, for purposes of sale, by such samples or patterns, and upon the understanding that such goods, wares or merchandise will afterwards be delivered in the municipality, without having first obtained from the Provincial Secretary, a hawker's and pedler's license, contrary to an Act respecting Hawkers and Pedlers, 2 Geo. V. 1912, Sask., ch. 37.

2. On August 25, 1919, the said L. F. Goad appeared before me in answer to a summons served upon him and pleaded not guilty to the charge as contained in the information.

3. On the evidence of the accused, I find the following facts:—

(a) On Saturday, August 23, 1919, Corporal T. Nelson interviewed a man, who gave his name as L. F. Goad, representing the Dominion Art Co., Ltd., of Toronto, who informed the said Nelson, that he was taking orders for enlarging photographs. He produced a sample case for my examination, which contained 2 enlarged photographs; samples of the work that he was soliciting orders for, and the said Goad failed to produce a hawker's and pedler's license, for the Province of Saskatchewan, on request.

(b) On August 22, 1919, the accused called at the house of Annie C. Stewart, in the vicinity of Kamsack, Sask., soliciting orders. He had 2 pictures in a large sample case, which he stated was a design of the picture, that his company would produce a similar picture from a small photograph, which Mrs. Stewart gave him, and which was to be an exact likeness of the small photograph, which was a family picture, and Annie C. Stewart signed an order in the following terms:

"DOMINION ART COMPANY, LTD., P.O. Kamsack.
Toronto, Canada. State Sask., Date Aug. 22, 1919.

You will please make for the undersigned from the photograph delivered to your agent this day 1 G. r./19x13 finely finished painting and deliver the same to me on or about the 29 day of Sept., 1919.

The price of the painting is	$25.00
Advertising allowance	10.00
LEAVING A BALANCE DUE OF	$15.00

which I agree to pay upon delivery.

The above price does not include frames or glass.

It is understood that this order cannot be countermanded. Verbal agreements not recognised.

This order is given you upon the further condition that your company will deliver the paintings so ordered in suitable frames which the undersigned is entitled to accept upon payment of a reasonable price, if the frames are satisfactory. In the event the undersigned does not accept the frames and pay for same they are to be delivered forthwith to your deliveryman.

I am to receive one additional painting at no additional cost.

Received by L. F. Goad. Mrs. B. F. Stewart,

Advertising Salesman. Customer."

(c) On August 22, 1919, the appellant called at the house of Mrs. Russell Ritchie, in the vicinity of Kamsack, Sask., taking orders for enlarging pictures. He had a sample case, and exhibited the pictures therein contained, and stated that a large picture would be made from a small family photograph, handed to him, which was a picture of Mrs. Ritchie's mother, and secured an order for a picture under the same terms as in the preceding paragraph.

(d) None of the parties solicited are dealers in this class of pictures by wholesale or retail. When the order is taken, it is forwarded to the office of the Dominion Art Co., in Toronto, Ont., and from the small photograph, a hand painting is made, called a tritone painting, made of 3 colours. The background is sepia, and the others water colours and ink. It requires an experienced artist to do the work. The completed picture is delivered to the purchaser one month after the date of the order, and the small photograph is then returned to them.

4. The appellant carried a small grip, about 15 x 22 inches large, containing 2 pictures of the same class of work, made in 3 colours as above described, the said enlarged pictures being without frames.

5. The appellant did not sell or offer for sale the enlarged pictures so carried, to any of the persons solicited, but exhibited them to such persons to display the class of work and the artistic finish.

6. At the time the order is taken a coupon in the following form is handed to the customer:

"For advertising purposes, this certificate will be accepted as a 'TEN DOLLAR' payment on one of our New $20 Tritone Convex Portraits, and one $20 Tritone Portrait Free.

Groups extra. Dominion Art Company, Ltd.

Groups extra."

7. Dominion Art Co., Ltd., is a corporation under letters patent, issued from the Department of the Secretary of State for Canada, and bearing date March 16, 1917, and among other powers given to it by the said letters patent, it is empowered:

(a) To manufacture, produce, buy, sell and deal in all kinds of drawings, prints, paintings and other pictorials, reproductions and representations and picture frames and all other articles of merchandise and generally to carry on the business of art dealers;

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(c) To purchase, lease or otherwise acquire and to hold, exercise and enjoy all or any of the property, franchises, good-will, rights, powers and privileges held or enjoyed by any person or firm or by any company or companies carrying on or formed for carrying on any business similar in whole or in part to that which this company is authorised to carry on either in its own name or in the name of any such person, firm or company, and to pay for such property, franchises, goodwill, rights, powers and privileges wholly or partly in cash, or notwithstanding the provisions of sec. 44 of the said Act, wholly or partly in paid-up shares of the company or otherwise and to undertake the liabilities of such person, firm or company;

(e) To carry on any other business (whether manufacturing or otherwise) which may seem to the company capable of being conveniently carried on in connection with its business or objects or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights;

(f) To apply for, purchase or otherwise acquire any patents, grants, copyrights, trade-marks, trade-names, licenses, concessions and the like conferring any exclusive or non-exclusive or limited right to use or any secret or other information as to any invention which may seem capable of being used for any of the purposes of the company, or the acquisition of which may seem calculated directly or indirectly to benefit the company, and to use, sell, assign, lease or grant licenses in respect or otherwise turn to account the property, rights, interest or information so acquired;

(k) To procure the company to be licensed, registered or otherwise recognised in any foreign country and to designate persons therein as attorneys or representatives of the company with power to represent the company in all matters according to the laws of such foreign country and to accept service for and on behalf of the company of any process or suit;

(n) To do all such other things as are incidental or conducive to the attainment of the above objects;

(o) To do all or any of the above things in Canada or elsewhere and as principals, agents or attorneys;

(p) The above objects, powers and purposes of the company shall be deemed to be several and not dependent on each other, and the company may pursue or carry on any one or more of such objects, powers or purposes without regard to the others of them, and no clause shall be limited in its generality or otherwise construed having regard to any other clause of such objects, powers or purposes.

(q) The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth and it may conduct its business in any Province or territory of the Dominion of Canada and in foreign countries and may have one office or more than one office and keep the books of the company in any place in which the company may do business although outside of the Dominion of Canada except as otherwise may be provided by law.

I found the appellant guilty of the offence charged, and fined him $25, and costs amounting to $12 and ordered that in default of payment, he should serve 30 days in Regina Jail.

The following questions are respectively submitted for the opinion of this Honourable Court of Appeal:

(a) Whether this contract was a contract for the sale of goods or the employment of an artist?

(b) Whether the picture carried by the traveller was not a picture of another person designed to show artistic skill and not a sample of goods or a pattern?

(c) Whether the accused is a hawker or pedler, within the meaning of the Act, seeing that the act of painting is the essential portion of the contract, and the article contracted for was not in existence, and the accused did not expose nor offer for sale, nor sell it?

(d) Whether the accused is a hawker or pedler, within the meaning of the Act, seeing that the enlarged picture or portrait, subject matter of the contract, is a family relic only and not an article of commerce?

(e) Whether the Act, in so far as it purports to place a tax upon persons residing in another Province, and making contracts within Saskatchewan, while materials and labour are all outside the Province, is not *ultra vires*, as being a restraint upon interprovincial commerce?

(f) Whether the Act does not also contravene the powers of the Dominion to incorporate companies (1) to do business in Saskatchewan (2) to carry on interprovincial trade?

(g) Whether the Act does not also contravene the power of the Dominion to regulate trade and commerce, and also the provision of the British North America Act, which provides for the admission in each Province of all articles of growth, produce or manufacture or any other produce?

(h) Whether the Act does not also contravene the power of the Dominion to incorporate Dominion companies to carry on business throughout the Dominion?

On August 29, 1919, the appellant applied to me to state and sign a case under sec. 761 of the Criminal Code, and delivered to me a request in writing to state such case, and, on that date, I ordered him to enter into his personal recognisance, for the sum of $300 under the terms of sec. 762, conditioned to prosecute his appeal without delay and to submit to the judgment of the Court, and pay such costs as awarded by the same, and the appellant has entered into such recognisance and has lodged the same with me.

Dated at Kamsack, Saskatchewan, this 11th day of September, A.D. 1919.

W. J. MCLENNAN (Seal)
Justice of the Peace, in and for the Province of Saskatchewan.

The first four questions may be dealt with together, and turn on the question whether or not, on the facts, the appellant is a hawker or pedler within the meaning of An Act respecting Hawkers and Pedlers, being ch. 37, 2 Geo. V., 1912, Sask.

The interpretation of the terms "hawker" or "pedler" in sec. 1 of the Act, as amended by 7 Geo. V., 1917, ch. 34, sec. 28, so far as the present case is concerned, is as follows:—

In this Act the expression "hawker" or "pedler" means a person who . . . carries and exposes samples or patterns of goods, wares, or merchandise for purposes of sale by such sample or pattern . . . and upon

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the understanding that such goods, wares and merchandise will afterwards be delivered in the municipality to any person who is not a wholesale or retail dealer therein.

The contract entered into between the parties, as set out in the stated case, is unquestionably a contract for the sale and delivery of a chattel, namely 1 G.r./19 x 13, finely finished painting.

The very terms of the contract itself are a complete answer to the argument advanced by counsel for the appellant that the contract was a contract for work and labour, and not a contract for the sale of goods. The contract is clearly a contract to produce a chattel which was to be transferred for a stated consideration from the maker to the respondent who ordered it, and on this point the case of *Lee* v. *Griffin* (1861), 1 B. & S. 272, 121 E.R. 716, very aptly applies. See also, *The Canada Bank Note Engraving and Printing Co.* v. *The Toronto R. Co.* (1895), 22 A.R. (Ont.), 462, 28 Halsbury 861; 1 Law Quarterly Review, 9-10.

Having found that the contract in question was for the sale and delivery of goods, it is clear from the further facts, as stated, that it was a contract for the sale of goods to be afterwards delivered in the municipality to a person who was not a wholesale or retail dealer therein. It also appears that the sale was made by reference to certain paintings which were carried and exposed by the appellant. Were these paintings so carried and exposed samples or patterns of the goods afterwards to be delivered? If the two paintings which were shewn to prospective customers were only shewn as examples of the painter's artistic skill, I should not call them samples. But the facts as stated, and the terms of the order, shew them to have been more than that. Their dimensions and colouring were more important elements in the transaction than their artistic value. The very terms of the order, "1 G.r./19 x 13 finely finished painting," refer, in my opinion, to an article of a standard description quite unrelated to the portrait to be reproduced. I therefore come to the conclusion that this was a case of sale by sample, and that the appellant was a hawker or pedler within the provisions of the Act.

The points involved in the remaining 4 questions were not raised on the argument before us, but I should answer them all in the negative, simply on the ground that the Act in question

is binding on all persons whether resident in the Province or not, and on all companies, whether created by the Provincial Legislature or by the Federal Parliament. The Act does not in any way attempt to prohibit anyone or any company from carrying on any business, but simply imposes a general license fee for the purpose of raising a revenue. *R.* v. *Great West Saddlery Co., etc., etc.* (1919), 48 D.L.R. 386.

The conviction should therefore be affirmed.

NEWLANDS, J.A.:—This is a stated case submitted by a Justice of the Peace for the opinion of the Court on a conviction under the Hawkers and Pedlers Act, 2 Geo. V., 1912, Sask., ch. 37. Newlands, J.A.

The Justice states on the evidence that he finds the following amongst other facts:

that the appellant, representing the Dominion Art Co., Ltd., of Toronto, informed the prosecutor that he was taking orders for enlarging photographs and he produced samples of the work that he was soliciting orders for.

After giving particulars of two cases where appellant solicited orders, he states, in the case submitted:

4. The appellant carried a small grip about 15 x 22 inches large, containing two pictures of the same class of work made in three colours as before described, the enlarged pictures being without frames.

5. The appellant did not sell or offer for sale the enlarged pictures so carried to any of the persons solicited, but exhibited them to such persons to display the class of work and the artistic finish.

A number of questions are submitted for the opinion of this Court, the effect of which are: Should the appellant have taken out a license under the Hawkers and Pedlers Act?

The only part of the definition of a hawker and pedler the appellant could come under is, in sec. 1 as amended by 7 Geo. V., 1917, Sask., ch. 34, sec. 28:

A person who goes from house to house . . . or carries and exposes samples or patterns of goods, wares or merchandise for purposes of sale by such sample or pattern . . . and upon the understanding that such goods, wares, and merchandise will afterwards be delivered in the municipality to any person who is not a wholesale or retail dealer therein.

The persons with whom appellant was dealing were not either retail or wholesale dealers in such goods.

I think the finding of fact above set out practically decides this case, *i.e.*, that the pictures "were exhibited to display the class of work and the artistic finish;" they therefore were not carried and exposed as samples or patterns of any goods, wares or merchandise for purchase and sale by such sample or pattern.

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Both these words "sample" and "pattern" have various meanings, and we therefore have to construe them in relation to the subject matter in which they are used. There is no difficulty with the word "sample," because, in the Sale of Goods Act and ordinarily in the sale of goods, it means a

relatively small quantity of material, or an individual object from which the quality of the mass, group, species, etc., which it represents may be inferred; a specimen. Now chiefly, a small quantity of some commodity presented or shewn to customers as a specimen of goods offered for sale.

New Eng. Dict., par. 2.

The pictures carried in this case were obviously not samples of goods which the appellant was selling.

A "pattern" in some instances has a meaning similar to a sample, as, for instance, the following meaning is given to the word in the New English Dictionary, par. 5: "A specimen or part shewn as a sample of the rest." As both words are used in the Act, I do not think they were intended to mean the same thing. But they are both used in reference to the sale of goods, and, therefore, they must be construed in relation to such a matter.

In discussing the word "pattern" in reference to the registration of a design under the Patents, Designs and Trade Marks Act, 46-47 Vict. 1883, ch. 57, in *In re Rollason's Registered Design* [1898], 1 Ch. 237 at 252, Vaughan Williams, L.J., says:

If you have to apply these words to such different subject-matters as wall-paper, lace, and engineers' patterns, you obviously in practice give a very different meaning to the word "pattern." Sometimes the pattern consists wholly of shape; sometimes the pattern may consist of partly of shape; and sometimes the pattern, as in the case of pattern stamped upon wall paper, does not involve any shape at all—it is all pattern. But you have to look at the particular subject-matter;

Now in this case the subject matter is the sale of goods, and therefore the word "pattern" refers to the pattern of the material offered for sale. It is used in the same sense in which Chitty, L.J., uses it in the above case, at 248. In discussing the difference between pattern and shape, he says:

The practical distinction is shewn by such a common illustration as that which I will give: "I like the shape of your coat, but I think that the pattern of the materials is in execrable taste."

I think the word "sample" is used in the Act as a small quantity of some commodity presented to a customer as a specimen of the goods offered for sale, and that the word "pattern" is used as a

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piece of the material shewing the design of the ornamentation of the goods, as in the case of cloth, wall paper or lace.

Having come to this conclusion, then, the pictures carried by the appellant were neither "samples," *i.e.*, a small quantity of a larger commodity, nor "patterns," *i.e.*, a piece of the material shewing the design of the ornamentation, but, as the Justice found, were carried to shew the class of work and artistic finish which the company he represented would do for the customer.

It is unnecessary for me to discuss the other questions raised, and I would answer the questions asked by the Justice generally, that the appellant was not guilty of an offence under the Hawkers and Pedlers Act and that the conviction should be quashed.

Newlands, J.A.

LAMONT, J.A., concurred with Newlands, J.A.

Lamont, J.A.

ELWOOD, J.A.:—I am of the opinion that the pictures carried by the appellant were neither "samples" nor "patterns" but were carried to shew the class of work and artistic finish of the work which the company, which the appellant represented, would do for its customers, and that, therefore, the conviction should be quashed.

Elwood, J.A.

Conviction quashed.

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Exchequer Court of Canada, Audette, J. November 8, 1919.

COLLISION (§ I A—3)—EVIDENCE—WEIGHING—DISINTERESTED WITNESSES —REASONABLE PROBABILITIES.

In case of a collision between two ships in a narrow channel the evidence of disinterested witnesses standing on the shore in such a position of advantage as to have a full and clear view of both ships and who follow the courses and manoeuvres of the vessels, will be accepted in preference to that of a passenger in the saloon of one of the ships with a limited range of sight as to the course of the two colliding ships.

That where there is conflicting evidence, the Court should examine into the probabilities of the matter and draw its own conclusion as to what would be the most reasonable courses.

[*The "Mary Stewart"* (1844), 2 Wm. Rob. 244, and *The "Ailsa"* (1860), 2 Stuart's Adm. 38, referred to.]

Statement.

APPEAL from a judgment of the Exchequer Court of Canada, New Brunswick Admiralty District, in an action for damages caused by a collision between two ships. Reversed.

The judgment appealed from is as follows:

HAZEN, L.J.A.:—The collision in question in this suit took place opposite Middle Hampstead in the St. John River, on the

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5th October last, between twelve and one o'clock in the afternoon. It was about a mile and three-quarters higher up the river than Hampstead wharf, and in that part of the river which lies between Long Island on the east and the main bank of the River St. John on the west. There was a light wind—in the language of the captain of the "Purdy" it was "a little mild breeze" and there was a current in the river of about two miles an hour. The day was clear.

It is first necessary to ascertain from the evidence and the position and courses of the vessels prior to and at the time of the collision and how the collision occurred. It was claimed on behalf of the "Premier" that after leaving Gerow's wharf on the eastern side of the River St. John, it rounded Long Island, coming over to the Hampstead side at first and then coming over in a slanting course to the Long Island side, and then proceeding parallel with Long Island and within a very short distance of its shore, up river; that when it first sighted the "Purdy" that ship had rounded what is called the curve in the island and was coming down river about midstream or further over towards the Hampstead shore, and that when it was within a few hundred yards of the "Premier" it turned suddenly to port and ran into the "Premier," striking it almost, though not quite at right angles on the port side, about eight feet aft of midships, injuring the "Premier" to such an extent that it had to be beached in order to prevent it sinking. Evidence to this effect is given by the captain and members of the crew of the "Premier," by some passengers who were on board, and by some witnesses who saw what occurred from the shore about half a mile away. As the river at the point where the accident occurred is between nine hundred and one thousand feet wide, these witnesses not only viewed the disaster over the water, but over a considerable distance of land intervening between the point where they stood and where the water on the western side of the River St. John commenced, and while I do not in any way dispute their *bona fides*, I am disposed to think that they were not in as good a position to speak accurately in regard to the accident or the distance of the "Premier" from Long Island or the position of the "Purdy" as would be those who were on the vessels at the time when the accident occurred, and that it would be an easy thing from their viewpoint to be mistaken in regard to the matter.

On the other hand, the evidence on behalf of the "Purdy" is to the effect that the vessel rounded the point of the island and came down river running within a short distance of the Long Island shore and parallel to it; that when the "Premier" was first sighted it was coming up river on the Hampstead side of the midstream, and that it gradually came across towards Long Island; that the "Purdy" continued its course down river, keeping to the port side of midstream and close to Long Island, and that if both vessels had kept their course they would have passed one another without any accident occurring, but that as they approached the "Premier" kept coming over towards the Long Island shore, and finally attempted to cross the bows of the "Purdy." The "Purdy's" engines were reversed, but it struck the "Premier" at the point that I have mentioned with the result as before stated.

As is the case in nearly all collision cases, the evidence was of a very conflicting character, and if there was only the verbal evidence of the witnesses to be considered it would be a difficult matter to decide between them. Some of the evidence, however, I think should be referred to. One of the witnesses was Mr. Parker Glasier, who was travelling on the "Purdy" that day, and who has had an experience of half a century in connection with steamboating and freighting on the River St. John. He states that he had his dinner on board the boat about twelve o'clock, and that when he came out of the dining saloon the "Purdy" was quite close to the island shore, that a returned soldier came out at the same time with him, and they stood talking, facing the Hampstead shore, and that after they had been talking a short time the soldier asked him what that was coming up river, and Mr. Glasier said it was the "Premier." At this time the "Premier" was between a quarter and a half mile below the "Purdy," and nearly midstream, while the "Purdy" was quite close to the island shore and keeping quite close to it. He judged that the boats were between a quarter and a half mile apart when he first sighted the "Premier." He went on with his conversation with the soldier and did not see the "Premier" again until the boats were right close together; that the "Premier" then changed her course to starboard and ran towards the island and across the bows of the "Purdy," when the collision occurred, although at that time the

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"Purdy" had reversed her engines and was backing. He states that if the "Premier" had continued on the course that she was apparently on when he first saw her, and the "Purdy" had continued on the course that she was on at that time, they would have passed one another in safety. He swears distinctly that the "Purdy," which is 140 feet long, was not more than three lengths from the island nor more than two lengths from the eel grass where the deep water begins and that when the collision occurred both boats were close to Long Island. This evidence given by Mr. Glasier is confirmed by the evidence of the officers on the boat, members of the crew and other passengers. It will be seen therefore that there is very strong evidence in support of both contentions. The witnesses, however, all agree that the angle of incidence at which the "Purdy" struck the "Premier" was only a little less than a right angle, and this is confirmed by a photograph which is placed in evidence, and by the evidence of Richard Tetallick, an experienced ship carpenter who was called in to give evidence regarding the state of the "Premier" after the collision took place.

The contention on the part of the "Premier" is that when the two boats were only a short distance apart, the "Premier" being nearer the island shore and running up parallel to it, the "Purdy" suddenly turned, without any apparent reason for so doing and ran directly over to the "Premier." If the "Premier" had not been there she would undoubtedly have run on the shore of the island. I cannot see what possible reason there could be for such action on the part of those who were in charge of the "Purdy," and fully expected to hear some evidence to the effect that the steering gear and machinery of the "Purdy" was out of order on that day. No such evidence, however, was offered, though there was evidence from the mate of the "Purdy" to the effect that it was a hard boat to steer in windy weather, and that was the only evidence offered which in any way bore upon this subject. The fact, however, that the blow from the "Purdy" was delivered almost at right angles, had an important bearing on the case. The evidence of those on board the "Premier" is to the effect that the "Purdy" and "Premier" were only a few hundred yards apart, when as they allege the "Purdy" changed its course and turned sharply to port. Captain McLean in cross-examination

stated that when the "Purdy" changed her course she was about 200 yards from the "Premier," that is, that there were about 200 yards from the bow of the one to the other on parallel courses, and that there were about 200 yards laterally between the two, and that if the "Premier" had held on its course and the "Purdy" had held on her course that where the collision took place they would have passed with 200 yards from port side to port side. In order, therefore, for the "Purdy" to have turned to port and run into the "Premier" it would have had to make a very sharp turn and from the evidence given I do not believe it could have turned so quickly as to have struck the "Premier" in the way that it was alleged to have done by the witnesses for the libellant. In order to have inflicted the wound, the blow being delivered almost at right angles, the "Purdy" would have had to turn a quarter circle, and I cannot make myself believe, in view of the evidence, that she could possibly have done so in that space, with the "Premier" moving up river all the time. A witness named Connor, who was called on behalf of the "Premier," states that the "Purdy" was only two hundred or two hundred and fifty yards above the "Premier" when she blew, and that she was about one-third of the river out from Long Island, or may be a little better, and other witnesses agree to the same thing. The only evidence given as to the possibility of the "Purdy's" ability or inability to turn in the space that I have mentioned so as to inflict the blow on the "Premier" if it was running up the Long Island shore, was given by Captain Day, who upon being asked the question as to the distance in which the "Purdy" could be turned at a right angle from her course, said that it would take nearly the width of the river there.

In view of all the evidence, I have come to the conclusion that if the "Purdy" was coming down river about midstream or a little nearer to the Hampstead shore, and the "Premier" was coming up along the Long Island shore, that it would have been a physical impossibility for the "Purdy" when within about two hundred yards of the "Premier" and being two hundred yards distant from her in a lateral direction, to have turned so sharply to port as to strike the "Premier" the blow which she received, and I find that the collision occurred when the "Purdy" was proceeding down river on the port side of midstream, when the

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"Premier" on its way upstream attempted to cross the bows of the "Purdy" for the apparent purpose of getting to the starboard or Long Island side of the river. Although I have come to this conclusion, it by no means determines the case, for there are other important matters connected with the rules and regulations for the safety of vessels at sea which must be considered before it can be settled that the course pursued by either vessel was the proximate cause of the collision.

The first of these questions which I have to decide is as to whether the St. John River at this point is or is not a narrow channel. No definition of a narrow channel had ever been attempted, and I think it is largely a matter of common sense, and is a question of fact that must be decided by the Judge trying the case in which it arises, having regard to the general tenor of decisions in other courts. At this point the river was from nine hundred to one thousand feet wide, the River St. John being divided by Long Island into two channels, of which this was the western. I have considered the cases in which the question of narrow channel has arisen, and find that the Detroit River at Bar Point, *The Tecumseh* (1905), 10 Can. Ex. 44, at p. 61; the harbor of Charlottetown, P.E.I., near Alshorn Point, *The Tiber* (1900), 6 Can. Ex. 402, at p. 407; the mouth of Charlottetown Harbor outside the blockhouse, *The Heather Belle* (1892), 3 Can. Ex. 40, at p. 46; the south channel in Nanaimo Harbor, *The Cutch* (1893), 3 Can. Ex. 362; the entrance to Halifax Harbor, *The Parisian*, [1907], A.C. 193, and the navigable channel in the harbor of Sydney, were all held to be narrow channels. In some of these cases the channel was wider and in some narrower than at the point where the collision occurred. In addition to the cases I have mentioned we have a case in New Brunswick of *The General* (1844), (see Stockton's Vice-Admiralty Reports, p. 86), in which it was decided by the late Judge Waters that the St. John River at Swift Point, which is a few miles above Indiantown, and where the width of the river is about a quarter of a mile, or considerably wider than the point where the present collision occurred, was a narrow channel. There is also the case of *The Tecumseh*, 10 Can. Ex. 44, at p. 61, in which Mr. Justice Hodgins of the Ontario Bench, held that the channel in

question, being about eight hundred feet wide must, he thought, be held to come within the designation of narrow channels mentioned in Article 21, especially in view of the length and tonnage of steamers sailing on the island water. The length of the "Purdy" was one hundred and forty feet and that of the "Premier" ninety-three feet, the tonnage of the latter being one hundred and ninety-one, and I have considered the size of these vessels in coming to the conclusion which I have. It was contended by the learned counsel for the "Purdy" that what was a narrow channel at night might not be regarded as a narrow channel during the day, and that the size of vessels which were in the habit of traversing the water, and other circumstances, must be taken into account. I have given consideration to this argument, and while there is some authority to the effect that a Judge might well consider the size of vessels that traverse the waters in question, I cannot possibly bring myself to think that whether a channel is narrow or not can possibly depend upon whether it is being used by day or by night. If it is a narrow channel at one time of the day in my opinion it is narrow during the whole twenty-four hours. After giving full consideration to the cases that have been decided on the subject, and to all the facts and circumstances of the present case, I have come to the conclusion that that part of the St. John River where the accident occurred, which is from nine hundred to one thousand feet in width—the deep water in which is probably about seven hundred feet in width, is a narrow channel, and I so find. Having come to that conclusion it is quite clear the rules and regulations for the safety of ships at sea will apply. Article 25 provides that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or channel which lies on the starboard side of such vessel. On the day the collision occurred it was perfectly safe and practicable for both vessels to do so, and yet neither of them observed the rule. If the "Purdy" had kept to the starboard side of the channel, and had the "Premier" when first sighted by the "Purdy" been on the starboard side of the fair way or mid-channel, and kept on that course, the vessels could have passed without collision. So far as Rule 25 is concerned, both vessels were deliberate transgressors of the law. Had both been on the

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side where they should have been or had either been on its proper side, I do not think the collision would have occurred, and I am of opinion that in thus violating the rule both vessels were at fault and contributed to the disaster. It was urged that the proximate cause of the collision was the action of the "Premier" in going too far to starboard after the "Purdy" was sighted, instead of proceeding up on the port side. In view of the fact, however, that the "Purdy" was not following its proper course and its being out of its course was a contributing cause, I cannot accede to that view.

Two other points were taken on behalf of the "Premier" under the rules and regulations. One was that there was a violation of Article 28, which provides that when vessels are in sight of one another, a steam vessel under way in taking any course authorized by the rules, should indicate that course by certain announcements on her whistle, and that the only signal that was given was by the "Purdy," which gave one short whistle, which is contended meant that it was directing its course to starboard. The evidence with regard to the short whistle was that it was given when the vessels were almost in collision, and at the same time the bells were given to the engine room for a reversal of the engine. I am not deciding what this short whistle meant for there is contention on that point and evidence to the effect that on the St. John River one short whistle is given when a steamer is approaching a wharf or a snag in the river, and is a direction to the engineer to stand by his engine. I do not think it necessary to do so, as the whistle was, in my opinion, under the evidence, given too late to have any effect one way or the other. Had a whistle been given by either vessel at an earlier period the collision might have been avoided.

It was also claimed that the "Purdy" did not have a sufficient look-out. In my opinion this applies to both vessels. There was very little evidence regarding the matter, and in my opinion had there been an adequate look-out on either vessel the accident might have been avoided. Such a contention it seems to me would apply with equal force to the "Premier" as to the "Purdy." Having found that both vessels were to blame by non-observance of Article 25 of the Regulations I give judgment in accordance with the rule laid down in the *London Steamship Owners' Insurance*

Company v. *Grampian Steamship Company* (1890), 24 Q.B.D. 663, for the libellant against the "Purdy" for one-half of the amount by which the "Premier's" damage exceeds the damage to the "Purdy," and as no damage was claimed by the "Purdy," that will be one-half the damage which the "Premier" has incurred. No evidence was given at the trial with regard to the amount of damages, so I presume it will be agreed upon between the parties. If not, there will have to be a further application in order to ascertain it.

The appeal was heard by Audette, J.

Fred. R. Taylor, K.C., for appellant.

J. B. M. Baxter, K.C., for respondent.

AUDETTE, J.:—This is an appeal from the judgment of the Local Judge of the New Brunswick Admiralty District, pronounced on April, 2, 1918, in a collision case, wherein he found both vessels to blame and gave judgment and

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pronounced in favour of the plaintiffs' claim for one-half damages and condemned the ship "D. J Purdy" in the amount to be found due to the plaintiffs for such half damages.

The action arises out of a collision which took place shortly after 12.30 o'clock, in the afternoon of October 5, 1918, between the S.S. "Premier" (93 feet in length) and the S.S. "Purdy," (145 feet in length) on the St. John River, N.B., between Central Hampstead and Long Island. The weather was good, not sunny, but with a clear atmosphere. There was a current of two miles an hour, and the wind was blowing about six miles an hour down river.

The collision occurred quite close to Long Island shore, where the "Premier" was beached within a minute or two after the accident.

The witnesses on behalf of the plaintiffs, and there is great unanimity between them, testify that on the day in question, the "Premier" having left St. John, at about 8 o'clock in the morning, for Chipman and intermediate ports, stopped at Gerow's, on the eastern shore of the river, about opposite Spoon Island, and thence proceeded up river toward Long Island and taking the channel between that Island and Central Hampstead, cleared the southern end of the Island by passing and keeping her course very close to the Island, on the eastern side of the channel, with the object of

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avoiding the current in the centre, which had been at the time, increased by freshets. It is further contended that the "Premier" all through steadily kept her course close to the Island, on the eastern side of the river, which at that place is reckoned to be between 850 to 1,000 feet wide. The attention of those on board of her was especially attracted by the eel grass which grows on the shore of the Island, and being so close to the shore fear was by some entertained that the propeller might get entangled in this grass.

While thus keeping her course, the "Premier" contends that having seen the "Purdy" coming down—almost mid-stream—some witnesses placing her slightly to the west of the fair-way—at about 250 to 300 yards, she blew one short blast, which was immediately answered by one blast from the "Premier." The "Purdy" then suddenly changed her course, slashing across the river—swung herself upon the "Premier," striking her abaft midship, practically at right angles, perhaps 40 degrees, and inflicted a jagged V shaped hole, of about 18 inches wide and running about four feet below the water line. The Captain of the "Premier" gave one bell to stop, and when the "Purdy" got clear and released the "Premier," the "Premier" was ordered ahead again, and was beached whilst there was still steerage on her, thus saving the passengers and the boat, while the "Purdy" backed right across the river.

Now, on behalf of the "Purdy," it is alleged and testified to, among others by her Captain, that when turning the bend she first saw the "Premier," the "Purdy" was about one-quarter of the way across from the Island side where the width of the river is about 900 feet; and, he asserts, the "Premier" was then, about opposite Hampstead, a little to the westward side of the fair-way, and that afterwards she seemed to come more to the middle, the "Purdy" keeping the same distance from the Island.

The Captain claims he held his course for some time after seeing the "Premier," intending to pass to port. He does not think he did ever go as far as mid-stream, *but would not be positive about that.* When he saw the "Premier" holding her course he changed his own course to port, and shortly after that, he says, the "Premier" changed her course and tried to cross his bow, and at that time she was about two lengths from the "Purdy." He

further contends he held the "Purdy's" course to port until she got to the left of the "Premier," and then steadied up. In the result it is contended the "Premier" travelled from west to east across the river, and threw herself across the "Purdy's" bow.

Therefore, it is common ground that the collision happened, that the "Purdy" struck the "Premier" slightly aft amidships as already mentioned, almost at right angles, and that the collision took place on the east side of the river, very close to Long Island. This latter fact being a very important element to consider in the endeavour to place the right interpretation upon the evidence—the collision having taken place in the course the "Premier" should have followed and away from where we should expect the "Purdy."

The evidence adduced on behalf of both parties with respect to the course pursued is very conflicting. The "Premier" contends she always kept to starboard and close to the Island, and the "Purdy" practically contends the "Premier's" course previous to the collision was from the west of the fairway towards the Island, while the "Purdy's" course was on a short distance from the Island and not on the western side of the fair-way or not in the midway.

Let us endeavor to reconcile this conflicting evidence with the object of discerning the truth.

Approaching the evidence on the question of reliability, one must first admit that the five witnesses heard on behalf of the "Premier," who were standing on land, at Central Hampstead, were in the very best position to witness the manoeuvre of the two vessels. Not only could they see the vessels better, but this testimony is that of absolutely disinterested witnesses, neither influenced nor biased one way or the other, as witnesses and officers on board a vessel may be, and so often are. Indeed, as Wellman, on the Art of Cross-Examination, so truly says that

> one sees, perhaps the most marked instances of partisanship in Admiralty cases which arise out of a collision between two ships. Almost invariably all the crew of one ship will testify in unison against the opposing crew, and, what is more significant, such passengers as happen to be on either ship will almost invariably be found corroborating the stories of their respective crews.

I fear this is a weakness in the make-up of human nature, and while such a witness is not deliberately committing perjury, he

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is unconsciously prone to dilute or colour the evidence to suit a particular purpose by adding a bit here and suppressing one there, but this bit will make all the difference in the meaning.

I accept without hesitation the evidence of the four witnesses on land, not only because they are disinterested and corroborated but because they were in a better position to follow the courses and the manoeuvres of the vessels, and their unanimity is also very convincing.

A deal of this class of evidence adduced by the passengers on board is given not from actual observation of the course of the vessel, but by deduction from casual observation at a given moment.

One must also not overlook the personal equation resulting from being on board a moving body. It is next to impossible for one on a moving vessel, unless he is in a position which allows him to see her from stem to stern, and at the same time maintain a complete and commanding view of the shore, to follow the course or evolution in the manoeuvres of a vessel.

Moreover, in cases of collision,

where the evidence on both sides is conflicting and nicely balanced, the Court will be guided by the probabilities of the respective cases which are set up. "*The Mary Stewart*" (1844), 2 Wm. Rob. 244; "*The Ailsa*" (1860), 2 Stuart's Adm. 38.

Let us pursue this search for finding what was the most reasonable course, the course most consonant with probability, that these vessels would have followed under ordinary circumstances.

What is the course that the "Premier" should have followed after leaving Gerow, if not the one substantiated by the unanimous evidence adduced in her behalf? She leaves Gerow, takes the most direct course to clear the south end of Long Island, and keeps as close to the Island as is consistent with good seamanship, with the double object of keeping out of a current that would impede her speed and of shortening her course while keeping in good waters—maintaining a direct course. Moreover, travelling in a narrow channel, she keeps to the starboard side of the channel.

What is the most rational course for the "Purdy," after clearing the bend in the Island, if not to keep in the fair-way, near or to the west of it with the object of benefiting by the current and also, as she is travelling in a narrow channel, to keep to starboard?

However, there has been a false manoeuvre somewhere; but so far, the courses of the two vessels, up to the time the "Purdy" sheered to port, is absolutely the reasonable one, the one most probable and in accord with ordinary seamanship—the very one described by the four witnesses viewing the manoeuvres from the land, whose view I accept corroborated as it is by the balance of the plaintiff's evidence, although questioned by evidence to which I am unable to give credence.

A perusal of the defendant's evidence, conflicting as it is with the plaintiffs', will shew conclusively that it is not only weak, but it is also wanting, excepting perhaps that of the Captain, in any statement resulting from personal observation consonant with that reliability from which one can deduce a satisfactory conclusion. Let us, as an example, examine the testimony of the old man Glasier—a witness upon whose testimony the learned Judge below seems to lay great stress, and rests his judgment in a large measure. That testimony has impressed itself upon my mind as earmarked with improbability from his manner of stating facts more from surmise and conjecture than from actual personal observation, leading me forcibly to adhere to the view that the evidence of the shore-witnesses must in preference be accepted.

He *thinks* the position of the "Premier" is as he says, with respect to the east shore, when he does not see that shore from the place he is standing, in fact, he was mostly absorbed, as he admits, in the conversation he was carrying on with the returned soldier, and his evidence, for the most part, is no more than an offer of opinion as to what he thinks and not from personal observation. And here again the personal equation of a person standing in the saloon of the boat and looking exclusively to one side of the stream, would militate against its acceptance, in preference to the evidenc of the shore witnesses corroborated in the manner hereinafter mentioned.

Then the nautical knowledge of this witness, who was travelling free on board the "Purdy," was most deplorably inadequate, and that ignorance seemed to have been shared by the "Purdy's" crew, as disclosed by the evidence.

Here follows an extract from the evidence of witness Glasier, viz: pp. 135, 136 and 137:

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Q. How is it that you figure you were below the bend if you didn't take particular notice about the houses? A. Of course I only *think*, but I *think* we were below the bend. Q. You say you think the "Premier" was coming up about amidstream, and you didn't keep looking at her? A. *No, sir.* Q. You were simply talking? A. *Simply talking.* Q. Were not paying particular attention to the shore or anything else—paying attention to this conversation. A. Yes, sir. Q. Did you, after you saw the "Premier," notice the shore particularly after the first time you saw the "Premier"—you say you were engaged in conversation—after that did you pay any particular attention to the shore? A. *I might have casually seen them* but not to recognise to—to know whose they were. Q. You were not paying any next particular attention to the shore after that at all? A. No. Q. Then the thing you noticed was that the angle of the "Premier" towards the "Purdy" was different from the angle that it had been when you first saw them? A. Yes. Q. You didn't notice the shore at all, but noticed the angle that one bore to the other was different from the angle when you first saw it. At first when you saw the vessels they were going about in parallel courses I think you said—or is that right? A. *Parallel courses*? Q. Would you say they were going in about parallel courses when you first saw them? A. I would say so because I was standing here and the way it *looked to me*—the way they were going—if they had both kept on the courses they would have passed. Q. You would not say they were crossing ships—one was not heading across the bow of the other? A. No. Q. When you first saw them they were going in about parallel courses or was one angling slightly towards the other? A. *I don't think so.* Q. You wouldn't say so—slightly or considerably? A. When I first saw them—no I wouldn't think so. Q. Afterwards when you saw them again it was how long after you first saw them would you say? A. That would be quite a few minutes. Q. Who called your attention to them the second time—what called your attention to them the second time? A. I don't know as anything in particular. Q. Anyway you saw them, and at the time you noticed one was going in a course across the bows of the other—is that right? A. Yes. Q. You were not paying attention to the "Premier" to see whether she continued her course in between—you did not see the "Premier" in between when you first saw her and the time they were coming together? A. *No,* from the time I *first seen her the two boats* were right close together. Q. You do not know whether the "Premier" changed her course or not? A. *No.* Q. You do not know whether the "Purdy" changed her course or not? A. No. Q. You cannot say which boat changed her course? A. No. Q. One of the boats must have changed her course so the two were not going parallel? A. I don't think the "Purdy" changed her course, because when I went forward and seen there was going to be a collision—I went forward and looked toward the island—the "Purdy" was heading right down—. Q. The "Purdy" was still heading down river? A. Yes. Q. About how far was the "Purdy" from the island at that time? A. She might have been—do you mean the island or the river bank? Q. I mean the island? A. She would not be three lengths from the island.

Is this testimony that can justify its acceptance in preference to the shore witnesses? I must find in the negative.

The evidence of witness Turner, heard on behalf of the defendant, is also very characteristic of this personal equation. He is on

the forward deck—he walks up and down, and ultimately says he could not say how the "Premier" got across their bow—all he knows is she was there. And at p. 177, he says that after the collision the "Purdy" backed, *working her stern out into the stream —away—from the island.*

Moreover on this question of the course of the "Purdy," the evidence on her behalf in that respect is not satisfactory, and the "Purdy's" own preliminary act gives it a straight denial.

As cited by Myers' Admiralty Law and Practice, p. 242:

> The object of the preliminary act is to obtain from the parties statements of the facts at a time when they are fresh in their recollection, *"The Frankland"* (1872), L.R. 3 A. & E. 511, and before either party knows how his opponent shapes his case.

The memory of the witness or party must be taken to be more accurate when deposing to a recent occurrence, than when testified to after a certain length of time. And, as put by Lord Moulton in *"The Seacombe"* [1912] P. 21:

> A statement of fact in a preliminary act is a formal admission binding the party making it, and can only be departed from by special leave.

A number of authorities have also been submitted by plaintiff's counsel upon this well-known point.

Coming to the question of the signals it is uncontroverted evidence that the "Purdy," before changing her course to port, indicated her course to starboard by the signal of one short blast, which under the Rules of the Road means "I am directing my course to starboard," and was in turn answered by the "Premier," with a one short blast also. Had the "Purdy" followed that course, as thus indicated, she would have gone towards Central Hampstead, toward the west, and as the collision admittedly took place on the east, close to the Island shore, the accident would have been avoided.

Had the "Purdy" desired to signal she was going to port, she had then to give two short blasts, which under the Rules of the Road mean, "I am directing my course to port."

Now, I do find, as clearly testified to by the shore witnesses, that previous to the accident, the "Purdy" suddenly started across the river and collided as above mentioned. True that manoeuvre was very erratic and devoid of any seamanship; but here again we have evidence corroborating that evidence by explaining it. The evidence of the mate, on this point, is all that may be desired by

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way of explanation. While the mate was eating his dinner in the dining room, his attention being directed to the proximity of the "Premier," he rushed up to the pilot house to assist the captain, because he says the "Purdy" is a hard boat to steer—"One man is no good to steer at all in windy weather." The evidence further shews, as follows:

Q. You thought he (the Captain) needed another man at the wheel. You went there as quickly as you could? A. Yes. Q. You thought that was a sort of a day when the Captain needed some sort of help at the wheel? A. I did.

The explanation fills the needed gap. Everything is explained. The boat was hard to steer. She took a sheer, as clearly described by all the witnesses on behalf of the plaintiff, and more especially by those on the shore.

More credibility is to be attached to the crew that are on the alert, "*The Dahlia*," 1 Stuart's Adm. 242, and accepting again this as a guidance one will be more than astonished to hear that just previous to the accident—almost when it was inevitable—in the agony of the collision—we see an officer on board the "Purdy," running to the engine room and giving orders to the engineer, ignoring the captain, who is in full command of the vessel at the time. We also have a crew, from the captain down, who are unacquainted with the Rules of the Road, and repeatedly admitting it, contending that one blast means an order to the engine room. In view of such poor nautical knowledge are we to be astonished at the lubberly seamanship displayed by the "Purdy"?

Moreover, if these vessels were travelling in a narrow channel, a fact which seems to be accepted by both parties, and as found by the trial Judge, each vessel under art. 25 had to keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel—and if the evidence of the "Premier" is reliable it would seem the "Purdy" did keep that course until her steering gear would have seemed to become beyond control, yet the captain of the "Purdy" and the witnesses heard on her behalf, insist in placing her on the Island side. However, from the reading of the evidence the view has impressed itself upon me that the captain of the "Purdy" knew very little of the Rules of the Road, as admitted by himself.

Coming to the question raised by the judgment appealed from, in respect of the rule as to the division of the loss where both vessels are to blame, it will be sufficient to say that the old rule of division followed below has been changed in England by 1-2 Geo. V. 1911, ch. 57, secs. 1 and 9, and in Canada by the Maritime Conventions Act, 1914, 4-5 Geo. V. 1914, ch. 13, sec. 2, whereby it is now enacted, in lieu of the old "arbitrary rule," that the liability to "make good the damage or loss shall be in proportion to the degree in which each vessel was in fault," as provided by the Act.

Therefore there will be judgment in favour of the plaintiffs, allowing the appeal and dismissing the cross-appeal, both with costs. *Appeal allowed.*

THORNE v. BALL.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. October 31, 1919.

ASSIGNMENTS FOR CREDITORS (§ VIII A—74 a)—CLAIM FOR WAGES—SUIT—JUDGMENT—SUBSEQUENT ASSIGNMENT OF DEBTOR—QUESTION OF MERGER—WAGES ACT, R.S.O. 1914, CH. 143, SEC. 3.

A wage-earner's claim to priority for his wages under sec. 3 of the Wages Act, R.S.O. 1914, ch. 143, is enforceable where his employer has made an assignment for the benefit of his creditors; even though the wage-earner has sued, and recovered a judgment against his employer before the assignment.

The right of preference is given because the claim is for wages, and the claim remains one for wages even after the judgment is obtained; the remedy, not the right is merged.

[*King* v. *Hoare* (1844), 13 M. & W. 494, 504; *Price* v. *Moulton* (1851), 10 C.B. 561, 573, referred to.]

Statement.

APPEAL by the defendant from the judgment of a Co. C. Judge, in an action brought in the County Court of the County of York.

The following statement of the facts is taken from the judgment of MIDDLETON, J.:—

The plaintiff sued and recovered a judgment for $195.75 wages due to him by J. Frank Osborne Limited. After the recovery of judgment, the debtor assigned for the benefit of its creditors. Ball then claimed to rank as a preferred creditor, but the defendant, the assignee, contested his claim. This action was then brought to establish his right.

The assignee contends that, upon the recovery of judgment, the cause of action merged, and Ball (the plaintiff) lost the right to

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a preference which he otherwise would have had. The learned Judge of the County Court held against this contention, and the defendant appealed.

A. R. Clute, for the appellant.

F. Regan, for the plaintiff, respondent.

MIDDLETON, J. (after setting out the facts as above):—The plaintiff's right must be determined upon the true construction of the Wages Act, R.S.O. 1914, ch. 143. This statute gives priority to the claim of the wage-earner for his wages, for the limited period mentioned, in the case of an assignment (sec. 3), in the case of distribution among execution creditors by the Sheriff (sec. 4), in the case of proceedings against absconding debtors (sec. 5), in the administration of estates (sec. 6); and the like preference is given in the case of liquidation and winding-up of a company, by the Companies Act, R.S.O. 1914, ch. 178, sec. 174 (*b*).

Although there can be no doubt that, upon the obtaining of judgment, the original cause of action is changed into matter of record, and no further action can be brought upon the original cause of action, this is by no means conclusive of the question before us. The claim is yet a claim for wages, payable not by virtue of an obligation arising out of simple contract, but by virtue of the judgment upon that contract. There is nothing to prevent our looking behind the judgment to ascertain the nature of the original claim. Indeed, if a record and judgment existed in the old common law form, upon its production the nature of the claim would appear upon its face. The right to the preference is given because the claim is for wages, and the claim remains a claim for wages even after the judgment is obtained. "It does not merge or extinguish the debt; but it merges the remedy by way of proceeding upon the simple contract . . . A man cannot have a remedy by covenant and by assumpsit for the same debt; the two are wholly incompatible and cannot co-exist:" *per* Maule, J., in *Price* v. *Moulton* (1851), 10 C.B. 561, 573.

"The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher:" *per* Parke, B., in *King* v. *Hoare* (1844), 13 M. & W. 494, 504. These quotations go to shew that it is the remedy which is merged, and not the right itself.

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In the statute in question there is found an indication that the wage-earner's right is not lost by the merging of his claim into a judgment, for the priority is recognised upon a distribution among execution creditors: sec. 4.

Where the Legislature has seen fit to grant a privilege in respect of claims for wages, it is our duty to see that this privilege is not cut down and the intention of the Legislature defeated by an undue application of artificial doctrines. To yield to the arguments pressed upon us would interfere with what was plainly intended. The wage-earner may sue and obtain priority under his execution. If the debtor assigns, he has priority.

It is argued that, by having sued and obtained a judgment which entitles him to priority, he has lost the priority he would otherwise have had under the assignment. This, in the language of Euclid, "is absurd."

The appeal should be dismissed with costs.

Riddell, J. Latchford, J. Meredith, C.J.C.P.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P.:—The single question involved in this appeal is: whether the assignee for the general benefit of creditors of J. Frank Osborne Limited should pay to the plaintiff wages in accordance with the provisions of sec. 3 of the Wages Act: and the single objection now made to the payment is: that before the making of the assignment the plaintiff had recovered judgment for all the wages due to him, and therefore has now no claim for wages.

If the right conferred upon employees by the enactment in question were merely—as it sometimes is—a privilege over other creditors, it might well be that this appeal should be allowed, because the plaintiff has now no claim for wages: he chose for his own purpose to change a simple contract debt for wages into a debt of another and higher character—a judgment debt—see *Keating* v. *Graham* (1895), 26 O.R. 361, in which the far-reaching effect of such a change is referred to—and so cannot now make any valid claim for wages.

But the enactment in question is wider, and was plainly intended to be far-reaching and effective in regard to the wages referred to in it. Its words are: "The assignee shall pay, in priority to the claims of the ordinary or general creditors of the assignor, the wages of all persons in the employment of the assignor at the

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time of the making of the assignment, or within one month before the making thereof, not exceeding three months' wages, and such persons shall rank as ordinary or general creditors for the residue, if any, of their claims."

The duty imposed upon the assignee is to pay such person "not exceeding three months' wages," if they remain unpaid and unsatisfied, as in truth the wages in question do: they were such wages, and they are unpaid and unsatisfied, none the less because of the judgment. The judgment would prevent proof of a claim for wages, but that the enactment does not require, it directs payment of the wages earned, in the way and at the time and for the period set out in it. It is a personal benefit which is conferred, not a benefit attached to and running with the debt.

The case would be quite different if the employee had accepted something in satisfaction of his wages: in such a case there would be an intention to release and a release of the right to wages, and an intention to acquire and an acquiring of another and a different thing: whilst in the case of the merger of the simple contract debt in a judgment there would be no such intention, and, in so far as it takes effect as a matter of law, the parties concerned would doubtless look upon it only as a legal technicality, not intended by, if indeed known to, either of them.

We may, therefore, I hope and think, apply the enactment in question to this case without infringing upon the doctrine of merger, however near we may come to it.

I am in favour of dismissing this appeal.

Appeal dismissed.

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CABANA v. BANK OF MONTREAL.

Alberta Supreme Court, Scott, J. November 24, 1919.

ESTOPPEL (§ III G—88)—BANKS—CUSTOMER—CHEQUES SIGNED BY OTHER PARTY—ACQUIESCENCE.

If a customer of a bank knowingly lets the bank believe that he has signed cheques which were presented for payment and paid by the bank, he is estopped from denying that subsequent disputed cheques were signed by him or by his authority.

[*Morris* v. *Bethell* (1869), L.R. 5 C.P. 47; *London Joint Stock Bank* v. *MacMillan and Arthur*, [1918] A.C. 777; *Ewing* v. *The Dominion Bank* (1904), 35 Can. S.C.R. 133; *Ogilvie* v. *West Australian Mortgage Corp. Ltd.*, [1896] A.C. 257, referred to.]

Statement.

ACTION to recover a sum of money alleged to have been wrongfully paid out by the defendant.

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Mr. McArdle, for plaintiff; *A. MacLeod Sinclair*, for defendant.

SCOTT, J.:—The plaintiff alleges that some time prior to January 20, 1919, he had moneys on deposit in the savings department of the bank's Calgary branch, that the bank without his authority paid out and deducted from the balance standing to his credit two sums of $750 and $1,400 on January 20, 1919, that he demanded from the bank the repayment thereof but the bank refused to repay the same. He claims judgment for $2,550 with interest and the costs of suit.

Among other defences the bank charges that the plaintiff ought not to be permitted to say that the payments were unauthorised by him because "if such cheques were signed by the said Albert E. Burgess" said Burgess had previously, to the knowledge of and without objection by the plaintiff, signed cheques on and withdrawn moneys from his account and the plaintiff did not inform the bank that said Burgess had no authority to sign such cheques, but, on the contrary, ratified his action in withdrawing such moneys.

In reply to the statement of defence the plaintiff alleges that prior to the payment by the bank of the moneys in question he specifically instructed the bank to pay no money out on his account unless in the presence of the plaintiff.

One Burgess was at one time employed by the plaintiff on his farm near Calgary. Later he let Burgess have his automobile to carry on a jitney service in Calgary on a partnership basis. This partnership was later dissolved and a new arrangement was made by which Burgess was to retain possession of the automobile and pay him a certain rent for it.

In December, 1918, Burgess confessed to him that he had forged cheques upon his account in defendant bank and had withdrawn moneys therefrom but stated that he had refunded to the account all the moneys he had withdrawn with the exception of $85.

The plaintiff went to the bank on January 2, 1919, and made a deposit to the credit of his account which was entered in his pass book at the time by the clerk in charge of the ledger. The plaintiff then became aware of the fact that three cheques signed by Burgess for $150, $750 and $85, respectively, had been charged to his account and that Burgess had deposited $900 to its credit. The plaintiff states that he asked the clerk to have the number of

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his account changed, that upon being asked why, he replied that there was a man that had the number of the account and that he did not want him to have it, that upon looking at the pass book he saw that a cheque given by him to his brother was outstanding, that he thereupon told the clerk that he did not believe he could have the account changed that day and that he then told the clerk to be sure not to pay any more cheques on the account except the one he had sent to his brother. He later qualified this latter statement by stating that what he told the clerk was that he was not to pay any more cheques on that account.

The clerk who made the entries in the pass book and ledger on January 2 states that he has no recollection of the depositor or of having had any conversation with him but that he thought that, if such a statement had been made to him, he would have remembered something about it and that he would have made some notation of it at the top of the ledger sheet containing the plaintiff's account and that no such notation was made.

On January 21, 1919, the plaintiff attended at the bank to make a deposit to his account. He handed in his pass book which was then made up and from it he discovered that Burgess had withdrawn further sums of $750 and $1,400 a few days before upon cheques signed by him in plaintiff's name. He then notified the bank that these cheques had been forged and he then for the first time informed the bank that the cheques which Burgess had signed and cashed before January 2, were also forged.

I find it impossible to believe the statement of the plaintiff that he notified the ledger keeper either not to pay any more cheques against his account or any cheques except one issued by him to his brother. In his reply to the statement of defence he alleges that the instructions he gave were to pay no money out of his account except in his presence. Surely his solicitor would not allege this without instructions to that effect from him. His evidence as to the instructions he claims to have given is contradictory and unsatisfactory and it is significant that in his interview with the bank's manager on January 21, he said nothing to him about having given any instructions as to payments out of his account.

If any such instructions had been given they would have been of such vital importance in their effect upon the bank's liability

that it is difficult for me to believe that the ledger keeper would neglect the obvious duty imposed upon him by the bank to take the necessary steps to see that they were carried out, viz., to make the necessary notation upon the ledger sheet. He is shewn to be an officer superior to that of a ledger keeper and well versed in the customs of the bank and was only temporarily in charge of the ledger during the absence of the ordinary keeper. It is not surprising that he has no recollection of the interview with the plaintiff on January 2. What would be surprising is that if he received any such instructions from him, he neglected to take the proper steps to ensure that the instructions would be carried out.

The plaintiff by his conduct must be taken to have represented to the bank or at least, knowingly led it to believe that he had signed the cheques which were presented by Burgess before January 2. If the bank's officers had any reason to doubt whether the signatures to those presented after that date were the plaintiff's, they would have been justified in comparing them with the signatures of those signed by Burgess before that date and paying them if they found that they were made by the same person.

In *Morris* v. *Bethell* (1869), L.R. 5 C.P. 47, the defendant had already paid to the plaintiff a bill of exchange to the acceptance of which his signature had been forged. The action was upon a similar bill his signature to which had also been forged. It was held that the payment of the first bill did not estop him from denying that the second was accepted by him or by his authority.

That case differs from the present case in that in the former the relationship of banker and customer did not exist. The distinction is clearly pointed out by Lord Finlay, L.C., in *London Joint Stock Bank* v. *MacMillan and Arthur*, [1918] A.C. 777, 119 L.T. 387, who says at page 804:—

> It is obvious that the position of the acceptor of a bill of exchange with reference to subsequent holders is very different from that of a customer with reference to a banker in the case of a cheque. In the latter case there is a definite contractual relation involving the obligation to take reasonable precautions.

In the same case Lord Haldane in referring to the duty of a customer towards his banker says at page 815:—

> The obligation of the customer to avoid negligence in this regard was, I think, well expressed by Kennedy, J., in *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (1906), 11 Com. Cas. 255, at 266, when that very accomplished Judge defined it as including a "duty to be careful not

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to facilitate any fraud which, when it has been perpetrated, is seen to have, in fact, flowed in natural and uninterrupted sequence from the negligent act."

Even apart from the relationship of banker and customer there appears to be certain duties cast upon those engaged in mercantile pursuits.

In *Ewing* v. *The Dominion Bank* (1904), 35 Can. S.C.R. 133, the bank discounted for the Thomas Phosphate Co. of which one Wallace was the manager, a promissory note to which Ewing's signature as maker had been forged by Wallace. The bank at once gave notice to Ewing that it held the note. Had he, upon receipt of the notice, notified the bank that the note was a forgery, it could have held the proceeds as they were not paid out until after Ewing received the notice. Instead of notifying the bank he communicated with Wallace, endeavouring to get him to settle the matter. It was held that it was the duty of Ewing to give the bank prompt notice of the forgery and that having failed to do so he was liable upon it.

Davies, J., says at page 153:—

Mere silence *per se* on the part of one who should speak is not, I grant, sufficient as an admission or adoption of liability, or as an estoppel to prevent him denying his signature. But such silence coupled with material loss or prejudice to the person who should have been informed and which prompt and reasonable information would have prevented, will so operate. Such a person under such conditions comes within the rule that where a man has kept silent when he ought to have spoken he will not be permitted to speak when he ought to keep silent.

In *Morris* v. *Bethell*, *supra*, Bovill, C.J., says at page 50:—

If it were made to appear that there has been a regular course of mercantile business in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of his principal, there would be evidence and almost conclusive evidence against the latter that the acceptance was written by his authority.

Willes, J., says at page 51:—

One who pays one bill which purports to bear his signature as acceptor thereby makes evidence against himself that the person who wrote the acceptance did so with his authority.

It is shewn that Burgess remained in Calgary for some weeks after January 2. Had the plaintiff notified the bank on that date of the forgeries committed by him it would doubtless have prosecuted Burgess with the result that Burgess would have been placed in a position where he could not have committed the further forgeries.

In *Ogilvie* v. *West Australian Mortgage Corporation, Ltd.*, [1896] A.C. 257, Lord Watson says at 270:—

> If . . . by keeping silence and allowing the forger to escape from the colony and the jurisdiction of its Courts the appellant had violated his duty to the bank, their Lordships are of opinion that these circumstances would, in themselves, have been sufficient to shew prejudice entitling the bank to have their plea of estoppel sustained to its full extent.

I hold that the plaintiff is by his conduct estopped from denying that the disputed cheques were signed by him or by his authority and I therefore give judgment for the defendant with costs.

Judgment accordingly.

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Saskatchewan King's Bench, Brown, C.J.K.B. November 8, 1919.

CONTRACTS (§ VI A—411)—ROAD BUILDING—PROVISION FOR REPAIR—10% OF CONTRACT PRICE HELD BACK—PERIODICAL NOTICE TO KEEP IN REPAIR—NO REPAIRS DONE—RECOVERY OF BALANCE DUE—COUNTER-CLAIM—ADJUSTMENT.

A firm making a contract with a city to build roads and allowing the city to hold-back ten per cent. to insure repairs, which, according to the contract, must be made by the firm on due notice, cannot on suit recover the full amount of the hold-back when notice has been given and the necessary repairs required to be done by them under the contract have not been made.

ACTION to recover balance due for paving certain streets, such balance having been retained by the city as a guarantee that the work would be kept in good repair. Statement.

R. W. Hugg and *E. B. Jonah*, for plaintiffs; *G. F. Blair*, K.C., for defendant.

BROWN, C.J.K.B.:—The defendants being desirous of having certain of their streets paved, called for tenders. The plaintiffs were the successful tenderers, and on June 20, 1910, they entered into a contract for the work. This contract called for the laying of a foundation of sand, cinders or gravel, of 3 inches in thickness; upon this foundation was to be laid a body of concrete of 5 inches in thickness; upon this concrete was to be placed a wearing surface 1½ inches in thickness. This wearing surface was to be of granitoid blocking, to be laid in sections and with expansion joints, all in accordance with the plaintiffs' patents. The city engineer at the time, L. A. Thornton, expressed himself as having grave doubts as to the suitability of such a wearing surface owing to the extreme climatic conditions experienced here, and advised the defendants against same. The defendants however entered

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into the contract, evidently considering themselves sufficiently protected by certain stipulations which were inserted therein. The contract of June 20, 1910, was subsequently varied to some extent by a further agreement dated December 2, 1911. The main provisions of these contracts which require to be emphasised are found in paragraphs 3 and 4 of the contract last referred to, and are as follows:—

3. The contractors shall be entitled to 90% of the amount of the contract price, except any deductions that in accordance with the agreement dated the 20th day of June, 1910, may be required to be made after the work has been completed on the certificate of the city engineer that the work has been performed and completed in accordance with the contract and specifications and satisfactory to the said engineer.

The remaining 10% will be held by the City for a term of 5 years as a guarantee to the City that the contractors will keep the work in good repair and will turn the same over to the City at the expiration of that term in first-class condition . . .

4. The contractors hereby guarantee that the work contracted for and completed by them for the City shall remain in good condition unless subjected to other influences other than those of wear and weather for a term of 5 years; of this condition the present or future engineer of the City shall be the sole judge. Should the pavement and curb and gutter, in the opinion of the City engineer be at any time during the 5 years in a defective condition he shall decide whether the whole or any portion thereof shall be taken up and re-laid or repaired in such a manner as he shall consider best, and in default of the contractors making such repairs within 10 days after notice so to do has been mailed to them by registered post pre-paid to Rudolph S. Blome Company, Chicago, Illinois, U.S.A., the said engineer shall take steps to have the repairs made and the cost of the same shall be drawn by the City from the deposit or guarantee left by the contractors with the City.

The work was completed in accordance with the specifications and the contract, on August 1, 1911; at least, August 1 was the date agreed upon as the date of completion, and the engineer issued his final certificate to that effect. This certificate was dated December 19, 1911. The pavement soon proved a great disappointment to all parties. The fault appears to have been in the nature of the pavement itself. Concrete was too rigid a material to accommodate itself to the extremes of temperature that characterise a climate such as ours, with the result that cracks showed up in all directions. These cracks—especially where traffic was heavy—soon developed into ruts and holes, and required constant patching and repairing. As early as 1913 the condition of the pavements was becoming serious, as appears by the following letter of the defendants' then engineer, McArthur, written to the plaintiffs:

Messrs. The R. S. Blome Co., September 10th, '13.
Chicago.

Dear Sirs:—

I again beg to call your attention to the deplorable state of the Granitoid Pavements constructed in this City by your Company. The conditions have now reached such a point that the streets are absolutely dangerous; last fall I took this matter up with you and you sent a man here to make repairs, judging from the manner of the man you sent for that purpose I feel that you had little idea as to what was required and the work he did gave very little relief, as the streets were worse than ever in the spring. Again this summer after considerable correspondence you sent another man to make repairs and you may judge as to the result of same when I tell you that the streets referred to are worse to-day then they ever were, and as I said before are in a very dangerous condition.

Something will have to be done immediately and if your firm do not put forth a determined effort to remedy the defects now existing it will be necessary for the City to undertake the work itself at your expense. I cannot help but think that it would be of a decided advantage to the Blome Company if some responsible official of that firm would pay a visit to Regina as I am sure from the interest taken that you have little idea of the deplorable condition of your pavements in this City.

Yours truly,
F. McARTHUR,
City Engineer.

The plaintiffs during the years 1912, 1913 and 1914 made certain repairs in response to notices from the defendants' engineer. These repairs were, however, of a more or less temporary character and do not appear to have been at all satisfactory as a permanent repair. No repairs were made in 1915 or 1916, and the result was that at the termination of the five year period, and at the time when they were to be turned over to the City in first-class condition, the pavements were in a deplorable condition. The evidence does not leave any room for doubt in that respect. The test period expired on August 1, 1916, and in June, 1916, the then acting city engineer, J. R. Ellis, wrote the following letter to the plaintiffs:—

I have to call your attention once more to the urgent necessity for making repairs to the granitoid pavement of Dewdney and Albert Streets, laid by the R. S. Blome Company, in this City. These pavements are in a very bad and dangerous condition. This will be official notice to you to effect the repairs necessary, without further delay. If this is not done it will be necessary for the City at its own to repair the pavements and charge the costs against your Company. I will say that the defects occur generally throughout the whole pavement and are detailed, in part, in the enclosed list.

Accompanying this letter was a lengthy statement shewing in considerable detail the defects then apparent. This statement concludes as follows:—

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In general, only a comparatively small amount of Granitoid Pavement is intact. It is doubtful if the removal of the defective pavement and replacement of same, depending upon the bond with the present satisfactory portions, would be satisfactorily effective. It would appear that if these pavements are placed in good condition, it will be necessary to rebuild practically the entire amount.

In response to these communications the plaintiffs wrote Ellis the following letter:—

We, on June 22, received your letter of June 19, relative to repairs to the Granitoid Pavements laid by us in your City, and we beg to advise that our Mr. Andrus will reach your City not later than the forepart of the coming week, when we hope a mutually satisfactory arrangement can be arrived at.

And, pursuant to their undertaking in the letter, the plaintiffs sent their representative, Andrus. Ellis and Andrus inspected the pavements,and discussed and considered various methods for repairing same. It seems clear from the evidence as a whole, that Ellis did not consider that patching similar to what had previously been done during the test period would prove satisfactory. On the contrary, he seems to have thought that practically the whole of the wearing surface would have to be re-laid if the pavements were to be put in good condition. At any rate, after various interviews, Andrus, on behalf of the plaintiffs, made the following proposition:—

With reference to the matter of guarantee of Granitoid Pavements constructed by us for the City of Regina during the years 1910 and 1911 and confirming our discussions of the past three days, we beg to make you the following offers:

We are prepared to carry out the work of patching with Granitoid Pavement to make good any present defects in the pavements which are due to faulty construction and to comply with the terms of our contract guarantee to leave the pavement in good condition.

After the careful examination of the pavements made with you and on the basis of cost data obtained on other work we have made an accurate estimate of the cost to us of making these repairs. We are prepared to either do the above mentioned repair work at our own expense or else allow the City of Regina an amount considerably more than what our cash expenditure would be.

Our reason for making this offer of a cash consideration is to comply with your suggestion that better and more permanent results could be obtained by patching the pavement with a concrete base and asphaltic concrete or bitulithic wearing surface. To this end, we have submitted our figures and compared costs with you and are making this offer so that the repairs can be made by the City or others at no extra expense and by using for this purpose the money which we would have to expend. Taking into consideration the condition of the pavements and the estimate of the cost of the repairs arrived at with you, we are prepared to offer the City the sum of $4,000, for the release of guarantee in lieu of doing the repair work ourselves with Granitoid Pave-

ment. We believe that with this sum at your disposal, you can not only put the pavement in good condition but can also provide for a considerable part of the future maintenance.

This proposition was not satisfactory to Ellis, as appears by his letter to Thornton, who at this time was and since April, 1912, had been City Commissioner; neither was the proposition satisfactory to or accepted by the city.

About this time Ellis seems to have somewhat forgotten that he was acting under the contract in the dual capacity of City engineer and arbitrator. This was, perhaps, not an unnatural result, in view of the difficult position that he was thus called upon to fill. He appears to have come under the influence in an undue degree of Commissioner Thornton, and allowed his subsequent conduct to be largely directed by Commissioner Thornton. This is made abundantly clear by the correspondence.

Ellis admits in his evidence that in June he was of opinion that repairs in concrete were all that could be demanded, and that he was then prepared to accept repairs by that method. He says that he changed his mind, following conferences with Commissioner Thornton and the City Solicitor, and after getting the letter from Commissioner Thornton dated July 18. Ellis' letter of July 29, to the plaintiffs shows his altered views at that time, where he requires a wearing surface of different material altogether. Commissioner Thornton also admits in his evidence that Ellis' letters at this time were written after consultation with him and under his instructions, and he more particularly refers to the letters of July 21, 1916, July 29, 1916, and August 25, 1916.

In the result no amicable arrangement was arrived at, the repairs were not made by either plaintiffs or defendants and had not been made at the time of the trial of this action.

The plaintiffs bring the present action to recover the full amount of the 10% hold-back. They admit that the pavements were not in repair on August 1, 1916, but claim that no sufficient notice was given them to repair, and that, if notice was given by Ellis it was given after he had been unduly influenced by Commissioner Thornton and when he could no longer act impartially, as is required of an arbitrator, and that any notice given under such circumstances was, therefore, not binding on the plaintiffs. They also urge that, in any event, the defendants'

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only remedy was to do the necessary repairs themselves and charge up the amount expended against the plaintiffs, and that, not having done so within a reasonable time, they are now without remedy.

I concede that under a contract, worded as the one at bar is, it is incumbent on the defendants to give notice of the repairs required to be done. See *London & South Western R. Co.* v. *Flower* (1875), 1 C.P.D. 77, 33 L.T. 687; *Makin* v. *Watkinson* (1870), L.R. 6 Ex. 25; *O'Keeffe* v. *New York* (1903), 173 N.Y. Rep. 474; Hudson on Building Contracts, 4th ed., vol. 1, 341.

But I am also of opinion that the letter of Ellis to the plaintiffs, dated June 19, 1916, with the accompanying statement, was a sufficient notice under the circumstances of this case. This notice, after pointing out in great detail the various defects in the pavements, in effect states that the only solution in compliance with the contract is a re-surfacing of practically the whole of the pavements. When this notice was given it cannot be said that Ellis was not acting on his own judgment and within the terms of the contract. The fact that subsequently, during the course of negotiations entered into by Andrus for an adjustment of the matter, Ellis changed his mind under the influence of the defendants and required something more and different, does not put the plaintiffs in the position of being able to say that no notice was given. This leads me to consider what were the defendants' rights and the plaintiffs' obligations as to the pavements on the expiration of the test period. The agreement provides for the pavements being handed over in first-class condition.

The defendants urge that to put the pavements in first-class condition as pavements it was necessary to provide a different kind of wearing surface altogether from that provided for in the contract. They contend that as granitoid pavements they could not be put in first-class condition.

The defendants knew what material was entering into the pavements when they executed the contract. There was no guarantee in the contract on the part of the plaintiffs other than to keep the pavements in repair during a reasonably lengthy test period of five years, and to turn them over at the expiration of that period in first-class condition. That does not in my view

mean that the pavements were to be turned over as something different from what all parties contemplated when they entered into the contract, but rather that they were to be turned over in first-class condition as granitoid pavements. The mere fact that a granitoid pavement is not so good as some other kind and is not suitable to the climatic conditions, does not appear to me to affect the question at all. The safeguard, and only safeguard which the defendants insisted upon was the repair for five years and that at the expiration of that time the pavements should be turned over in practically the same condition as when first made. This would mean that the plaintiffs were required to do whatever was necessary to put the pavements in first-class condition as granitoid pavements, but nothing more.

The view, therefore, which Ellis held in June, 1916, as to repairs and his attitude as set out in his letter and statement to the plaintiffs of June 19, was a correct view, and, under the circumstances, a justifiable and certainly not unreasonable attitude.

In what respect were the rights of the parties affected by Ellis' change of view and attitude after his negotiations with Andrus and after receiving directions from Commissioner Thornton?

The provision in the contract which makes the defendants' own engineer, the arbitrator in case of dispute, the judge as to what repairs are necessary, is one that was insisted upon by the defendants themselves, and largely for their protection. The plaintiffs in agreeing to such a condition must know that there would be a natural tendency on the part of the engineer to adopt the point of view of his employers. It is, however, a condition which is not uncommon in contracts of this character, and is evidently considered a necessary safeguard from the point of view of the party embarking on expensive and important operations. The dual capacity that an engineer or architect is thus called upon to fulfil is, to say the least, not easy. It is clear, however, that the engineer when called upon to act the part of the arbitrator or in a *quasi-judicial* capacity must, to a certain extent, keep himself aloof from both parties, and must certainly guard against being unduly influenced by his employers.

This matter is dealt with at length by the House of Lords in the case of *Hickman & Co.* v. *Roberts*, [1913] A.C. 229. Lord Alverstone, at p. 234, says:—

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My Lords, it has been pointed out in several cases in the Court of Appeal, and particularly by Lord Bowen in *Jackson* v. *Barry R. Co.*, [1893] 1 Ch. 238, that the position of these arbitrators is a very important one, and that the system could not have been allowed to exist, had it not been that it has been found that persons in position of engineers or architects are able to maintain, and do maintain, a fair and judicial view with regard to the rights of the parties. My Lords, it has to be remembered that in the great majority of cases they are the agents of the employers. It has also to be remembered that they not infrequently have to adjudicate upon matters for which they themselves are partly responsible. Both these matters have been pointed out by Lord Bowen. It is therefore very important that it should be understood that when a builder or contractor puts himself in the hands of an engineer or architect as arbitrator there is a very high duty on the part of that architect or that engineer to maintain his judicial position.

In *Bristol Corporation* v. *John Aird & Co.*, [1913] A.C. 241, which is a case that came before the Privy Council, Lord Atkinson, at p. 247, says:—

My Lords, I do not think there is any dispute between the parties as to the law applicable to such a state of things. If a contractor chooses to enter into a contract binding him to submit the disputes which necessarily arise, to a great extent between him and the engineer of the persons with whom he contracts, to the arbitrament of that engineer, then he must be held to his contract. Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shewn, in fact, that there is any reasonable prospect that he will be so biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land.

See also Hudson, vol. 1, pp. 408-09.

Under the circumstances, therefore, I am of opinion that the plaintiffs would not be bound by the decisions and attitude of the defendants' engineer. They could go ahead and make such repairs as were necessary to put the pavements in first-class condition as contemplated by the contract, or they could apply to the Court for guidance and relief.

I cannot agree, however, with the contention of counsel for the plaintiffs that they can treat the contract as if no notice whatever had been given, and recover the full amount of the holdback without doing any repairs whatever.

The whole matter is now before me, and I conceive it my duty to deal with the case on its merits. In August, 1916, the defend-

ants secured the services of three eminent engineers, Harris, MacPhail and Smith, and they made at that time a careful inspection and report on the pavements. A part of this report was by consent put in evidence,and from this, as well as from the evidence of MacPhail and Smith who gave evidence before me, I have received much assistance in helping me to get at the merits of the dispute. This report deals with several propositions for repairs, designated as "A," "B," "C," "D," "E," and "F." I have already indicated what class of repair the contract, in my opinion, calls for. This class is designated as "Proposition A" in the report referred to.

The evidence satisfies me that to make the repair in this manner would cost as of August 1, 1916, in the neighbourhood of $26,000. The evidence also satisfies me that a repair of greater utility and of much less expense is that which is designated in the report referred to as "Proposition B." It consists of repairing all holes and shattered portions of the pavements with concrete and granitoid, and by filling and sealing all cracks with a bituminous mastic. Both of the witnesses, MacPhail and Smith, say that this method, though much less expensive, is preferable as to utility to the one which they designate as "Proposition A," which is, as I have stated, the one that the contract calls for.

The evidence is that this method of repair would cost as of August 1, 1916, the sum of $9,137.30.

There are several other methods put forward by the defendants that would produce a better, and in some cases a much better pavement than either "Proposition A" or "B." They are, however, in each instance very much more expensive than "Proposition B," although in some cases not so expensive as "Proposition A."

In my view all that the defendants can insist upon is a repair as satisfactory as would be that of "Proposition A." If they can secure one as satisfactory and at less expense, they must accept same. "Proposition "B" fills this requirement.

The evidence shews that it would cost considerably more now to make repairs then it would as of August 1, 1916. Under the circumstances, however, the defendants cannot, in my opinion, claim any more than what would be sufficient to make the repairs within a reasonable time after August 1, 1916. This amount, as

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I have already indicated, under "Proposition B" would be $9,137.30.

The total amount of the 10% hold-back is $9,451.05. To this must be added, as per terms of contract, interest at 5% from August 1, 1912. Interest up to that date has already been paid by the plaintiffs. This would make the amount due as of August 1, 1916, as follows:—

Amount of hold-back	$9,451.05
Interest from August 1, 1912, to August 1, 1916	1,890.20
Total	$11,341.25

From this amount the defendants would be entitled to make the following deductions:—

Cost of repair as per "Proposition B," above referred to	$9,137.30
Amount charged up against the hold-back for repairs made by defendants during period of maintenance	69.80
Total	$9,207.10

This would leave a balance in plaintiffs' favour as of August 1, 1916, of $2,134.15.

The plaintiffs are therefore entitled to judgment for $2,134.15, with interest thereon at 5% from August 1, 1916. The plaintiffs will also have their general costs of action, but as they were only partially successful the costs will be taxed in the low scale of the King's Bench Tariff, and there will be no costs of the counterclaim.

Judgment accordingly.

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SWIFT CANADIAN Co. Ltd. v. INNISFAIL AGRICULTURAL SOCIETY.

Alberta Supreme Court, Hyndman, J. November 20, 1919.

DAMAGES (§ IV—370)—TREBLE DAMAGES—WEIGHTS AND MEASURES ACT, R.S.C. 1906, CH. 52, SEC. 83—INTERPRETATION OF SECS. 78-80—"PROCEDURE"—SECS. 81-83—"GENERAL"—DISTINCTION.

There is a clear distinction between penalties imposed by the Weights and Measures Act, R.S.C. 1906, ch 52, secs. 78-80, and the damages which may be recovered by the party grieved under the same statute (secs. 81-83). An action is maintainable for damages according to the provisions of the statute.

Statement.

ACTION brought to recover treble damages and treble costs due to the fact that the defendants, being public weighers, maintained a false weighing machine, and thereby caused the plaintiffs to pay certain moneys for cattle weighed thereon upon the weights certified by the defendants to be correct, whereas they were in

fact false weights contrary to the provisions of the Weights and Measures Act, R.S.C. 1906, ch. 52.

N. D. McLean, for plaintiff.

A. F. Ewing, K.C., for defendants.

HYNDMAN, J.—The dates of the alleged offence were May 5 and 11, 1917. The action was originally brought against the defendant, the Innisfail Agricultural Society, only, but, by order of the Master in Chambers at Edmonton, the statement of claim was amended by adding as co-defendants those who were officers and directors of the Society, which amendment was made on September 6, 1918, that is about a year and four months after the cause of action arose.

The individual defendants in addition to their defence on the merits also set up as a defence: Sec. 80, of the said Act, which enacts:

> No action or prosecution shall be brought against any person for any penalty imposed by this Act, unless the same is commenced within *six months* after the offence is committed.

Consequently, if this section applies to the action against the newly added defendants, the amendment having been made after the expiration of 6 months from May 11, 1917, the action against them does not lie.

By arrangement it was directed to have the legal objection above referred to first determined owing to the probable heavy expense of trying the merits of the action.

It is therefore necessary to consider whether or not sec. 80 contemplates a claim of this kind, or has reference only to the penalties imposed by the Act for violation of its provisions.

Secs. 78, 79 and 80, appear in the Act under the head of "Procedure," 78 and 79 being as follows:

> 78. All penalties imposed by this Act or by any regulation made under this authority, shall be recoverable with costs, (a) before any civil Court of competent jurisdiction, by any person who shall sue for the same; and in such case the amount of the judgment, if not forthwith paid, may be levied by execution and sale of the goods and chattels of the offender; or, (b) if the penalty does not exceed fifty dollars by summary conviction before any justice of the peace for the district, county or place in which the offence is committed, and, if the penalty exceeds fifty dollars, by summary conviction before any two such justices.
>
> 2. Subject to the provisions of this Act, Part XV. of the Criminal Code shall apply to all prosecutions for penalties.

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79. If the person who sues for the penalty is not an inspector or an assistant inspector a moiety of every penalty so recovered shall belong to him, and the other moiety, or, if the person suing is an officer acting in pursuance of this Act, the whole penalty, shall belong to His Majesty.

Then follow secs. 81, 82 and 83, under the head "General," sec. 83 enacting:

83. Every person aggrieved by the use of any weight or measure or weighing machine, which has not been duly inspected and stamped according to this Act, or which is found light, deficient or otherwise unjust, may recover treble damages and treble costs.

Counsel for the plaintiff argues that there is a distinction between the penalties imposed by secs. 78 and 79, and the treble damages and treble costs mentioned in sec. 83, and that the limitation set up in sec. 80 was not intended to apply to actions under that section.

No authorities were cited to me, but I find on reference to Darby & Bosanquet, in the Statutes of Limitations (supplement to the second edition), at page 512, an anonymous case reported in Noy 71, 74 E.R. 1038, the whole of which reads as follows:

By the Court it was said that where any statute, as 5 Eliz. for perjury, etc., limits any remedy by information for the party grieved, that such an informer is not within the statute, 31 Eliz., ch. 5. For that is intended of a common informer. And by Anderson it was adjudged in the case of the butchers of London that if a man be an informer, and is not the party grieved at one time, that yet he is not a common informer. And it was agreed in one Holden's case of Coventry, that an information (upon the 27 Eliz. of Fraudulent Conveyances) by the party grieved, after the year, etc., is good enough and not within the statute.

In the work referred to, Darby & Bosanquet, at page 512, it is said:

This case is now provided for by the 3rd section of 3 & 4 Wm. IV., ch. 42, which, amongst other things, enacts as follows:—"All actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force shall be commenced and sued . . . within *two years* after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for trying such action is or shall be by any statute specially limited."

It seems to me, therefore, that there is a clear distinction between penalties imposed by the Act and damages (though they be treble), which may be recovered by the party grieved. (See also Darby & Bosanquet, *supra*, page 542.

Section 79, I think, puts it beyond question, for if in a possible case the party grieved was also an officer, he could get nothing for himself as damages, but all would go to the Crown, which, I

am satisfied, was never contemplated where he actually suffered personal loss or damage by reason of false weigh scales.

If I am correct in the above conclusion, then the limitation is two years by virtue of the statute of Wm. IV., *supra*, but the time alleged in the statement of claim, being less than two years, that statute does not apply to this action.

I therefore find that the action is maintainable as against the individual defendants, and there will be judgment accordingly. Costs to be costs in the cause, as between the plaintiff and individual defendants. *Judgment accordingly.*

KENNEDY v. ANDERSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.

SALE (§ II C—26)—WARRANTY—STATEMENTS BY AUCTIONEER—REPRESENTATIONS—GOODS NOT AS REPRESENTED.

An affirmation by the vendor through his auctioneer at the time of sale is a warranty provided that it appears in evidence to be so intended; and on a breach of such warranty the purchaser is entitled to be indemnified for his loss.

[*Payne* v. *Lord Leconfield* (1882), 51 L.J.Q.B. 642; *Heilbut Symons & Co.* v. *Buckleton*, [1913] A.C. 30, followed.]

Statement.

APPEAL by defendant in an action for the price of live stock sold and delivered. Reversed.

J. B. Haig, for appellant; *W. G. Ross*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Newlands, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action for the price of 3 horses belonging to respondent sold at an auction sale of his cattle and farm implements, to the appellant.

The appellant since the action was commenced has paid for 2 of these horses, and except when I deal with the question of costs I will not refer to them again.

As to the other horse the defence is, that the respondent and the auctioneer represented and warranted her to be sound; that said representation and warranty were false, she not being sound but in a dying condition from kidney disease, and did in fact die of said disease a few days after the sale, and he asks that his agreement to purchase said horse be rescinded.

The representation as made by the auctioneer was in the following words as sworn to by three witnesses and not denied by the auctioneer, who gave evidence at the trial: "Gentlemen, would you let this good, sound, registered mare go for that

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money?" It was after this statement was made the appellant bid for and bought the horse in question.

That the auctioneer made this statement in the presence of the appellant is proved by the evidence. The next question therefore is, was it true? The mare died a few days after appellant took her home. Both he and a witness named Wilcox, who were present when the mare was opened after she died swore that she had only one kidney, and that the other one was pretty well gone. Aiken, who was licensed as a veterinary surgeon in Prince Edward Island, diagnosed her complaint as kidney disease and said that the statement made by the other two witnesses as to what they found at the *post mortem* to a certain extent bore out that diagnosis, and he was of the opinion that she had been sick for some months. I think this evidence is sufficient to bear out the defence that the representation made by the auctioneer that she was sound at the time of the sale was false. The finding of the trial Judge that Aiken was not a veterinary surgeon and that his opinion is not any better than any other person's who had a good knowledge of horses, cannot, in my opinion, be sustained, because, as I have said, he swears he was a licensed veterinary surgeon of Prince Edward Island, and it is not necessary for him to be registered in this Province in order to give an expert opinion as a witness.

Now the representation having been made by the auctioneer and it having induced the appellant to purchase the horse, and being false, the law applicable to the case is as stated in 1 Hals. p. 510, para. 1038.

> The verbal statements made by the auctioneer may or may not be part of the contract of sale.
>
> When they are not part of the contract they will, if material misrepresentations of fact, avoid the contract on the ground of misrepresentation, and, in case of fraud, give the purchaser a cause of action for damages against the auctioneer, or against the vendor if a party to the fraud.

There being no fraud proven, the purchaser has the right to rescind the contract. The fact that he cannot restore the property in the same condition in which he got it can have no effect in this case, because the mare died from the disease from which she was suffering at the time of the sale and which was the subject of the misrepresentation.

The appeal should, therefore, be allowed with costs, excepting

that respondent should be entitled to the costs of action up to the time appellant paid for the other two horses, because though he swears that he was to have a year to pay the whole purchase price the respondent denies this, and the condition of the sale, of which the appellant was aware, was that all amounts over $20 were to be paid half cash and half in 12 months secured by approved notes, and appellant has not therefore proved a variation of this condition. He never tendered half cash and a note for the balance, and therefore was liable when the action was brought to pay half the purchase price.

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LAMONT, J.A.:—On October 24, 1917, the plaintiff held an auction sale of some of his stock. At the sale the defendant bought 3 horses; one for $85, one for $95, and a registered mare for $210. He took these animals home with him, without making settlement therefor. The terms of the sale were half cash and the balance in approved notes. It would seem that subsequently, at any rate, to the sale, the plaintiff was willing to take a promissory note made by the defendant and his father for the full amount, but he denies altering the terms of sale when the mare was bought. There is no finding on the point, and until a special agreement is established the terms embodied in the conditions of sale would govern.

About a week after the sale, the mare took sick and a week later died. After her death the defendant refused to make settlement for her. He says he offered the plaintiff a note signed by himself and his father for the other 2 horses, but that the plaintiff refused to accept it, demanding payment for all 3. Not getting payment, the plaintiff brought this action.

After action was brought, and before trial, the defendant paid for the 2 horses, leaving only the price of the mare in controversy. In his statement of defence the defendant sets up that the plaintiff had "guaranteed that the mare was a first-class mare, sound in every way, and that there was nothing wrong with her," and that "relying upon the representation warranty and guarantee" he purchased the mare; that the mare at the time was in a dying condition, and the representations were made fraudulently.

At the trial, the substantial case which was sought to be made on behalf of the plaintiff seems to have had reference to fraudulent

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misrepresentations and failure of consideration. The District Court Judge found that the defendant had failed to establish failure of consideration, and stated that the evidence fell short of satisfying him that the mare was diseased when she was purchased by the defendant. This latter finding would be applicable to breach of warranty, although there is no finding as to warranty in the judgment.

The defendant now appeals, and under the Act it is our duty to give such judgment as the trial Judge should have given (Court of Appeal Act, 1915, ch. 9, sec. 9).

That the words were spoken which it is alleged constitute a warranty, was, I think, established by the evidence. The defendant alleges that the warranty was given on two occasions; first, in the stable just before the mare was going up for sale, and again when she was being sold. As to the first, the defendant says the following conversation took place:

Q. Give us that conversation. A. Well, Anderson and I came to this mare after looking over 3 or 4 horses, and Mr. Anderson says: "There is an awful fine mare, Harvey," and he walks up alongside of her, and I says: "Is the mare sound, Mr. Anderson?" and Mr. Anderson says: "The mare is sound in every way, she has a touch of scratch and she's a little thin, a little feed and a little care, this mare will come out all right."

As to this, the plaintiff has the following testimony in his examination in chief:

Q. Now Kennedy says that in the stable before the sale was made you told him that the mare was a good sound mare in every way. A. Never. Q. Did you have any conversation with him? A. I did not.

In cross-examination he admitted that he told the defendant the mare was sound as far as he knew. In addition, one at least of the witnesses testified that he saw the plaintiff and defendant talking in the stable. As to the second occasion on which the warranty was given, the defendant says that when the mare had been bid up to some $180 or $185, the auctioneer said that it was a shame to knock the mare down at that price, that she was a good, sound, registered mare; and that the plaintiff, who was standing near, said: "Yes, and the papers go with the mare. I have them in the house." The defendant then commenced bidding on the mare, and bid her up to $210. The testimony of the defendant on this point is corroborated by two independent witnesses, Clarence Cooper and Walter Isaacs, who were present at the sale. On this point the plaintiff testified that he was not present when the mare was being sold.

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In my opinion this evidence is sufficiently conclusive to justify us in finding that the statements as testified to by the defendants were made. Do they constitute a warranty?

Long ago the principle which has ever since been acted upon was laid down by Holt, C.J., in these words: "An affirmation at the time of the sale is a warranty provided it appears on evidence to have been so intended." The existence or non-existence in the mind of the plaintiff of an intention that his affirmation be taken as a warranty is a question of fact, and in determining that question all the evidence in the case touching the knowledge, conduct, words and actions of the plaintiff from first to last may be considered, *Heilbut Symons & Co.* v. *Buckleton*, [1913] A.C. 30.

The statement made by the auctioneer, it is true, would not be binding upon the plaintiff had the plaintiff not been present and affirmed the same. For an auctioneer has no implied authority to warrant the soundness of an animal he is selling.

Payne v. *Lord Leconfield* (1882), 51 L.J.Q.B. 642.

As, however, the plaintiff was present and affirmed the auctioneer's statement, he is, in my opinion, in precisely the same position as if he himself had made the statement. We have therefore to consider whether or not the totality of the evidence indicates an intention on the part of the plaintiff to warrant the soundness of the mare. In my opinion it does. The defendant was a prospective purchaser. He had already bought two horses. He was examining the mare in the stable just before she was placed on the block for sale. Any questions asked by him as to her soundness the plaintiff, under the circumstances, would reasonably expect were asked with a view to making a bid for her. Then, when the mare was on the block, the bidding seemed to stick around $185. The defendant had not yet made a bid. The auctioneer made his statement and the plaintiff gave utterance to his affirmation. The defendant then bid. I cannot think that that affirmation was only intended to apply to the registration of the mare. Taking the whole evidence, I am of opinion that the proper conclusion is that the plaintiff in effect said to any intending purchaser: "If you buy the mare I will warrant her to be a good, sound, registered mare." This amounts to a collateral contract between the plaintiff and the purchaser and is not merely a representation.

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The next question is, was the mare sound. In my opinion the trial Judge erred in holding that the evidence did not establish that she was in a diseased condition at the time of the sale. She took sick 6 or 7 days after the sale. A Mr. Aiken was called in. He was not a duly registered practitioner in this Province, but held a certificate as a veterinary from Prince Edward Island, and had spent 6 years there with a duly qualified veterinary. He diagnosed the case as kidney trouble. Sixteen days from the date of the sale the mare died. Two of the witnesses opened her up and found only one kidney and that in a badly diseased condition. Aiken gave it as his opinion that the mare had been diseased for months. Further, the mare had been losing in condition from the time she had her colt in the spring. There was no evidence to contradict the witnesses who testified as to the condition of the mare's kidneys when she was opened up after her death, nor was there any evidence which questioned the soundness of Aiken's diagnosis. The fact that he had not registered in this Province as a veterinary is not evidence that he did not correctly diagnose the case as kidney trouble or that he was in error when he testified that the mare must have been diseased for some time before the sale. The proper inference to be drawn from the evidence in my opinion is, that the mare was in a badly diseased condition at the time of the sale.

There was therefore a clear breach of warranty. As at the time of the sale the mare was in practically a dying condition, the loss suffered by the defendant by such breach was the amount he agreed to pay for her, namely, $210.

The defendant is entitled to set up against the plaintiff the loss suffered by him by reason of the breach of the warranty in diminution or extinction of the price. Sale of Goods Act, 51. As this loss extinguished the plaintiff's claim, the action should have been dismissed.

The appeal in my opinion, therefore, should be allowed; the judgment in the Court below set aside and judgment entered for the defendant. The costs of the Court below should be to the plaintiff up to the date of the payment in of the purchase price of the other two horses; after that date the costs should be to the defendant.

Elwood, J.A.

ELWOOD, J.A.:—I concur and the costs should go as indicated in the judgment of my brother Lamont. *Appeal allowed.*

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Alberta Supreme Court, Hyndman, J. October 18, 1919.

EXECUTION (§ II—20)—MORTGAGE IN DEFAULT—JUDGMENT—LAND NOT REALIZED UPON—EXAMINATION AS JUDGMENT DEBTOR.

A judgment having been obtained on a mortgage in default, an order will not issue for the examination of the defendant as a judgment debtor until the lands mortgaged have been realized upon, and the sum so realised found insufficient to satisfy the judgment.

9 Geo. V., 1919 (Alta.), ch. 37, sub-sec. 2.

MOTION for an order for examination of judgment debtor. Statement.

Order refused.

G. B. O'Connor, K.C., for plaintiff.

A. L. Marks, for defendant Westgate.

HYNDMAN, J.:—This is a motion for an order that the defendant Westgate attend at his own expense before the Clerk and submit himself for examination touching his estate and effects and as to the property and means he had when the debt or liability which was the subject of this action in which judgment has been obtained against him was incurred, and as to the property and means he still has of discharging the said judgment, and as to the disposal he has made of any property since contracting such debt or incurring such liability, and as to any and what debts are owing to him. The facts of the case may be stated shortly as follows: By agreement dated January 11, 1913, the defendants Madill and Westgate agreed to sell to the defendants Day and Nicholson certain lands and premises being lots 25 to 34 both inclusive in block 11 in King Edward Park, a subdivision of the City of Edmonton, for the price of $5,250, of which $1,750 was in cash and the balance $3,500 was agreed to be paid in instalments of $1,750 each on July 11, 1913 and January 11, 1914, with interest at 8% per annum. On May 16, 1913, the defendants Madill and Westgate assigned their interest in the said agreement to the plaintiff, and in the same document covenanted with the plaintiff that in case default were made by the said defendants Day and Nicholson, in payment of any sum or sums of money which would be due to the plaintiff, that the defendants Madill and Westgate would on demand pay or cause to be paid any sum or sums of money in default. Default was made by the defendants other than Madill and Westgate, and the last mentioned defendants have neglected and refused to implement their guarantee, and judgment on September 15, 1914, was duly entered against all the defendants for payment of the Hyndman, J.

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$3,500 and interest at 8% per annum from January 11, 1913, but the land has not yet been realised upon.

By sub-sec. 2 of ch. 37, 9 Geo. V. 1919, (Alta.), it is provided that:—

(2) No execution to enforce a judgment upon the personal covenant contained in a mortgage, encumbrance or agreement of sale on or of land on any security therefor shall issue or be proceeded with until sale of land, and levy shall then only be made for the amount of the said moneys remaining unpaid after the due application of the purchase moneys received at the said sale.

(3) As long as execution cannot issue or be proceeded with under the provisions of this section, the payment of the money secured by a mortgage or an agreement for sale of land shall not be enforced by attachment or garnishment, or by the appointment of a receiver or by any other process of a similar nature.

It seems to me that this being moneys arising out of an agreement for sale the above statutory provisions apply, but it is argued by counsel for the applicant that notwithstanding the money may not be due until after sale of the land mentioned in the agreement for sale, r. 634 of our Rules of Court give the plaintiff a right to examine the defendant as a judgment debtor. The rule reads as follows:—

Where a judgment is for the recovery by or payment to any person of money or costs, the judgment creditor may without an order examine the judgment debtor upon oath before a Clerk or Deputy Clerk, or by the order of a Judge, before any other person to be named in such order touching his estate and effects and as to the property and means he had when the debt or liability which was the subject of the cause or matter in which judgment has been obtained against him was incurred, or, in the case of a judgment for costs only, at the time of the commencement of the cause or matter, and as to the property and means he still has of discharging the said judgment, and as to the disposal he has made of any property since contracting such debt or incurring such liability, or, in case of a judgment for costs only, since the commencement of the cause or matter, and as to any and what debts are owing to him.

After giving the matter my best consideration I have come to the conclusion that the statutory provisions referred to must override to a certain extent the rule. It cannot be overlooked that the rule was made prior to the passing of the Act, which latter altered the rights between mortgagors and mortgagees and vendors and purchasers. At the time the rule was passed in a case of this kind execution could issue at once for the amount of the judgment and consequently there would then be a reason why the defendant should be examined as a judgment debtor. Under the law as it

now stands the judgment in this and similar cases is really not a final judgment as to the amount of money but I am inclined to think in effect is conditional should it transpire later on a sale of the land that the proceeds of the sale should not be sufficient to liquidate the debt and costs. It cannot be known what the exact amount of the judgment for money is until the security has been realised upon. If the land brought more at a sale than enough to pay the judgment, the contemplated proceeding here would be a useless waste of money, and it seems to me that that could not have been in the contemplation of the Legislature. A purchaser of land is not bound to pay the balance due on an agreement for sale until after the land, the subject matter of the agreement, has been disposed of. How then can it be said that he owes any particular amount of money to the plaintiff? It seems clear that the rule contemplates only a case where a judgment is for money presently due and the subject of an execution. Unfortunately no authorities were cited to me, and the legislation being of very recent date, in all probability, this is the first time the point has arisen. I therefore dismiss the application with costs.

Application dismissed.

McGIRR v. YOUNGBERG.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.

BILLS AND NOTES (§ VI C—167)—PROMISSORY NOTE—FAILURE OF CONSIDERATION—ACTION TO RECOVER AMOUNT.

In an action on a promissory note, the consideration for which is the delivery of stock, which has not been delivered, the plaintiff in order to succeed must shew readiness and willingness to deliver the stock.

APPEAL from the trial judgment in an action on a promissory note. Reversed. Statement.

E. F. Collins, for appellant; *C. W. Hoffman*, for respondents.

The judgment of the Court was delivered by

ELWOOD, J.A.:—This is an action brought by the plaintiffs as executrix and executor of the last will of Leonard Youngberg, deceased, against the defendant for payment of a promissory note for $250 given by the defendant to the deceased. Elwood, J.A.

The defendant alleges that the promissory note sued on, together with another note for a like amount, were given in pay-

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ment for certain shares of stock in the Moose Jaw Brewing & Malting Co. Ltd., which the deceased agreed to deliver to the defendant; that the defendant had repeatedly demanded delivery of the stock, but that the same had never been delivered to him. By way of counterclaim the defendant repeated the various paragraphs of the statement of defence, and alleged that on or about June 4, 1913, he paid to the deceased the sum of $250 and interest for six months, being the first of said promissory notes, and counterclaimed for the said sum of $250 and interest.

The only evidence given at the trial was the evidence of the defendant and one John Whalen. The defendant swore that in December, 1912, he had a conversation with the deceased in which it was agreed that the defendant should give to the deceased the two promissory notes above referred to, and that in consideration of these the deceased, as soon as he arrived at home at Macoun, would send to the secretary of the Brewing Company for the defendant certain certificates of stock in the Brewing Company; that these certificates of stock were never sent to the defendant; that the defendant several times went to Whalen, the secretary of the Brewing Company, and inquired if the stock had been sent to him and he replied that it had not; that he paid the first note; that when he paid that note he knew that Youngberg was a responsible man and did not worry about the non-delivery of the stock, he expected it would come; that he got Whalen to notify Youngberg, the deceased, by letter to forward the stock. Whalen swore that the deceased did have stock in the Brewing Company in 1912, and that the defendant had attended upon him (Whalen) with regard to this stock and had asked him about it.

The District Court Judge before whom the case was tried in the course of his judgment stated that, as this was an action by executors, there must be some corroboration in order to establish a claim against the estate of the deceased.

The law with regard to corroboration in establishing claims against the estate of the deceased is stated by Lord Russell, C.J., in *Rawlinson* v. *Scholes et al.* (1898), 79 L.T. 350 at 351, as follows:

> The learned Judge in this case seems to have thought that whether convinced or not that the claim was honest he was bound to find against it in the absence of corroboration of the evidence of the claimant. This is wrong. He ought to examine that evidence with care, even with suspicion, but if after that he felt that it was evidence of truth he should act upon it.

He ought to be completely satisfied before allowing the claim; but he ought not to disallow it, satisfied or not, merely because the evidence was not corroborated.

It is quite true that the District Court Judge does proceed to analyse in some particulars the evidence given by the defendant, and expresses the opinion that the defendant's evidence is not too satisfactory. He says:

It is reasonably good in some respects, but when I say it is not satisfactory, I mean in his clearness of recollection as to certain surrounding features it is not the most satisfactory evidence in the world.

These remarks of the District Court Judge are all directed to a consideration of the question of whether or not the certificates of stock were to be delivered prior to the payment of the note sued upon. There was no evidence that they were not to be so delivered. At the conclusion of the case judgment was ordered for the plaintiff as claimed.

There is evidence of the defendant, corroborated by Whalen, that the defendant did call upon Whalen with regard to this stock, at any rate prior to the maturity of the note sued upon, and I think the evidence justifies the conclusion that it was prior to the maturity of the first note. This goes to corroborate the evidence of the defendant that the arrangement was that the stock was to be sent to Whalen for delivery to the defendant. The analysis of the defendant's evidence by the District Court Judge, when compared with the evidence given by the defendant, does not in my opinion justify the conclusions arrived at by the District Court Judge as to the reliability of that evidence. For instance, he concludes that because the defendant paid the first note without getting the stock, therefore that raises a strong presumption that he was not to get the stock as the defendant claimed. I am of the opinion, however, that the defendant's explanation as to this is most reasonable. He says Youngberg was a responsible man; he considered he was all right; he didn't worry about it. That strikes me as being reasonable. On the whole, bearing in mind what was said by Lord Russell, *supra*, I am of the opinion that the District Court Judge should have accepted the story of the defendant, and should have found that the notes were executed in consideration of the promise by the deceased to forward the certificates of stock as soon as he reached home.

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Apart from that, however, the pleadings of both parties and the evidence in the case all shew that these promissory notes were given as the consideration for certificates of stock to be delivered, at least, when the promissory notes were paid.

The plaintiffs in their pleadings allege a readiness and willingness to deliver this stock. There is absolutely no evidence that shews that the plaintiffs, at the date of the trial, were the holders of the stock in question or were in a position to deliver the stock or any of it. The only evidence with respect to Youngberg having had any stock was the evidence of Whalen, who says that Youngberg did have stock in the company in 1912. I am of the opinion that stock not having been delivered, it was incumbent on the plaintiffs to shew that at the trial they were in a position to deliver the stock. They not having so shewn, then, in my opinion, their cause of action must fail.

I am also of the opinion that the defendant is entitled to recover the $250 which he paid upon the first note, as on a consideration which has failed. This $250 is counterclaimed with interest. The date upon which this $250 was paid is somewhat uncertain. The note itself is, apparently, lost, and the defendant is uncertain whether it was payable in 3 or 6 months. But in his counterclaim he alleges that it was paid on June 4, 1913, which would be 6 months after the date of the note.

In *Last West Lumber Co.* v. *Haddad* (1915), 25 D.L.R. 529, 8 S.L.R. 407, my brother Lamont, J., at 533, in delivering the judgment of the Court, states the law with respect to payment of interest in this Province to be as laid down by the Privy Council in *Toronto R. Co.* v. *Toronto Corporation*, [1906] A.C. 117 at 121, as follows:—

> The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

In the case at bar, the evidence shews that for something like 5 years, or 5½ years, the defendant made no attempt to get the stock for which the promissory notes were given. He made no request for repayment of the amount of the promissory note which he paid, in fact he just let the matter lie as it was until he was sued.

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I think, therefore, under the circumstances that it cannot be stated that, as to the amount paid in full of the promissory note the subject of the counterclaim, "payment of a just debt has been improperly withheld" prior to the date of the defendant's counterclaim.

In my opinion therefore the defendant should not have interest on the $250 prior to the date of his counterclaim, but should have interest at 5% per annum thereon from March 28, 1919, the date of the counterclaim.

I would, therefore, allow the defendant's appeal, with costs and dismiss the plaintiffs' action with costs. I would allow the defendant on his counterclaim judgment for $250 and interest thereon at 5% per annum from March 28, 1919, to judgment, and the costs of the counterclaim. *Appeal allowed.*

Elwood, J.A.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. December 4, 1919.

NEGLIGENCE (§ I D—70)—CRIMINAL CHARGE—CODE—AMENDMENT 9-10 EDW. VII. 1910, CH. 13, SEC. 1—REASONABLE USE OF HIGHWAY—RIGHTS OF PARTIES—CONVICTION AT TRIAL—APPEAL.

The rights of a driver of a motor vehicle and that of other vehicles (including bicycles) to use the highway are equal, and each is equally restricted by the rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution: and when accidents happen as incidents to the reasonable use of the highway, the law affords no redress by criminal or civil proceedings.

Statement.

APPEAL by defendant from the trial judgment on a conviction for criminal negligence. Reversed.

A. MacLeod Sinclair, K.C., for appellant.

J. Short, K.C., for respondent.

Harvey, C.J.
Simmons, J.
Stuart, J.

HARVEY, C.J. and SIMMONS, J. concurred with STUART. J.

STUART, J.:—The statute under which the charge was laid is quoted in the judgment of my brother McCarthy, which I have had the advantage of reading.

At the close of the evidence the Judge, who tried the case without a jury, gave the following reasons for convicting the accused:—

The Court: I hold this, that where a man driving an automobile is approaching a street corner he must see that he does not run anyone down. I am going to hold in this case that he neglected his duties. *Mr. Sinclair:* Neglected it wilfully? *The Court:* Yes, I am going to hold that he wilfully neglected his duties. *Mr. Sinclair:* If your Lordship holds that, I would

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ask your Lordship to reserve the case on the question of whether there is any evidence to uphold the verdict. *The Court:* I have no objection to reserving a case on that point, but I have very strong views on the subject, although I drive a car myself, I feel a person approaching an intersection of two streets is bound to see that he does not run anyone down. A foot passenger has certain rights at the intersection, a better right than he has when crossing between the intersections, but a rider of a bicycle is riding a vehicle and he has better rights than foot passengers, and it seems to me there is a a duty on the driver of a motor car to see that he does not run either a foot passenger or a bicycle rider down. I am going to convict this defendant of the charge but I will reserve the case if you desire it and suspend sentence in the meantime. On the ground of wilful negligence. *Mr. Sinclair:* I understand your Lordship is holding that there was no wilful misconduct. *The Court.* I will put it whether there is any evidence to support a conviction.

It seems to me that it is impossible, upon a perusal of this language, to draw any other conclusion than that the Judge held that he was entitled to infer from the mere fact that the driver of an automobile ran into a bicyclist and injured him, that he was guilty of wilful negligence and had so violated the statute and become subject to the severe maximum penalty of two years' imprisonment, subject of course to the Judge's discretion as to the sentence he would impose.

With much respect I think that that is not the law. The tribunal trying the case must, in my opinion, find as a fact the existence of some anterior wilful misconduct or wilful negligence which led to the collision, and it must find that fact upon a consideration of the conduct of the accused anterior to the moment of collision, and not solely as an inference from the mere fact of collision without reference to the conduct of the person injured.

It may be that the Judge had in mind certain conclusions as to the conduct of the two parties, but he certainly gave no expression to them and, as I think I have said on a previous occasion, an accused person who is convicted has a right to assume that the reasons given for his conviction are the real reasons and to question their validity in point of law. This being so, I think there is no doubt that the reason given was based on an erroneous view of the law.

The form in which the case was reserved is as follows:—

1. Is there any evidence to support the verdict herein and conviction of the said R. L. Wilson? 2. Having regard to the whole evidence, was I right in convicting the said R. L. Wilson for causing bodily harm to be done to one Ernest Parker by wilful misconduct or by wilful neglect when the

said R. L. Wilson was in charge of an automobile upon a public street in the City of Calgary? 3. Should the conviction of the said R. L. Wilson be set aside or a new trial ordered?

I have grave doubt whether the objection to the conviction which I have raised above could properly be dealt with under the first question. But I think the second question is clearly wide enough to cover that objection. It is true the question begins by the words, "Having regard to the whole of the evidence," but the actual question asked is whether the Judge was right in convicting the accused, and I think that question involves clearly the question whether the Judge was right in making the inference of guilt upon the ground upon which he states that he did make that inference. In fact, I think it is fairly plain that that is the real question which was intended to be reserved. We are not informed at all as to what view the Judge took of the conduct of the parties anterior to the accident "having regard to the whole evidence," and it seems to me that the Judge evidently intended to reserve for the Court the validity in point of law of the only view of the evidence which in his judgment he expressed.

We do not know that the Judge inferred that the accused was driving too fast, and indeed I do not think he could reasonably so infer from the evidence. We do not know that he inferred that the accused did not keep a proper look-out, and I doubt if he could have so inferred from the evidence. Finally, we do not know that he inferred that the accused saw the complainant in front of him far enough to have been able to stop his car before hitting him, and there again I doubt if there was evidence from which such an inference could have reasonably been made. Nor could it reasonably be inferred that the accused should have seen him because there are many people to watch at such a place, and to infer criminal liability because one of them was not seen soon enough would require more specific and exact evidence as to the relative positions of all the surrounding people than the case affords. The effort first to turn aside so as to avoid the bicycle instead of stopping at once was probably a mistake in judgment, but here again I do not think criminal liability should be inferred therefrom.

I would, however, answer the second question in the negative, which is sufficient to decide the case, and would answer the third question by saying that the conviction should be set aside.

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As to the question of a new trial, I do not think that under the Code we are bound to order a new trial, and I think the justice of the case does not require that it should be re-tried. The case is too near the line in any event, and in my view the accused has been already sufficiently warned in so far as criminal proceedings are concerned.

McCarthy, J.

MCCARTHY, J.:—On October 6, 1919, the defendant, Wilson, was found guilty upon a charge laid under sec. 285 of the Criminal Code, as amended by 9-10 Edw. VII., 1910, ch. 13, sec. 1, which reads as follows:—

285. Every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or motor vehicle, automobile or other vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person.

In the notes to this section in the Annotated Criminal Code, Treneear (1919), Wilful Misconduct is stated to mean:—

Misconduct to which the will is a party; something opposed to accident or negligence; the "misconduct" not the conduct must be wilful. It occurs where the person guilty of it knows that mischief will result from it, and also where the act is done under the supposition that it might be mischievous and with an indifference to his duty to ascertain whether it was mischievous or not.

On June 9, 1919, about mid-day, Wilson was proceeding in a northerly direction in his motor car on First Street East, in the City of Calgary, and crossed Eighth Avenue. The complainant was riding a bicycle westerly on Eighth Avenue, but turned in ahead of Wilson in a northerly direction on First Street East, and had proceeded along First Street East about 20 feet when the motor driven by Wilson overtook him, knocking him off his bicycle and dragging him some distance along the street, with the result that the complainant's ankle was broken and he sustained other personal injuries. Upon this state of facts the information was laid.

There was evidence that there were a considerable number of people at the intersection of the streets close to where the accident happened, that the motor car did not cross Eighth Avenue at an excessive rate of speed and apparently was under control. The trial Judge says in part:—

That where a man driving an automobile is approaching a street corner he must see he does not run anyone down . . . is bound to see that he does not run anyone down. A foot passenger has certain rights at the inter-

section, a better right than he has when crossing between the intersections, but the rider of a bicycle is riding a vehicle and he has better rights than foot passengers and it seems to me there is a duty on the driver of a motor car to see that he does not run either a foot passenger or a bicycle rider down. I am going to convict this defendant of the charge but I will reserve a case if you desire it and suspend sentence in the meantime, on the ground of wilful negligence.

Upon the application of the accused the following question was reserved for the opinion of this Court by the trial Judge:—

Is there any evidence to support the verdict herein and conviction of the said R. L. Wilson?

That, I take it to be, is that the trial Judge expresses a desire that his finding of fact be reviewed by this Court. Under the circumstances, therefore, it seems to me that the whole question is open to us, as well as to express our opinion as to whether or not his conclusions upon the mutual rights and duties on highways coincide with our views.

With his conclusions of fact, with respect, I am unable to agree. It does not seem to me that the evidence discloses any criminal liability in the accused. There is no evidence of wanton or furious driving or racing or other wilful misconduct or of wilful neglect.

With the conclusions of the trial Judge on the mutual rights and duties on highways I am also unable to agree, and whilst what I say upon this branch may appear to have application to civil liability it seems to me from the language used in the section that the prosecutor must go further to attach criminal liability than if he were seeking to enforce a civil remedy.

Although automobiles are comparatively new in use there is nothing novel in the principles of law to be applied with respect to travel in them on highways. The general principles applicable to the use of vehicles upon public highways apply to automobiles and may be summarised in the statement that a driver must use that degree of care and caution which an ordinarily careful and prudent person would exercise under the same circumstances. The rights of the driver of a motor vehicle and that of other vehicles (including bicycles) to use the highway are equal and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury, or inflicting injury upon the other, and when accidents happen as incidents to the reasonable use of a highway

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the law affords no redress by criminal or civil proceedings. The degree of care required in the use and operation of an automobile upon the streets of a city depends not only upon the condition of the streets but also upon the dangerous character of the machine or vehicle and its likelihood to do injury to others lawfully upon the said street. The more dangerous its character the greater is the degree of care and caution required in its use and operation. The degree of care which the operator of an automobile is bound to exercise is commensurate with the risk of injury to other vehicles and pedestrians on the road. In the application of these principles conditions frequently arise under which conduct amounting to reasonable care in the case of a light, slow moving vehicle does not amount to proper and necessary care in the operation of a heavy and rapidly moving automobile. Operators of motor vehicles, in addition to exercising reasonable care and caution for the safety of others, who have the right to use the highways, should do whatever the statute law or municipal law of the jurisdiction requires whenever the conditions therein referred to arise, and failure to comply with the regulations imposed by statute or by by-law may in itself be evidence of negligence. Nevertheless if the driver of an automobile complies with all the requirements of the statute regulating the operation of motor vehicles, he may yet be liable for the failure to exercise ordinary care to avoid injury to another traveller on the highway. He must anticipate the presence of others. It is his duty to keep his machine always under control so as to avoid a collision. He has no right to assume that the road is clear, and must be vigilant and must anticipate and expect the presence of others, more especially in crossing a busy street, which the evidence discloses applies to the accident in this case, or where other vehicles are constantly passing and when people are liable to be crossing; at the corners of streets or near street-cars and in other similar places or situations where people are likely to fail to observe the approach of an automobile. Whilst it is his duty to anticipate the presence of others, he is also entitled to presume, I take it, that others will exercise due care. The duty to take care between persons using the highway is mutual, and each person may assume that others travelling on the highway will comply with this obligation. Hence others have the right to assume that the driver of an automobile will exercise proper caution in approaching

corners, that he will not turn a sharp corner and run without warning against a person using the highway. A person operating an automobile has the right to assume and act upon the assumption that every person whom he meets will exercise ordinary care and caution according to the circumstances and will not recklessly or negligently expose himself to danger, but rather make an attempt to avoid it, but when the operator of a motor vehicle has had time to realise, or, by the exercise of proper care and watchfulness, should realise that a person whom he meets is in a somewhat helpless condition, or apparently unable to avoid the approaching machine, he must exercise increased care to avoid an accident.

A person operating an automobile and one riding a bicycle owe to each other the duty to use reasonable care to avoid a collision. The bicycle rider must be vigilant under all circumstances, and keep a proper look-out for automobiles, and he may be guilty of contributory negligence in approaching a much-travelled, intersecting city street, and looking only once for approaching vehicles, where had he exercised more care he might have seen in time to avoid the automobile which struck him. It is not necessarily negligence for a person riding a bicycle along the street in front of an automobile to attempt to cross the road in front of the machine if it is so far behind him that it may be reasonably expected that the driver will see him and can and will by the exercise of proper care so manage the machine as to avoid a collision.

For these reasons, which are rather general in their application but in my opinion are supported by authority and would justify me in concluding that the trial Judge was under a misconception as to the mutual rights and duties of the operator of a motor car; I think the conviction should be set aside.

Conviction set aside.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.

ASSIGNMENTS FOR CREDITORS (§ VII B—61)—SECURITIES ASSIGNED TO BANK —ASSIGNMENT ATTACKED BY CREDITOR, R.S. SASK., 1909, CH. 142, SEC. 39.

A gift or conveyance, made by a debtor when he is insolvent, which has the effect of giving a creditor a preference is void under sec. 39 of the Assignments Act, R.S. Sask., 1909, ch. 142; provided that the transaction is attacked in the manner laid down by statute within 60 days after it takes place.

[*Lawson* v. *McGeoch et al.* (1893), 20 A.R. (Ont.) 464, distinguished.]

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APPEAL by defendant from the trial judgment (1919), 12 S.L.R. 298, in an action to set aside an assignment under the Assignments Act, R.S. Sask. 1909, ch. 142. Affirmed.

F. L. Bastedo, for Union Bank, appellant; *W. E. Knowles*, K.C., for respondent.

HAULTAIN, C.J.S.:—The evidence in this case, particularly the evidence of the manager of the defendant bank, in my opinion amply supports the finding of the trial Judge (1919), 12 S.L.R. 298, that the defendant McLean was insolvent in May and June, 1918, at the time the securities in question were given. I am also of opinion that McLean was insolvent in October, 1917, when it is alleged the advance was made and the security agreed upon.

The taking of these securities under the circumstances of this case must necessarily have had the effect of giving the bank a preference. The securities were attacked in the present action within the statutory period of 60 days, and are *primâ facie* utterly void under the provisions of sec. 39 of The Assignments Act, R.S. Sask., 1909, ch. 142, which is as follows:

> 39. Subject to the provisions of secs. 43, 44, 45 and 46 of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation or of any other property real or personal made to or for a creditor by a person at any time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, and which has the effect of giving such creditor a preference over the other creditors of the debtor or over any one or more of them shall in and with respect to any action or proceeding which within sixty days thereafter is brought, had or taken to impeach or set aside such transaction be utterly void as against the creditor or creditors injured, delayed, prejudiced or postponed.

The first question to consider is, whether the transaction which is attacked comes within the saving provisions of any of the secs. mentioned in sec. 39.

The provisions of sec. 46 are clearly the only provisions which can apply to the facts of this case, and, in order to escape the effect of sec. 39, the defendant bank must establish that the securities in question were given for a pre-existing debt where, by reason or on account of the giving of the securities, an

advance in money was made to the debtor by the creditor in the *bonâ fide* belief that the advance would enable the debtor to continue his trade or business and pay his debts in full. There is absolutely no evidence to shew any such belief on the part of the bank. The manager of the defendant bank, who was the only witness who could have testified on this point, was not called, although he was, presumably, available as a witness. The fact that the manager was not called is, to my mind, very significant in relation to this point and other matters arising in the action. I think I should be justified in saying that the evidence clearly shews the entire absence of any reasonable ground for any hope, much less any *bonâ fide* belief that the advance in question could possibly enable McLean to pay his debts in full. For this reason, therefore, the appeal must fail.

A great deal of the argument on appeal was addressed to the question whether the giving of the securities by formal documents in pursuance of a verbal agreement alleged to have been made in October, 1917, would take the case out of the provisions of sec. 39. That is to say, that the advance was made and the security given under the verbal agreement, and that the 60 days would begin to run from the date of the verbal agreement and not from the date of the formal documents.

In my opinion the actual words of sec. 39 do not admit of such a contention. The section says "every gift, conveyance, assignment or transfer, etc.," made under certain conditions "shall in and with respect to any action or proceeding which within 60 days thereafter is brought to impeach or set aside such transaction be utterly void, etc." The equitable doctrine which regards that which has been agreed to be done as done is no doubt applicable as between the parties to the document, but that doctrine cannot, in my opinion, be applied to make the words "60 days thereafter" mean "60 days after an agreement to make any gift or execute any conveyance, assignment or transfer, etc.," instead of 60 days after the actual date of the gift, conveyance, etc.

A number of Ontario cases have been cited on this point, but they all turned on the construction of Ontario Statutes which were quite different in language to the statute now under consideration.

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Some of the cases which I shall refer to were decided under R.S.O. 1887, ch. 124, and amendments thereto. The sections applicable to the discussion are as follows:

Section 2 (as enacted by the Amending Act of 54 Vict., 1891, ch. 20, sec. 1:

2. (1) Subject to the provisions of the third section of this Act, every conveyance, assignment or transfer, delivery of or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them, shall as against the creditor or creditors injured, delayed or prejudiced be utterly void.

(2) Subject also to the said provisions of the third section of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, to or for a creditor with intent to give such creditor an unjust preference over his other creditors or over any one or more of them, shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

(a) Subject to the provisions of sec. 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall in and with respect to any action or proceeding which, within 60 days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

(b) Subject to the provisions of sec. 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within the 60 days after the transaction makes an assignment for the benefit of his creditors, be presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

Section 3, sub-sec. 1 of R.S.O. 1887, ch. 124.

3. (1) Nothing in the preceding section shall apply to any assignment made to the sheriff of the county in which the debtor resides or carries on business, or to another assignee, resident within the Province of Ontario, with the consent of the creditors as hereinafter provided, for the purpose of paying ratably and proportionately and

without preference or priority all the creditors of the debtor their just debts; nor to any *bonâ fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; nor to any payment of money to a creditor, nor to any *bonâ fide* gift, conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind, as above mentioned, which is made in consideration of any present actual *bonâ fide* payment in money, or by way of security for any present actual *bonâ fide* advance of money, or which is made in consideration of any present actual *bonâ fide* sale or delivery of goods or other property; provided that the money paid, or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

The case of *Cole* v. *Porteous* (1892), 19 A.R. (Ont.) 111, only decided that the presumption of an intent to give an unjust preference, mentioned in sec. 2 (2) (a) of the above mentioned statute, is an incontrovertible statutory presumption. This was a decision of Osler, J.A., in Chambers.

In the case of *Clarkson* v. *Sterling* (1888), 15 A.R. (Ont.) 234, there was an agreement under seal to give security, which was a valid agreement under the law as it then stood. The security was not given until after the coming into force of an Act respecting Assignments for the Benefit of Creditors, 1885. It was held that the agreement in question was not invalid and that the defendant's right to take the security had accrued before the Act came into operation, and that, as the Act was not retrospective, the defendant's right to take the security contracted for, as and when he did take it, was not affected. The Court refrained from deciding a question somewhat analogous to the question now under discussion.

In the case of *Lawson* v. *McGeoch, et al.* (1893), 20 A.R. (Ont.) 464, the facts were as follows: Clements advanced various sums of money to McGeoch on condition that a chattel mortgage should be given. The chattel mortgage was given later on at a time when McGeoch had become insolvent. The action was brought on behalf of creditors within 60 days to set aside the mortgage. Falconbridge, J., who tried the action, held that insolvency having been proved, the case was governed by *Cole* v. *Porteous, supra*, and gave judgment for the plaintiff with costs, but this judgment was reversed by the Divisional Court, whose decision, according to the headnote in the report, (1892), 22 O.R. 474, is as follows:

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A chattel mortgage given in pursuance of a previous agreement therefor to cover an antecedent debt and advance made at the time of the agreement, both the mortgagor and mortgagee believing the former to be solvent when the mortgage was actually made, was impeached within the 60 days provided for by sec. 2, sub-sec. (a) of 54 Vict. 1891, ch. 20 (o), amending the R.S.O. ch. 124.

Held, that the mortgage was valid.

The presumption of an intent to prefer as to transactions coming within the 54 Vict. ch. 20 (o), impeached within the 60 days, is not an irrebuttable one, but the onus of shewing that no such intent existed is cast on the person supporting the transaction.

On appeal it was held by Hagarty, C.J.O., with "great hesitation," and by Burton, J.A., that the presumption spoken of in sub.secs. 2 (a) and 2 (b) of the Act above cited is a rebuttable one, the onus of proof being shifted in cases within the sub-secs. Maclennan, J.A., held that the presumption was limited to cases of pressure and as to that is irrebuttable. Osler, J.A., held that the presumption is general and irrebuttable, but that the security in question was supportable under the previous promise.

In *Webster* v. *Crickmore* (1898), 25 A.R. (Ont.), 97, the headnote sufficiently indicates the decision, and is as follows:

Where a preferential security, given while R.S.O. (1887) ch. 124, as amended by 54 Vict. ch. 20, was in force, is attacked within 60 days, evidence of pressure is not admissible to rebut the presumption of intent to give a preference.

An agreement to give security, made in good faith, may, even though it is indefinite in its terms, avail to rebut the presumption of intent to prefer, but where the giving of security is deliberately postponed in order to avoid injury to the debtor's credit, or to avoid the statutory presumption, the agreement to give the security is of no avail.

In all of these cases there are dicta by individual Judges which, taken by themselves, might support the appellant's contention, but when applied to the particular statutes under consideration do not, in my opinion, apply. The Acts do not say that the transactions if attacked within 60 days shall be utterly void as in our Act, but that they shall be presumed to have been made under conditions which would make them utterly void under sec. 2 unless they came within the saving provisions of sec. 3.

In none of the above cases does the *Court* decide that the presumption does not arise because the transaction attacked dates back to an antecedent agreement. The party supporting

the transaction is permitted to rebut the presumption of unlawful intent and unjust preference by shewing that the transaction, whether the result of an antecedent agreement or not, falls within the saving exceptions of sec. 3. The date of the gift, conveyance, assignment or transfer in the Ontario Act (under 2 (a) and 2 (b)), is only significant in respect of the raising of the presumption, and once the presumption is rebutted it is no longer significant. Its date in relation to the date of the antecedent contract upon which it was based might have some significance in deciding whether the actual transaction came within the saving provisions of sec. 3.

From the foregoing I think I may fairly draw the conclusion that the Ontario Courts have never decided that the 60 day period, mentioned in 2 (a) and 2 (b), referred to any other date than the actual date of the gift, conveyance, transfer, etc., which was attacked. A comparison of our Act with the Ontario Act seems to me to warrant an *a fortiori* conclusion that in sec. 39 of our Act "sixty days thereafter" means 60 days after the date of the gift, conveyance, assignment or transfer, and not 60 days after the date of some other agreement upon which such gift, conveyance, assignment or transfer may have been made, and that "such transaction" means the transaction mentioned and not some earlier transaction.

Another ground raised by the appellant is that the respondent is a secured creditor, and is therefore not a creditor within the protection of the Act.

It was decided by the Supreme Court of Canada in *The Sun Life Ass'ce Co. of Canada* (1900), 31 Can. S.C.R. 91, at 95:

> That the mere fact of a creditor having something in pawn or pledge or hypothec or mortgage destroys his character as creditor or deprives him of the right which the statute gives a creditor. If, however, he is a *secured* creditor, if he has sufficient of the assets of the debtor in his hands to fully cover the indebtedness, then undoubtedly the statute was not intended for him, but for the general and unsecured creditors. But the authorities shew as May (2nd ed., p. 164), points out "that if the property mortgaged is not sufficient to satisfy the debt the mortgagee of course will be a creditor for the balance."

In this case we need not consider this question whether the respondent is a secured creditor on account of his vendor's lien,

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because he is not a secured creditor, in my opinion, so far as the promissory notes are concerned. In England, a "secured creditor" (the Bankruptcy Act, 46-47 Vict., 1883, ch. 52, sec. 168 (1)) is defined to be a person "holding a mortgage charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor." A security on the property of a third person, even though it be for the same debt, does not make the holder a secured creditor. *Ex parte West Riding Union Banking Co., In re Turner* (1881), 19 Ch.D. 105.

If the property is the property of a third party or of the bankrupt and a third party jointly, proof may be made regardless of it, the test being if the property if given up would augment the bankrupt's estate. 2 Hals. 224, noted. *Ex parte West Riding Banking Co., supra.*

Sec. 29 of The Assignments Act provides as follows:

29. If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable and which is not mature or exigible such creditor shall be considered to hold security within the meaning of the last preceding section and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its nonpayment he shall be entitled to amend and revalue his claim.

The fact that another person is jointly and severally liable with the respondent on the notes does not in my opinion constitute the holder of the note a secured creditor of the insolvent.

The appeal will, therefore, be dismissed with costs.

Newlands, J.A.

NEWLANDS, J.A., concurred with Elwood, J.A.

Lamont, J.A.

LAMONT, J.A., concurred with Haultain, C.J.S.

Elwood, J.A.

ELWOOD, J.A.:—I concur in the conclusions reached by the Chief Justice in this matter.

At one time I was impressed with the argument that the securities attacked having been given in pursuance of a verbal agreement made in October, 1917, the provisions of sec. 39 of The Assignments Act would not apply.

There are dicta of some of the Judges in *Lawson* v. *McGeoch*, (1893), 20 A.R. (Ont.) 464, which would lead to that conclusion, but a comparison of the Ontario Act with the Saskatchewan Act has convinced me that what was stated to be the effect of the Ontario Act does not by any means represent the effect of our Act.

Sec. 2 of the Act, R.S.O. 1887, ch. 124, as amended by 54 Viet., 1891, ch. 20, under consideration in *Lawson* v. *McGeoch*, *supra*, is different from sec. 39 of our Act in at least two important particulars. In the Ontario Act, the transaction is presumed to be made with "intent to give or to be an *unjust* preference." In our Act the transaction is declared to be "utterly void." The use of the word "unjust" before "preference," in the Ontario Act seems to me to afford any person supporting the transaction the opportunity of shewing that the transaction was not made with intent to defraud. Indeed that seems to me to be the idea which was in the minds of the Judges and was the basis of their decision in *Lawson* v. *McGeoch*. Under our Act, however, no such opportunity is afforded; the preference is not referred to as an "unjust preference" but as "a" preference. So that all that is necessary to render a transaction void under sec. 39 of our Act (subject, however, to secs. 43, 44, 45 and 46, which do not apply here) is, that the gift, conveyance, etc., attacked shall have been made by a debtor at a time when he is insolvent, etc., which has the effect of giving the creditor to whom the gift is made a preference over some other creditor, and such transaction is attacked in the manner prescribed within 60 days after the transaction.

In the case at bar, all of the conditions necessary to render the transaction void are present.

It was contended by the appellant that, so far as the assignment of book debts is concerned, there had been a prior assignment in 1917, covering the same debts, and that, therefore, the assignment of 1918 should not be set aside.

I think this contention is not well taken. The assignment of 1918 in my opinion comes within the provisions of sec. 39 of our Act just as much as the other transactions. The setting aside of the transaction of 1918 does not, in my opinion, affect the assignment of 1917, and if under that assignment the appellant had a right to the book debts, the decision in the case at bar should not affect that right.

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

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, and Mignault, JJ. November 10, 1919.

DESCENT AND DISTRIBUTION (§ I E—24)—WILL BY HUSBAND—RELIEF CLAIMED BY WIFE—DISCRETION OF COURT—MARRIED WOMEN'S RELIEF ACT, 1 GEO. V., 1910, 2ND SESS. CH. 18, SECS. 2 & 8.

The discretion of the Court in granting relief to a widow under the Married Women's Relief Act is restricted, by implication, to the amount that the widow would have received had her husband died intestate.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1919), 48 D.L.R. 29, affirming upon an equal division of the Court, the judgment of the trial Judge, Stuart, J. (1919), 45 D.L.R. 738, and awarding the respondent a sum of $10,198 by way of relief. Reversed.

C. T. Jones, K.C., for appellant; *M. B. Peacock*, for respondent.

Davies, C.J.

DAVIES, C.J.:—I have no doubt as to the intent and meaning of the statute in question on this appeal. It reads as follows, 1 Geo. V., 1910, 2nd sess. (Alta.) ch. 18:

1. This Act may be cited as The Married Women's Relief Act.

2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the Judge before whom the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief.

* * * * *

8. On any such application the Court may make such allowance to the appellant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

The Legislature of that Province has decided that under the conditions with which it was dealing in that Province the widow of a man dying intestate was entitled to receive as her share of the distributable estate of her husband one half. The statute now before us for construction seems to me to imply to mean that the widow shall not be deprived of this statutory right but that if the husband by his will has attempted so to deprive her she may apply for relief to one of the Justices of the Supreme Court who may grant her such relief as he may determine is "just and equitable in the circumstances."

On such application the question immediately arises whether there is any and what limitation on this power given to the Judge. Is he limited in its exercise by the amount of the statutory provision made for the widow in cases of intestacy, namely

one-half of the distributable estate of the husband or not, may he allow her without any limitation what he determines is "just and equitable in the circumstances" up to the full amount of the husband's distributable estate?

I think the Legislature in determining the widow's share of her husband's estate in cases of intestacy has, in this new statute quoted above, imposed that limitation upon the Judge's discretion and that he cannot allow her more than this statutory provision in cases of intestacy.

I cannot put the point more clearly or concisely than it is stated by Harvey, C.J., in the Court of Appeal where he says:—

> Then again it is clear that if the husband die intestate, under no circumstances can the wife have more than the share fixed by law as her share on intestacy. Similarly, if the will give her that much she can have no more. Then can it be intended that, if the will give her any less, no matter how small the difference, this fact gives the Court the right to set aside the total disposition of the testator of any part of his property. I agree with Walsh, J., that such an anomaly could scarcely have been intended.

I fully concur with this conclusion of the Chief Justice and am of the opinion the order of the trial Judge on this application must be set aside because it ignores the statutory limitation of her rights in cases of intestacy and is in excess of the jurisdiction given by the statute.

Then the question arises what proportion of the half of the husband's distributable estate should be allowed the applicant. Should she be allowed up to the full amount of her rights in cases of intestacy or a smaller amount and if so what? The trial Judge under a mistaken construction of his powers allowed her more than the full amount she would be entitled to in case of intestacy. Two of the Judges of the Court of Appeal agreed with him alike as to his powers and as to the amount he allowed. In these circumstances I think, without attempting to deal with the evidence and fix the allowance in this Court, full justice will be done by reducing the amount allowed by the trial Judge to the statutory provision in cases of intestacy, namely one-half of the distributable estate; that being the full amount I conclude the Court is entitled to give under the statute.

I would therefore allow the appeal, set aside the judgment below and allow the widow one-half of the distributable surplus

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Idington, J.

of her husband's estate and would refer the case back to the Appeal Court of Alberta to give effect to our judgment.

Costs throughout should be paid out of the estate.

IDINGTON, J.:—The Legislature of Alberta in 1910, by an Act entitled The Married Women's Relief Act, secs. 2 and 8 thereof, enacted as follows:—

2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the Judge before whom the application is made receive less than if he had died intestate may apply to the Supreme Court for relief.

* * * * *

8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

The respondent is the widow of the late Robert Thomas McBratney who by his last will and testament devised and bequeathed unto the appellant Janet McGregor McBratney, all his real and personal estate and declared therein that he had made ample provision for his wife by transferring to her certain real properties in the City of Calgary.

The respondent, after a fruitless and expensive suit instituted by her to set aside the will, made an application under said sec. 2, quoted above, for such relief as the Act provides may be given.

Stuart, J., who heard the application, found that the properties held by the said widow produce about $25 a month, after deducting expenses; that she got about $1,000 insurance on her husband's life; and that the estate devised and bequeathed was probably worth $18,000. Out of this estimated value of the estate would have to be paid succession duties, the costs of the litigation brought about by respondent alone at least $2,000 and debts and expenses of administration.

Inasmuch as there was only one child, issue of the marriage, surviving, the widow would, in case of intestacy, have received half of the estate.

There is therefore ground for the application under the Act even if property held by the widow is to be reckoned with.

On the application the Judge allowed the respondent $10,198 as a first charge on the estate.

He seemed to estimate she would have an annuity of $720 a

year payable half yearly in addition to the revenue from the property and insurance monies she had got.

He proceeded on the theory that she should get a lump sum that would produce such an annuity—being what he says looking at the annuity tables it would cost. I think if we use common knowledge of the rate of interest in that Province she thus gets an income of more than the husband's earnings in health, and income from real estate, at the time of the death combined, which had been found sufficient for the support of both of them.

With great respect, that does not seem to me to be the exercise of a reasonable discretion such as we are pressed with by the argument of respondent's Counsel that it was.

Nor do I think, if regard is had to the position of the sister who is devisee of the estate and whose earning capacity may terminate ere long and she be left penniless, or nearly so, that such a disposition would, in the language of the statute, be "just and equitable in the circumstances."

If an equal division between those concerned of the estate left after paying all costs and all other expenses and charges, which would be what the widow would have got if her husband had died intestate, had been made, I do not think there would have been much room for successful argument on this appeal.

Or even if the annuity, which the Judge suggested, had been given the respondent for life, as a charge upon the estate, I should not have felt disposed to interfere, though possibly I might not, if trial Judge, have given respondent as much.

In the firstly named alternative she would have got what the law has held for ages to be just under any circumstances; and hence, in the circumstances to be dealt with herein, possibly *primâ facie* just and equitable.

That is only after all perhaps a rough measure of justice but it has stood so long as being according to the conscience of our English race just and equitable that I do not think it should be discarded entirely in a case that presents such circumstances as this case does, and protects respondent thereunder in a way that seems ample seeing what she has already got.

I am not prepared to hold as two of the Judges of the Court of Appeal do that the line so drawn is one limiting the jurisdiction.

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It is a line that should be given due weight and possibly be adhered to as not inconsistent with what is "just and equitable" when the circumstances are such as exist here, for our consideration.

But in many cases from conceivably an innumerable variety of circumstances such a line would neither be just nor equitable. It would give in many too little and in many more too much. I am not prepared to sanction any such doctrine, as being what the Legislature intended as either the limit of this new jurisdiction or a *primâ facie* rule to be adopted.

The far reaching evil consequences of such a doctrine being established as law would, both in a social and economic sense, transcend what I would submit any of us can correctly appreciate.

I doubt if anyone possessed of the necessary intelligence and of calm judgment, and the results of profound study of the problem, has ever proposed what is not seriously contended to be the established rule.

I say "established rule, for if we hold it is implied in the statute as a limit of the jurisdiction it may be said with equal force by others that it must be held an implication of what is just and equitable in the circumstances in any given case. If that was what the Legislature intended it was manifestly easy to have said so. But it has not.

Is the reprobate husband of very small or moderate means entitled to give two-thirds, or say a dollar more than the one-half of his estate to some undeserving object and leave his wife practically penniless, a widow with children of tender years? Half of such an estate might leave the widow and children in poverty and distress when the circumstances might clearly demand that the entire estate should be given the widow to keep herself and children who depended on her alone. Yet in such a case the Judge, according to the pretension put forward could not do that which would be "just and equitable."

Or is the millionaire who may have had the misfortune of being wedded to a dissolute wife bound to leave her half of his estate, or anything, or alternatively to be debarred from bestowing his fortune, on those deserving to receive his bounties, or

giving it to public charities to promote the welfare of his fellow men?

I merely suggest these extreme cases to illustrate the possible consequences of interpreting the statute, as furnishing an intention of fixing a hard and fast line as to jurisdiction, and thereby possibly suggesting the implication goes much further than a jurisdictional limit which is not given.

The implication so found for one purpose can be so easily found for another if the judicial sense would so lean in some case that did not disclose any repulsive features in adopting that innocent looking view.

Anyone who has studied how legislation of the simplest and most reasonable character has become by slow steps the instrument of injustice, must feel how dangerous it is to depart from the plain ordinary meaning of the language used in this enactment. Can there be a doubt that the Legislature when confronted with the problem of protecting the wife against the harsh conduct of a husband by his will leaving her unprovided for, had decided firstly to let her abide by the limits laid down in the Statute of Distribution, if the husband died intestate, or if by his will he had given her what she might have got in such a case, and then default either such event to give her means of relief? A husband who made no will or made one that was in accord with what the law had long held reasonable or the embodiment of the wife's reasonable expectations, clearly was deemed to have so acted in accord therewith as not to permit this conduct being reviewed.

A failure in that regard was evidently deemed by the Legislature such *primâ facie* evidence of ill feeling and evil conduct on the part of a deceased husband as to entitle the wife to apply to the Court.

In such a case the entire burden was cast upon the Court without restriction, if plain language means anything, of deciding whether or not she had reason to complain; and next if she had, how far she was entitled to the rectification of the wrong done her, by taking out of the husband's estate for her benefit so much as might be "just and equitable in the circumstances."

The burden so cast on the Court was one of the heaviest

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conceivable, I imagine; and must be faced in each case as the plain language indicates.

The suggestion that such a complicated subject matter as the distribution of a man's estate "in the circumstances" is to depend wholly on the peculiar views of the Judge who happens to hear the case and his decision is to be final, would lead to curious results.

I cannot imagine that such was ever the intention of the Legislature.

The amount in controversy in this case gives us jurisdiction, in my opinion, freed from any difficulties such as have arisen in other cases as to some orders made, merely as a matter of discretion.

I think the appeal should be allowed with costs out of the estate and that the appellants may elect and determine whether or not the relief will take the form of an annuity to the widow for her life to be charged on the estate and that form of security to be changed if need be from time to time by leave of the Supreme Court of Alberta, in case in the administration of the estate such a course is desirable; of that the line of relief be the net residue of the estate after all costs heretofore incurred, and all other expenses and outgoings in the administration of the estate have been satisfied.

Duff, J.

DUFF, J.:—This appeal turns upon the construction of certain clauses in an Act entitled The Married Women's Relief Act which is ch. 18, 1 Geo. V., 1910 (Alta.) The material clauses are these:—

> 2. The widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the Judge before whom the application is made receive less than if he had died intestate may apply to the Supreme Court for relief.
>
> * * * * *
>
> 8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.
>
> 9. Any such allowance may be by way of an amount payable annually or otherwise, or of a lump sum to be paid * * *

Two interpretations of this enactment are proposed. According to the first the Act leaves unfettered the discretion of the Court as regards the share of the estate to be allotted to the applicant

provided the condition of jurisdiction is satisfied by which the authority of the Court to intervene only arises when in the opinion of the Judge the widow receives under the will less than she would have received if the deceased husband had died intestate. According to the second, assuming jurisdiction to be established, the Court is not invested with power to deal with the whole of the estate but only with such aliquot part of it as the applicant would be entitled to in a case of intestacy and to making provision in her relief limited in amount to the value of such part.

The second of these views was adopted by the Chief Justice and Scott, J., the first prevailing with Stuart, J., who presided at the hearing of the application, and McCarthy and Simmons, JJ., in the Appellate Division. On the whole I think the weight of argument favours the view of the Chief Justice and Scott, J.

The consideration that was most emphatically pressed in favour of the construction which leaves it in the discretion of the Court to apply the whole or any part of the estate in satisfaction of the widow's claim, according as justice and equity may appear to dictate, rests upon the words of sec. 8, which empowers the Court to "make such allowance * * * out of the estate * * * disposed of by will as may be just and equitable in the circumstances."

These words it is said are unambiguous and have the effect of placing the whole of the deceased husband's estate at the disposition of the Court for the purpose of providing for the widow in such a manner as the Court may think right—leaving it to the Court, as regards the property affected by the testamentary disposition, to remake the testator's will.

I am not in agreement with the view that this is the only construction of which sec. 8 is capable. Sec. 8 must, I think, be read with sec. 2 which is imported by the phrase "on any such application"—defined by sec. 2 as an application to the Supreme Court "for relief." Relief in respect of what? Relief obviously in respect of a grievance of the applicant arising out of the fact that by the will of her husband she has received less than she would have received under a division of his estate resulting from intestacy. The function of the Court, therefore, under this

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statute is to grant relief in respect of this state of facts in such manner and degree as may be just and equitable and that function of the Court is restricted to granting relief to the widow. This authority—by its own implications—seems to be one which necessarily becomes exhausted the moment the ground of the widow's complaint is removed, that is to say when the share to which the widow would have been entitled to under an intestacy is given to her. Consequently I am, as I have already remarked, unable to agree that the words of sec. 8 are incapable of a meaning supporting the construction of the Act which ascribes to the Court the more restricted authority.

It is nevertheless not to be disputed that the rival construction is also a construction of which these provisions are reasonably capable and the point for determination is which of these two is the preferable? Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; and if one find there is some governing intention or governing principle expressed or plainly implied; then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment run counter to the principle and spirit of it; for as Lord Selborne, L.C., pointed out in *Caledonia R. Co.* v. *North Br. R. Co.* (1881), 6 App. Cas. 114, that which is within the spirit of the statute where it can be collected from the words of it is the law, and not the very letter of the statute where the letter does not carry out the object of it. See *Cox* v. *Hakes* (1890), 15 App. Cas. 506; *Eastman Co.* v. *Comptroller-Gen. of Patents, etc.*, [1898] A.C. 571.

Now the second question appears to me to express sufficiently the object of these provisions. That object is clearly implied, I think, in the condition which is laid down as the very basis of the jurisdiction which enables the Court to intervene, the condition requiring that the Judge who hears the application must be satisfied, that the share of the widow under the husband's will falls short of the share she would have been entitled to under

an intestacy. This condition failing, the machinery for relief provided for by the statute does not come into operation and the implication appears to be that, according to the theory of the legislator, where the share under the will does not fall short in value of the share under the rules governing intestacy, justice is satisfied, so far as it is within the function of the legislator to see that justice is satisfied; this condition being observed, further interposition as between the testator and the natural objects of his bounty would be according to the theory of the legislator unwarranted or undesirable. It follows that the allowance made by Stuart, J., exceeded the limits set by the statute to the power of disposition conferred upon the Court.

In deciding what disposition ought to be made pursuant to the statutory direction to make just and equitable provision for the widow, I have discovered no reason for thinking that the respondent should not receive an allowance equivalent to that to which she would be entitled had her husband died intestate; and accordingly I think an order should be made directing that she is entitled to one-half of the distributable surplus of the estate.

The case should be referred back to the Supreme Court of Alberta to carry this declaration into effect.

Anglin, J.

ANGLIN, J.:—Sec. 2 of The Married Women's Relief Act, I think makes it reasonably clear that the intent of the Legislature in passing this remarkable statute was to enable the Court to relieve a widow from the consequences of her deceased husband having by his will attempted to deprive her, in whole or in part, of the rights she would have had in his estate had he died intestate. That being the mischief to be remedied, I am not prepared to place on the language of sec. 8—broad and general as it undoubtedly is—a construction which would vest in the Courts the extraordinary power of disposing of the deceased husband's estate to any greater extent than is necessary to set right whatever wrong or injustice to his widow would otherwise result from his having made a will instead of allowing the law to effect the distribution of his estate. In re *Standard Manufacturing Co.*, [1891]1 Ch. 627, at 646; *Watney, Combe Reed & Co.* v. *Berners*, [1915] A.C. 885, at 891. As the Chief Justice of Alberta says, 48 D.L.R. 29 at 32:—

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Then again it is clear that if the husband die intestate, under no circumstances can the wife have more than the share fixed by law as her share on intestacy. Similarly, if the will give her that much she can have no more. Then can it be intended that, if the will give her any less, no matter how small the difference, this fact gives the Court the right to set aside the total disposition of the testator of any part of his property? I agree with Walsh, J., that such an anomaly could scarcely have been intended.

The discretion conferred on the Court in favor of the widow, in my opinion, is restricted to the portion of her deceased husband's estate which she would have received on an intestacy. The Court may, where the circumstances render it just and equitable to do so, give her less: it cannot in my opinion give her more.

While I should have preferred to send this case back to the provincial Courts to determine what sum, not exceeding one-half of the value of the estate, it may be "just and equitable in the circumstances" that the applicant should receive, in order to put an end to this deplorable and wasteful litigation I accede to what I understand to be the view of the majority of my learned brothers that we should now determine this question as best we can upon the material in the present record. Three Judges of the Alberta Supreme Court, proceeding under the impression that the discretion of the Court was unfettered and unlimited, have determined that it would be just and equitable in the circumstances that the widow should receive an amount exceeding one-half of the estate. It is therefore quite apparent that if they had understood the power of the Court to be restricted as I incline to think it is, these Judges would have exercised that power to its fullest extent and have allotted to the applicant one-half of her husband's net estate—the full amount to which she should have been entitled to on an intestacy. We are without any expression of opinion on this aspect of the case from the two members of the Appellate Division who took the view of the construction of the statute which, in my opinion, should prevail. I think our duty will be best discharged by treating what has been done by the trial Judge and the two Judges of the Appellate Division who agreed with him as a determination that in the exercise of a sound judicial discretion it is just and equitable that the applicant should receive one-half of her husband's

estate. Had the provincial Courts actually so determined under the view of the statute which I take, upon the evidence in the record I would not have been disposed to interfere with the discretion so exercised.

I would therefore allow the appeal and direct a judgment declaring the widow entitled to receive one-half of her husband's net estate. What that will amount to can best be determined after the administration has been completed and all questions as to the extent of the assets and liabilities have been determined.

MIGNAULT, J.:—I think what I may call the policy of the Alberta Statute, The Married Women's Relief Act, ch. 18 of the statutes of 1910, is that relief which the Court may grant to the widow should not put her in a better position than if she had taken a share in her husband's estate under an intestacy. No doubt the language of sec. 8 is extremely broad, but I think that sec. 2 is the controlling section and that in the exercise of a sound judicial discretion the Court should not grant to the widow an allowance exceeding the share she would have taken if her husband had died intestate. In this case, had there been an intestacy, the respondent would have received one-half of the net proceeds of her husband's estate, and in my opinion she should not be granted more.

I feel some doubt whether or not the respondent has in fact been allowed more than a half share of her husband's estate. The trial Judge, who granted the respondent $10,198 or an annuity of $720, stated that the estate was valued in the probate papers at $25,740 including a disputed and still undecided claim of $7,000, the value of a number of horses which the testator's daughter pretends belong to her under a bill of sale. He thought that the value of the undisputed estate was probably as much as $18,000, probably less than that. This creates a state of uncertainty, and there has been a division of opinion among the Judges whether or not the Court could grant to the widow more than she should receive under an intestacy.

The trial Judge, however, stated that the general principle which he always felt disposed to adopt was to so decide the matter as to leave the widow in at least as good a position as she was with respect to her maintenance and comfort when her hus-

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band was alive, as far as this can be done without unduly interfering with the rights given by will to other persons who may also have strong moral or legal claims upon the testator with respect to maintenance. I think, with deference, that this is not the principle that should govern the exercise of sound judicial discretion under this somewhat extraordinary statute. The principle stated by the trial Judge would put the Court in the position of the testator and permit it to review the discretion he exercised when he determined what provision should be made for his wife and other persons having moral or legal claims on him. The statute certainly does not go so far, and merely entitles the wife to relief when she receives less under her husband's will than she would have obtained had there been no will. At the most therefore the measure of relief would seem to be the share she would have received in the case of intestacy, but I do not wish to be understood as holding that the share and no lesser amount should be allowed her. But she certainly should not obtain more.

Under the circumstances, having stated what I deem to be the policy of the Act, and being unable to concur in the principle laid down by the trial Judge, I think the case should be remitted to the trial Court so that the respondent may be allowed one-half of the net proceeds of the estate, costs of all parties to be charged against the estate. *Appeal allowed.*

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ADVANCE RUMELY THRESHER CO. v. DANKERT AND SANDIDGE.

Saskatchewan King's Bench, Bigelow, J. November 21, 1919.

SALE (§ I C—17)—TO DEFENDANTS—REPOSSESSION BY PLAINTIFF—RE-SALE—NON-COMPLIANCE WITH CONDITIONAL SALES ACT, R.S. SASK., 1909, CH. 145—RESCISSION OF CONTRACT.

A party re-selling goods under the Conditional Sales Act, R.S. Sask., 1909, ch. 145, must comply with the provisions of this statute, otherwise their action in re-selling amounts to a rescission of the contract; unless there are clauses in the contract operating as a distinct waiver of the provisions of the Act.

[*American Abell Engine & Threshing Co. Ltd.* v. *Weiden Wilt* (1911), 4 S.L.R. 388; *Advance Rumely Thresher Co.* v. *Cotton* (1919), 47 D.L.R. 566, followed.]

Statement.

ACTION to recover the balance due on a threshing outfit. Action dismissed.

F. L. Bastedo, for plaintiff; *M. A. Müller*, for defendant, Dankert.

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BIGELOW, J.:—On June 16, 1910, the North-West Thresher Company (whose rights were afterwards assigned to the plaintiff) sold to the defendants a threshing outfit for $4,063. The defendant Dankert afterwards sold his interest to his co-defendant Sandidge, and the property was moved away from the possession of the defendant Dankert. In November, 1915, the plaintiff repossessed and sold the machinery at public auction, buying it in themselves for $500. This action is brought to recover the balance due.

The defendant Dankert disputes the action on the ground that in reselling the company did not comply with the Act respecting Lien Notes & Conditional Sales of Goods, R.S. Sask. 1909, ch. 145, and that therefore the action in reselling amounts to a rescission of the contract. *The American Abell Engine & Threshing Co., Ltd.* v. *Weidenwilt* (1911), 4 S.L.R. 388, approved in *Advance Rumely Thresher Co.* v. *Cotton* (1919), 47 D.L.R. 566, 12 S.L.R. 327.

I find that the plaintiff did not comply with the said Act. No notice of the sale was received by the said defendant, and the plaintiff did not give the notice required by sec. 8 of the Act. A notice of sale was sent through the mail addressed to the said defendant at Hart, Saskatchewan. This was not the defendant's last known post office address. The address given in the order for the machinery is Forward, and Hart is 100 miles away from where the defendant resided. Why the notice was sent to Hart, Sask., does not appear, as the man who sent the notice, Fred Ostrander, was not called as a witness. It is not surprising that it never reached the defendant.

But the plaintiff answers this objection by claiming that the defendant contracted himself out of the statute, and that no notice was necessary. The contract contains this clause:

> **And in the event of the company resuming possession as aforesaid the purchaser hereby waives all legal notice and authorizes and empowers the company as his agent to repair, rebuild and repaint, if the company thinks it necessary, and in its discretion to sell said machinery or any part or parts thereof, without prejudice to any of its rights under or by virtue of this contract or under or by virtue of any collateral security thereto, on account of the purchaser by public auction or private sale, with or without a reserve price, and with leave to the company to bid and purchase at any such sale, crediting the net results of such sale when received in cash, (etc).**

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There is no distinct waiver of the provisions of the Act respecting Lien Notes & Conditional Sales of Goods as there was in *Advance Rumely* v. *Cotton, supra.* I cannot conclude that the clause in the contract "and in the event of the company resuming possession as aforesaid, the purchaser hereby waives all legal notice" refers to the resale that might or might not take place. In my opinion more definite language should have been used if this was the intention. There is nothing in the agreement defining particularly the resale which is to be made, except "by public auction or private sale with or without a reserve price and with leave to the company to bid and purchase at such sale." Therefore it seems to me that the provisions of the statute as to resale must be complied with, and, these provisions not having been complied with, the company's action in reselling amounted to a rescission of the contract. In addition to the cases above cited, see *Sawyer-Massey Co.* v. *Dagg,* (1911), 4 S.L.R. 228; *North-West Thresher* v. *Bates,* (1910), 13 W.L.R. 657; *Harris* v. *Dustin* (1892), 1 Terr. L.R. 404.

Even if there was a clause in this contract distinctly waiving the provisions of the said Act, or if the clause in question could be so construed, I do not think it would be effective as against the defendant Dankert. Dankert was illiterate. Both he and his wife asked the salesman if they could keep the order and have someone read it and interpret it, and the salesman replied that it was just an order for the machine. The salesman, Lucksinger, does not deny this, but says he does not remember it. The contract was not read over or explained to Dankert, and the salesman knew that Dankert could not read or write, as he had to sign the contract by his mark. The defendant Dankert, then, did not agree to such a provision nor to any other part of the contract than the order for the machinery. See *Sawyer-Massey Co.* v. *Szlachetka* (1912), 4 D.L.R. 442; *Iwanchuk* v. *Iwanchuk* (1919), 48 D.L.R. 381.

The plaintiff's action is dismissed with costs.

Action dismissed.

HONSBERGER v. THE WEYBURN TOWNSITE Co.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. October 14, 1919.

CONSTITUTIONAL LAW (§ I C—140)—EXTRA PROVINCIAL CORPORATIONS—STATUS WITHIN ANOTHER PROVINCE—RIGHT OF ACTION—LICENSE—EXTRA PROVINCIAL CORPORATIONS ACT, R.S.O. 1914, CH. 179.

A Provincial Legislature is not precluded by item 11, sec. 92 of the B.N.A. Act from creating companies with a capacity to accept extra provincial powers and rights. Such capacity need not be expressly conferred. On obtaining a license under R.S.O. 1914, ch. 179, a Saskatchewan company may do business in Ontario, and may institute and maintain an action in that Province, even though the required license be not granted until after the commencement of the action.

[*Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566, followed. See also annotation 26 D.L.R. 294.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1919), 45 O.L.R. 176, reversing the judgment of Masten, J. (1918), 43 O.L.R. 451, in favor of the defendant. Affirmed.

The questions raised on the appeal were whether or not the respondent company, incorporated under the Companies Act of Saskatchewan for the purpose of buying and selling land, could enforce in the Ontario Courts, an agreement for sale of its land in Saskatchewan to a purchaser in Ontario; and whether or not license to resort to the Courts of the latter Province had been validly granted by the authorities there.

The trial Judge held that the company could not carry on its business outside of Saskatchewan and dismissed the action. His judgment was reversed by the Appellate Division.

I. F. Hellmuth, K.C., and *A. C. Kingstone*, for appellant; *J. W. Payne*, for respondent.

Davies, C.J.

DAVIES, C.J.:—This appeal must, in my opinion, be decided in accordance with the law as laid down by the Judicial Committee of the Privy Council in the *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, as to the powers and capacities of companies incorporated by Provincial Legislatures.

I think the head-note of the case correctly defines what their Lordships in that case determined. It is as follows:—

Sec. 92 of the British North America Act, 1867, confines the actual powers and rights which a Provincial Government can bestow upon a company, either by legislation or through the executive, to powers and rights exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the executive to incorporate by charter so as to confer a general capacity

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analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corporation with this general capacity. The power of incorporation by charter transferred to the Lieutenant-Governor of the Province of Ontario by sec. 65 of the above mentioned Act has not been abrogated or interfered with by the Ontario Companies Act, R.S.O., 1897, ch. 191.

The doctrine of *Ashbury Railway Carriage and Iron Co. v. Richie* (1875), L.R. 7 H.L. 653, does not apply to a company which derives its existence from the act of the Sovereign and not merely from the regulating statute.

Lord Haldane in delivering the reasoned and considered judgment of their Lordships overrules the judgment of the majority of this Court, of which I was one, when the *Bonanza Creek* case (1915), 21 D.L.R. 123, 50 Can. S.C.R. 534, was before us, as to the meaning of sub-sec. 11 of sec. 92 of our Constitutional Act empowering Legislatures exclusively to make laws in relation to the "incorporation of companies with provincial objects."

Our judgment placed a territorial limitation upon the powers which the Provincial Legislatures were authorised to confer upon the companies created or incorporated by them, and this limitation was, Lord Haldane says, so complete

that by or under provincial legislation no company could be incorporated with an existence in law that extended beyond the boundaries of the Province.

Whether His Lordship stated with accuracy the real meaning and effect of the decision of this Court I do not stop to discuss. We are concerned alone with the proper construction of the judgment of the Judicial Committee for whom His Lordship was speaking, as to the meaning of this 11th sub-section.

I think, as I have said, the headnote of the *Bonanza Creek* judgment correctly epitomizes the gist of that judgment, namely, that while the "powers and rights" which a Provincial Legislature can bestow are confined to those exercisable within the Province, that does not preclude such Legislature from legislating so as to create by statute a corporation with the general capacity to acquire in another Province of the Dominion power to operate in that Province with respect to the carrying out of its corporate powers granted by the Province incorporating the company.

The question in this case, in my opinion, under the construction I put upon the Privy Council judgment in the *Bonanza*

Creek case, 26 D.L.R. 273, [1916] 1 A.C. 566, was confined to two points, first, whether the company had the capacity given to it by the Legislature to obtain power *ab extra* to carry on in another Province its authorised business of buying and selling real estate in Saskatchewan, and secondly, whether it had obtained such power from the Province of Ontario, assuming that its contract in question was made there.

I am, as I have said, of the opinion that its corporate powers "to carry on real estate loan and general brokerage business" in the Province of Saskatchewan, under the *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, decision of the Judicial Committee, conferred on it the *capacity* to obtain such power from Ontario under what is known as the law of comity.

Of course, such a statutory corporation as the respondent could not obtain *ab extra* power to carry on any business not strictly within its corporate powers, but within these powers it had such capacity. My construction of the powers conferred upon the company "of real estate loan and general brokerage business" is that they referred to real estate in the Province of Saskatchewan alone, and not to real estate elsewhere. The lands in question in this case were, of course, situate in the Province of Saskatchewan.

The question is then raised whether it did obtain such powers *ab extra* or not.

On that point I cannot think there can be any doubt. The law of Ontario has, as is pointed out by the trial Judge, Masten, J., always recognised, subject to certain specified restrictions which do not enter into this case, the right of foreign corporations to carry on their authorised business and make contracts within their authorised powers outside of the country in which they are incorporated, so that the contract sued on in this case even if made in Ontario, being admittedly within the express corporate powers of the company to buy and sell real estate in Saskatchewan, was not *ultra vires* and was capable of being enforced in the Ontario Courts.

The appellant relied upon the Extra-Provincial Corporations Act, R.S.O. ch. 179. The plaintiff admitted it did not have the license required by sec. 7 of that Act until after it had com-

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menced this action, but it did then obtain the license and the statute expressly provides that the granting of the license put the company's right of resort to the Ontario Courts in the same position as if it had been granted before the action was instituted.

In the result I am of the opinion that whether the contract sued on was made in Saskatchewan as found by the Appeal Court, or in Ontario as contended by the appellant, the right of the plaintiff to maintain an action upon it in Ontario was clear.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant is and has been throughout the period of time involved in the negotiations and bargaining in question herein, and this litigation founded thereon, a resident of Ontario.

The respondent is a company incorporated (March 23, 1912) under and by virtue of the Saskatchewan Companies Act, R.S. Sask., 1909, ch. 72, "to carry on real estate, loan and general brokerage business."

In the course of carrying on said business the respondent had its head office in Weyburn in Saskatchewan and acquired some lands in the said Province. The appellant by an agreement of sale dated October 15, 1912, made between the respondent and himself, agreed to purchase from the former certain blocks of said land and to pay the price named, for balance of which this action is brought.

The defences set up at the trial failed, except as to one which raised the question that the said contract was *ultra vires* the respondent company and hence null and void.

The trial Judge maintained this contention and dismissed, for that reason alone, respondent's action.

The first Appellate Division of Ontario reversed this and directed judgment to be entered for respondent for the sum claimed.

The agreement in question was drawn up in duplicate at Weyburn in Saskatchewan and forwarded to the appellant in Ontario, who executed both copies and returned them to the respondent, who, then in Weyburn, executed same there. That does not seem to me to constitute anything *ultra vires* the corporate powers or capacity of the respondent.

The said Companies Act of Saskatchewan appears in the Consolidation of 1909, which is enacted by a statute of the Legislature, assented to January 26th, 1911, and professes to be an enactment of His Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan.

The first chapter of said Revised Statutes, 1909, is called The Interpretation Act and by the second clause thereof provides that the following words may be inserted in the preamble of Acts and shall indicate the authority by virtue of which they are passed, that is to say:—His Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan enacts as follows:—

From this Act I infer as well as from the word in the preamble to the Act respecting the R.S. Sask., 1909, which adopts these enacting words: "His Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan," that each of the enactments in the consolidation are to be treated as if they were made in that form.

The fifth clause of the Companies Act declares as follows:—

> Any three or more persons associated for any lawful purpose to which the authority of the Legislature extends * * * may by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company with or without limited liability.

I am unable to understand how a company incorporated, without any limitations upon the powers or capacity of the legal entity thereby created, under and by virtue of an enactment professing to be enacted by His Majesty by and with the advice of the Legislature, and expressly intending that the full power of incorporation which a Provincial Legislature has to incorporate for certain specific objects is being exercised, can be said to have been acting *ultra vires* of the power thereby conferred, when confining its action within the obvious purposes of its creation; and that no matter where acting unless in violation of the law of the country or Province where so acting or other local limitations upon the usual observance of the comity of a foreign state in relation to the recognition of corporations enacted beyond its jurisdiction.

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I most respectfully submit that what was said in the *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, having been intended to be applicable only to an enactment using entirely different language and mode of thought for expressing the purpose of the Legislature, and also to a different state of facts from those presented herein, cannot be helpful herein or further than in an expressly identical sort of case.

I am quite sure that whenever it is in such an enactment the obvious intention of the Legislature when indicated as above to exercise to the fullest extent of the powers given it by the B.N.A. Act, the incorporating power it thereby confers upon those obtaining incorporation thereunder all the power and capacity that can be given by virtue of such powers as conferred by sec. 92, item No. 11 of said Act.

"The Legislature" which must be taken to mean all that

"The Legislature" which must be taken to mean all that sec. 92 of the B.N.A. Act implied by that very term which Parlia- incorporating power in question, has in the plainest and most comprehensive language quoted above, expressed such a purpose, and I am not prepared to minimise in the slightest degree the full effect thereof.

What Parliament in that regard conferred upon each Province in question in the B. N. A. Act has been conferred, by a process needless to trace here in detail, upon the Province of Saskatchewan.

What, in my opinion, that implied in item 11 of the B.N.A. Act, I have heretofore expressed in several cases. I am the more inclined to adhere thereto when I recall that I had reached the same result in the *Bonanza Creek* case (1915), 21 D.L.R. 123, 50 Can. S.C.R. 534, as did the Court above, and I now hear it argued as it was, relying upon the reasons assigned by the said Court in that case, by counsel for appellant herein, that the corporate body created as this was has no power to sue in another Province than Saskatchewan.

However ably and logically presented I cannot assent thereto.

Nor do I think the negotiations which took place in Ontario leading up to the execution of the above mentioned instrument under seal in which they would, so far as in any way affecting

the relations between the parties, be merged therein, can affect the answer to be given the question raised in one way or another.

As to the right to sue in Ontario I assume a corporation created by the like authority which created respondent may, as any one else may, be debarred from using the Courts of a Province in violation of a valid statutory prohibition; but anything of that kind which may have existed was removed by the license issued respondent.

There is nothing in the Ontario legislation which affects, or pretends to affect, in any way the legality of the contract.

I am, therefore, of the opinion that this appeal should be dismissed with costs.

DUFF, J.:—I shall assume for the purposes of this judgment that the respondent company was carrying on business within the meaning of the Ontario Statute, in Ontario, when the contract was made and that the contract, which is the subject of the action, was effected in the course of carrying on that business.

On that assumption, the principal question is whether the respondent company possesses capacity recognised by the laws of Ontario to become a party to that contract. The question whether it enjoys such capacity is primarily, of course, a question to be determined by the Ontario law. Ontario law on this subject, in so far as it has not been altered by statute, is the common law of England. The common law of England recognises the legal personality of juristic persons, speaking generally, for the purposes for which they have been endowed with capacity to be the subjects of rights and duties by the authority to which they owe their existence. The concrete point for decision is therefore, under the assumption above mentioned, did the respondent company under the law of Saskatchewan receive capacity to procure recognition in Ontario as a corporation and to acquire the right to enter into the contract it seeks to enforce?

It is argued that from the fact that the legislative authority of a Canadian province in relation to the incorporation of companies is an authority limited in respect of territory and subject matter, one of these two results follows: either(it is said) 1. A corporation (to which the doctrine of *ultra vires* applies) owing its existence to legislation passed under the authority of No. 11 of

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sec. 92 is inherently wanting in capacity in consequence of the limitations laid down in the B.N.A. Act to acquire recognition abroad for the purpose of pursuing the objects for which it is incorporated, or 2. It receives such capacity only when that is given in express words by the instruments defining its constitution.

To deal with these alternatives in the order in which I have stated them, the legislative authority of a Province is, of course, territorially limited—the power conferred by sec. 92 in relation to the subjects enumerated being a power to make laws for the Province; but when a question arises in another jurisdiction touching the recognition of a right acquired under the law of a Canadian province or alleged to have been so acquired, the rules applicable for deciding the question do not in any presently relevant respect differ from those applicable where rights are alleged to arise under a system of law owing its sanctions to a sovereign authority unlimited as regards subject matter and unlimited by any constitutional instrument as regards territory. The very point was discussed by Willes, J., in his most illuminating judgment, delivered on behalf of the Exchequer Chamber in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, at 20 he there says: "We are satisfied . . . that a confirmed act of the local Legislature lawfully constituted, whether in a settled or conquered colony, as to matters within its competence and the limits of its jurisdiction has the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

Almost identical language is used (with reference to the particular case of the Canadian Provinces) by Lord Watson in delivering the judgment of the Judicial Committee in *The Maritime Bank* v. *Receiver General of New Brunswick*, [1892] A.C. 437, and by Lord Haldane in giving judgment on behalf of their Lordships in *Re The Initiative and Referendum Act* (1919), 48 D.L.R. 18, at 22 Lord Haldane's exact words are:—

> Subject to this (the qualification has no bearing on the present discussion) each Province was to retain its independence and autonomy, and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be

supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

There seems to be no reason for suggesting that the recognition of corporateness or juristic personality, which is only the capacity to be the subject of rights, should stand on a lower plane than, *e.g.* rights arising from a judgment (see Dicey, p. 469 note and p. 23); and speaking generally the law of England recognises such capacity subject to the restrictions (if any) imposed by the authority from which the capacity is derived. Where corporate capacity is derived from a Legislature, having limited authority as regards the creation of corporations, the limits set to the legislative authority must, of course, be considered in determining the scope of such capacity and as I have already said the contention now advanced is that No. 11 of sec. 92 does confine the authority of a Provincial Legislature in relation to that subject to the creation of companies having capacity only to carry on business within the limits of the Province.

The judgment of the Judicial Committee in the *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, seems to be decisive of the point in the opposite sense.

Their Lordships there enunciate at p. 279, an interpretation of No. 11 of sec. 92 in these words:—

> For the words of sec. 92 are, in their Lordships' opinion, wide enough to enable the Legislature of the Province to keep the power alive, if there existed in the executive at the time of Confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the Province. Such provincial objects would be of course the only objects in respect of which the Province could confer actual rights. Rights outside the Province would have to be derived from authorities outside the Province.

And at p. 284:—

> The whole matter may be put thus: The limitations of the legislative powers of a Province expressed in sec. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial Government can bestow, either by legislation or through the executive, to powers and rights exercisable within the Province. But actual powers and rights are one thing and capacity to accept extra provincial powers and rights is quite another.

And again at p. 285:—

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Assuming, however, that provincial legislation has purported to authorize a memorandum of association permitting operations outside the Province if power for the purpose is obtained *ab extra*, and that such a memorandum has been registered, the only question is whether the legislation was competent to the Province under sec. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But their Lordships are of opinion that this interpretation was too narrow. The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the Province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the Province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of power and rights in respect of objects outside the Province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted.

The language of No. 11 of sec. 92, "incorporation of companies for provincial objects," had of course never been supposed by anybody to import any limitation by which companies created under it would be disabled from acquiring status and recognition abroad for the legitimate purpose of pursuing the objects for which they were incorporated. It was never supposed, for example, that a mutual fire insurance company authorised by Provincial Legislation to carry on business in a single county would, because of this restriction of its business operations, be disabled from enforcing the payment of a premium note in the Courts of another jurisdiction against a defaulting member who had left the Province.

The view which had been taken was that "provincial objects" had no immediate reference to legal powers and capacities but that the word "objects" denoted the undertaking of the company in the commercial or economic sense; and that these words "for provincial objects" expressed a condition requiring that the business or the undertaking of a provincial company must be so restricted as to fall within the description "provincial" and that in applying this condition, the word "provincial" must

be interpreted in a territorial sense. It followed—on the assumption that No. 11 was to be construed and applied in the spirit of the doctrine of *ultra vires*—that, such a company being a corporation only for such restricted objects, *Ashbury Carriage Co.* v. *Riche*, L.R. 7 H.L. 653, at p. 669, *per* Lord Cairns, and at pp. 693 and 694, *per* Lord Selborne, its capacity to enjoy status and rights outside the Province must exist only in respect of such status and such rights as might be necessary to enable it to pursue these objects; although it was by no means involved in this that particular transactions outside the Province could not be within the capacity of such a company, as incidental to or consequential upon the pursuit of objects, in substance provincial, in a territorial sense.

This view of No. 11 of sec. 92, which was the view adopted by the majority of this Court, was rejected by the Judicial Committee in the *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, as the extracts already quoted sufficiently shew, and it must be accepted as settled law that the words "for provincial objects" in No. 11 do not import any restriction upon the "objects" of a provincial company in the sense above mentioned; and moreover—and on this point the effect of the passages cited seems to be unmistakable—that the words "with provincial objects" are merely declaratory of the necessary limits upon the operation of provincial legislation on the subject mentioned which in the absence of them would have been the consequence of the legal principle that corporate status and capacity, in like manner as rights, arising under provincial law, cannot, in jurisdictions beyond the boundaries of the Province be legally operative *ex proprio vigors* but only by virtue of recognition, express or implied, accorded by some other political authority or system of law.

It is true that in the *Bonanza Creek* case, *supra*, it was held that the company whose capacity was there in question was not a company to which the doctrine of *ultra vires* applied. But the language of the passages cited is perfectly general and the principle laid down thereby is broad enough to embrace the case of a company to which the doctrine is applicable. Indeed once the point is reached that the scope of the undertaking (in the

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sense already mentioned) of a company incorporated under the authority of No. 11 of sec. 92, is not necessarily limited territorially by virtue of any limitation of legislative authority supposed to reside in the phrase "with provincial objects," it manifestly results that, as regards statutory corporations affected by the doctrine of *ultra vires*, the scope of corporate capacity must be determined by reference to the language 1st, of the statute, and then, if the statute be a general one, of the instrument defining the powers of the particular company under consideration.

Nor does there appear to be any good reason why in interpreting a provincial statute providing machinery for the incorporation of companies generally, or a special statute incorporating a company and defining its constitution, or a memorandum of association taking effect under the authority of a general statute, general words defining the constitution of a particular company and prescribing the scope of its activities, or general words defining corporate capacity, should be read as subject to some stringent canon of construction supposed to have its logical and legal foundation in the fact that the statute is a Provincial statute, or that the instrument derives its legal effect from the authority of a Provincial statute.

With great respect for the trial Judge, who seems to have taken the opposite view, I know of no legal principle—and here we come to the second branch of the argument I am considering—and no consideration of convenience, derived from business practice, requiring the Court to read the language of such a statute or instrument defining the scope of the company's activities as *primâ facie* confining those activities within the Province, or to read the language defining the capacity and powers of the company as *primâ facie* denuding the company of capacity to acquire rights and status abroad; or as *primâ facie* limiting the application of the rule that whatever may fairly be regarded as incidental to or consequential upon things authorized, ought not, unless a contrary intention appear, to be held by judicial construction to be *ultra vires*. *Att'y-Gen'l* v. *Great Eastern R. Co.* (1880), 5 App. Cas. 473.

Coming to the concrete case before us I cannot agree with

the view that there is anything in the Saskatchewan statute to support the inference that companies incorporated under it are to be limited in their business activities to the territory of the Province; and I cannot agree that the unqualified language of the memorandum of the respondent company can be read as subject to some qualification arising from the fact that the company is incorporated in Saskatchewan and has its head office there. Further, had the memorandum in otherwise unqualified words, authorised dealings in Saskatchewan lands only, I should not have deduced from the two circumstances mentioned alone, a presumption confining within the Province the operations of the company either in making contracts of purchase or in making contracts of sale, or indeed in establishing agencies for sale. I do not think there is any solid basis for such a presumption.

In this view the Ontario statute R.S.O. 1914, ch. 179, secs. 7 and 16, admittedly presents no difficulty.

The provisions of sec. 16 shew plainly enough that the policy of this licensing enactment is primarily in its object and effect a revenue enactment; and sub-sec. 2 of the last mentioned section explicitly provides that a license granted during the progress of an action is sufficient to support the right of action.

As regards the Saskatchewan Act, 7 Geo. V., 1917, ch. 34, sec. 42, I should only like to say that I pass no opinion upon the question whether the law of Ontario in recognising a foreign corporation as a jurisdic person, takes account (for the purpose of determining the capacity of such a corporation) of the enactments of a retroactive statute conclusively binding upon the Courts of the jurisdiction where the corporation had its origin and has its principal place of residence. The point is an important one and can more conveniently be considered when a case arises in which it is necessary to pass upon it.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The defendant appeals from the judgment of a Divisional Court of the Supreme Court of Ontario, 45 O.L.R. 176, reversing the decision of Masten, J., who dismissed the action, 43 O.L.R. 451, and directing specific performance of a contract for the purchase of land in Saskatchewan, and payment of the purchase price with interest amounting in all to $6,030.25. The facts are fully stated by Masten, J.

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The execution of the agreement for purchase was not contested. The plaintiff company was incorporated under the Saskatchewan Companies Act, R.S. Sask., 1909, ch. 72, sec. 72, part 1, a memorandum of association duly subscribed and registered, in which its objects are declared to be: To carry on real estate, loan and general brokerage business.

The following questions were in issue in the action:

(1) Was the contract procured by misrepresentations which made it voidable by the defendant?

(2) Was the contract made in Saskatchewan, or was it made in Ontario, or in the course of carrying on business by the plaintiff company in Ontario?

(3) If made in Ontario, or in the course of carrying on business there, was it invalid? (a) because the Legislature of Saskatchewan lacked power to endow a body corporate created by it or under its authority with the subjective capacity to avail itself outside the Province of powers, rights or privileges, similar to those enjoyed by it in Saskatchewan, of which any other Province or foreign state should by comity permit the exercise within its territory; (b) because, if the Saskatchewan Legislature possessed that power, it was not exercised in favor of the plaintiff company; or (c) because at the time of the execution of the contract the plaintiff company did not hold a license under the Ontario Extra Provincial Corporations Act, R.S.O. 1914, ch. 179?

(4) Did the want of such license at the date of instituting the action render it unmaintainable although a license was procured before the trial?

(1) The trial Judge was of the opinion that the defence based on misrepresentation wholly failed. His view was affirmed by the Appellate Division and that defence has not been made a ground of appeal to this Court.

(2) After stating the facts at some length, the trial Judge expressed his views on this aspect of the case, at p. 456: The agreement sued on is dated October 15, 1912. The only agreement made between these parties was the agreement which was negotiated on that date at Jordan, Ont., between Gayman, Bowman and Griffin, agents of the company, of the one part and the

defendant of the other part. The company subsequently treated what took place on October 15, not as an offer but as an existing agreement which the company then ratified as of October 15, and confirmed and evidenced by executing under its corporate seal a formal written agreement bearing date October 15.

* * * * * *

In the present case it seems to me that the question is whether the sale in question is essentially bottomed on acts of the plaintiff company done outside the territorial limits of Saskatchewan.

When the plaintiff company appointed Gayman, a resident in Ontario, to be its permanent representative and agent in St. Catharines, and when he, along with the President and Secretary of the company, approached the defendant at his residence in Ontario, sold him the lands in question, made the agreement of which Ex. 1 afterwards became the written record and at the same time received from him, as part of the purchase price, the promissory note (Ex. 2) payable in Ontario, and when Gayman at St. Catharines afterwards received from the defendant payments on account of the price and renewals of the note, the plaintiff company, I think, was carrying out in Ontario essential parts of the transaction in question and was assuming to exercise powers and acquire rights outside of Saskatchewan.

In so far as the question is one of fact I so find on the evidence. The view taken in the Appellate Division was that notwithstanding the negotiations conducted and the resultant verbal agreement made in Ontario, accompanied by part payment of the purchase money by the giving of a promissory note, and the execution there at a later date by the defendant of the formal instrument now sued upon, because of its execution by the plaintiff company subsequently in Saskatchewan, whereby it became a concluded agreement, it must be regarded as a contract made in Saskatchewan. Hodgins, J.A., expressed this opinion perhaps more pointedly than the Chief Justice of Ontario, with whom the other members of the Court concurred.

I am with great respect not quite prepared to accept without some qualifications the reasoning on which this conclusion has

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been based. It is the purchaser who is sued. Whatever answer the Statute of Frauds might have afforded him had he not signed the formal instrument upon his signature being affixed to it a memorandum sufficient to meet the requirements of that Act existed and the verbal contract made at Jordan, Ontario, if otherwise valid, would have been enforceable against him. But, apart from that view of the matter the execution of the agreement in Saskatchewan by the company was merely the carrying to completion of the oral bargain made and already in part performed in Ontario. Yet, assuming that all that had transpired there was void, because *ultra vires* of the company, and that while matters remained in that position the defendant would have had an unanswerable defence, what had been so done was not illegal and as such incapable of being made the basis of an agreement binding on the parties. There was nothing to preclude the company by a valid contract made in Saskatchewan from selling its land to a non-resident of the Province—nothing to prevent it accepting in Saskatchewan an offer from such a non-resident though obtained in and transmitted from another Province, even if the company's powers and capacity were as restricted as the defendant contends. If all that had been done up to the time he executed the formal agreement was ineffectual because *ultra vires* of the company, the defendant, if aware that he was dealing with a provincial corporation, might be presumed to have been cognisant of the contitutional limitations upon its powers and of the legal consequences which lack of capacity on its part would entail. But, even without the aid of that presumption, I would incline to accede to the view that the document signed by him and forwarded with his knowledge for execution by the company, if everything which preceded it were void, might be regarded as an offer to purchase then made by him to the company which was subsequently accepted by the latter in Saskatchewan and thereby became a valid contract binding upon it. Apart, therefore, from some considerations arising from the phraseology of the Extra-Provincial Corporations Act of Ontario presently to be noticed, I would be disposed to agree in the conclusion of the Chief Justice of Ontario that, assuming the restrictions upon the corporate capacity of the plaintiff

company asserted by the defendant, the contract eventually executed by it should not be regarded as open to the objection to its validity on which he relies.

3 (a) But if that view of the case should be wrong and in order to guard against being taken to hold the opinion expressed by Masten, J., in which Hodgins, J.A., expressly concurs, that it is beyond the legislative jurisdiction of a Provincial Legislature to incorporate a company with capacity to carry on in another Province or state, by virtue of its sanction express or tacit, business within the objects of its incorporation and not otherwise open to exception, I desire to state that on this aspect of the case I adhere to the opinion which I expressed in the *Re Companies Incorporation* (1913), 15 D.L.R. 332, 48 Can. S.C.R. 331; affirmed (1916), 26 D.L.R. 293, and in the *Bonanza Creek* case (1915), 21 D.L.R. 123, 50 Can. S.C.R. 534, and I find that opinion upheld by the judgment of the Judicial Committee on the appeal in the latter case, 26 D.L.R. 273, [1916] 1 A.C. 566. I venture to quote the following passages from what I said in the *Companies* case, 48 Can. S.C.R. at 453:—

If the operations or activities of any foreign corporation should depend for their validity upon the powers conferred on it by the law of the incorporating state, it would in my opinion be difficult to sustain them, inasmuch as "the law of no country can have effect as law beyond the territory of the Sovereign by whom it was imposed." But the exercise of its powers by a corporation extra-territorially depends not upon the legislative power of its country of origin, but upon the express or tacit sanction of the State or Province in which such powers are exercised and the absence of any prohibition on the part of the Legislature which created it against its taking advantage of international comity. All that a company incorporated without territorial restriction upon the exercise of its powers carries abroad is its entity or corporate existence in the State of its origin coupled with a quasi-negative or passive capacity to accept the authorisation of foreign states to enter into transactions and to exercise powers within their dominions similar to those which it is permitted to enter into and to exercise within its state of origin. Even its entity as a corporation is available to it in a foreign state only by virtue of the recognition of it by that state. It has no right whatever in a foreign state except such as that state confers.

* * * * * *

The provincial company is a domestic company and exercises its powers as of right only within the territory of the Province which creates it. Elsewhere in Canada, as abroad, it is a foreign company and it depends for the exercise of its charter powers upon the sanction

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accorded by the comity of the Province in which it seeks to operate, which, although perhaps not the same thing as international comity, is closely akin to it.

In delivering the judgment of the Judicial Committee in the *Bonanza* case Lord Haldane said, 26 D.L.R. at 284:—

The whole matter may be put thus: The limitations of the legislative powers of a Province expressed in sec. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the *actual* powers and rights which the Provincial Government can bestow, either by legislation or through the executive, to powers and rights exercisable within the Province. But actual powers and rights are one thing and capacity to accept extra provincial powers and rights is quite another.

* * * * * *

Where, under legislation resembling that of the British Companies Act by a Province of Canada in the exercise of powers which sec. 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by the British Companies Act, the principle laid down by the House of Lords in *Ashbury Carriage Co.* v. *Riche*, L.R. 7 H.L. 653, of course, applies. The capacity of such a company may be limited to capacity within the Province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorise, and therefore excluded, incorporation for such a purpose.

Note the contrast (p. 285) between the form of the clause dealing with the memorandum and that of the clause dealing with the statute. The antithesis is so significant that it is impossible that it was not intentional.

Assuming, however, that provincial legislation has purported to authorise a memorandum of association *permitting operations outside the Province* if power for the purpose is obtained *ab extra*, and that such a memorandum has been registered the only question is whether the legislation was competent to the Province under sec. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But *their Lordships are of opinion that this interpretation was too narrow.* The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the Province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. *Nor do they appear to preclude the Province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity.* What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative author-

ity, of powers and rights in respect of objects outside the Province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, *to accept such powers and rights, if granted ab extra. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted.*

On this branch of the case, therefore, I find myself unable to agree with the views expressed by Masten, J., and Hodgins, J.A. Meredith, C.J.O., expressly reserved his opinion on the scope of provincial legislative jurisdiction in regard to the incorporation of companies.

(b) This question presents more difficulty. It was because he thought that whatever power the Province possessed to confer the extra-provincial capacity under consideration had not been exercised in favor of the plaintiff company that Meredith, C.J.O., with the concurrence of three of his colleagues was of the opinion that "the appellant company by its incorporation acquired no capacity to carry on its business beyond the limits of Saskatchewan." The purview and scope of the power and capacity of the plaintiff company depend entirely upon the combined effect of the statute under which it was incorporated and the terms of its memorandum of association. Not having been incorporated by letters patent as was the Bonanza Creek Mining Co., it cannot in order to supplement the powers and capacity derived from its purely statutory incorporation, invoke the prerogative power (if it be vested in the Lieutenant-Governor of Saskatchewan) to the exercise of which their Lordships of the Judicial Committee saw fit to impute the possession by the Bonanza Creek Mining Co. of the powers and capacity, similar to those of a natural person, appertaining to a common law corporation. Since the plaintiff company depends for its existence entirely upon the statute, subject to the question of constitutional limitation upon the provincial legislative jurisdiction already dealt with, the problem presented on this branch of the case is to ascertain whether upon the fair intendment of the statute and the memorandum of association it should be deemed to have had conferred upon it the capacity to take advantage of the comity of other Provinces and states to enable it to exercise its powers within their jurisdiction. It cannot derive that

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capacity from any other source. As pointed out by Lord Haldane in the *Bonanza Creek* case, 26 D.L.R. 273, at 279, [1916] 1. A.C. 566: "The question is simply one of interpretation of the words used."

The principle of *Ashbury Carriage Co.* v. *Riche*, L.R. 7 H.L. 683, applies. That principle, as stated by his Lordship, at p. 278, "amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning whatever that may be. . . . The doctrine means simply that it is wrong in answering the question of what powers the corporation possesses when incorporated exclusively by statute to start by assuming that the Legislature meant to create a company with a capacity resembling that of a natural person such as a corporation created by charter would have at common law and then to ask whether there are words in the statute which take away the incidents of such a corporation."

In the passage already quoted referring to a provincial company incorporated by means of a memorandum of association under legislation resembling that of the British Companies Act his Lordship, applying the principle laid down in the *Riche* case, *supra*, said: "The capacity of such a company may be limited to capacity within the Province either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the Province or because the statute under which incorporation took place did not authorise and therefore excluded incorporation for such a purpose."

While at first blush this language might seem to import that the subjective capacity now in question must be conferred in explicit terms, his Lordship nowhere says so, and I cannot think he meant that in a statute providing for the incorporation of companies general terms may never be given a broad construction of which they are susceptible in order to carry out what should, having regard to all the circumstances and the context of the Act, be considered as having been the intent of the Legislature in passing it, but must always be read in the most restricted sense however unreasonable, inconvenient or even mischievous the result. The doctrine of reasonable intendment; *Boon* v. *Howard* (1874), L.R. 9 C.P. 277; *The Duke of Buccleuch*,

(1889), 15 P.D. 86, at 96; *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioner* (1882), 7 App. Cas. 694, at 702; *Llewellyn* v. *Vale of Glamorgan Railway*, [1898] 1 Q.B. 473, at 478; *Reid* v. *Reid* (1886), 31 Ch. D. 402, at 407, in my opinion applies to such a statute just as it does to others.

In the Saskatchewan Companies Act I find at least two provisions which afford, I think, sufficient indication that the Legislature meant that companies incorporated under it "for any lawful purpose to which the authority of the Legislature extends" (sec. 5) without any restrictive provision, express or implied, in the memorandum of association should possess, to use Lord Haldane's terms, all the "actual powers and rights" which it could bestow and also the fullest "capacity" which it could confer "to accept extra-provincial powers and rights." By sec. 17 the Saskatchewan Companies Act of 1909 provides that every body incorporated under that Act shall be "capable forthwith of exercising all the functions of an incorporated company," and by sec. 4 it is enacted that

> No company, association or partnership consisting of more than 20 persons shall hereafter be formed for the purpose of carrying on any business to which the authority of the Legislature extends that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof unless it is registered as a company under this Act or is formed in pursuance of some other Act of the Legislature.

The creation in Saskatchewan by charter of a common law corporation having more than 20 shareholders is probably precluded by this latter section. There appears to be no other general Act of the Saskatchewan Legislature providing for the incorporation of companies, and no provision for the registration of domestic companies created otherwise than under statutory authority. It would seem therefore that, unless by a special Act, a corporation with more than 20 shareholders having the capacity to avail itself of international comity cannot be brought into existence in that Province if it may not be done under the Companies Act. Compare secs. 18 and 4 of the Companies Act, 1862, ch. 89 (Imp.) and secs. 16(2) and 1(2) of the Companies (Con.) Act of 1908, ch. 69 (Imp.) and compare also secs. 95 and 97 of the Saskatchewan Companies Act of 1909 with sec. 37

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of the Companies Act of 1867, ch. 131 (Imp.) and sec. 76 of the Companies (Con.) Act of 1908. (Imp.).

I think it is abundantly clear that the Legislature of Saskatchewan intended to confer upon companies to be incorporated under the Companies Act of 1909, whose memoranda of association contain no restrictions thereon, the fullest powers, rights and capacity for the attainment of their objects which its legislative jurisdiction empowered it to bestow and which may be requisite or useful to enable it to exercise "all the functions of an incorporated body" for that purpose. It must not be understood, however, that my reference to the provision of secs. 4 and 17 implies that had they been omitted the general terms in which the Saskatchewan Companies Act provides for incorporation would not have sufficed to vest in corporations formed under it the capacity we are considering.

There is nothing in the memorandum of association of the plaintiff company which—to quote Lord Haldane again, "has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries." Its declared objects do not import activities confined to any limited area.

We are not now dealing with a question which affects only provincial corporations. The same problem is presented in the case of every company which has been incorporated by memorandum of association under the English Companies Act in general terms for objects not of such a nature as to imply an intention that the exercise of its powers should be restricted to the United Kingdom and without any such restriction being expressed, but also without any explicit provision that it may carry on its business abroad or may avail itself of the comity of foreign nations or of the self-governing overseas Dominions of the Empire. I am satisfied that thousands upon thousands of contracts have been made by and on behalf of such corporations outside the United Kingdom in the course of carrying out the objects of their incorporation and that it would surprise and shock its directors and legal advisers if the power of an English company so constituted to make such contracts were called in question and they were told that under the doctrine of *Ashbury Carriage Co.* v. *Riche*, L.R. 7 H.L. 653, its activities must be

strictly confined to the United Kingdom. Yet that is the effect of the *Bonanza* judgment as interpreted by the trial Judge and the Judges of the Appellate Division.

The English Companies Acts of 1862 and 1908 nowhere provide expressly that corporations formed under them shall possess, or may acquire, the capacity to accept powers and rights abroad. Sec. 55 of the Act of 1862 (sec. 78 of the Companies (Consolidated) Act of 1908) providing for foreign attorneys, and the recital and secs. 2, 3 and 6 of the Companies Seals Act of 1864, ch. 19 (sec. 79 of the Companies (Con.) Act of 1908), providing for foreign seals, appear to assume that such a capacity might be acquired under the Act of 1862. It is not without significance that it was thought necessary explicitly to restrict the possession of the powers conferred by the Act of 1864 to companies expressly authorised to exercise them by their articles of association. The English sections referred to have no counterpart in the Saskatchewan Companies Act, 1909.

While it may be said that the presence of these provisions in the English statute, at all events since 1864, made the intention to enable the companies incorporated under it to acquire the capacity under consideration clearer than it is in the case of the Saskatchewan statute, the difference is merely one of degree. In neither case is there explicit language conferring the capacity. In both its existence depends on the doctrine of reasonable intendment. Does the language of the statute fairly interpreted indicate that the Legislature meant to provide for the enjoyment of this capacity by the companies to be formed under its authority?

No doubt the plaintiff company as a statutory corporation, would not have the powers and capacity of a natural person unless conferred upon it by the statute. That is the doctrine of *Ashbury Co.* v. *Riche*, L.R. 7 H.L. 653. But it has nowhere been determined, so far as I am aware—and certainly not in the *Bonanza Creek* case— that in the absence of express language purporting to confer upon it capacity to avail itself of the comity of nations a corporation, formed under a statute, which by reasonable intendment should be taken as having been designed to vest in the bodies corporate created, without restric-

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tion, under its authority all the powers and rights and the fullest capacity which the Legislature had jurisdiction to bestow, and having objects which imply no territorial restriction and powers set forth in the most general terms, is by English law unable to avail itself of the comity of other nations or dominions and is therefore obliged to conform its activities within the territorial limits of the jurisdiction of the Legislature to which it owes its existence.

I am for these reasons of the opinion that the power which the Legislature of Saskatchewan possessed to endow corporations created by it with capacity to exist and to carry on outside the limits of the Province of Saskatchewan business within the objects of its incorporation sanctioned by the country where it is transacted has been exercised in favor of the plaintiff company.

I entirely agree with the Judges of the Provincial Courts that the plaintiff can derive no assistance from the Saskatchewan declaratory statute of 1917. If the contract in question has been *ultra vires* of the plaintiff company when entered into such *ex post facto* legislation could not render it enforceable in Courts not subject to the jurisdiction of the Legislature of Saskatchewan.

Ontario, as Masten, J., points out at p. 459, has always recognised the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation and not prohibited by its charter and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burdens imposed by the laws enforced therein. *Canadian Pacific R. Co.* v. *Western Union Telegraph Co.* (1889), 17 Can. S.C.R. 151, at 155.

Howe Machine Co. v. *Walker* (1873), 35 U.C.Q.B. 37, cited by the Judge is a comparatively early instance of the affirmation of that right, and, as he adds, "so far as I am aware it has ever since been maintained without question." It follows that, unless prohibited or rendered void by Ontario legislation, the contract sued upon, even if made in Ontario, being admittedly for the attainment of one of the provincial objects of the plaintiff company, was not *ultra vires* and is enforceable in the Ontario Courts.

(c) The only legislation of Ontario on which the appellant relies is the Extra Provincial Corporations Act, R.S.O. 1914, ch. 179. The plaintiff company admittedly did not hold the license required by sec. 7 of that statute when the contract in question was made, nor indeed until after this action was begun. Was the contract therefore void and unenforceable in the Ontario Courts? It was undoubtedly negotiated in Ontario and was executed there by the defendant, whose liability upon it it was sought to enforce and was not an isolated transaction. It was, in my opinion, clearly a contract, within the purview of sec. 16 (1) of the Extra Provincial Corporations Act, made * * in part within Ontario and in the course of or in connection with business carried on contrary to the provisions of said sec. 7 of the statute, *i.e.*, by or on behalf of an Extra Provincial corporation not then licensed (see sec. 7, sub-sec. 2). The Ontario statute however, does not declare such a contract void. On the contrary, it merely deprives the offending extra provincial corporation of the right of maintaining any action or other proceeding in any Court in Ontario in respect of any contract so long as it remains unlicensed, and upon the granting of a license puts its right of resort to the Ontario Courts in the same position "as if such license had been granted * * * before the institution" of the action or proceeding.

It is the prosecution of "such action or other proceeding *i.e.*, an action or other proceeding * * in respect of any contract made wholly or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of said sec. 7," that sec. 16(2) expressly authorises. That provision is utterly repugnant to the idea that the statute was intended to render such contracts void. The Extra Provincial Corporations Act of Ontario does not affect the validity of the contract.

(4) The statute in explicit terms provides by sub-sec. 2 of sec. 16 that upon the granting of the license a pending action upon a contract made contrary to the provisions of sec. 7 may be prosecuted as if such license had been granted * * before the institution thereof. I am, for the foregoing reasons, of the opinion that the contract sued upon was not *ultra vires* of the

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plaintiff company and is enforceable in the Courts of Ontario and that the judgment for its specific performance should be upheld.

I would dismiss the appeal with costs.

BRODEUR, J.:—A company only incorporated in a province becomes an artificial person authorised by its charter and has the capacity of carrying on its business in all the parts of the world where by the comity of the nation such business is not repugnant or prejudicial to the policy or to the interests of the local authority.

Supposing that in this case the respondent company had been selling in Ontario lands situate in Saskatchewan (a fact which is denied by the respondent) it was certainly within the limits of its authority and there was nothing in the Ontario laws which would prevent a company incorporated by another Province from doing business so long as it would pay for the licenses imposed upon it.

The facts disclosed in the evidence do not shew that the contract in question was made in violation of the powers conferred by its charter and by the comity of nation to the respondent company.

The appeal fails and should be dismissed with costs.

Appeal dismissed.

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IN THE MATTER OF THE SUBDIVISIONS ACT.

Re ASQUITH TOWNSITE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.

LAND TITLES (§ VI—60)—APPLICATION TO CANCEL PART OF PLAN—SUBDIVISIONS ACT, 5 GEO. V. 1914, SASK., CH. 9—CONSENT OF MINISTER OF HIGHWAYS—LAND TITLES ACT, 8 GEO. V. 1917, SASK., 2ND SESS., CH. 18, SEC. 80.

Before part of a plan containing streets and lanes, registered under the Land Titles Act may be cancelled, the consent of the Minister of Highways must be obtained.

Statement.

APPEAL by the Canadian Pacific R. Co. from a decision of the Master of Titles, on an application to cancel part of a registered plan. Affirmed.

A. L. Gordon, K.C., for appellant; *H. E. Sampson*, K.C., for Minister of Highways and Town of Asquith.

Haultain, C.J.S. Elwood, J.A.

HAULTAIN, C.J.S., and ELWOOD, J.A. concurred with Newlands, J.A.

NEWLANDS, J.A.:—This is an application under the Act respecting Subdivisions, 5 Geo. V., 1914, Sask., ch. 9, to cancel a part of the registered plan of the town of Asquith. The part of the plan which it is desired to cancel contains not only lots and blocks but streets and lanes. The Master of Titles, to whom the application was made, decided that he had no authority to cancel that part of the plan containing streets and lanes without the consent of the Minister of Highways.

Under the first mentioned Act, the Master of Titles has authority to take such steps as may reduce the number of owners of the subdivision so as to interfere as little as possible with the cultivation of the remainder of the subdivision; he may order the sale or transfer of one or more parcels to the owner or owners of other parcels, or the exchange of properties, and then may order the cancellation of the whole or part, or the amendment, or cancellation of the plan, the cancellation of the certificate of title and the issue of new certificates.

Under this Act he has no authority to take the property of any person except after compensation by sale or exchange. No mention is made in this Act of the interest of the Crown in streets, lanes, parks and reserves for public purposes, the title to which is vested in the Crown by sec. 80 of the Land Titles Act, 8 Geo. V., 1917 (2nd sess.), ch. 18. No authority is therefore given him by the Act respecting Subdivisions to take the property of the Crown and give it to the applicant, in this case the owner of the rest of the subdivision, which he would be doing if he cancelled the plan as to streets and lanes and issued a certificate of title to the owner of the lots and blocks for that part of the registered plan containing the lots and blocks and the streets and lanes between them.

Before the title of the Crown in the streets and lanes can be affected, the consent of the Minister of Highways must first be obtained.

Sub-sec. 11 of sec. 80 of the Land Titles Act provides that the title to streets, lanes, etc., on registered plans shall vest in the Crown and that no change or alteration shall be made in the boundaries thereof without the consent of the Minister of Highways. Any change or alteration in such boundaries would affect

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the title of the Crown to such streets and lanes, as it would either add to or take away from the Crown a part of the land already vested in it by the registration of the plan. To wipe out the streets and lanes altogether would not only alter the boundaries but take away from the Crown all of the land comprised in these streets and lanes which had already been vested in it and give such land to the owner of the adjoining lands.

Now, as I have already stated, there is nothing in the Act respecting Subdivisions that allows the Master of Titles to do this. Under the Land Titles Act he has this authority with the consent of the Minister of Highways. This consent must be first obtained by the applicant before the Master of Titles can act in that behalf.

Proceedings must be taken under the two Acts in order to completely cancel a plan and vest the title to the land covered thereby in the owner of the adjoining lands. Under the Act respecting Subdivisions in order to cancel the lots and the blocks, and under the Land Titles Act in order to cancel the streets and lanes.

The appeal from the Master of Titles should, therefore, be dismissed.

Lamont, J.A.

LAMONT, J.A.:—This is an appeal by the Canadian Pacific Railway Company from a decision of the Master of Titles.

Prior to December 20, 1907, the Company owned a quantity of unsubdivided land within the limits of the town of Asquith. On said date they registered a plan of subdivision thereof, which divided the land into lots, blocks, streets and lanes. The Company now applies to have the said plan cancelled in so far as it affects the lots in Blocks 12 to 17 inclusive, which lots have not been sold, and a new certificate of title issued covering not only the parcels embraced in the existing certificates of title, but the intersecting streets and lanes as well. Those cover in all about 25 acres. The Master of Titles refused to cancel the plan in so far as the streets and lanes were concerned, until the consent of the Minister of Highways was first had and obtained. From that decision the Company now appeals.

Sec. 80 of the Land Titles Act, 8 Geo. V., 1917 (2nd sess.), ch. 18, provides as follows:

80. (1) An owner subdividing land for which a certificate of title has been granted into blocks or lots shall register a plan and three copies thereof in accordance with the above named regulations.

(11) The registration in the land titles office of a plan of the subdivision of land in lots or blocks shall vest the title to all streets, lanes, parks or other reserves for public purposes, shewn on such plan, in His Majesty in the right and to the use of his Province of Saskatchewan; and no change or alteration in the boundaries of any street, lane, park or public reserve, shall be made without the consent of the Minister of Highways having first been obtained.

By this legislation no alteration in the boundaries of a street or lane can be made without the consent of the Minister. Unless, therefore, this is overridden by the special legislation embodied in the Act respecting Subdivisions, 5 Geo. V., 1914, Sask., ch. 9, the decision of the Minister must be upheld. That Act provides that the Master of Titles may ascertain what parcels within the subdivided area have been sold, and take steps to promote a purchase of said parcels by the owners of other parcels, and order a sale or transfer of the same, or order an exchange of properties. Also, sec. 2,

(2) Recommend . . . the cancellation in whole or in part or the amendment or alteration of any plan or survey, . . . order . . . the cancellation of the certificates of title issued according to the original plan and issue new certificates of title according to the new and amended plan authorised under this section.

A perusal of these sections shews that what the Master of Titles may deal with are the parcels which have been or might be sold or disposed of. These do not include the streets and lanes, the property of the Crown. He is given power to alter the plan, cancel existing certificates of title and issue new certificates in lieu thereof, but this must be held to refer only to private property and not the property belonging to the Crown, for it is a well established rule of construction that a right of the Crown shall not be barred by the general words of an Act of Parliament.

The property in the streets and lanes being in the Crown, an Act is not to be construed as authorising the Master of Titles to grant to an individual or corporation a certificate of title covering the Crown lands unless clear and explicit language to that effect is found in the statute. Such clear and explicit language I do not find in The Act respecting Subdivisions.

To give to that Act the interpretation sought to be placed

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upon it by the company would render nugatory the latter part of sub-sec. 11 of sec. 80 of the Land Titles Act.

In view of the express provision of that sub-section, the Minister's consent is necessary to any action which would result in altering or wiping out the boundary line of a street or lane and, *a fortiori*, to the handing over of the property of the Crown. It is a matter entirely within the discretion of the Minister. How he should exercise that discretion is not within scope of our duty to consider. In all probability it would depend upon whether or not on the facts of each individual case it appeared equitable to him that he should give or withhold his consent. As the statute requires his consent, and that consent has not been obtained, the Master of Titles was right in refusing the application.

The appeal should be dismissed.

Appeal dismissed.

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TOWNSHIP OF SOUTHWOLD v. WALKER.

TOWNSHIP OF SOUTHWOLD v. GOSNELL.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Latchford and Middleton, JJ., and Ferguson, J.A. October 31, 1919.

HIGHWAY (§ IV A—151)—NONREPAIR—STATUTORY OBLIGATION OF TOWNSHIP—MUNICIPAL ACT, SEC. 460—INJURY TO MOTORISTS—LIABILITY.

A municipal corporation is not liable for damages under sec. 460 of the Municipal Act, when the particular highway in question is kept in such a reasonable state of repair that those requiring to use it may do so, with ordinary care, in safety.

[*Raymond* v. *Tp. of Bosanquet* (1919), 47 D.L.R. 551, followed; *Foley* v. *Tp. of East Flamborough*, (1898), 29 O.R. 139, referred to.]

Statement.

APPEAL by defendants from the judgments of Masten, J., in an action for damages. Reversed.

The judgments appealed from are as follows:—The plaintiff in the first action is a stenographer, living in the city of London, and the accident happened within the confines of the township of Southwold, under the jurisdiction of the defendant corporation. On the 14th October, 1918, the plaintiff was an occupant of an automobile passing over a highway in the township. In rounding a curve, the motor, though going at a very moderate rate of speed, in daylight, swerved slightly to the left off the *via trita*, and, return-

ing to the track, got slightly too far to the right. At this point there was an embankment 14 feet high, and the road was very narrow, while the soil at the side of the beaten track was sandy and loose. When the car swerved to the right, the soil gave way, it became impossible to recover the *via trita*, and the car tipped over the embankment; the plaintiff was thrown out and sustained injury. She alleges that the accident happened in consequence of the failure of the defendants to perform their statutory duty to maintain the highway in a proper and reasonable state of repair, and also alleges misfeasance on the part of the defendants in constructing and maintaining this highway (not being an original road allowance) as it was constructed and maintained at the point where the accident happened. The defendants, on the other hand, allege that the highway was in a reasonable state of repair, having regard to the locality, the limited extent to which it was used, and to the requirements of traffic in that vicinity. This is the main issue, and upon it I am of opinion that the defendants have failed to fulfill the statutory obligation imposed upon them.

I will only add that I deliberately express my finding in this general way, and decline to indicate in what precise manner the defendants ought to proceed in order to put the highway in proper condition.

Counsel for the plaintiff placed her case largely upon the footing of the danger arising from the curve in the road which here exists, and (as appears from the sketches filed as exhibits) on the footing that the dangerous spot at which the accident occurred was screened by a growth of underbrush and bushes from the view of a traveller proceeding in a northerly direction, also on the footing that a warning sign and posts and railings should have been placed on the highway.

I am not particularly impressed with the view that the inability to see from a distance the danger of the place where the accident occurred has a bearing in the present case, because Miss Gosnell, who was driving the car, had recently been over the road some three or four times, and knew its condition. It may be that posts and a railing might have obviated the accident, but there is no satisfactory evidence that any ordinary post and railing would

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have prevented it, or would have sustained the weight of the car. Notwithstanding these considerations, I am clearly of opinion that the highway was not maintained in a proper condition for the traffic that existed.

The *locus in quo* was a fill over a gully, the portion of the road which could be travelled was excessively narrow, the soil at the side was loose and sandy, the slope at the right hand side was 51 degrees, and the perpendicular distance to the bottom 14 feet. While traffic on this highway may not have been as extensive as in some other parts of the county, it was substantial, and the highway was customarily used by automobiles as well as by horse-drawn vehicles of all types. It may be that the highway, which was originally constructed more than 40 years ago, was sufficient and proper for the requirements of the then existing traffic; but it has undoubtedly become the duty of municipal authorities to take cognizance of the fact that many of our highways must now be rendered fit for the passage of motor-traffic, which has become a regular and recognised method of transportation, not merely in cities, but throughout the country. The fact that no accident had occurred during the many years that the road had been in use must be set off against the fact that in the present case we have a moderately light car (5-passenger, weighing about 2,000 pounds), driven in daylight by a driver of 5 years' experience, much of it with this very car, driven at a slow pace (from 6 to 10 miles an hour), without any excitement or any cause for difficulty arising, and without any suggested lack of attention. Under these circumstances, the car having gone off the beaten track a very short distance, it became impossible to regain its course owing to the narrowness of the road and the yielding nature of the soil; and the car slid down the embankment and overturned. Without proceeding further into details, it is sufficient for me to say that I find that there was a breach of the statutory duty on the part of the defendants, and that this was the cause of the accident.

It only remains to consider the amount of the damages. Without discussing them in detail, but after having given them the most careful and anxious consideration of which I am capable, I fix them at $500, which includes the medical fees and all other loss and damage. Costs follow the event.

The circumstances with regard to one issue, viz., the breach

of statutory duty, are the same in the second action as in the first, which I have just determined, and I need not repeat here what I have said in that case. Even if there were contributory negligence on the part of the driver, Miss Gosnell, as to which I express no opinion whatever, the plaintiff is not affected by it.

An occupant of a motor-vehicle, who has no right of control over the driver and exercises no control over him, is not chargeable with the negligence of such driver: *Foley* v. *Township of East Flamborough* (1899), 26 A.R. (Ont.) 43; *Mills* v. *Armstrong* (1888), 13 App. Cas. 1; Berry on Automobiles, 2nd ed., sec. 318, note 1.

The fact that the occupant and driver of a motor vehicle are closely related and members of the same family, does not affect the rule that the driver's negligence is not imputable to the occupant: *Gaffney* v. *City of Dixon* (1910), 157 Ill. App. 589; *Henry* v. *Epstein* (1912), 53 Ind. App. 265; *Parmenter* v. *McDougall* (1916), 156 Pac. Repr. 460.

If the occupant has the right of control over the operation of the motor-vehicle and permits it to be negligently driven, he is chargeable with his negligent failure to exercise his right to require the driver to operate the car properly: *Bryant* v. *Pacific Electric R. Co.* (Cal., 1917), 164 Pac. Repr. 385.

Here the car was owned by the plaintiff, and he was the father of the driver and sitting beside her, but the occurrence was a sudden emergency, occupying no more than a second or two of time before the motor-vehicle was capsizing down the bank. In these circumstances, the plaintiff could have done no act to avert the accident. Had he attempted to intervene, it would only have disturbed the driver, who was distinctly competent. To do so might well have been harmful rather than helpful: *Clarke* v. *Connecticut Co.* (1910), 83 Conn. 219; *Wilson* v. *Puget Sound Electric Railway* (1909), 52 Wash. 522.

With respect to the damages, I fix them at $750, which sum includes medical fees and all other loss suffered by the plaintiff. Costs follow the event.

Shirley Denison, K.C., and *W. K. Cameron*, for the appellants.

O. L. Lewis, K.C., and *R. L. Gosnell*, for the plaintiffs, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—It is said that logic is not essential in law; but no one can reasonably deny that the more logically and consistently the law is administered the better it is: so too, it is

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said, no case decided upon its facts is a binding authority in any other case; and yet it must be that the more evenly the laws are administered the better their administration is: that contradictory and inconsistent verdicts and findings should be avoided as far as possible.

And, if so, the judgment appealed against should not stand because altogether inconsistent with the judgment of this Court in the latest like case considered in it: *Raymond* v. *Township of Bosanquet* (1919), 45 O.L.R. 28, 47 D.L.R. 551, and (1918) 43 O.L.R. 434.

The only substantial difference between this case and that, that I can see, is that this case is the stronger one for the defendants.

Each is the case of an abrupt turn into a narrower and more dangerous part of a highway; but in that case the turn was more abrupt and was immediately upon a narrow bridge, not made for the purposes of a highway, but for the purposes of access to a highway from one farm only: whilst in this case it was all a roadway which had always been a highway. In that case a previous accident had occurred, and there was considerable evidence as to difficulty and danger incurred by the sharpness of the turn into the narrowness of the bridge: in this case there was no evidence of that character—the contrary was well-proved. In that case there was evidence of complaints made and investigated: in this case it was proved that there were none. In that case the defendants, recognising the need of it, were about to widen the bridge: in this case no one saw any need for any change, and none was suggested until after the accident which gave rise to this action had happened. In that case there was much motor-car traffic over the road: in this very little. In that case the whole testimony, of those who knew, was that the approach to the bridge had been carefully and properly made, and the trial Judge gave credit to that testimony: in this case the weight of the evidence is that the accident was caused by the driver of the car turning too quickly and running over the bank; that she might and should have followed in the usual track of the traffic and have been quite safe.

The judgment of this Court in the case of *Raymond* v. *Township of Bosanquet* requires, therefore, if we are to be consistent, that I should say, as was said in it: that the accident was not due to the condition of the highway, but was due to some other cause for which the defendants are not liable.

Nothing, in my judgment, depends, in this case, on the defendants' duty to repair the highway, or the fact that the plaintiffs were being driven in an automobile: if the road were sufficient for vehicles of greater bulk and weight such as traction-engines, threshing machines, loads of hay and of wood, it was sufficient for this motor-car on this occasion. And I may add that it is common knowledge that in this Province most of the roads are single-track roads, generally with room enough for two teams to pass one another, but in many places too narrow, for a short distance, so that occasionally one may be obliged to wait while the other comes over the narrow part.

I would, accordingly, allow these appeals and dismiss these actions.

LATCHFORD, J.:—These appeals fall to be determined under sec. 460 (1) of the Municipal Act, R.S.O. 1914, ch. 192, which imposes on a municipality the obligation of keeping its every highway in repair, and in case of default renders it liable for all damages sustained by any person by reason of such default. Latchford, J.

Before liability can be held to attach, a plaintiff must establish two facts—that the highway was out of repair, and that that want of repair caused the damages sustained.

If it is permissible to paraphrase the admirable statement of the law made by Armour, C.J., in *Foley* v. *Township of East Flamborough* (1898), 29 O.R. 139, at p. 141, I would say that the requirement of the statute is not satisfied unless the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety.

It is clear upon the evidence that the highway on which the accident in these cases happened was out of repair at the culvert, where the bank had fallen in; but it is equally clear that the accident did not happen at that point, and the default of the municipality in that regard was not the cause of the damages sustained.

There was a sharp curve or elbow in the highway where it crossed a ravine, and the road was narrow. That it was but little travelled is manifest from the fact that the *via trita* was but 6 feet to 8 feet in width, cut through a sandy sod. Such unstable loads as hay and straw passed safely over it. Automobiles even—as many as three or four on busy days—passed around the curve in perfect safety except on the occasion of this accident.

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From a very careful perusal of all the evidence, I have reached the conclusion that the accident was not attributable to the condition of the highway, but to another cause, to which it seems unnecessary to refer. The condition of the road was such that an automobile driven at the speed proper on a forced road in a thinly settled district, and having its steering gear properly adjusted, could travel along it in absolute safety.

The road was dangerous only in the sense that, the curve in it being sharp, care had to be taken that the momentum of a car should not be so great as to carry the car over the outer bank, and in the further sense in which thousands of miles of our roads are dangerous, that, being elevated above the adjoining sides, a run-off, however occasioned, invites disaster.

I would allow the appeals and dismiss the actions.

Middleton, J.

MIDDLETON, J.:—In these actions the plaintiffs claim damages for injuries sustained when an automobile driven by Miss Gosnell, the daughter of the plaintiff Gosnell, ran off an embankment upon a highway, known as the "Ross road," in the defendant township. This highway was originally laid out some 40 years ago. Approaching the point where the accident occurred, it descends upon a very easy grade, then turns and crosses a ravine at right angles. At this place the road is on an embankment, and crosses a culvert. The curve is not said to be unduly acute, and an automobile travelling at any reasonable rate of speed ought to have no difficulty in rounding the corner.

The allegation in the pleadings is that the road was not in a safe condition, or a proper or reasonable state of repair, because the roadway round the curve is very narrow, and composed of loose, sandy soil, and has a ditch or gully on either side, and there was no guard or protection or warning against accident.

It appears that the *via trita* consists merely of wheel-ruts through the naturally sandy soil, and between the ruts and at either side grass has overgrown the road. The top of the embankment carrying the road was some 12 or 14 feet in width.

As Miss Gosnell rounded the curve, her car left the wheel-ruts, going to the left; and, feeling that she might go over the embankment on that side, she turned to the right with a view of regaining the travelled ruts, but, turning too sharply, she crossed

the travelled ruts and went over the embankment upon the right hand side.

[Quotation from the judgment of MASTEN, J., *supra*.]

I find myself quite unable to accept the view of my Lord that this case is governed by the decision of the Divisional Court in *Raymond* v. *Township of Bosanquet*; and, were it not for the expression of the view of the learned Judge in the Court below and of my brother Ferguson as to the extent of the obligation of municipalities, I should have been content to rest my judgment entirely upon the view taken by my brother Latchford, that the cause of the accident was the negligence or misfortune of the driver of the automobile in question, and not the negligence of the municipality.

The duty of the municipality to repair is, as I understand it, to keep the road in such a state as to be fit and safe for ordinary traffic—as expressed by Lindley, J., in *Burgess* v. *Northwich Local Board* (1880), 6 Q.B.D. 264; or, as expressed by Blackburn, J., in *Regina* v. *Inhabitants of High Halden* (1859), 1 F. & F. 678, to keep it in such repair as to be reasonably passable for the ordinary traffic of the neighbourhood in all seasons of the year.

The principle indicated by Lord Atkinson in *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General*, [1915] A.C. 654, 665, is, I think, applicable, although that statement is quite apart from the question under discussion in that case: "It is the duty of the road authorities to keep their public highways in a state fit to accommodate the ordinary traffic which passes or may be expected to pass along them. As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change."

Although a road is constructed in such a manner as to accommodate the ordinary traffic at the time of its construction, it may well be that the nature of the traffic will so change that "ordinary traffic" may mean something essentially different from the traffic known or contemplated at the time of construction, and I quite agree that those responsible for the maintenance and upkeep of the public highways must face the changed conditions, and a time may well arise when it is obligatory to alter the highway to meet the changed conditions, but it must be borne in mind that the duty

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of making the change rests upon the municipality, and the municipal council must be, in the first place, the judge of the necessity of the suggested change, and the municipality cannot be rendered liable unless the Court is able to find that there was negligence on the part of the municipality.

This depends upon considerations widely different from those proper when the case is one of dilapidation.

No one can doubt that motor-vehicles have a right to use the existing highways, taking them as they find them, and it is equally clear that when motor-traffic becomes part of the ordinary traffic over an existing highway the municipal council must do what is necessary to meet the changed conditions, but the mere fact that a motor occasionally uses a particular highway is not enough to make it at once obligatory on the municipality to reconstruct the road. It is always a question of degree, to be determined upon consideration of many factors—the extent of the change necessary to be made, and its incidental expense, the proximity of other roads already fit for motor-traffic, the general condition of the roads throughout the municipality, the population and its distribution, and the general financial situation, are some of the matters to be considered.

In this particular case I have read the evidence more than once with anxiety, and I have come to the conclusion that no case has been made or has really been attempted to be made to shew that the municipality was in any way negligent. There is nothing that has led me to suppose, if called upon to exercise my own judgment, that the road should now be reconstructed: much less am I prepared to say that those whose duty it was to form an opinion in any way neglected their duty or acted improperly.

The statement of the Chief Justice of Ontario in *Davis* v. *Township of Usborne*, (1916), 36 O.L.R. 148, 28 D.L.R. 397, quoted by my brother Ferguson, is taken from a judgment dealing not with the right of the owner of a motor vehicle and the liability of the municipality to that owner, but with reference to the plaintiff, who was travelling in a buggy, and whose horse was frightened by an automobile when upon a narrow part of the highway, and who was thrown into the ditch. As I read the case, the statement is directed to the duty of the municipality with reference to the road there in question, and it is not to be taken as laying down any

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general principle of universal application: "The statutory duty imposed upon the respondents required them to make the road in question reasonably safe for the purposes of travel, and so safe from any additional danger incident to the use of it by motor-vehicles" (p. 400 of 28 D.L.R.) Read in any other sense, this statement, I think, goes beyond the rule laid down by Lord Atkinson.

The danger of placing a burden upon the municipality too heavy to be borne is forcibly pointed out in *Doherty* v. *Inhabitants of Ayer* (1908), 197 Mass. 241.

The decision of the Supreme Court of Canada in *Fafard* v. *City of Quebec*, (1917), 55 Can. S.C.R. 615, fully reported in 39 D.L.R. 717, is an effective answer to many of the suggestions urged on the part of the plaintiffs. The condition of this narrow and rural highway was obvious to any careful traveller. That a motor-car could be operated upon it with perfect safety was plain. By the exercise of sufficient skill and care the accident could have been avoided. "A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety" (39 D.L.R. at p. 718).

I should have had more hesitation in reversing the judgment of the trial Judge if I felt that he had dealt with what I deem to be the real question involved. He seems to have thought there was a legal obligation resting upon the defendants to make the highway fit for motors.

Ferguson, J.A.

FERGUSON, J.A. (dissenting):—I am unfortunately unable to agree with the conclusions of my Lord the Chief Justice and my brother Latchford, whose opinions I have had the benefit of perusing.

After a careful perusal of the evidence, I am of the opinion that there is ample evidence to sustain the finding of the learned trial Judge, that the accident occurred because, without negligence on the part of the driver of the car, "the car having gone off the beaten track a very short distance, it became impossible to regain its course, owing to the narrowness of the road, and the yielding nature of the soil, and the car slid down the embankment and overturned."

While I do not say that counsel for the appellants did not, on the argument, dispute the correctness of that finding, my

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recollection and notes of the argument are that they urged, as their main ground of appeal, the contention that the appellants' duty was fulfilled if they had provided a road reasonably safe for the purpose of being travelled upon before the advent of motor-cars; that there was nothing in the law of the Province of Ontario which required the appellants to make their road reasonably safe for motor travel—in other words, that a municipality is only obliged to construct a road to meet the ordinary traffic at the time of construction, and to keep it in repair to meet that purpose. That I do not think is the law.

Lord Atkinson in *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General*, [1915] A.C. at p. 665, states their obligations in these words:—

"To keep their public highways in a state fit to accommodate the ordinary traffic which passes or which may be expected to pass along them. As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change."

This statement of the law is quoted with approval in *Weston-super-Mare Urban District Council* v. *Henry Butt and Co. Limited* (1919), 35 Times L.R. 345, at p. 346, [1919] 2 Ch. 1, at p. 8.

Meredith, C.J.O., delivering the opinion of the Appellate Division in *Davis* v. *Township of Usborne*, 36 O.L.R. at p. 151, 28 D.L.R. 397, at p. 400, states the obligation in these words: "The statutory duty imposed upon the respondents required them to make the road in question reasonably safe for the purposes of travel, and so safe from any additional danger incident to the use of it by motor-vehicles."

These quotations seem to me to state the law accurately, subject to the qualification that a municipality is not, I think, required to keep a highway in a back township that is little used in the same high state of maintenance and repair that it would be required to keep a well-travelled way in a city or town.

I agree with what is said by Armour, C.J., in *Foley* v. *Township of East Flamborough*, 29 O.R. 139, at p. 141:—

"The word 'repair,' as used in the Municipal Act, has been held to be a relative term; and to determine whether a particular road is or is not in repair, within the meaning of the Act, regard must be had to the locality in which the road is situated, whether

in a city, town, village, or township, and if in the latter, to the situation of the road therein, whether required to be used by many or by few, to how long the township has been settled, to how long the particular road has been opened for travel, to the number of roads to be kept in repair by the township, to the means at its disposal for that purpose, and to the requirement of the public using the road . . . And I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied."

Being of the opinion that this highway was unsafe for motor-traffic, and that the unsafe condition was the cause of the accident, and consequently that the defendants have not in this highway sufficiently provided for motor-traffic, it seems to me the question for our consideration is, whether or not, under the circumstances adduced in evidence, motor-traffic on the road in question was part of the *ordinary traffic* which the defendants should have known or expected and provided for.

The evidence is that the highway in question had frequently and for some considerable time been travelled by motor-cars. The plaintiff's daughter, who was driving when the accident occurred, had been over it before in a motor-car. Dr. Turner had driven over it many times. He says (pp. 102-104):—

"Q. Did you ever drive a car over this road where the accident happened? A. Yes, many times.

"Q. Back and forth, from time to time? You never thought of going down in this hole to see what was down there, did you? A. No.

"Q. You went back and forward around it many times with your car? A. Yes.

"Mr. Lewis: I thought your case was there were no cars ever went over this road.

"Mr. Cameron: We are finding out how many get over safely.

"Q. And you have gone over it both ways back and forward with your car? A. Yes.

"Q. What car do you drive? A. Well, I drove a Dodge for five years.

"Q. And you managed to get the Dodge round there all right on your numerous trips? A. Yes.

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"Q. They were numerous, were they not, Doctor? A. Yes, quite often. . . .

"Q. The traffic on the road would indicate that, and you are pretty familiar with it. Do you mean to tell me that it is not a pretty dangerous curve to go round? A. I could not tell you that.

"His Lordship: He said he did not go that way if he could help it.

"Mr. Lewis: Why didn't you go that way if you could help it? A. There are hills on the road.

"Q. Will you say that is not a dangerous turn in that road, due to the width of the road there and the trees that are around there? A. I would call it a dangerous turn.

"Mr. Cameron: Was it the turn on the road, or the hills on the road, you preferred the other for? A. I was not afraid of the turn myself: I knew the road.

"Q. On that road? A. I knew the road."

The witness Beecroft says that cars are driven on the road. The witness A. J. Plain lives in the neighbourhood, and says he has frequently driven his car around this corner of the road. J. A. Campbell has driven his car over this road frequently, and says that numerous cars are driven over the road. Albert J. Friar gives like evidence. In fact there is, if believed, abundant evidence of the continued and frequent use of this road for motor-traffic, such evidence as, I think, entitles us to hold that motor-traffic was part of the ordinary traffic which passed over this road, and which the municipality should have provided for.

I have not considered it necessary to set out the parts of the evidence on which I rely in coming to the conclusion that the road was unsafe for motor-traffic. There is evidence both ways; but, on the whole evidence, I agree with the trial Judge that it was not reasonably safe, and that its unsafe condition, and not negligence on the part of the driver, was the cause of the accident.

I would dismiss both appeals with costs.

Appeals allowed.

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Judicial Committee of the Privy Council, Viscount Haldane, Lords Buckmaster and Dunedin, and Duff, J. October 23, 1919.

CONSTITUTIONAL LAW (§ II A—154)—SEPARATE SCHOOLS ACT—APPOINTMENT OF COMMISSION—EXPENDITURES—AUTHORIZATION OF SAME BY STATUTE—ULTRA VIRES.

The Ontario Statute, 7 Geo. V. (1917), ch. 60, authorizing and approving of certain expenditures made by a commission appointed to administer the Separate Schools in Ottawa is not *ultra vires*. The expenditures so made are binding on the Board of Trustees of these schools.

Statement.

APPEAL from the Supreme Court of Ontario (Appellate Division) 45 D.L.R. 218. Affirmed.

The judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN:—The present case is what it is to be hoped is the last chapter of the history of the unfortunate disagreement between the Board of the Roman Catholic Schools and the Educational Authority of the City of Ottawa. This matter has already been before this Board in the two cases of *Ottawa Separate School Trustees* v. *Mackell*, 32 D.L.R. 1, [1917] A.C. 62, and *Ottawa Separate School Trustees* v. *City of Ottawa*, 32 D.L.R. 10, [1917] A.C. 76. It is unnecessary to state on this occasion the system under which the Catholic schools are maintained, as that is set out at length in those judgments. It is sufficient to say that it was decided in the former case that a regulation of the Education Authority prescribing the use of English in the schools was not *ultra vires* as infringing the provision of sub-sec. 1 of sec. 93 of the B.N.A. Act; while in the latter it was held that an Act of the Legislature of Ontario appointing a Commission to take over the schools and supersede the Board was *ultra vires* as infringing the said provision.

The Commission was in occupation of the schools theretofore managed by the appellants from July 26, 1915, till November following, when, upon the above second-mentioned judgment being pronounced, they gave up possession to the appellants. During the régime of the Commission the schools were carried on by them. In order to meet the expenses of the schools the Commission, besides levying a half-year's rate, took a sum of $97,000 odd standing at the credit of the appellants on an account in their name with the Quebec Bank. They also incurred a liability of $71,000 odd to the Bank of Ottawa.

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These actions were raised by the appellants against the Quebec Bank, the Bank of Ottawa and certain individual members of the Commission. There was claimed against the Quebec Bank the said sum of $97,000 odd, against the Bank of Ottawa a sum of $37,000 odd which had been transferred to it out of the $97,000 and kept as a sinking fund to meet certain debentures issued by the Board, and against the Commissioners the sum of $84,000 odd, being the produce of the half-year's rate above referred to. These actions were consolidated. Pending these actions the Legislature of Ontario passed the statute of 7 Geo. V., 1917, ch. 60, which is as follows:—

Whereas pursuant to an Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa passed in the fifth year of the reign of His Majesty, King George V., ch. 45, the Minister of Education with the approval of the Lieutenant-Governor in Council on July 20, 1915, appointed a Commission consisting of Denis Murphy, now deceased, Thomas D'Arcy McGee and Arthur Charbonneau herein referred to as "the Commissioners" to conduct and manage the Roman Catholic Separate Schools of the City of Ottawa, which said Act has been declared to be *ultra vires*, and whereas the Board of Trustees of the said Separate Schools prior to the appointment of the said Commission, had neglected and failed to open, keep open, maintain and conduct the said schools according to law and to provide qualified teachers therefor, had threatened at various times to close the said schools and had neglected and refused to discharge and perform the duties imposed upon it by law to the loss and damage of the supporters of the said schools and to the serious prejudice of the children entitled to attend the same; and whereas by reason of the neglect and default of the Board as aforesaid it was necessary to provide special means for the education of the children entitled to attend the said schools until the Board should be willing to perform its lawful duties in respect to said schools, and the Commissioners were appointed for that purpose; and whereas the Commissioners entered into possession of the school premises and property on July 26, 1915, and thereafter maintained and conducted the said schools continuously until the said Act was declared to be *ultra vires*, during the whole of which time the said Board was unwilling to conduct the said schools according to law; and whereas the Commissioners in carrying on said schools and meeting obligations of the Board disbursed $68,873.43 which at the date of their appointment stood to the credit of the Board in the Quebec Bank at Ottawa, the further sum of $84,156.04 received out of Court pursuant to an Order of the Appellate Division of the Supreme Court of Ontario, dated April 3, 1916, and the further sum of $71,944.08 received from other sources, all of which sums of money were by law applicable to the maintenance and conduct of the said schools; and the Commissioners in the maintenance, conduct and management of the said schools, also incurred a liability to the Bank of Ottawa for $71,891.16 and interest thereon which still remains unpaid; and whereas the Board has commenced actions against the Quebec Bank, the Bank of Ottawa and the Commissioners to recover the moneys so disbursed as aforesaid and has refused

to assume the said liability to the Bank of Ottawa and it is desirable to declare the rights of the parties;

Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. It is declared that the Commissioners disbursed the monies and incurred the liability herein recited for payments and expenditures which were necessary to maintain and carry on the said schools and which should have been made by the Board in the proper conduct and management of the said schools but for its wrongful neglect and default as aforesaid.

2. It is further declared that the said payments and expenditures shall be deemed for all purposes to have been made by the Commissioners for and on behalf and at the request of the Board and that the Commissioners are entitled to indemnity from the Board in respect thereof.

3. It is further declared that the said liability of $71,891.16 and interest thereon to the Bank of Ottawa, subject to the rights of third parties, if any, is a debt of the Board to the said bank and that the bank is entitled to set off the same against any other monies of the Board in its hands.

4. In default of payment of the said liability by the Board the same may be paid to the bank out of the Consolidated Revenue Fund of the Province and thereafter the said sum with proper interest thereon shall be a debt to His Majesty and may be recovered from the Board in any action brought for that purpose.

5. This Act may be pleaded as a defence to any action now pending or that may hereafter be brought by the Board against any person or Corporation in respect of any of the monies received and disbursed by the Commission as aforesaid.

6. The Order in Council made on August 26, 1915, which is set out in the Schedule herewith, is confirmed and declared to be and to have been from the said date, legal, valid and binding, and the Commissioners shall be indemnified by the Province from and against all liability for indebtedness incurred by them or damages recovered against them by reason of any of said payments and expenditures by them as aforesaid or in consequence of anything done or suffered by them or any of them while acting as such Commissioners.

SCHEDULE.

Copy of an Order-in-Council approved by His Honour, the Lieutenant-Governor, August 26, 1915.

The Committee of Council have had under consideration the report of the Honourable G. H. Ferguson, Acting Minister of Education, dated August 19, 1915, wherein he states that in view of the pending litigation in which the Roman Catholic Separate School Board for the City of Ottawa is plaintiff and the Quebec Bank a party defendant, the Quebec Bank has declined to pay to the Ottawa Separate School Commission the monies heretofore, now or hereafter standing to the credit of the said Board in the said bank without a bond of indemnity from the Province in that behalf, and that there is urgent need of the monies in question for the purpose of the Commission and of the separate schools under their control and management, and it is advisable to comply with the request of the bank. The Minister, therefore, recommends that he be authorised and empowered as Acting Minister of Education on behalf of the Province to execute and deliver with the seal of the Department of Education to the Quebec Bank a bond indemnifying

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and saving harmless the bank from all loss, costs or damage the bank may at any time suffer or sustain on account of or by reason of the payment or transfer at any time and from time to time by the said bank to the Ottawa Separate School Commission of any monies heretofore, now or hereafter standing to the credit of the Roman Catholic Separate School Board for the City of Ottawa in the books of the said bank or that otherwise but for the appointment of the said Commission would be the property of or payable to the said Board, or of any loans, advances, overdrafts or credits at any time or from time to time that may be made or given by the bank to the Commission, or of anything otherwise lawfully relating to the premises, the bond to be in such penal sum and in such form and to contain such provisions as may be satisfactory to the said bank and to the counsel for the Department of Education.

The Committee concur in the recommendation of the Minister and advise that the same be acted on.

Certified, J. LONSDALE CAPREOL, Clerk, Executive Council.

The Att'y-Gen'l for Ontario was allowed to intervene as a defendant. The consolidated cases were tried by Clute, J., who pronounced judgment in favour of the appellants, but under deduction so far as the Commissioners were concerned of whatever sums they could shew they had properly expended on the conduct of the schools while under their charge. The Appellate Court of Ontario unanimously overruled this judgment and dismissed the actions. Appeal has now been taken to this Board.

The claim against the Quebec Bank would be obviously good at common law. The bank was the debtor of the appellants, and it would be no defence to say that they had paid the money to a Commission whose authority was based on an Act of the Provincial Legislature which had been declared to be *ultra vires*. The real defence to the action lies in the later statute quoted above. It is equally clear that this statute by its terms provides a complete defence. The only real question is therefore whether that statute also is *ultra vires*. It can only so be held if it contravenes the exception to sub-sec. 1 of sec. 93 of the B.N.A. Act, or, in other words, if it prejudicially affects a right or privilege of the appellants. For indubitably in other respects it is a measure dealing with civil rights and as such within the domain of the Provincial Legislature.

It was frankly admitted by the counsel for the appellants that the money spent and the liability incurred was spent and incurred in the carrying on of the schools in a proper manner; that is to say, was not in any way expended on purposes other than the

carrying on of the schools. The appellants cannot say that the money, if they had had it, would not have been spent on the same purposes; all that they can say is that they would have had the control and spending of it. The right which has got to be prejudicially affected is the right to maintain separate schools under the Education Acts. Now it was pointed out by the Lord Chancellor in deciding the *Ottawa Corporation* case that there might be cases where a right might be affected without being prejudicially affected. It will at once be apparent what a contrast there is between the legislation which was the subject of that decision and that in the present case. There the right of the appellants to conduct their schools was taken away for an indefinite period. Their restoration did not depend on themselves, but could only be given them by others. They are now restored—that legislation having been held to be *ultra vires*—but their extrusion from management is a matter of past history which no legislation can obliterate. Nor does the present legislation seek to do so. It is possible to criticise the words used, but the gist of the statute is unmistakable. All it does is to declare that the payments made while the schools were being carried on by others than the appellants are good payments against the funds which were only raised and only available for the conduct of the said schools. If the contention of the appellants were given effect to —for they argued that the deduction allowed by Clute, J., was unwarranted—the result would be that the schools would have been carried on by funds provided gratuitously by the banks or by the individual Commissioners, the appellants would be in the possession of funds which had been destined for the carrying on of the schools in the past, and which as they could not now be so applied, would form a gratuitous bonus in their hands. Their Lordships therefore agree with the unanimous judgment of the Supreme Court that the statute is not *ultra vires* and that the actions fall to be dismissed. They fail to see that the right of the appellants has been in any way prejudicially affected by the statute. The only way in which they were prejudicially affected was by the action of the former statute, which extruded them from the management of the schools. Had they been left in management they would necessarily have spent this very money for the same purposes. It cannot be said to create a prejudice

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to affirm that the money was rightly spent for the purposes for which it was destined. The same ratio applies to a liability incurred by others for an equally proper purpose.

It may be as well to say a word as to the position of the $37,000 held by the Bank of Ottawa. On the appellants paying the debt incurred to the Bank of Ottawa of $71,000 odd, the said sum of $37,000 will, of course, be made available to the appellants for the purpose for which it was set aside, viz., the provision of a sinking fund for certain debentures.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeals.

The appellants will pay the respondents' costs. The Att'y-Gen'l of Ontario will bear his own costs.

Appeal dismissed.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 10, 1919.

CARRIERS (§ II G—96)—STREET CAR APPROACHING RAILWAY CROSSING—NEGLIGENCE OF MOTORMAN IN CROSSING TRACK—COLLISION WITH WORK TRAIN—INJURY TO PASSENGER FALLING OFF CAR—DAMAGES.

An electric railway company which by the inexcusable negligence and breach of rules of one of its motormen, places the passengers of a car in a position of great peril from imminent danger of collision with a railway work train, is liable in damages for the death of one of the passengers who becoming terrified jumps or falls off the car and is killed by the train.

The railroad company whose employees could have prevented the accident by prompt action, are equally liable and cannot plead as an excuse from such liability, the fact that, but for the negligence of the Electric Railway Company, the accident would not have taken place.

[*Bartlett* v. *Winnipeg Electric R. Co.* (1918), 43 D.L.R. 326, reversed in part.]

Statement.

APPEAL from a decision of the Court of Appeal for Manitoba, (1918), 43 D.L.R. 326, 29 Man. L.R. 91, affirming the judgment at the trial against the Winnipeg Electric Co. and in favour of the C.N.R. Co. Reversed.

O. H. Clarke, K.C., for the respondent.

Idington, J.

IDINGTON, J. (dissenting):—This is a remarkable appeal. The appellant, the Winnipeg Electric R. Co., and the respondent, the Canadian Northern R. Co., which I shall for brevity's sake hereinafter designate respectively the "Electric Railway" and "Steam Railway," were sued for damages arising from the death of the wife

of the respondent administrator, alleged herein to have been caused by the negligence of both or one of the said railway companies at a point where their respective tracks cross each other in Winnipeg.

The declarations of the plaintiff therein alleged sufficient to constitute grounds of action which might render both or only one of said companies liable.

And the defendants each by its pleading not only denied the allegations made in the declaration as against itself, but also alleged contributory negligence on the part of the deceased.

The plaintiff, in reply, denied each of these allegations of contributory negligence and joined issue.

The defendants each agreed with plaintiff before the trial that he was entitled to a verdict for $6,000 and $300 costs and reduced this to writing. The respective counsel for plaintiff and defendants at the opening of the trial announced the fact of settlement and the disposition of the case made thereby, and that there was nothing to be tried except this subsidiary question of whether or not either defendant was solely to blame or they were both liable.

No amendment of pleadings was made and nothing definitely settled in that regard.

Inasmuch as each of the companies in its pleading had carefully abstained from alleging anything against the other, how can we hold this an appealable case?

If the case had proceeded in the usual way of the plaintiff proving, or attempting to prove, his case, then there might have arisen incidentally thereto ample grounds for adducing evidence, which would have disposed of such an incidental issue, but how there can be said to have been a trial of that sort of case made, I am unable to see.

To make matters worse, the settlement agreement, which one of counsel said would be filed, is neither printed in the case presented to us, nor to be found in the record.

The novelty and difficulty of such a situation seems to have occurred to the trial Judge and respective counsel for each of the companies.

The following seems to cover all that there is in the final result of the discussion:—

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Mr. Clarke: It would be better for us to have this understanding, that neither party be bound by the pleadings in this case, because practically a new issue has arisen now. *His Lordship:* I do not see why you should not leave the pleadings as they stand, subject to any amendments you may suggest because I cannot try the case without any pleadings. *Mr. Clarke:* Then we will go on, it being understood that neither party will hold the other down to the pleadings. *Mr. Guy:* I would very much prefer that the Canadian Northern Railway Company put in their evidence first. When the question of the settlement was discussed, there was a question as to which one would put in his evidence first. *Mr. Clarke:* I was not present then. *Mr. Guy:* And the question was left open. *His Lordship:* Is it material? You are both defendants. *Mr. Guy:* We were not in a position to have an examination for discovery, and in order for me to proceed, it may be necessary for me to prove my case by calling employees of the C.N.R. Co., and I do not want to do that and be bound by their evidence. *His Lordship:* They are in the same position. *Mr. Guy:* Yes, but I don't think their case is affected in the same way as our case is. *His Lordship:* I think you had better proceed with the evidence and do the best you can. It is a very unusual kind of a case, and we are dealing with it in an unusual manner.

So far as I can find there was no amendment of any kind to the record of pleadings.

The formal judgment gave the plaintiff a recovery of $6,300 against the Winnipeg Electric Co., and then dismissed the action as against the C.N.R. Co., and awarded the latter as against the former its costs of this action.

I regret the actual situation I have thus outlined was not presented to us or present to my mind, intent on hearing what counsel had to say.

I am so much impressed with the nature of such a trial of an issue not raised by the pleadings being one by a Court chosen by the parties as *persona designata* and hence non-appealable, that if I could come to the conclusion that both Courts below upon what was tried have erred in mere concurrent finding of the facts, I should have desired to hear argument on the question before so determining.

I have considered all that was argued as to the facts and relevant law.

I am, after reading not only all that we are referred to, but also much more of the evidence, unable to see wherein the Courts below can properly and judicially be now held to have erred.

As quite natural in such an extraordinary and shocking exhibition of foolhardy conduct on the part of the man in charge of the car that ventured to cross under the circumstances presented,

the witnesses were liable from mere excitement, and haste due thereto, to give inaccurate and unreliable estimates of distances.

One can pick out, if he discards all else, quite enough in the evidence to constitute grounds for holding the steam railway company not only liable, but also solely liable.

Any such conclusion would seem to disregard the impressions of fact which a great many people, no doubt better placed than we are to appreciate the local situation and hence be probably seized of the right view of the facts, would receive.

It appears on the case before us that several duly constituted authorities had acted in a way quite contrary to what one would expect if the steam railway company was alone to blame.

And then we have in accord with the action of these other authorities a view taken by the trial Judge of the facts presented to him at the trial for which there is ample ground and that maintained by a Court of Appeal consisting of three Judges, all from local knowledge of the situation having an advantage over us, unanimously concurring in the finding.

I cannot, without anything conclusive and uncontradicted to guide me, save in one particular, which I am about to refer to, reverse such a finding, which ought not to be controlled any more than the verdict of a jury, by us here unless we can find undisputed facts and circumstances which beyond reasonable doubt would demonstrate error on the part of those making such concurrent findings.

The fact that appellant's argument is made only to turn upon its view of a very narrow margin of time and space, ascertained from guesses of fact, makes one pause.

I have been unable to find from which side of the electric car the deceased jumped or was thrown, and yet that fact alone, if I apply experience and common sense, would make a possible difference in what we are asked to deal with of 10 or 12 feet.

Nobody at the trial, I venture to think, deemed that the issue could reasonably be decided upon a calculation or finding of such a narrow nature as it is to be herein unless upon our holding that every car in the steam railway train must, by law, be linked up by the air brakes and the use thereof applied with the utmost celerity on pain of those applying them being possibly held liable to conviction of a charge of manslaughter in such events as presented herein.

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As to the engineer acting upon the signal given him by his brakeman, I accept his story and as between two statements prefer his to that of the brakeman who was placed in a distressing situation, which probably accounts for the evident doubts, inaccuracies and inconsistencies that exist in his evidence.

The only conflict pressed herein was whether or not the engineer acted on the first emergency signal given, or the second a few seconds later. The engineer swears he was looking and acted promptly. He knows probably better than a brakeman what time is necessarily lost in the operation.

The sec. 264, sub-sec. 3, of the Railway Act, R.S.C. 1906, ch. 37, then in force, reads as follows:—

> 3. There shall also be such a number of cars in every train equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed, or bring the train to a stop in the quickest and best manner possible, without requiring brakemen to use the common hand brake for that purpose.

Then follows sub-sec. 4, which renders it imperative to have, in the case of passenger trains, a continuous system of brakes applied to the whole train capable of being applied by engineer or brakeman instantly.

It seems the connection in the case in question was only between the engine and tender which those in charge had deemed sufficient for the service which was to be performed.

The witnesses explain why, in the shunting operations, on which they had been engaged, it was deemed impracticable to have brakes on each car to be shunted connected with the tender.

There is a discretion evidently permissible under the Act in that regard. And the weight of the evidence clearly is that so far as concerned the train in question running at the slow rate it was, the said method adopted herein of bringing into effect the air brake was usually sufficient.

The test of highest possible efficiency and results known to be got therefrom, as testified to by an expert, does not seem to me a fair one or such as the statute imperatively requires in such circumstances as in question.

Each case must be determined upon the circumstances in question as to how far beyond the connection of the air brake with the tender its connection is to be extended and to be made with the other cars, and may be reasonably necessary.

The Courts below have held that the connection adopted was in this case sufficient for the required efficient service being performed with such a train. I am unable to say they erred.

It is to be observed that, though citing the decision in the case of *Muma* v. *Canadian Pacific R. Co.* (1907), 14 O.L.R. 147, the Court of Appeal does not rest upon that, but upon the result of applying the facts in question herein.

I may point out that the decision in the *Muma* case, *supra*, proceeded upon the Railway Act when in this regard different from that now in question. The Act has been so amended as to make the law in question much clearer.

The rigid enforcement of the statute, or any other statute designed to protect life and property, I hold to be imperative. But reason must be applied and when it comes to a minute calculation of how many, or few, feet or seconds are involved in the application of the law we must decide reasonably.

Fifteen seconds was the guess of one man as to the time involved and so many as 15 feet in falling short of safety in performance is the guess of appellant's argument, and all dependent on the guesses of naturally excited people, unless as to one man who claims he was so cool and collected that he sat still and could by the eye measure, when looking from a moving car crossing at right angles the path of the moving train, its exact distance from his car.

The primary gross negligence of the appellant as the *causa causans* of that which is complained of, and in the circumstances was the natural consequence, is unrelieved by the interposition of independent responsible human action, and is all too obvious to be swept aside by any such guesses if the appellant is not to be allowed to escape having justice meted out to it.

The same proof of reasoning would lead to absolving both companies on the ground they each set up of contributory negligence, for, as I may repeat, why could not the unfortunate ladies have picked themselves up in 4 or 5 of these 15 seconds of time which they had?

For aught we know their necks were broken and they dead already as the result of appellant's car jerking them off.

And if we had to decide this case as against the steam railway

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we would have to ascertain exactly the measure of damages each company was responsible for.

There is no room for joint liability.

Their acts were distinctly separate and each responsible for the consequences of its own conduct and dependent in part upon the application of distinctly different principles.

I need not elaborate this and illustrate how the law has stood at least ever since the case of *Davies* v. *Mann* (1842), 10 M. & W. 546, was so long ago decided.

The Court below does not go further than to find upon the peculiar circumstances in this case that there was no negligence of respondent which led to the accident.

On that view of facts I am not able to reverse.

This case was one for the application of sound sense and not fine spun theories of what might have been, and I am sure the former was applied and guided the Courts below.

Hence I would dismiss the appeal with costs.

Duff, J.

DUFF, J.:—This litigation arises out of a most regrettable accident in which the deceased wife of the plaintiff, Andrew Jackson Bartlett, was run over by a train of the respondent company and killed. Mrs. Bartlett was a passenger on a car of the Winnipeg Electric Co. on Portage Avenue, which crosses the C.N.R. track She and two other passengers were thrown from the car on to the railway track in front of a freight train, the front truck of which passed over Mrs. Bartlett's body. The surviving husband sued both companies, charging both with negligence. The claim was settled, but the litigation proceeded for the purpose of determining whether both or only one, and, if so which, of the companies was properly chargeable with the negligence that was the real cause of the accident. On the facts the negligence of the electric railway company was not seriously open to dispute. Galt, J., who tried the action, and the Court of Appeal from Manitoba unanimously acquitted the railway company of negligence.

Negligence or no negligence is, of course, a question of fact, and the two Courts have pronounced in favour of the railway company upon that issue. The judgment is therefore one which ought not to be disturbed unless the appellant has clearly established error in some specific matter and error of such importance as to vitiate the conclusion of the Courts below. Careful judg-

ments were delivered by Galt, J., and by the Chief Justice of Manitoba in the Court of Appeal. I have examined these judgments closely, and, with very great respect, I am unable to escape the conclusion that they cannot be sustained.

Portage Avenue is a much used thoroughfare, traversed as already mentioned by an electric car line. As the C.N.R. train which was made up of a number of cars preceding and a number of cars following a locomotive approached this street, it was the duty of those in charge of the train to exercise great caution and particularly to be on the alert for the perception of any dangerous situation which might arise as the train reached the street car track. There is a rule of the railway company governing this crossing requiring trains to stop at least 100 feet before reaching the Winnipeg Electric Co.'s tracks and requiring them not to proceed until a proper signal is received from the signalman or from one of the train crew "located in a proper position" on the crossing.

It is not very material for the purposes of this appeal whether this instruction does or does not strictly apply to a train of this character—which, it is alleged, was engaged in a shunting operation. The instruction is valuable evidence of the view taken by competent persons responsible for the working of trains approaching this crossing as to the kind of precaution necessary to obviate the risks incidental to the running of a train over it.

The grounds of Galt, J.'s judgment are indicated in the following passages quoted textually from his reasons:—

When it was about 75 or 100 ft. from the crossing, the motorman of the electric car, without having received any signal from the conductor, started his car to get across before the train arrived. As I have said, the situation was perfectly apparent, and some of the people in the car, seeing the freight car coming towards them, got alarmed and moved towards the door at the rear end of the car. Amongst these people were two ladies; one of them was Grace Jane Bartlett, wife of the plaintiff.

By the time the electric car reached the diamond crossing the freight train was perhaps within 30 or 40 ft. of the car. The evidence (to which I will allude more particularly hereafter) shewed that at this juncture the brakeman, who was stationed on the front freight car, shouted the motorman to get across. Whether the motorman heard him or not does not appear, but there is evidence that the car, which was already in motion, started forward with a jerk and the two ladies either stepped off hurriedly, or were thrown off the rear steps of the car and fell on the diamond crossing. The brakeman on the freight train had already given a violent signal to the engine-driver to stop, but the freight train was not completely stopped before the front

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truck of the freight car had run over the two ladies and inflicted such injuries upon them that they both died.

. . . . .

Then again it was argued that the steam railway was negligent, that the engineer did not apply his emergency brake to the engine soon enough. It is quite possible, and the evidence seems to indicate that the engineer missed the first violent signal given by the brakeman, but the engineer had no reason to expect such a signal and had every reason to suppose that the way was clear.

As I read the Railway Act and the rules and regulations applicable to these defendant companies, I should certainly say that at the time in question the steam railway had the right-of-way across Portage Avenue. Even if it had been otherwise, the action of the motorman of the electric car in approaching the crossing and then stopping operated as an invitation to the engineer of the freight train to continue on his course. The whole trouble was caused by the frantic haste of the motorman to get across the diamond before the freight train.

The opinion of the Judge that the train was about 75 or 100 ft. from the crossing is affirmed by the Court of Appeal and is fully supported by the evidence. It does not appear to be necessary for the purpose of deciding the appeal to discuss or to consider any of the earlier incidents. When the motorman was seen by the brakeman to be starting his car across the track, a situation full of grave risk arose if the train were not stopped. The brakeman must have realised this if his story is to be accepted, because he had already given a signal to stop the train, and he says that in doing so—although he had the rule in mind—he was also influenced by the fact that he had noticed a car approaching the crossing. Upon seeing the motorman start his car he immediately gave the more vigorous signal used to indicate to the locomotive engineer that an emergency had arisen requiring the instant stopping of the train. It matters little whether one accept the evidence of the brakeman or not, for if he acted as he says he did, he appears to have done his duty; if he did not, he was incurring a grave and quite unnecessary risk in not taking instant steps to stop the train upon perceiving that the motorman was about to cross the track. So also as regards the locomotive engineer (if the signal was given) it is of no consequence whether he observed the signal or did not observe it, it was his duty to be on the alert for signals and instantly to obey a signal to stop.

With great respect, I think these considerations are not met by the reasoning of the trial Judge or by that of the Court of Appeal.

The Judges of the Court of Appeal appear to have considered that a dangerous situation requiring special precautions arose for the first time when, in consequence of the violent jerk forward of the electric company's car, Mrs. Bartlett was thrown to the ground. That, with respect, appears to be a misconception of the position. The approach by a train of this character towards a much used street having on it a street car line in operation, was in itself a situation involving risk, and this, as I have already said, is recognized in the instruction mentioned above. It was a situation requiring in itself exceptional precautions, as the instruction shews. Add to that the fact that a street car was on the line approaching the point of intersection and you have a not inconsiderable increase of risk; a situation imperatively demanding that the precaution prescribed by the instruction, namely, of coming to a stop, should not be omitted; and, as I have already said, a situation full of grave possibilities arose and became apparent when the street car was seen to move forward across the track.

Mr. Clarke, in his concise and able factum, faces the difficulty thus:—

> The appellant's contention amounts to this, that when Cammell saw the street car start to move it should have occurred to him that some of the passengers might fall on the track in front of the train, and his duty to avoid the consequences of the appellant's neglect began then and not when the last dangerous situation actually arose. Admitting that it was the natural thing for passengers in such a critical situation to rush to the front or rear of the car, no one would presume that when jumping they would select the diamond—the only dangerous spot there was upon which to alight. But even assuming that the brakeman should have foreseen what actually took place, the appellants are not entitled to complain if Cammell, who was thrown into a state of excitement by their negligence, did not act in the most reasonable manner.

This extract from the respondent's factum puts very forcibly the point upon which the respondent company must rely in view of the findings of fact already referred to. These contentions are first open to the observation—although in the present state of the litigation the controversy has become one between the appellant company and the respondent company—that the decision of that controversy must be dictated by the answer given to the question whether the plaintiff had or had not a cause of action against the respondent company. And it is perhaps need-

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less to say that in passing upon that issue the conduct of the electric company's servants is not to be imputed to Mrs. Bartlett as her conduct; and, further, the situation, if it was critical and embarrassing, was brought about, at least in part, by the failure to bring the train to a stop conformably to the practice.

The substance of the contention is that the persons responsible for the train might reasonably, in the exercise of their judgment, assume, and act upon the assumption, that the car would clear the railway track before the train reached the point of intersection; and that in the circumstances there was no ground for apprehending that the passengers would leave or be thrown from the car and remain helpless on the track as the train approached them. The first observation to suggest itself is an important one. The onward motion of the train was not the result of the judgment of the brakeman that it was safe to proceed; on the contrary, he, as we have seen, took the opposite view. The second is virtually a repetition of what already has been said, namely, that once the electric car started forward the risk of the situation imperatively demanded that the train should be stopped. The fact that in the event the car did clear the track without injury is little to the purpose; failure of the mechanism might have brought it to a standstill before the track was passed. The duty of the respondent company was to take suitable measures to obviate the danger incurred by the passengers of the car of injury from the respondent company's train arising out of the situation, and the fact that the particular manner in which the injury did occur was one not naturally to be anticipated is really of no importance. See *Hill* v. *New River Co.* (1868), 9 B. & S. 303; *Clark* v. *Chambers* (1878), 3 Q.B.D. 327.

The obligation to take care, default in respect of which constituted the negligence charged, was an obligation due to the passengers in the car, and that being so, the respondent company is responsible for harm suffered by them in consequence of its default to the extent to which the damages are not, in the language of the law, too remote.

Are the damages too remote? Was the running down of Mrs. Bartlett, in the circumstances, a consequence for which in law the respondent company was responsible? The rule as regards remoteness of damage was recently discussed by the President

of the Probate and Divorce Division in *H.M.S. London*, [1914] P. 72, and, with respect, I concur in the view there expressed that, where the harm in question is the direct and immediate consequence of the negligent act, then it is within the ambit of liability. Here the injury complained of was the direct and immediate consequence of the failure to stop the train.

Moreover, it is sufficient in this case to say that the railway company being under an obligation to take precautions to obviate the risk of harming the passengers in the electric car through the instrumentality of its train moving across the car track and the wrongful neglect of this duty having resulted directly in the very harm it was the duty of the company to avoid, remoteness of damage is out of the question. *Clark* v. *Chambers*, *supra*.

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Where there is a duty to take precautions to obviate a given risk, the wrongdoer who fails in this duty cannot avoid responsibility for the very consequences it was his duty to provide against by suggesting that the damages are too remote, because the particular manner in which those consequences came to pass was unusual and not reasonably foreseeable.

One aspect of the case was the subject of a good deal of discussion, and I refer to it only to make it quite clear that I neither dissent from nor concur in the views expressed by the Courts below with regard to it. The point to which I refer is that which arises upon the contention of the electric company's counsel that sec. 264 of the Railway Act is applicable and that the railway company should be held responsible for failure to observe the requirements of those sections with reference to braking appliances. I express no opinion upon the question whether this section applies to a train such as this.

ANGLIN, J.:—The liability of one or other or both the defendants to the plaintiff being admitted, the purpose of continuing this litigation is to determine where the responsibility rests, the defendants having agreed amongst themselves for contribution (on some basis with which we are not concerned) should both be held liable. The trial Judge's view was that the appellant is solely answerable, and his judgment was unanimously affirmed on appeal. The evidence so conclusively establishes that its negligence was a cause of the death of the plaintiff's wife that so far as it seeks

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to be wholly discharged its appeal is quite hopeless. Assuming that due care by its co-defendant would have enabled it to avoid running down the plaintiff's unfortunate wife, notwithstanding the peril in which she had been placed by the appellant's negligence, that fact could afford the latter no answer to the plaintiff's claim. *City of Toronto* v. *Lambert* (1916), 33 D.L.R. 476, 54 Can. S.C.R. 200; *Algoma Steel Co.* v. *Dubé* (1916), 31 D.L.R. 178, 53 Can. S.C.R. 481.

Upon the other question—that of the joint liability of the respondent—there is much more to be said.

The trial Judge could "find no particular in respect of which the steam railway company were guilty of any negligence conducing to the accident," and the Court of Appeal took the same view. I gather from his judgment that the trial Judge was of the opinion that there was no evidence on which a jury could have found actionable negligence on the part of the employees of the steam railway company and in effect so directed himself; and from the reasons for judgment of the Court of Appeal, delivered by the Chief Justice of Manitoba, I infer that in his opinion because, the electric tramcar having crossed in safety, the immediate peril to the deceased caused by her jumping or being thrown from that tramcar and falling on the diamond crossing in front of the approaching train was a situation which the steam railway employees could not reasonably have been expected to anticipate and because when it actually arose it was possibly too late to stop the train and prevent the accident, or, at all events, the train crew had little, if any, opportunity to think and act, liability on the part of the steam railway company could not be found. With profound respect, although the idea is not very clearly expressed, these views would seem to imply that the liability of the doer of a negligent act is restricted to consequences which he should have anticipated would flow from it as natural results. *Smith* v. *London and South Western R. Co.* (1870), L.R. 6 C.P. 14, at 21, *per* Channell, B:—

> Where there is no direct evidence of negligence the question what a reasonable man might forsee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . ; but when it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

Per Blackburn, J. at p. 21:—

What the defendants might reasonably anticipate is, as my brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence.

Beven, in his work on Negligence (Can. ed., ch. 3, page 85), introduces a discussion of this and other cases bearing on this aspect of the law of negligence by stating:—

. . . a distinction all-important for understanding this branch of the law; between acts from which injurious consequences in the result flow to others, but which are not negligent in law, because these consequences would not antecedently have been anticipated to flow as natural results; the acts which carry liability because their probable outcome is injurious acts, though, in fact, the consequences which flow are not those anticipated. . . . Further, the doer of a negligent act is responsible for the consequences flowing from it in fact, even though antecedently, to a reasonable man, the consequences that do flow seemed neither natural nor probable.

See, too, Shearman and Redfield on Negligence (6th ed.), secs. 26a, 29a, and 30.

The C.N.R. train was moving very slowly—between one and two miles an hour. The evidence establishes that, equipped as it was, it could easily have been stopped in 40 ft. The engineer deposed that he believed he had in fact stopped it within 15 ft. on receiving the first signal to do so. The evidence also establishes that when the electric tramcar started to move towards the crossing, thus creating a situation of danger, which, in my opinion, made it the duty of those in charge of the advancing steam railway train to stop it, or at least to get it under such control that it could be instantly stopped if the reckless conduct of the motorman in driving the electric tramcar on to the diamond crossing should give rise to a situation making that necessary—a duty which they owed to all the people on the tramcar—the train was at least 75 ft. from the diamond crossing. The brakeman on the front car so tells us. He saw the tramcar start. Had he at once signalled the engineer to stop or even to prepare to stop before reaching the crossing and had the latter promptly obeyed the signal, no harm would have ensued. Still later, when the electric tramcar was approximately two-thirds across the diamond and had almost stopped, as the brakeman informed us, the danger being thus greatly increased and the duty to stop all the more pressing, the train was still 50 ft. from the crossing, and prompt action by the brakeman and engineer would have brought it to

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a stand at least 10 ft. before it reached the crossing. That the appellant's train may have had the right of way over the electric tramcar affords no excuse for not fulfilling this duty. It would not justify the respondent running down the appellant's car if it could avoid doing so by reasonable care—still less in killing the plaintiff's wife. Whatever the brakeman may have done to signal the engineer, the evidence indicates that no attempt to stop or even lessen the speed of the train or to get it under better control was made by the engineer until it was almost upon the crossing, since when it was actually stopped the foremost part of the front car was in fact 16 ft. beyond the crossing. There was, in my opinion, abundant evidence on which a jury might have found negligence imputable to the steam railway company either on the part of the brakeman or on that of the engineer.

Had the electric tramcar been run into on the crossing, as would have happened if the motorman had failed for any reason to get it clear, the liability of the steam railway company for damages sustained in the collision at all events by passengers on the tramcar would seem to me to be incontrovertible. It was only by suddenly "speeding up" in response to the shouted warning of the brakeman, given when his train was only 30 ft. from the crossing, that the motorman succeeded in taking his car out of danger, possibly as a result precipitating the plaintiff's wife and two other persons on the crossing in front of the still advancing train, then only 15 ft. away. The actual danger which the brakeman should have anticipated, and apparently did, in fact, anticipate, viz., collision with the tramcar, was thus obviated. But the negligence of the C.N.R. employees, which was a cause of that peril having continued until the car escaped from the danger zone, did not thereupon cease to operate. It had a further and, under the circumstances, a natural consequence, in the sense explained in Shearman & Redfield's work (secs. 29a and 30), in the running over of the plaintiff's wife, and the steam railway company, in my opinion, cannot escape liability merely because that particular consequence or the immediate situation in which it occurred cannot be said to have been something which was or should have been within the contemplation of the train crew when they negligently failed, while the tramcar was in a position of peril, either to stop their train or to have it under such con-

trol that it could at any moment have been stopped before reaching the crossing.

Considerations such as arise between a plaintiff and a defendant in cases of contributory negligence are quite foreign to the question now before us—that of the liability of a defendant to a plaintiff against whom no contributory negligence is suggested.

In my opinion not only was there evidence of negligence on the part of the respondent—proper for submission to a jury—but on the uncontroverted facts a finding of such negligence should be made.

The negligence of both defendants conduced to the death of the plaintiff's wife. Had that of either been absent the lamentable tragedy would not have occurred.

It is our duty to give the judgment which the Court appealed from should have given. Exercising the power conferred on the Court of Appeal by sec. 9 of R.S.M. 1913, ch. 43, I would set aside the judgment of the trial Judge and direct the entry of judgment declaring both defendants liable to the plaintiff for the sum agreed on as damages with costs. There should be no costs as between the defendants of the proceedings in the Court of King's Bench, but the appellant is entitled to be paid its costs here and in the Court of Appeal by the respondent.

Brodeur, J.

BRODEUR, J. (dissenting):—The question in this case is whether the C.N.R. Co. has been at fault in the accident which caused the death of Mrs. Bartlett. The evidence may lead to the conclusion that there was negligence on the part of the employees of the railway company in not stopping the train after the engineer in charge of the locomotive had received the proper signals. But the evidence is not very positive and is in some respects conflicting. In view of the unanimous findings of the Courts below in that respect I would not feel disposed to interfere.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The whole question here is not whether the plaintiff, Bartlett, was entitled to recover damages for the death of his wife, for both the appellant and the respondent admitted that he was, but whether the plaintiff had a valid cause of action against the respondent as well as against the appellant.

In other words, would the plaintiff on the evidence be en-

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titled to recover damages for the death of his wife against both defendants or against one only of them. The trial Judge came to the conclusion that judgment should be entered in favour of the plaintiff against the defendant, the Winnipeg Electric R. Co., and that the action should be dismissed against the defendant, the Canadian Northern R. Co., with costs to be paid by Winnipeg Electric R. Co. to its co-defendant, the C.N.R. Co.

The conduct of the trial to a certain extent obscured this simple issue, for, as the trial Judge observed:—"The whole course of the trial consisted of evidence and arguments adduced by each of the co-defendants to shew that the other should be held liable." And so before this Court the argument was directed to shew that one company rather than the other should bear the burden of the admitted liability towards the plaintiff, with the result that the one emphasised the negligence of the other, especially the respondent the negligence of the appellant, while the latter, which could not deny that its motorman had been grossly in fault, endeavoured to shew that, but for the negligence of the respondent, this fault would not have caused the accident.

I propose to look at the case solely on the basis of the real question which was in issue, that is to say, on the evidence, would a jury, or a Judge sitting without a jury, have been justified in finding against both defendants negligence entitling the plaintiff to recover against both of them, or would a verdict or a judgment be justified only against the appellant, so that the respondent would have been entitled to have the plaintiff's action dismissed, as it was, in so far as it was concerned?

And on this basis and in answer to the question so submitted by the agreement of the parties, I have come to the firm conclusion, with deference, that the plaintiff was entitled to recover damages against both defendants as being jointly liable for the accident.

The plaintiff's wife was a passenger on an electric car of the appellant which had to cross the line of the respondent on the level on Portage Avenue, Winnipeg. At that time a freight train of the respondent was approaching the crossing very slowly, its speed being about two miles per hour. It consisted of 4 box cars in front, then an engine and some 12 empty cars. A brakeman, named Kenneth Cammell, was on the front car. The elec-

tric car, as the rules required, stopped within a few feet of the railway track, and the conductor got off and went ahead to see if the track was clear, and it was the duty of the motorman to wait until the conductor gave the signal to go ahead, which signal he never gave. What happened then is best described in the language of the trial Judge:—

When the freight train was within perhaps 75 ft. of the crossing the motorman of the electric car suddenly decided to get across in front of the freight train and started forwards. When the electric car was partly on the diamond the brakeman on the freight car saw imminent danger of collision, and as the car seemed to be stopping, shouted the motorman to "go ahead." The motorman thereupon apparently applied extra power, the car went ahead with a jerk, and 3 passengers, including the deceased, were either thrown off the rear platform of the car or else in desperation jumped from it and alighted on the diamond where the deceased was run over.

During all the time the brakeman had the electric car in full view, and when it suddenly started to go ahead, the train should have been stopped. The time card of the respondent required the train to stop 100 ft. from the crossing, and Cammell says that he gave at that distance the usual stop signal, but it was not obeyed. He was, he adds, about 50 ft. from the diamond, or crossing of the railway and electric car tracks, when the motorman ran his car ahead so that it came right on the diamond, where it seemed to stop and the brakeman gave several violent stop signals, which the engine driver either did not see or failed to obey, and the brakeman shouted to the car to go ahead, which it did with a kind of jerk and cleared the diamond, but at its sudden jerk forward, the plaintiff's wife, who with two other passengers had run to the rear platform of the car, was either thrown off or jumped off and fell on to the diamond, where she was run over.

There can be no doubt as to the gross negligence, not to use a much stronger term, of the motorman when he started forward with a moving train coming towards him so close to the crossing. But this does not mean that the railway company was itself free from negligence so that the plaintiff would not have a right of action against it also. The trial Judge stated that he could find no particular in respect to which the steam railway company was guilty of any negligence conducive to the accident. With deference, I think it was negligence not to have stopped the train, which could have been done, when the electric car first started

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forward in an attempt to clear the track. If the railway train was then "within perhaps 75 ft." of the crossing, as found by the trial Judge, or even about 50 ft. away, as testified by Cammell, the train, which he says was just crawling, could have been stopped short of the crossing had the stop signals been obeyed.

In view of these circumstances I cannot think for an instant that if the plaintiff had sued the respondent alone he would not have been entitled to a verdict or judgment, and surely the respondent could not have escaped liability by emphasising—as it does here—the gross negligence of the Winnipeg Electric R. Co.

The Chief Justice of Manitoba made use of an argument which at first impressed me when it was urged at the hearing by counsel for the respondent. He said, 43 D.L.R. 326 at 329:—

> The accident was a natural sequence of the negligent conduct of the motorman: See *Prescott* v. *Connell* (1893), 22 Can. S.C.R. 147. The brakeman on the front of the train had urgently signalled the engine driver to stop and had repeated his signals. There was not sufficient time to do anything further after the deceased fell on the track. The train was stopped as soon as possible. The trainmen were suddenly faced with a new situation of danger, which gave them little, if any, time to think and act. Even if they could have done anything more than was done to avoid the accident, the Court ought not to require of them, in the new situation that was created, perfect nerve and presence of mind enabling them to do the best thing possible.

And it was urged that the respondent could not have foreseen that passengers in the electric car would jump out or be thrown out of the car.

With great deference and upon full consideration, I am of the opinion that this argument cannot prevail. Before "a new situation of danger was created," there was a situation of danger created by the attempt of the electric car to cross before the train reached the crossing, and, as the Chief Justice observed, the brakeman had urgently signalled the engine driver to stop and had repeated his signals.

There was then time for the train crew, and especially the engine driver, if he was heeding the signals, to think and to act. Wooden, the engine driver, was examined before the Public Utilities Commissioner, and stated that he could have stopped his engine within 15 ft., and he did not contradict this statement when he was cross-examined at the trial. And as to the argument that it could not have been foreseen that passengers would jump out of the car in the dangerous situation created by the

joint negligence of the two companies, the Chief Justice rightly observes that the passengers did what might have been expected in such a case and rushed to the door and tried to leave the car.

On the whole I am of the opinion, with deference, that the judgment which absolved the respondent of any negligence conducive to the accident cannot stand, and that it should be declared that the plaintiff is entitled to recover against both defendants as being jointly liable for the accident.

The appeal should therefore be allowed with costs here and in the Court of Appeal and the two defendants condemned to pay the plaintiff the amount agreed upon. There should be no costs of the trial as between the defendants.

Appeal allowed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 20, 1919.

JUDGMENT (§ VII A—270)—PREVIOUS ACTION—REFERENCE—AGREEMENT—COMMON ERROR—JUDGMENT SET ASIDE.

A judgment must be set aside, where there has been a common error in the expression of the intentions of the parties.

[*Wilding* v. *Sanderson*, [1897] 2 Ch. 534, followed.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, affirming the judgment of the trial Judge, Morrison, J., and maintaining the respondents', plaintiffs', action. Affirmed.

Eug. Lafleur, K.C., and *Sir Charles Tupper*, K.C., for the appellant.

Davies, C.J.

DAVIES, C.J.:—I concur in the opinion of Duff, J.

Idington, J.

IDINGTON, J.:—The judgment in the original action by appellant against respondents, on the main issue therein, clearly was pronounced by the trial Judge against the will of the respondents.

And their avowed intention to appeal therefrom appears in the answer by their solicitors, to the suggestion of appellant's solicitors, that they should mutually try to avoid the expense of a reference to determine the amount of the allowances to be made the respondents, within the terms of the opinion judgment given by the trial Judge. That renders it difficult for me to understand how appellant could in good faith take the objection made to the

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hearing an appeal from the formal judgment issued as the result of the adjustments reached to avert a reference.

The appellant's solicitors expressly recognised in their reply to said answer the right and intention to appeal.

The adjustment of the matters to be the subject of a reference was all that either party contemplated giving assent to.

The initialling of the consents was evidently only intended to shew an adjustment had been made of the said matters and need for a reference.

As I read the memo thus initialled it was all done on the "basis of the judgment" pronounced by the trial Judge. And as I understand the facts appellant's counsel unfairly refused to let the Court of Appeal get seized of these facts when the motion for appeal was heard, and thus have the ambiguous document illuminated by what the letters clearly shew the parties intended.

Hence there was a failure of that Court to recognise the right of appeal and I imagine a failure of justice.

As the trial Judge herein well expressed his view of the situation thus created:—

> It would be a reproach upon our juridical system if it were impossible to put the parties to this action in a position whereby the judgment of the trial Judge could be worked out ultimately according to its true intent and meaning.

I, therefore, entirely agree with the judgment appealed from.

It may be that if called upon to consider the judgment in appeal against said judgment I should not agree with the result arrived at.

The mere question of practice or procedure relative to the proper method of rectifying what seems to be a grave wrong, is one that according to the settled jurisprudence of this Court we must not interfere with unless a result has been reached that violates natural justice.

The bringing of an action instead of proceeding by way of motion may have resulted in greater expense to be borne by appellant.

Of this the appellant has no right to complain for its course of conduct in refusing to accede to the request for a stay of proceed-

ings, when the appeal was being heard, in order to enable the respondents to move and rectify the form of judgment which raised the doubt and difficulty, is the cause of resorting to a more costly mode of procedure.

I think this appeal should be dismissed with costs.

DUFF, J.:—There is no dispute as to the agreement between *Mr. McMullen* and *Mr. Bull* respecting the judgment which was to be entered in the action. The trial Judge at the conclusion of the trial had pronounced an oral judgment in which he found in favour of the bank upon certain contested items and in favour of Skene and Christie upon certain other contested items for which credit was claimed in the defence and fixed the rate per foot upon which the sum for which judgment was to be finally given in favour of the bank was to be calculated; and a reference to the registrar was directed to work out this judgment and express the result in figures. After some correspondence the solicitors agreed that the two architects who had been examined as witnesses for the respective parties before the trial Judge should be requested to make the necessary measurements and calculations and to report to the solicitors, it being understood that, if they reached an agreement, the result of the investigation in figures should be adopted and that they should be incorporated in the judgment as if they had been arrived at by the trial Judge himself. It was not only understood, but expressly stated, that it was *Mr. McMullen's* intention to appeal from the adjudication of the trial Judge, that is to say, from the principle of the judgment. The findings, of course, in so far as they rested upon the report of the architects or upon the calculations of the solicitors themselves were the necessary result of the adjudications of the trial Judge and must stand or fall with these adjudications.

I cannot accept the contention that on these points there was not a concluded agreement. The correspondence read together with a document which finally became the judgment but which was not a judgment until it had been approved of by the trial Judge affords a complete demonstration not only of the general terms but of the particulars of the agreement between the solicitors. Moreover, there is no dispute upon it. *Mr. Bull's* evidence is explicit and the effect of the documents and the oral evidence is that both *Mr. McMullen* and *Mr. Bull* believed that both of them were giving

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their assent to certain findings which, taken with the adjudications of the trial Judge, should together constitute a judgment; a judgment which, save as regards these agreed findings, was the judgment of the trial Judge based upon his own decision. The truth is that as regards these consent findings the solicitors intended that they should be in precisely the same position as findings upon admissions made in the course of the trial.

The trial Judge, in giving judgment, I repeat, was acting in the ordinary course of jurisdiction, not at all *extra muros*, indeed there was nothing irregular in what was done and a judgment beyond all question could have been drawn in a form which would have excluded any possible suggestion that the judgment itself was a consent judgment or that on any ground the adjudications of the trial Judge were not to be open to the appeal to which everybody intended that they should be subject.

I express no opinion upon the point whether or not the form of the judgment presented is strictly an obstacle in the way of an appeal. The counsel for the bank took the objection that the judgment was drawn in a form which made it unappealable. I am not sure that I quite understand the precise nature of the objection but I gather from the evidence of *Mr. McMullen* that the view taken by the majority of the Court of Appeal on the occasion was that one paragraph in the judgment shewed that the adjudication was an adjudication by consent, not an adjudication resting upon judicial decision; and that consequently the parties were, as no doubt they would be if such were the case, precluded from impeaching the adjudication by way of appeal. I repeat, that I express no opinion as to this view, but counsel for the bank having contended for this construction and having succeeded in his contention and having got the appeal dismissed as a result of his successful contention, the bank cannot now be allowed to say as against the respondents, that this was not in law the construction of the order. I refer to a well known passage in a judgment of Bowen, L.J., in *Gandy* v. *Gandy* (1885), 30 Ch. D. 57 at 82:—

> I am not certain that this is not *res judicata* within the view which has been taken of *res judicata*, when the same questions arise again between the same parties litigating similar subject-matter. But whether it is *res judicata* or not, it seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn around and win the new

suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the Court allowed that.

Admittedly this construction of the judgment is one which defeats the intentions of the solicitors whose agreement the judgment was intended to give effect to. There is, as Chitty, L.J., said in *Wilding* v. *Sanderson*, [1897] 2 Ch. 534 at 551, common error in the expression of the intentions of the parties and therefore the instrument must be rectified or set aside. I think *Wilding* v. *Sanderson*, governs this case.

It is, I think, nothing to the purpose to say that this is strictly not a judgment by consent. The paragraph in the judgment which gave rise to the difficulty was a paragraph which was intended to express the agreement of the parties, and indeed the judgment may, for the purposes of this appeal, be read as two judgments. *McDonald* v. *Belcher*, [1904] A.C. 429: the judgment formally expressing what was orally pronounced by the trial Judge and the judgment by consent expressing the result of the findings and the calculations which the parties had agreed to. It was in attempting to express the result of these findings and calculations, in other words, in attempting to give effect to that part of the judgment which rested on consent, that the solicitors unfortunately used language which was afterwards thought to give a character to the whole judgment which nobody ever intended it should bear.

Nor should effect be given to the suggestion that the proper course for the present respondent was to apply for an amendment of the judgment by the trial Judge. For myself, I entertain no doubt that the trial Judge would have been quite within the ambit of his competency in making the amendment, because the trial Judge never intended to approve a judgment which nobody ever intended that he should approve, a judgment which should make him say that his adjudications rested upon the consent of the parties and not upon his own decision except in respect of the calculations mentioned. While that is so, it is quite clear that counsel for the bank took this position before the Court of Appeal and succeeded in maintaining it—that the trial Judge was *functus officio;* and on that ground induced the Court of Appeal to reject the application made by appellant's counsel for an adjournment. It is not now open to the appellant bank in view of this course of conduct to argue that the present action is unnecessary.

The appeal should be dismissed with costs.

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Anglin, J.

ANGLIN, J.:—As between the parties to this action I think it must be taken to be *res judicata* that the judgment in the former action was non-appealable. If so, on the merits this case is clearly governed by *Wilding* v. *Sanderson*, [1897] 2 Ch. 534. On matters of procedure, such as the appellant complains of, it is the usual practice of this Court not to disturb the judgments of the provincial Courts.

The appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—I concur in the opinion of Duff, J.

Mignault, J.

MIGNAULT, J.:—I concur with Duff, J.

Appeal dismissed.

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PETINATO v. SWIFT CANADIAN Co., Ltd.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. October 31, 1919.

CHATTEL MORTGAGE (§ I D—15)—NO AFFIDAVIT OF EXECUTION—INVALID AGAINST CREDITORS—BILLS OF SALE AND CHATTEL MORTGAGE ACT, R.S.O. 1914, CH. 135, SECS. 5-7—PROVISO IN MORTGAGE—VALIDITY. Under R.S.O. 1914, ch. 135, the Bills of Sale Act, a chattel mortgage registered without an affidavit of execution is void as against the mortgagor's creditors. But a proviso in the mortgage itself that the goods will be insured with loss (if any) payable to the mortgagee is valid, and acts as an equitable assignment of the insurance moneys.

[*In re Isaacson, ex parte Mason*, [1895] 1 Q.B. 333, specially referred to.]

Statement.

APPEAL from the judgment of Kelly, J., in an issue directed to be tried for the purpose of determining the right to certain insurance moneys. Reversed.

The judgment appealed from is as follows:—This is an issue in which Petinato claims to be entitled, as against the Swift Canadian Company Limited and other creditors of one Musalino, to certain insurance moneys resulting from a fire which, in October, 1917, destroyed a stock of groceries of Musalino in the premises in Parry Sound in which he carried on business. Much of the evidence is very unsatisfactory, and a reasonable conclusion can be reached only on a consideration of circumstances as to which I have no doubt from having seen and heard the witnesses. An attempt was made to prove that Musalino, before the 24th August, 1917—the date of the bill of sale to him by Petinato—was either the owner of or had an interest as co-owner with Petinato in the goods and stock in trade described in the bill of sale; and considerable evidence was directed towards shewing that he acted dishonestly and

fraudulently in disposing of and shipping out of his store-premises large quantities of goods which constituted part of his stock in trade, he being at the time indebted to merchants and manufacturers from whom he had purchased the goods. That all occurred after he made the purchase from Petinato, and when the latter had ceased to have anything to do with the conduct of the business, and was not interested in it except to the extent of his unpaid purchase-money on his sale to Musalino. That Musalino was either a partner, or financially interested in the business, prior to the sale to him on or about the 24th August, is not established. The foundation for the contention that he was so interested is chiefly the fact that his boarding-house business and Petinato's grocery business were carried on in the same building, Petinato having rented from him the store portion of the premises; and because of his having taken part in making purchases of goods for the store and at times joining with Petinato in the latter's discussions of his affairs with third parties. It is also urged that invoices and accounts of Gregory & Greek for goods supplied by that firm for this grocery business, prior to the 24th August, point in the same direction. I have no doubt that Mr. Gregory stated in his evidence what he believed to be true; but it is apparent that until this trouble arose it was not looked upon as important in what name the sales of that firm to this business were invoiced and their accounts therefor made out. A large number of these invoices, running from the beginning of May until the sale on the 24th August, are produced, and the names of the purchasers are therein variously entered—"Salvatore & Petinato," "Musalino & Petinato," "Musalino & Co.," "Petinato & Musalino." Petinato says that he took exception, both to Mr. Gregory and to the driver who delivered the goods, to the name in which the invoices were issued, and that he was told that this would be remedied. Mr. Gregory does not recollect this: he says that, if that objection had been taken, he would have made a change. A copy produced of some of the firm's accounts shews that at infrequent times during this period they received payments on account by cheque. Both Petinato and Musalino had bank-accounts: copies from the books of the banks containing those accounts are produced. The cheques so given to Gregory & Greek are not produced, but from the bank-accounts it is evidenced that in no instance is there a

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debit in Musalino's account corresponding in amount with any of these cheques, while in Petinato's bank-account there are debits exactly so corresponding. Were it not for a number of incidents and circumstances which materially support Petinato's position, it would be difficult to find in his favour in respect of his sole ownership of the business prior to the sale to Musalino. The manner in which that sale was made is of importance in determining that he was the sole owner, and that, so far as he was concerned, the sale was *bonâ fide*. As security for the unpaid portion of the purchase-money it was agreed that the purchaser should give a chattel mortgage.

A chattel mortgage upon the stock in trade of groceries and other merchandise and the trade-fixtures, furniture, chattels, and effects contained in and used in connection with the store-business carried on by the mortgagor and lately purchased from the mortgagee, together with any additions and accretions thereto and substitutions therefor, was accordingly prepared. It contained a covenant by the mortgagor to insure and keep insured the mortgaged goods and chattels to their full insurable value for the benefit of the mortgagee, with loss, if any, payable to him. It bears date and was signed by the mortgagor on the 24th August 1917, and on the 28th it was deposited for registry in the proper office for that purpose. It came out in the evidence that neither on the mortgage then produced from that office nor on the duplicate original in possession of the mortgagee, had the affidavit of execution by the mortgagor been sworn. This is fatal to Petinato's claim that the mortgage gives him a preference over the claims of other creditors of the mortgagor.

By sec. 5 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, every mortgage of goods and chattels in Ontario, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall be registered in the manner provided by the Act, together with (*a*) the affidavit of an attesting witness thereto of the due execution of such mortgage, or of the due execution of the mortgage of which the copy filed purports to be a copy, which affidavit shall also state the date of the mortgage, and (*b*) an affidavit of *bona fides* by the mortgagee.

Registration shall be made, except in the case of the Provisional County of Haliburton, in the office of the clerk of the County

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or District Court of the county or district in which the property mortgaged is at the time of the execution of the mortgage (sec. 18(1)).

If the mortgage and affidavits are not registered as provided by the Act, the mortgage shall be absolutely null and void as against creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith for valuable consideration (sec. 7).

These statutory requirements are imperative and must be strictly complied with—otherwise, as against the classes of claimants referred to, the mortgagee's position is just as if the mortgage had not been made.

The result is that Petinato cannot maintain priority of claim to the insurance moneys in question over the creditors of the mortgagor and subsequent purchasers and mortgagees in good faith for valuable consideration. He contends, however, that by virtue of the covenant for insurance contained in the chattel mortgage, his priority is preserved, on the theory that, there being an agreement therein in his favour for insurance, the loss under which is to be made payable to him, in equity he is entitled to have, as against other claimants, what the mortgagor bargained to give him. If that contention could be upheld in law, then his right to security upon the insurance moneys would be superior to any right he could have asserted to the mortgaged goods themselves if they had not been destroyed. That view is unreasonable and as a legal proposition is not supported by authority.

The assignment of the insurance moneys by the mortgagor to Petinato after the fire does not strengthen his claim as against creditors of the mortgagor.

It should be mentioned as a fact that no insurance was effected by Musalino until many weeks after the chattel mortgage was signed, and that, when it was procured, it was not, by any document or writing, made payable, in the event of loss by fire, to Petinato.

The question propounded in the issue must, therefore, be answered unfavourably to the claimant; and judgment will go accordingly with costs against him.

R. McKay, K.C., for the appellant.

H. E. Stone, for the defendants, respondents.

RIDDELL, J.:—The claimant in this interpleader issue

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owned a small grocery business at Parry Sound; falling sick, he negotiated a sale of his stock in trade to one Musalino. The purchaser had only $1,000; and, the stock amounting to $3,700, the vendor threw off $200, and it was agreed that Musalino should pay $1,000 and make a mortgage for the $2,500. It was also agreed that if the purchaser could get insurance on the goods it was (as the vendor puts it) to be put in the vendor's name "securing the mortgage," "to cover the mortgage." They went to a conveyancer to have the documents made out, and told him "to put down if he (M.) could get insurance it had to come to me" (P.) The conveyancer drew up a bill of sale and a chattel mortgage according to the agreement, and inserted in the latter a clause as follows:—

"And further that the mortgagor will during the continuation of this mortgage and any and every renewal thereof insure and keep insured the goods and chattels hereinbefore mentioned against loss and damage by fire in some insurance company authorised to transact business in Canada and approved of by the mortgagee in the sum of not less than their full insurable value in dollars as security for the moneys secured by this indenture for the benefit of the said mortgagee and will pay all premiums and moneys necessary for that purpose as the same become due and payable in respect to such insurance the loss if any to be payable to the said mortgagee and the production of this indenture shall be sufficient authority for and the said insurance company are hereby directed thereupon to pay such loss if any to the said mortgagee."

Of course, towards the beginning of the document, it was stated that Musalino was "hereinafter called the mortgagor" and Petinato "the mortgagee."

The documents were put on file, the $1,000 paid, and Musalino sought for insurance, and finally, some weeks afterwards, obtained insurance to the amount of $2,000: he paid $50, the premium, and received a receipt for the amount, which he sent to Petinato in a letter, dated the 15th October, 1917, which was thus interpreted at the trial:—

"I enclose in this my letter, receipt that I got from the company and another from the Dominion Fire Insurance Friday. I have been in Toronto and insured the store for more protection for you for $2,000. I could not get any more to cover your mortgage of $2,500 but I hope to send you $500 in a month or at least for Xmas so your

money is guaranteed in case of any fire these papers that I send you you can keep them till you are paid off what's coming to you as soon as I get the policy I will send it to you too. Here at the present everything is going fine and hope this my letter finds you better. Best regards to all yours and to you."

(The word translated "protection" is "garenzia," our "guaranty," and rather means "security," but the import is clear enough.)

The property was destroyed by fire on the 30th October; four or five days thereafter, Musalino came to North Bay to Petinato, and they went to a solicitor to have the insurance money applied for. The solicitor drew up another document, which Musalino signed, in these words:—

"*Assignment of Insurance Moneys.*

"In accordance with the consideration set out in chattel mortgage from myself to Sam Petinato, of Parry Sound, merchant, bearing date the 24th day of August, 1917, I hereby release, assign and set over unto the said Sam Petinato all moneys coming to me from the insurance with the Dominion Fire Insurance Company, and request the said company to pay all moneys due or accruing due to me, to the said Sam Petinato.

"Dated at North Bay this 5th day of November, A.D. 1917."

There was some dispute as to the amount payable by the insurance company, but this was settled at $1,200: the company paid the sum to their solicitors, who still have it in their hands for proper application.

The chattel mortgage had no affidavit of execution, and was, consequently, fatally defective as against creditors.

The Swift Canadian Company obtained a judgment against Musalino, and he has other creditors. They claimed the $1,200, as did Petinato. An issue was directed to be tried, and my learned brother Kelly decided in favour of the judgment creditors. The claimant, Petinato, now appeals.

It is of course admitted that sec. 7 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, prevents the claimant successfully asserting a right to the goods insured; and Mr. Justice Kelly thinks that the contention that his right to the insurance moneys is superior to that to the mortgaged goods is unreasonable and not supported by authority—that is the question for determination on this appeal.

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It will be well to consider the effect, if any, of the covenant respecting insurance (already quoted) which is in the chattel mortgage.

Section 7 provides that "if the mortgage and affidavits are not registered as by this Act provided, the mortgage shall be absolutely null and void as against creditors . . ." The "mortgage" which is thus "null and void" is consequently something which can be registered; it is a "conveyance" (sec. 2 (c)). That being so, is everything contained in the document which is filed, voided by the section?

An answer in the affirmative might be considered indicated by the Court of Appeal decision in *Davies* v. *Rees* (1886), 17 Q.B.D. 408. The Imperial Bills of Sale Act of 1882, 45 & 46 Vict. ch. 43, by sec. 9 enacted that "a bill of sale made . . . by way of security for the payment of money . . . shall be void, unless made in . . . the form in the schedule . . ." The plaintiff made a bill of sale (not in the statutory form) which contained a covenant to pay: the Court of Appeal held that this covenant was wholly void: "the whole of the instrument is to be void" (p. 411).

But, when this decision came to be considered in *In re Burdett* (1888), 20 Q.B.D. 310, it was pointed out that the former decision rested upon the fact that in the form in the schedule to the Act the covenant to pay was an integral part, and the words "bill of sale" in sec. 9 must be interpreted accordingly. The case in 17 Q.B.D. then is not helpful in the present instance, as no statutory form is given for the "mortgage" which is voided.

The Court in *In re Burdett* adopted the language of Willes, J., in *Pickering* v. *Ilfracombe R. Co.* (1868), L.R. 3 C.P. 235, at p. 250: "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good:" p. 314, *per* Fry, L.J., giving the judgment of the Court. The Court therefore held the bill of sale valid in respect of trade machinery, not being personal chattels within the Act, though void in respect of personal chattels.

In *Mumford* v. *Collier* (1890), 25 Q.B.D. 279, a mortgage of land in the usual form was given, which contained an attornment

clause—this by the Bills of Sale Act, 1878, sec. 6, was a bill of sale within the Act—but the Court held that, though it was void in respect of any personal chattels, the attornment clause was valid to create the relation of landlord and tenant—"In so far as it creates the relation of landlord and tenant it is a matter affecting the real estate. In so far as it gives power to distrain personal chattels, it is a bill of sale, and in that respect void by the operation of the Bills of Sale Acts:" *per* Wills, J., at p. 284.

A case nearer to the present is *In re Isaacson*, [1895] 1 Q.B. 333 (C.A.) There by one and the same deed the owner of a piano assigned by way of security a piano and also the benefit of a hire and purchase agreement into which he had entered respecting it. He had been in the habit of selling pianos upon the "hire-purchase" system; and had agreed to let the piano on hire to a person named, who was to pay him so much each quarter. Lord Esher, M.R., points out, p. 337, that in the deed there were two distinct things—"an assignment of proprietary rights, and an assignment of contractual rights . . . If the assignment of the contractual rights had been made by a separate deed, the Bills of Sale Acts would clearly not have applied to it. I cannot see how two things which are thus distinct can be said to be inseparable." Lopes, L.J., says (pp. 337, 338): "Here there are two distinct things comprised in the deed—the piano and the proprietary rights incident to it, and the contractual rights appurtenant to it under the hiring agreement . . . when the two assignments are comprised in one instrument they can be severed, so that the Bills of Sale Acts may apply to the one and not to the other. It has been distinctly decided that a deed may be void as to part of it while it remains good as to the rest of it, provided that the subject-matter is so described as to be severable." Rigby, L.J. (p. 338), makes the illuminating remark: "The piano could be struck out of the deed without affecting the assignment of the hiring agreement, and then there could be no question as to the validity of the assignment of the agreement." Take with this the "general principle" laid down by Bowen, L.J., in 17 Q.B.D. at p. 412, "When an Act makes one thing void we must see that we do not destroy independent obligations merely because they are contained on the same piece of paper, or because, apparently, they hang together," and it seems to me the course to be taken on this appeal is manifest.

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There are two provisions on the same piece of paper—one the assignment by way of mortgage of the proprietary interest in the chattels, the other an (equitable) assignment of the contractual rights to arise from a contract to be made with an insurance company—these are divisible. Although the contractual rights arise from the chattels assigned, they are no more connected with these chattels than the contractual rights assigned in *In re Isaacson* were with the piano assigned, and the statute voids the assignment by way of mortgage only.

It is quite possible to assign the insurance without assigning the chattels—an assignment of the insurance might be made to secure any debt, however disconnected with the chattels; and an assignment of insurance neither gives nor requires for validity any interest in the goods by the assignee: *McPhillips* v. *London Mutual Fire Insurance Co.* (1896), 23 A.R. (Ont.) 524.

The two things assigned were as different as the two things assigned in *Kitching* v. *Hicks* (1884), 6 O.R. 739, where an assignment of book-debts, contained in an imperfect chattel mortgage, was upheld.

Nor, as I think, can such an assignment be considered an evasion of the statute—"against the policy of the statute." It has been pointed out many times that it is the purpose of the Act to prevent one who is in possession of goods obtaining credit on the strength of his apparent possession, while all the time he does not own the goods at all—and it has been pointed out that the Act was intended to prevent a secret conveyance being set up against the Sheriff when he attempts to seize the goods.

The section of the Act we are now considering, sec. 7, goes back to 1849, 12 Vict. ch. 74, sec. 1: at that time the Sheriff could not seize choses in action at all, that power not being conferred till 1856 by 20 Vict. ch. 57, sec. 22.

I am of opinion that the agreement to insure—which, if valid, is admittedly an equitable assignment—is not voided by the statute.

The circumstances under which it was given shew that it was not in fraud of creditors: the purchaser was receiving goods worth $3,500 for $1,000 cash with a mortgage for $2,500, for which the insurance was to be security. It would be nothing but plain honesty that the vendor should have such security.

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Nor does the form prejudice the claimant—there is indeed a provision authorising the insurance company to pay to the claimant on production of the instrument, but there is also, before that clause, a complete equitable assignment.

The fact that the assignment is to the "mortgagee" is not of importance: the word "mortgagee" is short for the name of the claimant, and it does not at all follow that, if he cease to be "mortgagee" as against creditors, he is not to have the advantage of his assignment—in reading the document we should substitute his name for "the mortgagee." The form is the same as in some of the English cases.

The learned trial Judge cannot see that the claimant should have more advantage of the insurance obtained on account of the destruction of the goods than he would from the goods themselves intact. That difficulty, I venture to think, is met by supposing that he had no mortgage at all, but only an assignment of the insurance policy: then, so long as there was no fire, he would have no direct advantage of the goods; but, on the occurrence of a fire, he would receive the insurance money. I think that as regards other creditors that is the precise position of the claimant.

The cases *Re London and Lancashire Paper Mills Co. Limited* (1888), 58 L.T.R. 798, and *Climpson* v. *Coles* (1889), 23 Q.B.D. 465, at p. 473, are also helpful, but I do not think it necessary to quote from them.

Having come to this conclusion concerning the covenant contained in the chattel mortgage, I do not think it necessary to consider the effect of the subsequent document.

I would allow the appeal with costs throughout.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

Latchford, J.
Middleton, J.

MEREDITH, C.J.C.P. (dissenting):—As it seems to me, the real question involved in this case is, whether we should give effect to the plain words of provincial legislation, or should endeavour to "side step" their effect. I employ an inelegant, but much used, in these days, expression, because it is one which shall doubtless best convey to the parties my meaning; and though less elegant is less ponderous than that which has been so long in vogue, in

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the boast about driving a coach-and-four through any Act of Parliament.

The appellant took a chattel mortgage of goods, which afterwards became the subject-matter of the fire insurance in question; and that mortgage was, as is admitted on all hands, "absolutely null and void as against creditors," and some others. The respondents are creditors.

The mortgage contained the usual provision for insurance by the mortgagor of the mortgaged goods for the better security of the mortgagee; and the insurance in question was obtained for that purpose; that is, it was entirely and essentially a part of the mortgage; and, as I have said, a usual part of all mortgages which cover insurable property.

Then, the mortgage being "absolutely null and void as against" the respondents, how can any Court avoid the effect of this plain legislation, however hard a case it may, upon the surface, seem to be?

Recourse is had to cases decided in England; but, in the first place, the enactment in force there is not the enactment in force here; and, in the second place, none of them is really at all like this case.

And, if the cases there could be binding in a case here, having regard to the difference between the enactments and other things, it may not be difficult to shew from them that the judgment in appeal is right.

In the case of *Davies* v. *Rees*, 17 Q.B.D. 408, it was decided that a bill of sale void under the English enactment is "void *in toto*," and not merely as regards the personal chattels comprised in it, so that the covenant for payment also contained in it is void also; and in all the subsequent cases dealing with that question the same conclusion was reached. A recent one is *Smith* v. *Whiteman*, [1909] 2 K.B. 437. All these English cases, therefore, are in full accord with the plain words, which I have quoted, of our provincial enactment.

But there is a line of English cases, which decide that when, in a bill of sale made in England, a transfer is made of some property or right which does not come within the Bills of Sale Act, and is quite separable from anything transferred which is within the Act, the Act does not make void the transfer of the

thing which is not at all within its provisions; in short, that it is not brought within its provisions merely because it happens to be made in the same writing as that in which the thing within the Act happens to be written; and it may be added that it was not needful to go abroad for such case-law, because of the decisions to the same effect in cases under the enactment in question: the case of *Hunt* v. *Long* (1916), 35 O.L.R. 502, 27 D.L.R. 337, affords a recent instance. And it should be observed that in the case in England, most relied upon by the appellant, the assignment of the "hire-purchase" contract, which was held to be not within the Act, carried all the seller's rights in the goods—the bill of sale seems to have been wholly unnecessary.

That case is *In re Isaacson*, [1895] 1 Q.B. 333, in which it was decided that a transfer of a contract, existing at the time of the making of the bill of sale there in question, was not invalid because included in a bill of sale of chattels then in existence, which was void as to them under the Bills of Sale Act; the Court finding that there were "two distinct things"—an assignment of contract rights not within the Bills of Sale Act, and a transfer of property rights which was within the Act—and it is difficult to understand how there could be a different adjudication if the case were one coming under the provincial enactment in question.

But what has such a decision to do with such a case as this, unless it be to make it plainer that under its facts it is altogether avoided by the enactment in question?

In that case there were two existing rights, one contractual and the other proprietary, when the bill of sale was made; in this case there was but one, the ownership of the chattels; the provision as to insurance was merely a covenant contained in the mortgage, which falls with the mortgage, as the covenants did with the bills of sale in the cases in England to which I have referred. If no mortgage, then no covenant with the *mortgagee* to insure the *mortgaged goods* for the benefit of the mortgagee; and, need it be added, if no sale, no debt, no mortgage, nothing to be insured or secured?

It was a covenant only to protect the security which the mortgaged chattels afforded; a covenant which could arise only because of, and as part of, that security; it was a case of no transfer

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of the property, no insurance; of insurance, if insurance at all, insurance inseparable from ownership conferred by the mortgage. The insurance was merely to take the place of the chattels if the chattels were lost: it could be only *indemnity* to the *owner* or *owners* as their *actual interests* should be at the time of the loss; and in that form the policy would doubtless have been issued if the mortgagor had done that which he covenanted to do; and, though he did it not, in equity it must be looked upon as if it had been so done; and the rights of the parties must be dealt with accordingly.

What then has the line of cases relied upon by the appellant to do with this case, unless indeed it be to make it plain that in England, under the enactments in force there, this case could not have been decided in the appellant's favour?

In the case last referred to, it was said that the transfer of the goods could be struck out of the bill of sale without affecting the hiring agreement, and then there could be no question of its validity as an assignment of the contract merely. In this case, strike out the mortgage of the chattels, and nothing exists; except as mortgagee there was nothing the appellant had to insure or be insured for his benefit. He had parted with the property in and possession of the goods altogether, and had only the interests in them which the mortgage conferred upon him, including an insurable interest as mortgagee only arising out of and dependent upon this mortgage, which, as against the respondents, is "absolutely null and void."

We must deal with this case, not with an imaginary one; and in this case there was but one debt and one insurable interest in the appellant, both arising out of and dependent upon the mortgage, which is still quite good between the parties to it, but not good as against the rights and interests of the mortgagor's creditors and some others. And to say that in all fairness the appellant should have the benefit of the insurance is only to say, in other words, that he should have the full benefit of the mortgage of the chattels—for, if fairness should give one, it should give the other, which is only the same thing in another form—but that kind of fairness can be accorded only by a repeal of the enactment in question.

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So too as to hardship, it is not all one-sided. The creditors have something to complain of in that respect if the common debtor be allowed to expend their money—the proceeds of their unpaid for goods in his hands—to make good to the favoured debtor a mortgage which the law says is void against them.

The appellant's claim depends entirely upon the covenant in the mortgage. All that was done subsequently was done by reason of, and under, its provisions.

In my opinion, the judgment appealed against is right and should be affirmed. Therefore I am in favour of dismissing the appeal. *Appeal allowed.*

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ANDERSON v. THE KING.
Ex parte NICKERSON.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. 1919.

WATERS (§ I C—53)—WRECK—OBSTRUCTION TO NAVIGATION—REMOVAL—LIABILITY OF OWNER—SALE—STATUTORY REQUIREMENTS.

Where a wreck obstructs navigation, the Minister of Marine may proceed to remove the obstruction according to the provisions of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, secs. 16-18; and on complying with the statutory requirements, may recover the costs of such removal from the owner of the wrecked vessel at the time the wreck was occasioned notwithstanding the subsequent sale to a third party.

[*The King* v. *Anderson* (1919), 46 D.L.R. 275, affirmed.]

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, (1919), 46 D.L.R. 275, 18 Can. Ex. 401, in favour of the Crown. Affirmed by equally divided Court

J. McG. Stewart, for appellant.

R. V. Sinclair, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—I am of the opinion that the judgment of the Exchequer Court was right and that this appeal should be dismissed and such judgment confirmed.

As there is an equal division of opinion in this Court, in accordance with our usual practice there will be no costs of the appeal.

The action was brought by the Crown under the Navigable Waters Protection Act to recover expenses incurred by the Crown in removing a wreck from Barrington Passage, Nova Scotia, on the ground that the passage was a public harbour of Canada and that the wreck constituted an obstruction to navigation.

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Davies, C.J.

The facts necessary for the decision of the appeal are clearly and concisely stated in the written reasons of Brodeur, J., with which I concur.

I base my judgment upon the fact that the evidence shews such a full and substantial compliance with sec. 17 of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, as entitles the Crown to maintain this action under sec. 18 of that Act.

No injustice whatever was, in my opinion, sustained by the appellant.

If a reservation of property rights in the debris of the vessel after being blown up had been made, the amount of the tender would have been necessarily increased by such a problematical value as the tenderer might put upon such debris and the owner obliged to pay the increased amount.

The circumstances of the case were such as called for the exercise by the Minister of a wise and prudent discretion and I think in accepting the tender with the provision that the property in the debris of the wreck in question when blown up should belong to the tenderer, the Minister exercised, under the circumstances, such discretion and one in the interests of the owner Anderson.

Idington J.

IDINGTON, J.:—This is an appeal in an action brought by the respondent in the Exchequer Court to recover the expenses of removing a wreck, under and by virtue of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115. At common law there could be no such relief. The rights and remedies in question are entirely the creature of the said statute which has given a new remedy.

Section 16 provides that:—

The Minister may . . . if, in his opinion: (*a*) the navigation of any such navigable water is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck . . . cause such wreck, vessel or part thereof or other thing, if the same continues for more than 24 hours, to be removed or destroyed in such manner and by such means as he thinks fit, and may use gunpowder and other explosive substance for that purpose if he deems it advisable. (See Amendment 8-9 Ed. VII. 1909, ch. 28, sec. 3.)

Section 17 is as follows:—

17. The Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable; and may apply the proceeds of such sale to make good the expenses incurred by him in placing and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing.

2. He shall pay over any surplus of such proceeds or portion thereof to the owner of the vessel, cargo or thing sold, or to such other persons as shall be entitled to the same respectively.

The Minister did not direct anything to be conveyed to any place, or to be sold by auction. What happened was that he advertised for tenders for the execution of the work and in the advertisement expressly provided as follows:—

the materials in the obstruction, when the removal is satisfactorily completed, but not before, to become the property of the contractor.

The contract for removal was let to the firm which made the lowest tender based on specifications thus providing for the disposition of the property. Upon the execution of the work the contractors took the property as their own and afterwards, it is said, sold a part for some $129, and had still some more left. It is quite evident, I think, that there was not sufficient value in the wreck or the material of which it was composed to leave any balance in favour of the appellant. And inasmuch as he had sold to one Nickerson his rights in the wreck for $5 on the terms of removal, there would not be any grevious wrong done to the appellant by what transpired. That, however, is not the question.

Even if we could find that there was a very trifling sum realised out of the property after its removal, I do not see how that would affect the question involved.

That question is reduced solely to the one question of whether or not in this new remedy given the Crown to recover from the unfortunate owners of a wreck the cost of removing it, the steps laid down in the statute giving the remedy, as a condition precedent thereto, have been observed. I have come to the conclusion that they have not been observed.

So clear a departure from the terms of the Act should not, I submit, be maintained, no matter how well intentioned the modification made by the Minister or his deputy in carrying into effect the provisions of the Act may have been.

I think the appeal should be allowed with costs.

Duff, J.

DUFF, J.:—The decision of this appeal turns upon the construction to be given to secs. 13, 14, 16, 17 and 18 and particularly sec. 18 of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115. By the combined operations of secs. 13 to 16 inclusive the Minister is authorised in certain circumstances where the navigation of navigable waters is obstructed, impeded or rendered

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more difficult or dangerous by reason of the wreck, sinking or grounding or any part thereof to

cause such wreck, vessel or part thereof or other thing, if the same continues for more than 24 hours, to be removed or destroyed in such manner and by such means as he thinks fit, and may use gunpowder or other explosive substance for that purpose, if he deems it advisable.

By sec. 17

the Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable; and may apply the proceeds of such sale to make good the expenses incurred by him in placing and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing.

Section 18 (see amendment 8-9 Edw. VII., 1909, ch. 28, sec. 4) provides that where the Minister

has caused to be removed or destroyed any wreck, vessel or part thereof, or any other thing by reason whereof the navigation of any such navigable waters was or was likely to become obstructed, impeded or rendered more difficult or dangerous . . . and the cost of maintaining such signal or light or of removing or destroying such vessel or part thereof, wreck or other thing has been defrayed out of the public moneys of Canada; and the net proceeds of the sale under this Part of such vessel or its cargo, or the thing which caused or formed part of such obstruction are not sufficient to make good the cost so defrayed out of the public moneys of Canada, the amount by which such net proceeds falls short of the costs so defrayed as aforesaid, or the whole amount of such cost, if there is nothing which can be sold as aforesaid, shall be recoverable with costs by the Crown (a) from the owner of such vessel or other thing, or from the managing owner or from the master or person in charge thereof at the time such obstruction or obstacle was occasioned . . .

The dispute arises in this way: The schooner "Empress" was burned to the water's edge in Barrington Passage, a public harbour, and was abandoned to the underwriters as a total loss. By them it was sold at auction for $5.00 to one Nickerson who, after several ineffectual efforts, abandoned the attempt to remove the wreck. The Minister advertised by tender for the execution of the work of removal and in the contract which was let for $750, it was stipulated that "the materials in the obstruction when the removal was satisfactorily completed, but not before," were to "become the property of the contractor."

By the contractor the wreck was blown up and the pieces were removed to the adjacent shore and eight iron knees weighing over a ton, and about 150 lbs. of copper were taken by the contractors to Yarmouth and sold by them for their own benefit.

In this action the Crown sought to charge the appellant under sec. 18 with the whole cost of removing the wreck and Cassels, J., the Judge of the Exchequer Court, has held that the appellant is liable, 46 D.L.R. 275, 18 Can. Ex. 401. The appellant contends that the conditions of liability under sec. 18 have not come into existence.

At common law the owner of a vessel becoming an obstruction to navigation in the absence of negligence or wilful default of the owner or persons in control of her, is not responsible for the consequences of the obstruction, or chargeable with the cost of removing it, and the Navigable Waters Protection Act imposes a new liability upon the owners of ships, which comes into existence in certain defined conditions; a liability which it would be difficult in many cases to describe as just or fair or reasonable.

On well-known principles the party who asserts in a particular case that the conditions of a new statutory liability have come into existence, must establish that proposition strictly and in ascertaining whether that is so or not, the inquiry is: Do the facts established clearly fall within the statutory description of those conditions?

Now when sec. 18 is read in connection with sec. 17, it becomes apparent that "sale under this part" in sec. 18 refers to the sale authorised by sec. 17, and sec. 18 provides, if not in explicit terms, at least by plain implication, that if there is anything which can be sold, it is only the difference between the net proceeds of the sale of it and the amount of the costs which can be recovered.

It is quite clear that there was something of appreciable value which could be sold; the parts of the vessel, that is to say, which were taken away by the contractors and sold for their own account. And the appellant is entitled to succeed unless the condition of the statute is satisfied that there was a sale of these parts within the meaning of the statute.

On behalf of the Crown it is contended that the provision of the contract transferring the ownership of the materials to the contractor upon the completion of the work of removal, constituted a sale within the meaning of the Act. The consideration for this term of the contract would be found, it is argued, in an appropriate allowance made in the stipulated compensation which would be reduced in consequence of the supposed value of the stipulation in the eyes of the tenderers. The cost of removal being thus dimin-

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ished and the burden upon the owner correspondingly lightened, the owner, it is argued, would in this way get the equivalent in value of the materials just as if they had been sold as the statute contemplates.

The answer to this contention is and I think it is a complete answer, that the statute provides for no such thing. Neither in form nor in substance does this stipulation in this contract fulfil the statutory condition. The statute provides for a sale at auction and sec. 18 makes it quite plain that what is contemplated is a sale in the ordinary sense, that is to say a sale for an ascertained price which, if less than the cost, can be deducted therefrom in order to determine the amount of the liability under that section.

Moreover, it would be rash to assume that the procedure under consideration would in all cases operate as favourably to the owner as that prescribed by the statute. Under this procedure the competitive bidders are limited to persons who are prepared to tender for the execution of all the work of removal. Under the statutory procedure the bidders would include all persons naturally desirous of buying the articles for sale.

The appeal should be allowed and the action dismissed with costs.

Anglin, J.

ANGLIN, J.:—I was at first inclined to think that there had been substantial compliance with sec. 17 of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, sufficient to entitle the Crown to maintain this action under sec. 18. But further consideration has led me to the conclusion that this view cannot be sustained—somewhat reluctantly because I incline to think the course adopted may have been quite as beneficial to the appellant as a strict compliance with sec. 17 would have been.

Tenders were called for by an advertisement for the removal or destruction, under sec. 16, of the wreck of the defendant's vessel on the footing that the property in it after removal or destruction should belong to the contractor. It may be surmised that in this case something approximating their salable value after the ship was blown up had already been allowed to the Crown by the contractor in reduction of the amount of his tender for the destruction of the vessel and that the defendant, therefore, received the benefit of such salable value. But if that be the fact, and if proof

of it would entitle the Crown to maintain this action, such proof is entirely lacking; and in many other cases—perhaps the great majority—little or nothing would be allowed by a tenderer for the value of possible salvage from a submerged wreck to be removed or destroyed by him. On the other hand, after removal to the shore or to some other accessible place, portions of the same vessel or cargo might have a very substantial value and be readily salable.

We are required to place a construction on secs. 17 and 18. The latter section confers on the Crown a right which it did not theretofore enjoy. *Arrow Shipping Co. Ltd.* v. *Tyne Improvement Commissioners*, [1894] A.C. 508, at pages 527-8. It subjects the owner of a vessel which founders in a place where it constitutes an obstruction to navigation, who may be entirely free from blame, to what may be a very serious burden. It is only fair to him that any conditions which Parliament has attached to the imposition of that burden should be fulfilled. Section 17 imposes such a condition. If after the removal or destruction of a vessel by or at the instance of the Crown under sec. 16 there should be anything left "which can be sold," it must then be "sold by auction or otherwise" under sec. 17 before the Minister may invoke the remedy created by sec. 18 of maintaining an action for the balance of the expenses incurred by the Crown after crediting the proceeds of a sale under sec. 17. Disposing of what may prove to be of salable value after removal or destruction by inviting tenders for the removal or destruction on the basis that it shall belong to the contractor may be a convenient, possibly the most convenient, method of dealing with such a situation as was presented in the case at bar. It may under some circumstances even be more advantageous to the owner than the course prescribed by sec. 17. But it is not that course; nor can it be said that it has been shewn in the present case to have been its substantial equivalent, if that would suffice.

I am for these reasons, with great respect, of the opinion that the appeal must be allowed and the action dismissed.

BRODEUR, J.:—This is a case where we are called upon to construe certain provisions of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, concerning the sale, the removal or destruction of the wrecks in navigable waters. Brodeur, J.

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Brodeur, J.

The appellant, Anderson, was the owner of a schooner called "Empress"; and on November 10, 1915, while lying at anchor in Barrington Passage, the vessel was burnt to the water's edge and became an obstruction to navigation.

The owner was notified by the Department of Marine and Fisheries that it was his duty, under the provisions of the Act, to remove the schooner and, on November 18, Anderson caused the vessel to be sold at public auction to the highest bidder, and he stipulated that the purchaser should assume all responsibility for its removal. A person offered and paid $5 for the vessel, stripped her of everything of value and abandoned the remains after having unsuccessfully tried to remove the vessel.

The department then advertised for tenders for the removal of the wreck; and, in view of what had happened, stated in the notice calling for tenders that the materials of the vessel, when the removal has been satisfactorily completed, should become the property of the contractor. The successful tenderer, as requested by the notice calling for tenders, stated that he intended to blow the hull into pieces and agreed to do the work for $750. The present action has been instituted by the King to recover the sum of $750 and cost of advertisements, and some other incidental expenses.

The point raised by the appellant is that the sale of the vessel is a condition precedent to the right to recover the expenses of removal and that the Minister did not properly exercise his discretion as to whether the wreck is an obstruction to navigation and as to the manner of its removal.

By the provisions of sec. 16 of the Act the Minister

> may cause any wreck to be removed or destroyed in such manner and by such means as he thinks fit and may use gunpowder and other explosive substance for that purpose if he deems it advisable.

In the present case, the Minister called for tenders and in the notice the tenderers were asked to state how they would do the work. Different modes were suggested by the different tenderers; and the Minister having decided to accept a tender which provided that the vessel would be destroyed shews that the discretion has been properly exercised by the Minister and that in his view the hull should be destroyed.

It is rather evident in this case that the vessel could not easily be removed in view of the condition in which she had been left

after the fire, and in view of the efforts made by the first purchaser. Besides, the Minister was not bound to remove her. It was absolutely within his discretion to remove or to destroy her.

The Minister could then have purely and simply asked for tenders for her destruction. But in this case, in order that the owner could get from the vessel as much benefit as possible, he provided that the successful tenderer should become the owner of the wreck and should consider in his tender the value of such wreck. As I said, it was not necessary for the Minister to provide for that. He could have simply called for tenders for the destruction of the ship without providing at all for setting any value upon the hull. That condition was put in for the benefit of the owner; and he should certainly not now be entitled to complain and say the Minister had no right to do that.

I consider that the Minister substantially complied with the provisions of the law; and if he failed in something, it was in conveying to the owner certain benefits which otherwise the latter could not get.

For these reasons I consider that the action which was maintained by the Court below was well founded and the appeal from its judgment should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The only question that merits serious discussion here is whether the appellant is right in his construction of secs. 13, 14, 15, 16, 17 and 18 of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, as amended by 8-9 Ed. VII. 1909, ch. 28, so that the wreck not having been sold by auction by the Crown for the recovery of the cost of its destruction, the respondent cannot recover from the appellant the amount necessarily paid for the removal of the wreck. Otherwise it is obvious that the claim of the Crown is one which the appellant should pay.

The schooner "Empress," while anchored at Barrington Passage, a public harbour, was burnt to the water's edge, and was abandoned to the underwriters as a total loss and by them, on their account and on account of the owner, sold by auction for $5 to one Nickerson, the purchaser obliging himself to remove the wreck. Nickerson swears that he twice tried to remove the remains of the schooner to the shore and failed and so abandoned it where it was, after taking away what could be stripped off. The Minister, after notifying the owner to remove the wreck and this not being

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done, advertised for tenders to remove it, the materials to belong to the tenderer, and received several tenders, the lowest being $750, and the highest $2,700. The lowest tender was accepted, the wreck blown up with dynamite, and some of the materials were sold by the contractor. The Crown sued the appellant and the latter served a third party notice on Nickerson, but the issue was tried between the Crown and Anderson, and it was agreed that if the plaintiff succeeded against Anderson, the trial between Anderson and Nickerson would come on at a subsequent date.

As I have said, the claim of the Crown is one which Anderson should pay unless, adopting his construction of the Navigable Waters Protection Act, it be held that the sale of the wreck under sec. 17 is a condition precedent to the right of the Crown to claim from the owner the cost of removal.

That this question of construction is not free from difficulty is shewn by the division of opinion among the members of this Court. Section 17 deals with the sale of the obstruction or wreck. In form it is permissive and says that the Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable. The evidence here is that the wreck could not be removed from the place where it formed an obstruction, while certain materials, such as the chains, anchors, etc., could be and were taken away by Nickerson to whom the whole wreck had been sold, on account of the owner and underwriters, with obligation to remove the wreck, before the appellant received the letter from the Government ordering him to remove it. That the appellant bid $3 and did not judge it wise to go higher than $5, the amount of Nickerson's bid, shews that he considered the game was not worth the candle on account of the obligation incumbent on the purchaser to remove the wreck.

It is true that the contractor was allowed to dispose of the remains of the wreck after blowing it up. But if all these remains had to be brought by him to shore and then sold so as to defray in part the cost of removal, the contractor would no doubt have charged more, so that the appellant gets the benefit of the value of anything remaining after the wreck was blown up.

Coming back now to secs. 17 and 18, a not unreasonable con-

struction of sec. 17 would be that where the wreck or obstruction, or a material part thereof, cannot be conveyed to the shore and sold, there is no obligation (and I think that the word "obligation" is too strong for a provision such as sec. 17, which is as I have said, permissive in form) to sell it by auction, and if in such a case there is no direction in the statute to sell the wreck, the sale cannot be a condition precedent to the right of the Crown to recover the cost of removal.

Moreover, if the Minister had caused the wreck to be sold where it stood, owing to the impossibility of removing it, there is no reason to suppose that a larger sum would have been realised than that paid by Nickerson for, obviously, if the Minister sold the wreck, a necessary condition would have been that the purchaser should remove it.

But the appellant contends that after the wreck was blown up the remains should have been sold and credited to him. I have already answered that in that event the contractor would no doubt have charged more for removal.

I may add that sec. 18 contemplates the case where there is *nothing that can be sold* and in that event nothing is to be credited to the owner in deduction of the cost of removal. Here of course there were some iron knees and copper, but the sale of this stuff would not have benefited Anderson, as I have observed, if the contractor, deprived of these materials, had charged more for removal, and the whole of it is to my mind so insignificant that the maxim *de minimis non curat lex* may be usefully applied.

On the whole, I consider that the appellant has suffered no prejudice, and to allow his technical objection to prevail would deprive the Crown of the right to ever recover what is due by him.

I would dismiss the appeal with costs.

Appeal dismissed by equally divided Court.

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Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ. December 19, 1919.

WILLS (§ III G—126)—INTERPRETATION—DEVISE OF REAL ESTATE TO WIDOW —FEE OR LIFE INTEREST—INTENTION OF TESTATOR—BENEFIT TO CHILDREN.

The intention of the testator must be given effect to in every will. It must be carefully considered in determining the effect of the wording and general construction of the will.

[*Comiskey* v. *Bowring-Hanbury*, [1905] A.C. 84, followed; *Griffith* v. *Hughes*, [1892] 3 Ch. 105, distinguished.]

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APPEAL from the judgment of Chisholm, J. (1918), 48 D.L.R. 662, in favour of plaintiffs in an action claiming the possession of land and rents and *mesne* profits thereof, and dismissing defendant's counterclaim. Affirmed.

F. L. Milner, K.C., and *T. S. Rogers*, K.C., for appellant.

V. J. Paton, K.C., and *E. T. Parker*, for respondent.

Harris, C.J.

HARRIS, C.J.:—William Nelson Mills died on or about August 16, 1862, being owner in fee of the lands and premises hereinafter referred to and also of other lands. He left a will reading as follows:

This is the last will and testament of me William Nelson Mills of Amherst in the County of Cumberland, carriage maker. I give and devise and bequeath unto my wife Elizabeth Mills all my real and personal estate of which I shall die seized and possessed or to which I shall be entitled and all debts which may be due to me at the time of my decease with full power and authority for her to dispose of the same at her discretion by absolute deed or deeds of conveyance executed by her, or by her last will and testament among my children or any one of them and should she die without executing such deed or deeds or last will and testament, then the same to be divided among my children surviving or their legal representatives if dead share and share alike. And I commit the guardianship of my children Elizabeth and Hibbert until they attain full age unto my said wife whom I also constitute and appoint sole executrix of my last will testament and devise. In witness whereof I have hereunto set my hand and seal the eighth day of August, 1862.

Probate was granted to the widow Elizabeth Mills in January, 1863.

The plaintiffs are children of William Nelson Mills and the children of the deceased children or their representatives.

After the death of William Nelson Mills his widow seems to have thought that she was the owner in fee of the real estate and she made a deed of a portion of it to one William Hamilton. This deed is dated May 6, 1873, and the defendant claims under conveyances from Hamilton or his grantees.

The widow of William Nelson Mills died on March 12, 1902, without having disposed of the property by deed or will among the children of the deceased and the plaintiffs' action is brought to recover possession of the land so sold to Hamilton and subsequently transferred to defendant. The widow transferred all the real estate of the deceased to various persons and buildings have been erected on some of the lots and the property has very largely increased in value and a number of actions are pending all of which depend upon the decision in this case.

The main contention is as to whether the will of William Nelson

Mills on the true construction thereof gave his widow the fee or only a life interest in the real estate. If she took in fee simple then it is admitted that her deed to Hamilton and the subsequent deeds vested a good title in defendant.

On the other hand, if the will only gave the widow a life estate in the real estate of the deceased, it would seem to follow that she could convey a life estate only.

In stating the case in this way I do not overlook certain contentions made on behalf of the defendant on the argument to which I shall refer later.

The case was tried before Chisholm, J., at Amherst, and his decision was in favour of the plaintiffs and this appeal is asserted herefrom, 48 D.L.R. 662.

The first question is as to the construction to be put upon the will:

Was it the intention of the testator (to be gathered of course from the words of the will) to give his wife a fee simple, or only a life estate, with a power to convey or to will it to the children or any one of them and a gift over to the children equally on failure to exercise the power to convey or will it in their favour?

Reading the whole will together I think the testator's intention is clear. His intention that his children should benefit is perfectly obvious as is also his intention that they should at least take on the death of his wife. They are to take before her death if she in her discretion should so decide and should convey it to them otherwise on her death either by her will in their favour or otherwise under the testator's will equally. I do not see how a plainer intention to benefit the children could have been manifested. They were all infants when the testator made his will and, having confidence in his widow, he gave her power to make deeds of it or will it between the children or give it all to one of them in her discretion, but if she did not so convey it or will it, then it was to go to the children equally on her death.

In the argument of counsel for the defendant it was sought to divide the will into three distinct and separate parts or clauses and to ignore the fact that the gift to the wife and the special power to convey or will it among the children and the gift over to the children was all contained in one sentence. That fact is entitled to consideration, and is an indication, I think, of the

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intention of the testator to give the widow only a limited estate and not the fee.

The Earl of Halsbury, L.C., thought this fact entitled to some weight in *Comiskey* v. *Bowring-Hanbury*, [1905] A.C. 84.

Another thing which is very significant as indicating the intention to restrict the interest of the widow is the fact that all the property is to be kept intact until the widow makes the conveyance or will giving it to the children or one of them, and if she does not convey or will it to the children then it is to be kept intact until her death.

I underscore* the words of the will which make this apparent:

"I give devise and bequeath unto my wife Elizabeth Mills *all my real and personal estate* of which I shall die seized and possessed or to which I shall be entitled . . . with full power and authority for her to dispose *of the same* at her discretion by absolute deed or deeds of conveyance executed by her or by her last will and testament among my children or any one of them and should she die without executing such deed or deeds or last will and testament *then the same* to be divided among my children, etc."

It is the same property given to the wife which she has power to convey or will to the children and the same identical property and all of it which is to go to the children if she does not convey or will it.

This was also a feature in the *Comiskey* case which the House of Lords thought indicated an intention to limit the estate of which the wife was to take. See *per* Lord Halsbury, L.C., page 88.

One cannot but be struck by the many features common to this case and the *Comiskey* case, and I am unable to distinguish that case from this, except (in one unimportant point referred to but not relied upon to any extent) that in that case there was a gift of a sum not exceeding £150 to Charles Fisher "as my dear wife may decide upon."

It is, I think, obvious that the decision would have been the same if this clause had not been contained in the will in question in that case.

I refer particularly to the reasons for judgment of L.J. Cozens-Hardy in the Court of Appeal, reported, [1904] 1 Ch. 415, and the judgment of Lord Halsbury, Lord Davey, and Lord James, in the House of Lords, [1905] A.C. 84.

*Underscored words are italicized.

See also *Shearer* v. *Hogg* (1912), 6 D.L.R. 255, 46 Can. S.C.R. 492.

It was strenuously argued that the two cases referred to turned upon the fact that there was a trust created. It is clear if one reads the decisions to which I have referred in the *Comiskey* case that the decision did not turn upon the question as to whether or not there was a trust. It was a question as to the intention of the testator to be gathered from all the words of the will, and more than one of the Lords speak of the fact of there being a trust or not being a trust as making no difference in the decision.

I treat the first part of the clause of the will in this case as broad enough to give the wife a fee in the first instance and they are practically the same words as used in the *Comiskey* case, except that they were followed by the word "absolutely;" but no will can be interpreted by one clause alone, still less by a part of a clause or sentence. We must read the whole will together and so reading it I have no doubt that the testator did not intend his wife to take more than a life or limited interest with a power to convey or devise the property to the children and a gift over to them on her death if she had not conveyed or devised "the same" among the children in her lifetime.

It was argued that the power given by the will was to be read as an absolute power to sell and convey and that the words "among my children or any one of them" were to be restricted in their application to the power to appoint by will.

I do not think that is the natural meaning of the words and I can see no reason for giving them a forced or strained construction when the natural meaning seems so obviously to be the one intended.

The decision of *Griffith* v. *Hughes*, [1892] 3 Ch. 105, cited to us as supporting the construction contended for is, I think, really an authority the other way. It seems to admit or take for granted that the natural meaning was to be departed from in that case for special reasons which are not applicable here. I think this ground fails and that the power to dispose of the property given to the widow was limited to the children of the deceased and this whether it was exercised by deed or will.

It was also contended by counsel for the defendants that there was an implied power of sale in the widow; that she could sell and

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convey a good title to anyone and her deed was therefore good, and if the heirs had not received their share of the proceeds they were without remedy except against the estate of the widow. I cannot find any warrant for this and it seems opposed to principle and authority. The limited power would exclude any such implied authority as is suggested.

The principle of *Kenworthy* v. *Bate* (1802), 6 Ves. 792, and other cases following it, does not in my opinion apply. It is perfectly obvious, as the trial Judge has found, that the widow never pretended to exercise the power given her by the will. On the other hand, she thought she owned the property in fee and dealt with it as her own.

The argument as to the Statute of Limitations also fails. It was admitted that the statute did not bar the claim unless the plaintiffs' right of entry began in 1873 on the date of the deed from the widow to Hamilton. It was urged that by conveying in fee to Hamilton she made a tortious feoffment which gave an immediate right of entry to those in remainder and it was claimed that more than 40 years had elapsed since this deed was given and the claim of the plaintiffs was absolutely barred. It will be seen that this whole contention is based upon the theory that the English law of forfeiture by alienation was a part of the common law which was in force in this Province.

Before the argument was closed Mr. Milner, one of the counsel for the defendant, very properly called the attention of the Court to the case of *Berry* v. *Berry* (1882), 16 N.S.R. 66, in which it was distinctly held that the law of forfeiture by alienation had no application in this Province. That case disposes of the contention as to the Statute of Limitations and I understood counsel for defendant so admitted. I mention the matter only because the question is dealt with at some length in the judgment appealed from.

Another question argued at some length was the question of estoppel or acquiescence. The contention as I understand it is that at least one of the plaintiffs, C. Hibbert Mills, was estopped from claiming in this action because he knew there was a will and he therefore had constructive notice of the contents of it and must be taken to have read it and understood it in the sense in which the Courts will finally interpret it. It was also said that he was

bound to know the law and therefore he must be taken to have known that his mother could not convey it away, and knowing all this he stood by and allowed Hamilton, an innocent purchaser, to spend his money on the property.

The counsel for the plaintiffs, besides denying the facts to be as alleged by defendant, denied that plaintiffs could be affected by constructive notice of the contents of a will which he swore he had never read, and countered by arguing that if plaintiff was bound to know and to correctly interpret a will he had never seen because his title depended upon it, so also the defendant was bound to know and correctly interpret this will upon which her title depended; and upon this theory the defendant was not misled and did not expend her money innocently, but with full knowledge that the widow could only convey a life interest and therefore there could be no estoppel.

I accept the findings of the trial Judge, 48 D.L.R. 662, at 668, that:—

> Elizabeth Mills the widow, William J. Hamilton the first purchaser, and every subsequent grantor and grantee of the property down to and including the defendant honestly believed as to every conveyance purporting to pass a fee simple, that a good title in fee simple passed. With respect to Byron Mills who was about 22 years of age when his father died, I am of the opinion that he honestly believed that the property was devised to his mother in fee and was conveyed by her in fee to Hamilton; and that Byron Mills so honestly believed down to the day of his death. Elizabeth Fowler died in 1871 and before the conveyance to Hamilton. I am of opinion that her son Herbert Fowler honestly believed that his grandmother had a title in fee and conveyed such title to Hamilton and that he was of that belief down to his death. I believe that the plaintiff, C. Hibbert Mills, thought as his brother did as to the title until a short time before this action was brought. I find also that the price paid by Hamilton for the homestead, $2,400, represents fairly the value of the property in 1873. I find further that Byron Mills and the plaintiff, C. Hibbert Mills, knew that Hamilton was erecting a hotel on the property . . .
>
> I cannot find that there was any fraudulent standing by on the part of the plaintiff, C. Hibbert Mills, or on the part of the other plaintiffs or anybody through whom they claim. These parties were not aware of their own rights, nor were they aware of the ignorance or mistake of the purchasers as to their rights.

And I agree with him that there cannot be any estoppel or acquiescence in this case.

The case of *Willmott* v. *Barber* (1880), 15 Ch. D. 96, establishes that the acquiescence which will deprive a man of his legal rights must amount to fraud, and it is necessary that the party setting up the estoppel must have made a mistake as to his legal rights

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and must have expended money on the faith of his mistaken rights. It is also necessary that the party against whom the estoppel is set up should know of the existence of his own right which is inconsistent with the right claimed by the other party and he must also know of the other party's mistaken belief in his right, and he must have encouraged him in the expenditure of the money either directly or by abstaining from asserting his legal rights. Many of these elements are wanting in this case.

I, perhaps, ought to refer to a contention made in this connection with reference to a letter written by the plaintiff C. Hibbert Mills to one Dan McLeod, which was used in cross-examining this plaintiff. The letter was not put in by either side, but it was argued that the plaintiff's counsel had made it evidence by inspecting it. It is unnecessary to express any opinion on this question because, assuming this letter to be admitted in evidence, there is nothing in it to affect the case. The letter was written in June, 1917, and the writer after stating that he received some $475 from his mother at the time of his leaving home and later when he was evidently in need of funds says: "That's all I ever received out of the estate." It was argued that this was an admission that when he got these moneys from his mother he knew they came from the proceeds of the sale of the real estate. The money in all probability did not come directly from the sales of property and, as I understand it, the writer did not mean to suggest that they did. What I think is a fair inference from his language is that all he got from his mother were these advances and if they were charged against his share of the estate he had still a large claim. That is, I think, the obvious meaning of his letter. Then, again, while the letter was not put in as evidence in the case, such parts as the counsel for defendant considered important were read to the plaintiff and he was cross-examined at length as to what he meant by the expressions used. It is impossible to think that the findings of the trial Judge could have been affected in the slightest degree if the whole letter had been received formally in evidence.

I would for these reasons dismiss the appeal with costs.

Longley, J.

LONGLEY, J.:—I approach this subject with the natural feeling of any Judge sitting on it that it would be desirable and right, had the case admitted it, to set aside the judgment for the plaintiff, as it involves over $100,000 in land which has grown up in the 30

or 40 years since this case first arose on the making of the will of Mills, deceased. But I have searched in vain for any loophole by which, without violating the law of the country, this could be overturned. My reasons for this are so completely embodied in the judgment of the Chief Justice, and the authorities cited by him are so conclusive, that I rely upon his judgment and concur in it.

Drysdale, J.

DRYSDALE, J. (dissenting):—I have to dissent from my brothers in this appeal.

I am of the opinion that there is error in the judgment of Chisholm, J., herein. The trial Judge is in my view in error when he calls to his aid sec. 28 of the Wills Act, R.S.N.S. 1900, ch. 139, in interpreting the testator's devise to the widow. When the trial Judge deals with the query, "Have we in this will an absolute gift of the land to the widow?" I think there was error in his conclusions. No doubt a mere devise of the land without words of limitation would create a life estate only. But where the testator as in this case devises all his real estate to his wife the long settled rule is that the use of such words creates and carries a fee. This rule was not controverted by respondent's counsel and authority binding upon us was cited in its support. Taking this rule for granted, testator commences his will by an absolute fee to his wife in his lands followed by a power of disposition and in the event of failure to exercise the power a devise or gift over to testator's children. The trial Judge held the provision for the wife a life interest in the lands of testator by a failure to apply the rule I have referred to, by the use of the statute mentioned and discussing a "contrary intention" on the face of the will. To my mind this was error. I think we have here a fee to the wife in clear terms followed by words sounding like a power and on failure of the exercise of the power a gift or devise over in fee. Here we have two fees and which is to take effect? I think the rule taken from Halsbury and from Farwell on Powers cited in the opinion of the trial Judge, at page 79, applies and the gift over is repugnant and void. Once I find an absolute gift to the wife in fee with nothing in the context shewing any intention to restrict the absolute gift I think there cannot be a gift over taking the property out of the due course of devolution on the death of the first named grantee or devisee, in this case the wife. The land in question here was treated by the wife as her property, duly sold and disposed of for value and has

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Drysdale, J.

changed hands many times. The defendant claims through the wife and has, I think, a good defence. Besides relying on the interpretation of the will which I accept he has raised several other matters of defence which I will not deal with in detail other than to say I think they will not bear investigation. I would allow the appeal and dismiss the action. *Comiskey* v. *Bowring-Hanbury*, [1905] A.C. 84, was much relied upon by counsel for respondent but an examination of that case shews me that there the will indicated a trust for the nieces which was given effect to. I cannot distinguish this case at bar from *Bowman* v. *Oram* (1894), 26 N.S.R. 318, decided by a strong Court here covering the very point discussed, a case which I feel bound to follow.

Appeal dismissed.

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GRANT v. SCOTT.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. 1919.

BILLS AND NOTES (§ III B—65)—INDORSEMENT BY THIRD PARTY—SUBSEQUENT INDORSEMENT BY PAYEE—LIABILITY—BILLS OF EXCHANGE ACT, R.S.C. 1906, CH. 119, SEC. 131.

When a promissory note is indorsed by a third party, before it is indorsed by the payee, the former is liable as an indorser to the latter. [*Robinson* v. *Mann* (1901), 31 Can. S.C.R. 484, followed.]

Statement.

APPEAL by the defendant from a decision of the Supreme Court of Nova Scotia (1918), 52 N.S. R. 360, affirming the judgment for the plaintiff at the trial.

The defendant, to secure a debt due by one Holmes to the plaintiff, wrote his name across the back of a promissory note made by Holmes in favour of the plaintiff who afterwards wrote his name under that of defendant. The note was protested and an action brought against defendant as an indorser. The Courts below held him liable.

Findlay Macdonald, K.C., for appellant.

Neil R. McArthur, for respondent.

Davies, C.J.

DAVIES, C.J.:—I am of opinion that the unanimous decision of this Court in the case of *Robinson* v. *Mann* (1901), 31 Can. S.C.R. 484, that under sec. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee may be liable as an indorsee to the latter, is conclusive in this appeal.

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I myself was a party to that judgment. It has remained now for many years unquestioned and been accepted throughout Canada as law. I see no reason for raising any doubt now upon its correctness.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—It seems to me that the question raised in the appeal herein is decisively concluded by the decision in *Robinson* v. *Mann*, 31 Can. S.C.R. 484, and therefore that this appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—This appeal should be dismissed with costs.

I concur in the unanimous judgment of the Court below that it is governed by the decision of this Court in *Robinson* v. *Mann*, 31 Can. S.C.R. 484.

Anglin, J.

ANGLIN, J.:—The appellant, intending to become a surety for the maker to the payee, wrote his name across the back of a promissory note. On precisely similar facts this Court in *Robinson* v. *Mann*, 31 Can. S.C.R. 484, held the defendant liable as an indorser by virtue of sec. 56 of the Bills of Exchange Act of 1890— now sec. 131 of R.S.C. 1906, ch. 119, made applicable to promissory notes by sec. 186. That decision has been uniformly accepted as the law of Canada in the Provincial Courts and by text writers of repute. The respondent makes the following references:— *Slater* v. *Laboree* (1905), 10 O.L.R. 648; *McDonough* v. *Cook* (1909), 19 O.L.R. 267; *Knechtel Furniture Co.* v. *Ideal House Furnishers* (1910), 19 Man. L.R. 652; *Johnson* v. *McRae* (1910), 16 B.C.R. 473; Falconbridge on Banking (2nd ed.) 701; Maclaren on Bills and Notes (2nd ed.) 334.

I had occasion shortly after becoming a member of this Court to examine with some care how far the doctrine conveniently designated *stare decisis* should be held to govern it. *Stuart* v. *Bank of Montreal*, (1909), 41 Can. S.C.R. 516, at page 536. I have had no reason to change the views there expressed. Holding them, this case is for me concluded against the appellant by *Robinson* v. *Mann*, *supra*. I may add that personally I agree with the interpretation there placed on sec. 56 of the Bills of Exchange Act, 53 Viet., 1890 (Dom.), ch. 33.

Brodeur, J.

BRODEUR, J.:—This case is concluded by the decision of this Court in *Robinson* v. *Mann*, 31 Can. S.C.R. 484.

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By sec. 131 of the Bills of Exchange Act, it is provided that when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course and is subject to all the provisions of the Act respecting indorsers.

This section contains an important addition to the corresponding section of the Imperial Act and it would not be advisable then to follow the British decisions.

In the case of *Ayr American Plough Co.* v. *Wallace* (1892), 21 Can. S.C.R. 256, decided in 1892 on a promissory note made before the above addition, Sir Henry Strong stated that if the case were under the new law the defendant would have been held liable. This dictum was followed in the Province of Quebec where the doctrine had always existed, (Pothier, Traité du change, no. 132, art. 2311 C.C.) and also in some other Provinces.

Balcolm v. *Phinney* (1892), 30 C.L.J. (N.S.) 240.

Watson v. *Harvey* (1894), 10 Man. L.R. 641.

Fraser v. *McLeod* (1895), 2 Terr. L.R. 154.

Pegg v. *Howlett* (1897), 28 O.R. 473.

The question, as I said before, was finally settled by this Court in 1901 in the case of *Robinson* v. *Mann*, 31 Can. S.C.R. 484, where it was held that the Molsons Bank were holders in due course of a note made payable to their order and which the defendant had indorsed above them and that his indorsement was a form of liability which the Bills of Exchange Act had adopted.

I do not see any reason why this decision which has been followed should be changed.

The appeal fails and should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The point to be decided in this case is a very simple one.

The appellant signed his name across the back of a promissory note whereby one Holmes promised to pay to the respondent $500 twelve months after date with interest at 8% per annum as well after as before maturity. He claims to have thus signed the note as security for Holmes. He now contends that he is not liable as an indorser of the note.

Section 131 of the Bills of Exchange Act, R.S.C., ch. 119, which applies to both bills of exchange and promissory notes, states that

No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such; provided that when a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of this Act respecting endorsers.

In *Robinson* v. *Mann*, 31 Can. S.C.R. 484, a similar case, it was said by this Court, under the authority, sec. 56 of the Bills of Exchange Act, 1890, now sec. 131, that a person who indorses a promissory note not indorsed by the payee may be liable as an indorsee to the latter.

The fact that the payee, Scott, when he placed the note in the hands of the Royal Bank for collection, also indorsed the note, and he did so under the signature of the appellant, does not take the case out of the operation of sec. 131, and I cannot follow the argument of the appellant when he says that the respondent was not a holder in due course, for he clearly was one as the word is defined by sec. 56. *Robinson* v. *Mann*, *supra*, is conclusive authority that the payee can hold as an indorser a person who signs the bill or note otherwise than as a drawer or acceptor.

The appeal should be dismissed with costs.

Appeal dismissed.

WELLINGTON v. SELIG.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1919.

CONTRACTS (§ II D—170)—SALE OF LAND—PAYMENT IN GRAIN BY INSTALMENTS — ACCELERATION CLAUSE — REPUGNANT TO AGREEMENT — EFFECT.

If the acceleration clause in an agreement for the sale of land is repugnant to the other clauses, it cannot be given effect to.

[*Sherrin* v. *Wiggins* (1917), 27 Man. L.R. 572, referred to.]

Statement.

APPEAL by plaintiff from the trial judgment in an action on an agreement for sale of land. Varied.

J. W. Corman, for appellant.

M. A. Macpherson, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Elwood, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The defendant Selig purchased the south half of 15-11-13 West of the Third Meridian from the defendant Smith for $9,600, and paid cash $1,635, and agreed to pay the balance in crop payments by giving to the vendor three-quarters of the

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crop raised on said land each year. As collateral security for the payment of the first $3,000, of the deferred payments, Selig gave Smith a mortgage on the west half 10-11-13 W. 3rd. On the land sold by Smith to Selig there was a mortgage for $2,600, to the Saskatchewan Loan & Investment Co., Ltd., and the agreement of sale contained a provision that before making the annual payment on the purchase price the purchaser shall have the right to ascertain if the vendor has made the payments of the interest and of the instalments under said mortgage, and if they have not been made the purchaser shall have the right to make them in the name of the vendor, such payments by the purchaser being considered to be made on account of the purchase price of said land.

Both the agreement of sale and the mortgage given as collateral security thereto were assigned to the plaintiff, defendant Selig having notice of and being a party to said assignment.

The first payment under the agreement of sale was due December 1, 1917, and although plaintiff's share of the crop in that year amounted to $962.43, nothing was paid to him thereon. He therefore brought two actions, one on the agreement of sale for the full amount of the deferred payments which he claimed to be due under an acceleration clause therein, with the declaration of a vendor's lien and a sale thereunder, or, in the alternative, for an accounting and judgment for the amount found to be due him, and damages for the failure of defendant Selig to perform certain covenants contained in said agreement of sale; and the second for the foreclosure of the mortgage, and in the alternative for a sale, he claiming that in this case too the whole amount was due under the acceleration clause therein. These two actions were tried together, and the trial Judge held that, the deferred payments having been agreed to be made in grain, the acceleration clause had no meaning, and he gave him judgment for the amount of the payment that had not been made, *i.e.*, ¾ of the crop grown on the land in 1917, which he found amounted to said sum of $962.43, less the sum of $348.60 paid by defendant Smith on the mortgage on the land described in the agreement of sale, which, he says in his judgment, was admitted by counsel to have been paid by defendant Smith to the Saskatchewan Loan & Investment Co. In the mortgage action he held that the whole amount was due

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under the acceleration clause, and he made an order for the sale of the land covered thereby for such amount less the said sum of $348.60, paid on the mortgage to said Saskatchewan Loan & Investment Co.

From the judgment in the action on the agreement of sale the plaintiff appeals, on the ground that the trial Judge was wrong in holding that the acceleration clause was not applicable and that he should have given him a judgment for the full amount due under the acceleration clause and a declaration that the plaintiff had a vendor's lien therefor and ordered a sale thereunder; and as to the judgment in the mortgage action, that defendant should not have been given credit for said payment of $348.60 to the Saskatchewan Loan & Investment Co., but that he should be only allowed to redeem such mortgage by paying the whole amount of the crop due in 1917, viz.: $962.43, with the taxes, interest and costs of both actions.

The principal question to be decided in the action on the agreement of sale is, the effect of the acceleration clause.

The land in question is sold for $9,600; $1,635 is paid in cash, and the remaining sum of $7,965

by crop payments in annual instalments as hereinafter provided, together with interest at 8% per annum from the day of the date hereof, to be paid on the said sum or so much thereof as shall from time to time remain unpaid as well after as up to maturity, such interest to be payable yearly on December 1, until the whole of the moneys payable hereunder are fully paid and the first of such payments of interest to become due and be payable December 1, 1917, interest in arrear to be forthwith added to the principal and to bear interest at the said rate; and in the event of default being made in payment of any sums payable hereunder (including taxes and insurance premiums) or any part thereof, the whole purchase money to forthwith become due and payable.

The amount and manner in which these crop payments are to be made are set out in the following clause:

3. The purchaser further agrees with the vendor that the purchaser shall and will at the proper season during 1917 and each succeeding year during the continuance hereof, seed to wheat or such other grain as the vendor shall in writing consent to, all of the said land then under cultivation, save such portion thereof as may be left to be summer fallowed as herein provided; shall and will properly care for and harvest the crops at the proper season in each year; shall and will immediately after the harvesting thresh the said crops; and shall and will immediately after the threshing deliver at an elevator or in cars at Neville, Saskatchewan, the three-fourths share or portion of all said crops as the same come from the thresher, in the name of the vendor.

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And the manner in which the vendor is to apply these payments is provided for in the following clause:

9. The said share of crop so delivered under the provisions hereof by the purchaser to the vendor shall be by the vendor applied at the then market price of the grain, first, in payment of the interest payable hereunder in that year; next, in payment of arrears of any kind payable hereunder; and the balance on account of the purchase money.

The effect of these provisions is that the purchaser agrees to pay the balance due on the property in grain, and nowhere does he agree to make these payments in any other manner excepting in the following clause:

18. Notwithstanding anything herein contained, it is agreed that the said purchase price of the said land is to be paid in full on or before December 31, 1926, and if the crop payments herein provided to be made shall not by that time have paid all sums payable hereunder, the balance unpaid shall on that date become due and payable by the purchaser to the vendor in lawful money of Canada.

Now if all payments up to December 31, 1926, are to be made in grain by delivering to vendor ¾ of the crop raised on the land, I do not see how these payments can be accelerated unless by delivering the whole of the crop raised. The purchaser is only obligated to pay ¾ of the crop raised each year. It is impossible to accelerate these payments, and therefore that clause can have no effect.

If the purchaser does not keep his agreement to plant and harvest a crop and pay over the vendor's share to him, his remedy is either an action for damages or an action for rescission of the contract, and it is only after December 31, 1926, that he can require him to pay the balance of the purchase money in lawful money of Canada.

I think, therefore, that the trial Judge was right in holding that the acceleration clause in the agreement of sale was inapplicable.

As to the amount he found to be due, I am also of the opinion that he was correct. The total amount for which the land was sold to Selig was $9,600. On this land was a mortgage to the Saskatchewan Loan & Investment Co. On the purchaser paying the whole $9,600 to the vendor, he would be entitled to a transfer of the land free from this mortgage. For the protection of the purchaser it was provided that if the vendor omitted to pay interest or an instalment due on this mortgage the purchaser

could pay same, such payment to be considered a payment on account by him. This must mean a payment on account of the payment due on the agreement of sale. Now on December 1, 1917, there was a payment of $962.43 due under the agreement. This was not made. There was also a payment due under the mortgage to the Saskatchewan Loan & Investment Co. of $348.60. The vendor did not make this payment, therefore the purchaser could make it and it would be considered to be a payment on account of what he owed, and if made by him should be deducted from the $962.43, the payment due under the agreement of sale.

This payment was made by Smith to the mortgage company in January, 1918. This is stated by the trial Judge in his decision to have been admitted by the counsel at the trial. Selig had paid part of the money he owed plaintiff to Smith, therefore I presume Smith made the payment out of this money and, as he had then no interest in the land, he must be presumed to have made it on Selig's account, and as plaintiff got the benefit of it, Selig should be credited with it.

I therefore think the trial Judge's judgment in the action on the agreement of sale is correct.

As to the mortgage action, the mortgage having been given as collateral security, the amount due under it can only be the amount due on the principal debt. There is an acceleration clause in the mortgage and the trial Judge gave effect to it. I think he was wrong in so doing, as no more can be due under the collateral security than is due on the principal debt. To make a larger amount due on the collateral security than on the principal debt would be making a penalty for non-payment against which the Court would relieve. Besides the payments by the collateral mortgage are at the same dates as the original indebtedness, and as default in the payment of the debt would be a default in the security rendering the whole amount thereof due if the acceleration clause was to be given effect, it would follow that, by default of a small payment under the agreement of sale, the whole amount of the mortgage would become due, and that would not be according to the terms of the mortgage, which makes it collateral not to the first payment only, but to all payments up to $3,000.

I would therefore amend the trial Judge's judgment in the

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mortgage action providing for the payment into Court of all moneys realised from a sale of the land under the mortgage over and above the amounts he has found to be due under the agreement of sale, together with the interest and costs.

With this amendment to the trial Judge's judgment, I would dismiss the appeal with costs.

As both judgments are for the same cause of action either one or the other should be stayed. Therefore on plaintiff's proceeding on one judgment the other will be stayed until further order.

Lamont, J.A.

LAMONT, J.A.:—The main contest on the argument of this appeal was as to whether or not the whole purchase money became due and payable by reason of the purchaser's default and the acceleration clause.

Under the agreement the land was sold for

the price and sum of $9,600 payable as follows: the sum of $1,635 on the day of the date hereof, the receipt whereof is hereby by the vendor acknowledged, and the remaining sum of $7,965 by crop payments, in annual instalments as hereinafter provided; together with interest at the rate of 8% per annum from the day of the date hereof, to be paid on the said sum or so much thereof as shall from time to time remain unpaid.

The share of the crop to be delivered to the vendor was a three-fourths share of all the crop, and this was to be delivered at an elevator or in cars at Neville in the name of the vendor. the agreement then provides as follows:

9. The said share of crop so delivered under the provisions hereof by the purchaser to the vendor shall be by the vendor applied at the then market price of the grain, first, in payment of the interest payable hereunder in that year; next, in payment of arrears of any kinds payable hereunder: and the balance on account of the purchase money . . .

18. Notwithstanding anything herein contained, it is agreed that the said purchase price of the said land is to be paid in full on or before December 31, 1926, and if the crop payments herein provided to be made shall not by that time have paid all sums payable hereunder, the balance unpaid shall on that date become due and payable by the purchaser to the vendor in lawful money of Canada.

In view of these provisions it seems to me impossible to hold that the delivery of three-fourths of the crop to the vendor did not in each year cover both principal and interest, and in my opinion the vendor, apart from the share of the crop, was not entitled to demand payments of interest from the purchaser.

As to the acceleration clause, it is true the agreement provided that

in the event of default being made in payment of any sums payable hereunder (including taxes and insurance premiums or any part thereof) the whole purchase money to forthwith become due and payable.

The purchase money, however, was not payable in cash, but in grain; at least until 1926.

As held by Mathers, C.J.K.B., in *Sherrin* v. *Wiggins* (1917), 27 Man. L.R. 572, at 575:

> A provision that upon default the whole purchase money should immediately become due and payable in half crop payments would be absurd and ridiculous.

The reasoning and conclusions of the Chief Justice in that case I desire to adopt.

What we are in the present case asked to do is, to make a new agreement for the parties by adding a clause that in the event of default on the part of the purchaser the whole purchase price unpaid shall immediately become due and payable in money. The parties might have made such an agreement had they been so minded, but they did not do so, and, in my opinion, we cannot make it for them. The acceleration clause in my opinion is inapplicable to purchase money payable by delivering a specified share of the crop. It is repugnant to the other clauses in the agreement, and cannot be given effect to.

Selig, however, made default in the payment of the plaintiff's share of the 1917 crop, which the trial Judge found amounted to $962.43 less $348.60, paid by Selig to Smith and paid by Smith on the mortgage which the Saskatchewan Loan & Investment Co. held against this land. The agreement of sale between Smith and Selig provided that if Smith did not pay the instalments and interest on this mortgage Selig might make them, and such payments would be considered as made on account of the purchase price. This in my opinion would give Selig a right to deduct from the share of the crop going to the vendor in any one year the amount of any payment he might make to the mortgage company.

The trial Judge states that it was admitted that Selig had paid through Smith the sum of $348.60. Counsel for the appellant now contends that this was a mistake. If there is any doubt as to the amount, a reference may be had to the local registrar to clear up the point, and whatever amount is found to have been paid must be deducted from the $962.43, because Wellington is now

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subject to all the provisions of the agreement to the same extent as Smith before he assigned to Wellington.

The plaintiff in my opinion is entitled to an order for specific performance of the agreement, and a declaration that he was entitled to a vendor's lien subject to the mortgage on the land. As I have already pointed out, a reference to the local registrar may be had to ascertain the amount due.

The defendants to have 30 days within which to pay the amount so found. In default of payment, the plaintiff may have a sale of the property to satisfy his vendor's lien.

Re mortgage action: The mortgage being given as collateral security only to the first $3,000 of the purchase money, and as I am allowing the defendants 30 days within which to pay whatever balance may be found due for the crop of 1917, which is the only crop involved in this action, I would stay the mortgage action for 30 days. If the defendants pay the purchase money in arrear and all costs of both actions, the mortgage action should then stand dismissed, as the plaintiff's agreement would be in good standing, and I would vary the judgment of the trial Judge accordingly.

Elwood, J.A.

ELWOOD, J.A.:—This is an appeal with respect to two actions, one under an agreement of sale for the land and the other on a mortgage, which were consolidated and tried together.

So far as the action on the agreement of sale is concerned, there are three objections taken by the appellant to the judgment of the trial Judge: (1) That the trial Judge improperly credited the defendant Selig with $348.60; (2) that the trial Judge was in error in holding that, under the circumstances, there was no acceleration of the payments falling due under the agreement of sale, and (3) that the trial Judge was in error in holding that it was necessary for the plaintiff to shew that a clear title to the land in question could be given.

There was no evidence given of this alleged payment of $348.60, and the only reference to it is in the judgment of the trial Judge, in which he says that it was admitted by counsel that this sum had been paid on account of the first mortgage.

To understand what is meant by this transaction it is necessary to explain the facts a little more fully.

By an agreement in writing dated February 5, 1917, the defen-

dant Smith agreed to sell and the defendant Selig agreed to purchase the south half-15-11-13-W3rd Meridian in the Province of Saskatchewan, for the sum of $9,600, payable as therein stated as follows:

The sum of $1,635 on the day of the date hereof, the receipt whereof is hereby by the vendor acknowledged, and the remaining sum of $7,965 by crop payments, in annual instalments as hereinafter provided; together with interest at the rate of 8% per annum from the day of the date hereof, to be paid on the said sum or so much thereof as shall from time to time remain unpaid and as well after as up to maturity; such interest to be payable yearly on December 1, until the whole of the monies payable hereunder are fully paid and the first of such payments of interest to become due and be payable December 1, 1917; interest in arrear to be forthwith added to the principal and to bear interest at the said rate; and in the event of default being made in payment of any sums payable hereunder (including taxes and insurance premiums) or any part thereof, the whole purchase money to forthwith become due and payable.

The land so agreed to be sold had at the time of the agreement a mortgage thereon in favour of the Saskatchewan Loan & Investment Co., and the agreement of sale between Smith and Selig provided, *inter alia*, as follows:

It is also specially agreed between the said parties that before making the annual payments herein provided on the purchase price the purchaser shall have the right to ascertain if the vendor has made the payments of the interest and of the instalments under a certain mortgage registered against the said lands in favour of the Saskatchewan Loan and Investment Co., and if these payments have not been made the purchaser shall have the right to make them in the name of the vendor, said such payments by the purchaser being considered made on account of the present purchase price of the said lands.

For the purpose of securing the payment to the said Smith of the first $3,000 of the deferred payments under said agreement of sale, Selig granted to the said Smith a mortgage on the west half-10-11-13-W3rd, for securing payment of the sum of $3,000, payable as per the terms of said agreement of sale. This latter mortgage was also subject to a mortgage to the Saskatchewan Loan & Investment Co. Smith subsequently assigned to the plaintiff the said agreement of sale and the mortgage given to him as collateral security as above, and also transferred to the plaintiff the land agreed to be sold.

Counsel for the appellant on the argument before us stated that the trial Judge was under a misapprehension as to admission before him with regard to the $348.60. I have consulted the trial Judge, and I gather from such consultation that there is a possibility

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that he may have misapprehended the effect of what was said with respect to the $348.60. I think it is quite clear that the whole of this $348.60 should not be credited to the defendant in the cause of action herein. It was claimed that this $348.60 was paid by Smith to the loan company; part to be applied on the interest on the mortgage upon the land agreed to be sold and part upon the interest on the first mortgage on the land mortgaged as collateral security for the $3,000. As to the payment on this latter mortgage, the defendant is of course not entitled to any credit, and he is only entitled to credit on the first mortgage if the payment was made by Selig, or by Smith for or on account of Selig.

So far as the acceleration clause in the argument sued on is concerned, I am of opinion that the facts of the present case distinguish it very easily from *Sherrin* v. *Wiggins* (1917), 27 Man. L.R. 572.

In the agreement for sale in the case at bar it is quite true that the principal is payable by crop payments, but I am of the opinion that the interest is payable quite apart from the crop. It is payable on a time certain, which distinguishes it from *Sherrin* v. *Wiggins*. There are provisions in the agreement with respect to applying the crop on interest and principal, but I am of the opinion that that is merely a method of providing for what is to be done with the crop and how it is to be applied. If there is no crop, or if there is an insufficient crop, the interest is nevertheless payable in cash. Apart from that, however, the taxes are clearly payable in cash, and in the event of default being made in payment of either interest or taxes, the whole purchase money became due and payable.

I am, therefore, of opinion that the trial Judge was in error in holding that the whole of the purchase price was not due and payable forthwith.

So far as the title to the land is concerned, the only objection which the trial Judge takes to the title is the mortgage in favour of the Saskatchewan Loan & Investment Co., above referred to. It will be noted that that mortgage is expressly referred to in the agreement of sale, and provision was made for payment by the defendant Selig to the mortgagee in case of failure to pay by the vendor, and I am of the opinion that the existence of the mortgage upon the land is no objection to the plaintiff's prayer for relief.

The amount due on the mortgage will, of course, be taken into consideration in computing the amount to be paid into Court by the defendants, but the existence of the mortgage, under the circumstances of this case, is no bar to the plaintiff's claim to relief.

I would therefore make a reference to the local registrar to ascertain what part, if any, of the said sum of $348.60 was paid by or on account of the defendant Selig on the mortgage upon the south half of Sect. 15, Tp. 11, Range 13, west of the Third Meridian in the Province of Saskatchewan. The sum so found to have been paid to be credited on the date of the payment thereof on the said agreement in question, and the local registrar then to compute, after crediting such amount, the balance remaining unpaid under said agreement, and the defendants ordered to pay into Court to the credit of this cause within 30 days thereafter the said sum so found due, together with interest at 8% per annum, from the date that the last annual rest is made in computing said sum, on the sum found due at such last annual rest, and the costs of this action to be taxed less the amount due on the mortgage against the land covered by said agreement as of the date of the payment into Court, such amount due on such mortgage to be ascertained by a reference to be held on the application of any of the parties. In case default is made in payment into Court, the land to be sold subject to the mortgage against it and taxes and seed grain liens, the proceeds of the sale to be applied as follows:

1. In payment of the expenses of the sale including an allowance to the officers selling;

2. In payment of costs of the action;

3. In payment of the amount due to the plaintiff as hereinbefore set forth, together with interest down to the date of the delivery of the transfer, less the amount due on the date of the sale on the mortgage against said land.

Provided, however, that the defendants shall be relieved from the consequences of such default on payment of the taxes now due against said land, and on payment into Court before said sale of the costs of action, together with the arrears due under the agreement as follows:

(a) December 1, 1917; share of crop for 1917—$962.43, less any amount to which the defendant Selig is entitled to be credited as having paid on the said mortgage on said land agreed to be sold and as above referred to; (b) On December 1, 1918, interest from December 1, 1917, at 8 per cent. per annum on the balance unpaid under the agreement; (c) Interest on amounts payable under (a) and (b) from December 1st, 1918, to date of payment at 8 per cent. per annum.

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Elwood, J.A.

So far as the judgment on the mortgage is concerned, the defendants should only be relieved from the consequences of their default upon making the payments hereinbefore referred to with respect to agreement for sale of the land, and upon payment of the costs of action upon the mortgage.

The plaintiff should have the costs of this appeal. Any party may apply to a Judge for further directions.

Judgment varied.

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B.C. ELECTRIC R. Co. v. DUNPHY.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 20, 1919.

APPEAL (§ VII L—476)—FINDINGS OF JURY—NEGLIGENCE—PLEADINGS—SUFFICIENCY OF FINDINGS.

In an appeal on the grounds of contributory negligence, the findings of the jury, which were read in conjunction with the pleadings, the evidence, and the charge of the Judge, were found to be justified, and sufficient to support the judgment entered.

[*Dunphy* v. *B.C. Electric R. Co.*, 48 D.L.R. 38, affirmed.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia (1919), 48 D.L.R. 38, affirming the judgment of the trial Court with a jury and maintaining the respondent's, plaintiff's, action. Affirmed.

E. C. Mayers, for respondent.

Davies, C.J.

DAVIES, C.J.:—I confess that at the close of the argument on this appeal I felt inclined to allow it on the grounds submitted by counsel for the appellant, first, that the evidence of Cross, one of the witnesses for the respondent and who was in the respondent's motor car at the time the collision with the street railway happened, shewed clearly that he, Cross, had seen the electric car approaching and had warned the respondent Dunphy who was driving the motor car about 30 or 40 feet away from the track: "Look out, look out, the car." (No evidence was given challenging or qualifying Cross's evidence as to his having given the warning or to the effect that it had not been heard by Dunphy), and secondly, that the jury had failed to find in answer to the question put to them as to what the negligence of the defendant company consisted of—anything definite or certain—and that their finding was altogether too vague and uncertain to uphold the verdict entered against the defendant.

However, after reading the evidence over and the Judge's charge to the jury, which was very clear, and considering that in appreciating the weight to be given to Cross's evidence the jury had the advantage of having had a "view" of the locality where the collision occurred and of seeing and deciding as to the extent the alleged growing trees between the motor and the car would have prevented Clarke seeing from the motor the approaching electric car, I am, but with some doubt, of the opinion that we would not be justified in allowing the appeal and either dismissing the action or granting a new trial.

Read in connection with the Judge's charge to them, the jury's findings as to the defendant's negligence may be held to be definite enough and the evidence of Cross with respect to the warning shouted by him when he says he saw the electric car approaching would be much better understood and appreciated by the jurymen who had a view of the locality than it can possibly be by the Judges of this Court on the printed evidence and the conflicting contentions of counsel upon that evidence.

Not being convinced, therefore, that the judgment appealed from is clearly wrong, I will not dissent from the judgment dismissing the appeal.

Idington, J.

IDINGTON, J.:—I find the answers of the jury quite intelligible when read in light of the evidence and the trial Judge's charge to the jury.

The question of contributory negligence was one for the jury and their answer leaves no reason to rest the appeal thereon.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—Counsel for appellant bases his appeal upon two grounds: First, he argues that the admissions made by a witness called on behalf of the plaintiff, and indeed admissions brought out by the plaintiff's counsel in examination-in-chief, conclusively establish the defence of contributory negligence.

The passages relied upon are as follows:—

Q. When did you realise that the street car on the interurban was upon you, or was there? When did you first realise that it was coming? A. Well, I glanced up to the track, when we were about, I suppose, 30 or 40 feet away from the B.C. Electric tracks. I am not saying this definitely, but approximately,

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I glanced up to the track towards the east, and I saw the street car coming, and I shouted then to Dunphy: "Look out, look out, the car." Q. And you saw the car coming? A. And I saw the car coming, yes. Q. It would have been then about how far away? A. About 3 car lengths I should think. I could see the top of the car and not the bottom of it. It was the trolley pole I saw first. Q. Well, how long after you shouted was it that you were struck by the other car? A. Well, it was so quick I could not say. It was not more than a second or a couple of seconds. Q. From the time you shouted to Dunphy until the time you were struck? A. Yes.

The evidence as it stands affords no doubt very powerful support to the contention of the defendants that the plaintiff, if his attention had been reasonably alert to the situation as he was coming up to the railway track, must have had sufficient notice of the approach of the car in time to avoid a collision, and coupled with the observations of Taylor on the following page and with the fact that the plaintiff was not called to explain the failure to act upon Cross's attempt to warn him, it must, I think, be held to have established for all the purposes of the trial, the fact that Cross did shout to the plaintiff as he says he did. The discussion of the law to be found in the books on the effect of a statement made by a witness damaging to the party who calls him, is not entirely satisfactory. The Common Law Procedure Act of 1854, 17-18 Vict., (Imp.), ch. 125, sec. 22, which is the parent of the corresponding statute in British Columbia, provides that a party may

> In case the witness shall, in the opinion of the Judge prove adverse, contradict him by other evidence, . . .

seeming, as Stephens, J. (Digest Note XLVII.), points out, to imply that the right to contradict his own witness in such circumstances rests upon the condition that the trial Judge shall consider and hold the witness to be adverse. This, however, Stephens, J., remarks "is not and never was law": *Greenough* v. *Eccles* (1859), 5 C.B. (N.S.) 786. And the generally accepted rule appears to be that it is always open to a party to adduce evidence inconsistent with statements made by one of his witnesses, which, of course, is a very different thing from discrediting him by general evidence as to character.

There is a passage, however, in the judgment of Lord Sumner then Hamilton, J., in *Sumner* v. *John Brown and Co.* (1909), 25 T.L.R. 745, which seems to enunciate a somewhat stricter rule:—

> Upon the question of the plaintiff Leivesley's evidence, Mr. Keogh had called him with his eyes open and with full knowledge of what he was likely

to say, and it was not competent for the defendants to contradict him on the vital point of contract or no contract. It was not as if unexpected evidence had been given or there had been some contradiction in details. When two equally credible witnesses called by the same side flatly contradicted each other, it was not competent for the persons calling them to pick and choose between them. They could not discredit one and accredit the other. That, in his opinion, although no decision might have been reported, had been the practice for some time.

Hamilton, J., was, of course, speaking not only as a Judge who had the responsibility of giving directions as to the law to be applied but as the tribunal of fact as well, and it may be doubted whether he meant to lay down a rule absolutely controlling the discretion of a jury.

The practice at all events in British Columbia in jury cases has followed the rule enunciated by Lord Blackburn in *Dublin, Wicklow, and Wexford R. Co.* v. *Slattery*, (1878), 3 App. Cas. 1155, at 1201, as follows:—

> The jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any witness. They may believe that part of a witness's evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate;

and the view expressed by Sir James F. Stephens.

Cross's evidence, however, as to locality and point of time—where and when the incident which he relates occurred—is vague and of course naturally so; what he says about the position of the motor car with reference to the track at the time he shouted is couched in language quite consistent with the conclusion that, although he was quite certain that the motor car was quite close to the track and that the collision followed very quickly, he had nevertheless no very precise notion of the exact position of the car.

I think effect must be given to Mr. Mayer's contention that the evidence of the plaintiff and Hammond describing the occurrences accompanying the accident and the succession of events as the motor car approached the track, was evidence which it is impossible to say it was the duty of a jury to disregard and from that point of view I am unable to assent to the conclusion that the defence of contributory negligence was established with such certainty as to necessitate setting aside the verdict.

The onus of proving contributory negligence in the first instance

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lies on the defendant and it would be the duty of the jury to find the issue in favour of the plaintiff unless satisfied that the defence had been affirmatively proved.

The second contention of counsel for appellant was that the findings were insufficient to support the judgment, I concur with the opinion of the trial Judge, Macdonald, J., that the verdict presents no difficulty. It is quite true that the jury did not respond to an invitation by the trial Judge to particularise the charges of negligence which they found to be proved. But as the trial Judge observed in pronouncing judgment upon the motion for judgment, when the answer to the second question is read with the charge, it becomes perfectly intelligible.

I may add that the answers to these questions read together are equivalent to an affirmation that the plaintiff's injuries were due to the negligence of the defendant company and that the plaintiff is entitled to recover as damages the amount mentioned. Read together the answers constitute a perfectly good finding for the plaintiff for that sum. There can be no practical difficulty in giving effect to this as a general verdict because the instructions in the charge were quite sufficient to enable the jury intelligently to return a general verdict.

Had the answers been objected to as insufficient at the time they were given, the trial Judge, no doubt, could have presented to the jury the alternative of specifying their findings of negligence more particularly, or returning a general verdict, in the usual form. No such exception having been taken, it is not, I think, open to the defendants to take exception to the form—albeit an unusual form—in which the jury have expressed their findings.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The defendant appeals on two grounds from the judgment of the Court of Appeal for British Columbia (1919), 48 D.L.R. 38, dismissing its appeal from the judgment for the plaintiff entered by Macdonald, J., on the findings of the jury. It contends that the evidence of the witness Cross called by the plaintiff established contributory negligence on his part and that upon it the Judge should have withdrawn the case from the jury. Accepting Cross's statement that he shouted a warning to the plaintiff, it is not clear that he did so in time to enable the plaintiff to avoid the collision; nor is it quite certain that the plaintiff

heard the warning. Passages in the plaintiff's evidence as well as in that of Hammond rather indicate that he did not. The question of contributory negligence was in my opinion by no means concluded against the plaintiff by Cross's testimony and was therefore properly submitted to the jury and their verdict negativing it cannot be impeached.

The second point made by counsel for appellant is that the jury, having found the defendant guilty of negligence which caused the accident, failed, in answer to the second question—"If so, in what did such negligence consist?"—to specify the negligence. They said—"Insufficient precaution on account of approaching crossing and conditions on morning in question." As Mr. Mayers very properly pointed out the words "in approaching crossing" make it clear that it was negligence on the part of the motorman which the jury had in mind. Only two faults on his part were charged—failure to sound the air-whistle and excessive speed—both of them matters of more than usual importance in view of the "conditions on the morning in question," by which the jury, no doubt, meant the failure of the automatic warning signals at the crossing known to the motorman. The trial Judge in his charge distinctly warned the jury that they must confine themselves to the negligence charged and should not import matter "in the nature of a suggestion . . . that some other precaution could have been taken." We may not assume that the jury ignored this direction and unless we do so it would seem reasonably certain that the motorman's failure to sound his air whistle and to moderate the speed of his car was the "insufficient precaution" which, in the jury's opinion, constituted the "negligence which was the cause of the accident." Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial Judge. While it might have been more satisfactory had the second finding been more specific, if dealt with in the manner I have indicated it seems to be sufficiently certain what the jury meant by it.

I would dismiss the appeal.

BRODEUR, J.:—This is a street railway accident, and a jury trial found the appellant company guilty of negligence. There

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is some evidence given by the plaintiff's own witness which would shew that the victim had been guilty of contributory negligence. But the evidence of that witness is somewhat conflicting and the jury was properly charged as to its consideration. It was for the jury to determine in those circumstances whether there was contributory negligence or not; and their finding in that regard is not such that we would consider it as perverse.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—Counsel for the appellant attacked the judgment of the Court of Appeal, 48 D.L.R. 38, and the judgment thereby affirmed, of Macdonald, J., giving effect to the verdict of the jury on two grounds:

1. That the judgment should have been in favour of the defendant, appellant, for the reason that the evidence at the trial disclosed the fact that Dunphy drove into the street car after a warning received from Cross that it was coming and without looking to see where it was.

2. That after finding that the accident was caused by the negligence of the appellant, the jury entirely failed to state in what such negligence consisted.

First ground. This ground is based on the evidence of Cross who was riding in the motor car with Dunphy and the latter's brother-in-law, Hammond. Cross swore that when they were about 30 or 40 feet away from the track—but he adds that he was not saying this definitely but approximately—he saw the street car coming and then shouted to Dunphy: "Look out, look out, the car." Further on Cross states that after shouting it was not more than a second or two before they were struck by the car.

Although Dunphy and Hammond were not asked whether they had heard this shout, they both swear that the first thing they knew was that the car struck them. The latter was running, on approaching the crossing, at a speed of 18 to 20 miles an hour, and at the best from Cross's own story it is impossible to say whether his warning was given in time to be of any avail.

Under these circumstances, after the trial Judge had fairly left to the jury the question of the warning received from Cross, the latter found that the accident was the result of the appellant's negligence, the majority stating that Dunphy was not guilty of contributory negligence. I cannot say that this finding is clearly wrong, and, on this first ground, I would not disturb the verdict.

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Second ground. This objection is at first sight more serious. The jury, after answering that the appellant was guilty of negligence which caused the accident, were asked in what such negligence consisted. They replied: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

This answer seems very vague, but taken in connection with the Judge's charge, I think it sufficiently assigns the lack of sufficient precautions which in the jury's opinion caused the accident. The trial Judge fairly placed the matter before the jury and explained the conditions which, according to the evidence, prevailed on that morning at the crossing. He said:—

Then you have to consider whether the rate of speed which would have been too great ordinarily, was upon the morning in question too high a rate of speed, and whether this rate of speed is one subject to the surroundings. You have had pictured to you, and probably you have visualised yourselves the condition of affairs that morning. There seems to be no question that the British Columbia Electric had, as an extra precaution for the safety of those using that highway, installed not only bells that would ring automatically on the approach of a street car, but also a light which would give evidence of the approach of a street car. On this particular morning, to the knowledge, however, of the motorman, those safeguards were not in operation; so that it left a condition of affairs which it may well be argued, and you may conclude, that required a precaution on the part of the motorman different to that he would have required to pursue, say, the day before.

Then, again, you have the question of the bushes growing up in that locality, and obstructing, more or less, the view of the approaching street car. I instruct you, as far as the question of crossing is concerned, there is no law resting on the railway company to clear its right of way. That is a matter that pertains, and has to do with another branch of the duties placed upon a railway company operating in the country; but it is a fact that you can take into consideration when you determine whether or not, at that point, the motorman, upon the occasion in question, having in view that situation, was acting with due regard to those entitled to use the highway.

When, therefore, the jury found that the appellant had not taken sufficient precautions on account of the approaching crossing and the conditions existing on the morning in question, I think that their answer clearly means that in view of the fact that, to the knowledge of the motorman, the bell and the light at the crossing were not in working order that morning and that the bushes obstructed the view, the motorman had not taken sufficient precautions for the protection of persons entitled to use the highway. I would therefore conclude that the attack of counsel

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for appellant on this answer is not a reason for setting aside the verdict.

My opinion consequently is that the appeal fails and should be dismissed with costs.

Appeal dismissed.

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HILL v. SMITH.

Nova Scotia Supreme Court, Harris, C.J., Russell and Longley, JJ., Ritchie, E.J. and Mellish, J. May 2, 1919.

VENDOR AND PURCHASER (§ I A—2)—SALE OF LAND—VERBAL AGREEMENT AS TO MONEY PAYABLE BY RELIEF COMMISSION—EVIDENCE—STATUTE 8-9, GEO. V, 1918, N.S., CH. 61.

Under the statute regarding the Commission for the Relief of Halifax, moneys awarded by the Resconstruction Committee and allotted to certain property, must be spent on that property, and in the absence of an express agreement, will enure to the benefit of a purchaser obtaining the property since the explosion of 1917.

Statement.

APPEAL from the judgment of Chisholm, J., dismissing with costs plaintiff's action claiming damages for breach of covenants and for interfering with a contract. Reversed.

W. A. Henry, K.C., and *I. Oakes*, for appellant; *W. L. Hall*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—The plaintiff purchased a lot of land from the defendants, on which was a house, which had been damaged by the explosion of Decemben 6, 1917. The plaintiff and his wife say that at the time of the purchase it was agreed that any money coming from the Reconstruction Commission for the repair of the house was to be for the benefit of the plaintiff, and two other witnesses testify to conversations subsequently with defendants, that are only consistent with that agreement. There was also evidence of the plaintiff, corroborated by George Jeffrey to the effect that on one occasion the male defendant stated that he had "sold the house too cheaply and would take it back."

The evidence of the plaintiff and his wife is contradicted by the defendants, and a daughter, 14 years of age, but a careful reading of the evidence more than suggests that the female defendant and the daughter probably did not hear the conversation which plaintiff and his wife testified took place downstairs before they went upstairs, where the mother and daughter were. The male defendant denies the conversation, which the other two

witnesses swear to, but he does not deny the statement of the plaintiff, corroborated by George Jeffrey, that he said that he sold the property too cheaply and would take it back. A reading of the male defendant's evidence produces a strong conviction that he was absolutely unreliable. I cannot escape the conclusion that at the time he sold the property he and his wife had no hope of getting anything from the Reconstruction Committee, and he evidently thought he had made a good sale, but later, when he found that the Reconstruction Committee were prepared to repair the house, he changed his mind, and convinced himself that he ought to have at least a portion of the sum received from that source. After reading and re-reading the evidence, I find myself forced to the conclusion that the findings of the trial Judge are against the evidence and ought to be set aside. Even if it is to be assumed that the wife and daughter heard all the conversation and the defendant's version is to be accepted as correct, I think the plaintiff ought to succeed.

The defendants' statements are to the effect that nothing whatever was said as to who was to get the money from the Reconstruction Committee. It is undisputed that there was a mortgage on the property for $1,250. Sec. 33 of 8-9 Geo. V. 1918 (N.S.), ch. 61, proyides that:—

> In every case in which the Commission shall pay any sum or sums of money in respect of any real property destroyed or damaged in or by reason of the disaster and in every case in which the Commission shall repair, restore or re-build any real property damaged in or by reason of the said disaster, the Commission shall to the extent of such payment or to the extent of the cost of such repair, restoration or rebuilding be subrogated to and have all the rights of the owner of such property against all or any insurance companies which may have insured the said property or any part thereof, and may sue for, recover or give valid and effectual receipts for the same in its own name. In every case in which the Commission shall pay any money under this section, where such real property is subject to any mortgage, lien or encumbrance, such money shall only be paid as the work of restoring, repairing or rebuilding erogresses, unless such mortgagee or person having such mortgage, lien or 'ncumbrance otherwise agrees.

It is clear that any money coming from the Reconstruction Committee must be spent on the property, and, therefore, must enure to the benefit of the plaintiff.

Of course, the Act would not prevent the parties from making an agreement by which any money coming from the Reconstruction Committee should be accounted for and the equivalent paid

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to the defendant, but that is not what was done in this case. The two stories are absolutely inconsistent with that. The plaintiff's statement is that it was agreed that he was to get this money while the defendants say nothing whatever was said about it. On either theory the defendants must fail.

The appeal should be allowed and there should be a declaration that the defendants are not entitled to the money from the Reconstruction Committee. The plaintiff should have the costs of the action and appeal.

Longley, J.

LONGLEY, J., concurred with Harris, C.J.

Russell, J.

RUSSELL, J.:—The Appeal Court is properly reluctant to reverse the decision of a trial Judge on a question of fact. But in this case I cannot come to any other conclusion on the evidence than that an agreement was made substantially as the plaintiff has stated. He and his wife both say that the plaintiff purchased the property with the understanding that it was to be put in repair by the Relief Commission. O'Connor, to whom the plaintiff sold the property, corroborates their evidence. His statement is as follows: "I said to Hill, it will be fixed up by the Reconstruction. Hill said certainly. He said you will not know it when it is fixed up. And Smith said that was so; it would be fixed up. They both said that jointly, Hill and Smith."

The evidence has convinced me that the defendant had lost patience awaiting the action of the Relief Commission and had made a sale which he afterwards repented. The evidence of Jeffrey strongly corroborates this view. If, as he now contends, he sold his property in its then condition with the understanding that he was to receive the amount of the damages as appraised by the appraisers of the Relief Commission, it would not have been a bad sale. It would have been an exceedingly good bargain for him, and I cannot believe that he would ever have repented it or made the remark which Jeffrey attributes to him as to his having sold it too cheaply.

The trial Judge accepted the evidence of Mrs. Smith to the effect that nothing was said about the reconstruction. I do not find it necessary to reject her evidence. She did not hear what had been said. The plaintiff's wife explains that the bargain was made downstairs, not in the kitchen, which was upstairs in an ell. She adds that she saw Mrs. Smith upstairs in the kitchen

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and did not think she was very well; she had already stated that there were only three persons present downstairs when and where the bargain was made. The three witnesses who support the case of the plaintiff are not, therefore, really in conflict with any other witness than the male defendant, and one cannot read his evidence without being impressed, as the trial Judge seems to have been to some degree, by its unsatisfactory character.

I think the plaintiff is entitled to a declaration that he bought the property with the understanding that it was to be put in repair by the Relief Commission, and I do not think it will ever be necessary to decide the question as to defendant's liability for damages. The Commission will, no doubt, repair the building or furnish the funds for its repair when they know who is entitled to receive them.

Ritchie, E. J.

RITCHIE, E. J. (dissenting):—In my opinion this is a case where the facts were peculiarly for the trial Judge. The question of fact is as to whether it was verbally agreed that any money coming from the Halifax Relief Commission was to be for the benefit of the plaintiff. The burden, of course, was on the plaintiff to establish this verbal agreement. There is direct and absolute contradiction. The trial Judge makes an absolute finding of fact, and he distinctly states that he was impressed by the witnesses for the defence, and believes they told the truth. The fact that the plaintiff's advertisement was that he wanted to buy houses "in their present condition" is a significant circumstance in favour of the trial Judge's finding. If my opinion inclined against the trial Judge's finding, I think that under the well-settled rule applicable to cases of this kind I would not be at liberty to substitute my judgment as to the facts for that of the Judge who saw and heard the witnesses The relative credibility of witnesses was what the Judge had to deal with; he says he was impressed with the evidence of two of the witnesses for the defence, and that he believed their evidence. If a witness makes an impression upon a Judge, he makes that impression by his manner and demeanour in the witness box. Where the credibility of witnesses turns on manner and demeanour, the well-established rule is that an Appeal Court "always is and must be guided by the impression made on the Judge who saw the witnesses." The words in quotation marks will be recognised as

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those of Lindley, M.R., in the very familiar case of *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; see 1 D.L.R. 386, note to *Taylor* v. *B.C. Electric R. Co., Ltd.*

I may add that the case of *Lake* v. *Davis* (not reported), decided in this Court in January last, is in point, as it decides that where there is conflict in the evidence, the findings of the trial Judge will not be disturbed.

The following striking passage will be found in the judgment of Lord Wrenbury, in *Wood* v. *Haines* (1917), 33 D.L.R. 166, at page 169:—

> It must be an extraordinary case in which an appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial Judge who has seen and watched them, whereas the appellate Judge has had no such advantage.

But it seems to me that to set aside the findings in this case is to go contrary to the most recent deliverance on the subject in the Supreme Court of Canada. I refer to *Morrow Cereal Co.* v. *Ogilvie Flour Mills* (1918), 44 D.L.R. 557, 57 Can. S.C.R. 403, affirming (1917), 39 D.L.R. 463.

The facts being as the trial Judge has found them, the plaintiff's case, in my opinion, is at an end.

Sec. 8 (a) of the Act incorporating the Halifax Relief Commission, 8-9 Geo. V. 1918, ch. 61, is as follows:—

> The Commission shall have power to expend, disburse, distribute and appropriate all moneys vested in, or paid, given or donated to the Commission in such manner as the Commission shall in its discretion deem proper, and may repair, rebuild or restore any buildings or property damaged, destroyed or lost in or by reason of the said disaster, or compensate the owner thereof, or any person having an interest therein in respect thereof to such extent as the Commission may think fit; provided, however, that in case any money or property has been subscribed, contributed or voted for any particular purpose or purposes, the Commission shall expend, disburse, distribute or appropriate the same as far as practicable in accordance with the expressed intention of the donor.

The Halifax Relief Commission, it will be seen by the section quoted, may disburse and distribute the moneys under its control as it thinks fit or it may repair, rebuild or restore buildings or property. The moneys may or may not be spent on the buildings or property according as the Commission exercises the unlimited discretion vested in it.

Sec. 33 of the Act is obviously passed only for the purpose of subrogating the Commission to the rights of the owner, who

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is the man insured at the time of the loss, as against the insurance companies, to the extent of payments made or of the cost of repairs, restoration or rebuilding, as the case may be.

It is to be noted that this section clearly recognises that the Commission may pay money to the sufferer or may expend the money in repairs, restoration or rebuilding. The only claim which either party could have on the Commission was a claim on its bounty. The defendants say to the Commission we are the sufferer and entitled to claim on your bounty, and this action on their part is what it is claimed gives rise to a cause of action against them. They were the sufferers; they sold the house in its damaged condition, and never assigned any claim they might have on the Commission. Under the facts it is so obvious that the plaintiff has no cause of action that I will not discuss it. I may add that I am wholly unable to see what jurisdiction this Court has to make a declaration as to who is or is not entitled to the bounty of the Halifax Relief Commission, inasmuch as the statute gives to that body the untrammeled discretion in that regard.

I would dismiss the appeal with costs.

Mellish, J.

MELLISH, J. (dissenting):—The defendants owned a house in Halifax which was injured by the explosion of December 6, 1917, to the extent of about $800. The plaintiff advertised for houses in their damaged condition as a prospective purchaser, and the defendants accordingly sold their house to the plaintiff. Previous to the sale the defendants had put in a claim to the Halifax Relief Commission for compensation for the damages which they had suffered by reason of the injury to this house; but at the time of the sale it does not appear to have been settled upon what conditions or terms relief, if any, would be granted. Subsequently the policy was adopted, under statutory authority, of repairing the injured houses or paying for the repairs up to a certain valuation.

After the plaintiff purchased the property, he had the repairs effected thereon, on the assurance of the Commission that he would be reimbursed by the Commission up to the amount of $807 (page 32E/6); and plaintiff appears to have received $200 from the Commission on account of this account.

Meantime the defendants appear not to have withdrawn their

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claim for compensation, but, on the contrary, when they found out that the Commission was paying plaintiff for the repairs, protested and had further payments stopped.

Plaintiff then brought this action, claiming *inter alia* a declaration that the defendants are not entitled to any part of the compensation, an injunction and damages; alleging, in the statement of claim, in effect, that at the time of the delivery of the deed to plaintiff, the defendants also assigned their claim for compensation to the plaintiff.

The trial Judge found that no such assignment was made and dismissed the action.

From this decision the plaintiff has appealed.

Appellant's counsel, wisely, I think, did not press us to set aside the trial Judge's finding on the question of fact, but he contended that, notwithstanding such finding, the plaintiff was entitled to succeed upon the grounds that the defendants had no right to interfere with the performance by the Relief Commission of the latter's contract with the plaintiff. I have come to the conclusion, not without some hesitation, that this contention cannot prevail. It may be that the Relief Commission was bound to the plaintiff, but it does not appear that the defendants had any knowledge of such a relationship. The defendants would naturally expect that the compensation would be paid to the parties who suffered the loss unless they had parted with such claim. Further, if the plaintiff obtained the offer of compensation from the Commission on the representation that he held the injured party's claim to compensation as assignee, the defendants, upon the facts as found in the Court below, would be justified in preventing the payment of the money to the plaintiff upon such a representation. It would appear only reasonable that it is not the policy to afford relief except to those who suffered, and any person, I think, applying to the Commission for relief by way of repairs or otherwise, must be taken to represent to that body, impliedly at least, that he is himself a sufferer or represents a sufferer by reason of the explosion to the extent of his claim.

I think the appeal should be dismissed with costs.

Appeal allowed.

JACKSON v. CANADIAN PACIFIC R. Co.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 30, 1919.

APPEAL (§ XI—720)—LEAVE TO APPEAL—ACTION ARISING IN DISTRICT COURT—APPEAL TO SUPREME COURT OF CANADA—EXTENSION OF TIME—SUPREME COURT ACT, R.S.C. 1906, CH. 139, SECS. 37, 71.

Leave to appeal to the Supreme Court of Canada in an action which does not originate in a superior court can only be granted by the Supreme Court of Canada or a Judge thereof; and no extension of the time for bringing on such appeal can be granted by the Saskatchewan Court of Appeal, R.S.C. 1906, ch. 139, secs. 37, 71.

[*Hillman* v. *Imperial Elevator & Lumber Co.* (1916), 29 D.L.R. 372, 53 Can. S.C.R. 15, referred to.]

Statement.

APPLICATION for leave to appeal to the Supreme Court of Canada in an action originating in a District Court. Refused.

E. F. Collins, for appellant. *L. J. Reycraft*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—This action was brought in the District Court, under the Workmen's Compensation Act, 1 Geo. V. 1910-11 (Sask.), ch. 9, and was dismissed by the District Court Judge at the trial.

On appeal to this Court the appeal was also dismissed (1919), 49 D.L.R. 320. More than 60 days have elapsed since the judgment of this Court was given. The plaintiff now applies for leave to appeal to the Supreme Court of Canada and for an extension of time for that purpose.

As this action did not originate in a superior court, leave to appeal can only be granted by the Supreme Court of Canada or a Judge thereof, under the provisions of sec. 37 of the Supreme Court Act, R.S.C. 1906, ch. 139. The application for leave to appeal must therefore be refused.

As to the application to extend the time for bringing the appeal; it has been held by the Supreme Court of Canada, under almost identical conditions, that sec. 71 of the Supreme Court Act does not give this Court power to extend the time for bringing an appeal in cases of this kind.

Hillman v. *Imperial Elevator & Lumber Co.* (1916), 29 D.L.R. 372, 53 Can. S.C.R. 15.

Motion refused with costs.

Newlands, J.A.

NEWLANDS, J.A., concurred with Haultain, C.J.S.

Lamont, J.A.

LAMONT, J.A.:—This is an application on behalf of the plaintiff for an order granting leave to appeal to the Supreme Court of Canada and extending the time therefor. More than sixty days

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have elapsed since the judgment of this Court was given, 49 D.L.R. 320. The action was brought for damages for personal injuries under the Workmen's Compensation Act, and was commenced in the District Court.

Sec. 37 of the Supreme Court Act provides for an appeal to the Supreme Court from any final judgment of the highest Court of final resort in any Province where the action, etc., did not originate in a superior court, in the following cases: "(c) in the Provinces of Saskatchewan and Alberta by leave of the Supreme Court of Canada or a Judge thereof."

Application for leave to appeal from a judgment of this Court, in an action originating in the District Court, must therefore be made to the Supreme Court of Canada or a Judge thereof.

It was argued that the Court had jurisdiction to allow the appeal under sec. 71 of the Act. That section reads as follows: "71. Notwithstanding anything herein contained the Court proposed to be appealed from, or any Judge thereof, may under special circumstances allow an appeal, although the same is not brought within the time hereinbefore prescribed in that behalf."

This section applies only to cases commenced in a superior court, and in respect of which an appeal lies to the Supreme Court of Canada as a matter of right, but the appellant has failed to bring his appeal within the 60 days prescribed by sec. 69, within which an appeal must be brought.

This case in my opinion comes within what was held in *Hillman* v. *Imperial Elevator & Lumber Co.*, 29 D.L.R. 372, 53 Can. S.C.R., page 15. There the action was commenced in the District Court and brought to this Court on appeal. After the expiration of 60 days from the judgment of this Court, an order was obtained from the Chief Justice allowing an appeal to the Supreme Court of Canada. That Court held, however, that it had no jurisdiction to hear the appeal. In giving the judgment of the Court, the Chief Justice said, at page 373:

> The plaintiff then applied to the Chief Justice of Saskatchewan, with the consent of the defendants, and obtained an order, professedly under sec. 71 of the Supreme Court Act, which gives to the Court below the power to allow an appeal, although the same was not brought within the sixty days prescribed by sec. 69. Sec. 37, however, does not give the Court below power to grant leave to appeal in a case of this kind, and it has been held by this Court in *John Goodison Thresher Co.* v. *The Tp. of McNab* (1910), 42 Can. S.C.R.

694, that sec. 71 does not authorize the Court below to extend the time for bringing an appeal so as to confer power on this Court to grant leave to appeal where the application to this Court for leave to appeal is made under sec. 48e.

The application must, therefore, be refused.

ELWOOD, J.A., concurred with LAMONT, J.A.

Judgment accordingly.

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RILEY v. CURTIS'S AND HARVEY LTD., AND APEDAILE

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Supreme Court of Canada, Mignault, J. 1919.

APPEAL (§ XI—720)—LEAVE TO APPEAL—WINDING-UP ACT, R.S.C. 1906, CH. 144, SEC. 106.

If a proposed appeal to the Supreme Court of Canada raises no question of public importance, and if the hearing would not settle any important question of law or dispose of any matter of public interest, leave will not be granted under the Winding-up Act, although the amount in controversy exceeds $2,000.

Statement.

MOTION for leave to appeal from a decision of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of MacLennan, J., and dismissing a claim made by the appellant for $50,000. Dismissed.

The facts are fully stated in the judgment of Mignault, J., on the application for leave.

H. N. Chauvin, K.C., for the motion; *A. H. Elder, contra.*

Mignault, J.

MIGNAULT, J.:—This is a motion made before me by the appellant on August 6, 1919, for leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench (appeal side) of the Province of Quebec, of June 26, 1919, which unanimously affirmed the judgment (MacLennan, J.,) of the Superior Court of February 11, 1919, dismissing a claim made by the appellant against the respondents for $50,000.

The litigation arose out of an agreement of March 13, 1917, between the appellant and Curtis's & Harvey (of Canada), Ltd., whereby the latter, for the consideration therein stated, promised to pay the appellant the sum of $250,000, payable as follows:—$25,000 in ten days, $75,000 before the end of May, 1917, and $150,000 before July 15, 1917, with option to the company, in the event of its obtaining any new contract involving deliveries after the completion of existing contracts, that it might pay the last instalment of $150,000 in three amounts of $50,000 on the last days of July, August and September, 1917, with interest at 6%.

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By clause 7 of the agreement, it was provided that until full payment of the sum of $250,000, the company would not deal with, dispose of or charge its assets, save in the ordinary course of its business operations, under a penalty of $50,000 payable to the appellant.

The company paid the two first instalments, and the condition provided for having happened, it made option to pay the balance of $150,000 in three instalments, and it paid the first of these instalments, $50,000, which became due on July 31, 1917. On August 18, 1917, practically the whole of the company's plant and materials at Dragon were destroyed by fire and explosions which prevented the continuance of the company's manufacturing operations, and it was decided that it was inadvisable to rebuild the plant.

The company had then an unfinished contract with the United States Government, entered into in July, 1917, for the manufacture of 10,800,000 pounds of refined trinitro-toluol, which contract was cancelled after the fire, and the United States Government made a new contract with Canadian Explosives Ltd. out of which a substantial percentage of profit was to be paid, and was paid, to the company.

A winding-up order was made against the company on October 5, 1917, on the petition of the secretary of the company in his capacity as shareholder, but at the request of the company which acquiesced in the winding-up order.

The appellant filed his claim with the liquidator for the balance of $100,000 then due to him, and also claimed the penalty of $50,000 on the ground that the company had violated clause 7 of the agreement. This latter claim was contested by the liquidator whose contestation was maintained by the Superior Court and by the Court of King's Bench.

It is stated in the reasons for judgment of Martin, J., in the latter Court, that the liquidator has since paid the appellant $75,000 and that there remains only due $25,000 on the $250,000 payable under the agreement.

With regard to the penalty of $50,000, both Courts have held that the appellant cannot claim it under clause 7 of the agreement, the Superior Court because the company had not dealt with its assets in the manner provided against, and the Court of King's

Bench mainly because by the happening of the fire of August 18, 1917, the condition of clause 7 no longer applied and the company was entitled to deal with its remaining assets in the manner in which it had done in the interest of the appellant and its other creditors.

Under these circumstances the appellant has applied to me for leave to appeal to this Court from the judgment of the Courts below. This appeal cannot be taken, under sec. 106 of the Winding-up Act, R.S.C. 1906, ch. 144, unless the amount involved exceeds $2,000, and unless leave be obtained from a Judge of the Supreme Court of Canada.

Here the amount involved is sufficient to give jurisdiction to this Court. The sufficiency of the amount is not, however, conclusive of the right of the appellant to appeal to this Court. He must obtain leave, and the discretion to grant or refuse this leave must be exercised judicially, that is to say, for sufficient reason in the judgment of the Judge to whom the application for leave to appeal is made.

The question as to the sufficiency of the reasons for granting leave to appeal is not now a new one, and certain rules have been laid down which I feel I should follow.

Thus in *Lake Erie and Detroit River R. Co.* v. *Marsh* (1904), 35 Can. S.C.R. 197, where special leave to appeal was applied for under sec. 48, sub-sec. (e) of the Supreme Court Act—and I conceive that the same rule should be followed in cases arising under sec. 106 of the Winding-up Act—Nesbitt, J., stated that:

> Where the case involves matter of public interest, or some important question of law, or the application of Imperial or domestic statutes, or a conflict of Provincial or Dominion authority, or questions of law applicable to the whole Dominion, leave may well be granted.

While the Judge disclaimed the intention of laying down any rule which would not be subject to future qualification, I think his statement of the reasons why the discretion to grant leave should be exercised furnishes a convenient test for the guidance of the Court or of its Judges in a matter like this. And I would also think that where the only importance of a case is on account of the amount at issue, and where, however important the matter may be for the parties to the litigation, the only question to be determined is the construction and effect of a private contract, leave to appeal to this Court from the unanimous judgment of two Courts should not be granted.

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Moreover, in *Re The Ontario Sugar Co., McKinnon's* case, (1911), 44 Can. S.C.R. 659, Anglin, J., refused leave to appeal under sec. 106 of the Winding-up Act, on the ground that the proposed appeal raised no question of public importance, and that the affirmance or reversal by this Court of the judgment of the Ontario Court of Appeal would not settle any important question of law or dispose of any matter of public interest.

This is emphatically the case here. The proposed appeal would deal exclusively with the question whether there has been a breach on the part of the company of the obligation it assumed under clause 7 of its agreement with the appellant, entitling the latter to claim the penalty of $50,000, and the affirmance or reversal of the judgment of the Quebec Court of King's Bench would not settle any important question of law or dispose of any matter of public interest.

I can therefore see no reason why I should exercise the discretion given me by sec. 106 of the Winding-up Act and grant leave to appeal from the judgment of the Court of King's Bench. The motion of the appellant is dismissed with costs.

Motion dismissed.

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J. F. GERRITY Co. v. BRAGG.

Nova Scotia Supreme Court, Harris, C.J., Drysdale and Mellish, JJ. December 19, 1919.

TRIAL (§ II A—40)—CONTRACT—BREACH—DAMAGES—FUNCTIONS OF COURT AND JURY.

It is the duty of the Court not the jury to determine the meaning of a contract. And when failure on the part of one party to fulfil its obligations has been established, the only question for the jury to deal with is the assessment of damages.

Statement.

APPLICATION to set aside the verdict for defendant and the judgment entered thereupon in an action by the plaintiff company claiming damages for short delivery of lumber which defendant had contracted to supply. Reversed.

F. L. Milner, K.C., for appellant; *J. L. Ralston*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—The defendant is a lumberman engaged in manufacturing lumber from standing timber in the county of Cumberland, and the plaintiffs are engaged in buying and selling lumber at Bangor, Maine, U.S.A.

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The plaintiffs and defendant entered into the following agreement in writing:—

Collingwood Corner, N.S., Sept. 18, 1917.

For consideration acknowledged, Charles Bragg of Collingwood Corner, N.S., sells and J. F. Gerrity Co. of Bangor, Maine, buys about 2,000,000 merch. spruce and hemlock lumber to be manufactured as well as stock shipped 1917. Said Bragg agrees to manufacture and stick this lumber, and to load same as said Gerrity Co. send orders during 1918, on cars at their station.

The following list is to vary according to Charles Bragg's ability to get this from his cut, but to approximate same:

200 M	Hemlock boards		at	$16	
100 M	Spruce	2 x 3			
300 M	"	2 x 4			
100 M	"	2 x 5	at	18	
500 M	"	2 x 6			
200 M	"	2 x 7			
200 M	"	2 x 8	at	21	
200 M	"	2 x 9	at	21	
100 M	"	2 x 10	at	23	For 2 x 10 and 2 x 12
25 M	"	2 x 12	at	23	only
200 M	1 Spruce boards		at	18	

Terms 45 days net.

Charles Bragg agrees further to cut 100 M more of 8 and take it off the 2 x 6, if this can be accomplished.

The defendant only delivered 459,773 feet of lumber and the plaintiffs sue for damages for non-delivery.

Apart from denials the defences pleaded are:—

6. If the plaintiff and the defendant entered into said agreement as set out in par. 2 of the statement of claim herein, which the defendant denies, the defendant shipped to the plaintiff's order all the lumber he was able to get from his 1917-18 cut.

7. In the fall of 1917 the defendant let contracts to various persons for the cutting and manufacturing of lumber from standing timber to the extent of two million superficial feet, but on account of the unprecedented depth of snow and the nature thereof in the areas where the said defendant's contractors were to operate during the winter of 1917-18 it was impossible for the said contractors to carry out their contracts with the defendant; and as a result it was impossible for the defendant to secure from his 1917-18 cut more than 459,733 superficial feet, and all of the lumber cut and manufactured by the defendant from his 1917-18 cut was shipped to the plaintiff's order.

The case was tried at Amherst with a jury and there was a verdict for the defendant, and the plaintiffs move against this verdict on the ground of misdirection. The trial Judge did not tell the jury what the meaning of the contract was—as to whether it was a binding stipulation for about 2,000,000 feet, or whether the words used were merely words of conjecture or estimate or

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expectancy; nor did he tell them whether the words "the following list is to vary according to Charles Bragg's ability to get this from his cut but to approximate same" applied only to the sizes or whether they limited the quantity sold to whatever the cut might be. He left the meaning of the contract to the jury and told them with regard to certain vital parts of it that "it is a question whether it shall mean anything at all and if you do say it had a meaning you shall give it the meaning it requires."

The meaning of the contract was, I think, for the Court and not for the jury.

There were other questions of misdirection argued, but it is unnecessary to discuss them.

Mr. Ralston, who appeared for the respondent, did not attempt to support the charge, but argued that he was entitled to judgment on the contract and evidence, and Mr. Milner, for the appellant, asked the Court to say that there was nothing for the jury except the question as to the amount of the damages plaintiffs were entitled to recover.

The first question which arises is as to the true construction of the contract with reference to the quantity of lumber which defendant was to cut and deliver. For the defendant it was strenuously argued that the defendant had not undertaken to deliver any more lumber than his cut might amount to and having delivered his whole cut, 459,773 feet, the contract was satisfied.

I cannot see any ground whatever for such a construction of the contract. The words at the beginning of the second clause of the contract refer only to the sizes of the boards in the list which follows and make provision simply for variation of these sizes.

When the contract was entered into neither party could say what would be the dimensions of the logs which would be cut nor just what quantity of boards each of the respective sizes mentioned would be produced. It was obvious that there might be more of one size and less of another than the exact quantities specified in the list and so provision was made that the sizes might be varied according to the defendant's ability to get the respective sizes from his cut; but even as to this the contract required defendant to approximate the quantities of the given sizes.

If we read the words at the beginning of the second clause as applying only to a variation of the sizes—and that is the natural

and obvious meaning of them—then the first clause stands as an agreement to sell about 2,000,000 feet to be manufactured, and defendant "agrees to manufacture and stick this lumber and to load same, etc."

The word "about" occurring before the 2,000,000 feet can have no other meaning than "approximately" and such a contract, while it may permit of a slight variation either way, cannot be satisfied otherwise and must be substantially performed.

The cases cited by counsel for the defendant on this branch of the case are all distinguishable and obviously have no application. It is, I think, clear that the word "about" is not used merely as an estimate or expectation, but the true construction requires the delivery of approximately 2,000,000 feet.

It was also argued by Mr. Ralston that the contract was to be read and understood as subject to an implied condition that if it was impossible or commercially impracticable for defendant to carry out the contract its performance was excused, and it was argued that the evidence in the case shewed that it was "impossible" or "commercially impracticable" to get out 2,000,000 feet of lumber during the winter in question because there was an unusual quantity of snow. The evidence does not shew any reason whatever for non-performance of the contract, within the meaning of the authorities, but quite the opposite; there is nothing in this case for a jury to try except the question as to the amount of the damages. The damages, as I understand the authorities, must be assessed by a jury, and the case must go back for that purpose. There will be judgment for the plaintiffs on all the issues for damages to be assessed.

It is clear that no findings of a jury in favour of the defendant could be supported on the evidence in this case and there is no suggestion that further evidence can be given affecting the matter. The practice is well settled that the Court will not send such a case back for a new trial.

The defendant must pay the costs of the appeal and of the first trial and the assessment of damages.

DRYSDALE, J.:—The plaintiffs are lumber dealers in Bangor, in the State of Maine. The defendant is a manufacturer of lumber in Cumberland, N.S. On or about September 18, 1917, plaintiffs and defendant entered into a contract whereby defendant agreed

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to manufacture and supply plaintiffs about 2,000,000 feet of lumber in 1918. The contract is in writing and is as follows.

(The Judge set out the contract as set out in full in the opinion of the Chief Justice and continued as follows:)

The defendant failed to cut and deliver more than 459,773 feet under this contract, hence this action for damages. The contract calls for substantially 2,000,000 feet and as to the shortage in delivery I think this is an undefended action. Before us the argument was made attempting to justify defendant's failure on the ground of *vis major* or the act of God in that weather conditions were so bad during the 1918 season that performance became and was impossible. The first answer to this is that no such defence was pleaded and, if pleaded, I do not think bad weather conditions is any answer to non-performance of the contract. Such conditions must have been taken into consideration in the making of the contract and the facts in evidence do not support the proposition put forward. I think there was error on the trial and that there was nothing for the jury but the assessment of plaintiff's damages. There was an obvious breach on the part of defendant of this contract and the only question open is the assessment of damages. If this is properly done it ought to end the litigation. I do not think we can assess the damages here and that the case must go back to a new trial on this one question only. The parties have a right to the findings of a jury on this question and with regret I conclude there must be a new trial. The only point to be open and to be determined being the amount of plaintiff's damages, this, under proper instructions is, I think, for a jury.

Drysdale, J.

The appeal or motion should prevail and a new trial ordered, the costs here to be paid by defendant

Mellish, J.

MELLISH, J.:—I agree that the verdict must be set aside and that the plaintiff have judgment for damages to be assessed by a jury.

Appeal allowed.

REID v. COLLISTER.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. *1919.*

MINES AND MINERALS (§ I C—21)—MINERAL CLAIM—APPLICATION FOR CERTIFICATE OF IMPROVEMENTS—MINERAL ACT, R.S.B.C. 1911, c. 157—ADVERSE CLAIM—EXPIRATION OF WRIT ISSUED—ABANDONMENT OF CLAIM—TRESPASS.

The owner of a mineral claim who has complied with specified conditions precedent, and has applied for a certificate of improvements as provided by sec. 57 under the Mineral Act (R.S.B.C. 1911, ch. 157), except that he was deterred from filing the affidavit required by subsec. (g) by the statement of the Mining Recorder that an adverse action had been begun, who does nothing further before the expiry of the writ, than to inquire of the Mining Recorder from time to time whether or not the obstacle has been removed, cannot be said to have intended to abandon the interest which he claims and is entitled to judgment in an action for trespass against the adverse claimant, who has located mineral claims on the same ground after the expiry of the writ.

[*Collister* v. *Reid* (1919), 47 D.L.R. 509, affirmed.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia (1919), 47 D.L.R. 509, reversing the judgment of the trial Judge, Gregory, J., and maintaining the respondent's, plaintiff's, action. Affirmed.

E. C. Mayers, for appellant; *O. C. Bass*, for respondent.

Idington, J.

IDINGTON, J.:—Not without some doubts, but largely because of such, I am unable to assent to the allowance of this appeal.

It seems to me that, on the evidence adduced, the curative sections of the Act relevant to the several questions raised, as to all but one question, which I am about to refer to, meet and answer them effectively.

The one question about which I have doubts is whether the trial Judge was right in holding that, because the respondents failed to meet the formal requirements of the Mineral Act, R.S.B.C. 1911, ch. 157, they forfeited all their rights, and their claims are to be *ipso facto* deemed vacant and abandoned.

I agree so far with the trial Judge that the language of sec. 49 is so plain and expressive that it requires a very exceptional case (such as this I fancy is) to render it possible to hold otherwise than he does.

It seems to me that, having regard to a consideration of the purview of the statute, whilst it may be possible rightly to hold as the judgment of the trial Judge does, that when there has in fact arisen default in a literal compliance with the requirements

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of the Act, no matter how induced, forfeiture must ensue. Yet the Act should not be so construed, when the omission to comply with its terms has been brought about (through no fault of the claimant, who has had done everything to entitle him to a grant, save in the mere formal requirements of application therefor, being complied with, and the acts necessary therefor have been prevented), by the wrongdoing of some malicious person rendering it impossible to make the necessary affidavit in its entirety.

When we find, as herein, that the mere issue of a writ setting up an adverse claim, but never served, though made to appear of record in the office of the Mining Recorder, is virtually held to suffice to frustrate an honest claim, I think we must pause and consider, as the Court of Appeal has done, whether the purpose and scope of the Act imperatively requires a declaration of forfeiture instead of any other alternative.

Indeed, the trial Judge suggests other alternative courses were open to the respondents, but either of those suggested involved a possible, and probable, loss of time that would work a forfeiture if the section is to be taken in the sense declared or an expenditure never contemplated as part of the policy of the Legislature before the claimants' right to a grant was recognised.

I cannot think the Legislature ever in fact desired to produce such grossly unjust and absurd results, and they should be averted if a more reasonable construction is open to us.

I am inclined rather to adopt one or other of the alternative views presented in the opinion judgments delivered in appeal and now called in question, and hence must refuse to allow this appeal.

Indeed my doubts, to put the matter no higher, preclude my assenting thereto.

I think there is for the respective reasons assigned by Martin, J., nothing in the other objections taken in support of the appeal herein. In some of such objections which are taken I do not agree with appellants' view of the facts.

I would dismiss the appeal with costs.

Duff, J.

DUFF, J.:—The question of substance presented for determination on this appeal is by no means free from difficulty; but, after a full examination of the considerations presented by the

appellant, I think the better view is that expressed in the judgment of the Chief Justice in the Court below, 47 D.L.R. 509. With his reasons I concur.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I concur in the opinion of the majority of the Judges of the Court of Appeal as to the construction and effect of sec. 52 of the Mineral Act and as to the sufficiency of what was done by the plaintiffs as a compliance with its requirements. But, without further consideration, I am not prepared to accede to Martin, J.'s, view as to the scope and effect of sec. 56, which, if correct, would seem to render sec. 52 quite superfluous. The presence in the Act of the latter section indicates that the existence of the conditions which render sec. 56 operative does not *per se* suspend the obligations imposed by sec. 48. On the other questions in issue between the parties I accept Martin, J.'s, conclusions.

The appeal should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—The plaintiffs, respondents, were the recorded owners of the claim in question; and if they have not filed with the Mining Recorder an affidavit shewing the performance of the conditions required by the Mineral Act, it is due to the fact that an adverse action had been instituted against them by the appellants, and that they had to swear in that affidavit that their possession was not disputed.

The appellants, however, did not proceed with their action before the Courts; but they located mineral claims upon the same land of which the respondents were the recorded owners.

The present action has been instituted by the respondents to restrain the defendants, appellants, from interfering with their rights.

I entirely agree with the view expressed by the Chief Justice of the Court below.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The only serious question in this case is whether, in view of sec. 49 of the British Columbia Mineral Act, R.S.B.C. 1911, ch. 157, the mineral claims of the respondents must be deemed to have been vacant and abandoned. The trial Judge considered this section as being conclusive against the respondents, and expressed his regret at having to dismiss their

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action, the more so as in his opinion, and in this opinion Martin, J., of the Court of Appeal fully concurred, the appellants had simply "jumped" the respondents' claims. In the Court of Appeal, however, the objection based on sec. 49 did not prevail with the majority of the Court, and the trial Judge's judgment was reversed.

The whole question is as to the effect of the Mineral Act. And if sec. 49 does not stand in the way of the respondents, the appeal must be dismissed.

After consideration, I have come to the firm conclusion that sec. 49 does not deprive the respondents of their claims, for I cannot doubt that they had applied, which they could do verbally, to the Mining Recorder for a certificate of improvements. They were fully entitled to this certificate, having done and recorded work or made payments to the amount of $500 on each claim. And when they applied for the certificate of improvements, the Mining Recorder informed them that an adverse claim had been filed and that the filing of that adverse claim stopped all proceedings in the matter of obtaining a certificate of improvements. The respondents had complied with all the requirements of sec. 57, with the single exception of the affidavit required by subsec. (g) of that section. But in as much as that form of affidavit obliged the affiant to swear that he was in undisputed possession of the claim, it was impossible for the respondents to make this statement on account of the filing of the adverse claim, and the Mining Recorder told them that they could not make the affidavit.

Under these circumstances my opinion is that, in view of the making of the application for a certificate of improvements, and while this application was pending, sec. 52 exempted the respondents from the obligation of doing any more work or paying any more money in connection with their claims. The result is that sec. 49 does not apply, and the respondents' claims are not to be deemed vacant and abandoned.

Had I any doubt as to this result, I would not, in the words of Macdonald, C.J., give the appellants, whose conduct places them in a somewhat unenviable position, the benefit of this doubt, but I really can feel no doubt, after reading the judgment of the Chief Justice and the very complete and convincing opinion of Martin, J.

The appeal should be dismissed with costs.

Appeal dismissed.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. December 1, 1919.

BANKS (§ IV A—63)—AUTHORITY OF AGENT OF CROWN—INDORSEMENT OF CHEQUE—PAYMENT BY BANK—BANK'S AUTHORITY—PROOF.

The burden of proving the authority of a Government agent to receive payment of a cheque drawn on a certain bank, payable to "Dominion Government Elevator Co.," rests upon that bank. The Crown is not liable for the negligence of its officers.

[*Viscount Canterbury* v. *Attorney-General* (1842), 1 Ph. 306, referred to.]

Statement.

APPEAL by defendant from the trial judgment in an action on a cheque. Affirmed.

S. E. Richards, K.C., and *W. L. McLaws*, for appellant.

A. J. Andrews, K.C., and *F. M. Burbidge*, K.C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—This action is brought on a cheque for $673.68, drawn by Woodward & Co., grain merchants, on the Grain Exchange branch of the Royal Bank of Canada, in favour of "Dominion Govt. Elev. Co." The words, "Canadian Government Elevator" are stamped on the back of the cheque with a rubber stamp and underneath these words there is written, "Per F. S. Burgess." The cheque in question was given in payment of charges due from Woodward & Co. to the Dominion Government in connection with wheat received and stored at the terminal elevator, Port Arthur. It is claimed that the proceeds of the cheque were improperly paid by the bank to F. S. Burgess who was in charge of the Dominion Government Elevator business at Winnipeg and who kept the money for his own use.

By the Canada Grain Act, 2 Geo. V., 1912, ch. 27, a commission was created under the name of "The Board of Grain Commissioners for Canada" (sec. 3). Power was given to the Governor in Council to authorise the Minister of Trade and Commerce to construct, acquire, lease or expropriate for His Majesty any terminal elevator. Upon the construction or acquisition by His Majesty of any terminal elevator the Board is charged with its operation and management and may, with the approval of the Governor in Council, make regulations for its management and operation and prescribe a tariff of fees (sec. 13).

Pursuant to the powers conferred by the Act terminal elevators were constructed or acquired at several points, one of them being at Port Arthur, Ont. Operation of these elevators was then undertaken by the Board. Cars of grain shipped to the elevator were unloaded and inspected. The grain was graded, cleaned and

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dried, if necessary. It was stored in the elevator and the freight and other charges were paid by the Board. The owner of the grain on production and surrender of his bill of lading, and on payment of the charges against the grain, received a warehouse receipt.

In 1913 the Board found it necessary to have a man at Winnipeg to look after the business of the Board at that city. On October 14, 1913, F. S. Burgess was engaged as a clerk in the Government elevator office, Port Arthur, at a salary of $85 per month. This man had previously been a clerk in a drug store. He was employed for a few days at the terminal elevator at Port Arthur, so as to acquire some knowledge of the work and was then sent to Winnipeg to take charge of the Government elevator business in that city. At first he was given desk-room in an office in the Grain Exchange building, but afterwards had a room to himself in that building with two employees under him. He was known as the "Agent of the Canadian Government Elevators." The Board did not make regulations for the management and operation of elevators as they were empowered to do by the Act. The instructions given to Burgess were mainly verbal. Bright, the accountant of the Board at Port Arthur, explained to Burgess what his duties would be. Bright says:

> I told him that the owners of grain would present bills of lading of travelling cars of grain, and that on presentation of these bills of lading properly endorsed, and payment of all charges, he should hand out the warehouse receipts.

These warehouse receipts covering cars of grain received at the elevator were made out at Port Arthur and then sent to the Winnipeg agent, Burgess, together with sheets giving all particulars, including net bushels and freight charges. As bills of lading are often negotiated to purchasers, the name in the warehouse receipt was left blank, so that when the owner, whoever he might be, appeared with the bill of lading his name was entered in the warehouse receipt by Burgess and, on the surrender of the bill of lading and on payment of all charges for freight, grading, cleaning, drying, etc., the warehouse receipt was delivered to the owner. It is evident that Burgess had authority to receive payment of the charges in money. If the bills of lading in this case had been tendered by the owners together with the amount of the charges in bank notes and silver, Burgess would have had

authority, and it would have been his duty, to receive the same and hand over the warehouse receipts. The charges, however, seem to have been paid almost always by accepted cheques. He was instructed to deposit the moneys received to the credit of the Receiver-General in the Bank of Ottawa. Two stamps were provided for him, one of which read: "Deposit to credit of Receiver-General, Canadian Government Elevator Account." The other stamp only differed from the first in that it contained the word "Dominion" in place of "Canadian." The moneys so deposited were on Burgess' direction forwarded by the Bank of Ottawa to the Receiver-General, passing through the Ft. William office for the purpose of record.

It is admitted that the cheque upon which this action is brought was given

in repayment of moneys paid out by the Dominion Government Elevator for freight charges, weighing and inspection fees in connection with cars or cars of grain consigned to said Woodward & Co., and unloaded in the Dominion Elevator at Port Arthur.

It was therefore the duty of Burgess to impress the stamp furnished to him upon this cheque and deposit it in the Bank of Ottawa to the credit of the Receiver-General. Instead of doing so he put the indorsement on the cheque now appearing upon it, presented it to the teller of the Grain Exchange branch of the defendant's bank on which it was drawn and the teller paid to him the amount in cash. There is no doubt that Burgess appropriated the proceeds of this cheque and of many others that were cashed by the defendant's teller at the same branch.

Burgess, as I have shewn, had authority to receive payment of the charges in cash. It is argued on behalf of the bank that Burgess having this authority would be entitled to receive the proceeds of the cheque, no endorsement being necessary when the cheque was presented for payment by the payee. But although Burgess had authority to receive cash when tendered to him, he had no authority to cash cheques given in payment of moneys due to the Government. The instructions given to him were to deposit all cheques in the Bank of Ottawa in the manner already mentioned. The explanation given by the teller as to how he came to pay the cheque in question and many others presented by Burgess does not absolve him from negligence. In effect it was, that because Burgess came to him on July 7, and bought

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a draft in favour of "Canadian Government Elevator," he, the teller, thought he was justified in paying on July 21, a cheque made payable to "Dominion Government Elevator Co." The fact that Burgess indorsed the cheque, "Canadian Government Elevator, per F. S. Burgess," shewed a discrepancy between the name of the payee as written in the cheque and the name of the party purporting to indorse as payee. This was enough to arouse suspicion in the mind of any bank teller possessed of ordinary experience and discretion. Prior to this, the same teller had cashed two cheques of a firm of grain merchants for $658.87 and $891.67, respectively, payable to "Dominion Government Elevator Co." The teller's explanation is that he thought the payees were grain merchants and that Burgess was their manager. It does not appear to have occurred to him that it was a most unusual thing, almost unprecedented in fact, for a business firm to cash cheques for such amounts instead of putting them through their own bank account.

A large number of cheques which were cashed by the defendant's teller at their Grain Exchange branch, subsequently to the cashing of the cheque sued upon, were put in on behalf of the plaintiff to shew further acts of negligence, but these should not be looked at as they cannot affect the present transaction.

The burden of proving the authority of Burgess to receive payment of the cheque in question rests upon the defendant. In this it has failed.

There is the further circumstance that the words "Dominion Government" and "Canadian Government" appear either on the face of the cheques or on the indorsement. This was a warning that the cheques dealt with public money belonging to the Dominion Government and that such money should be paid to the credit of the account of the Minister of Finance and Receiver-General: R.S.C. 1906, ch. 24, sec. 35; 4-5 Geo. V., ch. 33, sec. 1.

It was urged by counsel for the defendant that the Board of Grain Commissioners were negligent in the manner in which they conducted the business of the Commission at Winnipeg. Burgess was in charge of the office at that city. He made returns to the Board, but, as it is claimed, so slight was the control exercised over him that in a period of about 5 months he was able to appropriate over $140,000 of the moneys collected by him.

It is urged that the salary paid to him, namely $85 per month, was quite insufficient to support him and his family and to enable him to maintain some degree of respectability as the incumbent of a Government office. The importance of the position he filled is shewn by the fact that in the single year ending July 31, 1916, he collected for the Board $3,352,512. It was suggested that his speculations were, in the beginning, induced by his necessities, and that he took larger and still larger amounts when he found how easy it was to steal and avoid detection.

But the stolen moneys belonged to the Crown and the Crown, is not liable for the negligence of its officers. In *Viscount Canterbury* v. *The Attorney-General* (1842), 1 Ph. 306, a petition of right was presented claiming compensation for loss by fire alleged to have been caused by the negligence of the Commissioners of Woods and Forests. In the following passage taken from the report Lord Lyndhurst deals with the position of the Crown, at 323:

> Now, assuming that the fire had been caused by the personal negligence of the Commissioners, would the Crown in such case have been liable to make good the loss? They are indeed styled servants of the Crown; but they are, in truth, public officers appointed to perform certain duties assigned to them by the Legislature, and for any negligence in the discharge of such duty, and any injury that may be thereby sustained, they alone are, I conceive, liable. Is it supposed that the Crown is responsible for the conduct of all persons holding public offices and appointments and bound to make good any loss or injury which may be occasioned by their negligence or delinquency? . . . The Keeper of the Great Seal and other persons holding high situations in the state have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern.

No negligence was established, if such could be established, against the Crown. On the other hand, it is clear that the defendant's teller who cashed the cheque was guilty of negligence and his negligence was the direct cause of the loss of the money.

The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—In the statement of claim in this action it is alleged that Woodward & Co., grain dealers, drew a cheque, dated July 21, 1916, on the defendant bank for the sum of $673.68,

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payable to the order of His Majesty under the name of "Dominion Government Elevator," a name used by the Department of Trade and Commerce, one of the Departments of His Majesty's Government of the Dominion of Canada, in carrying on the business of the Department. It is further alleged that Woodward & Co. delivered said cheque to the plaintiff whereupon it became the property of the Dominion of Canada and negotiable only by deposit to the credit of the Receiver-General and that on or about July 21, one Burgess, an employee of the plaintiff, forged an endorsement on said cheque and delivered same to the defendant bank. It is further stated that said cheque was one of a large number payable to the Dominion Government Elevator, endorsements on which were similarly forged by Burgess, under such circumstances that the defendant bank knew or should have known of the criminal action of Burgess and that it was by reason of the negligence of the defendant bank that Burgess was enabled to carry out his fraudulent designs. The plaintiff demanded payment of the said cheque from the defendant bank, which was refused.

By the statement of defence, the allegations of the statement of claim are specifically denied and it it charged that Burgess was the agent and manager for the Canadian Government Elevators at Winnipeg; that as such agent Burgess was authorised to collect transportation charges in respect of warehouse receipts entrusted to him either in cash or by cheque; that the plaintiff gave Burgess the authority or ostensible authority to collect the amount of such cheques; that Burgess endorsed the said cheques in the course and within the scope of his employment and that the defendant bank acted honestly throughout. It is further alleged that the cheque sued on was presented for payment by one who had authority or apparent authority to endorse it, that it was complete and regular on its face and was paid in the ordinary course of business.

The action came on for trial before Metcalfe, J., who entered judgment for the plaintiff, and from this judgment the bank appeals, the principal ground taken, being that Burgess had authority to endorse the cheque in question.

The head office of the business described and known as that of the Canadian Government Elevators was and is at Ft. William,

Ont. That business was and still is carried on by a commission known as the Board of Grain Commissioners, acting under the Department of Trade and Commerce. This Commission was created, and its powers defined, by ch. 27, 2 Geo. V., 1912. By sec. 13 of that Act the Commission was charged with the operation and management of terminal elevators duly acquired by the Minister of Trade and Commerce. This sec. 13 was amended by sec. 1 of ch. 33, 4-5 Geo. V., 1914, by adding thereto the following provision:

4. Advances to an amount not exceeding $500,000 may be made to the Minister out of the Consolidated Revenue Fund of Canada for the payment of freight charges and weighing and inspection fees on grain received into or shipped from elevators operated and managed by His Majesty. Such payments shall be subject to all the provisions and regulations in that behalf of the Consolidated Revenue and Audit Act, and when the amounts so paid are from time to time refunded to His Majesty such amounts shall be paid to the Minister of Finance and Receiver-General of Canada for deposit to the credit of the said Consolidated Revenue Fund.

It is to be noted that

all public moneys, from whatever source of revenue derived, shall be paid to the credit of the account of the Minister of Finance and Receiver-General, through such officers, banks or persons, and in such manner as the said Minister, from time to time, directs and appoints.

R.S.C., 1906, ch. 24, sec. 35.

In October, 1913, an entry appears in the Minutes of the Board shewing the appointment of Burgess as a clerk. He was employed in Port Arthur for about a week. Subsequently he went to Winnipeg as a clerk, his position, as such, being strictly defined. He was to collect the amounts due by the grain dealers as refunds to the Government of advances made for freight charges under the above sub-sec. 4, sec. 13. His business was to receive bills of lading and the cheques for refunds and give in return warehouse receipts. The moneys received by him were Government moneys to be deposited to the credit of the Government with the Bank of Ottawa. Burgess had no office at first but had desk space in the office of the Registrar, but later he had an office to himself with a clerk and stenographer. He was further authorised to sign split warehouse receipts for registration in the office of the Registrar. This all appears in the evidence of Bright, accountant for the Board of Grain Commissioners, where we find the letters from Birkett, Secretary of the Board, to Burgess as follows:

I have just been speaking to Mr. Bright in reference to the depositing of funds collected in connection with the Dominion Government Elevator.

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All moneys collected will have to be deposited to the credit of the Receiver-General in the Bank of Montreal, or the Bank of Ottawa, Winnipeg, and every so often, say twice a week, you will get a draft from the bank which you will forward to this office, along with the duplicate and triplicate. The bank supplies the forms. It is pretty hard to explain the system that they work under, if you are not used to this sort of work, and I would suggest that you go in and see Mr. J. Smith, Chief Clerk for Inspector Serls. He will explain to you fully what he does in connection with their funds. You will follow out exactly the same lines.

Two letters from the secretary to Tood are in evidence. The first is dated October 15, and is as follows:

This will introduce to you Mr. Burgess, who has been delegated by the Board to take care of the Government Elevator business at Winnipeg. I understand from Commissioner Jones that he will be given desk space in your office. Please extend to him the usual courtesies, and oblige.

And the second, dated October 17, 1913, is as follows:

Please note that F. S. Burgess, who is taking charge of the Winnipeg end of the Dominion Government Elevator business, is authorised to sign split warehouse receipts for registration in your office. The countersigning will be done on surrender of the paper.

Following the course of events we find in the exhibits a cheque, issued by Peaker Bros. & Co., drawn on the Bank of British North America, dated June 30, 1916, payable to Canadian "Government Elevator," endorsed "Canadian Government Elevator per F. S. Burgess," and paid by the defendant bank July 3. Nothing was said about this cheque on the argument and it is referred to only incidentally in the evidence by Scott, the auditor. Apparently it was not in the possession of plaintiff's counsel on Eden's examination.

On July 7, Burgess purchased from the defendant bank two drafts for $112.72 and $288.70 respectively. The requisition forms are signed by "F. S. Burgess, Manager," and "F. S. Burgess." Eden, the bank's teller, from whom these drafts were purchased refers in his evidence to these two purchases as one transaction and gives their date as the date of his first meeting with Burgess. He is not asked about, and does not offer any account of, the Peaker Bros. cheque which apparently left no impression on his memory.

There was, according to the teller, no conversation in connection with these drafts, at least none that he remembered. He remembered seeing Burgess and that is all. The drafts were paid for in cash, no introduction was necessary and any stranger would have been treated the same way.

Next in order comes the cheque of McLaughlin & Co. on the Bank of Montreal (and accepted by that bank) for $658.87, payable to the order of "Dominion Government Elevator Co." It is endorsed "Canadian Government Elevator, per F. S. Burgess, Manager," and was cashed by the defendant bank July 8. On being questioned as to this cheque the teller positively states that this cheque was the first cheque he cashed for Burgess and reiterates that the occasion of the purchase of the draft was the first time he saw him. He is asked "You had not been introduced to him, other than the introduction that he himself gave you?" and answers "That draft was all." The teller knew that neither the Dominion Government nor McLaughlin & Co. were customers of his bank. Nothing took place on the occasion of the cashing of this cheque further than that it was presented by Burgess and the cash handed over. No inquiry as to Burgess' authority was made. "I," he says, "just thought he had the authority" and when asked what facts led you to that conclusion, he replies "He signed the requisition as manager." This is plainly incorrect as is shewn by the Peaker Bros. cheque.

Then cheques are cashed by the teller for Burgess as follows:

1. Cheque, dated July 10, issued by Benson-Newhouse Slabeck & Co. for $625.86, on the defendant bank.

2. Cheque, dated July 12, by same company for $387.94 on defendant bank.

3. Cheque, dated July 20, issued by McLaughlin & Co. for $891.67 on the Bank of Montreal.

4. Cheque, dated July 20, issued by Hanson Grain Co. for $471.89 on the Bank of Nova Scotia.

All these were cashed on the day of their issue or on the day following.

Next comes the cheque, dated July 21, for $673.68, payable to "Dominion Government Elevator Co." which is endorsed "Canadian Government Elevator, per F. S. Burgess" and is the cheque sued on. The difference between the name of the payee on the body of the cheque and that endorsed on it was not noticed by the teller at the time of the transaction or until his examination. Again, with reference to this cheque (as in the case of that of McLaughlin & Co.) when asked "You say you assumed he had the authority; what fact was known to you which gave you the right to assume that?" the teller replies "The fact that he signed

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the requisition as manager." It was nothing that Burgess said as there was no conversation between them and no representations were made by him. The teller knew nothing about the Dominion Government Elevator being an instrumentality or branch of the Dominion Government and seems to have been of the impression it was an incorporated trading company.

Now, we have it established that no representations were made to the teller or to the bank by any one on behalf of the Crown other than the representations made by Burgess. The teller knew nothing of Burgess, he says, until he came in to purchase the drafts referred to and nothing then occurred of any significance except that to one of the requisitions he affixed his name as "Mgr." The purchase of a draft for cash involves no question as to the identity of the purchaser as that is immaterial. There is no possible liability to the bank in the transaction. The cash is taken in and the draft is handed out. That dealing is a different matter altogether from cashing a cheque payable to order. The practically universal rule is that cheques payable to corporations are deposited and if the corporation requires currency it issues its own cheque for that purpose. The plainest dictates of prudence point out this as the safe method for all concerned.

Again I wish to point out the importance of the Peaker Bros. cheque. Though we have no specific evidence on the point, there is no doubt whatever that Eden was the man that cashed this cheque, and this was some days before Burgess bought the drafts. There can be no question of this though the teller says when asked about any cheques before July 8, "No, the buying of the draft was the first time I saw him."

But, apart from the Peaker Bros. cheque, and throwing it out of consideration altogether, the signing of the draft requisitions and their presentation to the teller with the accompanying currency, affords no reason whatever to justify the teller in thinking Burgess had authority to endorse cheques payable to his principal to be cashed over the counter. The two transactions are not related and are not in the same plane. No representations were made by Burgess other than those that were conveyed by his actions and one examines them in vain to find anything that has any significance as bearing on the question of his authority except

the fact that he presented the cheque. But it is impossible to argue that his authority to endorse and cash the cheque can be inferred from the fact that he presented it to be cashed. That seems perilously near to reasoning in a circle.

The teller never had a similar experience in cashing for an individual a cheque payable to a corporation, not drawn on his bank. We need no expert evidence to tell us that this would be an unusual and dangerous practice. His laxity in the matter was extraordinary. The discrepancy between the endorsement and the name of the payee was unnoticed by him until his attention was called to it at the trial. One would have thought that his first idea on scanning the first of these cheques (or any of them for the matter of that) would be to submit it to the manager of the branch for his consideration and opinion. The law of self-preservation would indicate this as the obvious way of safety. And more than that, it was not his own money that he was blindly handing over to a man of whom he knew nothing and about whom he made no inquiry, not even of the man himself.

In all the circumstances leading up to and connected with the presentation and cashing of this cheque, I can see nothing whatever that could in any degree justify anyone in the teller's position in arriving at the conclusion that Burgess had authority to endorse a cheque for any other purpose than deposit or that he had authority to draw the cash for the cheque in question. The history of the transaction is so bare of incident that it is almost as if Burgess had for the first time stepped up to the teller at his window, slapped down the cheque in front of him, and the teller, without looking up, had counted out the cash and pushed it out of the window seeing and knowing nothing but the cheque itself. And after all is not that what took place when the Peaker Bros. cheque was presented? Certain it is no reasoning or argument based on the draft requisitions can be applied to that cheque.

Where a person has by words or conduct held out another person, or enabled another person to hold himself out as having authority to act on his behalf, he is bound, as regards third parties, by the acts of such other person to the same extent as he would have been bound if such other person had in fact had the authority which he was held out as having.

1 Hals. 201. And see also Bowstead on Agency, at page 300, par. 429. I cannot find in the evidence any words or actions on the part of the Crown in this case that can, with any regard to

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reason, be considered as holding out Burgess or as enabling Burgess to hold himself out as having authority to cash this cheque. The simple fact is that the teller cashed the cheque without any reflection and without attempting to exercise his judgment as a bank official in his position would be expected to exercise it in the circumstances. He carelessly overlooked the simplest precautions in a position that necessarily demands vigilance and in a case where the facts suggested and demanded further investigation and inquiry.

Now this branch of the law of agency is founded on estoppel, and even if there could be found in the case facts and circumstances sufficient to constitute Burgess an agent by estoppel, nevertheless the Crown is not bound thereby.

It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them.

Everest & Strode, Law of Estoppel, page 8. This rule has been frequently applied in Canada, and I am not aware that it has ever been rescinded or relaxed.

It was argued that, putting aside the question of the endorsement, Burgess had sufficient direct authority to collect the amount of the cheque. It is, I think, a rule almost without exception, that in Canada the bank requires an endorsement on a cheque payable to order, both for purposes of identification and as a receipt. In point of fact, I have no doubt that in this very case reliance was placed on the endorsement and that that was why the endorsement was put there. The idea behind this argument is that Burgess had authority to collect moneys and this covers his collecting an order (*i.e.*, a cheque) by Woodward & Co. on the Bank of Montreal, which the Royal Bank was warranted in cashing for him. It did not, from this viewpoint, make any difference whether Woodward & Co. paid by an order on another person or by cash. In both cases Burgess' authority permitted him to collect the cash.

I have already set out the evidence relating to Burgess' position and authority.

Counsel for the bank placed much reliance on the wording of the letter of October 17. "Funds collected" and "all moneys collected" it was argued, were equivalent to stating and implied that Burgess was authorised to collect moneys, cash as well as

cheques, and there was nothing in the letter to prevent him from collecting cash or inhibit him from turning a cheque into cash or currency. It is further argued that it is not stated in the letter that all *cheques* must be deposited to the credit of the Receiver-General but that all *moneys* collected must be so deposited. Further, it is said that if Woodward & Co. had paid in cash there would and could have been no objection. But we must take the letter of October 17 in connection with the facts. Burgess' duties lay in a small and well-defined circle. They were restricted to the simplest routine work. He got the bills of lading and the cheques from the dealers and if these were in order, handed over to them the Government warehouse receipts. The word "moneys" used in the letter is a loose term and means cheques and the refunds were of course paid in no other way. Payments in cash, though not impossible, were never in contemplation. But taking it for granted that the letter gave Burgess authority to receive the refunds for advances by the Government in bank bills, by what line of reasoning does that lead to the conclusion that he was thereby given authority to take a cheque payable to the Government, endorse it, not for deposit to the credit of the Receiver-General, but to be cashed, and to receive the cash personally over the counter in return for the cheque. Nothing of the kind was intended or expressed or indicated. Burgess was to take the dealers' cheques when they handed them over and put them to the credit of the Receiver-General and that was the length and breadth of his authority so far as cheques were concerned.

In my opinion Burgess had no such authority as is contended. And I cannot see that he was shewn to have had any ostensible or apparent authority that ought to have led anyone of the most ordinary prudence exercising a moderate amount of common sense, to disregard the simple precautions which would at once have checked these malversations. Apart from what is implied in the act of presenting the cheque and taking the cash, even Burgess himself made no assumptions or representations. And I cannot see that the Crown made any. And the Crown gave Burgess no authority, expressly or by implication, to do the acts complained of which are criminal in their nature.

I would dismiss the appeal.

HAGGART, J.A.:—I have had the advantage of perusing the judgment of my brother Dennistoun. In his reasons he has set

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forth very fully and clearly all the facts and circumstances relevant to the matters in question in this suit. I would adopt his statement of these facts and I concur in the conclusion at which he has arrived.

As between the parties to this suit the cheque sued on—the document itself and the moneys represented by that cheque—was originally the property of the Crown. The onus of proof that the cheque and the moneys represented by it became transferred to the defendants is on the defendants. They have not satisfied that onus, and I could not find otherwise on the admissions and the evidence adduced at the trial.

At the trial and on the appeal counsel for the plaintiff made the same contention that this cheque was the property of the Crown and was payable to the Crown. Then there was the duty imposed upon Burgess to deposit it to the credit of the account of the Receiver-General for Canada and in the statute itself practically these provisions were made. I would dismiss the appeal and affirm the judgment of the trial Judge.

Fullerton, J.A.

FULLERTON, J.A., concurred with Perdue, C.J.M.

Dennistoun, J.A.

DENNISTOUN, J.A.:—F. S. Burgess, a druggist's clerk, was on October 14, 1913, engaged as a clerk in the Government Elevator Office at Port Arthur at a salary of $85 per month. He was presently transferred to Winnipeg as clerk of the Board of Grain Commissioners with desk room in the office of Todd, the Deputy Registrar of Grain Warehouse receipts, but at the time the events took place with which this case is concerned he had a room of his own with a stenographer and a boy in the Grain Exchange building.

From October, 1913, until November, 1916, he carried on his duties as Government Elevator clerk at Winnipeg. In the latter month he became a fugitive from justice and as appears from the evidence, from cheques filed as exhibits, and from statements of counsel, the sum of upwards of $140,000 is unaccounted for to the Government of Canada.

The authority with which he was actually invested is contained in certain letters defining his duties which are set out in the judgment of my brother Cameron and need not be reproduced by me. Stated shortly, it was his business to deliver warehouse receipts for grain in storage at Port Arthur, to the persons entitled to those

documents, upon payment of transportation charges disbursed by the Government. The funds so received by him were to be deposited to the credit of the Receiver-General of Canada in the Bank of Ottawa at Winnipeg, and for that purpose he was supplied with a rubber stamp which bore the words "Deposit to credit of Receiver-General, Dominion Government Elevator Account." The word "Dominion" was subsequently changed to "Canadian" and a new stamp furnished accordingly.

The duty of Burgess to make deposit of all funds received by him was not only specifically set forth to him in the written instructions quoted but was statutory: 2 Geo. V., 1912, ch. 27, sec. 61; and 4-5 Geo. V., ch. 33, sec. 1.

It was assumed, as was the case, that all funds received by him would be represented by cheques, but I have no doubt that he had authority to receive cash if tendered in the ordinary course of business.

He had no authority to expend any money, either for office expenses or for any other purpose.

Although this action is brought upon one cheque only and that for a comparatively small amount, it is admitted that a large number of cheques for large sums of money were cashed over the counter by the defendant bank for Burgess. Most of these cheques were drawn on banks other than the defendant bank, which made collection from the drawee bank through the Winnipeg Clearing House.

These cheques were filed by consent of counsel, all rights being reserved as to their relevancy as evidence. The cheque sued on is one drawn on the Royal Bank of Canada, Grain Exchange Branch, by Woodward & Co. for $673.68, dated July 21, 1916, marked accepted by the Royal Bank, payable to the order of Dominion Government Elevator Co. and endorsed by rubber stamp "Canadian Government Elevator" to which is added by pen and ink "per F. S. Burgess."

It may be noted that the cheque is not properly endorsed, that the rubber stamp supplied by the Government, Ex. 8, was not used, and that Burgess violated his instructions, which were to make deposits in the Bank of Ottawa to the credit of the Receiver-General.

Counsel for the bank state that they do not rely upon the

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endorsement as the money was paid by the bank to the person who had a right to receive it, and this appears to be the sole point upon which the case turns.

It is therefore necessary to determine the authority, both actual and ostensible, with which Burgess was clothed, and the negligence of the bank, if there be any, in making payment of the cheque in question in cash over the counter of the bank to bearer.

The actual authority of Burgess is determined by the letters and oral instructions referred to. He was authorised to take cheques or money in exchange for warehouse receipts and to make deposits to the credit of the Receiver-General. He had no other general authority except to sign split warehouse receipts when necessary.

I have no hestitation in stating that having received a cheque payable to a Government department in exchange for a warehouse receipt, Burgess had no actual authority to take that cheque to a bank and receive cash for it over the counter. When he did so he violated his express instructions.

While he was authorised to receive money when tendered for freight charges in the ordinary course of the business of the Grain Commission, in exchange for warehouse receipts, he had no authority to receive money for the Government in any other way. He had no authority to endorse generally but was limited to a special endorsement for deposit only.

So much for his actual authority. It only remains to consider what was his ostensible authority.

Without any express representation being made the bank teller assumed that Burgess was the manager of a grain company with full powers as such. In this the teller was clearly negligent. The name which appeared on the back of all the cheques "Canadian Government Elevator" plainly intimated that the payee of the cheque was an official and not a commercial entity. He should from the very first have been upon his guard.

Moreover the endorsement "Canadian Government Elevator, per F. S. Burgess" was direct notice that the cheque was being negotiated not by the owner but by an agent " per proc."

By sec. 51 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, a signature by procuration operates as notice that the agent has but limited authority to sign, and the principal is bound by such

signature only if the agent in so signing was acting within the actual limits of his authority.

In this case the endorsement "per F. S. Burgess" was sufficient to put the bank upon enquiry as to the agent's authority. Had a demand been made upon Burgess to disclose what his authority actually was, it must have appeared that he was a clerk with very limited powers: *Hambro* v. *Burnand*, [1904] 2 K.B. 10, at page 22; *Bryant et al.* v. *La Banque du Peuple*, [1893] A.C. 170, at page 180.

The law is well settled that a principal is not bound by a payment to or settlement with an agent unless such payment or settlement be made in the ordinary course of business, and in a manner actually or apparently authorised by the principal: Bowstead on Agency, 4th ed., pages 325 and 331; *Kaye* v. *Brett* (1850), 5 Ex. ch. 269, 155 E.R. 116.

In the case of *Bank of England* v. *Vagliano*, [1891] A.C. 107, at page 128, the bank officials drew the attention of Ziffo, the out of door manager of Vagliano Bros., to the fact that large bills were being presented across the counter and paid to the plaintiff's clerk Glyka, in bank notes, and Ziffo expressed the opinion that if the bills had been properly advised, they should be paid; moreover the payments so made were duly debited in Vagliano Brothers' pass-book without objection on their part. The suspicious circumstances of the clerk asking for bank notes having been duly reported and acquiesced in by his superiors, the bank could do no more. Both Lord Halsbury, L.C., and the Earl of Selbourne were of opinion that after enquiry the bank was justified in charging such payments to the plaintiff's account, and was by its prudent action absolved from the charge of negligence.

In the present case, it being apparent at first sight that Burgess was an agent, the duty was cast upon the bank of making enquiry as to his powers and the limitations of his authority. In my judgment the only ostensible authority which Burgess had was to put himself forward as a clerk, the onus being upon the bank to compel full disclosure of his real authority: *Pole* v. *Leask* (1863), 33 L.J. Ch. 155.

The bank made no enquiry whatever. It paid all manner of cheques drawn by grain merchants on various banks payable

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to "Canadian Government Elevator"; "Dominion Government Elevator Co."; "Canadian Government Elevator Co."; and "Dominion Government Elevator." It paid no regard to the endorsement which was always "Canadian Government Elevator, per F. S. Burgess" or "per F. S. Burgess, Manager," which in all but two instances was an improper endorsement. The cheque sued on is improperly endorsed. All of this is evidence of negligence on the part of the bank and in my opinion it was negligence which compassed the loss of these public moneys.

In determining what evidence of negligence there is in this case, care has been taken to exclude all the cheques which are admitted to have been cashed after July 21, 1916, the date upon which the cheque sued on was cashed; and to base this judgment upon what took place prior to that date, as disclosed by an examination of the six cheques which were cashed between June 20, 1916, and July 21, following.

They are sufficient to have warned any careful banker that something most unusual was going on. That a clerk or even a manager should bring to a bank with which he had no account a series of cheques of third parties for which he demanded cash was in itself a most suspicious circumstance.

There is ample evidence in the case given by experienced bankers that the payment of such cheques was unbusinesslike and negligent on the part of the bank concerned. It is the practice of business houses to deposit all cheques payable to order in their own banks and when cash is required to draw it by means of cheques signed by themselves. Otherwise a valuable record of business transactions is lost and a door is opened wide to peculation and fraud.

It is a matter of common occurrence that a clerk has authority to receive cash or cheques and to give valid receipts therefor in the ordinary course of his employer's business. It does not follow that he has any ostensible authority to present cheques payable to his employer, endorsed by himself, for payment in cash over the counter of a bank, and the bank that pays him without enquiry is clearly negligent.

It appeared at the trial that certain restitutions had been made by Burgess prior to his flight and some attempt was made to shew what application had been made of the moneys restored.

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but the point was not cleared up, and was not argued on appeal. It has therefore received no consideration from me as the parties appear to desire judgment on the general issue and not on this special point.

Two cases referred to on the argument are valuable as exhibiting legal principles which are applicable: *Toronto Club* v. *Dominion Bank* (1911), 25 O.L.R. 330, relieves the bank from responsibility in the case of an agent who was held to have actual authority to endorse and receive money on behalf of his principal. *Ross* v. *London County Westminster & Parr's Bank*, [1919] 1 K.B. 678, holds a bank liable for negligence in dealing with official cheques without sufficient enquiry as to the authority of the bearer who deposits them at his own credit. Neither of these cases is on all fours with the present case, in so far as the facts are concerned.

Upon the whole case I am of opinion that the plaintiff has established the negligence alleged in the statement of claim and is entitled to judgment; that the defendant bank has failed to establish the agency of Burgess, actual or ostensible, to receive this sum of money over their counter, and has failed to shew that it acquired any title to the cheque in question by means of a valid endorsement.

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

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Alberta Supreme Court, Walsh, J. December 11, 1919.

NEGLIGENCE (§ I C—35)—BARBER SHOP—TRAP—PERSONAL INJURIES TO INVITEE—NO WARNING OF DANGER—LIABILITY.

When a customer who is properly in a shop for the purpose of trading in it seeks to reach, for a proper purpose, what is apparently another part of the premises which the tradesman is bound by law to provide for him and is in constant use for that purpose by his customers, the tradesman is bound to warn him of any concealed dangers that there are on the road to it, and, if he fails to do so, he cannot shield himself from responsibility for harm that comes to the customer therefrom, by proving that the way and trap were under the control of someone else. [*Mitchell* v. *Johnstone Walker* (1919), 47 D.L.R. 293, referred to; *Dickson* v. *Scott* (1914), 30 T.L.R. 256, followed.]

ACTION for damages for injuries received by plaintiff while in defendant's shop as an invitee. Statement.

N. D. Maclean, for plaintiff.

Frank Ford, K.C., for defendant.

WALSH, J.:—The plaintiff went into the defendant's barber shop in Edmonton for a shave. Whilst waiting for his turn he Walsh, J.

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found it necessary to go to the water closet. On his way to it he fell into the open well of a stairway and dislocated his shoulder. Hence this action.

The barber shop is on the ground floor of a business block, and the water closet is in the basement beneath it. The only way from the one to the other is through a door in a partition at the back of the shop which opens into a hall. The deep end of the well of the stairway, which leads to the basement, is in this hall immediately in front of this door and about a foot and a half from it. Two uprights from the floor to the ceiling guard this end of the well. A sharp turn to the left and another one to the right take one past these uprights and bring him to the side of this well. He then has to walk along the edge of the well a distance of 6 feet to reach the head of the stairs. This walk is but a foot and a half wide, the outer wall of the hall being but that distance from the edge of the well. There is no guard, or railing, or protection of any kind between the walk and the well. There is no window or other opening for the admission of natural light into this hallway. It is wired for electricity and a socket is in the ceiling but on the day of the accident no bulb was in it, nor had there been for some time before that, nor has there ever since been. It is therefore, a place which even at noon of a bright day then was and still is in almost utter darkness, the only light reaching it being such as can find its way through the cracks of the outer door and such as comes up the stairway from the gloom of the basement. The place was a trap of the very worst character. The defendant frankly admits its dangerous character so I need not labour that, but denies that it is responsible for it.

Although the plaintiff had been a customer of the defendant at this shop for some time, he had never before been or tried to go to this closet, nor did he know where it was. All that he knew of it was that the way to it lay through the door through which he passed in his search for it. He had, on former occasions, heard other customers enquire of the defendant's employees their way to it, and had seen the door pointed out as the approach to it, and had seen customers and employees go and come through it. But where it was beyond that door, or how it was reached, he had no idea. He had never even been through the door, and so had absolutely no idea of what was beyond it. On the trial he said

that on this day he enquired of one of the barbers where the toilet was before he started for it, but he did not convince me that he did, and I find that he did not.

A city by-law requires that such a barber shop as this shall have connected with the premises one or more water closets which shall be kept open for the use of patrons during business hours, which shall be properly partitioned off from the rest of the shop. This closet forms the only approach that there is to a compliance by the defendant with the provisions of this by-law. It is not on the premises but is immediately beneath them. It is the closet ordinarily resorted to by the defendant's employees and customers with its knowledge and consent, though the defendant's manager says that sometimes resort was had to another closet somewhere in the same block. A jacket, owned and operated by the defendant, for heating the water used in the barber shop is installed in the same basement, and the defendant's coal, used in heating the water, is stored there. Others use this stairway to get to the basement, as it affords access to the plant which heats the block, and some of these others also use this toilet. All such others, however, get access to it through the outside door of the hallway from which they walk direct to the top of the stairway. None but those coming from or going to the barber shop have to walk along the unlighted eighteen-inch way which skirts the edge of the well.

I do not remember, that there was any evidence, that no warning of this danger was exposed so that one could read it. Certainly no evidence was given that such a warning was posted. I viewed the premises which the manager swore were on the day of the trial exactly the same as on the day of the accident, and no such warning was then there. There is no evidence of any verbal warning of the danger having been given to the plaintiff. I think, therefore, that I am safe in saying that no notice of this danger was given to the plaintiff. The defendant well knew of it. At least two of its customers and one of its employees had before this dropped into this well on their way to the closet. Apart from this, one of its employees expressly drew the manager's attention to it. The uprights facing this door at the end of the well were put up by the defendant as a protection after one of these earlier accidents. After this present accident the defendant put up a railing along the edge of the walk, but the landlord compelled its removal

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because it interfered to some extent with passage down the stairs. The defendant leases only the barber shop proper, which ends at the partition through the door of which the plaintiff passed. The arrangement under which the defendant used the basement was not made clear at the trial, but I think it not open to dispute that it had the right to use it for its heating apparatus, and to use the toilet in it, and that it had a right of way for its employees and its patrons through the hall and down the stairway to the same for these purposes at least. The plaintiff, about two in the afternoon, passed out of the well-lighted barber shop through this door, which he closed behind him, into this dark and unprotected hallway. He made a mis-step when about half the length of the opening and, without having any idea that it was there, fell into it.

If this trap had been on the defendant's own premises there would, of course, be no escape for it from liability. I had occasion to deal with this subject in the recent case of *Mitchell* v. *Johnstone Walker Ltd.* (1919), 47 D.L.R. 293, and so I need not dwell upon it. Whether or not it is so liable under the above facts is not so easy to decide.

The plaintiff was unquestionably in the barber shop as an invitee of the defendant. The invitation extended to him by the defendant gave him the right to use the premises, not only for the immediate purpose that brought him there but for all other necessary purposes that arose during the time that he was properly there. The defendant was under an obligation, which may properly be called statutory, for it was imposed by municipal by-law passed under statutory authority to provide him with the convenience that he was in search of when he met with this accident. I feel justified in assuming that this particular convenience was provided by the defendant in the discharge of this statutory duty, because it is the only one so provided, and because of the open use made of it to the defendant's knowledge and with its consent, by its employees and patrons. The invitation to the plaintiff to use the premises included, in my opinion, an invitation to use the toilet if necessary, which must, so far as the plaintiff is concerned, be considered a part of the premises, and that in turn included of necessity an invitation to use the only way which led to it, an invitation which it had a perfect right to extend.

The evidence of the defendant's manager is that the stairway

leading to the basement and the hatchway (though I do not think anything was said about the walk) were under the control of the owner of the block, and that the defendant had no control over them. That appears to me to be rather the drawing of a conclusion of law than the stating of a fact. It would have been more satisfactory to have had the details of the arrangement between the parties sworn to, so that I might reach a conclusion of my own as to where this control lay. Apart from that, however, I do not think that it makes any difference, so far as the plaintiff is concerned, where it lay. It may be quite possible that the landlord is also under responsibility for this accident. It may perhaps be that as between him and the defendant liability must rest upon the owner. It by no means follows, however, even if this is so, that the defendant is entitled to escape. It was under the duty to provide the plaintiff with the convenience which he sought and impliedly at least a safe way to it. It surely can make no difference that the way which it provided was one which, although it had the right to use for such a purpose, was one over which it had not absolute control. The plaintiff had a right to look to the defendant for protection. He could not be expected to be concerned over nice questions of legal liability as between his invitor and others, arising out of facts which were not within his knowledge, and to differentiate between the liability to him of the landlord with respect to something occurring on one part of the premises which he had a right to use and that of the defendant for something happening elsewhere in them. I do not think the defendant can rid itself of liability by saying that someone else is responsible for the perils of the way which it invited him to use. Even if this is not so, I think for another reason the defendant is liable. If the invitation to the plaintiff was limited to the barber shop, the defendant was, in my opinion, under a duty to warn him of the dangers he was facing when he passed through that door. If it was intended by the defendant that the closet should not be used by its customers at all, the locking of the door would most effectually have prevented its use by them. If it was intended that it should be so used, the defendant should have put forward some warning which would clearly bring to the attention of those using it the hidden peril along their way to it. I think that when a customer, who is properly in a shop for the purpose of trading

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in it, seeks to reach for a proper purpose what is apparently another part of the premises which the tradesman is bound to provide for him and which is in constant use for that purpose by his customers, the tradesman is bound to warn him of any concealed dangers that there are on the road to it, and if he fails to do so he cannot shield himself from responsibility for harm that comes to the customer therefrom by the simple proof of the fact that the way and the trap were under the control of someone else. It is not so much a question of the control of the way as it is of the neglect of the duty to warn of the danger.

I have read all of the cases to which Mr. Ford referred me, and a good many more along the same lines. The latest English case I have found is *Dunster* v. *Hollis*, [1918] 2 K.B. 795, in which Lush, J., carefully reviews the authorities. I have not found them very helpful though, because they deal exclusively with the question of the liability of owners. I have been quite unable to find any case decided upon facts at all like those here present, or containing any statement of the law applicable to such a case as this. I have, therefore, reasoned this case out as best I could and applied to it the principles which I think should govern in its decision and my conclusion is that the defendant is liable.

It is argued that the plaintiff cannot recover because he should not have thus entered into this, to him, unknown territory and tried to find his way through it and because the darkness should have been a warning to him. I cannot agree with this contention. I think that he had a perfect right to assume from the constant use that the defendant permitted of this way and the entire absence of warning of danger, that it was perfectly safe. He was entitled to think that if there was any peril which he could not see the defendant would have warned him of it and so thinking to go ahead in perfect confidence that there was no danger. Mr. Ford referred me to the note of a Scotch case, *Fleming* v. *Eadie* (1898), 35 Sc. L.R. 422, which is said to have held that the darkness should have been a warning. Unfortunately the report of the case is not available and so I am unable to see how this was reasoned out. I should say that the darkness instead of being a warning that there was some danger would be an intimation that there was none. The plaintiff if he thought about it at all would, I should say, be inclined to conclude that if there was any danger the place would be

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so lighted that he could see it and avoid it and that it was not lighted because of the entire absence of anything of that character. The latest case, which I have found in which a man who was injured while fumbling around in the dark in a strange place in which there was a trap was held entitled to recover is *Dickson* v. *Scott* (1914), 30 T.L.R. 256, a judgment of the Court of Appeal, delivered by Lord Reading, C.J.

The defendant's lack of consideration for the safety of the plaintiff was in my opinion almost criminal. A printed warning on the door or a word of caution uttered before he passed through it would have directed his attention to the very dangerous road over which he had to pass. A lighted electric bulb in the socket already there and wired for that very purpose would have enabled him to see and avoid the danger thus pointed out. One would think that the ordinary dictates of humanity would have prompted the management of this shop to have taken these simple inexpensive and effective methods of keeping him and their other customers out of harm's way apart entirely from any question of legal liability to so protect them.

There will be judgment for the plaintiff for the hospital bill $22.75, and the doctor's bill $75, as special damages and $1,200 as general damages and costs. *Judgment accordingly.*

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S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 19, 1919.

AUTOMOBILES (§ III B—180)—PERSONAL INJURIES—NEGLIGENCE—AUTOMOBILE ACCIDENT—MOTOR VEHICLES ACT, 5 GEO. V. 1915 (N.B.), CH. 43—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN.

The owner of an automobile, who is driving his car, is liable for damages in respect to personal injuries caused a pedestrian when, even though the negligence of the latter may have contributed to the accident, he could have avoided such accident by the exercise of ordinary reasonable care and diligence.

[See annotation, 39 D.L.R. 4.]

Statement.

APPEAL by defendant from the judgment of Barry, J., in an action for damages for personal injuries caused by being struck and run over by an automobile. Affirmed.

W. B. Wallace, K.C., for respondent.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—This action, which was tried before Barry, J., at the St. John Circuit Court, in February last, was brought

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by the plaintiff for the recovery of damages for personal injury sustained by him on July 19, 1915, by being struck and run over by an automobile owned and operated by the defendant. A verdict and judgment was rendered for the plaintiff for $1,471.90, from which this appeal is taken.

The facts of the case are very fully dealt with by the Judge, and shortly may be stated as follows:—

The plaintiff resided at Renforth, about 6 miles from the city of St. John. The defendant, in the summer season at least, resided at Fairvale, about 12 miles from the city, and was accustomed to come each morning by automobile to his place of business. On the morning of July 19, 1915, the plaintiff, who was accustomed to take an early train to the city of St. John for the purpose of attending to his business, left his home to proceed to the station. On crossing the highway he was struck by a car driven by the defendant, and very seriously injured. One of the medical men who attended him described his body as being much cut up, bruised and broken. The base of the skull had been fractured, the brain hurt by the concussion and shock, the right collar bone broken, the left ear very much lacerated and partially torn from the head. There was a bad cut on the forehead over the right eye, and his back and backbone were considerably bruised; both his knees were bruised and hurt and both ankles hurt, the right one badly. When picked up he was unconscious, the result of the fracture of the skull, concussion and shock, and remained unconscious for 2 weeks, and for another week in a state of semi-consciousness. Further, Dr. Walker stated:—

The injury to the plaintiff's head and brain was of such a serious nature as to prevent him going back to his work (of a book-keeper) and I reluctantly permitted him to do so the first of December. He continued to complain of suffering from headaches and of pounding in the head and weakness of the back and ankles, and of not being able to raise the right arm, and these effects will be permanent and are caused by the accident. In my opinion his injuries were of such a nature as he would always feel the effect of them, and they are of a permanent character.

It appears that, following his usual custom, the defendant left his residence at Fairvale to proceed to the city of St. John, in his Ford automobile. He had with him in the car three neighbours, James Belyea, H. C. Barnes and W. C. Brown. At about the time he was passing the Fairvale station the suburban train was practically leaving for St. John. When the defendant reached

Renforth the train was, as found by the Judge, approaching the station, so that the defendant reached Lyman's pathway at practically the same time the train reached the station. As the defendant approached Renforth he sounded his horn, for the reason apparently that a Mr. Pender was crossing the road. As he approached Lyman's pathway a milk cart, owned by one Mercer, who had a man or boy by the name of Orr assisting him, was standing by the side of the road. After the plaintiff was struck, he was carried some distance by the car, which finally stopped in a ditch. The plaintiff was picked up and carried to the house and received medical treatment, but, according to the evidence, was not able to resume his work until the month of December following. Large expenses were incurred by him for medical and nursing treatment, and considerable outlay for the necessary medicines and remedies which his injuries required.

In view of the findings of the Judge, I do not feel it is necessary to elaborate more fully the facts, as there is no dispute about the accident having happened, but only in respect to the liability, if any, which was incurred by the defendant. The findings of the Judge practically cover all of the grounds upon which both parties relied at the trial. These findings may be particularised as follows:—

That the car arrived at the crossing of Lyman's pathway at one and the same time as the railway train spoken of reached the station at Renforth.

That the motor car had been running at an average rate of 19 miles per hour between Fairvale and Renforth, and when it struck the plaintiff was going at the rate of from 16 to 17 miles per hour.

That when the plaintiff was hit by the car he was in the centre of the gravelled or travelled highway.

That the milk wagon which has been referred to did not obstruct or interfere in the slightest way the Lyman pathway, and did not form an obstruction as between a man in an automobile coming from the direction of Rothesay and a man walking down the Lyman pathway, though it would form a very slight and almost negligible obstruction to the one seeing the other.

This finding, as I gather from the judgment of the Court, is based upon the fact that the milk wagon was a common express

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wagon without any top, and as such would not form an obstruction which would prevent a man or persons in an automobile from seeing a man standing at or near or passing the wagon.

That the car travelled from 60 to 75 feet after it struck the plaintiff, also that the defendant did not sound his horn when approaching Lyman's; that the defendant was not keeping a vigilant lookout and so failed to see the plaintiff, Mercer or Orr, who was observed by the other passengers he carried in his car, two of whom at least gave evidence of having seen Mercer and Orr at or near the milk wagon.

That the plaintiff could have seen the approaching car if he had been looking, and that, even with the milk wagon standing where it was, there should have been no difficulty whatever in a person coming down the path from Lyman's seeing an automobile in the road at a point in a distance of 100 feet north of the pathway, nor for a person in an automobile within the same stretch of road seeing a person coming down the pathway.

That Renforth is a village, and the speed of the car at from 16 to 17 miles per hour was a rate greater than was reasonable or proper under 5 Geo. V. 1915, ch. 43, sec. 4, sub-sec. 1, An Act Relating to Motor Vehicles.

That the accident was caused by the ultimate negligence of the defendant in failing to slow up or to sound the horn, or both, and that, because he did not see the automobile, when under the circumstances had he been keeping a proper lookout he should have seen it, the plaintiff cannot escape the imputation of negligence, but, though this negligence did doubtless contribute to the accident, notwithstanding the carelessness of the plaintiff, the defendant could, had he exercised ordinary and proper care and diligence, have avoided the accident, and upon these findings the verdict was entered as stated.

The Judge also applies to the case well-known rules of law relating to negligence, and which, I think, have been very properly applied to this case. There is undoubted evidence to support all the findings which have been made and which are herein stated, and, that being the case, and no injustice or wrong having been done to the defendant by the judgment rendered, the same should not be interfered with.

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No application was made for a new trial or otherwise in respect to the damages, on the part of the defendant, from which it may reasonably be concluded that the findings of the Judge were not considered too large or in any way beyond what would be reasonable under the particular circumstances of the case.

The appeal will be dismissed with costs.

Appeal dismissed.

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JOHNSON v. MOSHER.

Alberta Supreme Court, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. December 4, 1919.

AUTOMOBILES (§ III B—205)—MOTOR CAR ACCIDENT—LIABILITY UNDER MOTOR VEHICLES ACT (ALTA.), 7 GEO. V. 1917, CH. 3.

Under sec. 21 of the Motor Vehicles Act (Alta.), 7 Geo. V. ch. 3, the liability for violation of the Act is penal, not civil.

[*Johnson* v. *Mosher*, *McCallum* v. *Mosher* (1919), 49 D.L.R. 347, affirmed.]

APPEAL from the judgment of Hyndman, J. (1919), 49 D.L.R. 347, dismissing an action for damages for injuries caused in an automobile accident. Statement.

J. J. MacDonald, for appellant.

A. A. McGillivray, K.C., for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—This is an appeal from the judgment of Hyndman, J. (1919), 49 D.L.R. 347, withdrawing the case from the jury and dismissing the action with costs. Affirmed. Harvey, C.J.

The defendant is the owner of an automobile. The plaintiff was injured by the automobile when it was being driven by another person not with the consent or on behalf of the defendant.

We dismissed the appeal with costs at the close of the argument but in view of the fact that this decision displaces *B. & R. Co.* v. *McLeod* (1914), 18 D.L.R. 245, 7 Alta. L.R. 349, reversing (1912), 7 D.L.R. 579, as an authoritative declaration of the liability of the owner of an automobile under the circumstances mentioned it is thought advisable to put our reasons in writing.

In the last mentioned case it was held that the owner was liable for the damages caused by reason of his ownership of the automobile. That decision was based upon the fact that the section of the Motor Vehicle Act, 2-3 Geo. V., 1911-12, Alta., ch. 6, imposing liability had been taken from an Ontario section of the Motor Vehicle Act, 6 Edw. VII, 1906, Ont., ch. 46, where previously

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to its being taken, it had been judicially interpreted which interpretation this Court thought should be applied to it here. The section has, however, been much changed and now bears little resemblance to the original section formerly judicially interpreted.

The original sec. (35) provided that:—

The owner of a motor vehicle for which a certificate of registration has been issued under the provisions of this Act shall be liable for violation of any of the provisions thereof in connection with the operation of such motor vehicle.

The liability of the section was construed to be one for damages to a person injured as well as a liability to the penalties prescribed by the Act.

As the section now stands (amended by 7 Geo. V., 1917, ch. 3, sec. 21), it continues with the following words:—

Unless such owner shall prove to the satisfaction of the Justice of the Peace or Police Magistrate trying the case that at the time of the offence such motor vehicle was not being driven by him, nor by any other person, with his consent, express or implied.

Provided that if the owner was not at the time of the offence driving the motor vehicle he shall not be liable to imprisonment.

It seems perfectly clear from the section as it now stands that a full immunity from the liability exists if the owner can prove the facts stated. That proof can only be made in a case for imposition of penalty and not in a civil action. The "case" specified in the section is surely the case in which the liability is being sought to be established and that is a case being tried by a Justice of the Peace. The use of the word "offence" leads to the same conclusion.

There seems no doubt, therefore, that the only proper construction to place on the section as it now stands is that it refers only to a liability for a penalty under the Act. *Appeal dismissed.*

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Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. 1919

SALE (§ I B—6)—OF GOODS—GOVERNMENT INSPECTION—DE FACTO OFFICER—RECOVERY BACK OF PURCHASE PRICE.

Under a contract which provides for the sale of goods to be "Government inspected," the purchaser may recover back the purchase price which he has been obliged to pay in order to get possession of the goods, where the inspection was not made by a Government inspector, but by an assistant appointed by an inspector who had no power to make such appointment, and so did not comply with the inspection stipulated for in the contract. The *de facto* doctrine has no application to such a case.

[*Fawcett* v. *Hatfield* (1916), 31 D.L.R. 498, reversed.]

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Statement.

APPEAL from the judgment of the Supreme Court of New Brunswick Appeal Division, (1916), 31 D.L.R. 498, 44 N.B.R. 339, reversing the judgment of the trial Judge and ordering a new trial. Reversed.

The facts appear fully from the following judgments:—

The judgment of W. B. Jonah, J.C.C., the trial Judge, was as follows:—

At the conclusion of their evidence in this case Mr. Chandler, of Counsel with defendants and Mr. Bennett, for the plaintiff before going to the jury, raised a number of legal questions upon the decision of which I think the case wholly turns. These questions were substantially as follows:—

Mr. Bennett: 1. Was there such an inspection of the potatoes in question as the essential terms of the contract called for and as the requirements of the Insects and Pests Act, and regulations thereunder, demanded? *Mr. Chandler:* 2. Was there an acceptance by plaintiff of the goods in question by payment of the bank draft and subsequent dealing with the car of potatoes? 3. Was the contract an entire one and plaintiff therefore precluded from rejecting the car in dispute by reason of having previously accepted and paid for one car? *Mr. Bennett* and *Mr. Chandler:* 4. If the plaintiff is entitled in law to a verdict can he recover more than the price he paid for the goods with freight and interest?

The judgment delivered orally at the trial upon these questions was substantially as follows:—

This action was brought by plaintiff who is a seedman and potato dealer at Sackville, N.B., to recover from the defendants, who are general dealers in and shippers of potatoes principally in Carleton County, both the price of a car of potatoes which he ordered from the latter and paid for and damages for the loss of profits which would have resulted from the resale of said potatoes.

The contract, for the breach of which the plaintiff claims to recover, was first made between the parties over the telephone, but was afterwards reduced to writing by letters of ratification. That part of plaintiff's letter referring to the goods in question is as follows: "March 16, Hatfield & Scott, Hartland, N.B. Dear Sirs: I hereby confirm my purchase over the 'phone from you of two cars seed potatoes, Irish Cobbler, Government inspected, in bulk and F.O.B. loading station for 80c. for 165 lb. bags (if necessary) at 7c. which includes bagging. C. Fred Fawcett."

On March 11, the defendants had written a letter to plaintiff in which they say: "We hereby confirm sale over the 'phone of two cars of Irish Cobbler potatoes, Government inspected, at 80c. 165 lb. bulk. If bagged, 7c. extra to be paid for bags and bagging. Please let us know a week ahead of loading time if possible, so we can secure cars. Hatfield & Scott."

This last letter omits the word "seed" but it was to be seed potatoes as stated in plaintiff's letter of ratification.

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By these letters it will be seen that the contract called for two cars of seed potatoes, "Government inspected"—shipping directions were to be given as the potatoes were required, and were so given.

The first car was delivered in good order and was paid for. The second car was collected at a different point and was shipped by bill of lading to Upper Sackville where the plaintiff's warehouse is situated. This bill of lading was attached to a sight draft and had stamped on it by direction of defendants the words "Allow inspection." The plaintiff says he was required to pay the draft in order to get the bill of lading and delivery of the car. He paid the freight at Sackville station and the car was then moved up to Upper Sackville to its destination sometime in the afternoon of the same day. The next morning when plaintiff and his helper opened the car to remove the potatoes, which were in bags, he said they found some of the bags wet and upon opening them discovered rotten potatoes and upon further examination, which is fully detailed in the evidence, disclosed a few cases of powdery scab. All the above facts are uncontested except plaintiff's evidence and that of his witnesses as to the condition of the potatoes when turned out. And as this latter is a matter clearly for the jury I do not give any opinion, nor is it necessary to do so from the view I take of the law involved in the first question above stated.

All the bags in the car were certified as inspected as well as the car itself, by cards and placards, such as are prescribed and furnished by the Department of Agriculture of the Dominion Government, which tags and placards were signed by one "Christian" purporting to be a Government inspector.

The tags and placards were in evidence and need not be set out at length. It is only necessary to say that they purported to comply with the requirements of the Government regulations as to inspection of seed potatoes.

It is admitted further by the defendants that 51 bags of the potatoes placed in this car and purchased by them from a farmer by the name of "Peterson" were not inspected at any time by this man "Christian" nor any other inspector, although he attached his tag to these bags the same as to the others certifying that there had been an inspection of the potatoes contained therein.

I am asked to say first, whether, under these admitted facts there was a Government inspection, such as the law required and

this contract called for. The Government regulations in force at the time this contract was made and known to both parties at the time but since abrogated were made under the authority of the Destructive Insect and Pest Act, 9-10 Edw. VII., 1910, ch. 31.

These regulations had been printed in pamphlet form under authority of the Minister of Agriculture; Circular No. 6 was put in evidence by Mr. Chandler. On page 2 of this circular is found the list of inspectors appointed under the Pest Act for the carrying out of these regulations. Among these inspectors appears the names of Holmden and Johnston, who were the inspectors mentioned in the evidence in this case, but nowhere does the name of J. B. Christian appear as such inspector. The only evidence offered at the trial in support of Christian's authority to act as an inspector was given by himself and he says he was appointed by Inspector Johnson by word of mouth only. Sec. 5 of above cited Act is as follows:—

> The Minister may appoint inspectors and other officers for carrying out this Act and the regulations made thereunder.
>
> 2. Such appointments, if not confirmed by the Governor in Council within 30 days of the date thereof, shall lapse and cease to be valid.

It will be seen by this section that an inspector can only be appointed by the Minister of Agriculture and that even his appointment ceases to be valid after 30 days if not ratified by the Government-in-Council. Christian, who assumed to act as inspector and who inspected the potatoes in dispute, so far as they were inspected, does not pretend that he was regularly appointed. I do not think he can claim to be anything more than an assistant or working helper to the inspector Johnson who employed him. Undoubtedly the task of inspecting a large quantity of potatoes for the purpose of discovering among other things, a rare disease known as powdery scab, not readily recognised, would entail a great deal of physical labor in racking over the potatoes which would require many assistants.

It was put forward by Mr. Chandler that, notwithstanding the manner of his appointment, Christian professed to act and did act as an inspector and would therefore be a *de facto* officer and his acts good and valid. I do not agree with this contention. Had his appointment purported to have been made by the Minister, or in anyway through him, to fill a position which had become vacant, or which was not already occupied by a *de jure* officer,

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then I would be disposed to think his actual performance of the duties of the office would satisfy the requirements of this contract and would be good in law, no matter how irregular his appointment might be. On the contrary, there was an inspector for this particular locality properly appointed and acting, and it was to him that the defendants actually applied for inspection of these potatoes when they were ready to load and ship them, not only so, but there were also three assistants to the inspector's staff duly appointed for the Province of New Brunswick. See page 2, Ex. 3.

To say because this officer for no reasons, because none are stated, assumes to delegate someone else to do his work, that all parties affected by his acts are bound thereby would, I think, be carrying the *de facto* doctrine to a dangerous limit. The duties of an inspector required a certain degree of scientific and technical knowledge and there would be sound reasons of public policy why the selection and appointment of such a person should be exclusively in the hands of a responsible Minister, therefore I do not think the contention is good that the inspector might deputise another to perform his duties.

It is a well established principle of law that where the duties of a public officer are of a judicial character they cannot be deputed to another, as in such cases the judgment and discretion of the officer are relied upon, and are presumed to be the consideration of the grant of office.

But there is another objection to the inspection which J. B. Christian professed to make, which even if his acts were otherwise good and sufficient would render this inspection at least voidable on the part of plaintiff. Sec. 10 of the Potato Regulations requires that inspections and certification of potatoes shall be made only by department inspectors and that labels and certificates for potatoes and containers shall only be used when the potatoes and containers have actually been inspected by such inspector. In this case it is admitted that labels and certificates of inspection were affixed to all bags or containers. But as a matter of fact admitted by the defendants themselves there were over 50 containers of which it is not pretended any inspection of the contents was made. This fact alone, I think, would entitle the plaintiff to refuse the whole car load with which the uninspected goods were inseparably intermixed. Not only would he be so entitled but it

was imperative upon him to refuse acceptance because regulation (13a) says:—

> No potatoes originating in the infected area shall be permitted to be sold by seed merchants or other persons, within or without the infected area, unless they have been examined, certified, labelled and shipped, according to the regulations governing the movement of seed potatoes, originating in the infected area.

Clearly the plaintiff would have rendered himself liable to the penalty of the Act had he accepted and in due course of business resold these potatoes as it was understood he intended to do.

I think, for these reasons, there was not a Government inspection nor such an inspection of these goods as the contract between the parties called for, and the plaintiff would for that reason be entitled to refuse acceptance. I have next to say whether notwithstanding the state of facts which I have just considered the plaintiff by his conduct waived his right of refusal, if I am correct that he had such right. I have no doubt where goods were purchased as these were, with no opportunity of inspection by the plaintiff before shipment, that a reasonable opportunity for inspection would be presumed and in fact the bill of lading attached to the sight draft, which was made by the defendants upon the plaintiff for the price of the potatoes contained the words "Allow Inspection," and until such reasonable time had elapsed this right existed. The fact that plaintiff had contracted for Government inspection did not exclude this right to look the goods over himself and see if they were such as he contracted for. The sight draft it must be remembered was paid by the plaintiff while the car was sitting on the siding at Lower Sackville, at the nearest station on the I.R.C. to the place of its destination, which in the bill of lading is stated to be Upper Sackville. The car was held at this place according to the well known railway rule requiring freight to be paid at the station nearest to the point of destination if there be no railway station at such point. The plaintiff therefore was required to pay the freight in order that the car might be promptly forwarded to Upper Sackville, and he also paid the draft in order that he might obtain the bill of lading and thus have authority to break the seals and open the car.

I do not think that by these acts the plaintiff can be said to have waived his right of inspection or rejection. He would be in

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no worse position than if he had paid for the goods in advance, and they afterwards turned out to be other than he had bargained for; but even if it is considered that the plaintiff by his conduct in this respect expressed a clear intention of accepting these potatoes without further examination the fact that all the bags contained in the car were labelled and certified as having been inspected by a department inspector whereas in truth a very considerable portion of them had not been so examined, or inspected, would I think be such a misrepresentation on the part of the defendants of a material fact that the plaintiff, upon discovery, would be entitled to repudiate the whole contract, even after he had taken full possession and delivery of the goods.

The mere fact that two car loads of potatoes were contracted for does not, I think, afford support to Mr. Chandler's other contention that the contract was an entire one and plaintiff having accepted one part could not reject the other, the one in question. These potatoes were purchased and to be paid for 80c. per bbl. of 165 lbs. Two car loads were named as the maximum quantity to be shipped. Had there been more or less barrels in these cars than the actual number shipped it would not have affected the contract, and there being no lump sum or value put upon these two car loads of potatoes I think the contract was clearly severable.

As to the fourth and last question raised by Mr. Bennett's statement of claim for special damages I am of the opinion that no such damages are recoverable. The plaintiff contracted to purchase seed potatoes "Government inspected." Potatoes answering to that description are of a specific quality well known to the trade and clearly defined by the regulations of the Department of Agriculture.

From the admitted facts to which I have referred it is clear, I think, that such were not the kind of potatoes shipped to the plaintiff and he was not, therefore, under obligation to accept them, and all he could do under the circumstances is precisely what he did, reject the goods and demand a return of his money as for a total failure of consideration.

If I am right in my judgment on these points raised by counsel, there are no questions of fact material to the case before me which should be left to the jury, and there will be judgment for the plaintiff for a return of the purchase price paid by the plaintiff to the

defendants with the freight and interest, amounting in all to $257.60.

The money realised by the sale of the potatoes in question, by the I.R.C. authorities for demurrage, and which is now in possession of the said railway, should be paid over to the defendants.

On appeal to the Supreme Court of New Brunswick, Appeal Division, this judgment was reversed by a unanimous Court.

The judgment is fully set out in 31 D.L.R. 498, 44 N.B.R. 339.

M. G. Teed, K.C. for appellant.

J. B. M. Baxter, K.C. for respondents.

DAVIES, C.J.:—I am of opinion that this appeal should be allowed with costs. Davies, C.J.

It was an action brought to recover back the price of a car of potatoes, the price of which and the freight on which plaintiff had been obliged to pay in order to get possession of the potatoes. The contract admittedly provided for two cars of "seed potatoes Government inspected." Only one car was in question in this suit, the other had been delivered in good order and paid for. As a fact the potatoes in question had not been "Government inspected." A person, not a Government inspector, had inspected them and had affixed official tags to the bags. But as a fact he was not a Government inspector at all or authorised as such, and it was admitted that as to one lot of the potatoes Christian, the alleged inspector, had affixed the inspector's tags to them without inspecting them at all. The County Court Judge who tried the case properly found that the alleged inspection was not made by a Government inspector at all and so did not comply with the inspection stipulated for in the contract between the parties. He further found, I think correctly, that there was no waiver by the plaintiff of his contractual right to have delivery of Government inspected seed potatoes and that the plaintiff was not therefore bound to accept the potatoes shipped to him by car to Sackville which were not "seed potatoes Government inspected" as contracted for.

I fully agree with the careful statements and reasoning of the trial Judge on these points and that having reached those conclusions there was nothing left for him to leave to the jury.

It was urged at bar that the formality of directing the jury to bring a verdict for the plaintiff should have been gone through, but as no question of the kind was raised at the trial or in the

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factums here, I think we are bound to assume that what was done should be held as done with the consent or at least the acquiescence of counsel.

I would therefore allow the appeal with costs here and in the Supreme Court, Appeal Division, New Brunswick, and restore the judgment of the County Court Judge.

IDINGTON, J.:—If it had been necessary to try the issues of fact suggested by the evidence and the judgment of Grimmer, J., in order to properly dispose of this cause there possibly might have arisen a need for further inquiry as to the meaning of the case submitted.

The trial Judge at the close of the taking of evidence in the case seems to have heard a lengthy and prepared argument by counsel, and then to have come to the conclusion on the undisputed facts that in law there never had been that Government inspection which the contract clearly required and hence there was nothing for a jury to try.

It may be that in a common law trial with a jury long ago, it would have been necessary for the trial Judge to have duly observed the form of retaining the jury to tell them that in his opinion of the law governing the issues raised between the parties, it was their duty to find a verdict for the plaintiff for the amount for which judgment was in fact entered.

The legal formalities of that remote time were such that possibly in order to constitute a legal record upon which a formal judgment could be entered there was no escape from the observance of the form.

In these later, and some with a sigh may add, degenerate days, when parties can dispense with a jury entirely, I think the fair inference is that all concerned did so on learning the opinion the trial Judge had formed to dispense with the jury; as frequently is done under the like circumstances.

There is no record of any objection having been made thereto.

The case does not in fact give any light upon the subject but I imagine the counsel never addressed the jury or asked to do so.

The opinion the trial Judge formed and expressed upon the undisputed facts clearly was right and plaintiff entitled to judgment accordingly.

The alternative question of fact to which the trial Judge refers and which Grimmer, J., quarrels with, is not necessary to be determined.

Once we read the evidence of Christian, called for the defence, to prove a Government inspection, we find what a sham was presented thereby and what a bold disregard of the law was ventured upon by those who ought to have known better; there ought only to be one result and that was properly reached by the trial Judge.

There was no pretence by Christian that he was an inspector within the meaning of the Act, and the certificate (so called) of inspection does not pretend that he was such.

There is not a vestige of foundation for applying the doctrine of law which sometimes has been applied to save the situation arising from the conduct of someone *de facto* a Judge, or other officer.

The *O'Neil* case in (1896), 26 Can. S.C.R. 122, does not decide what it was cited for on argument but at page 131 the report contains a foot-note of references of value. Take *Rex* v. *The Corporation of the Bedford Level* (1805), 6 East. 356, one of the many so appearing, and apply the *de facto* doctrine as explained therein by Lord Ellenborough, C.J., and read Christian's evidence in light thereof and then there seems to me to be no room for further contention herein.

The point made but not pressed of two cars in one contract does not seem to help respondents.

The appeal should be allowed with costs throughout and the judgment of the trial Judge restored.

Anglin, J.

ANGLIN, J.:—With deference, I am of the opinion that the view taken by the County Court Judge as to the construction of sec. 5 of 9-10 Edw. VII., 1910, ch. 31 was correct and that his conclusion that there had been no Government inspection of the potatoes in question, as was required by the terms of the contract between the parties, was clearly right.

The *de facto* doctrine relied on in the Appellate Division, in my opinion, has no application to such a case as this where the question is whether the goods furnished under a contract were or were not what had been contracted for and their failure to answer the description of what had been sold not only rendered them unsuitable for the known purpose for which they had been bought but made their re-sale as seed potatoes, which was contemplated, illegal. Moreover, the evidence of the defendant Hatfield makes it clear

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that he knew that Christian who certified to the inspection of the potatoes was not a Government inspector. On the undisputed facts the question for determination was purely one of law proper for the decision of the Judge himself. The facts as to the alleged waiver by acceptance, likewise not in controversy, also presented merely a question of law.

If, as is alleged, the practice of the New Brunswick Courts requires that at a jury trial the Judge shall under such circumstances formally direct the jury to find in accordance with his view of the law and that he shall not withdraw the case from them and himself enter judgment without taking a formal verdict unless counsel consent to that course being adopted, the proper inference from the absence of any statement from him that he proceeded to enter judgment without such consent of counsel, or other clear evidence that that was the case, in my opinion would be that there was at least a tacit consent to what he did. If counsel for the appellant in the Court below intended to rely upon the want of such consent it was his duty to have protested against what the trial Judge was doing and to have seen that the absence of consent on his part was made clear upon the record. The judgment of the Appellate Division setting aside the judgment of the trial Court cannot, in my opinion, be maintained on this purely technical ground.

The two legal issues to which I have adverted having been properly determined in the plaintiff's favour the other defences on the record could not avail the defendants.

I would with respect allow the appeal with costs here and in the Appellate Division and would restore the judgment of the County Court.

Brodeur, J.

BRODEUR, J. (dissenting):—In March, 1915, the respondent sold to the appellant seed potatoes, Government inspected. When a car-load of those potatoes arrived in Sackville, in New Brunswick, the purchaser, the appellant, found that they were not of good quality and refused to receive them. As the bill of lading had been sent with a draft attached, however, the purchaser had to pay the value of the car before delivery and before he could ascertain whether or not the potatoes were of good quality.

The purchaser then took an action against the vendor for the recovery of the sum which he had paid, on the ground, as he

alleges in his statement of claim, that the potatoes "were not of the kind or quality contracted for and were not seed potatoes and could not be sold or used for seed purposes and were unmerchantable and utterly unfit for the purpose for which they were bought."

The parties went to trial on that action.

The plaintiff brought in evidence to prove the allegations of his action, viz., that the potatoes were not of good quality. On the other hand, the vendor brought witnesses to prove them good quality. One of their witnesses, however, was the man who, as the Government employee, had inspected those potatoes before they were shipped; and it was brought in evidence that this man had not been appointed by the Minister as inspector, as required by the Destructive Insect and Pest Act, 9-10 Edw. VII., 1910, ch. 31. The trial Judge then withdrew the case from the jury on the ground that the goods sold were not properly inspected and gave judgment in favour of the purchaser for the value of the potatoes and the freight.

In the Court of Appeal that judgment was set aside and a new trial was ordered, 31 D.L.R. 498.

It seems to me that the case should not have been withdrawn from the jury, because there were not only questions of law but questions of fact upon which the jury alone could give a verdict. There was evidence on which the jury could find that there was a waiver by the plaintiff of the inspection and there were also several other questions of fact on which a jury alone could pass judgment.

Besides, this question of inspection was not raised by the pleadings. The trial took place only in order to find out whether the potatoes were of good or bad quality. No complaint was ever made by the plaintiff that they had not received Government inspection, though he was aware, when he took his action, of the circumstances under which the inspection took place.

It appears that the vendors, before shipping the goods, applied to the chief inspector of the district, in which the goods were, to have them inspected; and, in due course, a man arrived to do the work. He had in his possession all the necessary labels, tags, and certificates which are supplied by the Government and used in such cases. He proceeded with the work, inspected the potatoes, labelled and tagged them; and finally issued a certificate shewing that they had been inspected.

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FAWCETT v. HATFIELD AND SCOTT.

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It may be that this man was not regularly appointed; but that issue was not tried; it is only during the course of the trial that this fact was elicited and I think that the plaintiff, not having based his action on the lack of Government inspection but on the other clause of the contract, viz., the supply of goods of good quality, that question of lack of inspection should not now be raised.

Besides, the fact of Christian acting as inspector constituted him a *de facto* officer acting as he was under the orders of his superior officer and made his work legal and valid. As was decided in the case of *O'Neil* v. *Att'y-Gen'l of Canada*, 26 Can. S.C.R. 122, the rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with regard to all persons but the holder of the legal title, legal and binding.

By the Act, seed potatoes have to be inspected. Could it be contended for one moment that the vendors in this case could be liable because they had not had their potatoes inspected? Certainly not. They have acted in good faith; they received the certificate, which they had every reason to believe was a valid certificate; and, in those circumstances, I do not think that the Court should declare that the clause of the contract requiring Government inspection was not carried out.

I am of opinion that a new trial should take place and that the judgment *a quo* should be confirmed with costs.

Mignault, J.

MIGNAULT, J.:—As I read the contract between the parties it was a condition of the sale of the seed potatoes in question that they would be "Government inspected," which inspection was necessary under the regulations of the Dominion Government. One of the cars containing the potatoes sold by the respondent to the appellant arrived at Upper Sackville on April 29, 1915, with labels and tags certifying that they had been inspected by one J. B. Christian who styled himself a Government inspector, which he was not. The condition of the contract was therefore not fulfilled—an important one because the appellant could not buy potatoes from an infected area unless they had been inspected and labelled by a Government inspector—and the right of action of the appellant, who also complained of the quality of the potatoes, cannot be doubted. The County Court of Westmoreland therefore condemned the respondent to pay the appellant $267.13.

This judgment was set aside by the Supreme Court of New Brunswick mainly because in the opinion of the Judges Christian was at least a *de facto* officer and therefore his acts were legal and valid. With all possible deference I think that the Court below misapplied the doctrine which, for the protection of third parties in good faith, validates the acts of *de facto* officers. As I have stated the inspection of the potatoes by a Government inspector was a condition of the contract, and this inspection was moreover necessary because the district was an infected one. It would have been no defence for the appellant, had he been prosecuted for buying potatoes for sale without their having been duly inspected by a Government inspector, to plead that Christian was a *de facto* officer. No inspection under the regulations could be considered as valid unless it was made by a regularly appointed Government inspector, and what is known as the *de facto* doctrine can certainly have no application in such a matter.

The Supreme Court also held that the whole matter of inspection should have been left to the jury for its finding, and should not have been disposed of by the trial Judge as was done in this case. The trial Judge considered the question whether there had been, under the facts proved, such an inspection as the essential terms of the contract and the Insect and Pest Act required, as a question of law, and he withdrew the case from the jury and rendered judgment in favour of the plaintiff. This course of deciding himself the question at issue, so far as the record shews, seems to have been acquiesced in by the parties. In a matter where the amount is so small, I would be very reluctant to prolong the litigation and order a new trial merely because the case was withdrawn from the jury, this having been done, so far as I can see, without objection from the respondent. And as I cannot think that the *de facto* doctrine has any application here, I would not feel justified in disturbing the judgment of the trial Judge.

The appeal should therefore be allowed. It is very regrettable that the law should ever have permitted appeals to be brought before this Court where the amount involved is so small. I cannot, however, for this reason deprive the appellant of his costs which he should have in this Court and in the Courts below.

Appeal allowed.

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WALTERS v. MOORE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 3, 1919.

PARENT AND CHILD (§ I—9)—DAUGHTER—LOSS OF SERVICE—ENTICEMENT BY DEFENDANT—SERVICE DETERMINABLE AT WILL—ACTION—DAMAGES.

The fact that the contract of service between a father and daughter (over 16) is terminable at the will of either party is no bar to an action by the father, whose daughter has been enticed away and her service consequently lost.

[*Evans* v. *Walton* (1867), 36 L.R. 2 C.P. 615, referred to.]

Statement. APPEAL by defendant from the trial judgment in an action for damages for enticing away plaintiff's daughter. Affirmed by equally divided Court.

N. R. Craig, for appellant.

C. E. Gregory, K.C. for respondent.

Haultain, C.J.S. HAULTAIN, C.J.S.:—I agree with my brother Lamont's statement of the law applicable to this case, and, in addition to the authorities cited by him, would refer to Bullen & Leake (7th ed.), page 361, and the cases mentioned therein. However, in my opinion there should be a new trial on the ground of misdirection. The charge of seduction, involving carnal connection, was withdrawn during the course of the trial. On the withdrawal of that portion of the claim a great deal of the evidence given became quite irrelevant to the remaining issue. I do not go so far as to hold that there should be a new trial on the ground of non-direction, although I think that all the circumstances of the case made it desirable that the jury should have been distinctly instructed that the evidence tending to shew improper relations and improper conduct on the part of the defendant prior to the alleged enticing away ought not to influence them in assessing damages. Not only was this not done, but the trial Judge informed the jury that in estimating damages they might take into consideration the "dishonour" which the parent suffered. This, in my opinion, was a clear misdirection, which, in the absence of the explanation above-mentioned, must have very largely influenced the jury in considering the question of damages.

The appeal should, therefore, be allowed with costs, and the verdict should be set aside and a new trial ordered.

Newlands, J.A. NEWLANDS, J.A.:—This action was for seduction, and also for enticing away the plaintiff's daughter, whereby he lost her

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services. The claim for seduction was dropped, there being no evidence that the defendant carnally knew the plaintiff's daughter, nor was she with child.

The jury found for the plaintiff on the count for enticing away his daughter, and assessed his damages at $1,000. From this verdict the defendant appeals.

That such an action will lie has been decided in several cases, and no proof of service is required other than that the daughter is residing with her father. Nor is it a bar to the action that the service is determinable at the will of either party, it being sufficient that the plaintiff has been deprived of his daughter's service by the action of the defendant.

In *Evans* v. *Walton* (1867), L.R. 2 C.P. 615, Bovill, C.J., at page 620, says:—

> There is no allegation in this declaration of a hiring for any definite time. All that is alleged is, that the girl was the daughter and servant of the plaintiff. It cannot be doubted that the jury would infer from the facts that the relation of master and servant did exist, without any evidence of a contract for a definite time; and, if we are to draw inferences from the facts, I should come to the same conclusion. Then, was that relation put an end to? The service, no doubt, was one which would be determinable at the will of either party, as is said by Bramwell, B., in *Thompson* v. *Ross* (1858), 5 H. & N. 16, 157 E.R. 1082. That this kind of service is sufficient, I should gather from the language used by this Court in *Hartley* v. *Cummings* (1847), 5 C.B. 247, 136 E.R. 871, and particularly from the judgment of Maule, J.

Willes, J., at page 621, says:—

> That runs so completely with the earlier case, and also with the doctrine of Lord Denman in *Sykes* v. *Dixon* (1839), 9 Ad. & El. 693, 112 E.R. 1374, and of Maule, J., in *Hartley* v. *Cummings*, *supra*, and also with the observations of Bramwell, B., in *Thompson* v. *Ross*, *supra*, that I feel no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether *de son bon gré* or *sur retainer*, he is equally entitled to her services, and to maintain an action against one who entices her away. Assuming that the service was at the will of both parties, like a tenancy at will, the relation must be put an end to in some way before the rights of the master under it can be lost.

And Montague Smith, J., says, at page 624:—

> At first I was inclined to think that, as the service was determinable at the will of the daughter, when she willingly quitted her father's house the service was at an end. But the facts shew that she was incited by the defendant to leave her home, and was taken out of a continuing service. Such an action was held to be maintainable in a case of *Speight* v. *Oliviera* (1819), 2 Stark. 493, the facts of which are like those here, except that there the girl was seduced after she had left her father's house and service, and entered into

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the service of the defendant. Lord Tenterden, in summing up, said: "During the time that she was in her father's house, she was in his service. Was there an end put to that service? It was alleged by the defendant that there was, because he himself hired her for the purpose of keeping his own house, at the rate of 7s. per week. But if he did not in reality hire her with that intention, but with the wicked view of seducing her, then I am of opinion that the relation of master and servant was never contracted between them." It seems to me that the facts proved here shew that the girl did not intend to leave her father's service until she was induced to do so by the defendant. Under these circumstances, I think the action is maintainable without any amendment.

As to the damages allowed by the jury, it is contended that the amount is too large, and that the jury should only have allowed the actual loss of the plaintiff. In 10 Hals. 325, note (*f*), it says: "Where a daughter is 'enticed away' from service in her father's employ, and there is no 'seduction' in the sense of corporal misconduct, the damages, in the absence of evidence of express malice, are limited to the actual loss of the parent. *Evans* v. *Walton* (1867), L.R. 2 C.P. 615. And this is so in all cases where a master sues for the enticing away of an employee. *Gunter* v. *Astor* (1819), 4 Moore C.P. 12."

Neither of those cases supports the above statement. In *Evans* v. *Walton* the jury allowed £50, although the daughter, her father's barmaid, was only away eighteen days on two different occasions; and in *Gunter* v. *Astor* the jury allowed £1,600, two years' loss of profits. On appeal, Dallas, C.J., said: "I left it to the jury to give damages commensurate with the injury the plaintiff had sustained;" and the verdict was sustained.

It was also contended that the trial Judge, in his charge to the jury, misdirected them; that his charge was one for seduction, and not for enticing away the plaintiff's daughter from her service.

It is true the trial Judge calls this action one for seduction, but so does Richardson, J., in *Gunter* v. *Astor* (*supra*). He says, at page 14: "This was an action for seducing and enticing away the plaintiff's servant."

In this case, too, the Judge was careful to tell the jury that the action for seduction and carnally knowing the plaintiff's daughter was dropped, and that it was only for seducing her away from her service that they could give damages. I do not think there was any misdirection, nor do I think that we should inter-

fere with the amount of the verdict; and I would dismiss the appeal with costs.

LAMONT, J.A.:—At the trial this action was reduced to an action for enticing away the plaintiff's daughter, with consequent loss of service to the father. The jury found that the defendant had enticed the plaintiff's daughter away and awarded $1,000 damages. The defendant appeals.

Three questions present themselves for determination:—1. Was there evidence on which the jury were entitled to find that the defendant had enticed away the plaintiff's daughter? In my opinion there was. 2. Does an action for enticing away a daughter from her father's house lie in view of the fact that the service rendered by a daughter to her father is determinable at the will of either party, and that the foundation of the action is loss of service?

In Eversley on Domestic Relations (1906 ed.), at page 581, the author says: "An action will lie for enticing away the plaintiff's daughter though there be no allegation that the defendant debauched her or that there was any binding contract of service between her and the plaintiff. In *Evans* v. *Walton*, L.R. 2 C.P. 615, Willes, J., at page 622, says: (see judgment of Newlands, J.A.).

It was argued that the authority of *Evans* v. *Walton* was overruled by the decision of the House of Lords in *Allen* v. *Flood*, [1898] A.C. 1. In my opinion *Allen* v. *Flood* has no bearing on the case at bar. In that case it was held that the defendant, by informing the plaintiffs' employers that some 100 other employees would cease working for them unless the plaintiffs were dismissed, had not violated any legal right of the plaintiffs, and for so doing he was not liable to an action, the terms of the plaintiffs' employment in that case being that they could be discharged at any time. As the plaintiff's service was from day to day, it ceased with each day's work.

In commenting upon that case, Sir Frederick Pollock, in his Law on Torts, 1916 ed., at page 347, says: "But that decision, it must now be understood, was based on the finding of fact that there was no threat, persuasion or inducement at all, but only a warning given by a person who had no control over the event."

As Lord Watson pointed out, it is the absolute right of every

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workman to exercise his own option as to the persons in whose society he will agree to work. Having that right, a workman is not guilty of any legal wrong if, having made up his mind to no longer work in the society of certain others, and having a right under his contract to quit work, he communicates that determination to his employer.

No right of the plaintiffs in that case was, therefore, infringed. But in the case at bar, a right of the plaintiff was infringed. Every father has a right to the services of his daughter until the relation of master and servant existing between them is put an end to. If that relationship is terminated, and the girl leaves her father's abode, but subsequently makes up her mind to return and renew the relationship, but is persuaded not to do so by a third party, no action for so doing would lie against such third person. But until the relationship is terminated, anyone who induces the daughter to put an end to it does the father an actionable wrong. None of the text writers that I have read treat *Evans* v. *Walton* (*supra*), as being overruled by *Allen* v. *Flood* (*supra*). The action, therefore, in my opinion, lies.

The only remaining question is as to damages: (a) Were they assessed on a proper principle? (b) Are they excessive?

The trial Judge instructed the jury as follows: "I have to tell you that damages may be given for the loss which the plaintiff has suffered by being deprived of the society and comfort of his child and by the dishonour which he suffered."

Counsel for the defendant contended that damages can be assessed only for the actual loss suffered by the plaintiff by reason of being deprived of his daughter's services. In my opinion, this contention cannot be maintained.

In Pollock's Law on Torts, 10th ed., 1916, at page 239, under the heading of "Enticing Away Servants," I find the following:—

> Still later the action for enticing away a servant, *per quod servitium amisit*, was turned to the purpose for which alone it may now be said to survive, that of punishing seducers; for the latitude allowed in estimating damages makes the proceeding in substance almost a penal one.
>
> In this kind of action it is not necessary to prove the existence of a binding contract of service between the plaintiff and the person seduced or enticed away. The presence or absence of seduction in the common sense (whether the defendant "debauched the plaintiff's daughter," in the forensic phrase) makes no difference in this respect; it is not a necessary part of the cause of action, but only a circumstance of aggravation.

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This seems to indicate that damages are not limited to mere loss of service.

In 29 Cyc. 1682 the law is laid down in these words: "The parent is entitled to recover for the loss of the child's services, the injury to the parent's feelings, his mental suffering caused by the wrong, the loss of the companionship of the child, and reasonable and proper expenditures incurred in seeking to regain possession of the child."

In my opinion the trial Judge was substantially right in the instructions he gave to the jury, although it might be more accurate to substitute "the mental suffering he endured" for "the dishonour he suffered." It has not been shewn that the jury based their award on any improper principle. (b) The amount awarded is not, in my opinion, so unreasonable that we would be justified in interfering with it.

I would dismiss the appeal with costs.

Elwood, J.A.

ELWOOD, J.A.:—This action, as originally framed, was brought for damages alleged to have been suffered by the plaintiff on account of the defendant having seduced and carnally known the daughter of the plaintiff, one Frances Moore, on or about December 22, 1918, and, as a further cause of action, it was alleged that the plaintiff suffered damages by the defendant, on or about December 23, 1918, wrongfully inducing and procuring the said daughter of the plaintiff, to whose services the plaintiff was entitled, to depart from the said service unlawfully and without the consent and against the will of the plaintiff.

After considerable evidence was had at the trial, the claim for damages for carnally knowing the said Frances Moore was withdrawn, as the evidence clearly shewed that the defendant had not carnally known the said Frances Moore. The plaintiff and defendant are brothers-in-law, the plaintiff having married the sister of the defendant. In March, 1918, two sons of the plaintiff purchased from the defendant a farm south of Chaplin, in this Province, and these two sons, together with their sister Frances, came out to work the farm. The defendant is an illiterate man; he had an adopted child by the name of Jean, of tender years; he is a man who has considerable business dealings; for these reasons he required someone to help him transact his business and to take care of the little girl. An arrangement was

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made with the wife of the plaintiff that the said Frances should keep the defendant's books for him and should take care of the adopted child. At this time the plaintiff and his wife were living in Ontario. In or about the month of August or September the defendant visited the plaintiff and his wife in Ontario, and these arrangements were confirmed, and it was also arranged that the plaintiff's wife should come out to Saskatchewan, the defendant advancing the money for that purpose. It was further arranged that the plaintiff himself should come out later, after he had cleared up his affairs in Ontario. The plaintiff's wife came out to Saskatchewan, with the defendant, and went to live with her two sons on the farm sold to them by the defendant, and where her daughter Frances and the defendant were also living with the child Jean. It was arranged that the defendant was to compensate the daughter for her services by leaving money to her in his will. Everything apparently was satisfactory until on or about October 10, when the defendant took Frances with him and went to visit at the home of a farmer named Craig. For some reason they did not return that night, and when they returned the next day Mrs. Moore found fault with them for staying over-night, and one thing led to another, and finally the defendant and Frances and Jean left and stayed for four or five weeks at the home of one of the defendant's sons. Subsequently the plaintiff came from Ontario, and the defendant was telephoned to, and, as a result, the ill-feeling that existed was smoothed over, and the defendant, Frances and Jean came back to the home of the plaintiff's sons, and they all continued to live there until December 22. On December 22, 1918, the defendant and Frances went to Moose Jaw for the purpose of transacting some business of the defendant's. They were assigned one room, with two beds in it, at the hotel, and apparently the register at the hotel had on it "Mr. and Mrs. Walters." Neither Walters nor Frances signed the register, and apparently the hotel proprietor, assuming that they were husband and wife, so signed the register. A brother of Frances happened to be in Moose Jaw and learned of this, and, as a result, had the defendant arrested. The defendant was subsequently liberated. He came back to the home then being occupied by the plaintiff and his wife and had a considerable row, and the upshot of it was that the defendant, Frances and Jean

left the plaintiff's home, and, except to return for some clothes, were never back there again. On or about January 10 Frances went to live at the home of Mr. Craig, and subsequently, on or about February 12, was married to young Craig. Frances was 17 years of age in September, 1918.

The plaintiff, in his evidence, says that up until December 22 he had no objection to his daughter Frances being with the defendant, and that up to December 22 she was not performing any services for him, and that he was getting wages from her services. It is quite clear that there was no objection to Frances going to Moose Jaw with the defendant on December 22, and that it was only after it had been ascertained that she and the defendant occupied the same room at the hotel that the objection was raised. It is quite clear from the evidence of a doctor who examined Frances in January that up to that time she had never been carnally known. The evidence also shews that when Frances left with the defendant on the night of December 23 she did so with the consent of her mother, and that the plaintiff stood by and never objected, and the evidence of Frances is that she left of her own free will.

The jury brought in a verdict of $1,000, and on that verdict judgment was entered for the plaintiff, and from that judgment this appeal is taken.

The statement of claim at the trial was amended by claiming damages for enticing Frances away between October 8 and the beginning of the action. The action was commenced on December 28, 1918. As I have mentioned above, according to the plaintiff's own testimony no cause of action arose up to December 22. The foundation for the plaintiff's action is loss of service. See *Evans* v. *Walton*, L.R. 2 C.P. 615. That case seems also to be authority for the proposition that the service, if any, which existed between the plaintiff and Frances was one terminable at the will of either. See judgment of Bovill, C.J., at page 620.

It was contended, however, on the argument before us, that such would not be the case, on account of the age of Frances. It will be remembered that she was 17 years of age. It seems to me that the cases of *Thomasset* v. *Thomasset*, [1894] P. 295, and *Stark* v. *Stark*, [1910] P. 190, are authority for the proposition that if Frances was unwilling to live in her father's house, her

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father could not reclaim her by a writ of *habeas corpus;* at any rate under the circumstances of the case at bar.

As I have stated above, the evidence shews that up to December 22 there was no cause of action, because the plaintiff consented to Frances being with the defendant; and the evidence shews that on December 23 she left with the consent of her mother, her father not objecting, and left and remained away of her own free will and intending so to remain. This easily distinguishes the present case from *Evans* v. *Walton, supra.* But, apart from that, the contract of service, if any, and in this case it was of the flimsiest character, was terminable at will, and *Allen* v. *Flood,* [1898] A.C. 1, seems to me to clearly hold that no cause of action will arise for inducing the servant to terminate such service. At page 151 of this report Lord Macnaghten is reported as follows:—

> I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse.

I am, therefore, of opinion that the plaintiff has no cause of action against the defendant and that this appeal should be allowed with costs, and the plaintiff's action dismissed with costs.

Appeal dismissed by equally divided Court.

N. S.

S. C.

RHODENIZER v. RHODENIZER.

Nova Scotia Supreme Court, Russell and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. May 2, 1919.

NEW TRIAL (§ II—8)—MISDIRECTION—ACTION FOR SLANDER—CHARGE OF TRIAL JUDGE TO JURY—APPEAL—NEW TRIAL ORDERED.

A Judge's charge to a jury must be clear and concise, not misleading in any way, nor ambiguous, otherwise misdirection may be found, and a new trial ordered.

Statement.

MOTION to set aside the verdict for defendant and for a new trial in an action claiming damages for slander. New trial ordered.

J. A. McLean, K.C., and *S. Jenks,* K.C., for plaintiff.

V. J. Paton, K.C., for defendant.

The judgment of the Court was delivered by

Chisholm, J.

CHISHOLM, J.:—The plaintiff and defendant are farmers and traders residing at Northfield in the county of Lunenburg. The

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plaintiff was one of a party of men who came to Halifax on December 8, 1917, to assist in relief work following the great explosion of December 6 of that year. He remained in Halifax until noon of the following Tuesday, when he returned to Bridgewater. It is alleged that shortly after plaintiff's return the defendant said in Hebb's restaurant at Bridgewater:—

What do you think of a prominent citizen of Northfield going to Halifax with an oil coat and coming back with two overcoats on?

And that on another occasion the defendant said to one Albert Smith:—

Don't it beat the devil about Hughie; he went to Halifax on relief work, he dressed in rough clothes, he went under an assumed name and he called himself Jim Jones or Tom Jones, he got an outfit of clothes, shoes and all, as if he were one of the sufferers and took them home with him.

The plaintiff has brought this action for damages for the alleged slanders, and in his statement of claim he says the words were meant and were understood to mean that the plaintiff stole the said articles or obtained the same under false pretences, and was thereby guilty of an offence against the Criminal Code.

At the trial the jury rendered a verdict in favour of the defendant. The plaintiff moves to set aside the verdict on the ground of misdirection, among other grounds, and directs our attention to the following words in the charge of the trial Judge:—

Now the whole question before you is: Did Wallace Rhodenizer use these words in any sense which involves stealing? If he did not of course he is entitled to a verdict. If he did the plaintiff is entitled to a verdict.

I think there was misdirection in this portion of the charge because the jury were told that if the defendant did not use the words in a sense which meant stealing he was entitled to a verdict. The words imputed to defendant can be understood to mean that the plaintiff obtained the articles by means of false pretences, which is a distinct offence from theft, and he is entitled to a finding by the jury under proper directions, as to whether the words were understood to mean that he was guilty of obtaining goods under false pretences.

They were instructed that they need not do this.

I think the verdict should be set aside and a new trial ordered. Costs of motion to abide the final result of the action.

New trial ordered.

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RUTTLE v. ROWE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.

EXECUTION (§ I—1)—JUDGMENT AGAINST ESTATE—EXECUTION ISSUED AGAINST LANDS—LANDS SOLD TO PLAINTIFF—LEGAL AND EQUITABLE TITLE.

Execution will issue and will bind the lands of an estate, when judgment against the estate has been allowed by the executors of the same to go by default. Such execution will be prior to the claim of any person obtaining his title through the executors; provided that the execution is filed before transfer to the claimantt akes place.

Land Titles Act, R.S. Sask. 1909, ch. 41, sec. 118, amended by 3 Geo. V. 1912-1913, ch. 16.

[*Morgan* v. *De Geer* (1917), 36 D.L.R. 161, followed.]

Statement. APPEAL by plaintiff from the trial judgment in an action to set aside an execution filed against the plaintiff's lands. Affirmed.

L. A. Seller, for respondent.

Haultain, C.J.S. HAULTAIN, C.J.S., concurred with Lamont, J.A.

Newlands, J.A. NEWLANDS, J.A.:—This action was brought to have an execution issued by defendant against Eliza Stevens and John Macdonald Patrick, executrix and executor of the estate of W. A. Stevens, deceased, *et al* removed as a cloud upon plaintiff's title.

The facts are stated by the trial Judge as follows:—

The land was formerly owned by the Canadian Pacific R. Co. under certificate of title dated August 20, 1906. On August 10, 1906, the C.P.R. Co. agreed to sell to one Frank L. Hiles. This agreement was assigned by Hiles to William A. Stevens on May 10, 1911. On November 29, 1915, the defendant registered an execution against the lands of Eliza Stevens and J. A. M. Patrick, executors of William A. Stevens for $5,303, which execution was renewed on November 21, 1917. On February 16, 1916, Eliza Stevens and J. A. M. Patrick, executors of William A. Stevens, agreed to sell the land to plaintiff for $1,300 payable $300 cash and $500 December 1, 1916, and $500 December 1, 1917. On May 9, 1917, the C.P.R. Co. transferred the land to Eliza Stevens and J. A. M. Patrick, executors of William A. Stevens, which transfer was registered on June 8, 1918. On March 5, 1918, Eliza Stevens and J. A. M. Patrick, executor of William A. Stevens, transferred the land to the plaintiff, which transfer was registered June 8, 1918. On May 8, 1918, the defendant registered a caveat against the land in question claiming under his execution. The contract with the C.P.R. Co. was in default at the time of the plaintiff's agreement. On March 29, 1916, there were arrears of $481 besides the final instalment of $200 due August 10, 1916.

The first ground upon which the plaintiff contends he is entitled to succeed is, that the above execution was not properly issued and therefore never bound the estate of W. A. Stevens, deceased.

He bases this argument upon the case of *J. I. Case Threshing Machine Co.* v. *Bolton* (1908), 2 A.L.R. 174, where Beck, J., held that, unless there was a direct affirmative admission of assets on

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the part of the executor or administrator, the proper judgment was a judgment for payment in due course of administration, or, in other words, a judgment for the administration of the estate. Upon such a judgment no execution could be issued.

With great respect for the opinion of that Judge, I am of the opinion that there is no authority for the above proposition.

In the case upon which he bases his opinion, *McKibbon* v. *Feegan* (1893), 21 A.R. (Ont.) 87, and the remarks of Maclennan, J.A., therein, a plea of *plene administravit* had been put in and found in favour of the defendant, while in *J. I. Case Threshing Machine Co.* v. *Bolton*, *supra*, no such defence had been pleaded and there was, therefore, an admission of assets on the part of the executor, in which case the judgment should have been for the amount claimed with costs.

Such sum of money and costs to be levied of the goods and chattels which were of the testator at the time of his death come to the hands of the defendant as executor (or administrator) to be administered if he hath or shall hereafter have so much thereof in his hands to be administered; and if he hath not so much thereof in his hands to be administered, then, to be levied of the proper goods and chattels of the said defendant.

See form of judgment in An. Pr. 1909, vol. 1, at page 133, and 14 Hals., page 332, par. 777.

If the executor allows judgment to go against him by default, or fails to plead *plene administravit*, he admits the claim and that he has sufficient assets to satisfy it.

Wheatley v. *Lane* (1680), 85 E.R. 228 at 233; 1 Wm. Saund. 216, at 219a, note 8; 14 Hals. 332, par. 779, note p.

In the note to 1 Wm. Saund. at page 219a, it is stated:—

A judgment against an executor or administrator whether by default or upon demurrer; or upon a verdict or any plea pleaded by the executor, except *plene administravit*, or admitting assets to such a sum, is conclusive upon him that he has assets to satisfy such judgment.

The same statement is contained in 14 Hals. 352, and in the An. Pr. 1909.

In this case the executors allowed judgment to go against them by default. They therefore admitted assets sufficient to satisfy the judgment, and are personally liable in an action on such judgment, in which action they cannot plead *plene administravit*, 1 Wm. Saund. 219c.

The executor cannot in either case (an action on the judgment or a *scire facias*) plead *plene administravit*, or any other plea of the same nature, which puts his defence upon want of assets. For such plea would be contrary

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to what is admitted by the judgment, and if the truth were that he had no assets, he should have set it up as a defence to the original action, and having neglected to do so, he shall not be permitted to say so afterwards. For it is a general rule, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action he cannot afterwards plead it, either in another action founded on it, or in a *scire facias*.

This answers the objection that where the estate is insolvent the assets are divided *pari passu*, because here the executors being personally liable the defendant was entitled to the whole amount of his judgment, if not from the estate then from the executors personally.

Now in this case the judgment was not in the form given in the An. Pr. 1909, above set out. It was simply a judgment against the executors of the estate of W. A. Stevens, and the execution was issued against them as such, but as it is only sought by such judgment and execution to bind the assets of the estate, it is, in my opinion, sufficient. The execution was therefore properly issued and binds the estate of W. A. Stevens in the hands of his executors.

Under any circumstances, I am of the opinion that this execution could not be set aside in an action such as the present; but only in an application in the original action, and then only if it was improperly issued, and on such an application it would have been proper to amend the judgment and execution so as to only charge the goods etc., of the estate as in the form, which, after all, is all that has been claimed as the effect of the judgment and execution.

Then if the execution was properly issued, the next question is: Does it bind the land in the hands of the plaintiff

Sub-sec. 2 of sec. 118 of the Land Titles Act, R.S. Sask. 1909, ch. 41, as amended by 3 Geo. V., 1912-13, ch. 16*, which was the law in force at the filing of the execution and the date of the sale to plaintiff by the executors of Stevens, provides that the execution shall form a lien and charge on all the lands of the execution debtor as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal. Giving these words their ordinary meaning, the execution creditor would have had an equitable charge on this land until the executor obtained the legal title, this equitable charge became a legal one upon the certificate of title being issued to the executors, on which certificate this execution was endorsed as a charge upon

*See 8 Geo. V., 1917 (2nd Sess.), ch. 18.

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the land. This was prior to the issue of the certificate of title to the plaintiff, who, until he got such certificate, had no better claim upon the land than the execution creditor, and as the execution creditor's charge became a legal one prior to the plaintiff getting title, that title could only issue subject to the defendant's execution.

The cases cited by the appellant are all cases where the execution debtor never had the legal title, and, therefore, they have no bearing on this case, where the execution debtors obtained the legal title to which the execution attached.

The plaintiff's remedy is, therefore, not against the defendant but against the executors of W. A. Stevens, and the appeal must therefore be dismissed with costs.

Lamont, J.A.

LAMONT, J.A.:—In August, 1906, one F. W. Hiles purchased from the Canadian Pacific R. Co. the south-west quarter of 19-26-5 west of the 2nd Meridian, under an agreement of sale. In 1911, Hiles with the consent of the railway company assigned all his interest in the said land to W. A. Stevens. Stevens died, leaving a will in which Eliza Stevens and J. A. M. Patrick were appointed his executrix and executor. I shall refer to them hereafter as "executors." After Stevens' death, the defendant herein brought an action against his executors for a debt due to him by Stevens in his lifetime. The executors did not enter any defence to the action. More than that they appeared by their solicitor before the local master on an application for judgment, and consented to judgment being entered against them, as the documents on file shew. Judgment was accordingly entered for $5,303.27, and on November 29, 1915, the defendant issued execution on said judgment against the goods and land "of the executors of the estate of W. A. Stevens, deceased." At the date of the execution the railway company were still the registered owners of the land, and the purchase money thereof had not been paid in full. In February, 1916, the executors sold the said land to the plaintiff. In March, 1917, they paid the railway company the balance due and obtained a transfer thereof, and on May 8, 1918, that transfer was registered and the executors became the registered owners. On the same day a transfer of the land from the executors to the plaintiff was registered. The plaintiff's certificate of title issued subject to the defendant's execution, and the plaintiff has brought this action to compel its removal.

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The learned Judge held that the execution was properly against the land, and gave judgment for the defendant. The plaintiff now appeals.

Two grounds are urged for the reversal of the judgment:—

(1) That the defendant had no right to obtain a judgment on which he could issue execution, but was entitled simply to a judgment for payment in due course of administration of the estate; and (2) that even if he had, the execution did not attach to the executors' interests in the land, because that interest was an equitable interest only.

The answer to the first of the above contentions seems to me to be, that whatever argument might be advanced in favour of the contention that the executors were entitled to a judgment for payment of the defendant's claim in due course of administration, such was not the judgment to which they consented. They consented to a judgment upon which under our Rules of Court execution could be issued. Having consented to that, they can not, so long as that judgment stands, be heard to question its validity or the validity of the execution issued thereon. This was decided by the Court *en banc* in *Morgan* v. *De Geer* (1917), 36 D.L.R. 161, 10 S.L.R. 312. In that case the defendant consented to an order giving the plaintiff personal judgment and also specific performance. The plaintiff was entitled to both these remedies. He issued execution on the personal judgment. It was sought to have the execution removed. In giving the judgment of the majority of the Court, Elwood, J., at page 164, said:—

The order, having given the plaintiff something that he was not entitled to, might have been appealed from, as was suggested above in *Regina Brokerage & Inv. Co.* v. *Waddell* (1916), 27 D.L.R. 533, 9 S.L.R. 154. It was not appealed from, and so long as the order stands the execution must stand.

If the executors can not be heard to object to the validity of the execution, neither can the plaintiff. He cannot stand in any stronger position than his vendors. When he bought the land the execution was already registered. If that execution attached to the land in question, then all he bought was what the executors could sell, and that was the land subject to the execution.

It was, however, contended that the execution did not attach to the land in question, because the executors had only an equitable interest therein, and that when the executors obtained the legal title they were then simply bare trustees for the plaintiff.

We need not here consider whether an execution attaches to an equitable interest in land, because there came a time when that

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equitable interest was converted into a legal interest to which the execution undoubtedly did attach. The execution attached at any rate at the moment the executors became registered owners. It is now sought to get the land from under the operation of the execution on the ground that the plaintiff having paid the executors for the land the executors were only bare trustees for him. But of what interest were they trustees? The execution was registered prior to the time the executors agreed to sell to the plaintiff. After its registration, and while it remained in force, the executors could get title to the land only subject to the execution. That is all they could convey to the plaintiff. That was, therefore, all they could sell. Having sold, and the plaintiff having paid the purchase money, they are trustees for him to the extent of the interest they had, but no more. Their agreement to sell to the plaintiff a larger interest may leave them liable to him for damages for failure to make title to the interest they agreed to sell, but it does not give him a right to have the execution removed. His remedy is against his vendors.

It was argued that to allow the defendant to maintain his execution might be unfair to other creditors. It is unnecessary to consider here whether the defendant in case he realised out of the land would hold the money entirely for his own benefit or for the benefit of all the creditors of the estate, because that is a matter in which the plaintiff is not interested, nor does it arise in this action. The only question here is, whether the plaintiff is entitled to have the defendant's execution removed.

In my opinion he is not.

The appeal should be dismissed with costs.

ELWOOD, J.A., concurred with Newlands, J.A.

Elwood, J.A.

Appeal dismissed.

CITY OF SYDNEY v. SLANEY.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. 1919.

MUNICIPAL CORPORATIONS (§II G—195)—NEGLIGENCE—ICE ON SIDEWALK—LIABILITY OF MUNICIPALITY FOR INJURY TO PEDESTRIAN—STATUTORY OBLIGATION.

A municipality, under statutory obligation to keep a street in repair, which allows ice to remain on the sidewalk, is liable for damages in respect of injuries sustained by a pedestrian who slips and falls.

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Statement.

APPEAL from a decision of the Supreme Court of Nova Scotia (1919), 46 D.L.R. 164, affirming, by an equal division of opinion, the judgment at the trial in favour of the plaintiff. Affirmed.

The plaintiff fell on a sidewalk and was injured. The trial Judge found that the fall was due to the slippery condition of the sidewalk and that the municipality had neglected to keep it in repair. His judgment for the plaintiff was affirmed by an equal division of opinion in the full Court.

Finlay Macdonald, K.C., for appellant.

T. S. Rogers, K.C., and *J. McG. Stewart*, for respondent.

Davies, C.J.

DAVIES, C.J.:—Accepting as I do the findings of fact of the trial Judge, confirmed as they are by the full Court in Nova Scotia, and giving proper weight to the frank admissions of the counsel for the city appellant on the argument at bar, I find myself, after giving the facts and admissions much consideration, unable to hold the city not to be liable for the injuries sustained by the plaintiff.

The city's statutory duty to keep the street in repair on which the accident to the plaintiff happened was certainly not discharged by the simple giving of a notice to the "frontager" to remove the frozen slush and ice. That notice given in pursuance of its by-law was one of the means adopted by the city of having its statutory duty with respect to the streets discharged. Whether neglect on the part of the frontager after such notice to remove the dangerous snow and frozen slush would render him liable to an injured party is quite another question not now before us. But it is clear that the giving of such a notice would not in itself be a discharge of the city's statutory obligation and duty.

The injuries sustained by the plaintiff from the dangerous condition of the sidewalk were, therefore, in my opinion, attributable to the defendant's negligence in not causing the frozen slush to be sanded or otherwise made reasonably safe for pedestrian traffic.

In Ontario the Legislature has deemed it necessary for the due protection of cities and municipalities to provide that for injuries which may be sustained by pedestrians and others by reason of ice and snow on their sidewalks they shall only be liable for "gross negligence." But there is no such provision in the legislation of Nova Scotia.

That provision or limitation upon the city's liability may account for some of the decisions in cases which at first sight may seem at variance with the conclusion I have reached as to the city's liability in this case.

The appeal must be dismissed with costs.

Idington, J.

IDINGTON, J.:—The liability of the appellant rests upon sec. 249 of the Act incorporating it as a city, which reads as follows:—

> The City Council shall keep in repair all such streets as prior to the passing of this Act have been dedicated to and accepted by the Town of Sydney by resolution of its council, and all streets laid out under any law of the Province and no other.

There might be a doubt arise from the peculiar wording of the limitations therein as to whether or not this street in question fell within the definition of the streets in regard to which the duty to keep in repair was imposed: but for the clear admission in the statement of defence relative to pars. 1, 2 and 3 of the statement of claim.

The said third paragraph alleged that

> The streets of the City of Sydney are vested in the defendant, City of Sydney, and the said City is required to keep them in repair.

The facts found by the trial Judge amply justify the conclusion he reached.

It is now well settled jurisprudence relative to the measure of responsibility imposed upon municipalities by legislation providing for their repair of highways that on such facts as he finds the municipality is liable.

The appeal should, therefore, be dismissed with costs.

Duff, J.

DUFF, J.:—I concur in the view that sec. 249 of the Sydney Corporation Act gives a right of action to persons who suffer harm in consequence of default in performance of the duty thereby imposed on the municipality to repair certain streets. I think the contention fails that George Street is not one of those streets in respect of which this duty arises. Accepting the construction suggested by Mellish, J., and urged upon us by counsel for the municipality that the sections confer upon the city council the power of determining by resolution what streets shall be kept in repair and that the statutory duty exists only in relation to such streets—I think there was sufficient evidence to establish a *primâ facie* case that responsibility for repairing George St. had been accepted by the municipality. *Victoria Corporation* v. *Patterson*, [1899] A.C. 615.

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It has repeatedly been decided that natural accumulations of snow and ice on a highway may amount to disrepair within the meaning of statutes requiring municipalities to keep highways in repair; and counsel for the appellant did not deny that these decisions may legitimately be appealed to as a guide for the construction and application of the statute now before us. There can, I think, be little doubt that the accumulation of ice and snow which occasioned the respondent's injury constituted a serious danger to pedestrians, though proceeding with ordinary care, a condition which amounts to disrepair within the contemplation of the statute.

It is desirable, I think, to add a word of comment upon an argument based upon the supposed necessity of notice to the municipality of the dangerous condition of the street as one of the conditions of liability. The statutory duty is to keep in repair. That does not, of course, involve absolute responsibility for disrepair. Such provisions, it has been many times held, do not create liability for the consequences of a state of things which has not arisen through the failure of the municipal authority to observe reasonable precautions to prevent it. *Jamieson* v. *City of Edmonton* (1916), 36 D.L.R. 465, at 472-3, 54 Can. S.C.R. 443; *Hammond* v. *Vestry of St. Pancras* (1874), L.R. 9 C.P. 316; *Bateman* v. *Poplar District Board of Works* (No. 2) (1887), 37 Ch. D. 272.

But where the disrepair complained of consists in a condition such as that in question here in a frequented street a condition, not to put it moderately, outside the purview of reasonable anticipation in a Nova Scotia winter, then the municipality can only escape responsibility by shewing that the measures taken came up to the standard of reasonableness and this may include a proper system of inspection.

I concur in the opinion of the majority of the Court below that the municipality failed to discharge its duty.

Anglin, J.

ANGLIN, J.:—I would dismiss this appeal. I agree with Chisholm, Russell and Ritchie, JJ., that the City of Sydney is civilly liable to a person injured through non-repair of streets in respect of which the city charter (sec. 249) imposes the obligation to repair where such non-repair is due to inattention to the duty so imposed sufficient to constitute negligence. I accept Russell, J.'s view that

the law imposing upon the city the duty of keeping the streets from falling into disrepair in consequence of snow and ice must be reasonably interpreted and applied.

With him also

I am unable to say that it has not been so applied by the trial Judge in this case.

The facts in evidence establish a condition amounting to disrepair likely to be productive of danger known to the city authorities at all events on the day before the plaintiff met with his accident. It was the duty of the city officials to see to it that that state of affairs was remedied and they had abundant opportunity to do so. The finding of negligence is supported by the evidence. It follows that there was a breach of statutory duty resulting in an injury to the plaintiff which entailed civil liability on the part of the city.

BRODEUR, J.:—The only question in this case is whether the appellant municipal corporation has been negligent. Brodeur, J.

The snow had been permitted to accumulate on the sidewalk at the place where the respondent fell, and the slush which the mild weather had formed was converted into ice as a result of the night frost. The sidewalk became dangerous for pedestrians. The City of Sydney is bound by the law to keep in repair all its streets. That would involve the duty to take reasonable precautions against the streets becoming dangerous by reason of the ice and snow.

I would distinguish this case from *Pictou* v. *Geldert*, [1893] A.C. 524; and *Municipal Council of Sydney* v. *Bourke*, [1895] A.C. 433; because no duty to repair was imposed by the statute then under consideration.

It is not contended at bar that the duty to repair would not cover the removal of the ice and snow on the sidewalk, or the sanding of the sidewalk. As a question of fact, the sidewalk had been sanded some time before; and by a by-law of the city the snow should be removed by the riparian owners.

The question is whether the municipality has discharged its duty in a reasonable manner. That becomes then a question of fact and the concurrent findings of the Courts below in that respect should not be disturbed.

The appeal should be dismissed with costs.

MIGNAULT, J.:—On the findings of fact of the trial Judge that the accident was caused by the slippery condition of the sidewalk; Mignault, J.

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that the appellant was aware of the condition of the sidewalk and allowed the snow to remain there for some time, when, to the knowledge of the city officials, a lowering of the temperature was very likely to take place and the slush to be frozen over night; that the street in question was one of the principal streets of the city, travelled over by thousands of people by day, or at all events on Sunday; that its condition on the day of the accident could have been prevented, the city having the means to clear the sidewalk and having failed to employ these means; and on the admission of the counsel for the appellant that to leave ice on the sidewalk for an unreasonable time would be a lack of repair, an admission which I think he rightfully made—I am of the opinion that the judgment of the trial Judge should not be disturbed.

The statute obliged the city council to repair the streets and it failed to fulfil this obligation and under the circumstances it is liable for the accident.

The appeal should be dismissed with costs.

Appeal dismissed.

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ROSS v. SCOTTISH UNION and NATIONAL INSURANCE Co.

Ontario Supreme Court, Middleton, J. November 15, 1919.

STAY OF PROCEEDINGS (§ I—5)—FIRST ACTION DISMISSED—SECOND ACTION VEXATIOUS—COURT'S JURISDICTION TO STAY—JUDGMENT—TIME LIMIT FOR BRINGING SECOND ACTION—ONTARIO INSURANCE ACT, R.S.O. 1914, CH. 183, SEC. 194.

Where the issue in an action has been determined, a second action for the same cause is vexatious, and the Court may stay proceedings in this action. A judgment in the first action will have the effect of determining all issues which are, or might be, raised, as far as the claim set up in the action is concerned.

Statement.

MOTION by the defendants for an order staying proceedings in this action and directing the plaintiffs to pay the costs of the action so far incurred, upon the ground that the present action was vexatious and an abuse of the process of the Court, in that the causes of action had all been disposed of in an earlier action between the same parties (See *Ross* v. *Scottish Union and National Insurance Co.* (1917), 39 D.L.R. 528, 41 O.L.R. 108; (1918), 46 D.L.R. 1, 58 Can. S.C.R. 169), and upon a further ground, that the action being to recover upon a fire insurance policy, and it being admitted that the fire occurred more than a year prior to the issue of the writ in this action, the limitation prescribed prevented the action from being successfully prosecuted. Motion granted.

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

H. J. Macdonald, for the plaintiffs.

MIDDLETON, J.:—On the 8th May, 1913, the plaintiffs, being owners of certain buildings, insured them in the defendant company. The policies were renewed in due course, and were current when the buildings were destroyed by fire on the 29th August, 1916. The policies covered the buildings only while occupied as dwellings; and, upon an action being brought upon the policies, five of the dwellings being vacant, the plaintiffs failed to recover the insurance in respect of them.

The plaintiffs now bring this action seeking to have it declared that the restriction in the policies as to the insurance upon these five dwellings was improperly inserted in the policies, and for a judgment rectifying the policies by deleting the restrictive provision, or in the alternative for an amount equal to the insurance as damages for fraud of the defendants in improperly inserting the restrictive words in the policies issued.

There is no doubt that, where a matter has been finally and conclusively determined between the parties in an action, the bringing of a second action for the same cause is vexatious, and the Court has jurisdiction to stay proceedings in the second action: *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210.

The first question, then, to be considered, is, whether the question between the parties is *res judicata* by reason of the decision in the first action. Mr. Macdonald argues very forcibly that it is not, and relies properly upon the statement found in Halsbury's Laws of England, vol. 13, para. 22: "If the words are capable of a double meaning, a party may first set up his own construction as being the right one, and, if he fails, may then seek relief on the ground of mistake." The true significance of these words cannot be appreciated unless read with their context. The question under discussion is the effect of a mistake in the reducing of the agreement to writing, and it is said that the result may be that the parties have never contracted because they were never *ad idem*. It is then said that usually the mistake can only be set up as a defence to an action for specific performance; formerly a successful defence would still have left the mistaken party liable to an action at law; and this result is in effect preserved by the present rule that the Court which refuses specific

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performance can give damages, if any, to which the plaintiff may be entitled, shewing that the words relied upon are not at all conclusive of the present discussion.

Before the fusion of law and equity, undoubtedly a party might, either as plaintiff or defendant in a Court of law, insist upon his views as to the construction of a document; and, failing at law, he might afterwards resort to equity for the purpose of having the contract set aside or reformed. By the Judicature Act, R.S.O. 1914, ch. 56, it is provided (sec. 16 (*h*)): "The Court . . . shall have power to grant, and shall grant, . . . all such remedies as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them, ... so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

As said by Lord Justice Lopes in *Poulett* v. *Hill*, [1893] 1 Ch. 277, 281: "A fusion of law and equity has taken place, and . . . it is clear that the plaintiffs can obtain in the first action everything to which they are entitled, yet they bring a second action. This second action is unnecessary."

I agree with Mr. Macdonald that his clients were quite within their rights in contending, as they did, that they had the right to recover upon the policy as it stood, and that this does not preclude them from saying, if unsuccessful in this contention as to the true meaning of the contract as it stood, that the contract ought to be reformed so as to express the true intention of the parties; but I am of the opinion that under the present practice it was obligatory upon the plaintiffs to assert all their claims in the one action.

Mr. Macdonald contends that the argument as to the meaning of the policy was not duly raised in the first action, and that his clients are at a disadvantage in that the Appellate Division where the argument, he says, was first put forward, ought not to have permitted the defendants to contend that the terms of the policy had the effect which, in the view of the majority of the Supreme Court of Canada, they had, as he might have answered the contention by seeking a reformation of the policy. His view is clearly set forth in the memorandum which he has handed in, in which he states that upon the argument of the appeal he took

the position that this "new contention nevertheless could be rebutted by an issue of fact, viz., whether the policies conformed to the application . . . If this question was to be raised, it could not be adequately met at that stage unless there was a new trial. It was quite clear that the pleadings would have to be amended to enable this to be done. The case was one in which the plaintiffs were properly entitled to have a jury find upon this issue, viz., as to whether the plaintiffs applied for policies which insured only occupied dwellings."

He also says: "If the Court, in the exercise of its discretion—and it was purely a discretionary matter—chose to allow the defendants to raise this contention, and absolutely face about and take a position entirely at variance with and contradictory to the case made out on the pleadings and the circumstances as admittedly known to the defendants, and if the Court did not, as a condition of allowing the question to be raised, see fit to order a new trial, or, as a substitute for a new trial, give the plaintiffs the opportunity to adduce evidence before them, the plaintiffs could not be prejudiced by such an order . . . At the very worst, it is submitted that what happened in the Appellate Division can only be treated as a refusal of the Court to allow the defence to the new point to be raised or to give a proper opportunity of raising it."

All this appears to me to tell strongly against the plaintiffs' present proceedings. The Court in the first action must have taken the view, upon the pleadings in that action, that it was open for the defendants to contend that the policy established no liability when it appeared that it only insured buildings that were occupied, and that the fire took place while the buildings were unoccupied.

Mr. Macdonald in effect applied to the Court to allow him to meet this contention by setting up his claim for reformation. This application was in effect refused by the Court.

The conclusive effect of a judgment is to determine not merely the issues raised between the parties in the action, but also all other issues which ought to have been raised, at any rate so far as the particular claim therein set up is concerned. Where the second action relates to an entirely distinct cause of action, there is authority for the statement that a defendant may be allowed to set up as an answer to the second claim matter that he might

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have set up in answer to the first claim, although he did not do so; but I fail to find any case, since the Judicature Act, which suggests that a party may in a second action seek to reform a contract upon which he has brought an action and failed.

In the case of *Goldrei Foucard & Son* v. *Sinclair*, [1918] 1 K.B. 180, the plaintiffs first sued a company for rescission of an agreement and repayment of money paid to the company thereunder, and thereafter brought a second action to recover damages sustained by reason of fraud. It was held by the majority of the Court of Appeal that the second action might be maintained because the two remedies were separate and distinct. Lord Justice Bankes, in a dissenting judgment, took the view that the causes of action were substantially the same, and that therefore the second action would not lie.

Here the plaintiffs' right and their real cause of action is to recover from the defendants upon a contract of insurance. If the policy does not evidence that contract, then it ought to have been reformed so as truly to evidence the real agreement; but the right to recover must be based upon the contract, whether expressed in the written document or in evidence leading to the conclusion that the document must be reformed. There is, as far as I can see, but one cause of action.

I am further of the opinion that the second objection must also prevail. The fire took place in 1916—this action is not brought until three years later. The statutory limit requires the action to be brought within one year.* This is admitted, but it is contended that some estoppel prevents the defendants from relying upon this statutory limitation. What is alleged against the defendants is that they argued and were permitted to argue with success that upon the true construction of the policy they were not liable. This cannot, in any view, constitute a misleading attitude or such misconduct as to found estoppel.

On both grounds I think the action must be stayed, and an order should now be made directing the plaintiffs to pay the costs of the action so far incurred and of this motion.

I dealt with the motion though it was made in Chambers, but I think the better practice would have been to apply in Court, and the order should therefore issue as an order of the Court.

*See the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194, condition 24.

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Nova Scotia Supreme Court, Harris, C.J., Drysdale and Mellish, JJ. December 19, 1919.

CONTRACTS (§ IV F—370)—SALE OF TIMBER—TIME LIMIT FOR REMOVAL—QUESTION OF TITLE TO LANDS—ACTION—CONSENT OF OWNER—DELAY—EXTENSION OF TIME.

Where it is clearly shewn that one party has been led to believe by the conduct and actions of the other that the latter will not insist on his strict legal rights under the contract, such party will be entitled to equitable relief.

[*Hughes* v. *Metropolitan R. Co.* (1877), 2 App. Cas. 439, followed; *Beatty* v. *Mathewson* (1908), 40 Can. S.C.R. 557, distinguished.]

Statement.

APPEAL from the judgment of Longley, J., in favour of defendant in an action claiming a declaration that plaintiffs were owners of all merchantable timber and trees which on November 13, 1914, were standing, growing, lying or being on land referred to in an agreement in writing entered into between one H. N. Fillmore and plaintiffs, liberty to enter upon said lands for the purpose of cutting down and carrying away said timber and trees, an injunction to restrain defendant from interfering with plaintiffs and other relief. Reversed. The agreement in question is set out in full in the judgment of Harris, C.J.

F. L. Milner, K.C., for appellants; *J. L. Ralston*, K.C., and *E. T. Parker*, for respondent.

Harris, C.J.

HARRIS, C.J.:—The plaintiffs entered into the following agreement under seal with one Horatio Nelson Fillmore:

Memorandum of agreement made November 13, 1914 between H. N. Fillmore of River Philip in the county of Cumberland, farmer, of the first part and Wilbert Thompson and Kiever Thompson both of Little River in the said county of Cumberland, lumbermen, of the second part.

Witnesseth that the said H. N. Fillmore, for and in consideration of the sum of $1,200, to be paid to him by the said Wilbert Thompson and Kiever Thompson in the manner hereinafter mentioned, agrees to sell to the said Wilbert Thompson and Kiever Thompson all the merchantable timber and trees now standing, growing, lying or being on the certain lot or parcel of land situate on the north side of the Intercolonial Railway at River Philip aforesaid, in the said county of Cumberland, together with full liberty to Wilbert Thompson and Kiever Thompson, their servants, agents and workmen, at all times, and with or without horses, cattle or other animals, wagons, sleighs or other vehicles, to enter upon, pass through, over and upon the said land for the purpose of felling, cutting down, and carrying away the said trees and timber, and with liberty also to the said Wilbert Thompson and Kiever Thompson to place and dry the bark of said trees on any convenient part of said premises.

In consideration whereof the said Wilbert Thompson and Kiever Thompson agree to pay to the said H. N. Fillmore the said sum of $1,200 as follows: $600 in 30 days from the date hereof, and $600 in 4 months from this date with interest at 6% per annum.

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And the said Wilbert Thompson and Kiever Thompson agree that they will cut down and remove all of the said timber and trees which they intend to cut and remove, on or before November 13, 1918, that is, within 4 years from the date hereof, and that they will cut no more small trees than is absolutely necessary in culling said land, and not to cut or remove any hardwood on or from said lot of land. And the said Wilbert Thompson and Kiever Thompson shall make compensation for any damage done by fire caused by the lumber operations herein mentioned. And the said Thompsons shall have liberty and right to set up a saw mill on said lot and operate the same during the continuance of this said agreement.

And it is hereby agreed that if any dispute shall arise between the parties hereto with regard to the said timber, or to the compensation to be made for any damage done as aforesaid or to anything herein contained, the same shall be submitted to two men as arbitrators, whose award shall be final and conclusive between the parties hereto, their executors, administrators and assigns.

It is hereby further agreed that the names Wilbert Thompson, Kiever Thompson and H. N. Fillmore shall, where the context allows, include and be binding not only on the said Wilbert Thompson, Kiever Thompson and H. N. Fillmore, the parties hereto, but also on their respective heirs, executors, administrators and assigns.

The plaintiff carried on lumbering operations upon the lands in the winter of 1914-15, and started operations again in the winter of 1915-16, and on March 8, 1916, they received the following notice from the solicitors of one Walter A. Fillmore:

To Wilbert Thompson of Oxford
in the county of Cumberland, lumberman,

On behalf of Walter A. Fillmore of Oxford Junction in the county of Cumberland, farmer, we hereby beg to notify you that unless you cease cutting logs on the land of the said Walter A. Fillmore at Oxford Junction aforesaid proceeding will be taken against you for trespass on said lands.

And we further hereby notify you that Mr. Fillmore must be compensated for the damage done to his lands and premises by the cutting already done on said lands.

The plaintiffs took this notice to Horatio Nelson Fillmore and he gave them a guarantee in writing as follows:

Whereas I, H. N. Fillmore, of River Philip in the county of Cumberland, Province of Nova Scotia, have sold to Wilbert Thompson of Little River, county and Province aforesaid, the lumber on my land on the north side of the railway and have defined the lines on such land, do hereby guarantee him against all damage or costs to him from all persons whomsoever.

On March 10, 1916, a writ was issued by Walter A. Fillmore against one of the plaintiffs and his foreman, indorsed with a claim "for trespass on the lands of the plaintiff (*i.e.*, Walter A. Fillmore) at Oxford Junction in the county of Cumberland."

The plaintiffs had only cut a portion of the timber and trees on the land and on being served with the writ at the suit of Walter

A. Fillmore they went to Horatio Nelson Fillmore and advised him of the proceedings and asked him what he was going to do, and Wilbert Thompson says he replied: "You will have to go to Amherst and put it into the courts and my men I choose (as solicitors) are Logan, McKenzie and Smiley."

He also says that Fillmore also said to him that "operations would have to cease."

The conduct of the action was placed in the hands of Logan, McKenzie and Smiley, and was not concluded till May, 1918, and in the meantime the plaintiffs ceased all operations on the property.

The evidence shews that there was about 100,000 feet of lumber still uncut, a large part of it being on the land outside the lot claimed by Walter A. Fillmore. The disputed area in the action brought by Walter A. Fillmore is estimated by different witnesses from 2½ to 20 acres, and the whole lot covered by the agreement between plaintiffs and H. N. Fillmore at 100 to 150 acres.

About the time the suit of Walter A. Fillmore was concluded negotiations took place between the plaintiffs and H. N. Fillmore for an extension of time to cut and remove the lumber on the whole lot, but nothing resulted. H. N. Fillmore offered to let plaintiffs cut over the disputed area and they refused to accept that offer, and a few days later H. N. Fillmore died. These negotiations were in November, 1918, renewed with the present defendant, who is the executor of H. N. Fillmore, and defendant offered to extend the time for cutting on the disputed area, but plaintiffs refused, the defendant then prevented plaintiffs from cutting and they thereupon brought the present action for a declaration that they had the right to enter on the lands and cut off all the timber upon it at the time of the making of the agreement.

The plaintiffs put their claim to this relief upon two grounds:

1. They say that the agreement transferred to them the property in the timber absolutely and that they have the right to cut and take it away at any time; that the covenant to remove the timber within a limited time is independent and did not take away plaintiffs' ownership of the timber nor their right to remove it after the expiration of that time although it might render them liable to an action of trespass for entering on the lands.

2. They say that they delayed cutting the timber at the request

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of the deceased, H. N. Fillmore, and were thereby led to suppose that the time limit in the contract would not be enforced.

On the first branch of the case I have reached the conclusion that the true meaning of the agreement is that the plaintiffs got by it only a right to remove the timber prior to November 13, 1918, and I reach this conclusion largely from the language used in the agreement.

1. It is only the "merchantable" timber and trees "now" standing, "growing, lying, or being on the land" which is sold. From the fact that the growth of spruce timber in Nova Scotia is so rapid it is apparent that after a period of ten years it would be practically impossible to say whether the timber then on the land was there when the agreement was made, and it was only merchantable timber on the land at the date of the agreement which was sold.

2. The construction contended for by plaintiffs presupposes the right of the plaintiffs to have the trees "nourished forever or for their life upon the land or should occupy the land perpetually." See Magee, J., in *Mathewson* v. *Beatty, et al.* (1907), 15 O.L.R. 557, at 565, followed by Maclennan, J., in (1908), 40 Can. S.C.R. 557, at 565, and obviously one of the reasons referred to by Idington, J., in his judgment at 562.

3. The covenant is that plaintiffs "agree that they will cut down and remove all of the said timber and trees which they intend to cut and remove on or before November 13, 1918."

I think this language points unmistakably to the fact that all the timber passing under the agreement was to be taken off before the date mentioned.

4. The agreement provides that the plaintiffs are to have the liberty and "right to set up a saw mill on said lot and operate the same during the continuance of this said agreement."

This language shews that the whole agreement has a limited time for operation. It could not be successfully contended that the mill could be kept on the lot after November 13, 1918.

I think we must read the agreement as a whole, and so reading it I am unable to conclude that the parties intended more than a right to remove the timber and trees within the limited time mentioned.

If that is the true meaning and interpretation of the contract then the rule of *Stukeley* v. *Butler*, Hobart 168, has nothing

to do with the case. Duff, J., in *Beatty* v. *Mathewson* (1908), 40 Can. S.C.R. 557, at 571, in discussing *Stukeley* v. *Butler* said:

> The Court below adopted the decision of the Divisional Court in *Dolan* v. *Baker* (1905), 10 O.L.R. 259. In that case the Divisional Court proceeded in part upon the principle of a long series of decisions in the State Courts of the United States and in part upon the authority of a series of decisions in the Courts of Ontario. These last mentioned decisions, however (which are collected in the judgment of Magee, J., at page 271) appear to rest in every case upon the view that on the true construction of the transaction under consideration the vendee had acquired only a right to take away such of the timber as he should remove within a limited time. Such decisions plainly have no bearing upon the question I am now considering.

Upon the other branch of the case as to whether or not a case has been made out for the equitable interference of the Court, I have had much difficulty in reaching a satisfactory conclusion.

In *Hughes* v. *Metropolitan R. Co.* (1877), 2 App. Cas. 439, at 448, Cairns, L.C., said:

> It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

Here it is undisputed that there was a lawsuit over the property or its boundaries and it does not appear by the indorsement on the writ in the suit brought by Walter A. Fillmore just how much, or what part of the whole lot was in question.

It is not disputed that the deceased sent the plaintiffs to his own solicitors to carry on the litigation, and one of the plaintiffs —the father—swears that the deceased also, at the same time, told him that operations would have to cease. The doubt I have had about this branch of the case is as to whether there was corroboration of this evidence of plaintiff that the deceased said that operations would have to cease within the meaning of ch. 163 R.S.N.S., 1900, sec. 35.

It was part of the conversation regarding the defence of the action by the solicitors of the deceased, and admittedly that part of the conversation relating to the defence took place, and then

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we find that plaintiffs immediately ceased operations, a thing they would be unlikely to do without the consent of H. N. Fillmore, and as the litigation involved the title to part of the property and the statement on the writ did not disclose what portion of the land was being claimed by Walter A. Fillmore, it seems reasonable that operations should cease on the whole, because all logs cut by plaintiffs on that part of the property which turned out to belong to Walter A. Fillmore would have to be paid for by H. N. Fillmore.

I have reached the conclusion, though not without some doubt, that there is sufficient evidence of corroboration and that plaintiffs were led by the conduct and words of the deceased to suppose that he would not insist on his strict legal rights under the contract.

Counsel for defendant strenuously argued that the reply of the defendant to cease operations, if made, could only have referred to the operations on the disputed area, but from the fact that the plaintiffs stopped all their operations they must have understood it as applying to the whole, and as it could not then be definitely known just what part Walter A. Fillmore was claiming, I think the fair inference is that it was intended to apply to all the operations on all the property, and that a case has been made out for equitable relief within the meaning of the rule laid down by Lord Cairns.

I would allow the appeal with costs of the appeal and of the action. The question as to the length of time the plaintiffs should have to finish their operations and the other terms of the decree will be settled when the order is moved for.

Mellish, J.

MELLISH, J.:—By deed dated November 13, 1914, one H. N. Fillmore

agrees to sell to the said Wilbert Thompson and Kiever Thompson all the merchantable timber now standing, growing, lying or being on the certain lot or parcel of land situate on the north side of the Intercolonial Railway at River Philip aforesaid, in the county of Cumberland, together with full liberty to Wilbert Thompson and Kiever Thompson, the plaintiffs their servants agents and workmen at all times and with or without horses, cattle or other animals, wagons, sleighs or other vehicles, to enter upon, pass through, over and upon the said land for the purpose of felling, cutting down and carrying away the said trees and timber, and with liberty also to the said Wilbert Thompson and Kiever Thompson to place and dry the bark of said trees on any convenient part of said premises.

In consideration whereof the said Wilbert Thompson and Kiever Thompson agree to pay to the said H. N. Fillmore the said sum of $1,200

as follows: $600 in 30 days from the date hereof and $600 in 4 months from this date with interest at 6% per annum.

And the said Wilbert Thompson and Kiever Thompson agree that they will cut down and remove all of the said timber and trees which they intend to cut and remove, on or before November 13, 1918, that is, within 4 years from date hereof, and that they will cut no more small trees than is absolutely necessary in culling said land, and not to cut or remove any hardwood on or from said lot of land. And the said Wilbert Thompson and Kiever Thompson shall make compensation for any damage done by fire caused by the lumber operations herein mentioned. And the said Thompsons shall have liberty and right to set up a saw mill, on said lot and operate the same during the continuance of this agreement.

H. N. Fillmore died on May 30, 1918, and the defendant is his executor in the Province of Nova Scotia and devisee in trust under his will.

In pursuance of this agreement the plaintiffs entered on the land and carried on lumbering operations during the winter 1914-15 and again during the winter of 1915-16.

One Walter A. Fillmore by his solicitor sent the following notice to the plaintiff, Wilbert Thompson, dated March 8, 1916:

To Wilbert Thompson of Oxford
in the county of Cumberland, lumberman.

On behalf of Walter A. Fillmore of Oxford Junction in the county of Cumberland, farmer, we hereby beg to notify you that unless you cease cutting logs on the land of the said Walter A. Fillmore at Oxford Junction aforesaid proceeding will be taken against you for trespass on said lands.

And we further hereby notify you that Mr. Fillmore must be compensated for the damage done to his lands and premises by the cutting already done on said lands.

These alleged acts of trespass were apparently the lumbering operations which the plaintiffs were and had been engaged in on the lands pointed out by H. N. Fillmore as the lands referred to in said agreement.

The plaintiff Wilbert Thompson took this notice to H. N. Fillmore who accordingly gave him the following guarantee:

Whereas I, H. N. Fillmore of River Philip in the county of Cumberland, Province of Nova Scotia, have sold to Wilbert Thompson of Little River, county and Province aforesaid, the lumber on my land on the north side of the railway, and have defined the lines on such land, do hereby guarantee him against all damage or costs to him from all persons whomsoever.

The lumbering work accordingly proceeded for a day o two longer, until, shortly after March 10, 1916, when said plaintiff was served with a writ issued at the suit of Walter A. Fillmore on that date indorsed as follows:

The plaintiff's claim is against the defendants for trespass on the lands of the plaintiff at Oxford Junction in the county of Cumberland.

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The plaintiff, Wilbert Thompson, at once took this writ to H. N. Fillmore who referred him to solicitors at Amherst who would defend the action on behalf of the defendants, on which occasion, as this plaintiff states, H. N. Fillmore then told him "operations would have to cease." In fact the lumbering operations did then cease.

It will be observed that up to this time there is nothing to indicate the nature or extent of Walter A. Fillmore's claim. As far as I can determine from the record the real nature of this claim only becomes apparent later on when it was apparently agreed by or on behalf of the parties to that action that it should be settled by the employment of a surveyor, McKenzie, to fix the boundary line between Walter A. Fillmore's and H. N. Fillmore's property on the northern end of the former's land (see plan, Ex. 5), which was accordingly so fixed about May 22, 1918, or 8 days before H. N. Fillmore's death. In the result this settlement gave to H. N. Fillmore all the land and indeed a little more than the land which he had pointed out to the plaintiffs as covered by the agreement sued on in this action. The real dispute as it turned out in the Fillmore action only involved the matter of a few acres.

It is proven that the plaintiffs left on the land covered by the agreement from 5,000 to 15,000 feet of merchantable lumber on this "disputed area" and about 100,000 feet on the whole lot.

The plaintiffs asked the defendant for an extension of time to complete their operations beyond the date fixed by the agreement (November 13, 1918), but this was refused except as to the timber on the "disputed area" which restriction plaintiffs would not accept. The defendant stopped the plaintiffs' lumbering operations on the land in January, 1919, and refused to let them take any timber except from the "disputed area."

Accordingly on April 13, 1919, plaintiffs brought this action claiming *inter alia* a declaration that they are entitled to enter the land and cut and carry away the merchantable timber and trees (except hardwood) which were on the land at the date of the agreement (November 13, 1914).

The defendant, as above indicated, did not establish the defence pleaded by him that the plaintiffs had cut all the timber except that on the disputed area.

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The action was tried before Longley, J., without a jury. He decided that as the only dispute as to ownership of the land was in fact in reference to a small portion of the area, the 5 months' extension of time given to remove the timber from it was sufficient and that the plaintiffs should have removed the timber from the remainder of the land within the specified time. Accordingly he dismissed the action with costs. From this judgment the plaintiffs have appealed.

The appellants contend that the effect of the agreement sued on is unconditionally to give them the right to the merchantable timber (except hardwood) on the land at the date of the agreement and that the covenant to remove it within a specified time if broken does not give the defendant the right to treat the timber as forfeited but at most gives a right of action for damages.

I think this contention is a sound one and should prevail. *Smith* v. *Surman* (1829), 9 B. & C. 561; *Marshall* v. *Green* (1875), 1 C.P.D. 35; *Jones* v. *Earl of Tankerville*, [1909] 2 Ch. 440, at 444, 445; N.S. Sale of Goods Act, 10 Ed. VII., 1910, ch. 1.

The above would indicate that this was a sale of goods. The price, a lump sum, appears to have been paid. Have the plaintiffs agreed that they were not to have the goods unless they removed them within the time limited? I do not think so. And even if they had so agreed, relief might well be granted.

As between the vendor and vendee in such a case as this the property in the trees is to be taken as passing to the vendee. I say "is to be taken as passing" advisedly because in my opinion, as expressed in *Hingley* v. *Lynds* (1918), 44 D.L.R. 743, at 750, 52 N.S.R. 422, at 435, in truth and in fact the property does not pass till the trees are severed. It is only in "understanding of law" as expressed in *Stukeley* v. *Baker*, Hobart 168, at 173, that the unsevered trees become chattels in such a case and that only *quoad* the vendee. "*Quoad* . . . all others they remain parcel of the inheritance." *Liford's* case. 6 Co. Rep., part XI. 46b, at 50a; *Lacustrine Fertilizer Co.* v. *Lake Guano and Fertilizer Co.* (1880), 82 N.Y. 476, at 484-5.

I think the contract here is unambiguous and that on its proper construction the agreement to remove the trees is a collateral covenant, and that the sale of the trees was not conditional upon their removal within a given time.

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In the absence of binding authority I am unable to interpret this contract as meaning that the purchaser was not buying "all the merchantable timber and trees" as the parties say, but only such as the purchaser might remove within a specified time. I do not think the subsequent words of the agreement "which they intend to cut and remove" alter the meaning of the foregoing words above quoted. The purchaser obviously had to determine what was merchantable and I think the subsequent words have reference to that circumstance. *Primâ facie* the purchaser must be taken to have intended to remove what he bought. The case of *Beatty* v. *Mathewson* (1908), 40 Can. S.C.R. 557, does not, I think, preclude the conclusion I have arrived at. That case dealt with a special contract said to be ambiguous and requiring to be interpreted in the light of all the circumstances. I think the time limit equitably as between the parties ceased to exist when at the vendor's request the operations ceased at the beginning of the trespass action. I think the attendant circumstances are corroborative of the evidence that he made such a request. It was reasonable that they should cease over the whole lot as the nature of the plaintiff's claim was then apparently unknown. The operations did cease and I think the vendor must be precluded from relying on the time limit. I would allow the appeal with costs here and below. The precise form of the judgment will be settled when the order is moved for.

Drysdale, J.

DRYSDALE, J., I agree. *Appeal allowed.*

ESQUIMALT & NANAIMO R. Co. v. WILSON. IMP.

ESQUIMALT & NANAIMO R. Co. v. DUNLOP. P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Atkinson, and Duff, J. October 23, 1919.

PARTIES (§ II A—70)—ACTION RELATING TO LANDS—INTEREST OF THE CROWN—ADDITION OF ATTORNEY-GENERAL AS PARTY.

The Attorney-General is a necessary and proper party to any action relating to lands in which the Crown has an interest, and the rights of the public are involved.

[*Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494, referred to.]

Statement.

APPEALS from the British Columbia Court of Appeal (1919), 46 D.L.R. 541. Reversed, and judgment of Macdonald, J., 41 D.L.R. 737, restored.

The judgment of the Board was delivered by

Lord Buckmaster.

LORD BUCKMASTER:—The question that is raised by these appeals is a question of procedure, technical in its nature, but doubtless of great importance both to the appellants and the respondents. It is simply whether the Attorney-General can and ought to be added as defendant to proceedings in which the appellants are plaintiffs and the respondents are the defendants. Although the merits of these actions are in no way involved in the determination of this point, it is necessary that the facts should be stated in order that it may be clearly understood in what capacity and for what purpose it is sought that the Attorney-General should be brought before the Court.

The following facts are taken from the first of the appeals, but so far as the point for determination before their Lordships is concerned, the appeals are identical and it is unnecessary to state the facts in both.

On April 21, 1887, the Crown, in the right of the Dominion of Canada, granted to the appellants, a railway company duly incorporated and having its head office in Victoria, B.C., the fee simple of a large tract of land in the island of Vancouver. On December 24, 1890, the company granted the surface rights of part of this land to Joseph Ganner. On January 26, 1904, Ganner died, and the respondents in the first appeal are his executors and trustees. Joseph Ganner was one of the original settlers upon the island, and accordingly his representatives became entitled to the benefit of the provisions of the Vancouver

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Lord Buckmaster.

Island Settlers' Rights Act, 3 & 4 Edw. VII. 1903-4 (B.C.) ch. 54, which received the royal assent on February 10, 1904.

Section 3 of that statute is in the following terms:—

Upon application being made to the Lieutenant-Governor in Council within twelve (12) months from the coming into force of this Act, shewing that any settler occupied or improved land within said railway land belt prior to the enactment of ch. 14 of 47 Vict., with the *bonâ fide* intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him, or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler.

Many of the settlers, and among these the representatives of Ganner, failed to avail themselves of the rights conferred by this statute within the time thereby limited, and the rights conferred would consequently have lapsed but for another statute of the Province of British Columbia passed on May 19, 1917, called The Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, which provided that the Act of 1904 should be amended by striking out the words "within twelve months from the coming into force of this Act" and inserting in lieu thereof "on or before the 1st day of September, 1917."

Pursuant to the power so obtained, the respondents, as executors and trustees under the will of Joseph Ganner, applied for the Crown grant and obtained the same on February 15, 1918, such grant carrying with it the coal rights under the surface. To ascertain the effect of this grant it is necessary to examine the provisions of "the Land Act in force at the time when the said land was first so occupied or improved by the said settler." This was the Land Act of 1875, 38 Vict. (B.C.) No. 5, and by its provisions the grant conveyed the fee simple of the land to the settler or his representatives, according to a form known as Form 9, which contained important reservations in favour of the Crown. These reservations are as follows:—

(*a*) The right to "resume any part of the said lands . . . for making roads, canals, bridges, towing paths or other works of public utility, or convenience."

(*b*) The right to "enter into and upon any part of the said lands, and to raise and get thereout any gold or silver ore which may be thereupon or thereunder situate, and to use and enjoy any and every part of the same land."

(*c*) The right to authorize any person "to take and occupy such water privileges and . . . such rights of carrying water over . . . any

parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes."

(*d*) The right to authorize any person "to take from or upon any part of the hereditaments hereby granted . . . without compensation, any gravel, sand, stone, lime, timber or other material, which may be required in the construction, maintenance or repair of any roads, ferries, bridges or other public works."

The effect of the legislation and the effect of the grant, therefore, if nothing more had happened, would have been to defeat the grant previously made by the Crown in favour of the appellants and to reserve to the Crown certain rights which they could not possess if the grant to the appellants were undisturbed. The appellants allege that the grant to the representatives of Ganner was inoperative, and instituted the proceedings out of which the first appeal has arisen for the purpose of raising and testing that question. The action as originally framed, claimed a declaration that the Crown grant was null and void so far as it purported to grant to: "(*a*) The coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances in, upon or under the said lands; (*b*) That part of the surface of said lands to which or upon which the plaintiff is entitled to exercise acts of ownership, purchase or rights of easement;" and sought for an injunction to restrain the defendants from working the coal and from attempting to register a title. There was an alternative claim that the grant was null and void in a certain and more limited aspect. In the first instance the plaintiffs based their claim upon the ground that the hearing, which they allege was necessary under sec. 3 of the Act of 1904, was improperly held, or in fact was never held at all. The defendants, among many other defences, objected that the Crown grant could only be impeached in an action to which the Crown was a party. After the issue of the writ a petition was presented for disallowance of the statute of 1917. This was disallowed by the Governor-General in Council on May 30, 1918. On June 7, 1918, application was made by the plaintiffs asking that the Attorney-General for British Columbia might be added as a defendant to the action and that certain amendments should be made in the statement of claim, the most important being that the statute of 1917 had been disallowed. Macdonald, J., before whom the case was heard, granted the relief sought (1918), 41 D.L.R. 737, but the Court of Appeal overruled his judgments, 46 D.L.R. 541, so far as the addition of the Attorney-General was concerned, and from that judgment these appeals have been brought.

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The respondents put forward 3 grounds on which they say the appeals should fail. (1) That there is no need to make the Attorney-General a party. (2) If his presence is necessary, a petition of right is, in the circumstances, the only means by which it can be secured. (3) That, if a petition of right is not applicable, the case does not lie within the ambit of the cases where the Attorney-General can be brought before the Court by any means.

With regard to the first of these contentions, their Lordships are clearly of opinion that the Attorney-General ought to be before the Court. It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but in the event of the plaintiffs' success, the rights existing in the Crown and consequent upon the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as defendant, and that is the best means of testing the necessity of the attendance of the Crown. The Judges of the Court of Appeal, from whose judgment their Lordships feel compelled to differ upon this point, do not refer to the rights of the Crown which may be affected, but base their opinion solely on the ground that the Crown is not affected by the result, and that consequently a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with this conclusion.

It may further be added that an argument that the Crown ought not to be introduced into the litigation lies strangely upon the lips of the respondents, whose definite assertion that the Crown was a necessary party was the real origin of the application that the Attorney-General should be joined.

With regard to the second point, in their Lordships' opinion this is not a case to which procedure by petition of right is properly applicable. Such procedure is adopted for the recovery from the Crown of property to which the applicant has a legal or equitable right, as, for example, by proceedings equivalent to an action of ejectment or the payment of money. In Blackstone's Commentaries, Stewart's ed. (1841) Book 3, pp. 275-6, it is said that petition of right is of use where the Crown is in full possession of any hereditaments or chattels and the petitioner suggests such a right as controverting the title of the Crown. In British Columbia

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the proceeding is regulated by the Crown Procedure Act, R.S.B.C. 1897, ch. 57. An examination of this will, in their Lordships' opinion, shew that procedure by petition of right is inapplicable. In that statute the "relief" is defined as a species of relief claimed or prayed for in any petition of right, whether a restitution of any corporal right or a return of lands or chattels or a payment of money or damages or otherwise, following the old principles by which a petition of right has always been regulated. Sec. 7 shews that where a petition of right is presented to recover real or personal estate or any right granted away or disposed of on behalf of His Majesty, a copy is to be left at the house of the person last in possession, shewing that the main claim is against the Crown, that the person last in possession is not necessarily a proper party to the suit, but that, in order that he may be affected with knowledge, provision is made that he should be served in the manner indicated.

Now if the plaintiffs were to succeed in this case, no order would be made requiring the Crown to do any act at all. It is due to the peculiar circumstances in which the legislation relating to these lands stands that, if the Crown's grant to the respondents be void, the appellants' estate is complete. All that the Crown could do to perfect the appellants' title has already been done, and it is only through the indirect operation of the grant by the Crown to the settlers that any interest arises in the Crown at all. If the grant fail, the interest fails with it. It may indeed be open to argument that the reservations in favour of the Crown cannot be operative where the Crown has already made a grant from which such reservation would derogate. This question was not however raised before their Lordships and they express no opinion upon it.

There remains the consideration of the question upon which much learned argument has been addressed to their Lordships. It is asserted on behalf of the respondents that "there is no instance of any action in the Court of Chancery or any other Court, save the old Court of Exchequer, where the Crown represented by the Attorney-General has ever been defendant, except as a consequence of a petition of right after granting a fiat," and the jurisdiction of the Court of Exchequer is alleged to be due to the application of the statute of 33 Henry VIII., ch. 39.

Their Lordships cannot accept this contention. The reference

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to proceedings in Chancery under a fiat confuses two separate methods of procedure. It is, of course, true that proceedings in the Court of Chancery covering such a claim as would properly be the subject of petition of right cannot be brought except either by the direct medium of such proceedings or by first asking for a fiat that proceedings might be instituted in Chancery; and the case of *Ryves* v. *The Duke of Wellington* (1846), 9 Beav. 579, is an illustration of this fact.

But there are many cases in which petition of right is not applicable in which the Crown was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned, apart altogether from the provisions of the statute of Henry VIII. One of the earliest of such cases was *Pawlett* v. *The Attorney-General* (1679), Hard. 465. In that case the plaintiff had executed a mortgage in favour of a mortgagee; the mortgagee had died, and his heir being attainted of high treason, the King had seized the lands. The plaintiff thereupon exhibited a bill against the King and the executor, seeking redemption of the mortgage, and the question that arose was whether he could have any remedy against the King for redemption. It was said that he could not, but that he must prefer a petition of grace and favour. It was decided by Lord Hale and Baron Atkins that the proceedings would lie, and though Lord Hale gave as one of his reasons the consideration of the statute of 33 Henry VIII., ch. 39, Baron Atkins based his judgment on a far broader basis. It was stated in the report that he was strongly of opinion that the party ought in this case to be relieved against the King, because the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him—a ground of decision which has no relation whatever to the statute of 33 Henry VIII., but is based on general principles. In *Barclay* v. *Russell* (1797), 3 Ves. Sen. 423, the Attorney-General having been made a party to a suit, application was made before Lord Thurlow asking that he might be directed to appear. This, in accordance with practice, he declined to order; but his Lordship asked, when the Attorney-General on behalf of the Crown was

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a necessary defendant, whether he was served with a subpœna, pointing clearly to the view that the Attorney-General was regarded as being a proper party to proceedings in equity; and *Perkins* v. *Bradley* (1842), 1 Hare, 219, is another instance of such a case. But it is unnecessary to pursue this matter, for in *Deare* v. *The Attorney-General* (1835), 1 Y. & C. Ch. Cas. 197, a case on the Equity side of the Court of Exchequer, where a bill was brought to obtain discovery against the Attorney-General, the question was examined in some detail by Lord Lyndhurst, then Lord Chief Baron. He stated this at 208: "I apprehend that the Crown always appears by the Attorney-General in a Court of Justice, especially in a Court of Equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned." This statement, though made on the Equity side of the Court of Exchequer, is certainly not limited to the Chancery proceedings that were instituted in that Court; it is of wide and general application. It is in entire agreement with the principles enunciated by Baron Atkins in the earlier authority, and it is recognised as being the existing practice in Courts to-day.

It may be mentioned that in *Ellis* v. *The Duke of Bedford*, [1899] 1 Ch. 494, where the Court of Appeal thought that the rights of the public were involved in the appeal, and that consequently the Crown ought to be represented, Judges of such wide experience as Lord Lindley and Lord Justice Rigby directed that the case should be amended by the addition of the Attorney-General as defendant. The House of Lords thought the amendment unnecessary, but no one questioned that if necessary it could be made. Apart also from statute, the Attorney-General is always added as defendant in Chancery proceedings where his presence is necessary on behalf of charities, and their Lordships have not heard of any objection having been taken at any time to his introduction as a defendant in suits so brought.

It does not follow from this that procedure by petition of right is in any way infringed. In proceedings for which a petition of right is the proper course, the Courts, as already pointed out, would undoubtedly decline to entertain an action brought against the Attorney-General in the ordinary way; and indeed it was this

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very practice that led to the dispute in the case of *Dyson* v. *The Attorney-General*, [1911] 1 K.B. 410. In that case there was no defendant except the Attorney-General, and the claim was for nothing but the declaration that the plaintiff was under no obligation to comply with the provisions of a notice issued by the Commissioners of Inland Revenue on behalf of the Crown. It was there contended that the authorities referred to had no application except in cases in which the rights of the Crown are only incidentally concerned. In all cases where the rights of the Crown are the immediate and sole object of the suit, it was urged that the application must be by petition of right. The question now urged as to the jurisdiction in the Court of Exchequer was raised then before the Court of Appeal, but the Master of the Rolls points out at page 416 that the equity jurisdiction of the Court of Exchequer on the Revenue side had nothing peculiar as distinguished from the Court of Chancery. Their Lordships are of opinion that in making that statement the Master of the Rolls was perfectly accurate, and it is unnecessary to consider, and their Lordships pass no opinion upon, whether or no the case of *Dyson* v. *The Attorney-General* was in other respects properly decided.

Turning back once more to the present case, the claim sought is a declaration not against the Crown, but against grantees from the Crown. If the relief be granted and if the injunction sought be made, there will be nothing directing the Crown to do any act whatever. It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with. But in order to see whether this involves a direct claim against the Crown, it is necessary to see how those rights arose. The position is certainly strange. The original grant by the Crown to the appellants is perfectly good and remains unassailed except to the extent to which it may be defeated by application made by the settlers. If such application be made and granted, there is then reserved to the Crown out of the grant certain powers and rights against the grantee which they would not otherwise possess. In the event of the grant being good, these rights arise; if the grant be bad, they fall with it. But the chief substance of the action is the declaration that the grant is void, and the other result is consequential upon that decree.

Their Lordships, therefore, think that the Crown is affected in this matter, so that the presence of the Attorney-General is

proper and necessary for the determination of justice. The conclusion arrived at by their Lordships, though at variance with that of the Court of Appeal, does not, as it appears to them, conflict with the view entertained by the Judges of the law, but depends entirely on the interpretation which they place on the rights which the Crown possesses unless the grant is overthrown, and this consideration does not appear to have been present to those Judges' minds. In the result, therefore, they think these appeals succeed, and they will humbly advise His Majesty that the judgment of Macdonald, J., be restored, and that the costs of the appellants here and in the Court of Appeal be paid by the respondents. *Appeals allowed.*

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Nova Scotia Supreme Court, Harris, C.J., Drysdale, J., Ritchie, E.J., and Mellish, J. December 19, 1919.

NEW TRIAL (§ II—5)—EVIDENCE—NEGLIGENCE—BURDEN OF PROOF—MISCONDUCT—MOTOR VEHICLE ACT (1918), 8-9 GEO. V. (N.S.), CH. 12, SEC. 50.

A Judge in his charge to the jury must be careful in expressing his opinion upon the facts to bring out all points in both parties' favour. And further in his charge as regards negligence where the burden of proof has been changed by statute, he should state upon whom the burden is placed.

[*Elliott* v. *South Devon R. Co.* (1848), 2 Exch. 725, referred to; *Bray* v. *Ford*, [1896] A.C. 44; *McLeod* v. *Holland* (1913), 14 D.L.R. 634, 47 N.S.R. 427; *Jefferson* v. *Paskell*, [1916] 1 K.B. 57, applied.

APPEAL from the trial judgment by plaintiff, an infant, suing by her next friend, claiming damages for injuries received in consequence of the alleged negligent driving of defendants' automobile. Reversed. Statement.

T. R. Robertson, K.C., and *W. R. Tobin*, for appellant.

A. D. Gunn, K.C., and *J. McG. Stewart*, for respondents.

HARRIS, C.J.:—I think there should be a new trial but I place my decision on the ground that there was some evidence of negligence for the jury and the trial Judge did not explain to the jury that the burden was on the defendant to establish that the accident was not caused by the negligence of the person operating the motor vehicle. The Motor Vehicle Act, 1918, 8-9 Geo. V. (N.S.) ch. 12, sec. 50. Harris, C.J.

DRYSDALE, J.:—I agree with my brother Ritchie. Chisholm, J.

RITCHIE, E.J.:—The plaintiff, a child of 11 years of age, sues by her next friend to recover damages for personal injuries. Ritchie, E. J.

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It is common ground that the child was struck by the defendant's motor car and that she sustained thereby very serious personal injuries. Negligence is charged as the cause of the accident.

The questions to and the answers of the jury are as follows: (a) Was the defendant guilty of negligence? No. (b) Of what did the negligence consist? (c) Was the car operated at an unreasonable rate of speed? No. (d) Could the driver, Carl Colburne, by the exercise of ordinary care avoid the injury or prevent the accident? (e) Did he stop the car as quickly as conditions required? No. (f) Did the driver have a permit or license? (g) Was the car operated at a greater rate of speed than was reasonable having regard to the locality and the traffic on the street at the time of the accident? No. (h) Was there contributory negligence on the part of the plaintiff? No. (i) If you find for plaintiff what are the damages? (*a*) To the infant plaintiff, (*b*) To Thomas England.

In addition to the findings there is the following note: "The jury retire and return into Court and say they find the defendants not guilty of negligence and not liable for damages. We recommend that the defendants pay the bills of hospital and doctor."

On these findings judgment was entered for the defendants.

A new trial is sought on the ground of misdirection. It goes without saying that a Judge has the right, and often I think it is his duty, to express his opinion to the jury on the facts, but if he does so in a case where the evidence discloses facts making in favour of the plaintiff, and proper for consideration by the jury, it will not do for him to strongly put to the jury the defendant's case and make no reference to the facts from which the jury might properly draw inferences in favour of the plaintiff. If the Judge goes further, and not only does not put the plaintiff's case, but clearly intimates that he has no case, the mischief becomes intensified. With respect, I think this is what the trial Judge did, and in my opinion it constitutes misdirection. I extract the following part of the charge:—

With regard to the rapidity with which they were going. That does not seem to require much argument. Eight miles an hour is not a rapid rate. Whether they were going 8 miles an hour is a question, but 8 miles an hour is the outside they were going at this time, and therefore they can't be charged with too much speed. As they were going along this little child looms out

and rushes directly in front of the engine. They turn the engine to escape her but she runs on and is brought in contact with the mudguard of the car and injured. What could these people have done? What could you have done? What could any person have done to have avoided that accident? Now, that is the whole question. I confess that I have difficulty in seeing what they could have done but that is a question for you. I think they did take all the pains they could. They did not rush on, as they might have done, into space and become unknown. They came back and saw the child; took charge of the child. They employed a doctor and did everything they could, and it is for you to determine whether they could have pursued any course which they did not pursue and still have the child remain free from injury. It is quite possible for a child of tender years to sling herself under an engine and no person be responsible. It is for you to consider and to point out in plain language, if you can, what they could have done or what not have done which would have avoided the accident.

It will, I think, be seen that the Judge not only put the defendant's case strongly, but that he was equally emphatic in his intimation that there was nothing for the jury in support of the plaintiff's case. It is true that after giving this intimation he told the jury that it was for them, but that, in my opinion, does not save the situation in a case where a Judge, there being facts for the jury on both sides, puts one side only, and clearly gives the jury to understand that there is no other side. The defendant's car was on the wrong side of the street. This is always an important fact because the man who is on the wrong side, under the authorities, is held to be bound to be more cautious and to be more on the alert in consequence of being on the wrong side. The driver of the car saw the child 10 feet ahead of him; he made no attempt to stop his car; I think he ought to have done so—at all events it was for the jury. As to the speed, there is the opinion of the defendants' witnesses that the car was not going more than 8 miles an hour; evidence of this kind does not amount to more than an honest guess. On the other hand, the car was coasting down a descent; the rate of speed was uncertain, and therefore for the jury.

The suggestion that "it is quite possible for a child of tender years to sling herself under an engine and no person be responsible" I think was unfortunate, because there was nothing of the kind in the case. In *Dallimore* v. *Williams* (1914), 58 Sol. Jo. 470, Lord Sumner said that: "A Judge in charging a jury could never safely indulge in irrelevant observations because he would not be sure that the jury would be sufficiently logical to take no notice of them."

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The usual instructions as to negligence were not given. I cannot think that a jury is properly charged in a case of this kind unless the Judge when dealing with the question of negligence draws the attention of the jury to the fact that by statute the owner of a motor vehicle is liable for any injury caused by it "unless he shall establish that the injury, loss or damage was not caused by any negligence or wrongful act of his or of a person operating such motor vehicle in the course of his employment as a servant or agent of the owner." The person operating the car is placed by the statute in the same position. The Legislature has, I think, properly recognized that motor vehicles are death-dealing things and placed the burden of proof accordingly.

The jury should, I think, be told the effect of the statute, and so be in a position to take it into consideration when dealing with the question of negligence. In *Elliott* v. *South Devon R. Co.* (1848), 2 Exch. 725, the question was whether a railway was passing through a town. The word "town" was defined in a statute. The trial Judge put to the jury the meaning of the word "town" without referring to the statute, and it was held to be misdirection.

I think the principle is the same when a Judge is dealing with the question of negligence and the burden of proof has been changed by statute.

Walton, J., in *Re William Warner* (1908), 1 Cr. App. R. 227 at 228, said "I think it is a serious flaw in a summing up if it does not put the case for the prisoner to the jury as carefully as the case for the prosecution." I see no reason in principle why this remark is not applicable in a civil case. It has been so applied. I refer to *McLeod* v. *Holland* (1913), 14 D.L.R. 634, 47 N.S.R. 427, and to the remarks of Lord Watson in *Bray* v. *Ford*, [1896] A.C. 44.

The rule as to the remarks of a Judge on the facts was laid down by Pickford, L.J., in *Jefferson* v. *Paskell*, [1916] 1 K.B. 57 at 74, where he said: "A Judge is entitled to give the jury his views of the evidence, and is not obliged to detail to them every part of it, or every view which each party wishes them to take, so long as he does not mislead them as to the matters they have to consider, or the evidence in the light of which they must consider them."

In my opinion the verdict and judgment should be set aside and a new trial ordered with costs.

Mellish, J.

MELLISH, J.:—I agree in allowing the motion for a new trial.

New trial ordered.

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C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, J.J.A. December 23, 1919.

MASTER AND SERVANT (§ I E—23)—WRONGFUL DISMISSAL—EMPLOYEE OF MUNICIPALITY—WAGES FIXED BY DAY—NOTICE—LIABILITY—RURAL MUNICIPALITIES ACT, SEC. 148.

A superindentent of road work in a municipality is regarded as a municipal officer, and may be dismissed at the pleasure of the municipal council. This superintendent being hired at so much per day, cannot claim notice; neither can reimbursement for any moneys paid out be claimed, except such expenses as were authorized by the municipality.

Statement.

APPEAL by defendant from the trial judgment in an action against the defendant municipality, claiming wages, and damages for wrongful dismissal. Reversed.

N. R. Craig, for appellant; *W. E. Seaborn*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Newlands, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The facts in this case are stated by the trial Judge as follows:—

On July 6, 1912, plaintiff was employed by the defendant as a superintendent to construct roads under the following resolution of the council:—"Proposed by Mr. Kurst that J. H. Dickenson be selected from the applicants for the appointment of superintendent of road work as advertised for by the council recently at a salary of $7.50 per day and any reasonable out-of-pocket expenses incurred when away from camp on business of council to be refunded. The secretary was instructed to draw up a draft agreement embodying the terms mentioned and submit same to the council at its next meeting for approval by both parties. Carried unanimously."

Plaintiff went to work immediately under this resolution. There was an agreement drawn up about 2 weeks later and signed by both parties, but this agreement was not put in evidence nor was any evidence given of its contents as no proper foundation was laid for secondary evidence. The agreement, I suppose, would only embody the terms of the resolution, and as plaintiff entered upon his duties under this resolution, I think the rights of the parties must be determined thereby.

On September 7, 1912, the plaintiff was suspended and on September 21, 1912, dismissed. Plaintiff brings this action for damages for wrongful dismissal and to recover payment of moneys paid out and asks for indemnity against certain obligations incurred.

The defendant contended that it had the right to dismiss the plaintiff at any time, relying on sec. 148 of the Rural Municipalities Act, 7 Geo. V., 1917 (Sask.), ch. 14: "All municipal officers shall hold office during the pleasure of the council."

The trial Judge followed *Speakman* v. *City of Calgary* (1908), 1 Alta. L.R. 454, and held that the plaintiff was not an officer of the municipality, and, therefore, was entitled to notice before dismissal.

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One of the cases cited in *Speakman* v. *City of Calgary*, *supra*, was *In re Great Western Coal Co.*, Carter's Case, (1886), 55 L.J. Ch. 494, where it was held that a solicitor was not an officer of a company. The reasons given by Pearson, J., for that decision have, in my opinion, no bearing either on this case nor the case of *Speakman* v. *City of Calgary*. He says, at page 495:—

If the matter were *res integra* I should have great difficulty in saying that the solicitor is an officer of the company within the section, but it has actually been held that a banker is not an officer—*In re The Imperial Land Company of Marseilles* (1870), 39 L.J. Ch. 331; *In re The National Bank* (1870), L.R. 10 Eq. 298, and, to my mind, a solicitor stands in the same position towards the company as a banker does. The solicitor discharges duties from time to time to perform for the ordinary professional remuneration, just as other clients do. I am at a loss to see how a solicitor, by taking upon himself those professional duties, puts himself in any different relationship to the company from that in which he stands to any other client. I am unable to see that the solicitor is an officer of the company in any sense of the word. They come to him when they want him. They can discharge him or cease to send him work. They can part company with him as and when they please. His remuneration is not a salary paid to him as an officer, but the ordinary remuneration which, according to the ordinary well-established scale of fees, he is entitled to demand either from a company or from a private individual who is his client.

I do not think the Legislature, in using the word "officer," intended to apply it only to the highest officers of the municipality. It does not seem reasonable that these officers should hold office during pleasure, while the clerks and servants of the municipality could only be dismissed after reasonable notice. I am of the opinion that the word is used in the same sense as in *Legg et al.* v. *Stoke Newington*, cited in 2 Stroud's Jud. Dict. 1326, under "Officer," where it was contended:—

that whilst "Officer" *qua* 56 & 57 V. c. 55, s. 11, would admittedly include a Medical Officer, yet that it did not include a Hall-Porter, or Messenger, and still less an Office Boy. But Day, J., held that all these were included, his reason being,—"We are now in 1893, and not 1855. This is an age of exaggeration and humbug; we do not now, even in Acts of Parliament, use the same language as we did 100 years ago. No doubt, in those days, these plaintiffs would have been called 'Servants' and not 'Officers'; and very properly so too. I must, however, read this Act in the sense of our time; and I think it clearly means to compensate any of the servants who by its operation have suffered any pecuniary loss."

The plaintiff was, in my opinion, an officer of the municipality, and held office during pleasure, and could be dismissed by the council without notice.

As to the plaintiff's claim to be paid for the amount he paid for the McMillan account and to be indemnified for the accounts

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of F. E. Jones and the Moose Jaw Grocery Co., the evidence shews that he ordered these goods for the municipality, and that they were charged to and the accounts rendered the municipality. Under these circumstances the plaintiff would not be liable if he had authority to make the purchases; he would only be liable if he had no such authority for breach of warranty of authority, in which case the municipality would not be liable over to him.

As to the value of plaintiff's disc, which was used on the work and which was taken by another workman and afterwards lost, I cannot see how the municipality would be liable.

Newlands, J.A.

Nor are they liable for the wages paid by the plaintiff to Paul Gerard, who was employed by plaintiff after his suspension to assist the auditor to audit his accounts. This was clearly as much for the benefit of the plaintiff as of the municipality, and at the time he hired him he was not in the employ of the municipality and knew that they would not pay his wages.

The appeal should be allowed with costs as to all the above items, and the remainder of the plaintiff's account should be referred to the local registrar; any amount found due to the plaintiff being set off against the defendant's costs.

LAMONT, J.A.:—This is an appeal from a judgment in favour of the plaintiff, who claimed from the municipality wages and damages for wrongful dismissal, payment of or indemnity against certain accounts, and money paid out on behalf of the municipality.

Lamont, J.A.

Prior to July, 1912, the defendant municipality advertised for a superintendent to take charge of certain road making, then in contemplation. The plaintiff was one of the applicants. A meeting of the council was held on July 6, 1912, at which the following resolution was passed, as appears by the minutes. (See judgment of Newlands, J.A.)

An agreement was drawn up and submitted at the next meeting of council. The plaintiff was present. The agreement was read and discussed. It was then signed by plaintiff and the reeve. The minutes of that council meeting do not shew that a resolution approving of the agreement was passed, but Councillor Oliver testified that the agreement was read to council, that it was ratified by the council, and that they omitted to have it recorded in the minutes. The agreement was left in the hands of Craddock,

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secretary-treasurer, who is now dead. Subsequently it appears to have been handed to a firm of solicitors in Moose Jaw, but whether it was returned to Craddock is not clearly shewn. At any rate it disappeared and could not be produced at the trial, and no one seemed in a position to say just what were its exact terms. Under these circumstances, I agree with the trial Judge that we can take the resolution of July 6 as embodying the terms of the agreement, for that resolution directed a contract to be drawn up embodying the terms mentioned, that is, mentioned in the resolution, and until it has been shewn that these were altered they would be presumed to be the terms of the contract. Under the resolution the plaintiff was engaged at $7.50 per day. On September 7, 1912, he was suspended, and on September 21 was dismissed. In March, 1918, he brought this action.

I will first deal with the question of wages. What wages was the plaintiff entitled to under the above circumstances?

The trial Judge held that the resolution established a contract with no definite time fixed for the employment, and that, under it, the defendant had no right to dismiss the plaintiff without reasonable notice, and he fixed one month's notice as reasonable. He, therefore, allowed him wages at the stated rate for one month after his dismissal. Does the contract indicate that the hiring was for an indefinite period, or was it a daily hiring?

The earlier authorities laid down the simple rule that, if a master hired a servant and no time was limited, either expressly or by implication, for the duration of the contract, the hiring was to be considered as a general hiring, and, in point of law, a hiring for a year. Smith on Master and Servant, 5th ed., page 59.

The more modern authorities, however, seem to treat the matter as a question of fact, not one of law.

In *Bain* v. *Anderson & Co.* (1898), 28 Can. S.C.R. 481, Taschereau, J., in giving the judgment of the Supreme Court of Canada, said, at 484:—

> It cannot at the present day be contended that, as a rule of law, where no time is limited for the duration of the contract of hiring and service, the hiring has to be considered as a hiring for a year. The question is one of fact, or inference from facts, the determination of which depends upon the circumstances of each case.

By the terms of the contract, the plaintiff was hired at $7.50 per day. *Primâ facie*, this is a daily hiring.

In *Rex* v. *Pucklechurch* (1804), 5 East 382, 102 E.R. 1116, Lord Ellenborough, C.J., said, at 384:—

If nothing be said as to the term of the service but that the servant shall have weekly pay, it must *primâ facie* be understood that the parties intended a weekly hiring and service. But circumstances may shew a different intent.

In *Rex* v. *Newton Toney*, 2 Term. Rep. 453, 100 E.R. 244, Buller, J., said, at 455:—

In the present case the hiring is merely at so much per week. Now if there be anything in the contract to shew that the hiring was intended to be for a year, there a reservation of weekly wages will not control that hiring. But if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring. And the hiring in the present case is of that kind.

In *Noble* v. *Gunn, Ltd., et al.* (1910), 16 O.W.R. 504, Riddell, J., states the rule as follows, at 505:—

No doubt the circumstance that payment of wages takes place weekly or monthly is strongly in favour of the view that a hiring is for a week or a month —and if there be nothing more, this circumstance will be conclusive as to the duration of the contract.

See also 20 Halsbury 93.

In *Evans* v. *Roe* (1872), L.R. 7 C.P. 138, the plaintiff agreed to accept the position of foreman in the defendant's works at a salary of £2 per week and a house to live in. This was held to be a weekly hiring. It was also held in that case that evidence of a conversation at the time of the signing of the contract, tending to shew that a hiring for a year was intended, was not admissible. It is clear in that case that the parties did not contemplate that the plaintiff should be their foreman for one week only. What they contemplated was that the plaintiff's services as foreman should continue from week to week. Yet it was held to be a weekly hiring.

In view of these authorities, the hiring of the plaintiff at $7.50 is conclusive of a daily hiring, unless some circumstances appear shewing that the parties contemplated something different from what the language of the resolution *primâ facie* means.

The only circumstance upon which an argument can be founded that the parties did not contemplate a daily hiring is, that, from the nature of the plaintiff's employment and the extended scope of his duties, the parties must have contemplated more than a daily hiring. The plaintiff was to superintend the construction

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of roads; he was to employ, on behalf of the municipality, some 30 or 40 men, working at different places; it was his duty to see that these men were fed—this entailed the hiring of cooks and the purchase of provisions. It was also his duty to secure forage for the animals, and implements with which to carry on the work, and to make out and certify to all the accounts and forward them to the defendants. There is no doubt that the position was a responsible one, involving the expenditure of a large amount of money. That very reason, however, to my mind argues more strongly for the contention of the defendants than that of the plaintiff. The members of the council knew that their proposed operations would involve large expenditures, not only for wages, but for supplies. If the plaintiff did not prove to be the proper man for the job, if he could not keep track of the multitudinous details of such extensive operations, if he could not foresee the necessities of the men and make proper provision therefor, the municipality would not obtain value for its expenditure and probably would not get the roads built at all. It was, therefore, of first importance to the municipality to be in a position to put a new superintendent on the job at once should the plaintiff prove inefficient.

In my opinion, therefore, there is no evidence whatever from which the inference could fairly be drawn that the council ever contemplated any other arrangement than a daily hiring.

In this respect the present case is distinguishable from *Gould* v. *McCrae* (1907), 14 O.L.R. 194, where it was held that the evidence established that the hiring was for an indefinite time and not by the day.

In the *Town of Sydney* v. *Hill* (1893), 25 N.S.R. 33, Henry, J., in giving the judgment of the full Court of Nova Scotia, at page 435, says:—

> There is nothing to shew that the defendant was appointed or engaged for any fixed or definite period, and therefore he was obviously free to resign his position at any time, as in fact he ultimately did. The defendant not being bound to serve, the town council was correspondingly free to increase or diminish the salary as they might think fit from time to time.

That decision I think applicable here. Had the plaintiff decided to quit work at the end of any day, I do not see why he would not have been entitled to his wages up to that time without being liable to the defendants in damages for quitting his

employment without notice, and if he was entitled to leave his employment at the close of any day without notice, the defendants were entitled to dismiss without notice.

Having reached the conclusion that the hiring was a daily one, it is unnecessary for me to consider whether or not the plaintiff was an officer of the corporation within the meaning of sec. 147, or whether the council had sufficient cause for dismissing him. The plaintiff is entitled, under the heading of wages, to $7.50 per day up to the time he was suspended, but no more. From this, of course, will be deducted any payments made on account thereof; the amount to be ascertained on the reference which the trial Judge directed.

I have now to consider the other items claimed by the plaintiff. The first has reference to 3 accounts for supplies which the plaintiff purchased, namely, McMillan's account, $106.90; F. E. Jones' account, $127.65; and an account of the Moose Jaw Grocery Co. of $356.85.

In each of these cases the plaintiff testified that, when he ordered the goods comprised in the accounts, he told the vendor that he was buying on behalf of the municipality. This was corroborated by McMillan and by Jones as to their respective accounts, and they charged the accounts in their books to the municipality. The Moose Jaw Grocery Co. must have done the same, for they subsequently sued the municipality for the amount of their account, as appears from a resolution of the council under date of April 13, 1913, but apparently without success. The plaintiff swore that the goods for which these accounts were incurred were purchased by him for the use of the camps under his charge.

The defendants repudiated liability, apparently on the ground that they had authorized the plaintiff to purchase all necessary supplies from one Craddock, a son of the secretary-treasurer, who had a small store. The plaintiff admitted he was directed to get all supplies from Craddock, but said that Craddock was unable to supply the goods which he ordered. No evidence was offered to shew that Craddock could supply them. The plaintiff consulted some of the councillors, who told him that if Craddock could not supply the goods ordered, to get them elsewhere. This he did, and the above accounts are the result of his going elsewhere.

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In my opinion the direction of an individual councillor would not make the municipality liable, but, Craddock not being able to supply the necessary goods, the plaintiff, I think, had implied authority to get them elsewhere and bind the municipality for the purchase price. I am, therefore, of opinion that the municipality was liable on these 3 accounts for all goods covered thereby which were delivered to the camps and used by the men.

The fact, however, that the municipality was liable for these accounts does not give the plaintiff any claim against the defendants in respect thereof. The plaintiff was in no way liable on these accounts.

In 1 Hals. p. 220, par. 464, the law is stated as follows:—"Where a person, in making a contract, discloses both the existence and the name of a principal on whose behalf he purports to make it, he is not, as a general rule, liable on the contract to the other contracting party."

It is only where the agent has been compelled to pay the debt and discharge the liability of his principal, or has made payments or incurred liability in the due course of his employment, that the principal is bound to reimburse or indemnify him. 7 Hals. 455, 1 Hals. 196, Addison on Contracts, 10th ed., 895.

After the defendants had repudiated these accounts, the plaintiff paid McMillan. This he was not obliged to do, as he had not incurred any personal liability in respect of it. His payment was, therefore, the act of a volunteer, which, although it may leave the defendants under a moral obligation to reimburse him, does not give him any legal right to compel them to do so. Shrewsbury v. Wirral Railways, [1895] 2 Ch. 812; *Clinton's Claim*, [1908] 2 Ch. 515.

Of course, having paid the account, the plaintiff may take an assignment thereof and sue on that, but in such action his right to recover would be subject to any defence the defendants would have against McMillan, if the action were brought in his name.

The Jones account has not been paid, neither has that of the Moose Jaw Grocery Co. It appears, however, from the evidence that the grocery company obtained a judgment against the plaintiff in respect of this account. How they obtained that judgment does not appear. It may be that the plaintiff did not defend and allowed judgment to go by default. On the evidence

before us, I am satisfied the plaintiff was clearly not liable. The bare fact that the grocery company holds a judgment against the plaintiff for the amount of the account is not sufficient to enable him to compel the defendants to pay or indemnify him against the judgment. As he was not legally liable on any of these accounts, he has no cause of action against the defendants in respect thereof.

The remaining items appealed against are as follows:—(a) Advances made to the workmen, which has been called in the evidence the commissary account, $135.45.

The plaintiff had no authority to make advances on behalf of the defendants to men employed by him. It may be, however, that the defendants, in settling with the men, retained out of their wages the advances made by the plaintiff, in which case their action in so doing would be a ratification of what the plaintiff had done, and they would hold the money so retained as monies had and received for the plaintiff's use. The defendants' books should furnish cogent evidence on this point. The plaintiff has given no particulars of these payments. All his papers, he says, were handed over to one Hendrickson, who was employed to audit his accounts after he was suspended. This item can more properly be dealt with on the reference. The plaintiff will be entitled to all sums advanced by him of which the defendants had notice and which they recognised in settling with the men. (b) For two teams from July 6 to September 7 at $6 per day, not including Sundays. (c) Implements used in the work, $1.25 a day from July 6 to September 7.

I agree with the trial Judge that the plaintiff is entitled to be paid for his teams and implements at the stated rate for the days they were employed. These may be computed on the reference. The plaintiff admitted that there were days when his teams worked without a separate driver, and that he would not be entitled to $6 per day for such days. The referee should make a fair allowance for the use of the teams on such occasions. (d) Value of one disc, $45.

I would disallow this item. The plaintiff testified that when he was suspended he took his implements off the work and put them beside the road, and that when he went back for them after he had been dismissed, one disc had disappeared. He says he went down to where the men were working, and a farmer

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told him he had taken the disc and had used it and would return it. As he took his implements out of the possession of the defendants when he was suspended, the defendants cannot be held responsible for the disc, unless they authorized some one to again take possession of it. Of this there is absolutely no evidence. (e) Two orders on the treasurer cashed for workmen.

As the plaintiff only recollected cashing 2 orders on the treasury, and as one order was produced which he had cashed and as this order shewed that he had endorsed it over to a third person who had collected from the municipality, this item should be dealt with on the reference. The plaintiff will be entitled to recover for the treasury order cashed by him which the defendants have not paid. (f) $400 paid by plaintiff, set out in paragraph 10 of the claim.

Paragraph 10 of the claim is as follows:

10. The said plaintiff further says that during the progress of the said work and on account thereof and for the benefit of the defendants he paid out large sums of money for various services in connection with the said work amounting in all to upwards of $400 and particulars thereof are in possession of the defendants.

The defendants in their statement of defence deny that the plaintiff paid out any sums whatever for the defendants as alleged, and further say that if he did pay out any sums he was re-imbursed in full therefor. In his evidence the plaintiff gave the following testimony respecting this item:

Q. Now you claim in paragraph ten $400 advanced to the municipality; can you give me particulars of that? A. No, I could not, only in a general way; it was money I paid out for expenses and provisions and meat, potatoes and vegetables, and things of that kind. It was all for supplies at the camp and there was a voucher for every item except one or two, amounting to perhaps 3 or 4 dollars, some small things from the farmers. The vouchers were turned over to Hendrickson, every article. Q. In that claim? A. With the exception of one or two items amounting to 2 or 3 dollars. Q. Does that include cash out of pocket while you were away? A. I think it is all in that account.

And in his cross-examination he testified as follows:

Q. And $400 you are satisfied is right, are you? A. I am not exactly certain as to the amount, as long as (if) I saw the books, I could not tell you. Q. Well, is $400 the outside amount? A. I could not tell you that. Q. I don't want you to claim less or more? A. I could not tell you whether you have the exact amount, whether too small or too large; I can't say.

If the plaintiff cannot say whether $400 is too large or too small an amount to cover the moneys he claims to have paid

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out, I do not see how he can have judgment for that amount. The plaintiff failed to establish any definite amount for which the defendants are liable, but as a reference has been already ordered, I think this item might properly be referred. The books and the vouchers in the defendants' possession will be produced to the plaintiff and he will be entitled to such sums as he can establish he paid out for the defendants and for which he has not been reimbursed. (g) $50 paid Paul Gerard for wages.

This item I would disallow. The circumstances under which these wages were incurred were as follows: after the plaintiff was suspended, the defendants employed one Hendrickson to audit his accounts. Gerard was the plaintiff's book-keeper and had a knowledge of the accounts. The plaintiff says Hendrickson asked to have Gerard assist him in going over the accounts. Gerard would not go without the plaintiff would guarantee his wages. The plaintiff in his evidence puts it as follows:—

Q. This Gerard was doing the books, was he? A. Yes, and he would not stay without I would guarantee his wages; he thought the council would not pay him; Mr. Hendrickson would not guarantee his wages; I guaranteed his wages and paid him.

As the plaintiff had been suspended, he had no authority to employ anyone on behalf of the defendants. They had employed Hendrickson to check over the accounts. Gerard's knowledge would, of course, facilitate the work but if Hendrickson would not take the responsibility of hiring Gerard, the plaintiff could not do so and make the defendants liable.

The appeal in my opinion should be allowed with costs, and the judgment below varied as set out above. The appellants' costs of appeal may be set off against any amount found due to the plaintiff on the reference. The costs in the Court below and the costs of the reference to be determined after the referee has made his report.

Elwood, J.

ELWOOD, J.A.—I concur in the judgment of my brother Lamont herein and I also am of the opinion that the plaintiff was an officer of the municipality for the reasons stated in the judgment of my brother Newlands.

Appeal allowed.

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MONTGOMERY v. SCOTT.

Manitoba Court of Appeal, Perdue, C.J.M., Haggart and Dennistoun, JJ.A. December 12, 1919.

CONTRACTS (§ II D—145)—PURCHASE OF LAND—JOINT OWNERSHIP—ASSIGNMENT OF INTEREST BY ONE PARTY—TERMS OF PAYMENT—"NET PROCEEDS"—INTERPRETATION—EXCUSE FOR NON-PERFORMANCE—ACTION.

A party to an agreement who covenants to pay a certain sum and interest from the "net proceeds" of the sale of land, cannot set up the excuse that "net proceeds" mean "net profits," and that as there were no "net profits" he is absolved from payment.

[*Canadian Port Huron Co.* v. *Fairchild* (1910), 3 S.L.R. 228 distinguished.]

Statement. APPEAL by defendant from a County Court judgment, in an action to recover the amount claimed to be due under the terms of an agreement between the parties. Affirmed.

H. A. Bergman, for appellant; *A. E. Hoskin*, K.C., for respondent.

Perdue, C.J.M. PERDUE, C.J.M.—The plaintiff sues for $140, being interest on the sum of $2,000, which he claims to be due to him from the defendant under the terms of an agreement dated May 17, 1915. The plaintiff and the defendant had entered into an agreement in writing dated May 31, 1912, by which they agreed to purchase from one Dowdall a section of land in Manitoba for the sum of $13,280, payable partly in cash and the balance in 5 equal annual payments with interest at six per cent. The plaintiff paid $2,800 on account of purchase money and taxes. He enlisted for overseas service on May 12, 1915. He was then unable to pay his share of the remaining payments on the land and the defendant agreed to purchase his interest in it. Accordingly the plaintiff gave a quit claim deed and an assignment to the defendant by which he granted, and assigned, to the defendant all his estate, right, title and interest in the land and in the agreement to purchase it. The parties at the same time entered into the agreement of May 17, 1915. This agreement recites the purchase of the land from Dowdall and the giving of the quit claim deed. The third recital is as follows: "And whereas in consideration of the said quit claim deed and assignment it has been agreed that the said party of the first part (the defendant) shall pay to the party of the second part (the plaintiff) the sum of $2,000 on the days and times hereinafter mentioned."

By the first clause of the operative part of the agreement

the defendant agreed to pay the plaintiff "one-half of all the net proceeds received from time to time by the party of the first part from the sale of the said lands after the sale of the said lands shall be made by the party of the first part until there shall have been paid by the party of the first part to the party of the second part the sum of $2,000, and it is agreed that any part of such moneys which shall be paid within 3 years from this date shall not bear interest but interest shall be paid on any part of said $2,000 paid after the expiration of 3 years from this date, such interest to be computed from May 17, 1918, and at the rate of 6% per annum."

By the second clause there shall be no obligation on the part of the defendant to sell the land until he shall have received an offer satisfactory to him.

By the last clause it is agreed that the plaintiff has no right, title, or interest in the land, "but relies solely upon the covenant of the party of the first part to pay to him the party of the second part the said sum of $2,000, without or with interest, as hereinbefore set forth."

The defendant has sold the land for $14,080 and has received the purchase money in full. The plaintiff brought this action in the County Court of Winnipeg to recover $140, being interest, $2,000, from May 17, 1918, under the provisions of the first clause of the agreement. The defence is that the defendant sold the land for the best market price that he could obtain and he puts in an account shewing the amounts paid out by him for purchase money and taxes and claiming interest upon all moneys so disbursed. After giving credit for the purchase money the defendant alleges there was a deficiency of $668 and that no "net proceeds" were realized.

The defendant claims that the expression "net proceeds" means the same as "net profits." In support of this contention the following American cases were cited: *Maloney* v. *Love* (1898), 52 Pac. Rep. 1029; *Hall* v. *Abraham* (1904), 75 Pac. Rep. 882; *Williams* v. *Walsh* (1912), 135 N.W. Reptr. 954. In *Maloney* v. *Love*, a decision of the Court of Appeals of Colorado, it was held that the expression, "net proceeds, as used in a contract, where their signification is not qualified or restricted by other words in the same contract, means what remains of the gross

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proceeds after all expenses and loss incurred in realizing them are deducted." But the judgment goes on to shew that this could not be the meaning in the particular contract there under consideration, and therefore the true intention should be gathered from the rest of the document. In *Hall* v. *Abraham* it was held that "net profits" may be synonymous with "net proceeds," "in the light in which the latter is employed in the agreement under consideration." In *Williams* v. *Walsh* the expression "net proceeds" as used in the agreement there under consideration was held to be equivalent to "net profits." In all of these cases the meaning of the expression was gathered from the context of the document in which it was found.

Another authority cited was *Caine* v. *Horsfall* (1847), 1 Exch. 519, 154 E.R. 221. In that case the following letter was addressed to a captain and supercargo by his employers:

> Your commissions are £6% on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., £4 per ton from the gross sales of the oil when taken from the quay, and £4 15s. when warehoused.

It was held "that the commission was payable only on the sums actually realized, after deducting bad debts as well as other charges." Pollock, C.B., said at 522 that "net proceeds," in mercantile language, meant the sum actually received after making all deductions. The Court held that not only were the usual charges to be deducted from the gross sales but also the bad debts in order to arrive at the net proceeds.

In the present case the whole purchase money of the land has been received by the defendant and the net proceeds will be the sum left after he has deducted the moneys properly paid out. He seeks to take into account all sums of money paid out by him in connection with the purchase of the land and the payment of taxes upon it and to charge interest on such sums although some of them were paid prior to the agreement of May 17, 1915. When the last mentioned agreement was made the plaintiff and defendant were joint owners of the land. The transaction evidenced by the agreement was a purchase by the defendant of the estate and interest of the plaintiff in the land. The net proceeds of the sale of the land by the defendant would be the sum that remained after deducting from the money received from the sale of the land all sums properly paid out by the defendant after the date of the

agreement. These sums would include the moneys due under the agreement of May 31, 1912, and taxes accruing after May 17, 1915. The defendant cannot go behind the last mentioned date and charge against the proceeds of the sale moneys paid by him during the joint ownership. We are not dealing with his profit or loss in respect of the whole transaction from the time he entered into the first agreement. He was to pay the plaintiff one-half of the net proceeds received from the sale until the plaintiff should have received $2,000. When the agreement of May 17, 1915, was executed the plaintiff also executed and delivered to the defendant a quit claim deed of the land and an assignment of the original agreement of purchase of May 31, 1912. In this assignment it was stated that the amount then owing and unpaid under the last mentioned agreement was $6,480 with interest at 6% since May 31, 1914. The tax receipts put in shewed that the taxes had been paid up to December 31, 1914. The taxes from and including the year 1915 and the balance of the purchase money would be payable by the defendant. His account shews that he paid $7,560, being the balance of purchase money and interest, and $628.08 taxes for the years 1915-1918, making together the sum of $8,188.08. Allowing interest on the taxes the net proceeds would, from defendant's own figures, appear to be about $5,800.

By the agreement the defendant covenanted to pay the plaintiff one-half of the net proceeds received from time to time from the sale of the lands, until there should be paid to the plaintiff the sum of $2,000. Now if the parties meant *net profits* when they used the words *net proceeds*, how could these net profits be ascertained from time to time as they were received from the sale of the land? The net profits could not be ascertained until the whole purchase money was received. The purchaser might fail in making his payments and the land might have to be re-sold at a loss. But *net proceeds* being the amounts actually received, after making all deductions, are ascertainable from time to time. From the agreement and the evidence it appears that the sum of $2,000 was payable by the defendant to the plaintiff since May 17, 1918, and interest on that sum at 6% per annum was overdue when this action was begun. I think the judgment in the County Court should be affirmed with costs.

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Dennistoun, J.A.

HAGGART, J.A., concurred with Perdue, C.J.M.

DENNISTOUN, J.A.:—In 1912 the plaintiff and the defendant jointly purchased a parcel of land for $13,280, payable by instalments. On May 17, 1915, the plaintiff, who had paid some $2,700 on account of his share of the purchase money, represented to the defendant that he was leaving on overseas military service and was unable to make further payments on account of the purchase. A new agreement in writing was then entered into in accordance with which the plaintiff gave to the defendant a quit claim deed of the land and an assignment of his rights under the sale agreement. Both parties executed this new agreement under seal. After reciting the terms of the agreement to purchase, it continues as follows:—

"And whereas the party of the second part (plaintiff) being unable to pay his portion of the purchase price of the said lands payable under the said agreement has by a quite claim deed and assignment bearing even date herewith granted, assigned, transferred, and set over unto the party of the first part (defendant) his executors, administrators and assigns all the estate, right, title and interest of him, the party of the second part under and by virtue of the said agreement and in and to the said lands and premises.

"And whereas in consideration of the said quit claim deed and assignment it has been agreed that the said party of the first part shall pay to the party of the second part the sum of two thousand dollars on the days and times hereinafter mentioned;

"Now therefore this indenture witnesseth that in consideration of the premises, the party of the first part doth hereby for himself, his executors, administrators and assigns, covenant and agree to pay to the party of the second part, his executors, administrators, or assigns, *one-half of all the net proceeds received from time to time by the party of the first part from the sale of the said lands*, after the sale of said lands shall be made by the party of the first part until there shall have been paid by the party of the first part to the party of the second part the sum of two thousand dollars, and it is agreed that any part of such moneys which shall be paid within three years from this date shall not bear interest, but interest shall be paid on any part of said two thousand dollars paid after the expiration of three years from this date.

such interest to be computed from May 17th, A.D. 1918, and at the rate of six per cent. per annum.

"And it is agreed that there shall be no obligation on the party of the first part to sell the lands until he shall have received an offer of purchase for said lands on such terms of purchase and interest as shall be in all respects satisfactory to the party of the first part, his executors, administrators and assigns.

"And it is further agreed between the parties hereto that the party of the second part has now no estate, right, title, or interest in the said lands of any nature or kind whatsoever but relies solely upon the covenant of the party of the first part to pay to him, the party of the second part, the said sum of two thousand dollars without or with interest as hereinbefore set forth."

On April 5, 1918, the defendant Montgomery sold the lands referred to for $14,080, and it is admitted that he has received the purchase money.

When interest, taxes, and other outgoings are taken into consideration, it appears that the lands were sold by Montgomery at a loss to him of $668.

Scott brings this action in the County Court of Winnipeg for interest only and judgment has been given in his favour for $140, and costs.

Montgomery defends and appeals on the ground that the property having been sold at a loss there were no "net proceeds" out of which to pay the $2,000 which he covenanted to pay the plaintiff and for that reason there is not and never will be either principal or interest payable to the plaintiff.

He contends that "net proceeds" is equivalent to, and synonymous with "net profits" and he refers in support of this contention to *Canadian Port Huron Co.* v. *Fairchild* (1910), 3 S.L.R. 228; *Caine* v. *Horsfall*, 1 Exch. 519; *Maloney* v. *Love*, 52 Pac. Rep. 1029; *Hall* v. *Abraham*, 75 Pac. Rep. 882; *Williams* v. *Walsh*, 135 N.W. Reptr. 954; *Moore* v. *Donogh*, [1919] 2 W.W.R. 680; *Finkbeiner* v. *Yeo* (1915), 25 D.L.R. 673, 26 Man. L.R. 22.

I am of opinion that the meaning of the words "net proceeds" must be determined after perusal and consideration of the whole document and reach the conclusion that they do not mean "net profits" in this case.

The case of *Canadian Port Huron Co.* v. *Fairchild*, *supra*,

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Dennistoun, J.A.

cited by the defendant, does not support his contention. In that case there was a re-sale of re-possessed machinery. When the parties agreed that the "net proceeds" of such sale should be credited to the original purchaser there was no thought of profits. The parties were trying to minimize a loss, by crediting the proceeds of the re-sale after deducting the necessary outgoings in connection with that sale.

If a testator should devise lands to trustees for sale the "net proceeds" to be applied as directed, the question of profit would not arise at all.

In the present case the parties agreed that Scott, who had invested $2,700 in the property, should recover $2,000 when the land was sold and paid for. His loss was fixed at $700. The profits, if any, were all to belong to Montgomery, who had the right to postpone the sale until he received a price satisfactory to himself. He chose to sell at a loss and has received all the proceeds of the sale. He may deduct from the proceeds of the sale which come to his hands, all the expenses and outgoings connected with that sale, and all sums which it may be necessary to pay in order to give title to the purchaser. The balance remaining will be the "net proceeds" of the sale which are to be applied from time to time, one-half to each of the parties until the plaintiff has received $2,000 and interest. The remainder of the money belongs to the defendant and whether eventually he makes a profit, or sustains a loss, makes no difference so far as the plaintiff is concerned.

The defendant's covenant as recapitulated in the last clause of the agreement to pay $2,000 is absolute. He may postpone payment until he makes a sale satisfactory to him, but not for an unreasonable length of time: *Granger* v. *Brydon-Jack* (1919), 46 D.L.R. 571, at 578, 58 Can. S.C.R. 491, at 500; *Hancock* v. *Hodgson* (1827), 4 Bing. 269, 130 E.R. 770.

I think the words "from time to time" are illuminating and important. They clearly indicate that payments are to be made as the money comes in by instalments. There is no suggestion that there is to be a final casting up of profits or losses before the proceeds of the sale are available for division.

The net proceeds of the sale exceed the sum of $4,000. The defendant has received the whole of the purchase money and

under the terms of the agreement should pay interest to the plaintiff as claimed.

I would affirm the judgment of the County Court Judge and dismiss this appeal with costs.

Appeal dismissed.

HEICHMAN v. NATIONAL TRUST COMPANY, Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. December 23, 1919.

HUSBAND AND WIFE (§II I—110)—PROPOSED MARRIAGE—REPRESENTATIONS MADE BY HUSBAND'S FATHER AS TO PROPERTY—MARRIAGE—DEATH OF HUSBAND—REPRESENTATIONS NOT CARRIED OUT.

Representations made by the father as to the state of property of his son who is about to contract marriage, upon the faith of which such marriage is subsequently contracted, must be carried out by the person who made them.

[*Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363; *Jorden* v. *Money* (1854), 5 H.L. Cas. 185, followed.]

Statement.

APPEAL from the trial judgment in an action by an administrator for a transfer of certain lands and the return of certain moneys belonging to the deceased and converted to his own use by the defendant, also an application for a new trial on the ground of the discovery of new evidence. Affirmed.

H. E. Sampson, K.C., and *G. A. Cruise* for appellant; *A. E. Bence*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I have come to the conclusion, very reluctantly, that this appeal must fail. The very strong findings of the trial Judge on conflicting evidence should not be reversed by a Court which has only seen the evidence in cold print or typewriting.

I am also of opinion that the application for new trial, on the ground of the discovery of new evidence, should not be granted. In view of the findings of the trial Judge on the evidence given at the trial, it is impossible to imagine that the new evidence if given on the trial could have affected the result. While dismissing the appeal, I think that the judgment below should be modified in one particular. It appears from the evidence that the crop on the land in question was put in, harvested and threshed, very largely by the work and machinery and horses of the defendant and his sons and employees. The defendant also, it would appear, supplied the seed grain. If this is the case, the defendant should not be charged with the whole value of the crop as found by the

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trial Judge. Unless the parties agree there should therefore be a reference to the local registrar to determine the amount properly chargeable against the defendant in respect of the crop as found and valued by the trial Judge.

All questions arising out of the reference, including the costs of the reference, will be dealt with by the trial Judge as if the reference had been ordered in the original action.

The appellant will pay the respondent's costs of this appeal.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action by the plaintiff as administrator of the estate of Stephen Heichman, deceased, for a transfer of the south half of 30-37-12-W. 3rd., and the return of certain moneys, goods and chattels, horses and cattle, belonging to the deceased taken and converted to his own use by the defendant.

The facts as found by the trial Judge may be briefly stated as follows: The deceased, Stephen Heichman, wished to marry one Mary Solinuk. Her father when asked for his consent to the marriage apparently asked the deceased as to his property and prospects. The result was that the deceased, Solinuk, the father of the girl, and one Antonsko, went to the defendant's place, and the defendant then told them that he was giving the above described half-section to his son, and the horses and machinery necessary to work the same. Solinuk then consented to the marriage, which took place shortly afterwards, and the deceased and his wife—after living with his father for some 2 months—went to and resided on the half-section until his death in October of that year. During the time they resided on the half-section, various horses, machinery and one cow were taken over there, and the crop which was growing on the land, consisting of wheat and hay, was harvested. Immediately after Stephen's death, his father went to his place and removed all the chattels he had given him, along with some money belonging to Stephen. For the return of this property and a transfer of the land this action was brought.

After a careful perusal of the evidence, I cannot say the trial Judge was wrong in so finding. The evidence is very contradictory, but there is sufficient evidence on which the Judge could base such findings. I think, therefore, that they should not be interfered with.

In addition to asking this Court to reverse the findings of the trial Judge, 2 principal objections were taken. First, that the agreement was not in writing, and, although the Statute of Frauds was not pleaded, that defendant could take advantage of same; and, secondly, that the plaintiff as representative of Stephen Heichman, deceased, could not sue, the only right of action being in the father-in-law to whom the representations were made.

To the first objection I would say that it is not a matter of contract at all, but a representation, upon the faith of which the marriage was entered into, and the defendant having made these representations must now make them good.

The law as applicable to this case is stated by Stirling, J., in *Mills* v. *Fox* (1887), 37 Ch. D. 153, at 162-4, as follows:—

It was, however, further contended on behalf of the plaintiffs that both the marriage and the settlement were sanctioned by the Court on the faith of a representation of fact made by her or on her behalf, that at the date of the order of the 21st of July, 1884, the defendant Mrs. Fox was entitled to an estate tail in one moiety of the property, the purchase-money of which is represented by the fund in Court, and that in equity she is bound to make good such representation, or, at all events, to abstain from setting up in herself any title to the fund inconsistent therewith.

The law on this subject is thus stated by Lord Cranworth in the well-known case of *Jorden* v. *Money* (1854), 5 H.L. Cas. 185. At page 210 he makes these remarks: "It is said that upon a principle well known in the law, founded upon good faith and equity, a principle equally of law and of equity, if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There the person who has made the false representations has in a great many cases been held bound to make his representations good." His Lordship then refers to the cases of *Neville* v. *Wilkinson* (1782), 1 Bro. Cl. Rep. 543; *Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363, and *Gale* v. *Lindo* (1687), 1 Vern. 475; and then there follows (page 212), a passage which seems to me of considerable importance with reference to this case: "These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I should be in the last degree sorry that any opinion or decision to which I am a party, should lead to a notion that I, in the slightest degree, question their propriety. Nay, more, I think that the principle has been carried, and may be carried, much further; because I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But

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if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good." So that Lord Cranworth distinctly lays it down that it is not necessary that the party making the representation should know it was false, or that fraud need have been intended at the time; and the only limitation which he places upon the application of the principle is this—that the person to enforce it must be someone whom the person who made the representation had reasonable ground for supposing to be about to act on the representation.

In the case of *The Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L.R. 6 H.L. 352 at 360, Lord Selborne says: "I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true, and shall be compelled to make them good, but those must be representations concerning existing facts." He then proceeds: "The limits of that doctrine, and the distinction between it and contract, were carefully examined, and, I I think, well pointed out in the judgment given by Lord Cranworth in this House in the case of *Jorden* v. *Money*, 5 H.L. Cas. 185."

As to the second objection: Stephen Heichman could have brought this action, and, therefore, his administrator can.

Lord Mansfield, C.J., in *Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363, states the law to be as follows:

> The law is, that where, upon proposals of marriage, third persons represent any thing material, in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It *shall be*, as represented to be. And the husband alone is entitled to relief, as well as when the fortune, etc., so misrepresented has been specificially settled on the wife: for no man shall set up his own iniquity as a defence, any more than as a cause of action.

As to the application for a new trial on the ground of the discovery of new evidence, I do not think that it is probable that if such evidence had been given at the trial it would have changed the result. If this case was to be decided upon a contract it might have that effect, but it does not affect the evidence that the defendant represented to Solinuk that he was giving his son this

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property and that Solinuk consented to the marriage of his daughter upon the faith of such representation. The application for a new trial upon this ground should therefore be refused.

I would, therefore, dismiss the appeal, excepting upon one point on which, I think, the trial Judge's judgment should be amended. The undisputed evidence is, that the crop on this half-section was put in, harvested and threshed by the defendant and his family, including the deceased Stephen. It was apparently put in as a partnership transaction, therefore Stephen's estate is not entitled to the whole proceeds of it. There should therefore be a reference to the local registrar to find out what part his estate is entitled to, and the judgment should be amended accordingly.

LAMONT, J.A., concurred with Newlands, J.A.

Appeal dismissed.

FULLER v. GARNEAU.

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Alberta Supreme Court, Scott, J. December 16, 1919.

MINES AND MINERALS (II A—32)—SALE OF LANDS—RESERVATION—RIGHT TO MINES AND MINERALS—IMPLIED RIGHT TO ENTER.

A sale of land with a reservation of mining and mineral rights implies a right to enter on such land in order to exercise these rights.

[*Duke of Hamilton* v. *Graham* [1871] L.R. 2 Sc. & Div. 166, referred to.]

TRIAL of questions of law raised by the pleadings pursuant to an order for directions.

Statement.

J. R. Lavell for plaintiff; *C. H. Grant*, for defendant.

SCOTT, J.:—The plaintiff in his statement of claim charges that the defendant gave to one Phillips an option to sell the lands in question upon certain terms which option was duly assigned by Phillips to the plaintiff; that the plaintiff accepted the option and paid the required payment on account of the purchase money, that the defendant accepted the payment but he then informed the plaintiff that he could not agree to sell the mines and minerals as they were reserved but that this was the only reservation and he thereupon offered and delivered to the plaintiff an agreement in writing whereby he agreed to sell to the plaintiff who, in view of the statement of the defendant, agreed to purchase the lands reserving unto His Majesty his successors and assigns all mines and minerals; that, relying upon the said statement, the plaintiff

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thereafter made further payments on account of the purchase money; that the plaintiff afterwards discovered that the reservation was not as represented by the defendant and as stated in the agreement but was as follows:—

Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under said lands together with full power to work the same and for this purpose to enter upon and use or occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same.

The plaintiff claims the cancellation of the agreement on the ground of this misrepresentation and upon other grounds set out in the statement of claim.

In Cockburn on Coal Mining, the author states at page 117:—

The rights of a grantee or person entitled to mines and minerals depend upon the terms of the instrument, but if the mines are excepted in a lease, conveyance or other instrument without any express mention of working powers then the law implies or confers all such powers as are necessarily sufficient to enable the mine owner to dig and carry away the minerals—namely, a power to enter upon the surface, dig pits, get the minerals and for a limited period deposit them on the surface.

In Goddard on Easements, 6th Ed., ch. 2, the author, in discussing rights of way of necessity, says, at page 359:

This species of right has been recognized from very early times, and is said to depend upon the principle that when a grant is made, every right is also presumed to have been granted without which the subject of the grant would be useless.

In *Earl of Cardigan* v. *Armitage* (1823), 2 B. & C. 197, 107 E.R. 356, Bayley, J., says at 207:

It was indeed conceded in the argument that if the exception had stopped after excepting and reserving the coals to Sir Thomas and his heirs and had contained no words to give him an express liberty for sinking pits and doing other works to get them, the exception would have enured without any restriction to Sir Thomas in fee; and that he his heirs and assigns would have had a right for ever to do what should be necessary to get the coals.

In *Rowbotham* v. *Wilson* (1860), 84 H.L. Cas. 348, 11 E.R. 463, Lord Wensleydale says, at page 360:

The rights of the grantee to the minerals by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie* it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by Sheppard (Touchstone 5 ch. 89) in illustration of the maxim "*quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit,*" that, by grant of mines, is granted the power to dig them. A similar presumption *primâ facie* arises, that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided.

In *Duke of Hamilton* v. *Graham* (1871), L.R. 2 Sc. & Div. 166, Lord Chelmsford says at page 171:

> The nature and extent of the interest which remains in a grantor upon an exception of mines or minerals in a grant of the surface appear to me not to have been precisely defined in the few cases which are to be found upon the subject; but they all seem to me to assume that by the exception of mines and minerals in a grant the land remains in the grantor, not to be used in its natural state at the pleasure of the owner, but as a species of property which can be made profitable only by removal, and which therefore carries with it as necessarily incident a right to use all proper means for obtaining the minerals but nothing further.

The contrary view appears to be expressed by Lord Abinger in *Harris* v. *Ryding* (1839), 5 M. & W. 60, 151 E.R. 27. In that case in a conveyance of land the mines and minerals were reserved to the grantor together with the right to dig and delve for them, sink pits and shafts, etc., and the right of ingress and egress upon the land for that purpose. It was held that under that reservation the owner of the mines and minerals was not entitled to take all the minerals but only such as he could get leaving a reasonable support for the surface.

Lord Abinger, C.B., says at page 66:

> Now, to try this question, I will first suppose that the defendants or the person they represent, had sold the estate to the plaintiff or the person he represents, with an exception of the mines generally, without anything else. The exception of the mines and minerals which were so reserved, would vest in the defendants the whole of the mines and minerals—all the property would have been vested in them, but they would have no right to get them, except by the consent of the plaintiff—that they should enter upon the surface; they must have got them by means of access through other shafts and channels with which the plaintiff's land had nothing to do. In that case, supposing the reservation was nothing more than that, could it have been contended, that because they had excepted the mines, and the whole was vested in them, they could get every particle of them in the manner which is contended for, and without leaving support for the land above? Clearly not.

This dictum of Lord Abinger that a reservation of the mines and minerals without more would not entitle the grantor to enter upon the surface for the purpose of gaining the minerals does not appear to be supported by any other authority that I have been able to refer to. If that effect were given to such a reservation the mines and minerals would be absolutely valueless to the grantor.

In my view the powers reserved in the grant from the Crown in the present case are not in excess of those which would be implied by law by the reservation of the mines and minerals

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alone without any express reservation of the right to enter upon the surface for the purpose of gaining the minerals and such being the case, I am of opinion that the plaintiff must be taken to have agreed to accept the transfer of the land subject to these powers.

The other ground upon which the plaintiff claims to be entitled to cancellation of the agreement for sale is that the property is subject to certain incumbrances. This does not appear to me to be a sufficient ground for cancellation and counsel for the plaintiff admitted during the argument that, if the plaintiff was not entitled to its cancellation on the ground of the misrepresentation referred to, the action shall be dismissed.

I dismiss the action with costs.

Action dismissed.

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BUCKLEY v. MOTT.

Nova Scotia Supreme Court, Drysdale, J. December 17, 1919.

FOOD (§ I—5)—MANUFACTURE OF CANDY—NEGLIGENCE—PURCHASE FROM MIDDLEMAN—INJURIES FROM EATING—DAMAGES—PRIVITY OF CONTRACT.

A manufacturer of chocolate bars for use as a food and supplied to the public through retail dealers, owes a duty to the public not to put on sale a chocolate bar filled with powdered glass or other injurious substance and is liable in damages to a purchaser who is made ill through eating the bar although there is no privity of contract between the manufacturer and the purchaser.

[See note following].

Statement.

ACTION for damages for negligence in the manufacture of chocolate bars.

J. J. Power, K.C., for plaintiff; *W. A. Henry*, K.C., for defendants.

Drysdale, J.

DRYSDALE, J.:—The defendants are manufacturers of chocolate bars for use as a food and supplied to the public through retail dealers, in the City of Halifax and elsewhere. The plaintiff bought and ate a chocolate cream bar put on the market by the defendants. The purchase of the bar was from and through a retail dealer named Jamison. The charge is that defendants so negligently manufactured the said cream bar as to make it dangerous as human food; in that put up in said bar and as a part thereof, there was a quantity of powdered glass which plaintiff, without fault on his part, took into his alimentary canal with very injurious results. Defendant insists that there is no duty owing from

defendant to plaintiff, that the duty, if any, arises out of contract and that this is limited to parties to the contract, that the plaintiff as purchaser, is a stranger to the contract with defendants in the sale of the chocolate and that an action against defendants, founded on such sale will not lie even in tort. If the action rests on contract I agree it does not lie, the plaintiff being a stranger to the contract of sale by defendants but there has long been engrafted on this rule exceptions that, in my view, cover this case, a duty on the part of defendants, as to the public, exists. The exceptions clearly apply to drugs and things in their nature dangerous in themselves. This was lately considered in the House of Lords, in *Dom. Natural Gas Co.* v. *Collins*, [1909] A.C. 640, at 646, by Lord Dunedin, where the New York case of *Thomas* v. *Winchester* (1852), 6 N.Y. 397 (Court of Appeals), is cited with approval. The cases both English and American are collected and reviewed in the Illinois Appeal Court in *Salmon* v. *Libby* (1906), 219 Ill. 421, and *Tomlinson* v. *Armour* (1908), 75 N.J.L.R. 748. In the American Courts it is held that where defendants manufacture and put a dangerously faulty article in its stock for sale, they are therein negligent and liable to an action for such negligence, it being the proximate cause of injury to plaintiff without any reference to contract relation existing between him and the plaintiff. After examining the numerous cases on the subject, both English and American, I conclude that there was a duty to the public not to put on sale such a dangerous article as the chocolate bar in question; that defendants were guilty of negligence in this respect, which was the proximate cause of plaintiff's injuries. The jury having found this negligence and assessed plaintiff's damages at $700, I am of opinion plaintiff is entitled to judgment for $700 with costs.

Judgment accordingly.

ANNOTATION.

Annotation

The interest in this case lies in the fact that it is the first of its kind to be tried in a Canadian Court.

A careful search has disclosed very few cases either in the English or American Courts on the specific branch of this general question of the liability of a packer or manufacturer of food to the ultimate consumer, who purchased the same from a middleman.

Annotation.

Tomlinson v. *Armour & Co.* (1908), 75 N.J.L.R. 748. Held that irrespective of the presence or absence of contractual obligations arising out of the dealings between manufacturer and retailer, and between retailer and consumer, the manufacturer of canned goods is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer to exercise care that the goods which he puts into cans and sells to retail dealers to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison.

In *Salmon* v. *Libby*, 219 Ill. 421, reversing 114 Ill. App. 258, a declaration was held to be good which set out a statute permitting a recovery for the death of a person caused by the wrongful act or omission of another and which alleged that defendant negligently and improperly prepared and manufactured mince-meat so that the same became poisonous and destructive to human life when used as food, and that the plaintiffs testator while lawfully partaking of the same, was poisoned and died in consequence thereof; though it also shewed that the plaintiffs testator did not purchase the mince-meat directly from the defendant. The question of the liability of the packer to persons not in privity of contract with him was not discussed as the specific objection to the declaration was that it failed to state the particular negligence complained of. *Craft* v. *Parker W. & Co.*, 96 Mich. 245, is another case to the same effect. This was an action to recover damages for injuries caused by eating spoiled bacon sold by defendant to the plaintiff's brother. The Court held if the defendant was negligent in selling meats that were dangerous to those who ate them, he would be liable for the consequences of his act if he knew the meats to be dangerous or by proper care on his part could have known their condition, but in this case also the Court did not discuss the question of the manufacturer's liability to third persons.

In *Nelson* v. *Armour Packing Co.*, 76 Ark. 352, the Court refused recovery to a purchaser from a retailer of canned meats, against the packer on the ground that as the goods were purchased from a middleman, there was no privity of contract between the consumer and the packer and that therefore no warranty of wholesomeness passed to the property, from the packer to the consumer through the latter's vendor. The question of the packer's liability for negligence in the preparation of the goods was not discussed by the Court.

Uren v. *Holt*, [1903] 1 K.B. 610, was an action to recover damages for breach of an implied warranty upon the sale of beer. It was proved that the plaintiff had suffered damage from illness caused by arsenical poisoning by beer purchased and drunk by him at a beer house kept by defendant. The plaintiff's custom was to go to the house and ask for ale, with which he was served in the usual way, but he knew that the house was a tied house at which all the beer sold came from the brewery of the owners of the house, and he went to the house because he preferred their beer.

Held, that the beer was bought by description within the meaning of the Sales of Goods Act, and that under the Act an implied condition arose upon the sale, that the goods should be of merchantable quality, for the breach of which the plaintiff was entitled to recover.

On the general question of the liability of a manufacturer or tradesman to persons other than those directly contracting with him, the following cases may be noted. Qu. *Langridge* v. *Levy* (1837), 2 M. & W. 519, the father of the plaintiff bargained with the defendant to buy of him a gun, for the use of

Annotation.

himself and sons, and the defendant by falsely and fraudulently warranting the said gun to be made by a certain maker and to be a good, safe and secure gun, sold the gun. The gun was not made by the maker as represented, and was unsafe and dangerous and in consequence of its weak and dangerous construction, exploded while in the hands of the plaintiff, injuring him. The Court held that admitting the proposition to be true that no person can sue on a contract but the person with whom the contract is made, still a vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not a party to the original contract, provided at least that his use of the article was contemplated by the vendor and that the boy who used the defective gun for whose use the defendant knew it was intended, had a good cause of action.

The case of *George* v. *Skivington* (1869), L.R. 5 Ex. 1, was an action by a wife, her husband being joined for conformity, against a tradesman who in the course of his business professed to sell a chemical compound made of ingredients known only to him, and by him represented to be fit to be used as a hair wash, without causing injury to the person using it, and to have been carefully compounded by him. The husband thereupon bought a bottle of the hair wash to be used by his wife, as the defendant well knew. The wash was unfit to be used for washing the hair and the wife who used it for that purpose was injured. Held that the wife had a good cause of action, and the defendant was liable.

Dominion Natural Gas Co. v. *Collins*, [1909] A.C. 640, was an action for damages in respect of an accident against the appellant gas company. It appeared that the appellants were not occupiers of the premises on which the accident had occurred and had no contractual relations with the plaintiffs, but they had installed a machine on the said premises, and the jury found that the accident was caused by an explosion resulting from gas emitted, owing to the appellants' negligence, through its safety valve direct into the closed premises, instead of into the open air. Held, that the initial negligence having been found against the appellants in respect of an easy and reasonable precaution which they were bound to have taken, they were liable unless they could shew that the true cause of the accident was the act of a subsequent conscious volition, *e.g.*, the tampering with the machine by third parties.

In *White* v. *Steadman*, [1913] 3 K.B. 340, the male plaintiff hired from the defendant, who was a livery stable keeper, a landau with a horse and driver for the purpose of taking a drive. His wife accompanied him in the carriage. The horse shewed considerable signs of restiveness when meeting motor cars, and when passing a traction engine shied and became unmanageable and the carriage was upset and both husband and wife were injured. In an action by the husband and wife to recover damages for the injuries the jury found that the defendant ought to have known, if he had used proper care, that the horse was unsafe to be sent out with the carriage, but that the driver was not negligent. The defendant upon these findings, while admitting liability to the husband, contended that he was not liable to the wife. The Court held that as the defendant ought to have known of the vicious propensity of the horse, he was in the same position as if he had known, and that therefore it was his duty to the wife, whom he must have contemplated would use the carriage, to warn her of the dangerous character of the horse, that this duty arose independently of contract, and that therefore the defendant was liable to the wife.

Annotation. In *Bates* v. *Batey & Co.*, [1913] 3 K.B. 351, the defendants manufactured ginger beer which they placed in bottles bought from another firm. They sold the bottled ginger beer to a shopkeeper from whom the plaintiff bought one bottle; owing to a defect in the bottle it burst when the plaintiff was opening it and injured him; the defendants did not know of the defect, but could have discovered it by the exercise of reasonable care. Held, that the defendants were not liable in as much as they did not know of the defect, although they could have discovered it by the exercise of reasonable care.

In this case Horridge, J., referring to the *White* v. *Steadman* case, says at 355: "I do not think that . . . that case can have intended to decide that, where a thing not dangerous in itself becomes dangerous through a defect occasioned by breach of contract in its manufacture or delivery, the person handing it over must be held liable to a third party because, although he did not know, he might by the exercise of reasonable care have known its condition."

A recent case in The Ontario Supreme Court (Appellate Division) is that of *Hill* v. *Rice Lewis & Son* (1913), 12 D.L.R. 588, which held that a retail vendor is not answerable for personal injury sustained by the purchaser of a sealed box of cartridges of a certain description and make, as the result of the box containing one cartridge of a different kind, and of the explosion of the cartridge after it had missed fire because of its being the wrong size, where the plaintiff relied solely on his own judgment and not that of the vendor in making the purchase.

MAN.

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THE KING v. NOVAK.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Dennistoun, JJ.A. December 12, 1919.

CONTRACTS (§ IV A—322)—AGREEMENT WITH CROWN AND STUDENT FOR EDUCATION—PAYMENT OF EXPENSES GUARANTEED BY GUARDIANS—STUDENT A MINOR—BREACH—SUIT FOR DEBT.

The guarantors of a debt owing under an agreement between the Crown and a minor are liable to the Crown for such debt on proof of same, when the minor has defaulted.

[*Harris* v. *Huntbach* (1757), 1 Burr. 373, 97 E.R. 355, referred to; *Hancock* v. *Hodgson* (1827), 4 Bing. 269, 12 Moore 504; *M'Intyre* v. *Belcher* (1863), 14 C.B. (N.S.), 654, 8 L.T. 461, followed.]

Statement. APPEAL from a judgment of a County Court Judge, in an action by the Crown against the guarantors, on a contract, to educate a foreign infant. Reversed.

H. J. Symington, K.C., and *E. D. Honeyman*, for appellant.

W. H. Trueman, K.C., and *T. H. Johnson*, for respondent.

The judgment of the Court was delivered by

Dennistoun, J.A. DENNISTOUN, J.A.:—This action was tried in the County Court of Winnipeg. Evidence was given on behalf of the plaintiff. The defendant declined to adduce evidence and a judgment of nonsuit was entered.

The plaintiff appeals.

Mr. Trueman for the respondent argues that the contract is too obscure, too improvident, and too unreasonable for enforcement. That the infant placed himself unreservedly in the hands of the Crown and that his rights are so indistinctly defined as to leave him at the mercy of the Department of Education without any assurance that he will ever receive a certificate, or a permit, or a school to teach in.

Had the contract been one of apprenticeship to a commercial firm or even one relating to education by an institution looking for a profit, the Court might well have adopted such a view: *De Francesco* v. *Barnum* (1890), 45 Ch.D. 430. But it must be assumed that the Crown, acting by a responsible Minister, will deal fairly and justly by a young student of foreign nationality, its only object being to provide qualified teachers for the public schools of the Province and with special reference to the non-English-speaking communities. Looked at from this point of view, the contract is both reasonable and even generous in its terms and one which the guardians of an infant might well be advised by this Court to execute on his behalf.

The student attended the school as provided by the contract from about December 6, 1911, until June, 1913, when he ran away and has not been heard of since. He obtained no certificate or permit and never became qualified to teach in a public school. The sum claimed in this action is $291 for board, lodging, books, paper, and other materials of whatsoever kind or nature (clothing and wearing apparel excepted) necessary for his health, comfort, support, maintenance, and education, being at the rate of $200 per annum. That is a very reasonable sum for the services rendered by the Crown.

The agreement states that the student was a minor when the contract was entered into and it is evident that the Minister was not satisfied to rely upon the covenant of an infant, even for necessaries nor upon the probability of recovering from his salary as a teacher after he left the school as provided by the agreement. He required and obtained an absolute covenant and an original undertaking to pay from the defendants Novak and Demczuk, which is set forth in paragraph 9 of the agreement as follows:

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Dennistoun, J.A.

9. And whereas the said party of the second part (the student) is a minor within the age of twenty-one years, and the above-named parties of the third part (guarantors) being the warrantors and natural guardians of the said party of the second part, they the said parties of the third part join in this agreement for the purpose of binding themselves jointly and severally with the said party of the second part to the said Minister and hereby covenant with the said Minister that they will hold themselves personally liable for the repayment of all moneys due to the said Minister for the support, maintenance and education of the said party of the second part under the terms and conditions of this agreement.

In *Harris* v. *Huntbach* (1757), 1 Burr. 373, 97 E.R. 355, Foster, J., discussing the liability of guarantors for a person under disability, says, at page 376: "The infant was not liable and therefore it could not be a collateral undertaking. It was an original undertaking of the defendant to pay the money."

In the case under consideration, it is contended that the contract is for necessaries supplied to an infant upon which he may be personally liable and that the undertaking of the other defendants is a collateral promise only. In my opinion the covenant relied on is a direct promise, an original undertaking, and not one of suretyship, but in any event I do not think it makes any difference in this case whether Novak and Demczuk are principals or sureties, as the Crown cannot be guilty of laches and thereby permit a surety to be discharged. *Black* v. *The Queen* (1899), 29 Can. S.C.R. 693; De Colyer on Guarantees, 3rd ed., page 446; 15 Hals. 560. The defences pleaded on such grounds cannot avail.

It is further argued by Mr. Trueman that there is an absence of mutuality; that the contract is not binding upon the Crown, and that such a liability must be established before it can be held that the defendants are liable on their part. The answer is that the Crown adopted and ratified the contract entered into by the Minister and supplied the infant with necessaries for a year and a half. The contract has been fully performed so far as the Crown is concerned, and the defendants are estopped from taking this position. *Secy. of State for India* v. *Kamachee Boye Sahaba* (1859), 7 Moo. Ind. Ap. 476; *Buron* v. *Denman* (1848), 2 Ex. 167.

Respondent further alleges that bi-lingual schools having been abolished by statute in 1916, there was a total failure of consideration, as it was contemplated by the agreement that the

infant was to become a teacher in a bi-lingual school before any liability attached to him or his guarantors. Although bi-lingual schools are referred to in one of the recitals of the contract, a perusal of the whole document makes it clear that the object was to qualify the student as a teacher in the public schools of the Province and not otherwise. Through his own default this became impossible. Moreover, bi-lingual schools were not abolished until 1916, 3 years after the student absconded. This argument may therefore be eliminated.

The covenant for payment on the part of the student provides for recovery of the amount of the debt from his salary as a teacher in a school selected by the Minister after having received a certificate or permit to teach. In the event of his failing to act as a teacher for 3 years, or refusing to teach in the school selected, payment of the amount due under the agreement is to be made.

The agreement does not specifically provide for the contingency which has happened whereby the student by his own act and default has made it impossible for him to obtain a certificate or permit or a salary or a school to teach in.

He cannot set up his own breach of faith as an answer to the plaintiff's claim. To do so would be fraudulent. Having put it out of his power to pay the debt in the manner contemplated he must pay it unconditionally for the debt must be discharged. It is due and owing to the Crown.

Nor are the sureties or guarantors—and I use these terms as synonymous under English authority—though a distinction is drawn between them in some of the Courts of the United States—in a better position.

The covenant which they have signed is absolute as set forth above. They bind themselves for the repayment of all moneys due to the said Minister for the support, maintenance and education of the said party of the second part under the terms and conditions of this agreement.

The existence of the debt has been established, the method of payment by the student has become impossible through his default, and the covenant of the other defendants on the strength of which these necessaries were supplied must now be resorted to and enforced: *Hancock* v. *Hodgson* (1827), 4 Bing. 269, 12 Moore 504; *M'Intyre* v. *Belcher* (1863), 14 C.B. (N.S.) 654, 8 L.T. 461.

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I would allow the appeal and set aside the nonsuit entered in the County Court. There should be judgment for the Crown for the amount claimed against all defendants with costs here and below, if demanded.

Appeal allowed.

SASK.

K. B.

GILBERT v. GILBERT.

Saskatchewan King's Bench, Bigelow, J. December 18, 1919.

DIVORCE AND SEPARATION (§ V B—50)—ALIMONY—ACTION—SUIT MONEY.

In an action by a wife against her husband for alimony the Court will, upon application before trial, order the defendant to furnish security for plaintiff's costs, in order that she may have her case heard, but where no such application has been made and the plaintiff has brought her case to a hearing and has failed the husband will not be made liable for her costs.

[*Sewell* v. *Sewell* (1919), 49 D.L.R. 594, followed.]

Statement.

ORDER as to costs in an alimony action.

T. A. Lynd, for plaintiff; *D. C. Kyle*, for defendant.

Bigelow, J.

BIGELOW, J.:—This is an action by a wife against her husband for alimony which I dismissed at the conclusion of the trial. The plaintiff asked for costs notwithstanding the action was dismissed. I reserved the question of costs, awaiting the decision of the Court of Appeal in *Sewell* v. *Sewell* (1919), 49 D.L.R. 594. In that case Taylor, J., deprived the wife, the unsuccessful plaintiff, of costs. The Court of Appeal was divided so the appeal was dismissed. Had there been an application before trial in this case I would have ordered the defendant to pay plaintiff's costs or to have furnished security for same so as to enable plaintiff to have her case heard, but there not having been any such application before trial I do not think she is now entitled to her costs against the defendant. In *Sewell* v. *Sewell*, Newlands, J.A., is reported as follows, at p. 599:—

> In *Smith* v. *Smith* (1882), 7 P.D. 84, Lord Hannen, the President, at page 87, said: "In the Ecclesiastical Courts the wife was entitled to have her costs taxed *de die in diem* so as to enable her to defend herself; but if her proctor neglected to take this precaution it was the invariable practice of the Court not to make any order for costs in favour of a wife who had brought her case to a hearing and had failed . . . But if the wife has brought her case to a hearing howsoever and fails the husband has never then been made liable for her costs."

There will be no costs to either party.

In re A. S. McDONALD Co., Ltd.

N. S.

S. C.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. April 22, 1919.

COMPANIES (VI C—348)—JUDGMENT BY CREDITOR—FILED AGAINST LANDS—WINDING-UP OF COMPANY—SALE OF LANDS BY LIQUIDATOR—EFFECT OF JUDGMENT—WINDING-UP ACT, R.S.C. 1906, CH. 144, SEC. 84.

No lien shall be created on the property of a company by filing of a judgment against the same, if before such judgment has been satisfied, winding-up proceedings have been commenced.

[*Re Heyden* (1869), 29 U.C.Q.B. 262; *Re Toronto Wood & Shingle Co.* (1894), 30 C.L.T. 353, referred to.]

Statement.

APPLICATION by liquidator for directions or a declaration under the Dominion Winding-up Act, R.S.C. 1906, ch. 144.

J. B. Kenny, for the motion.

R. H. Murray, K.C., *contra*.

Harris, C.J.

HARRIS, C.J.:—The liquidator appointed under the Winding-up Act, R.S.C. 1906, ch. 144, has applied to the Court for an order declaring that a judgment recovered in the Supreme Court by the Imperial Oil Co., Ltd., against the A. S. McDonald Co., for a debt due and owing, and which judgment was recorded in the office of the Registrar of Deeds for the county where the lands are situate does not constitute a lien or encumbrance upon the lands of the company and that the liquidator is entitled to sell and convey the lands free from any lien or encumbrance or by the judgment. The claim of the liquidator is that proposed purchasers of the lands have refused to buy because of the recorded judgment and the estate will get more for the land if it can be sold free and clear of any doubt as to the judgment being an encumbrance.

The first question is as to whether the judgment binds the lands or whether the lien which would otherwise exist is taken away by sec. 84 of the Winding-up Act.

Section 84 is in part similar to sec. 13 of the Upper Canada Insolvent Act of 1865, 29 Vict., ch. 18 (2nd sess.), or sec. 83 of the Insolvent Act of 1875, 38 Vict., ch. 16, and provisions in part similar are to be found in sec. 45 of the Imperial Bankruptcy Act of 1883, 46-47 Vict. (Imp.), ch. 52, and sec. 11 (1) of the Bankruptcy Act of 1890, 53-54 Vict. (Imp.), ch. 71; also the Ontario Assignments Act of 1897, R.S.O. 1897, ch. 147, sec. 11, and sec. 14 of the present Assignments Act of Ontario, R.S.O. 1914, ch. 134.

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Harris, C.J.

I quote sec. 83 of the Insolvent Act of 1875:

83. No lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor has been assigned to an assignee, or if proceedings to place the same in liquidation under this Act, have been adopted and are still pending. But this provision shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the Province in which such writ shall have been issued.

This is similar to the other Acts referred to. It will be noted that it does not deal with the lien created by the registration of a judgment for the purpose of binding lands and it was held in *Dereber* v. *Austin* (1875), 3 Pugs. (N.B.) 55, by the Supreme Court of New Brunswick that a judgment a memorial of which had been registered could be enforced against the real estate of a person who afterwards became insolvent and made an assignment under the Insolvent Act of 1869, 32-33 Vict., ch. 16. The same conclusion was reached by the Supreme Court of Nova Scotia in the case of *Murdock* v. *Walsh* (1873), 9 C.L.J. (N.S.) 198.

It would seem that sec. 84 of the Winding-up Act must have been enlarged in its scope to get rid of the effect of these decisions.

In Clarke's Insolvent Act, 1877, at page 249, he says of sec. 83 of the Insolvent Act:

The aim and policy of the insolvent law as expounded in this section are to prevent all judgment debts, without exception, becoming a lien if the money recovered is not paid over before the insolvency.

And at 250:

In the Province of Ontario, before the passing of the Act, an execution creditor, when he placed his writ in the sheriff's hands, had a particular lien on his debtor's property, to the extent of his debt and costs. This section deprives him of that lien, for the judgment debt, under the circumstances stated; but it does not affect his lien for the costs of recovering that judgment, and a judgment creditor who has an execution in the sheriff's hands at the time the assignment is made, is entitled to rank for his costs of the judgment as a privileged creditor, against the insolvent (*In re Heyden* (1869), 29 U.C.Q.B. 262; overruling *In re Ross* (1866), 3 P.R.U.C. 394; see also *Canada Landed Credit Co.*, v. *McAllister* (1874), 21 Grant 593).

Where proceedings for compulsory liquidation are taken under the Act, and an attachment is issued, money which has been levied by the sheriff under an execution against the debtor, but which has not been paid over to the judgment creditor, passes to the assignee, under this section (*Bullen* v. *Harding*, 1871; Steven's Digest, N.B. Reports, 3rd ed., page 413).

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In the case of *Re Heyden*, 29 U.C.Q.B. 262, Morrison, J., delivering the judgment of the Court, said of the corresponding section of the Insolvent Act, at 264, "The object of the section was to provide against judgments being a lien."

There are similar declarations as to the sections of the Bankruptcy Acts dealing with the matter and in Mitchell on Canadian Commercial Corporations at 1552-1553 he says of sec. 84:

> The aim and policy of the section are to prevent all judgment debts, without exception, becoming liens, if the moneys recovered are not paid over before the commencement of the winding-up.

It is argued that some meaning must be given to secs. 76 to 80 of the Winding-up Act, and that these sections recognise that there may be registered judgments not validated by sec. 84. There is a suggestion that these sections may be given effect to where money has been lent on the security of a judgment. I express no opinion on this point. It is sufficient to say that the judgment in question is not of that class and the point does not arise here.

The lien which the judgment in question constituted under the statute of Nova Scotia seems to be taken away by sec. 84 and under that section the liquidator can sell and dispose of the lands free from any lien or encumbrance so far as the judgment is concerned.

A question has been raised as to whether the Court should on summary application make the order applied for or grant an order giving leave to the liquidator to bring an action.

In *Re Toronto Wood and Shingle Co.* (1894), 30 C.L.T. 353, at 356 the Master in Ordinary in Ontario said:

> And it must be kept in view that the intention of this Winding-up Act and of all legislation respecting insolvency is to get within the control of one Court all the estate of the insolvent company to settle there all claims of debt, privilege, mortgage, lien or right of property upon, in or to any effects or property of such insolvent company in the simplest and least expensive way, and to distribute its assets among its creditors in the most expeditious manner possible, and not to have the proceedings of the Winding-up Court or the distribution of the assets delayed or impeded by or dependent upon outside or expensive litigation in other Courts.

This is, I think, a correct statement as to the matter, and I think the effect of the various sections of the Act is to give the Court power to make the order asked for. If it is perfectly clear, as I think it is, that the judgment is not to be regarded as a lien upon the property, and if as is alleged by the liquidator, the fact of the

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judgment being on record prevents, or interferes with, the sale on proper terms of the lands, then it seems clearly to be the duty of the Court to protect the creditors and the estate by an order such as is asked for. There are no facts in dispute and to give leave to bring an action would have no result except to increase the costs and delay the winding-up proceedings for many months.

The judgment creditor should, as a condition of the order, be paid his costs of recovering the judgment; otherwise he will be in a worse position than the other creditors.

There should be no costs against the judgment creditor on the application.

RUSSELL, J., RITCHIE., E.J., and CHISHOLM, J., concurred with Harris, C.J.

Mellish, J.

MELLISH, J. (dissenting):—This is an application to the Court for directions or a declaration under the Dominion Winding-up Act. A Winding-up Order has been made and a liquidator appointed who is desirous of selling the real property of the company. The Imperial Oil Co., before the winding-up proceedings were taken, obtained a judgment against the McDonald Co. which was duly registered in the Registry of Deeds where the lands lie. The Court is asked by the liquidator to make a declaration that no lien or charge exists by reason of this registry and that the liquidator is at liberty to sell these lands unburdened by the judgment. Section 16 of the Nova Scotia Registry Act, R.S.N.S. 1900, ch. 137, is as follows:

16. A judgment, a certificate of which is registered in the manner by this chapter provided in the registry of any district, shall, from the date of such registry, bind and be a charge upon any land within the district of any person against whom such judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment.

This is in effect, I think, a re-enactment of old Provincial legislation.

Sec. 84 of the Dominion Winding-up Act is as follows, R.S.C. 1906, ch. 144.

84. (2) No lien, claim or privilege shall be created upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or making of any attachment or garnishee order or other process or proceeding, if, before the payment over to the plaintiff of the moneys actually levied, paid or received under such

writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding-up of the business of the company has commenced; provided that this section shall not affect any lien or privilege for costs, which the plaintiff possesses under the law of the Province in which such writ, attachment, garnishee order or other process or proceeding was issued.*

We are asked to declare that his latter section in effect annuls the Provincial section above quoted, at least to this extent,—that the registry of a certificate of an unsatisfied judgment constitutes no charge on the land of an incorporated company, no matter when made, if when the company is subsequently being would up under the Dominion Act.

I am not prepared to assent to this very broad proposition as a general statement of the law. I do not think we have before us sufficient material to enable us to determine whether sec. 84 above quoted is applicable to the particular circumstances of the present case.

It is not shewn how or when the company which is being wound up was incorporated, or how sec. 6 of the Winding-up Act is applicable to that company. It is not shewn whether or not the company was solvent when the judgment in question was registered. The question raised appears to be one in my opinion of great difficulty, if one can judge from the meagre materials before us. That registered judgments may constitute valid liens even against the property of companies that are being wound up would appear clear from sec. 80 of the Act—under what circumstances? If we grant the application on the material before us we must answer—"Under no circumstances." I am not prepared to say this. Is sec. 84 intended to annul liens and charges created under Provincial statutes? And, if so, to what extent and under what conditions?

I would decline to make the declaration asked for but would give the liquidator leave to determine by action the question at issue if he be so advised.

Application granted.

*Repealed 7-8 Ed. VII. 1908, ch. 75, sec. 1.

SASK.

C. A.

Re DEVOLUTION OF ESTATES ACT. Re BAKER ESTATE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. December 23, 1919.

DESCENT AND DISTRIBUTION (§ I E—20)—WILL—RIGHTS OF WIDOW FOR LIFE OR UNTIL RE-MARRIAGE—RIGHTS OF CHILDREN—PROVISION FOR WIDOW LESS THAN IF TESTATOR HAD DIED INTESTATE—RIGHT TO RELIEF—DEVOLUTION OF ESTATES ACT, R.S.S. 1909, CH. 43 AND AMENDMENTS.

The provisions of the Devolution of Estates Act, R.S.S. 1909, ch. 43, as amended by 1 Geo. V. 1910-1911, ch. 13, must be strictly interpreted. A widow may obtain relief against the provisions of a will by which she is left a lesser share of her late husband's property than she would have received had he died intestate.

Statement.

APPEAL by widow from a refusal to grant an application under sections 11a and 11g of the Devolution of Estates Act (Sask.). Reversed.

G. A. Cruise, for appellant; *H. Fisher*, for the official guardian.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—One T.H.C. Baker died in December, 1918, leaving a widow (the appellant), and three infant children all under the age of 10 years. By his will, after providing for payment of his debts and funeral expenses, he left the whole of his property to his executors on the following trusts:—

Firstly, to sell and dispose of my real estate and personal property or so much thereof as they may deem advisable as soon after my death as to them shall appear necessary or expedient either at public or private sale, whichever they shall think best, and to execute all transfers and other documents necessary to give title to the purchaser or purchasers thereof. (As a suggestion only to my executors and trustees I mention that my wife and family might find it more convenient and be able to live with less expense after my demise on the south-east quarter of section 28, 33, 22, west of the third meridian, if I should possess this property at the time of my death, in which case it might not be advisable to sell the said quarter at least for some time.)

Secondly, to collect in all accounts and debts outstanding as soon after my decease as possible and the proceeds of such sales and collection as aforesaid after paying all my debts and funeral expenses to invest in good security on real estate, preferably farm property in Canada, and when necessary to re-invest the same.

Thirdly, to pay over to my wife until she shall re-marry or until her death, whichever event shall happen first, the entire interest or proceeds from the aforesaid investments. And I direct my said wife to apply the said proceeds, so long as the same shall be paid to her, for her maintenance and support and the maintenance and support of my children.

Fourthly, should my wife re-marry or die while any of my said children are under the age of twenty-one years, I direct my executors and trustees to then apply the interest and proceeds from the said investments towards the maintenance and support and education of my said children in such proportions as their needs may require, and the funds at the disposal of my said executors and trustees may admit of, until such time as my youngest

living child shall be of the age of twenty-one years, at which time I direct my executors and trustees to realise upon the said securities and pay over to my children then living all my property share and share alike.

Provided only that should any of my children now living be then dead leaving child or children them surviving the share or shares which would have gone to my said child or children if living I direct to be paid to my grandchild or grandchildren share and share alike.

Should my wife die or re-marry after my youngest child then living is of the age of twenty-one years, I then direct my said executors and trustees upon the death of my said wife or upon her re-marriage, whichever event may happen first, to realise upon the said securities and to pay over to my children then living all my property whatsoever share and share alike, provided only that should any of my children now living be then dead leaving child or children them surviving, the share or shares which would have gone to my said child or children if living, I direct to be paid to my grandchildren share and share alike.

Fifthly, if upon the death of my wife all my children should also be dead leaving no children them surviving, I then direct my executors and trustees to pay over all my property to my next-of-kin share and share alike.

Sixthly, I direct that such portion or portions of the said securities as may be necessary for the purpose, be realised upon, and the proceeds applied to the support and maintenance of my said wife and children for so long and for such periods as may be necessary to secure for my said wife and children a comfortable living.

An application was made by the widow under secs. 11a and 11g. of the Devolution of Estates Act, R.S.S. 1909, ch. 43, as amended by 1 Geo. V., 1910-11, ch. 13, which are as follows:—

11*a*. The widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the Judge before whom the application is made receive less than if he had died intestate leaving a widow and children may apply to the Supreme Court for relief.

11*g*. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as shall in the opinion of the Judge be equal to what would have gone to such widow under this Act had her deceased husband died intestate leaving a widow and children.*

This application was refused by the Judge to whom it was made, and the widow now appeals.

The reasons given for refusing the application are as follows:—

The sole ground of the application is that she is entitled as of right to one-third of the estate and the limitation on re-marriage makes the bequest under the will of less value than her distributive share would be.

In my opinion if the Legislature intended to confer on a widow a right to demand at least her distributive share as an intestacy and permit her to elect against any testamentary disposition depriving her thereof, they would have plainly legislated therefor. It is difficult to lay down any general rule as to the application of the section. But where as here the testator appears to have fully appreciated the moral responsibility and made ample

*See the Devolution of Estates Act, 1919, 9 Geo. V. 1918-9 (Sask.), ch. 20.

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provision for his wife during her lifetime up to the time when his responsibility would cease, and be accepted by another and those who might suffer if the widow received money would be their infant children, it does not appear to me that the widow really needs "relief." The Act was never intended to compel a husband to provide a dowry for his widow on re-marriage.

The application is dismissed with costs to be paid by the applicant.

Haultain, C.J.S.

If the deceased had died intestate, his widow would have been entitled to 1/3 of all his property absolutely. It cannot be argued, therefore, that under the terms of the will she would not receive less than if he had died intestate. Under those terms she is obliged to apply the income arising from the trust fund for her maintenance and support and the maintenance and support of the 3 children so long as they live. That practically means that she will only have the benefit of one-fourth of the estate, and that only so long as she remains unmarried. I will not go so far as to hold that the wife's right under this legislation is absolute, and that relief should always be granted without regard to all the circumstances of the case.

It is quite clear from section 11g of the Act, that the wife has not an absolute right to 1/3 of the property, as that section gives a large discretion to the Judge as to the nature and amount of the allowance to be made.

But where, as in this case, the wife is left manifestly worse off than she would have been in the case of intestacy, and has done nothing to disentitle her to relief, I think the relief ought to be granted.

I would therefore allow the appeal. The order dismissing the application should be set aside and an order made declaring the appellant entitled to one-third of the estate.

The costs of all parties should be paid out of the estate.

NEWLANDS, J.A., concurred with LAMONT J.A.

Lamont, J.A.

LAMONT, J.A.:—This is an application by the widow of the late Thomas H. C. Baker, for an order that the executors of the will of her late husband do pay to her 1/3 of the proceeds of all properties of which her husband died possessed.

Baker died in December, 1918, leaving a widow and 3 infant children, the eldest of which is stated to be under 10 years of age. He left property to the value of $30,000. By his will, which was made in March, 1915, he left all his property to his executors in trust to realize the same, pay his debt and funeral expenses,

and invest the remainder in good securities. The will then contained the following:—

Thirdly, to pay over to my wife until she shall re-marry or until her death, whichever event shall happen first, the entire interest or proceeds from the aforesaid investments. And I direct my said wife to apply the said proceeds, so long as the same shall be paid to her, for her maintenance and support and the maintenance and support of my children.

Fourthly, should my wife remarry or die while any of my said children are under the age of twenty-one years, I direct my executors and trustees to then apply the interest and proceeds from the said investments towards the maintenance, support and education of my said children in such proportions as their needs may require and the funds at the disposal of my said executors and trustees may admit of, until such time as my youngest living child shall be of the age of twenty-one years, at which time I direct my executors and trustees to realise upon the said securities and pay over to my children then living all my property share and share alike.

The application is made under the Devolution of Estates Act, R.S.S. 1909, ch. 43, as amended by 1 Geo. V., 1910-11, ch. 13. Sections 11a and 11g of the Act read as follows:—

(See judgment of Haultain, C.J.S.)

Power is then given to the Court to direct that any allowance made may be by way of an amount payable annually or otherwise, or a lump sum to be paid, or of certain property to be conveyed to her for life or for a term of years or for her use and benefit, as the Court may see fit.

Sec. 4 of the Act provides that if a man dies intestate leaving a widow and a child or children or issue 1/3 of his real and personal property shall go to his widow.

The language of sections 11a and 11g clearly indicates an intention on the part of the Legislature to restrict the right of a man to dispose of his property by will to the exclusion of his wife.

From the abolition of dower by the Territories' Real Property Act to the enactment of the above sections, a man living in the territory now forming this Province had the power to dispose by will of all his property without making the slightest provision for his wife and children. Cases arose in which men willed away their property without making any, or sufficient, provision for the widow and cases of such hardship arose that the Legislature took steps to prevent the injustice being continued.

The Legislature had previously provided that in case a man died intestate leaving a widow and child, or children, 1/3 of his real and personal property should belong to the widow. The

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Lamont, J.A.

Act as it now stands gives the Court jurisdiction to place the widow in as favourable a position where her husband has made a will but in which he has not left her as large a share of his property as would have been hers had he died without a will.

The first question therefore is: Did the deceased Baker by his will leave his widow 1/3 of his real and personal estate?

A perusal of the will shews that he did not. He left her only the income until she remarried (if she should remarry), and even then she was directed to use that income for the maintenance of the children as well as herself. If she re-married, she lost it all.

The trial Judge was of opinion that if a man made ample provision for the needs of his widow until she married another, whose duty it would be to provide for her maintenance, that she did not stand in need of "relief." With deference, I think he misinterpreted the language of section 11 (a). The "relief" for which a widow may apply to the Court is not the procuring of such a sum of money as will be sufficient to provide her with the necessaries of life according to her station. It is relief against the provisions of a will by which she has been left a lesser share of the property of her late husband than she would have had received had he died intestate. If the will does not leave her the equivalent of what she would have received upon intestacy, she need not be bound by its terms but may apply to the Court for that equivalent. This is what the widow has done here, and in my opinion she is entitled to 1/3 of the estate.

I do not see that either she or the children would be placed in any better position if the Court gave her that share in any of the ways provided by the Act other than by way of a lump sum. I think, therefore, she should be given a lump sum. See *Re Ostrander Estate* (1915), 8 S.L.R. 132; *Re Estate of Joseph Davison* (1919), 46 D.L.R. 259, 12 S.L.R. 167; *Drewry* v. *Drewry*, 30 D.L.R. 581, [1916] 2 A.C. 631.

The appeal should be allowed, the order dismissing her application set aside, and an order made decreeing that she is entitled to a one-third share of the real and personal property of the deceased. The costs of all parties to be paid out of the estate.

Appeal allowed.

THE KING v. MANDACOS.

N. S.

S. C.

Nova Scotia Supreme Court, Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. December 19, 1919.

BAIL AND RECOGNISANCE (§ I—17)—ESTREAT—CHARGE AT PRELIMINARY HEARING—CHARGE BY GRAND JURY—MOTION TO SET ASIDE.

A bailor remains responsible for a prisoner being brought into Court even though the charge on which the accused was committed for trial was later changed to a more serious charge by the grand jury. The bail may be estreated, if the prisoner is not produced.

Statement.

MOTION to set aside estreat of bail. Dismissed.

J. J. Power, K.C., in support of motion.

Andrew Cluney, K.C., for the Attorney-General, *contra*.

Longley, J.

LONGLEY, J. (dissenting):—In this case the bailor undertook to be responsible for the prisoner being brought into Court and charged with the crime of improper assault. As a matter of fact the jury brought in the prisoner for rape—one of the most serious crimes with which he could be charged. The bailor Petropolis would say, properly, that he did not give bonds for the appearance of the prisoner on such a charge as this, and would not have gone as bondsman for such a charge as this, and we have clear undisputed Canadian authority, viz: *The Queen* v. *Ritchie* (1865), 1 C.L.J. (N.S.) 272, 3 Can. Cr. Cas. 5, and *The Queen* v. *Wheeler* (1865), 1 C.L.J. (N.S.) 272, 3 Can. Cr. Cas. 7. I am not aware that these determinations—one by the highest Judge in Ontario, and the other by a distinguished Judge in the Province of Manitoba, now since deceased—have ever been called in question, and therefore I think that the hunting up of cases in Massachusetts is unnecessary and of no significance, and they ought not to be considered by this Court.

The application, therefore, in my opinion, should be allowed.

Mellish, J.

MELLISH, J.:—This is an application to set aside an order of the Chief Justice authorising the estreat of a recognisance. The application is made on behalf of a surety, Nicholas Petropolis.

It appears from the printed record before us that an information for rape committed by Mandacos and another was laid and heard before W. B. McDonald, Stipendiary Magistrate for the County of Halifax, on May 8, 1918. The magistrate heard the evidence and committed the accused for trial at the next Criminal Court upon the charge of indecent assault, as he was of opinion that the evidence would not support the charge of

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rape. On May 16, 1918, the accused, Mandacos, was admitted to bail upon entering into a recognisance with Petropolis as surety, conditioned as follows:

If therefore the said Basil Mandacos will appear at the next court of criminal jurisdiction to be holden in and for the county of Halifax and there surrender himself into the custody of the keeper of the common jail there and plead to such indictment as may be found against him by the grand jury for and in respect to the charge aforesaid and take his trial upon the same, and does not depart the said Court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

This condition is in the statutory form required by the Can. Crim. Code and the English Indictable Offences Act, 1848, sec. 23.

Mandacos did not appear at the said Court and is still apparently out of the jurisdiction. The grand jury found an indictment for rape against him at said Court.

The motion to discharge the order estreating the recognisance is made before us upon the sole ground that the surety was required by the terms of the recognisance to have Mandacos before the Criminal Court only in the event of an indictment being found against him for the charge upon which he was committed, viz.: Indecent assault; and that consequently, no such indictment having been found, no condition of the recognisance was unfulfilled.

In my opinion this is not the proper interpretation of the condition.

I think, under the recognisance in question, the accused was bound to appear in Court and not "depart the said Court" without leave, whether any indictment was found against him or not. The main object of the recognisance, in my opinion, is to keep the accused under the control of the Court just as if he had been committed for trial, in which case, even if no bill were found against him, he would nevertheless not be discharged without an order of the Court.

I very much regret that I am unable to agree with the view expressed by Hagarty, J., and Morrison, J., in the case of *The Queen* v. *Wheeler* and *Queen* v. *Ritchie*, reported in 3 Can. Cr. Cas. at 7 and 8.

The argument that the surety might be willing to become bail for a lesser offence and not for a greater is, I think, with great respect, even if precisely relevant, which I much doubt,

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insufficient to control what I conceive to be the true meaning and plain construction of the recognisance. The surety is not strictly bail for any offence, but for the appearance of the accused, and the amount of his liability remains the same whatever the charge against the accused may be. This is pointed out in the old case of *Rex* v. *Ridpath*, Fortes 358, where the point seems to have been raised. By parity of reasoning to that adopted in this argument the recognisance would, I think, be equally void if the indictment was for a lesser offence than that originally charged, because if the surety is only bail in respect of one offence he should not be held to be bail in respect of another.

I am much impressed by the case of *The State* v. *Stout* (1829), 11 N.J.L. 124 (1830), at 362, and am of opinion that the views therein expressed are more in accordance with the true interpretation of the document in question. The case of *The Queen* v. *Hamilton* (1899), 3 Can. Cr. Cas. 1, is not, I think, an authority in point on the facts therein disclosed, although the Judges who decided it apparently adopted the decisions in the cases of *The Queen* v. *Wheeler* and *The Queen* v. *Ritchie* above referred to. In the case of *The Queen* v. *Hamilton* the recognisance was conditioned simply on appearing "to receive sentence." The conviction in the meantime having been quashed it would appear inequitable to estreat the recognisance if there was nothing else for which he could be detained if he had appeared. It appears from the judgment of Killam, C.J., in this case that no authority was found opposed to that of the Ontario cases relied on.

I also refer to the following authorities: *Commonwealth* v. *Teevens* (1887), 143 Mass. 210; *O'Brien* v. *The People* (1866), 41 Ill. 456; *The State* v. *Hancock* (1892), 54 N.J.L. 393; *Silvers* v. *The State* (1896), 59 N.J.L. 428.

DRYSDALE, J., and RITCHIE, E.J., concurred with MELLISH, J.

Drysdale, J.
Ritchie, E.J.

Motion dismissed.

SASK.

C. A.

BROWN v. BANK OF OTTAWA.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. December 23, 1919.

JUDGMENT (§ VII A—288)—PETITION TO REVOKE—EVIDENCE—ALLEGED PERJURY—ACTION DECIDED ON EVIDENCE OF APPLICANT.

An application to set aside a judgment on the grounds of perjury on the part of one party's witnesses will not be granted, when the merits of the action were decided on the evidence given by the party who makes the application.

Statement. APPEAL in an action to set aside a judgment on the grounds that it was obtained by fraud. Affirmed.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

Newlands, J.A. NEWLANDS, J.A.:—This action is to set aside a judgment as having been obtained by fraud; the fraud alleged being the perjury of defendant's witnesses who were also their employees. The action in which the judgment was obtained was on 3 claims: (1) A claim for damages for breach of contract for not advancing money as agreed; (2) damages for illegal seizure and sale of plaintiff's live stock, and (3), damages for malicious prosecution on a criminal charge.

I tried the action in question, and on looking up the proceedings on that trial I find that I dismissed the first claim upon the plaintiff's own evidence, and as to the third: that, although there was a favourable termination to the proceedings in the plaintiff's favour, the Attorney-General having declined to lay a charge, by the plaintiff's own evidence he was guilty of the offence as charged. I therefore dismissed both these claims as a result of the plaintiff's, not the defendant's, evidence, so that neither perjury nor fraud on the part of the defendant entered into my judgment. On the other claim, that for damages for illegal seizure and sale of plaintiff's live stock, I found in favour of the plaintiff for $150.

The principal evidence given by defendants was on their counterclaim, upon which I found in their favour; the only dispute being as to the amount plaintiff owed defendants.

Upon the argument of this appeal, plaintiff, who appeared on his own behalf, stated that he had no other witnesses than those that appeared at the former trial; therefore, before the judgment can be quashed on the ground of perjury, another Court would have to rehear the case and decide upon the same evidence as was before me which of the witnesses was telling the truth.

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Newlands, J.A.

This to my opinion would be only a retrial of the original cause of action; in other words, the present application is for a new trial on no other grounds than the assertion of the plaintiff that defendant's witnesses perjured themselves, and when it is considered that this evidence only applied to the counterclaim, the plaintiff's cause of action having been either dismissed on his own evidence or found in his favour, it will readily be seen that it is an application that would not be granted.

I think the stay granted until plaintiff pays the costs of the former action should stand, and that the appeal should be dismissed with costs. *Appeal dismissed.*

CANADIAN GRAIN Co. Ltd. v. NICHOL.

SASK.

K. B.

Saskatchewan King's Bench, Bigelow, J. December 18, 1919.

BROKERS (§ II B—12)—SALE OF GRAIN—DIFFERENT BUYERS—LOSS—COMMISSION—NO PRIVITY OF CONTRACT.

A broker who does not procure privity of contract between two principals, and fails to establish performance of the contract for which he was employed, cannot succeed in an action for loss sustained by him and for commission.

[*Beamish* v. *Richardson* [1913] 13 D.L.R. 400 (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595; *Smith Grain Co.* v. *Pound* (1917), 36 D.L.R. 615, 10 S.L.R. 368, followed.]

ACTION by a broker to recover commissions on a sale of grain. Statement.

H. Phillipps, K.C., for plaintiff; *J. A. Allan*, K.C., and *G. A. Cruise*, for defendant.

BIGELOW, J.:—The plaintiff is a broker dealing in grain. On July 19, 1916, the defendant instructed plaintiff to sell for him on the Winnipeg market 5,000 bushels of wheat for delivery in the month of October at the price of $1.14¼ per bushel. The plaintiff, through its agent, on the Winnipeg Grain Exchange, Norris Commission Company Ltd., made the said sale. The name of the purchaser is not mentioned in the confirmation slip sent by the Norris Company to plaintiff or in the confirmation slip sent by plaintiff to defendant. On July 20, 1916, plaintiff sent defendant this letter:— Bigelow, J.

D. Nichol, Saskatoon, Sask.—Dear Sir,—We enclose herewith confirmation of the following trade made to-day for your account, sold five Wpeg. Oct. wheat at $1.14¼.—Yours truly, Canadian Grain Company, Limited, per L. D. Peterkin.

and the slip enclosed in the last mentioned letter reads as follows:—

Canadian Grain Co., Limited, Grainger Building, Saskatoon, July 20th,

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1916.—D. Nichol, 711 14th Street, City.—We beg to confirm the following transactions made by us to-day for your account: Sold: Quantity M. 5, Market Wpeg., Delivery Oct., article wheat, price 114¼. These transactions are made subject to the rules and customs of the Exchange at the place of contract, and the right is reserved to close the transactions when the margins are exhausted, or nearly so, without giving further notice. The Canadian Grain Co., Limited, per S. Edwards.

Similar transactions were entered into on July 21, 2,000 bushels at $1.15 and on July 27, 2,000 bushels at $1.23.

On October 24, 1916, at the request of plaintiff's officer, Vanatter, defendant signed a slip instructing plaintiff to buy 9,000 bushels of wheat for October delivery at the market price, which plaintiff, through its agent, the Norris Company, bought on the Winnipeg Exchange at $1.81 per bushel. Vanatter says he obtained these instructions to prevent further loss when he discovered that defendant could not deliver the wheat which he had agreed to. I accept this evidence.

This action is brought to recover the loss sustained by the plaintiff on these transactions and for commission.

The defences relied upon are: First, that the contracts are illegal, being contrary to section 231 of the Criminal Code; second, that the plaintiff did not make privity of contract between two principals.

Vanatter, the vice-president of the plaintiff, gave evidence that at the first conversation defendant wanted to sell wheat for delivery in the fall. The defendant agrees with that first conversation. Vanatter explained that plaintiff would need some protection as a guarantee for delivery and accordingly defendant paid plaintiff $350 for that purpose. Wheat advanced in price and plaintiff agreed to carry defendant if he would sign a binding agreement to make the deliveries and defendant then entered into this agreement:—

Made in duplicate the 20th day of July, A.D. 1916.

This Agreement between the Canadian Grain Company, Limited, hereinafter called the "company," of the first part, and D. Nichol, of the city of Saskatoon, in the Province of Saskatchewan, of the second part.

Witnesseth that the parties hereto mutually agree as follows:—

(1) The seller does hereby constitute and appoint the company, and the company agrees to act, as the seller's agent, to sell on the Winnipeg Grain Exchange and according to the rules and regulations thereof 5,000 bushels of wheat for delivery in the month of October at and for the price of 1.14¼ cents per bushel; bushels of.....for delivery in the month of.....

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at and for the price of....cents per bushel.....bushels of.....for delivery in the month of.....at and for the price of.....cents per bushel.

(2) The seller hereby warrants that he has now under crop: in wheat, 140 acres of the S.W. ¼ sect. 22 and N.W. ¼ sect. 15-36-2-3, and in wheat 200 acres of the N. ½ sect. 11 35-2-3, and in flax.....acres of the.....

(3) The seller covenants and agrees with the company to deliver all grains sold by the company on his behalf, and further covenants and agrees that all grain so delivered shall grade not lower than number three Northern.

(4) The seller covenants and agrees to indemnify and save harmless the company from all loss or damage arising directly or indirectly from failure of the seller to so deliver.

(5) It is understood and agreed that delivery herein means that all grain sold by the company on behalf of the seller shall be received in the terminal elevators at Fort William on or before the last day of the month named for delivery.

(6) The seller does further constitute and appoint the company and the company agrees to act as the seller's agent to market all shipments of grain made by the seller of all grain grown by the seller in the year 1916, and the seller agrees to consign all such shipments to the company and to pay to the company one cent for each bushel of grain so marketed.

In witness whereof the party of the first part has hereunto affixed its corporate seal duly attested by the hands of its proper officers, and the party of the second part has hereunto affixed his hand and seal, the days and year first above written.

Witness to signature of David Nichol
S. Edwards.

For The Canadian Grain Company, Limited.
Per C. R. Vanatter.
For the seller
David Nichol.

Similar agreements were entered into on July 21 and 27, 1916.

Lloyd Peterkin, a clerk in the plaintiff's office at the time, also swears that defendant told him when he sold the first 5,000 bushels that he intended to deliver the wheat. I find from the evidence that at the time the instructions were given to the plaintiff to sell, plaintiff and defendant intended that the wheat was to be delivered and the transaction in question does not come within sec. 231 of the Criminal Code. This disposes of the defence of illegality.

As to the other defence that the plaintiff did not make privity of contract between two principals: see *Smith Grain Co.* v. *Pound* (1917), 36 D.L.R. 615, at 618, 10 S.L.R. 368, *per* McKay, J.:—

> The plaintiff sues as an agent who was employed to sell defendant's wheat; he does not claim that defendant sold the wheat to him. He would, therefore, in my opinion, in order to succeed in his action have to shew that he made a valid and subsisting contract between defendant and a third party, that is, that a third party agreed to buy, whom the defendant could hold liable.

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In *Johnson* v. *Kearley* [1908] 2 K.B. 514, at 528, Fletcher Moulton, L.J. says: "The office of broker is to make privity of contract between two principals."

At the trial evidence was given that the Norris Company had completed the different transactions with different individuals and the names were given to the defendant for the first time, but Robb, an employee of the Norris Co., says: "In executing an order for a client with another broker on the Exchange we do not furnish the name of the person for whom we are acting to the other broker. We appear in all our contracts as principals with the other members of the Exchange."

There was no evidence before me as there was in *Richardson* v. *Beamish* (1913), 13 D.L.R. 400, 21 Can. Cr. Cas. 487, 23 Man. L.R. 306, of the system of the clearing house, but there is sufficient evidence to shew that the Norris Co. made settlement for the loss with the clearing house. Further, the loss was charged by the Norris Co. to the plaintiff on 3 different dates: September 2, September 18, and October 24. They had money on deposit for margins and it was charged against them.

As Howell, C.J.M., remarks in *Richardson* v. *Beamish*, *supra*, at p. 404:—

> The plaintiffs in this case, by acting through the clearing house, did not procure privity of contract with a principal, and if the rules of the Exchange permit this they are unreasonable, and I see no evidence whatever that the defendant had notice of it.

I am unable to distinguish this branch of the case from *Beamish* v. *Richardson* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595, which I am bound to follow.

See judgment of Anglin, J., 49 Can. S.C.R., at 618:—

> Their commission was to procure persons to enter into binding contracts to buy grain from the defendant. It is admitted that, although they made contracts with other brokers for the sale of grain in the quantities stipulated, these contracts were all subject to the rules of the Clearing House Association—an adjunct of the Winnipeg Grain Exchange. It is conclusively established by the evidence that, as a result of what the plaintiffs did in professed fulfilment of the defendant's commission, he did not, and it was intended that he should not, obtain any contract whereby any other person became and remained bound to him as a purchaser of the grain which he instructed the plaintiffs to sell on his account. . . . In fact, as the net result of what occurred, the personal responsibility and solvency of the plaintiffs was the only security which the defendant had that, at the maturity of the contract he had employed them to make for him, purchasers would be available to take his grain and pay him the sale prices. Nobody else was under any contractual obligation to do so. Such an outcome is something

so radically and essentially different from what is contemplated by the instructions ordinarily given to a broker to buy or sell stocks or commodities that it could be taken to be a performance of the broker's undertaking only upon the clearest proof that the principal knew of the rules which operated to produce it, and therefore contemplated the adoption of this method of carrying out his mandate. . . . The present case, in my opinion, falls within the principle of the authorities cited and relied upon by the learned Chief Justice of Manitoba, in whose conclusions on this branch of the appeal I respectfully concur.

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See also *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802, 33 L.T. 544.

I find that the plaintiff did not procure privity of contract between two principals and fails to establish the performance of the contract for which defendant employed him, and, therefore, plaintiff's action is dismissed with costs.

Action dismissed.

FENERTY v. THE CITY OF HALIFAX.

N. S.
S. C.

Nova Scotia Supreme Court, Longley and Drysdale, JJ., and Ritchie, E.J. January 13, 1920.

JUDGMENT (§ II A—60)—FORMER ACTION—DISMISSED—NEW ACTION—IDENTICAL ISSUES—ESTOPPEL—RES JUDICATA.

When the cause of action and the issues sought to be set up are identical with the cause and the issues already disposed of upon a former trial, the plaintiff is estopped from bringing the new action.

[*Phosphate Sewage Co.* v. *Molleson* (1879), 4 App. Cas. 801, referred to.]

APPEAL from the judgment of Mellish, J., dismissing a motion made on behalf of defendant to stay plaintiff's action on the ground that the matters in issue were *res judicata*. Statement.

F. H. Bell, K.C., for appellant; *J. McG. Stewart*, for respondent.

LONGLEY, J.:—I have read the judgment of my brother Ritchie in this case and I approve of the same. The pleadings in this case are the same as the pleadings in the former case, and if the plaintiff desired or was capable of proving there was a distinct set of facts existing, or that entirely new conditions were involved as respects the stream of water, he could easily have said so. In order to maintain a case of this character it is necessary to shew some real substantial difference between the present action and the one which has already been disposed of, and it is necessary to shew furthermore that things exist at the present time which did not exist then; and if conditions existed then which would have enabled him to succeed on that action, they should have been Longley, J.

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pleaded and he should not be able to bring them up now. The law is entirely clear upon the question of estoppel. The plaintiff in this action has said nothing, done nothing, alleged nothing which would make the present suit one particle different from the former suit, and if actions of this kind can be brought year after year the City of Halifax would be entirely without any remedy. The burden is on the plaintiff if he wishes to escape the matter of *res judicata* to shew conclusively that something can now be brought forward which could not be brought forward in the former suit. The plaintiff having failed to do that must fail in this case. I am in favour of allowing the appeal and dismissing the action with costs.

Drysdale, J.

DRYSDALE, J.:—I agree with my brother Ritchie.

Ritchie, E. J.

RITCHIE, E.J.:—In the year 1910 the plaintiff in this action brought an action against the City of Halifax claiming that in the months of June, July, August, September, October and November, 1909, the city wrongfully obstructed the stream leading from the Chain of Lakes to the North West Arm and withheld and permanently diverted water to which the plaintiff claimed that he was entitled. The action was tried before Drysdale, J., and the judgment was in favour of the city. This action was brought in 1911 and the statement of claim is for all practical purposes the same as in the former case except that the months of May, June, July, August, September, October and November, 1911, are substituted and damages claimed in respect of these months. I quote the judgment of my brother Drysdale in the former case because it states clearly the matters in dispute in that action.

The judgment is as follows:—

After the argument of this case I did not get all the exhibits until I had to take up my fall circuit. Since returning I have again gone over the extended notes.

At one stage of the argument both sides seemed to agree that the plaintiff's rights were based on the natural flow of water coming from the Chain Lake Valley or watershed as conditions existed in 1846, but later plaintiff's counsel seemed to argue that he is entitled to a greater flow by reason of the city increasing such flow from bringing into the Chain Lakes other streams, and by reason of their extensive storage dams, relying upon dicta cited to the effect that if water is added to a natural stream by artificial means, it becomes a part of the natural stream and subject to the same natural rights as the rest of the water. This latter contention is, I think, however, concluded as against the plaintiff by reason of the deed or agreement of 1846, made between the predecessors in title of the plaintiff on the one part and

the predecessors in title of the city on the other part. In and by that deed the right to bring the Long Lake waters into the Chain Lakes for storage purposes, and for supply to the city from the latter lakes by means of pipes, is expressly given, and the right of Hosterman, plaintiff's predecessor in title, to water expressly limited to the quantity naturally flowing from the Chain Lakes theretofore. Since the said deed the city has connected said lakes, constructed large dams and made one large watershed, and it seems to me quite clear that the plaintiff's rights must be based on the natural flow from the Chain Lake Valley based on conditions as they existed before the date of said deed and quite apart from any increased flow that may have been caused by the city's works.

This brings me to a consideration of the plaintiff's evidence in support of his allegation that the city, in the summer months of 1909, deprived him of water that he was entitled to for his mills; in other words, that they did not let down to his mills the natural flow of the Chain Lake Valley to which he was entitled. Outside a few personal visits by himself to Bayer's Brook, and very casual inspections of such brook, which I do not think I can consider under the evidence as reasonable proof of plaintiff's claim, his whole case is based on the theory that he is entitled to 1/5th of the entire waters collected from the large watershed and the whole city works. No evidence was given as to the volume of water that would come from the Chain Lake Valley as it existed prior to 1846, but plaintiff contents himself with an estimate based on the fact that the Chain Lakes watershed forms about 1-5th of the whole watersheds that now feed the city's storage, takes the total amount fed to the city through the pipes, and claims one-fifth of the water so used plus an allowance for evaporation. And, taking this estimate as proof of the plaintiff's claim, he can afford to abandon the item of evaporation. After giving the plaintiff's theory—for it is only a theory—full consideration, I am forced to conclude that it is not reliable, and it does not satisfy me that it makes out the case that he can only succeed upon, viz., that he has been deprived of any water that he is entitled to based on Chain Lake conditions in 1846. Doane, the city engineer, makes cogent criticism in respect to Fenerty's data. The latter's statements are obviously mere guesses in many respects, and the proof, to my view, falls short of satisfactory evidence that the plaintiff has been deprived of any rights to which he is entitled.

The plaintiff has the burden of establishing that he has been deprived of water to which he was entitled, and in this, I think, he fails. From the system adopted by the city for ascertaining the natural flow of Chain Lake Valley, I am satisfied the plaintiff has been getting quite all the water to which he was entitled.

By the use of the measuring board at Bayer's Brook a satisfactory basis for the calculation of the Chain Lake waters is, it seems to me, established. It is true this board was out for a time in 1909, but the attendant who had worked the outlet and watched the inlet satisfied me that during the season of 1909 the plaintiffs had not suffered.

I am of the opinion the plaintiff's action fails and must be dismissed.

The doctrine of *res judicata* is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause. The

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rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising. It is clear that the plaintiff must go forward in the first suit with his evidence; he will not be permitted in the event of failure to proceed with a second suit on the ground that he has additional evidence. In order to be at liberty to proceed with a second suit he must be prepared to say: "I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been ascertained by me before." I have quoted from Cairns, L.C., *Phosphate Sewage Co.* v. *Molleson* (1879), 4 App. Cas. 801, at 814.

Mr. Bell, K.C., the city solicitor, moved before my brother Mellish to dismiss the action on the ground, to put it shortly, that the claim set up in this action is *res judicata*. The motion was made on the affidavit of Doane, the city engineer. Paragraph 8 in that affidavit is as follows:—

8. The present action is identical with that determined by Drysdale, J., except that the water alleged to have been wrongfully diverted by the city was in different years. I produce herewith pleadings which, it will be noted, are identical with those in the former action. The city's defence is precisely the same as in the former action, and the sole point in controversy will be inevitably whether or not the city's mode of ascertaining the amount of water to which the plaintiff is entitled is accurate or not.

By leave of the Court, granted on the hearing, the city was permitted to furnish a supplementary affidavit of Doane which is as follows:—

The mode of determining the supply of water to be furnished to the plaintiff by the defendant was throughout the year 1911 identical in all respects with that followed in 1909, and described in the trial of the former action. The measuring boards or weirs were placed in the same locations and were of the same size and shape in every respect, the only possible difference being that concrete may have been substituted for wood in the interval. Concrete is used at present, and I am not certain as to the exact date when the change from wood was made. The instructions to the keeper of the gate house were the same in 1911 as in 1909, and were followed by him.

Mr. Stewart, for the plaintiff, asked for and was given leave to file an affidavit in reply, which he subsequently declined to do.

At the hearing, Mr. Bell stated that if Mr. Stewart would state that any new question had arisen for adjudication he would be willing that the case should go to trial, but Mr. Stewart declined

to make any such statement. In my opinion the position taken by Mr. Bell was fair and reasonable. If anything new had arisen for adjudication all Mr. Stewart had to do was to say so; if nothing new has arisen then the questions involved are *res adjudicata*.

Mellish, J., refused the application and this appeal is from his refusal. I may add that he did not have before him the supplementary affidavit of Doane. It is stated clearly in Doane's affidavits that only the same identical questions are raised in this action as those in the former action. There is no denial on affidavit, and, as I have stated, Mr. Stewart would not say at the Bar that any new question had arisen. He urged the fact that this action was brought to recover damages for alleged grievances in 1911, while the former action was for alleged grievances in 1909, but in my opinion this does not meet the contention made on behalf of the city that the second action is based upon the same grounds disposed of in the first action. The thing in dispute in the first action was the plaintiff's right to recover in consequence of the alleged improper and illegal way in which the water was distributed by the city. I think under the affidavits that the plaintiff's right to recover for the same thing is raised in this action. The question to my mind is has anything arisen since the judgment in the first action to change the aspect of the case? I must answer this question on the material before the Court, and on that material I answer it in the negative.

In view of the pleadings in both actions and the affidavits used on behalf of the city which have not been answered, the only conclusion which I can come to is that this action is an attempt on the part of the plaintiff to try again questions which have been decided against him; in other words, that it is a case of *res adjudicata*. If I am right as to this, the attempt is an abuse of the process of the Court, and there is inherent jurisdiction in every Court to prevent this, and the way of prevention in this case is to dismiss the action, which I would do with costs, and allow the appeal with costs.

Appeal allowed and action dismissed.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Haggart, JJ.A. December 12, 1919.

MUNICIPAL CORPORATIONS (§ II G—195)—PERSONAL INJURIES TO PEDESTRIAN—CARE OF SIDEWALK—STATUTORY OBLIGATION TO REPAIR—LIABILITY.

A municipal corporation under a statutory obligation to keep its streets in good repair, fails to fulfil such obligation if it allows boards in a sidewalk to rot and become a source of danger to pedestrians. It is sufficient to bring home notice to the defendant, if the attention of the proper officer was called to a defect in the plank which made it dangerous, although the injury was caused by another defect in the same plank.

[*Lottine* v. *Langford* (1917), 37 D.L.R. 566, 28 Man. L.R. 282, distinguished; *Holland* v. *Tp. of York* (1904), 7 O.L.R. 533, referred to; see also *City of Sydney* v. *Slaney* (1919), 50 D.L.R. 351.]

Statement. APPEAL from the decision of Galt, J., in an action for damages for injuries sustained through the breaking of a defective plank in a sidewalk. Affirmed.

T. A. Hunt, K.C., and *Jules Preud'homme*, for appellant; *G. C. Lindsay*, for respondent.

Perdue, C.J.M. PERDUE, C.J.M.:—The plaintiff sustained an injury by a fall caused by the breaking of a plank in a sidewalk on Sargent Ave. in the City of Winnipeg. The plaintiff was returning home with 2 friends at about 11 o'clock at night. The plank broke when he stepped on it and he fell and one of his hands was injured, a bone being broken. The plank which broke appeared to be sound on the upper surface but had rotted underneath. The sidewalk was 14 years old but, according to defendant's witnesses, was still generally in good condition. On July 23, the defendant's inspector examined the portion of the sidewalk in question. He noticed that the plank which afterwards caused the accident had a little piece out of the corner of it. He marked the plank to be taken out and replaced by a new one, lest, he says, "the heel of a lady's boot might get caught in the hole, and an accident be caused." The inspector's report calling for a new plank was sent to the proper authority on the evening of July 23. The accident to the plaintiff took place on the night of July 26. On the morning of July 27, a repair gang came and put in a new plank.

The defendant claims that the plank was condemned by the inspector for a minor defect which did not call for immediate repair and that the rotten state of the plank was not known to him. If the inspector had known the true condition of the plank, he would, it is said, in accordance with custom, have indicated

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in his report that it required immediate attention. But the answer made to this is that the corporation through its proper officer had notice that the plank was defective and he had ordered it to be replaced; that if the repair had been made promptly, the accident would not have happened. The cases cited by defendant's counsel, namely: *Breault* v. *Town of Lindsay* (1907), 10 O.W.R. 890; *McNiroy* v. *Town of Bracebridge* (1905), 10 O.L.R. 360; *Forrest* v. *City of Winnipeg* (1909), 18 Man. L.R. 440; *Davies* v. *City of Winnipeg* (1910), 19 Man. L.R. 744; and others, related to the sufficiency of constructive notice. In the present case the contention of the plaintiff is that the defendant had actual notice of the unsafe condition of the plank, I think it was enough to bring home notice to the defendant if the attention of the proper officer of the defendant was called to a defect in the plank which rendered it dangerous, although it was another defect in the same plank which caused the injury and not that of which the officer had notice. See *Holland* v. *The Township of York* (1904), 7 O.L.R. 533. The jury has found that the defendant was negligent in that it did not more promptly replace the defective plank. This was essentially a question for the jury and there was evidence upon which the jury might find as it did.

I think the appeal must be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—The plaintiff was walking, with his companions, on the wooden sidewalk on the south side of Sargent Ave., near Maryland St., in this city on the evening of July 26, 1918, when a board in the sidewalk gave way. His foot was caught therein and he was thrown to the ground and sustained personal damage, the fifth bone of his right hand being permanently injured. He brought this action to recover damages and the same was tried before Galt, J., and a jury, who gave a verdict for the plaintiff for $500.

From the judgment entered on this verdict the defendant appeals. Objections were taken to portions of the charge to the jury of the trial Judge, but these were not pressed and this Court was not asked to grant a new trial but was urged to set aside the verdict of the jury as unwarranted by the facts of the case, and by the law applicable thereto.

At the conclusion of his charge the trial Judge submitted the following questions: 1. Was the plaintiff's injury caused by

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negligence of the defendants? 2. If so, in what did this negligence consist? 3. What damages has the plaintiff sustained?

The jury returned to Court and announced that they had agreed upon a verdict for the plaintiff, assessing the damages at $500. The foreman read the verdict, which was as follows:—"We, your jury, beg to report that we find for the plaintiff; that while the system of inspection and repair of board sidewalks is satisfactory, but in this particular case, in the carrying out of same the city was negligent in that it did not more promptly replace the defective board, and we assess the damages at $500."

Here we have the jury making a finding upon the precise matter upon which the city relied as a defence. Obviously we ought not to interfere with that finding except upon the clearest grounds.

The city's system of inspection and repair of board sidewalks is given in detail by W. F. Tallman, the Street Commissioner since 1907. Inspectors for different divisions start out with sheets of paper and if they find a loose or broken plank they note it on the sheet. These sheets are turned in at night to the repair gang "that goes out the next morning and they are turned in the next morning."

The inspectors, 5 in number, themselves carry hammer and nails and if they find a loose plank they nail it. There are 5 to 7 repair gangs and an extra 1 or 2 are added if needed. The sidewalk in question is inspected about every 10 days. Tallman says the life of a wooden sidewalk varies according to the quality of the lumber and other circumstances, and gives from 7 to 10 years as an average period. He explains what are called "special sheets" in this way: "A repair gang may be out and there is something not on the sheet that he sees wants repairing; the foreman is not allowed to put it on the sheet, but he has a special sheet and puts it on there." If a police officer notifies the department by telephone of a broken plank, that matter is always attended to on the same day.

McDowell, the inspector of the district in question, says he covers it every 11 days, or, if a Sunday intervenes, in 12 days. His reports were put in as exhibits. On July 23, he noticed the plank that caused the accident and says of it "there was a little three cornered piece out of this plank; it was seemingly a good

plank, but this little piece was out of the northwest corner of it, and I marked that plank for a new plank lest the heel of some lady's boot might catch there and throw her." The plank did not appear to him to be rotten. He is asked further on "And so far as the top was concerned, it appeared all right?" To which he answered, "The rest of the plank was quite sound." That is so far as the top is concerned.

On cross-examination, McDowell says that when he made his recommendation on the 23rd, he expected the repair to be done in 2 or 3 days afterwards. If the repair gang were not behind in their work "they should have done it the next day."

McGuire, the foreman of the repair gang, is shewn Exhibit 2, 2241, with his signature, shewing the date of the report as July 23, and that the repair, "1 new plank," was made by him July 27. He says that when he went to find the plank he found the inspector's mark on it "McD." Afterwards he got instructions on the 27th at 1 o'clock about this defective plank and when he went there found the repairing had been done.

Evidence was given to shew that one of the foremen, Bie, engaged in this district with McGuire, had in April cut his ankle with an adze and was laid off accordingly. The object of giving this evidence was apparently to account for the delay.

As for the condition of the plank itself, there is direct evidence on this point. Johannson, a friend of the plaintiff, went with him to the place where the accident occurred and saw the new board that had just been put in and the old board lying there in "two rotten pieces" in a very bad condition. The plaintiff says he happened to stick his foot through the sidewalk or step on a rotten board that sank down when he got his toe stuck in the sidewalk. Joseph Johnson was with the plaintiff on the night of July 26 and says of him: "He stepped on a rotten board in the sidewalk" and that he "notices the centre stringer on the street side, the board had broken away and it sagged down about four inches where it broke."

According to Tallman that sidewalk was constructed in 1904 and has not been rebuilt.

Now it is clear that McDowell, a city official, saw this defective plank on July 23, and noted it in his report with the recommendation "1 new plank" and that the recommendation was not carried

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out until July 27. Tallman was asked on his examination on discovery: "An important thing is that the city knew on the 23rd of July of that defect?" To which he answered, "Yes, they knew there was a new plank required there."

What is the effect of the finding of the jury? It is that the city's system is satisfactory but that the application of it in this instance was delayed too long. The repair work that should have been done on the first or second or even the third of the days after McDowell marked the plank and sent in his report was not done until the fourth day after. There must be a dividing line somewhere. Tallman says the repairs are as a rule done the next morning after the report and McDowell says within 2 or 3 days. The jury has said the fourth day was too late to relieve the city from the charge of negligence and there is the evidence of the city's witnesses on which the jury were at liberty to base this finding.

Section 731 of the Winnipeg Charter, 8 Geo. V., 1918, ch. 120, provides that

> Every public road, street, bridge and highway, and every portion thereof, shall be kept in repair by the city, and, on default of the city so to keep in repair, the city shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default.

This is substantially the provision governing municipalities under the general Municipal Act, secs. 624 and 625, R.S.M. 1913, ch. 133.

Now, the Court is asked in this case, notwithstanding this provision imposing a positive and unconditional liability for damages occasioned by the city's default, to go behind the verdict of the jury, when the facts and the law have been fairly submitted to them, examine the evidence and determine whether or not the finding of the jury is in accordance therewith. If there be any evidence to support the finding it should not be disturbed. Here the evidence on which the jury finds is mainly that put in by the defence. The jury have held that on that evidence the repairing of the walk was done too late.

We were referred to several cases: *Breault* v. *Lindsay*, 10 O.W.R. 890; *McNiroy* v. *Town of Bracebridge*, 10 O.L.R. 360; *Lottine* v. *Langford* (1917), 37 D.L.R. 566, 28 Man. L.R. 282; and *Rushton* v. *Galley* (1910), 21 O.L.R. 135. These are, however,

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cases of constructive notice, and the difference between them and this is apparent. Here the city had actual notice through McDowell, the inspector, who marked the defective plank for renewal on July 23. The delay in repairing was considered by the jury too great and I see no reason to interfere with their finding. That delay in repairing was due to an accident to one of the city's foremen is immaterial and cannot affect the rights of the plaintiff.

It was urged that McDowell's inspection revealed only a chipping from the plank and no inherent weakness, and that there was, therefore, no notice of the real defect. But he marked the plank for complete renewal, "1 new plank," and if that recommendation had been followed by action on the following day, or the day after that, or on the day after that again, there would have been no accident. On this branch of the subject of notice I refer to Denton on Municipal Negligence, p. 238. If the notice refers to another defective spot close to the one creating the danger, it is sufficient if the repair of the one would of necessity draw attention to the other. *Holland* v. *Township of York*, 7 O.L.R. 533.

I would dismiss the appeal.

HAGGART, J.A., concurred. *Appeal dismissed.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1919.

WILLS (§ III D—100)—GIFT TO SPECIFIC CHARITY—CHARITY NOT IN EXISTENCE—GIFT CONDITIONAL ON FUTURE EVENT—REMOTENESS—UNCERTAINTY.

In a will where there is no general intention to benefit charity, but only a particular gift for charity conditional upon a future and uncertain event, the gift is subject to the same rules and principles as any other gift dependent upon a condition precedent. If the gift is so remote and indefinite as to transgress the time limits prescribed by the rules against perpetuities it must fail.

[*Attorney-General* v. *Bishop of Chester* (1785), 1 Bro. S.R. 444; *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232, distinguished; *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206; *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265, referred to.]

Statement.

APPEAL by Norwegian Lutheran Church of Canada from the judgment of Brown, C.J.K.B., in an action to construe a will, affirmed.

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RE SCHJAASTAD ESTATE.

H. E. Sampson, K.C., for Norwegian Lutheran Church of Canada.

H. Fisher, for official guardian.

L. L. Dawson, for certain children of deceased.

F. W. Turnbull, for executors.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—By his last will and testament dated September 10, 1917, John Otteson Schjaastad, *inter alia*, provided as follows:

I devise and bequeath all my estate, real and personal, to my executors and trustees hereinafter named in trust for the purposes following:—

Firstly, to pay my just debts, funeral and testamentary expenses, and thereafter in trust to dispose of and pay over or convey the same to the person or persons or corporations hereinafter named as follows:—

I hereby direct my executors and administrators to firstly dispose of all my real and personal property and immediately after the completion of such sale to divide the proceeds as follows to my wife Betsy Schjaastad the one-third share of all monies so derived and to the First Norwegian Lutheran Orphans' Home built in Saskatchewan or Alberta, the two-thirds share. Should my wife Betsy Schjaastad decease before me I direct that the whole of the proceeds of my estate shall be given to the above institution.

Should one of the Norwegian Lutheran Orphans' Homes not be founded in the above Provinces at the time of my demise I direct that my executors shall invest the said proceeds in first mortgage farm loans from term to term until such time as one of the above institutions shall have been founded.

The said Schjaastad died on or about July 6, 1918, and letters probate were issued to the executors named in the will, who subsequently caused an originating summons to issue, asking the opinion of the Court on the following questions, namely:

(1) Whether the gift under the will of the deceased John Otteson Schjaastad to the First Norwegian Lutheran Orphans' Home built in Saskatchewan or Alberta of a two-thirds share of his estate, is a valid gift at law.

(2) If the said gift is not a valid gift, direction as to the proper parties entitled to said two-thirds share of the said estate.

(3) Such further and other directions as to this Court may seem just.

The matter came on for hearing before the Chief Justice of the King's Bench, who, on the evidence before him, found that at the time of the testator's death there was no Norwegian Lutheran Orphans' Home built in Saskatchewan or Alberta; that none had since been built, and that there was no assurance that any would ever be built, and under the circumstances he held that the gift was not immediate and therefore failed, and that the portion of the estate of the testator sought to be appropriated to the Norwegian Lutheran Orphans' Home must be divided on the

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basis of an intestacy and that the widow would get one-third and the children two-thirds. From that judgment this appeal has been taken by the Norwegian Lutheran Church of Canada.

It was contended for the appellants that the gift for an Orphans' Home was an immediate gift, and the fact that the particular application of the gift is indefinitely postponed does not render the gift void.

A number of cases were cited on the argument, and I have had occasion to peruse several not cited on the argument but which I think have a bearing upon the subject.

It was very strongly urged upon us that the case of *Attorney-General* v. *Bishop of Chester* (1785), 1 Bro. Ch. Rep. 444, was authority for the contention of the appellant. In that case, the late Archbishop Secker, among many charitable legacies, gave £1,000 3% bank annuities to his trustees, the defendant and the late Dr. Stinton, for the purpose of establishing a bishop in His Majesty's dominions in America. He also gave £1,000 to be laid out upon repairing parsonage houses to be chosen by the defendant and Dr. Stinton, and ordered that if any charity to which he had given a legacy should no longer subsist, such legacy should fall into the residue. The words in the residuary legacy are:

> Should no longer subsist at the time of his decease, or should have been so grossly perverted that they should think giving any thing, or so much, to it improper, *then* they should give what he had appointed for it, or such part of what they should approve, or such as they should please, to any other charity.

It was contended on behalf of the Bishop of Chester that as to the legacy for the purpose of establishing a bishop in America, there being no bishop in America, or the least likelihood of there ever being one, that it was a void legacy and fell into the residue. The Lord Chancellor said the money must remain in Court till it should be seen if any such appointment should be made.

In *Martin* v. *Maugham* (1844), 14 Sim. 230, at 232, 65 R.R. 571, at 573, the Vice-Chancellor says as follows:

> Although the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty cannot take effect, yet, as there is, confessedly, a devotion of his personal estate to charitable purposes my opinion is that his next of kin have no claim at all to his property. I conceive that, if a testator has expressed his intention that his personal estate shall be, in substance, applied for charitable purposes, the particular mode

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which he may have pointed out for effecting those purposes has nothing to do with the question whether the devotion for charitable purposes shall take place or not; and that, whatever the difficulty may be, the Court, if it is compelled to yield to circumstances, will carry the charitable intention into effect through the medium of some other scheme.

The case of *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232, I think must have been decided upon the ground that the bequest was a general charitable bequest. Lord Hatherley, L.C., at 240, is reported as follows:

> Very able arguments on both sides have been addressed to me this morning with respect to the application of the doctrine of *cy-près*, but I do not think that there is any necessity for going into that question at present. As far as I can judge from what has been stated, there is a possibility of a church being built at *Aberystwith*, and therefore I think it is extremely probable that we may never arrive at the application of that doctrine at all.

I do not think that the Lord Chancellor would have expressed himself in the language in which he is quoted above unless he had been of the opinion that the bequest under consideration was a general bequest to charity. And further down in his judgment he says at 240:

> As to the difficulty from the possible remoteness of the time when her intention can be carried into effect, I think the case of the *Attorney-General* v. *Bishop of Chester*, *supra*, is a complete answer.

In *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, the Lord Chancellor is reported as follows: "He said that the only question which appeared to require decision was, whether there was in the will an immediate gift for charitable purposes of the whole residuary personal estate, or whether that gift was conditional upon the acquisition of land at some future time. If there was an immediate gift for charitable purposes, it was clear upon the authorities, that such gift was valid, notwithstanding the particular application of it could not take place within any assignable period of time, or at all, except upon the happening of events in their nature contingent and uncertain. When personal estate was once effectually given to charity it was taken entirely out of the scope of the law of remoteness . . . On the other hand, if the gift in trust for charity was itself conditional upon a future and uncertain event, it was subject, in their Lordships' judgment, to the same rules and principles as any other estate depending upon its coming into existence upon a condition precedent. If the condition was never fulfilled the estate never arose. If it was so remote and indefinite as to transgress the limits of time

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prescribed by the rules of law against perpetuities, the gift failed *ab initio*, because no doubt there might be, as Lord Cottenham said, in *Cherry* v. *Mott* (1835), 1 My. Cr. 123, at 132, a conditional legacy to a charity, as well as for any other purpose, and the question whether this was so or not ought to be determined, like all other questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will."

In *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265, Romer, J., states the law to be as set forth above in *Chamberlayne* v. *Brockett*, and in *In re Swain, Monckton* v. *Hands*, [1905] 1 Ch. 669, at 675-676, Stirling, L.J., says as follows:

> The law on this subject is laid down in *Chamberlayne* v. *Brockett*, and it is to the following effect: An immediate gift to a charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all, except on the occurrence of events in their essence contingent and uncertain; while, on the other hand, a gift in trust for a charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent.

I gather from the foregoing cases, that, where a testator makes an immediate gift for charity and evinces a general intention to benefit charity, but the particular gift fails, through remoteness or for some other reason, the Court will nevertheless administer the trust in favour of charity; but, on the other hand, where there is not any such general intention and the particular gift for charity is conditional upon a future and uncertain event, it is subject to the same rules and principles as any other estate depending upon its coming into existence upon a condition precedent, and if the condition is not fulfilled the estate does not arise. If it is so remote and indefinite as to transgress the limits of time prescribed by rules of law against perpetuities, the gift fails *ab initio*.

In the case at bar, I am of the opinion that it cannot be said that there was a general gift to charity. I am of the opinion that the proper construction of the will is that it was a gift to a Norwegian Lutheran Orphans' Home should such be founded, but it cannot be said that the testator, failing such a Home, intended to benefit charity generally to the exclusion of his wife and children.

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RE SCHJAASTAD ESTATE.

Elwood, J.A.

It is distinguishable from the case of *Attorney-General* v. *Bishop of Chester, supra*, and *Sinnett* v. *Herbert, supra*, because, as I have stated above, I think the Courts that decided those cases decided them clearly upon the principle that there was a general intention to benefit charity, and not solely an intention to benefit the particular charity mentioned in the will. Had there been such a general intention in the case at bar, then I think it might very well have been argued that before the Court should undertake to administer the trust for charitable purposes a further time should be allowed to elapse, to see if a Norwegian Lutheran Orphans' Home would be erected.

Having, however, come to the conclusion that there is no such general charitable intention, I have no hesitation in coming to the conclusion that the gift is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, and must therefore fail.

In my opinion, therefore, this appeal should be dismissed.

Appeal dismissed.

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BECKORD v. BRANDLE.

Alberta Supreme Court, Scott, J. January 9, 1920.

LANDLORD AND TENANT (§ II B—10)—LEASE—COVENANTS—ALLEGED BREACH—DETERMINATION OF LEASE—DAMAGES.

After the surrender of a lease, the landlord can only recover damages for breaches of covenant committed before the surrender. The measure of damages should be the actual loss to the landlord by reason of such breaches.

[*Ex parte Glegg* (1881), 19 Ch.D. 7; *Ex parte Dyke* (1882), 22 Ch.D. 410, referred to.]

Statement.

ACTION for damages for breaches of certain covenants in a lease made by plaintiff to defendant.

G. F. Auxier, for plaintiff; *C. F. Newell*, for defendant.

Scott, J.

SCOTT, J.:—On March 23, 1917, the plaintiff leased to the defendant certain farm lands for a term of 3 years from April 1, 1917, at a rental of one-half the crop grown upon the premises in each year, and the sum of $2 in each year for every acre of the portion thereinafter agreed to be summer-fallowed, which should not be summer-fallowed, by the defendant.

The covenants on the part of the defendant contained in the lease, in so far as they are material to the issues arising in the

action, are as follows: 1. To keep up fences. 2. To leave the premises in good repair. 3. To either put into crop or summer-fallow in a good, husband-like and proper manner, every portion of the demised premises which had been or should thereafter be brought under cultivation, the summer-fallow to be ploughed between the first and thirtieth days of June in each year. 4. To summer-fallow at least 50 acres in each year of the term. 5. To leave ploughed and ready for crop at the expiration of the term at least 120 acres over and above the land summer-fallowed in the preceding season. 6. To keep all the barnyards free from all manure, etc., and to keep them clean.

The crop of 1918 having proved a failure, the defendant wrote the plaintiff on August 13, informing him that he intended to leave the premises the ensuing fall, and on August 24 he notified him that he would leave in 2 weeks. The plaintiff upon receipt of the notice came from his home in Nebraska. Upon his arrival at the farm he found that the defendant had abandoned it, and on September 21, he leased it to other tenants for a term extending from that date to March 1, 1920.

The plaintiff claims damages: 1. For failure to leave 120 acres ready for crop above land summer-fallowed. 2. Damage to summer-fallow by reason of late and improper ploughing, and failure to reduce to cultivation. 3. Cost of removing 800 loads of manure. 4. Damage to buildings and fences. 5. Loss of time and expenses in journeying to Alberta and return. 6. For the abandonment by the defendant of the demised premises whereby the plaintiff lost his tenant and has been unable to obtain another tenant and has suffered loss of rents and profits for the remainder of the term.

The defendant charges that the lease between him and the plaintiff was executed by mistake and that one of the terms agreed upon between them was to the effect that either party could determine the lease on one week's notice, which notice was given by him, and that, as to any repairs which were necessary, the plaintiff was to furnish the material therefor. The defendant counterclaims for a rectification of the lease by inserting therein that either party had the right to terminate it at any time after the fall crop had been harvested and before the time

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to commence the spring work on giving notice to the other party, and by inserting a provision that the lessor should furnish the materials for repairs.

The rectification sought for by the counterclaim with respect to the right of either party to terminate the lease by notice is not in accordance with the agreement between the parties as alleged in the defence, neither is it in accordance with the agreement as stated by the defendant in his evidence. His version of it is as follows: "I told him (the plaintiff) that it was a large farm and that I wanted to lease it for a year only. He said I will lease the land for 3 years and, if you want to leave it, I can notify you or you can notify me twice a year. I said 'all right.'"

The defendant states that the agreement was that he was to make the repairs and plaintiff was to furnish the materials, and his statement is not contradicted by the plaintiff, but the notary public who drew up the lease states that the plaintiff and the defendant came to his office to have the lease drawn up, that he took notes of what they agreed upon and prepared the lease in accordance with the instructions they gave him, that there was nothing said in his presence about the termination of the lease in one year, that it was read over by him to the defendant and fully explained to him, and that the only provision the defendant referred to was that which gave the plaintiff the right to determine the lease in one year in case of sale. The evidence of the notary as to his having read over the lease to the defendant is corroborated by another witness who was present at the time.

I dismiss the counterclaim with costs.

Other defences are that the plaintiff agreed to determine the lease in September, 1918, and that in pursuance of such agreement the defendant gave up possession of the land to the plaintiff; that certain windows were blown out by a tempest, that the defendant requested the plaintiff to furnish the materials or the money with which to purchase them, which the plaintiff neglected to do, and that the defendant did the summer-fallowing in July and August, being the only time owing to the condition of the soil, that it was possible to do the work.

The defendant has paid into Court $240 to cover the cost of ploughing 120 acres referred to in the lease and $20 to cover the cost of repairs to buildings and fences.

As to the plaintiff's claim for damages for the omission of the defendant to plough and leave ready for crop the 120 acres at the expiration of the term, I am of opinion that the $240 paid into Court is sufficient to answer the damages which plaintiff has sustained. It is shewn that the greater portion if not the whole of that area was ploughed by the new tenant, without any expense to the plaintiff, and that the yield therefrom in 1919 was equal to the average crop of that year in that vicinity. The evidence does not shew what is meant by the words "plough and leave ready for crop" in the covenant, or whether ploughing alone would constitute leaving the land ready for crop. The value of the ploughing is practically determined by the lease, as it provides that in case the plaintiff determined the lease by notice, he should pay the defendant at the rate of $2 per acre for ploughing done by him in preparation for crop in excess of the 120 acres.

Apart from this, however, I entertain serious doubt whether the plaintiff is entitled to recover damages for the breach of that covenant. The taking of possession by him and his leasing it to other tenants in September, 1918, constituted a surrender of defendant's lease, one of the consequences of which appear to be that the relationship of landlord and tenant between them no longer existed, and that, after the surrender, the plaintiff could recover only for breaches of covenant committed before the surrender. (See *Ex parte Glegg* (1881), 19 Ch.D. 7, and *Ex parte Dyke* (1882), 22 Ch. D. 410.) Defendant's covenant was to leave the 120 acres ready for crop at the expiration of the term granted by the lease, namely, April 1, 1920, which would be more than a year after the surrender. The determination of the term by the plaintiff at an earlier date would not entitle him to shorten the time for the performance of the covenant.

The payment of the $240 into Court should, in my view, be construed as an admission of liability only to the extent of the payment.

As to the claim of the plaintiff for damages for breach of defendant's covenant to summer-fallow 50 acres in June, 1918, the plaintiff adduced evidence to shew the cost of doing the work which the defendant left undone. In my opinion the proper

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measure of damages is, not the cost of doing the work left undone, but is the loss occasioned to the plaintiff by reason of its being left undone.

The defendant ploughed about 60 acres in July, 1918, in preparation for summer-fallow. He states that he could not plough in June as the ground was too dry, and his statement does not appear to have been contradicted. It is shewn that the ploughing was shallow and skimpy in places. Owing to the season having been dry there were no weeds upon it during the summer. For anything that appears to the contrary in the evidence all the other work required to constitute summer-fallowing might have been done by the defendant in the fall subsequent to the date of the surrender had there not been a surrender.

The evidence of the plaintiff's witnesses as to the loss sustained by him is contradictory. During the fall of 1918 the new tenants double-disced the 60 acres, ploughed by the defendant, ploughed about 60 acres more and disced about 30 acres of stubble. The whole 150 acres was seeded into wheat the following spring, and the yield from these 3 different methods of preparation was equal, and the whole crop was equal to the average yield in that vicinity. One of the new tenants states that the land put in crop that year was not all properly prepared for crop, and that if it had been, the yield would have been 10 bushels more per acre. . . . while another of plaintiff's witnesses who gave evidence as to the summer-fallowing states that he could not say that the crop of 1919 would have been any better if the land had been properly prepared. In view of this contradictory evidence and of the fact that the crop from the 60 acres ploughed by the defendant was equal to the average crop in that vicinity, I must hold that the plaintiff has failed to shew that he has sustained any loss by the breach of that covenant.

As to the damages claimed for breach of defendant's covenant to keep all the barnyards free from manure, the plaintiff states that there was manure around the hog house, the block house and in the large corral, and he estimated the whole quantity at about 800 loads. It is shewn that the greater portion of it was in the corral, which is about 10 rods distant from the farm buildings, and forms no part of the yards pertaining thereto.

The defendant therefore was not bound by his covenant to keep it free from manure, neither was he bound to spread the manure over the cultivated land. One of the new tenants states that they hauled out about 220 loads from around the barn, cow stable and cattle sheds, and that there is still left about 400 or 500 loads. This estimate may, and probably does, include the quantity in the corral. The defendant says that he hauled away in the spring of 1918 all the manure which had accumulated during the preceding winter. I think I may assume that all or nearly all the manure around farm buildings is, under ordinary circumstances, deposited during the winter months and that the proper time to remove it is during the ensuing spring. The proper time for removing that which was deposited after the spring of 1918 would be during the spring of 1919, after defendant's lease had been surrendered.

Upon another ground, however, I hold that the plaintiff is not entitled to recover. The crop of 1918 was seriously damaged by frost. On July 29, 1918, the defendant wired the plaintiff that the crop was completely frozen, that he had an offer of $500 for the plaintiff's interest in it if cut at once. The plaintiff thereupon wired his agent at Halkirk authorizing him to dispose of his interest in the crop and to use his best judgment. The agent, on August 8, 1918, sold the plaintiff's interest to a live-stock company with the privilege of cutting and pasturing thereon. The purchasers a short time thereafter put about 300 or 400 head of cattle on the property, and they remained there until after the surrender of the lease. The defendant states that the manure that was there in the fall of 1918 was from that 300 head of cattle, which not only pastured upon the property but also occupied the barn and other buildings. His evidence upon this point is not contradicted, and it therefore appears to me to be unreasonable that the defendant should be called upon to remove the manure so deposited.

As to the claim for damages for non-repair, it is shewn that a number of windows were broken by a storm, but that is not an answer to a claim under a covenant to repair from which such damages are not specifically excepted. (See *Sharp* v. *Milligan*, (No. 2), (1857), 23 Beav. 419). I assess the damage for non-

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repair of windows at $35, and for the non-repair of fences at $25.

During the course of the trial I ruled that the plaintiff was not entitled to recover his travelling expenses of his journey from Nebraska to look after the property, as such damages were too remote. By reason of my having so ruled the plaintiff did not adduce any evidence in support of that claim.

As to the plaintiff's claim for damages for the abandonment by the defendant of the demised premises, I doubt whether the plaintiff can now maintain such a claim in view of his having accepted a surrender of the lease, but, apart from that question, I cannot find, upon the evidence, that he has sustained any damage. In his lease to the defendant he was to receive one-half of the crop in each year by way of rent, but was to supply the seed grain each year and to pay ½ the twine and threshing bills and ½ of the threshing bill and board of the threshing crew. In his lease to the subsequent tenants he was to receive only ⅓ of the annual crop by way of rent, but the tenants were to supply the seed grain and pay the threshing bill. The plaintiff offered them the choice between the half-crop system or the one-third-crop system, stating that it made no difference to him, and, in his evidence he states that if the crop is a good one the landlord would have the advantage under the half-crop system, but, if a poor one, the tenant would have the advantage. It is therefore impossible for me to determine that the plaintiff has sustained any loss by reason of the defendants having abandoned the premises.

I give judgment for the plaintiff for $300, the $260 paid into Court by the defendant to be applied in reduction of the judgment.

The plaintiff will have the costs of the action as upon a claim for $360 up to the time of payment into Court and thereafter as upon a claim of $40. There will not be any set-off of costs, and rule 27 of the cost rules will not apply.

Judgment accordingly.

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FULLERTON v. CRAWFORD.

Supreme Court of Canada Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. Oct. 14, 1919.

COMPANIES (§ V E—220)—DIRECTORS—SECRET PROFIT—ACTION TO RECOVER —COMPANY'S NAME NOT USED—RIGHTS OF SHAREHOLDERS— COMPANIES ACT, R.S.O. 1914, CH. 178.

Certain directors of a company having made what was decided in this action to be a "secret profit" and the company refusing to allow its name to be used in an action to recover the same, the capacity of a single shareholder to assert the right of the company to this money is doubtful, and the action cannot succeed.

[*Towers* v. *African Tug Co.*, [1904] 1 Ch. 558 referred to.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1918), 43 D.L.R. 98, 42 O.L.R. 256, affirming the judgment at the trial (1916), 37 O.L.R. 611, in favour of the plaintiff. Reversed.

Hugh J. Macdonald, for appellants, Fullerton and the Doran Estate; *Mr. Urquhart*, for appellants, the other directors; *A. C. McMaster* and *J. H. Fraser*, for respondent, Crawford.

Davies, C.J.

DAVIES, C.J. (dissenting):—I concur with Duff, J.

Idington, J.

IDINGTON, J.:—This suit is ostensibly concerned with the rights of a shareholder in a company to keep erring promoters and directors in the path of duty, but in truth is the outcome of an unsavoury squabble between two late partners in a law firm which had been solicitors for the company and could not, on a dissolution of their firm, settle their partnership accounts without adjusting the affairs of the company.

The appellant Fullerton, an elderly practitioner of law in Toronto, took, in January, 1912, as junior partner, one Crawford, a young man who professed to have some knowledge of company law, on the understanding that he was to bear the burden of the office work.

We are not very fully informed as to the exact details of their arrangements, but we are told that they were to divide the results of the office on the basis of five to Fullerton and three to Crawford "but each to have the liberty of having business in which" he might "have a personal interest done in the office without charge."

Fullerton had a proposition made to him, by a client and personal friend named Wallace, to buy from one Bicknell a hundred and fifty-nine acres in the township of York at $725 an acre. An optional agreement was obtained by Wallace therefor,

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which was drawn in the said law office. To secure that, the selling agent, and one Doran, and Wallace, each contributed in nearly equal parts to a deposit of $2,500 which Wallace as buyer was required to pay.

Having in view the ultimate purpose of forming a joint stock company to carry out the speculation, a syndicate agreement was drawn up in the office of Fullerton & Crawford whereby Fullerton was to buy from Wallace at $800 an acre the land which he had thus secured at $725 an acre.

This agreement purports to be made in duplicate, on March 4, 1913, between Wallace the vendor of the first part, and Fullerton as trustee thereinafter called the purchaser of the second part, and the subscribers whose names are signed, of the third part; and to provide that a syndicate is thereby formed with a capital of $75,000 divided into $100 shares to carry out said purchase by Fullerton. Doran was to be the manager of the syndicate; Fullerton to be treasurer; and it was declared to be the intention to organise a joint stock company in which each syndicate shareholder was to become a shareholder in proportion to the number of shares held by him in the syndicate.

The trustee Fullerton was then to convey the land to said company. The details were to be decided at any meeting of the syndicate.

Crawford subscribed said syndicate agreement for $5,000. An agreement of sale was entered into on same day for the sale by Wallace to Fullerton at the price of $800 an acre.

Inasmuch as Fullerton is described in both documents as a trustee I see no importance to be attached to this latter, save its being referred to in the syndicate agreement as definitely fixing the terms of purchase.

It was contended by Crawford in this suit, and by his personal representative in this appeal, that he was entitled, a year and seven months later, to bring an action against Fullerton and Doran to recover for the company which was duly formed as projected in said agreement, about six weeks later, the respective sums of $3,877.20 each, which Wallace had paid each out of the profits he had thus made of $75 an acre.

The trial Judge and the Appellate Division upheld such contention.

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I assume for argument's sake that the company if suing might have recovered said profits.

Indeed, very early in the argument it was intimated by this Court to the counsel for the representative of Crawford, that as to the said amount so received by Fullerton they might so assume also, and direct their attention to the claim made by the respondents, that Crawford had become disqualified and disentitled to bring such an action especially in face of the almost unanimous opposition of his fellow shareholders.

I have sought in vain for any decision in favour of a shareholder coming into Court with so many impediments in his way, by reason of honest opposition on the part of his fellow shareholders to any assertion of such right as he claimed and with the evident disqualification attaching to him by reason of his knowledge of and acquiescence in the conduct of those accused until he had failed in an attempt to profit thereby and to extort by virtue thereof a share of such part as Fullerton had got.

The trial Judge rejected another item of his claim which was to recover for the company moneys paid out by reason of the said payments impairing capital.

That claim was rejected, not because unfounded in law if made by the company or a proper party, but solely by reason of the plaintiff's disqualifications resulting from his sharing in such illegal payments.

The same principle as thus acted upon and as applied in the case of *Towers* v. *African Tug Co.*, [1904] 1 Ch. 558, ought on the evidence of the plaintiff to be applied to the rest of the claims in question.

Shortly after the events I have already related in regard to the origin of the claim for recovery of secret profits above referred to, the company became incorporated on the application by petition of Fullerton, Doran, Crawford and others who were named as provisional directors.

The papers connected with this application were all prepared by Crawford and he made the usual affidavit verifying the petition.

The papers already referred to, and those others to found this proceeding upon had been all kept in the office vault of Fullerton & Crawford and along therewith the agreement between Wallace and Bicknell which Crawford admitted seeing and handling.

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The interest of Crawford evidenced by his subscribing one-fifteenth part of the whole proposed capital in the syndicate, coupled with opportunity and duty alike to know should have led any intelligent man to learn by the time incorporation was completed the fact that there was a profit going to Wallace.

We are not left to rest on these circumstances alone for Crawford in his evidence spoke of the relations between Wallace and Fullerton, as follows:—

Q. After March 4—prior to that have you any recollection of any conversation with either Doran or Fullerton? A. Yes, some time prior to that, I think it was before March 4, Fullerton told me that he was taking this deal in Wallace's name because he did not want himself to go on any covenant. Q. Then he was taking this deal in Wallace's name as he did not want to go on any covenants—is that the first statement that you recollect as having been made by any person about this matter? A. So far as I know it is, although I know that I had a number of office conversations with him. Q. Probably prior to that time. Then do you want us to understand that Fullerton was putting Wallace forward as a stool pigeon in this matter and you knew that from the first? A. Why, of course. Q. Just go the limit if you will? A. Of course, he was putting Wallace forward. Q. Pardon? A. He was taking the deal in Wallace's name so there was no liability on his part. Q. So from the first—? A. If he was not successful in raising a syndicate———Q. So you want us to understand the first conversation you had with anybody about this matter you recall is one in which Fullerton represented to you that he was taking this, which was his, Fullerton's deal, in Wallace's name, so as to avoid his, Fullerton's, personal liability? A. I would not say that was the first conversation, but that was one of the conversations.

And again:—

Q. Yes? A. And was considering getting up this syndicate. Q. Will you please give me something definite, is it the first conversation you recollect or not? A. So far as I know it is.

And to his taking an interest:—

Q. I understand you were very little interested in it at that time—where did it take place? A. Somewhere in the office. Q. In your office or his? A. I cannot say as to that. He used to walk into my office and talk to me about it and in his office and in Doran's office, and he would talk about it, it was the talk of the whole office. Q. Fullerton was not hiding anything under a blanket or keeping anything from you? A. I do not believe he was. Q. The matter was discussed pro and con? A. I thought so. Q. You were in Doran's office and took it up with him? A. I think so. Q. You went in to Doran's office, any conversations about it? A. Yes, we used to talk about it.

. . . . . .

Q. Well, you ought to remember it—when did you first make up your mind to take an interest in this proposition? A. It would be about March 10. Q. And you subscribed for how much? A. $2,500. Q. $2,500—was

that your original subscription? A. The original subscription was $5,000 which included $2,500 of Mr. Eaton's.

. . . .

Q. Now, tell me, Mr. Crawford, had you any other investments of a similar character to this, at that time? A. No. Q. Had you any other money in any other real estate transactions at or about that time? A. No. Q. Can you suggest any other investment you made in 1913? A. No. Q. Had you any other investments that were of a similar amount, or to any extent in 1912? A. No. Q. Had you any in 1914? A. No. Q. Then so far as this was concerned, this was practically your ewe lamb in the way of investment? A. Yes. Q. Your ewe lamb, and the one, therefore, in which you were particularly interested? A. Yes.

And again as to Doran's contribution:—

Q. When did you have the first interview with Doran about the matter? A. Oh, I cannot say. Q. Can you recall any interview with Doran prior to March 10, when you agreed to go in? A. I can recollect several conversations with Doran. Q. Can you cast your mind back, and having regard to this, your first and most important and practically your only investment at that period of time, can you cast your mind back to any conversation with Doran, and fix that conversation in your mind with Doran, and say what took place? A. Not previous to the signing up of the deal. Q. Not previous—what do you mean by signing up of the deal? A. The agreement of March 4. Q. What? A. The agreement of March 4. Q. But previous to March 4, and after March 4, if you recollect any conversation with Doran, what was the first you remember? A. I remember Doran telling me that he had put up the $2,500. Q. The whole $2,500? A. The whole $2,500. Q. Do you remember the time that Doran told you that? A. No, it was some time shortly afterwards, and he was bragging, he bragged to me of having put one over on Boehm. Q. What? A. He was—Q. Don't characterise it bragging—you know, give us the conversation? A. He told me in other words that he had got ahead of Boehm. Q. Yes? A. He succeeded in getting Boehm to put up a third of the deposit. Q. He had succeeded in getting Boehm? A. To put up a third of the deposit. Q. In addition to them—was that at the same time he was discussing about having to put up the $2,500? A. Yes. Q. So that you understood at that time, that in the $2,500 that was put up, Boehm had contributed one-third of the deposit? A. Yes, from what he told me.

And again as to Wallace:—

Q. Now, Wallace was not in this real estate business for his health, so far as you could see, was he? A. No, I do not suppose he was. Q. You thought it reasonable that Wallace went into these ventures with a view to make a profit? A. Apparently so, if he disclosed them. Q. I am not asking whether he disclosed them or not, so far as Wallace was concerned, he transferred by an agreement to Fullerton, certain rights and interests in that property at $800 an acre—you knew that, you knew that? A. I knew he had an agreement with Fullerton.

Doran had taken an office about July 1, 1913, to carry on real estate business in same building and, as I understand the evidence, adjacent to those rooms occupied by the firm of Fullerton &

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Crawford, would seem thus to have had the opportunity of daily intercourse with Crawford as well as Fullerton in regard to the joint venture in which he put $5,000 for himself and a friend.

I cannot accept the statement he (Crawford) seems to have made that he did not know that there was a profit of $75 an acre to somebody, for it is inconsistent with what he admits in relation thereto and the exercise of ordinary common sense applied to the business he was so deeply interested in for himself and others.

His pretension was that he only became aware of the amount Fullerton got by looking at the papers in the vault in January or February, 1914, after his partnership with Fullerton had ceased, as it did in said January.

Why, or how, he should have, as it were accidentally, discovered it then and not before on the many opportunities equally good for doing so, I am unable to understand.

I prefer to think he obviously had either forgotten or had not felt the same keen interest as this suit indicates in sharing in the profits made by Fullerton.

Indeed, he puts it rather as a realisation of the fact in the following evidence:—

Q. Then you told us yesterday that you had made some discovery about this alleged property, I think you said, in February, 1914? A. Yes. Q. Just tell us what the discovery was that you then made? A. The discovery was that Wallace had made this profit of eleven thousand and some hundreds of dollars. Q. Yes? A. That was the first time that I realised that Wallace had made that money. Q. Tell me the date on which you discovered it? A. I cannot tell you that, but the day—Q. Well, about the day? A. It would be some time about the latter end of February.

The trial Judge expressly finds as a fact, notwithstanding Crawford's denial, that he knew a profit was being made by Wallace.

But for his omission to find also that he knew, or must be held to have known, that Fullerton and Doran were interested therein, I should not have set forth the foregoing evidence so fully as I have done.

Crawford at the trial would have the Court believe that, though the facts were plain and palpable to anyone possessed of the documents as he was, he had failed to realise the actual situation in which Fullerton had placed himself by what said documnets demonstrated. I do not think this improved his claim to found such a suit as this.

And still less so when we find him immediately attempt to make merchandise of his realisation of the fact by the attempt to frighten Fullerton into giving him a share of what he claimed herein to be an illicit profit, as evidenced by the following letter:—

401 Crown Office Building,
Toronto, March 13, 1914.

James S. Fullerton, Esq., K.C.,
Toronto, Ont.
Re Accounts.

Dear Sir:—

I contend that you received moneys from Mr. Edwin Wallace in connection with the purchase of Bathurst Centre, and must now ask you to account to me for the same under our partnership.

I think my share nearly amounts to $1,500.

Yours truly,
(Signed) J. P. Crawford.

This letter admittedly refers to the said secret profits got by Fullerton. I cannot think that a suitor who proposed, as this one in this letter did, to share in that complained of, is entitled, within the doctrine laid down in many cases but latest in the *Towers* case, [1904] 1 Ch. 558, cited above, to bring in support of such a claim such an action as this when he failed to intimidate and extort a division of the spoils.

His share therein as a shareholder in the company as the result of success herein in that regard might be $300, but he was willing to take $1,500 if the item was brought into the accounts of Fullerton & Crawford.

The suppression of secret profits is most desirable but I submit it will never be accomplished by upholding the claim of one who thus attempted first to make use of such a club to promote his own ends, and then only months afterwards when he failed to so intimidate, resorts to an action ostensibly in the interest of the company.

To recognise such a suitor as well entitled first to attempt such a levy and then entitled, despite his failure therein, would be productive of evils far surpassing those springing from a single successful reaping of secret profits, especially when the latter has been maintained as rightful by nearly all those concerned but himself.

On that ground the appellant Fullerton is entitled, in my opinion, to succeed as to this item of the claim made.

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I am, moreover, very far from holding the opinion that a single shareholder can insist, against an overwhelming majority of fellow shareholders who have no interest adverse to the claim for recovery in such a case, save the honest purpose of allowing him who has received such compensation to retain it, though so ill advised as to have kept his doing so secret instead of manfully proclaiming the fact.

In such a case the question of *ultra vires* or fraud in the sense used in the decision bearing upon such an issue may not arise and the matter be within the competence of a disinterested majority of the shareholders to deal with.

What is clear from the latest decisions such as *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56, is that shareholders in maintaining an advantage for themselves not shared by others, cannot be permitted to accomplish the wrong merely on the pretence that it falls within the internal management of the company.

This decision followed the judgment in the case of *Menier* v. *Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350, wherein, as also in *Gray* v. *Lewis* (1873), L.R. 8 Ch. 1049, at 353, Sir W. M. James, L.J., expressed comprehensively what I may be permitted to think is still the law governing such cases as this when the question raised may not present some act merely *ultra vires* the company and the test have to be applied whether or not a fraudulent use is being made of its powers by the majority of the shareholders or directors as the case may be.

In the case at bar the plaintiff fails, I think, to bring himself within the principles there laid down not only as to the first item but also the other remaining items of his claim when we consider, as I think we must, the action of the shareholders at the September meeting which was called at his instance.

The other items I refer to are Doran's share of the profits made by Wallace and Doran's commission on the resale. As to the former, all I have said and set forth, relative to the claim against Fullerton, applies.

It may be observed that though there was no demand made upon Doran for a share, yet the obvious purpose of the litigation was the same improper one in its origin, and suit was taken after long knowledge and acquiescence.

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As to Doran's commission on the resale, I think there was beyond a doubt present to Crawford's mind the knowledge that it was Doran's effort that produced the resale, that he knew Doran would be expecting a commission and was the only man entitled to commission and whose claim could alone be that referred to in the circular letter of April 22, 1914, to him and all other shareholders, announcing the sale and referring to the year's operations and the paying of commissions on sale, could refer to nothing else than Doran's commission.

Yet in face thereof he not only refrained from objecting thereto but actually participated in the distribution of the moneys as therein suggested, and I hold must be held to have assented thereto.

Inasmuch as he drew the misleading by-law of the company which provided as follows:—

> 6. Except in so far as the remuneration of the directors shall be fixed by this by-law the directors themselves shall have power to fix their remuneration either as directors or as officers of the company, and also the salaries or remuneration to be paid to all salaried officers of the company, and to vary the same when it may be expedient to do so,

upon which no doubt the directors may well have imagined they had a right to act in fixing the commission, I do not think he was entitled to complain of the result.

Under all the foregoing circumstances I am of the opinion that he had no right to complain of this commission and was not entitled to override the action of the shareholders by the bringing of this action though other shareholders may have had such right by virtue of the statute.

I think the appeal should be allowed with costs throughout.

Duff, J.

DUFF, J. (dissenting):—The liability of the appellants in respect of three sums at the suit of the respondent in a representation on behalf of the shareholders is to be determined on this appeal: The sum of $3,867.36 for which the appellant Fullerton has been adjudged responsible and the like sum for which the Doran estate has been adjudged responsible and the sum of $8,121.22 for which all the appellants have been adjudged responsible.

The question raised, whether Crawford, the original plaintiff, was entitled to maintain the action, whether, that is to say, he had not lost any right he might otherwise have had by acquiescence or estoppel, would naturally come first in order of consideration

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but the discussion of it may conveniently be postponed until after the discussion of the substantive question of responsibility.

The trial Judge, Masten, J., gave judgment against the appellants and the Doran estate respectively for the sums first above mentioned and against all the appellants in respect of the sum of $8,121.22. This judgment was sustained by the Appellate Division and that Court was unanimous as regards all points except in respect of the liability of the defendants Murray, Gibson and Brian, in relation to which there was some difference of opinion.

The first two sums were paid to Fullerton and Doran respectively by Wallace out of the purchase money, which, on the same day, had been paid to Wallace by Fullerton on behalf of the syndicate, and constituted in each case one-third of Wallace's profit by the sale, which amounted in all to $11,601.75. It seems to be unnecessary in regard to this transaction to say more than that Fullerton and Doran were both in the position of promoters of and consequently of trustees for the syndicate, and in that character incapable of retaining any profit derived in this way from the transaction. These moneys, therefore, which they received from Wallace remained the property of the syndicate and later of the company in their hands. In passing it may be noted that these moneys were, of course, part of the proceeds of the original subscriptions, that is to say, of the original capital of the syndicate.

The substantive defence of the appellants in respect of these sums rests upon certain resolutions, which were passed on November 4, 1914, by the shareholders of the company, professing to take effect as a release of the company's claim to them. I concur with the view of the trial Judge that, in the situation in which the company found itself on the date mentioned, it was not competent to the shareholders to transfer without consideration a title to these moneys to Fullerton and Doran.

The company made a sale of its lands in the spring of 1914 and, at the end of May, the directors, after paying a commission of $8,000 odd to Doran, proceeded to distribute $36,000 odd in dividends; and the resolutions of November 4, already alluded to, professed to ratify this payment to Doran and to secure a title

to Doran in respect of this sum as well as to deal with the sums distributed by Wallace already referred to.

In May, 1914, the profits arising from the company's transactions (treating Doran's claim for commission as a liability of the company) had reached $25,000 odd on the assumption, and this is rather important, that a third mortgage of $50,000 odd given by the purchasers of the land sold in the spring of 1914 was worth its face value, and on the further assumption that in respect of the two mortgages, one assumed and the other given by Wallace, the company was under no contingent responsibility. Thus the directors in paying the dividend mentioned as well as the Doran claim had disposed of at least $11,000 in excess of the moneys available for distribution among the shareholders.

On November 4, therefore, the capital of the company had actually been diminished by a considerable sum and the principle of *Newman's* case, [1895] 1 Ch. 674, forbade any further distribution of its assets among the shareholders until the statutory proceedings had been taken. *In re George Newman & Co., supra; Paton's* case (1903), 5 O.L.R. 392, at page 406; *Hutton* v. *West Cork R. Co.* (1883), 23 Ch. D. 654; *Flitcroft's* case (1882), 21 Ch. D. 519, at 534-5.

Now the sums in the hands of Fullerton and Doran which had been paid to them by Wallace were assets of the company, just as the moneys standing to the credit of the company in the bank were; and the attempt on November 4, to hand this property over to Fullerton and Doran was just as illegal, and inoperative in point of legal effect, as would have been a resolution authorising the directors to transfer any asset, *e.g.*, the mortgage above mentioned, into the name of any one of them and to sell and dispose of it for the benefit of the directors.

As to the Doran commission. I am disposed to agree with the view of sec. 92 of the Ontario Companies Act advanced on behalf of the appellants; I am inclined to concur in the view that this section does not contemplate special payments of the character here in question which are not made by way of remuneration for services of a director as director, but a special allowance made on some other ground.

Our attention has not been called to any other provision of the Ontario Companies Act, and I assume that if there had been such

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a provision our attention would have been called to it, that in any way weakens the force of the rule by which directors, trustees of their powers for the shareholders, are incapacitated from retaining as against the company any profit arising from a contract made between themselves and the body of directors of which they are members, unless the company knows and assents, *Imperial Mercantile Credit Association* v. *Coleman* (1871), 6 Ch. App. 558, at 566; *James* v. *Eve* (1873), L.R. 6 H.L. 335, at 348; *Gluckstein* v. *Barnes*, [1900] A.C. 240; *Boston Deep Sea Fishing Co.* v. *Ansell* (1888), 39 Ch. D. 339. The application of the principle does not appear to be affected by the provisions of by-law 6 of the company's general by-laws. The power given thereby to the directors is a power to fix their own remuneration as directors or as officers of the company; and, no doubt, it would have been competent to the directors acting thereunder to attach a salary to the office of director or to the office of vice-president, or to the office of general manager, but it is impossible to suggest that what is alleged to have been done here in order to support the payment to Doran, is or bears any kind of resemblance to any of these things. What is alleged is a contract between the company and Doran through the instrumentality of the board of directors of which he was a member, allowing him a specific fee for a specific service—a service given in the ordinary course of prosecuting his calling as land agent. That would be a transaction which could not be brought within the authority given by this by-law. Doran, it may be noted, on November 4, was still vice-president, director, general manager. The fee which had been illegally paid to him was the property of the company in his hands. It is quite true it required only the assent of the company to give him a title and the resolution of November 4 is relied upon as furnishing adequate evidence of that assent.

The first objection which is taken to the proceedings on November 4 is based on the fact already mentioned, namely, that in paying the dividend of May 29, the company had more than disposed of all its available distributable assets, and that objection seems to be fatal.

It is quite true that if the company had possessed itself of the moneys in Fullerton and Doran's hands, amounting to $15,000 odd, then, assuming always that the third mortgage on the lands

disposed of should be counted at its face value, it would appear that there would be a small surplus, $4,000 odd; but on the closest calculation the retention of neither the Wallace donations nor the Doran fee could be sanctioned without obliterating this surplus and there is, I think, no escape from the conclusion that these proceedings of November 4, which were virtually simultaneous, must on this account be held to be without legal effect.

There is another grave objection, moreover, to these proceedings which I should have preferred not to mention and which I should have passed over in silence had it not been that it has material weight in considering the important question of the right of the plaintiff to maintain the proceedings.

It is unfortunately too clear that knowledge of the participation in the Wallace profit was industriously withheld by Fullerton and Doran from the shareholders—until in the autumn of 1914 the curiosity excited by Crawford's activities, left them no other choice than disclosure. At the trial Fullerton still maintained the attitude that these payments were bonuses and any suggestion of impropriety in the non-disclosure of them was treated rather contemptuously as a quibble. I am referring, of course, to Fullerton's own attitude, not to that of his counsel. In view of this state of mind, one is not surprised to discover in a letter written on September 11, to Ruckle, for the information of persons from whom proxies were to be obtained, the statement that Wallace came to him, Fullerton, as any other client would have come, and told him that he had an option on this property at $800, that no other price was ever mentioned and that "the deal was put through" at that price; and again in a letter of July 6, addressed to the shareholders generally, this statement: "Edwin Wallace's option was at the price of $725 per acre and he offered it to the syndicate at $800 per acre, whereby Wallace made a profit of the balance." Fullerton's attitude is perhaps best brought out in some parts of his own evidence:—

Q. Then you say that you first knew that you were going to get something on what date? A. Oh, my recollection now is that it was on March 14. Q. On March 14? A. Yes. Q. That you first knew that you were going to get something? A. Yes—or rather I did not know that I was going to get something until I got it, but on March 14, Wallace spoke to me about it. Q. Wallace spoke to you about it and then you did not know what amount you were going to get then? A. I did not. Q. And when did you find out

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what amount you were going to get? A. When I got the cheque. Q. When was that? A. I cannot say whether it was the afternoon of the 14th or the morning of the 15th. I can only state that I deposited it on the 15th or that it was deposited for me on the 15th. In my examination I was speaking from the deposit, and I thought it was on the 15th I got it, but further recollection the 14th or 15th. Q. The 14th or 15th—now up to that date you did not know yourself you were going to get anything? A. I did not. Q. And any knowledge Crawford could have acquired up to that date could not have conveyed that information to him? A. No. Q. Is that right? A. That is right. Q. He could not have found it out if he had known all about Wallace's profit? A. Yes. Q. He could not have told you were getting anything and he could not have told Doran was getting anything? A. I cannot tell you: Q. You cannot tell that then when you did get something, Mr. Fullerton, why did you not disclose it to your friends and associates? A. I am not much in the habit of disclosing to my friends and associates what my deals are or what was done. Q. I mean your associates in this particular deal—why did you not disclose it? A. I did not disclose it but I have no particular reason except that I am rather reticent about my business and I did not intend to disclose it at that time. Q. Now, Mr. Fullerton, on September 18, when all the cheques were spread out before you and when apparently Crawford had all this time information for the $11,000 cheque was there, now why—come to the time when he knew about the $11,000 odd cheque—it was there before you? A. Yes. Q. And Crawford said "Fullerton and Doran are you getting any share of that?" A. Yes. Q. And you heard Wallace say that he would not say how he had distributed it, that that was his own business, do you remember that? A. Yes. Q. Why did you not then say you got a part of it? A. Because I was calling a meeting of the company I intended calling a meeting of the company and intended to make disclosure there in regard to the whole matter and I knew that Crawford was seeking information at that time for the purpose of his suit, and I did not intend to give it until I called my own meeting. Q. You did not intend to give it? A. Until I called my own meeting. That was absolutely the reason why. Crawford had written me a letter in which he had demanded $1,500 on the belief and sole belief that he was considering whether to bring an action against me in the partnership or on the other, and I did not propose to assist him at that meeting if I could avoid it.

Fullerton and Doran, as directors and officials of the company, were under a duty to the company and to the shareholders as a body to see that the fullest information was laid before the shareholders regarding the transactions under review at the meeting of November 4. *Cook* v. *Deeks*, 27 D.L.R. 1, [1916] 1 A.C. 554.

It is regrettable that no effort was made to perform this duty; that these gentlemen considered themselves entitled to act within the spirit of the communications and the evidence just set out; and that the members represented by proxy at the meeting of November 4 seem to have remained in ignorance of the facts to the very end. In these circumstances I think the resolution of

November 4 cannot be treated as satisfactory evidence that a majority of the shareholders with knowledge of the facts approved these transactions of which Fullerton and Doran were the beneficiaries: *Cook* v. *Deeks*, 27 D.L.R. 1, [1916] 1 A.C. 554; *Pacific Coast Coal Mines Ltd.* v. *Arbuthnot*, 36 D.L.R. 564, [1917] A.C. 607.

As to Crawford's right to maintain these proceedings. The status of a single shareholder to attack an *ultra vires* proceeding is, as a rule, unquestionable, in the absence of evidence disclosing conduct making it unjust that he should be permitted to go forward with his attack.

As regards the Doran commission: It is not, I think, seriously argued that Crawford did anything to preclude him from impeaching that payment.

As regards the sum given by Wallace to Doran I have heard no suggestion requiring discussion pointing to any conduct of Crawford's precluding him from taking steps to impeach that.

As to the sum received by Fullerton from Wallace. It is now said, 1st, that Crawford knew of the distribution of the Wallace profit from the beginning, and 2nd, that in March, 1914, he wrote a letter to Fullerton calling upon him to account for the sum received from Wallace as part of the partnership proceeds and that this last mentioned act constituted such a participation in the conduct of Fullerton as to make it inequitable and contrary to justice to permit Crawford now to complain of it.

It is necessary to keep clearly in view two things, (1) that the moneys in question, as I have already said, in Fullerton's hands constituted an asset of the company; (2) that the general rule is that a single shareholder is entitled to impeach an *ultra vires* or illegal act of a company without using the name of the company subject to the qualification that the right of a single shareholder to proceed where the majority refuse to allow the name of the company to be used, in such case rests upon the proposition that justice requires the sanction of the proceeding. *Russell* v. *Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474, at 480.

It follows of course that if in a particular case it would be unjust to permit a single shareholder to take a proceeding, the right is denied him and virtually the point to be determined at

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this stage is this: In view of the circumstances mentioned would it be unjust to permit Crawford to maintain the action? Consider the conduct of Fullerton as disclosed by the communications and the evidence above referred to; he was a promoter, not technically merely but actively engaged in soliciting subscriptions and support from all quarters. He deliberately and with set policy withheld the fact that he was making a substantial profit out of the promotion. This fact he withheld until at the very last he was virtually forced to disclose it. He says that as late as September, 1914, Crawford was searching for information to enable him to take proceedings and that he was resisting his attempts to get it.

Crawford, as the trial Judge found, understood that Wallace was making a profit at a comparatively early stage, but the evidence of Fullerton read with that of Crawford is convincing upon the point that as regards Fullerton and Doran, Crawford had nothing more than a suspicion down to the middle of 1914, and Crawford's explanation of the letter, namely, that it was written with the object of getting information is virtually accepted by Fullerton himself.

Crawford's delay in actually pressing his inquiries may perhaps be accounted for by the fact that it was only after the dissolution of the partnership with Fullerton that he decided to press his claim; but in truth it is hardly disputable that until months after the dissolution Crawford was not in possession of information which would have justified him in charging Fullerton and Doran with participating in Wallace's profit. This is evident from Crawford's own course and is virtually asserted by Fullerton himself. And when one considers the course of conduct deliberately pursued by Fullerton and Doran, the persistent determination to conceal the facts touching their relations with Wallace and the actual destination of the profit derived by Wallace from the sale to the syndicate, it seems an extreme view that by writing the letter of March, a letter which was never acted upon, which affected nobody's conduct, nobody's rights or interests, Crawford was doing something making it unjust that he should institute legal proceedings to compel these fiduciaries to account to the shareholders for the property of the shareholders in their hands.

It should be noted perhaps at this point that the trial Judge in declining to accept Crawford's testimony to the effect that he

did not know the price at which Wallace bought, acquits him of any intention to misstate the facts.

The question for disposition here has little analogy to that which arose in *Towers* v. *African Tug Co.*, [1904] 1 Ch. 558, where an action was brought by a shareholder against directors seeking to hold them responsible for moneys distributed among the shareholders which were not available for distribution. The shareholder who was plaintiff in that action had received his share of these moneys knowing the facts and brought the action with the proceeds of the distribution in his pocket; in other words, he had made himself a party to—he had participated in—the very act he was complaining of. Crawford, on the other hand, received nothing and moreover did nothing which could have precluded him from saying to Fullerton, if in response to his letter Fullerton had offered to divide his profit with him—the money is not yours to divide.

In *Towers'* case, [1904] 1 Ch. 558, each one of the Lords Justices dwells upon the fact that when the action was brought and when it was tried Towers still had in his pocket his share of the proceeds of the *ultra vires* act of which he was complaining. Vaughan-Williams, L.J., at p. 565; Stirling, L.J., at p. 568; Cozens-Hardy, L.J., at p. 572. Moreover, the transaction in *Towers'* case, *supra*, was not impugned as a transaction in which directors or trustees had tried to benefit themselves at the expense of their co-adventurers; it was a case in which there had been an equal distribution among shareholders, by the consent of every one of them, of a small part of the company's capital not legally distributable; and the Lords Justices (see especially Stirling, L.J., at p. 570), emphasise the fact that no one had ascribed fraud or dishonesty to anybody concerned in the distribution.

There is another and fatal objection to the contention of the appellants on this point and that is that it is not raised in the pleadings as originally framed, nor by any amendment, nor is there anything in the course of the proceedings at the trial to justify the inference that the pleadings were treated as amended in such a way as to make this defence available. The cross-examination by counsel for the defendants was, after repeated objections, allowed to proceed in deference to the contention that Crawford's conduct, with regard to all these matters, was material on the

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question of credit and the cross-examination of Fullerton proceeded on much the same lines. The point now contended for, namely, that the letter of March plus the delay was an act precluding Crawford from taking these proceedings, is not noted in the judgment of the trial Judge who, it is to be observed, deals with the issue raised by the allegation in the defence—the narrow issue raised by paragraph 10 of Fullerton's defence and paragraph 4 of Doran's defence—that Crawford knew that Wallace had made a profit. The trial Judge deals with this issue and finds that Crawford became aware of this profit having been made. He also deals specifically with the defence set up in answer to another claim, a claim in relation to the moneys distributed as profits, the defence that, having received his share, he was precluded, under the authority of *Towers'* case, [1904] 1 Ch. 558, from disputing the regularity of the distribution. He deals with this and gives effect to the defence, but there is not a word in his judgment from the beginning to the end countenancing the idea that any such defence as that I am now considering was put before him. There are, moreover, discussions reported in the appeal book which seem to shew affirmatively that this defence, if it was in view, was never in any way put forward at the trial.

I refer specifically to two examples only of this. At p. 171 the following occurs:—

Q. If Doran pledges his positive oath against your uncertain memory of other matters that that conversation did take place, will you undertake to contradict him? A. I certainly will. I asked particularly about that commission at the meeting in September. I did not know then about the commission. *Mr. McMaster:* Surely my Lord, the right to commission does not turn on his knowledge or lack of knowledge. Surely this is wasting a lot of time—his knowing has nothing to do with Doran's right to take commission. *Mr. Dewart:* It is a matter of his right to take commission of 5%. It may have an important bearing on the evidence we will offer, my Lord.

If the defence I am now discussing was to be relied upon it is quite impossible to suppose that this colloquy could have taken place in these words.

Again at pp. 340 and 341 there is the following:—

His Lordship: I might say to counsel frankly, my own idea is that all that long discussion and great conflict of testimony in regard to what was done, and what was not done, and various things of notice to Crawford, makes no difference. I think that the subject—I am not giving judgment, understand, at all, by any means, and I am entirely prepared to hear what everybody has to say, and I may be entirely wrong, but my present view is these moneys were promotion moneys and these people were originally in the position of having received promotion moneys and were promoters and that

it all becomes a question, the whole question comes down to the effect of what we have been recently discussing. Now, as to the subject of ratification that is on that original part, that is my view—I do not want at all to interfere with your elaborating just as fully as you choose for the benefit of any Court of Appeal, on the different view. *Mr. Rowell:* Of course, as the whole matter has been raised in issue, we want to get all the facts in this connection with the transaction. *His Lordship:* I am not interfering in any way. *Mr. Rowell:* That is my only reason for mentioning now, until we get in the contents of this note book, and have Mrs. Dack called, I cannot ask Fullerton in reference to a point I want to ask him. *Mr. McMaster:* What I mean, is the great conflict there was whether Crawford knew that Wallace was getting something —now how can it effect this case against the other two directors whether he did know that or did not know it? Just simply I want to get through with the case as early as possible, that is all. *Mr. Dewart:* The evidence directs itself solely to a different branch than that.

If the defence of knowledge of the Fullerton and Doran participation and condonation of that was to be raised in this Court (the defence not having been pleaded) it should have been specifically brought forward at this point.

It is not the practice of this Court to allow an appellant to reinforce his hand with cards he has hitherto been concealing in some part of his habiliments.

The defence, as one would expect, is not referred to in any of the judgments of any of the Judges of the Appellate Division.

It should be added that the status of the respondents to maintain the proceedings rests upon two grounds; (1) the illegality of the proceedings of November 4; (2) a recognised exception to the rule that the company is the only proper plaintiff in an action to recover company property is that where misconduct on the part of the company and one or more of its officers is to be investigated the arm of the law is not stayed by the rule. *Cockburn* v. *Newbridge Sanitary Steam Laundry Co.*, [1915] 1 I.R. 237, at 258; *Cook* v. *Deeks*, 27 D.L.R. 1, [1916] 1 A.C. 554.

For these reasons the appeal should, in my judgment, be dismissed with costs.

Anglin, J.

ANGLIN, J.:—As the syndicate acquired the Bicknell property merely to hold it pending the incorporation of the projected company and its members became shareholders in that company in proportion to their respective interests in the syndicate, I do not distinguish between rights of the company and rights of the syndicate.

At the outset I should state that I entertain no doubt that upon

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the receipt by the defendants, Fullerton and Doran, of their shares in the Wallace profit liability to account for them to the company immediately arose. *In re North Australian Territory Co., Archer's* case, [1892] 1 Ch. 322.

But it is not so clear that this is one of the exceptional cases, referred to in *Towers* v. *African Tug Co.*, [1904] 1 Ch. 558, in which a single shareholder, suing on behalf of himself and of shareholders other than the defendants, may, against the will of the majority, assert a right of the company to recover its property and compel its enforcement (Lindley on Companies, 6 ed., vol. I, 779, 781; Buckley on Companies, (1909) 612-14), or that the plaintiff in this action had not disqualified himself from maintaining it. On this branch of the case I find it necessary to pass definitely only upon the latter question.

The trial Judge expressly found, contrary to the testimony of the plaintiff Crawford, that he was fully apprised of the profit made by Wallace on the sale to Fullerton as trustee for the syndicate, adding, however, that neither he nor any of the subscribers of the syndicate were aware of the division of that profit with Fullerton and Doran. A study of the evidence, all of which I have found it necessary to read with care, has satisfied me that little reliance can be placed on the plaintiff's testimony. His cross-examination is most unsatisfactory. His witness, Eaton, seems to be even less reliable; and there is practically no other corroboration of the plaintiff's story on controverted points. The evidence of Fullerton and Doran, while not entirely satisfactory, is, in my opinion, much more reliable than that of Crawford.

While Crawford may not have known of the actual payments by Wallace to Fullerton and Doran at the time they were made, with great respect I think the evidence leaves no room for any real doubt that he knew at a comparatively early date that the defendant Fullerton had shared in Wallace's profit and I cannot believe that he remained long in ignorance of the actual division made of it. His reiterated statement that Fullerton had told him from the first that he (Fullerton) was the real purchaser from Bicknell and that he had taken the agreement to purchase in Wallace's name merely to escape liability on covenants, coupled with his letter of March 13, 1914, in my opinion puts Crawford's

knowledge as to Fullerton's share beyond question. His admitted knowledge that Doran had furnished one-third of the deposit of $2,500 made by Wallace with Bicknell to secure the property, another one-third of it having been obtained from one Boehm (Bicknell's agent for sale), and his familiarity with all the details of the purchase by Wallace, of his sale to Fullerton as trustee, of the formation of the syndicate and of the incorporation and organisation of the defendant company, which I think the evidence establishes, warrant the inference that he also knew of Doran's receipt of one-third of the Wallace profit. With that knowledge he determined to treat the $3,877.20 received by Fullerton as money properly obtained by him for which he should account as partnership assets of the firm of Fullerton and Crawford. By his letter of March 13, 1914, he distinctly demanded from Fullerton an accounting "under our partnership" of the "moneys received (by him) from Edwin Wallace in connection with the purchase of Bathurst Centre"—the property in question. That, in my opinion, amounted to such acquiescence in the receipt by Wallace of the profit on the sale to the syndicate and its distribution between himself, Fullerton and Doran, that the plaintiff is disqualified from complaining of it individually; and

he cannot get any greater right of complaint because his action is, in form, an action by himself and all the other shareholders in the company. In fact, he must succeed by his own merits and not by the merits of the other shareholders.

Towers v. *African Tug Co.*, [1904] 1 Ch. 558, at 572, *per* Cozens-Hardy, L.J.

On this ground the action, in my opinion, fails as to the two sums of $3,877.20 each claimed respectively from Fullerton and Doran.

Moreover, the receipt by Fullerton and Doran from Wallace of part of the latter's profit—their sharing that profit with him on the understanding which the trial Judge found had existed from the inception of the project—was neither something which it was *ultra vires* of the company to sanction, nor something *in se* illegal and therefore not susceptible of ratification by the shareholders. It was not within the Secret Commissions Act, 8 & 9 Edw. VII., 1909 (Dom.), ch. 33, sec. 3, because not accepted or obtained *corruptly*. Had the Wallace profit, and the interest of Fullerton and Doran in it, been fully disclosed to the shareholders from the

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first its payment and distribution could not have been successfully challenged. It was the concealment and secrecy of the payments to Fullerton and Doran that made them fraudulent against the company and entitled it to recover them back. *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369, at 373, *per* Chitty, L.J. Viewed as a fraud on it carried out by a breach of duty on the part of the defendants Fullerton and Doran, who occupied a fiduciary position in regard to it, the company had the option to elect to ratify what had been done or to demand an accounting from Fullerton and Doran.

There is not a little to indicate that a majority of the shareholders not in anywise implicated or interested in the payments to Wallace, Fullerton and Doran have been prepared to ratify those payments and are opposed to the plaintiff's attempt to compel Fullerton and Doran to account to the company for their shares. The shareholders' meeting of November 4, 1914, appears to have been fairly called. From the plaintiff himself and in the directors' notice calling the meeting they had received full information of the transactions of which he complains and of which their sanction and approval were sought. The defendants, Fullerton and Doran, made the mistake, however, of allowing proxies procured for an earlier meeting, held in September, to be used in the voting of November 4. When those proxies were given it is not at all clear that the shareholders had been fully apprised of the payments to Doran and Fullerton now in question. Although Crawford had notified them in a circular letter of July 4, that there had been "a secret profit of $11,601.75 made by some of the promoters of the syndicate," it was only in his circular letter to them of October 23 that he distinctly charged Fullerton and Doran with having in this way obtained $3,867.20, each, and Doran with having been paid $8,121 as a commission. With that knowledge, however, the shareholders who had given proxies in a most general form to Fullerton, Doran and Ruckle apparently allowed them to stand unrevoked and available for use at the November meeting called expressly to ratify and confirm these payments. While, under these circumstances, there is not a little to be said for the view that they intended to have their votes recorded in support of the proposition made by the directors in the notice calling the meeting of the 4th of November, on the

whole, apart from any question to which the impairment of capital then existing gives rise, I think it would not be safe to treat what occurred there as a sufficiently certain expression of the views of shareholders whose votes were cast under the September proxies. *Pacific Coast Coal Mines Co. Ltd.* v. *Arbuthnot*, 36 D.L.R. 564, [1917] A.C. 607.

But for this difficulty in regard to the votes cast by proxies, in the absence of any ground to question the good faith of the action of the majority in sanctioning and approving what had been done, the right of a minority shareholder to maintain this action to compel repayment to the company—to recover its property—to enforce its rights—would be at least questionable. The corporation is *primâ facie* the only proper plaintiff in such an action. Had the use made of the proxies at the November meeting been beyond suspicion, this would not appear to be one of the exceptional cases in which a dissentient shareholder should be permitted to exercise the company's right against the will of the majority—cases which, to quote Sir George Jessel's observation in *Russell* v. *Wakefield Waterworks*, L.R. 20 Eq. 474, cited by Stirling, L.J., in the *Towers'* case, [1904] 1 Ch. 558, at 480, "turn very much on the necessity of the case; and that is, the necessity for the Court doing justice."

I rest my judgment for the defendants on this branch of the case, however, on the plaintiff's disqualification to maintain the action.

The $8,121.22 paid to the defendant Doran as a commission on the very advantageous sale of the company's property to Robins, Limited, undoubtedly effected by him, stands on a different footing. While there was some delay after the plaintiff had knowledge of the actual payment to Doran in bringing this action and he accepted a dividend which he knew had been recommended and passed on the basis that it represented a balance divisible amongst shareholders after payment of the outstanding unsecured liabilities of the company, including a commission on the sale to Robins, Limited, there is not in regard to this item the evidence of unequivocal acquiescence which the plaintiff's letter of the 13th of March, 1914, affords as to the distribution of the Wallace profit. I therefore prefer not to rest my judgment in regard to it on personal disqualification of the plaintiff by acquiescence.

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The reasonableness of the amount paid, if Doran was entitled to a commission, is not questioned and I find nothing to justify the suggestion that either his employment or the payment to him was in any sense secret or surreptitious. On the contrary, the fair inference from the evidence is that all who were interested in the company, including the plaintiff, knew that upon the lapse of the Sorley option the sale of the property was placed in the hands of Doran, whose business was real estate brokerage. The suggestion now made that he negotiated the sale as the general manager of the company acting without remuneration, is one which I cannot accept. His expenditure out of his own pocket in endeavouring to effect the sale is utterly inconsistent with any such view of the footing on which he was proceeding.

The objections made to the payment of this commission are that since Doran was a director of the company any payment to him must, under section 92 of the Ontario Companies Act, be authorised by a by-law confirmed by a general meeting of the shareholders; that it was not proved that he was employed to make the sale; and that the payment to him was made out of capital.

The commission was not paid to Doran as a director of the company, but as an agent employed by it to sell its property. I think such a payment does not fall within section 92 of the Ontario Companies Act. I agree with the view expressed by Middleton, J., in *Re Matthew Guy Carriage and Automobile Co.* (No. 2) (1912), 4 D.L.R. 764, at 765, 26 O.L.R. 377, that this section does not extend to a payment to a director at the ordinary market price for a service rendered by him in his capacity of a mere employee of the company. After reviewing the authorities in *Canada Bonded Attorney and Legal Directory Co.* v. *Leonard-Parmiter Co.* (1918), 42 D.L.R. 342, 42 O.L.R. 141, Mr. Justice Riddell, dealing with section 92, says, at 353:—

> There is no reason, however, why one who happens to be a director should not serve the company in another capacity, as servant, clerk, bookkeeper, mechanic, etc., and receive reasonable remuneration therefor. It is of course the duty of every director, a duty which he owes to his company and to the other shareholders, to see to it that he does not receive too great a remuneration for such service as he does render.
>
> If the services are such that only a director can perform them, *e.g.*, attending board meetings or acting in other regards as a director, he can recover compensation, payment for such services, only by complying with the statute;

but, if he is employed in a subordinate capacity and at a reasonable figure, there is no necessity for a by-law confirmed at a general meeting.

Ferguson, J.A., concurred in this judgment; Rose, J., while differing on some of the facts, concurred in Mr. Justice Riddell's statement of the law; and Lennox, J., concurred with Rose, J. I think a by-law was not necessary to authorise the defendant Doran to act as agent of the company for the sale of its lands. Nor was a by-law confirmed by a general meeting required to authorise his being paid for services rendered in that subordinate capacity. They were not services rendered in the government of the company. *Mackenzie* v. *Maple Mountain Mining Co.* (1910), 20 O.L.R. 615, at page 621, *per* Meredith, J.A.

Mr. Justice Rose summarizes the evidence on this branch of the case—very fairly, if I may be permitted to say so—as follows, 42 D.L.R. at 110:—

> Mr. Doran swore, and Mr. Fullerton's evidence seems to support his statement, that it was understood amongst the directors that he should not be given a regular salary for acting as vice-president and general manager, but should have the opportunity of finding a purchaser for the land and, if he succeeded, should be paid the usual land agent's commission, and should accept that as his "recompense" for performing the duties of his office.

At a meeting of shareholders, he was instructed, informally, to endeavour to find a purchaser. He did make a sale, and he managed to induce the purchasers to add to the price first offered by them, which price some, at least, of the shareholders and directors were in favour of accepting, a sum practically equivalent to the amount of the commission; and apparently, all the members who knew about the matter were content. It was paid and the question is whether there was legal authority for paying it.

At the meeting which was held on May 29, 1914, and which seems to have been a directors' meeting, although the minutes called it a meeting of the company, the secretary-treasurer is reported to have put in a statement of liabilities shewing the solicitor's charges in connection with the sale, a commission to Doran of $8,121.22, small sums for fees of the several directors, and a small salary to the secretary-treasurer. The statement ended with the following memorandum:—

> The amount at present in the bank is $45,014.48. The disbursements as above are $8,829.22, which will enable us to pay a dividend of 57% and leave the balance in the bank of $161.76 to the credit of the company.

Resolutions were passed that the directors be paid $10.00 per

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meeting for meetings attended by them; that the secretary be allowed the sum mentioned in the statement as owing to him; and that a dividend of 57% be declared and be paid to the shareholders forthwith. On the same day cheques were issued for the commission and for the dividend.

There was no resolution referring to the commission or to the solicitor's charges.

While there is no doubt a lack of proof of a by-law or resolution formally authorising Doran to act as the company's selling agent, the impression left on my mind by the whole of the evidence bearing on this issue is that he was authorised at the shareholders' meeting of the 27th of March, 1914, at which Crawford admits he was present, to sell the company's property as a real estate broker on commission, and that acting on that authorization he proceeded in good faith to procure and did procure a purchaser for the lands at an advantageous price. While the absence of a minute of this action of the shareholders affords ground for adverse comment, it by no means conclusively establishes that Doran was not in fact so authorised. *Bartlett* v. *Bartlett Mines Co.* (1911), 24 O.L.R. 419; *In re Fireproof Doors Co.*, [1916] 2 Ch. 142. I accept Doran's uncontradicted statement, partly corroborated by Fullerton's testimony, that he was. The company had the benefit of what he did and was, in my opinion, liable to him for a commission. Doran's employment as selling agent being established, the amount of the commission paid him is readily defensible on a *quantum meruit* basis.

I incline to think that it was only because they deemed it unnecessary to do so that the directors did not at their meeting of the 29th of May, 1914, pass a formal resolution for the payment to Doran of his commission of $8,121.22. Payment of the item for solicitor's charges shewn in the secretary-treasurer's statement submitted to the meeting was likewise not covered by any specific resolution. That statement admittedly shewed this commission as an outstanding liability of the company and it was on the footing of its being paid that it proceeded to indicate that there would be enough money left in the bank to warrant a distribution of 57% of the amount of the company's capital as a dividend amongst the shareholders—leaving $161.76 still in bank to the credit of the company. It was on that statement, as the minutes shew, that

the directors resolved to pay the 57% dividend. I have no doubt (as Masten, J., Meredith, C.J.C.P., and Lennox, J., appear to have thought), that it was intended at this meeting to recognize the Doran commission claim as a liability of the company and to authorise its payment. Otherwise the dividend there directed to be paid would have been not 57% but 69%. The purpose was to act on the memorandum submitted by the secretary-treasurer and to leave in bank the comparatively insignificant sum of $161.76 to meet current petty expenses—not $8,300. The $8,121.22 was paid to Doran on the same day (May 29, 1914) by the company's cheque, signed by J. A. Murray, president, and Jas. S. Fullerton, secretary-treasurer, and it is reasonable to assume that this payment preceded the payment of the 57% dividend. If so, the capital was intact when and after it was made and, however irregularly made, it was not *ultra vires* of the company.

What I have said as to the proceedings at the shareholders' meeting of the 4th of November applies to this branch of the case. While upon the whole evidence I have little doubt that the majority of the shareholders approved of the payment of a 5% commission to Doran and would have ratified and confirmed the action of the directors in making it, the uncertainity as to the use at the November meeting of the September proxies having been quite legitimate prevents the resolutions passed at it from being given whatever effect they might otherwise have had. But without the aid of this attempted ratification, the payment of the commission to Doran may be upheld as the liquidation of an honest debt by the company which it was within the authority of its officers to make.

No one suggests any fraud or dishonesty on the part either of Doran or of the directors. All that was done, if done regularly, would not have afforded a scintilla of ground for complaint. Mistakes may have been made and foolish courses adopted; but fraudulent intent has not been established.

I would, for these reasons, allow this appeal with costs here and in the Appellate Division and would dismiss the action with costs.

BRODEUR, J.:—This appeal should be allowed and I concur with my brother Idington. Brodeur, J.

Appeal allowed with costs.

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Solicitor for the appellants Fullerton and the Doran Estate, *Hugh J. Macdonald;* solicitors for appellants Murray, Gibson and Bryan, *Urquhart, Urquhart & Page;* solicitors for the respondent Crawford, *McMaster, Montgomery, Fleury & Co.;* solicitor for the respondent the Bathurst Land Co., *J. Earl Lawson.*

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MYERS v. NOVA SCOTIA TRAMWAYS AND POWER Co., Ltd.

Nova Scotia Supreme Court, Harris, C.J., Longley, and Drysdale JJ., Ritchie E.J. and Mellish, J. January 13, 1920.

NEW TRIAL (§ II—9)—DAMAGE ACTION—QUESTIONS SUBMITTED TO JURY—FURTHER QUESTIONS REQUIRED BY COUNSEL—REFUSED BY JUDGE—NEW TRIAL—JUDICATURE ACT, 9-10 GEO. V., 1919 (N.S.), CH. 32, SEC. 42 (6).

Counsel in a damage action may require the Judge to direct the jury to answer certain questions raised by the issues and the refusal of the Judge to so direct the jury may be used as a ground for a new trial.

[*DesBarres* v. *Bell* (1888), 20 N.S.R. 482, distinguished; *Holmes* v. *Robbins* (1889), 21 N.S.R. 434, referred to.]

Statement.

MOTION on behalf of defendant to set aside the findings of the jury and directing a new trial herein, or alternatively directing that plaintiff's action be dismissed and judgment entered for defendant with costs of action and of appeal.

L. A. Lovett, K.C., for appellant.

V. J. Paton, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—The defendant company owns and operates an electric tramway or railway in the City of Halifax.

The plaintiff was a passenger on this tramway on the evening of September 15, 1917, and was injured while alighting at or near to the corner of Barrington and Prince streets.

The 5th, 6th, and 7th paragraphs of the statement of claim read as follows:

5. The plaintiff was desirous of alighting from the said car at the corner of Barrington and Prince streets which is a usual place for stopping said cars, in order to allow passengers to alight therefrom, and the conductor and motorman were duly signalled to stop said car at said corner.

6. Accordingly the said car stopped for the purpose of allowing the plaintiff and other passengers to alight from the said car and while the plaintiff was in the act of alighting therefrom, the said car was improperly, negligently and carelessly started ahead so that the plaintiff was violently thrown down and received serious injuries, violently striking her head and body upon the ground by reason whereof she was rendered unconscious and she received so severe a shock that her health has become permanently impaired and she has not recovered, and she suffered and is still suffering great pain, expenses and

inconvenience, and was and is permanently disabled and incapacitated for work of any kind and has been and will be an invalid for the rest of her life, and has incurred expenses for medical attendances and appliances and for nursing and medicines and was prevented from returning to her home for about four months and was obliged to remain that time at Dartmouth, Nova Scotia, at considerable expense and has since been unable to attend to her household duties.

7. The negligence of the defendant company consisted of the following matters:

(a) In starting said car ahead while the plaintiff was in the act of alighting therefrom.

(b) Sufficient time was not given the plaintiff to alight or get away from the car.

(c) Sufficient time was not given to take passengers on board and for the plaintiff to alight when the car stopped as aforesaid.

(d) The conductor was not in his proper place and was not in a position to see either when to start the car or whether sufficient time was allowed for passengers to alight or to board the car or to see that they had safely landed or got away from the car.

(e) The conductor was negligent in not observing the plaintiff and in not giving her time to complete the act of alighting from the car, or to avoid it after doing so, before the car was started.

(f) The conductor was negligently inattentive to his duty of seeing that passengers had an opportunity and time to safely alight and depart from the car.

(g) The car was started by the motorman without waiting for a signal.

(h) The car was put in motion while the plaintiff was in the act of alighting from the car, and no warning was given to the plaintiff not to alight.

(i) The car was put in motion without warning to the plaintiff and while she was in the act of alighting from the car, and before she had time to safely reach the ground, or before she had time to avoid being struck by the car.

(j) The car was started negligently, unskilfully and violently or with a jerk at too great a speed or with too much power.

(k) The car was out of control.

(l) The car was started after the plaintiff had begun to alight from the car, and it was the duty of the defendant company's servants to have seen that the plaintiff was alighting and was not safely upon the ground and out of and away from the car before starting the car. It was further their duty to have stopped the car immediately the plaintiff's accident was discovered.

(m) The said car was equipped with improper brakes or brakes that were not suitable for the purpose and said brakes were defective and said injuries were caused owing to the negligence of the defendant company in not providing proper or suitable brakes.

The defence after specific denials of the plaintiff's allegations proceeds:

As to the whole statement of claim:

(a) The defendant denies that defendant company or any of its servants or agents were guilty of any of the acts of negligence or default at all.

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(b) Defendant denies that the alleged injuries or the alleged results therefrom or the alleged expenses were caused by any negligence or default of defendant company or any of its servants or agents or by any of the acts or defaults or matters complained of.

(c) The alleged accident and consequent injuries to plaintiff were caused by inevitable and unavoidable accident and circumstances which could not be foreseen by the exercise of any reasonable care or skill by the servant or servants of defendant in charge of said tram car, who exercised all reasonable prudence and care in connection with the control and management of said tram car and did everything that could be done to avoid the accident.

(d) The alleged accident and injuries to plaintiff were occasioned by the negligence and default of plaintiff, without any negligence or default on the part of defendant company or any of its servants or agents.

(e) The plaintiff was guilty of contributory negligence.

Particulars of said negligence:

The car of defendant was proceeding south on Barrington St. and when it was leaving George St., signals were given to stop said car at the next regular stopping place at the corner of Barrington and Prince Sts. After said car left George St. and before same reached the regular stopping place at the corner of Barrington and Prince Sts., and before said car stopped, plaintiff arose from her seat, and made her way towards the side of said car as if preparing to alight therefrom at the next regular stopping place at the corner of Barrington and Prince Sts. aforesaid, but before said car reached that place or had stopped the plaintiff negligently stepped off said car while it was still moving and fell to the ground and was injured.

So far as the pleadings are concerned it will be seen that one of the main features, if not the main feature, of the plaintiff's case is that the car having stopped for the purpose of allowing her and other passengers to alight, and while plaintiff was in the act of alighting the car was improperly and negligently started and in consequence she was thrown down and injured.

On the other hand, defendants set up that before the car had reached its regular stopping place, and before the car stopped,

the plaintiff negligently stepped off the car while it was still moving and thus was the cause of the accident.

On the trial the lady who accompanied the plaintiff at the time gave evidence confirming that of the plaintiff herself which, if believed by the jury, establishes the plaintiff's case. This lady, however, on cross-examination, marked on a plan shewn her by counsel for the defendant company the place where she thought plaintiff was picked up after the accident, and she located the place as being about the middle of Prince St. The usual stopping place at the corner of Barrington and Prince Sts. was on the south side of Prince St.

This evidence would tend to shew either that the car had stopped before reaching its usual stopping place, or that the plaintiff had attempted to alight from a moving car. There was also the theory set up by the plaintiff's counsel on the trial that his witness had not correctly indicated the place where the plaintiff was picked up after the accident.

No doubt the able counsel on both sides in addressing the jury fully dealt with this matter from their respective standpoints.

The question as to whether the car stopped at the regular place or whether it stopped 10 or 15 ft. further north and before reaching the usual stopping place could not affect the plaintiff's right to recover under the circumstances of the case as detailed in the evidence. If the jury reached the conclusion that the car had stopped before reaching the usual stopping place the plaintiff would clearly be justified in supposing that it had been stopped in answer to her signal and therefore in alighting. She swore that she knew nothing about the usual stopping places and it was in the night time and she was a stranger. So far as I can see from a careful reading of the evidence, she was justified under the circumstances in getting off if the car stopped, no matter whether it was or was not the usual stopping place.

There was evidence that another passenger—a lady—got off just before her.

The evidence for the defence was that the car did not stop until it reached the usual stopping place and that the conductor called out to the plaintiff to wait until the car stopped; all of which, if believed by the jury, went to establish the defendant's contention that the plaintiff was injured in attempting to alight from a moving car.

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The question as to whether the car stopped between the north and south sides of Prince St. was not the main issue. It was only incidental to the real question as to whether the plaintiff attempted or not to get off a moving car.

It was open to the jury under the evidence to adopt any of the theories regarding the accident if the case was properly put to them.

I have examined the charge of the trial Judge and I cannot find anything in it to shew that the matter was not fairly and properly put to them; at least from the standpoint of the defendant company. Isolated passages in the charge might lead one to suppose that the trial Judge stated the law as being that the plaintiff would not be justified in attempting to alight when the car stopped unless it had stopped at the usual stopping place. The proposition if stated in this general way would not in my opinion be a correct statement of the law. It obviously must depend upon the circumstances under which the car was stopped. Reading the charge as a whole I do not think it could be understood in the way suggested, but even if it could be so understood it would not affect the verdict in this case. The plaintiff might have had reason to complain but certainly not the defendant company.

One of the grounds urged strongly by the counsel for the defendant company on the motion for a new trial was that the trial Judge should have put to the jury certain questions tendered by counsel.

The questions tendered by him were as follows:

1. Was the injury caused by the negligence of (a) The defendant? (b) The plaintiff? Or by the negligence of both plaintiff and defendant? 2. State what any negligence you find consisted of? 3. Did the tram car stop between the north and south side of Prince St.? If so, state where it stopped with reference to the south side of Prince St.? 4. Was the plaintiff negligent in attempting to alight from said car when she did? 5. Did the plaintiff fall off said car as far north of the south side of Prince St. as indicated by the point marked "X" on plan E/A? 6. Did the car stop at the regular stopping place at Mahon's store south of Prince St.? 7. If you find that the plaintiff was negligent could the defendant notwithstanding such negligence, have avoided the accident by the exercise of reasonable care? 8. If you find that defendant was negligent could the plaintiff notwithstanding such negligence have avoided the accident by the exercise of reasonable care? 9. Was plaintiff permanently injured as a result of the accident? 10. If so state what said permanent injury is? 11. What damage has plaintiff sustained as a result of the injury?

The questions put by the trial Judge with the answers of the jury are as follows:

1. Was there negligence on the part of the defendant company or its servants directly causing the accident? A. Yes. 2. If there was such negligence of what did it consist? A. Starting car before alighting. 3. Did the plaintiff by negligence on her part contribute to the accident? A. No. 4. If so what was her negligence? A. —— 5. If the plaintiff was negligent, could servants of the defendant company nevertheless have averted the accident by the exercise of due care on their part? A. —— 6. What damage has the plaintiff sustained? A. $3,000.

On the argument counsel confined his objection to the refusal to put the questions numbered 3, 5, 7 and 9, and contended that these questions should have been put to the jury and because they were not it was argued there should be a new trial.

It is important to consider the law on this subject.

In *DesBarres* v. *Bell* (1888), 20 N.S.R. 482 at 485, a similar objection was urged and in delivering the judgment of the Court, Weatherbe, J., said:

> There are two classes of questions contemplated by the statute: (a) Pertinent or relevant questions raised by any of the issues; (b) Questions necessary to be answered by the jury as essential to a complete determination of all matters involved in the case.
>
> To define "a pertinent question raised by an issue" involves the ascertaining what the issue in the case is, and I do not understand that when you have once agreed on what an issue is, that you can split up the question raised and put to the jury interrogatories as you might in examining a witness. There would be no end to the process of getting a case decided by a jury if this were so, and that, I apprehend, was not the intention of the Legislature. And respecting the other class of questions, if, when the learned Judge has submitted to the jury what questions of fact he directs them to answer, these questions amply cover all the issues raised by the pleadings, or, in other words, leave nothing necessary to be determined afterwards to settle the issues of fact involved in the pleadings, then I think the Judge may decline to put any other question required by counsel . . .
>
> If the questions refused here were permitted we should be putting the jury on the stand, as it were, for cross-examination. To adopt this system we should be allowing them to be tripped up. We should be calling on them to expose to us the minute process by which they arrived at their conclusions. Moreover we should be permitting that which would create and promote divisions among them, which I do not think was the object of the Act. I have come to the conclusion that this Act is framed in the light of that system of trials upon which the jury were directed by the Judge heretofore, and it requires no more in effect than would sustain a charge against an attack for misdirection.

In *Holmes* v. *Robbins* (1889), 21 N.S.R. 434 at 445, Townshend, J., said:

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I conceive it to be the imperative duty of the presiding Judge under the statute to formulate and himself decide the question of fact to be submitted to the jury, and he cannot abdicate his functions by throwing the responsibility on counsel. It is true counsel may suggest material and pertinent questions, but it is for the Judge to decide whether he will adopt them or not. If he refuses it may be a ground for a new trial, if in the opinion of the Court they should have been put.

In *Turner* v. *Burns* (1893), 24 O.R. 28 at 37, Armour, C.J., said:

It is no ground, moreover, for a new trial that the Judge refused to submit any particular question to the jury or any question; but, if the Judge refuses to charge the jury in respect of the subject matter of any question which counsel desires to have submitted to the jury, it may be made the subject of a motion for a new trial on the ground of non-direction.

Apparently in Ontario they did not have any rule or statute corresponding to our section 41 (6) of the Judicature Act, but the decision in *DesBarres* v. *Bell*, 20 N.S.R. 482, seems very clearly to indicate that the statute has not affected the principles which should guide the Court in such a case.

The trial Judge put the usual questions in such a case and he fairly stated all the issues raised by the pleadings to the jury and charged them with respect to the subject matter. The questions proposed were clearly in the nature of cross-examination and open to all the objections so well stated by Weatherbe, J., in *DesBarres* v. *Bell*. I think this objection fails.

Another ground urged was that the findings were against the evidence and I must confess that I was very much impressed by the very able argument of Mr. Lovett, K.C., on this point, but after carefully reading the evidence I think it is impossible to say that the case is within the well known rule applicable in such cases.

I only wish to add in this connection that the case cited by the counsel for the plaintiff of *Fraser* v. *Pictou County Electric Co.* (1916), 28 D.L.R. 251, 20 Can. Ry. Cas. 400, 50 N.S.R., page 30, was not intended to, and does not, lay down any new rule with regard to the burden resting on parties moving for a new trial on the ground that the verdict is against evidence.

It was urged that evidence was improperly rejected on the trial.

A witness for the plaintiff had stated on cross-examination that while in a drug store to which the plaintiff was carried on the night in question, and where she was lying in an unconscious

condition, nothing was said by the witness so far as the conductor and motorman were concerned. On this it was sought to ask the conductor and motorman to say that the witness had said that the plaintiff should not have jumped off before the car stopped. The Judge rejected the evidence. I think he was right in doing so as the ground had not been laid for it under sec. 43 of the Evidence Act, R.S.N.S. 1900, ch. 163.

Harris, C.J.

There were two passages in the charge of the trial Judge which it was claimed were misdirection but the charge was in my opinion, when read as a whole, without objection and I think these grounds fail.

There was still another objection on the ground of non-direction. It was said that there was independent evidence and that the jury should have been told that as a matter of law such evidence was entitled to more weight than that of the parties. I can find no authority for the proposition that a failure to tell the jury this must lead to a new trial. The point has no doubt been fully discussed by counsel.

I would dismiss the application with costs.

Longley, J.

LONGLEY, J.:—The trial and verdict herein are quite beyond question, and the fact that three testify against two is no reason why the jury should not find in favour of the two.

But there was one question which seems to me to be the vital question in the whole case, and that was, where the car stopped, and where Mrs. Myers fell out of it. If the car stopped at the corner of Prince and Barrington Sts., then it seems to me it is impossible to believe the evidence of the plaintiff which is that it stopped in the middle of Prince St., and then went on again as far as Sackville St.; and if, on the other hand, the jury should conclude that Mrs. Myers was found in the middle of Prince St., then it will be extremely difficult for her to establish in the minds of the jury that she is telling the truth when she says that the car stopped at that place, because it was not the regular stopping place, which was at the south corner of Barrington and Prince Sts.

Now, I can easily imagine that the Judge, in sending this case to the jury, thought his questions which he submitted were sufficient, and upon the face of it, it looks so. But as we come to examine the case thoroughly in detail it is found that this place

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where the woman was found lying in the middle of the road, in the centre part of Prince St., becomes of enormous importance in reaching a conclusion as to which of these parties was telling the truth. It must be understood that the plaintiff in her statement of claim mentions that the car stopped at the corner of Barrington and Prince, whereas her witnesses stated that the car stopped in the middle of Prince St.; and if the plaintiff has to rely upon her statement of claim, that the car stopped at the corner of Barrington and Prince Sts., then where does she get the woman off in the middle of Prince St.? It seems to me that this question is the most crucial of all, and all the circumstances are in favour of its being put to the jury with all the facts concerning it, and for the jury to determine, because on the determination of this issue will depend the credibility of the witnesses for the plaintiff and defendant respectively.

I also think that the question of whether the injury was permanent or temporary should have been put to the jury, but that is not nearly so vital a question as the one to which I have called attention, and without desiring to disturb the verdict at all, I am satisfied that the interests of justice would be sustained by putting this supreme vital question to the jury—where did the car stop? Where was the place at which Mrs. Myers was found? And these questions have to be put and answered before a true verdict can be upheld in this case. I am in favour of a new trial in this case.

Drysdale, J.

DRYSDALE, J.:—I agree with my brother Mellish.

Ritchie, E. J.

RITCHIE, E.J.:—I also agree with my brother Mellish.

Mellish, J.

MELLISH, J.:—This is an action for negligence. Plaintiff claims that she was injured when attempting to alight from the defendant's car when it was stopped for passengers to alight, by the defendant's servants negligently starting the car and thereby causing her to fall and receive injury. The statement of claim, I think, must be taken to allege that the car stopped at a usual stopping place to enable the plaintiff to alight at the corner of Barrington and Prince Sts. The usual stopping place of this car, which was going south, would be at the south east corner of these streets. The track is on Barrington St. and this corner would be on the further side of Prince St. from the approaching south bound car, and in the usual course the car would stop after

its whole length had passed over Prince St. The defence admits that the car was stopped at the usual stopping place, at said corner, but sets up that the plaintiff attempted to leave the car before reaching such stopping place and so caused the injuries complained of. On this defence the plaintiff joined issue.

The plaintiff's own evidence is that while the car was stopped, and while she was attempting to alight, it suddenly started, throwing her to the ground. Admittedly, however, she did not know much about the location of the streets and could not tell just where the car stopped. The plaintiff's niece, Mrs. Eunice Heasman, gives more detailed evidence. She was the first witness called on plaintiff's behalf and on her direct examination it seems to have been taken for granted by plaintiff's counsel that the car stopped at the regular stopping place. On cross-examination, however, this witness admits that the body of the plaintiff immediately after the accident was lying in the middle of Prince St., by so locating it on the plan produced. Further on she states that the car stopped across Prince St.—a car length north of its regular stopping place. This evidence as to the location of Mrs. Myer's body and the stopping place of the car apparently took her counsel by surprise, and an attempt is made on Mrs. Heasman's re-examination to explain it away.

The only other witnesses as to the cause of the accident are William McAlpine, an apparently independent witness; Rowe, the conductor, and Diamond, the motorman, all called on behalf of the defendants. These witnesses all state that the car stopped at the regular place at Mahon's corner; that the plaintiff attempted to leave the car before it stopped, and in doing so fell on the street, —about the centre of Prince St. The point is, I think, distinctly located by McAlpine and Rowe, and inferentially also by Diamond. The questions on this evidence as to whether the car stopped a short distance north of Mahon's corner, or at the usual stopping place at that corner, or at both places, and whether in fact the plaintiff fell in the centre of Prince St. are, I think, of supreme importance in determining whether or not the defendants were liable for this accident, and the answers of the jury to these questions would afford great light on the inquiry as to whether their conclusions as expressed in the questions they did answer were justified. The following were the questions actually put to

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the jury and the answers: (The questions and answers appear in full in the judgment of Harris, C.J.)

The defendant, however, asked to have the following questions *inter alia* submitted also to the jury, which the trial Judge refused:

(These questions (a), (b), (c), (d), and (e) also appear in the judgment of Harris, C.J.)

The defendant asks for a new trial on the ground *inter alia* of such refusal.

The Nova Scotia Judicature Act, see 9-10 Geo. V., 1919 (N.S.), ch. 32, sec. 42 (6), provides as follows:

6. (a) . . . the Judge instead of directing the jury to give a general or a special verdict may direct the jury to answer any questions of fact raised by the issues.

(b) Such questions may be stated to them by the Judge and counsel may require the Judge to direct the jury to answer any other question raised by the issues or necessary to be answered by the jury in order to obtain a complete determination of all matters involved in the action.

(d) If the Judge refuses to direct the jury to answer any question which counsel requires him to submit to them, such refusal may be used as a ground of a new trial.

The express provisions as to the right of counsel to require questions to be submitted and as to the refusal to direct the jury to answer such questions, being used as a ground for a new trial, are, I think, peculiar to the Nova Scotia Act; at least, no such express rule has been cited in any other jurisdiction. Some at least of the above questions (a), (b), (c), (d), (e), I consider must necessarily have been "answered by the jury in order to obtain a complete determination of all matters involved in the action" and are within the express provisions of the above rule 6 (b).

I think the jury must necessarily have determined where the car stopped before they could satisfactorily answer the questions as to negligence, and also as to contributory negligence, having regard to the place where the body was found after the accident—as to which I think there is no contradiction.

Likewise the question as to whether the plaintiff was permanently injured must necessarily have been answered by the jury in determining the damages. Why then have not counsel a right to know such answers? The reason suggested is that the answers are necessarily involved in the other questions submitted. That is one of the very conditions according to my

interpretation of the above rule which requires specific questions to be put. Indeed, why are any questions put to the jury except the one question which involves all others—whether they find for the plaintiff or defendant, and then perhaps the question of damages? Mainly, I think, for the purpose of guarding against the jury coming to a wrong conclusion by not properly appreciating the facts or the law upon which such a general verdict depends.

Why was the second question put to the jury in the present case? Why is it usual and perhaps even necessary to put such a question in negligence actions? The answer is, I think, that this question is put to make sure that the jury has not made a mistake in answering the first question. *Mader* v. *Halifax Tramway Co.* (1905), 37 Can. S.C.R. 94, at 98; *Spencer* v. *Alaska Packers Association* (1904), 35 Can. S.C.R. 362, at 373. The effect of the questions in such cases is, I think, to prevent justice being defeated. *Pritchard* v. *Lang* (1889), 5 T.L.R. 639, at page 640. If this be so I think it immaterial whether the system of requiring juries to answer specific questions be called quasi "cross-examination" as suggested by Weatherbe, J., in *DesBarres* v. *Bell*, 20 N.S.R. 482, or not. I do not think that the only purpose of the provisions under discussion is to make it clear that questions of fact in such cases are to be tried by the jury if counsel so insists and not by the Judge. No precise authority has been cited, I think, to assist us in deciding this question. The case just cited I consider not to be in point. There it was held there was no case to go to a jury and I agree of course that in such circumstances no questions need be put. Weatherbe, J., makes some *obiter* remarks, however, as to the construction to be put upon a similar rule to that now under discussion with which I do not agree. I prefer rather the following language of Townshend, J., also, however, *obiter*, in the case of *Holmes* v. *Robbins*, 21 N.S.R. 434, as a better expression of the proper construction to be put upon the section then under discussion:

> I conceive it to be the imperative duty of the presiding Judge under the statute to formulate and himself decide the questions of fact to be submitted to the jury and he cannot abdicate his functions by throwing the responsibility on counsel. It is true counsel may suggest material and pertinent questions, but it is for the Judge to decide whether he will adopt them or not. If he refuses it may be a ground for a new trial, if in the opinion of the Court they should have been put.

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The argument that the admission of such questions if they are to be necessarily allowed would lead to intolerable limits is not, I think, well founded. The rule itself confines the questions to such as are (1) raised by the issues or (2) necessary to be answered by the jury in order to obtain a complete determination of all matters involved in the action. These limits, I think, preclude all questions that are not essential even though they may be relevant. The number of such essential questions is not usually, I think, very large. The language of the rule discussed in the cases last above cited, it will be noticed, is somewhat different from that now before us. This is probably not a very material circumstance but is some explanation of the remark by Townshend, J., in the above quotation, that "counsel may suggest material and pertinent questions."

This is not a case I think where we can be reasonably sure that the defendant was not prejudiced by the refusal to submit questions and I, therefore, think a new trial should be granted.

Judgment accordingly.

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GREENE AND MADER (Plaintiffs), MADER Respondent, and DILLABOUGH (Defendant), Respondent, and KNOWLES, HARE & BENSON, Appellants.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23 1919.

SOLICITORS (II B—25)—AUTHORITY—ACTION FOR TWO PARTIES—DISPUTE BETWEEN PLAINTIFFS AS TO RETAINER—EVIDENCE.

A solicitor acting for two parties in the same action does not have to prove a written retainer from the party disputing his authority, if the question of retainer is between the two parties themselves, not between solicitor and client.

[*Wiggins* v. *Peppin* (1839), 2 Beav. 403, distinguished.]

Statement.

APPEAL by solicitors from an order of Bigelow, J., in an action brought by them on behalf of certain partners. Reversed.

P. H. Gordon, for appellants.

D. A. McNiven, for respondent Mader.

H. E. Sampson, K.C., for respondent Dillabough.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The evidence in this case, more particularly the letters written by the plaintiff Mader himself, satisfies me that the action against Dillabough was brought with the authorisation and consent of Mader.

Holding that opinion it is unnecessary for me to consider the question as to the existence of partnership relations between Mader and Greene in respect of the Limerick Hotel property.

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The appeal should therefore be allowed, and the order appealed from set aside, and the application below dismissed with costs to the appellants and the defendant Dillabough. The appellants are entitled to be paid their costs of this appeal by the respondent Mader, but I would not allow Dillabough any costs of appeal.

NEWLANDS, J.A.:—The appellants, a firm of solicitors in Moose Jaw, brought an action in the name of the respondents Greene and Mader against the respondent Dillabough. Some two years later, on the service upon him of a copy of a garnishee summons, Mader, one of the plaintiffs, made application to have his name struck out as a plaintiff and all proceedings stayed as against him, on the ground that he never authorised the bringing of the action and had no knowledge of the same until the service upon him of the garnishee summons.

The matter came before Bigelow, J., in Chambers, and he held that Mader had never authorised the use of his name in the action. He therefore stayed all proceedings against him and ordered the solicitors, Knowles, Hare & Benson, to pay Mader's costs as between solicitor and client, and the defendant Dillabough's costs as between party and party, including the costs of those proceedings.

The solicitors appeal on two grounds. (1) That Greene and Mader were partners; that the action in question was a partnership transaction and that Greene had therefore authority to instruct Knowles, Hare & Benson to commence the action in the names of the parties, and (2), that the trial Judge was wrong in finding that Mader did not authorise the bringing of the action in his name.

Greene and Mader were in partnership in Avonlea as hotelkeepers. This partnership was, according to the evidence of Mader, dissolved in 1916, before the suit in question was commenced. This is not denied by Greene, therefore I take it to be a fact. Mader was never in partnership in the hotel business in Limerick, but there is evidence that he was a joint owner of hotel premises there with Greene and his wife. Mader denies that a partnership existed and in my opinion, all the evidence on the part of Greene, together with the declaration of Mrs. Greene, only goes to prove a joint ownership of real property and not a partnership, and a joint owner who was not a partner would not be authorised to

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commence an action in the name of his co-owner without his actual authorisation.

Therefore Knowles, Hare & Benson must have been actually authorised by Mader to commence action in his name, otherwise this appeal must be dismissed.

I think the trial Judge was wrong in thinking that rule 41 of the Rules of Court had any bearing on this case. That rule only refers to adding a plaintiff after an action brought, and not to the commencement of an action, and we have no rule nor has it been the practice in this Province for solicitors to have a written retainer before commencing action.

As all the evidence in this case was given by affidavit, we are in the same position as the trial Judge to make a finding on the facts, and in this connection I would point out that he was mistaken in holding that there was no evidence from the Greenes that Mader ever authorised his name to be used in the action. Greene in his affidavit says, "this action was commenced only after obtaining the said Mader's consent, and was commenced with his full knowledge and authority."

The only witnesses who give evidence on this point are Greene and Mader, and they are in direct contradiction with each other. If this contradiction had taken place between Mader and the solicitors, then, I think, they would have had to prove a written retainer, or be condemned to pay Mader's costs. The law in the case is stated in *Wiggins* v. *Peppin* (1839), 2 Beav. 403, at 404, by Lord Langdale, M.R., as follows:

> I believe it has been decided more than once, that it is not necessary that an authority given to a solicitor should be in writing; further, it has been said —that it is the duty of the solicitor to take care that he has sufficient evidence of the authority; and if he neglects the precaution of obtaining it in writing, and his authority is afterwards challenged, he will, for want of written evidence, be treated as if he had no authority at all; I think the cases go to that length.

I don't think this rule should apply where the question of retainer is between two plaintiffs, and not between a plaintiff and a solicitor. This case should I think be decided upon the ordinary rules of evidence. Greene, who swears positively to the fact that Mader authorised him to use his (Mader's) name in the action, is corroborated by a letter written by Mader; and Mader's explanation of this letter does not, I think, help his case, because it can hardly be the true explanation. The foreclosure action

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he refers to was not against him but against Greene, so there was nothing in that action for him to leave to Greene, unless it was the settlement made by Greene with Dillabough, for the enforcement of which the action in question was brought. I think it therefore corroborates Greene's statement that he consulted Mader about this settlement and that he authorised him to bring the action to enforce it.

Newlands J.A.

I would therefore allow the appeal with costs against Mader. As to Dillabough's costs, I think he should be entitled to his costs of appearing before the trial Judge, as against Mader, but he had in my opinion no interest in this appeal and should, therefore, have no costs.

LAMONT, J.A.:—Some time about 1914, Dillabough became the owner of a mortgage on the Limerick Hotel and commenced foreclosure proceedings thereon. After the proceedings had begun, F. L. Greene was added as a party defendant, he appearing to have acquired some interest in the property, and an order *nisi* for foreclosure was obtained. During the period allowed for redemption, Greene approached Dillabough to accept a certain cash payment and take a new mortgage in settlement of his foreclosure action. Dillabough offered to do so on certain terms. Greene subsequently accepted the offer, but Dillabough refused to carry out the proposed settlement, saying that he had withdrawn his offer before it had been accepted by Greene. On Dillabough's refusing to carry out his offer, Greene instructed his solicitors, Messrs. Knowles, Hare & Benson, to bring an action to compel him to carry it out. Greene informed the solicitors that the Limerick Hotel business belonged to himself, his wife and the applicant Mader, although the title stood in the name of Mrs. Greene. Greene and Mader were, at the time, operating an hotel at Avonlea in partnership.

Lamont, J.A.

The action was brought in the name of Frank Greene, Rebecca Greene, and F. P. Mader, and on July 3, 1917, an order was made dismissing that action with costs. These costs were taxed at $231.28. Nothing more seems to have been done until February, 1919, when Dillabough took out a garnishee summons in the action, garnisheeing moneys in the hands of W. E. Holmes of Avonlea, presumably belonging to Mader. Mader was served with the garnishee summons on February 11. On February 28

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he served a notice of motion to set aside the order of July 3, 1917, in so far as it affected him; for striking his name from the record as plaintiff in the action, and staying proceedings on the garnishee summons, on the ground that he had been made a plaintiff without authority and that he had not given instructions, express or otherwise, to the solicitors to bring action in his behalf.

The right of the solicitors to bring the action in Mader's name as well as that of Greene and his wife, depends upon whether or not Mader was a partner in the Limerick Hotel business, and, if he was a partner, whether or not Greene had authority, express or implied, to use his name as plaintiff in the action.

The Judge in Chambers before whom the application was made, was not satisfied that Mader had an interest in the Limerick Hotel. With deference, I think the evidence establishes the existence of a partnership in that business. Greene in his affidavit of May 2, 1919, swears positively that Mader was a partner in the Limerick Hotel undertaking; that he consulted Mader in reference to bringing the action in question, and that the said action was commenced with his full knowledge and authority. This Mader in his affidavit denies, and swears that he knew nothing whatever of the said action until he was served with the garnishee summons on February 11, 1919. In corroboration of Greene's affidavit, the solicitors filed another affidavit sworn to by Greene, on June 3, 1916, before the commencement of the action in question, which affidavit contains the following : "6. That Fred P. Mader, my partner in my hotel business at Avonlea, Saskatchewan, is interested in the said property with me although his name does not appear. I hold his interest therein as trustee."

The hotel at Limerick burned down. There seems to have been some difficulty with the insurance, and in August, 1918, Rebecca Greene made a statutory declaration, one paragraph of which is as follows: "2. That the said lots and the hotel building erected thereon and the contents thereof do not belong to me exclusively, but are the property of myself, my husband, Frank L. Greene, and F. P. Mader of Avonlea in the Province of Saskatchewan, and we three are the beneficial owners thereof."

Mader admits that he collected a portion of the insurance money on the hotel, to which he would not have been entitled had he not had an interest therein. He admits also that moneys

from the partnership in Avonlea were put into the Limerick undertaking, but says it was by way of a loan. This loan he admits was to be repaid out of the profits of the Limerick hotel. The most cogent evidence, however, is a letter written by Mader to Greene on February 17, 1919, a few days after he had been served with the garnishee summons. It is, in part, as follows:

Dear Frank:

I have been going to write to you for some time but somehow kept putting it off from time to time but on receipt of a Garnishee from our Friend Dillabough for $231 which he claims to have a judgment for against you, Mrs. Greene and my self. He is collecting this amt. from me or trying to so I am writing you for information. I never got any writ from him or his lawyer and never thought for a moment but he got all was coming to him when he turned over the title of the Limerick Hotel. As you know I left it all to you and never thought of anything like that happening. And I cannot see how he could get judgment against any of us especially without me knowing anything about it.

Mader in his affidavit states that the phrase "as you know I left it all to you," had reference to the foreclosure action by Dillabough. But how could it reasonably refer to those proceedings? If Mader's story be true, he had no interest in the property, and, therefore, had nothing to leave to Greene.

This explanation on the part of Mader is, in my opinion, an afterthought. Further on in the letter he said:

I have rec'd in cash on insurance collected this summer on Limerick Hotel for $499.60, less paid cash Henderson $85 and $25 to Emit Collins for defending McMillan's acct. of Limerick, he had the insurance garnisheed, and Collins paid it out to me for $25, which was very decent of him, as they had us foul.

"Had *us* foul." "Us" can only refer to Greene and Mader. This language indicates that they were in the same position, which they could only be if they were both interested in the property. It is to my mind strange language for a man to use who had no interest in the undertaking.

Then near the end of the letter he says: "I will expect to hear from you very soon on acct. of the Dillabough affair as I would like to know if we owe him this or not."

This is not the language one would expect from a man who had just discovered that Greene had been trying to implicate him in an undertaking by adding his name as plaintiff, with which undertaking—according to his examination—he had steadfastly refused to have anything to do. It is, however, the language one would expect from a partner who had left the conduct

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of the Limerick business to his co-partner, and who was under the impression that Dillabough had been settled with in full.

Apart altogether from the affidavit of Collins, which the appellants desire to have admitted and read, the evidence in my opinion establishes that there was a partnership between Greene and Mader in connection with the Limerick Hotel business. I need not, therefore, consider the application to admit the additional affidavit.

Having found that a partnership existed, Mader's testimony must be considered unreliable. I therefore think we may accept Greene's statement that he consulted his partner about the action in question. In his letter, as I have already pointed out, Mader says, "As you knew I left it all to you." It is in connection with a reference to Dillabough's claim that the phrase is used. How could Greene know that Mader left the matter to him unless Mader told him so?

The position would seem to me to be that they discussed the bringing of the action between themselves, and that Mader told Greene he would leave it all to him. This, in my opinion, is expressly authorising the bringing of the action if Greene thought it wise to adopt that course. Greene thought it wise to bring the action. Mader is therefore bound by what Greene did, although, had he not expressly authorised it, I am doubtful whether Greene would have had implied authority to commence an action of this nature on behalf of the partnership. But that question I need not consider, in view of the conclusion I have reached on the evidence.

The appeal in my opinion should be allowed with costs, the order made in chambers set aside, and the motion dismissed with costs. As Dillabough was served with the notice of motion he should have his costs in Chambers as against Mader. On the appeal he submitted his rights to the Court without contesting anything. No costs should therefore be given against him nor should he have any.

Elwood, J.A.

ELWOOD, J.A.:—On or about February 26, 1917, the appellants, purporting to act as solicitors for the plaintiffs, commenced an action against the defendant for the purpose of compelling the defendant to carry into effect an arrangement which it was alleged was entered into for the payment of a mortgage held by the

defendant upon property in Limerick, referred to as the Limerick Hotel, and which at that time was registered in the name of the plaintiff Rebecca Greene. Prior to the commencement of this action the plaintiff Mader and the plaintiff Frank L. Greene had carried on an hotel business at Avonlea in partnership, and also were together interested in the Avonlea Mercantile Co., Ltd. The action against Dillabough was tried and was dismissed and judgment ordered against the plaintiffs for the costs of the action. Subsequently Mader launched a motion for an order setting aside the judgment in the action against Dillabough, wherein it was ordered that the action be dismissed with costs, in so far as such judgment affected the said Mader, and for an order discharging a certain garnishee summons in which W. E. Holmes was garnishee on the ground that the action against Dillabough was commenced without the authority of Mader, and that Mader was not in any way interested in the property with respect to which the action against Dillabough was brought.

The Judge of the King's Bench before whom the motion was made ordered that there should be a stay of all proceedings against Mader, and that Mader's name should be struck out of the proceedings in the action as a plaintiff, and that the appellants should pay all of Mader's costs and all costs which he had been ordered to pay, and pay also the defendant's costs. From that order this appeal is taken.

The evidence shews quite clearly that about the time that Greene became interested in the Limerick Hotel, funds of the Avonlea business to the amount of about $3,000 were used either in connection with the purchase of the Limerick Hotel or for the purpose of paying off claims against that hotel. Greene and his wife both swore in affidavits that Mader was interested in the Limerick Hotel property, and that, while his name did not appear in the registered title, the registered owner held the property in trust for the three plaintiffs. As far back as June, 1916, before the arrangement which it was alleged was made with the defendant and which led to the action against the defendant, Frank L. Greene made an affidavit in which he there stated that Mader was interested in the property. There were several letters put in evidence admittedly written by Mader, although signed by Mader with Greene's name, which, in my opinion, are

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quite inconsistent with the position which Mader now takes, and which point to his having an interest in the Limerick property. Mader now swears that he had no interest in the property, that he was never consulted with regard to bringing an action against Dillabough. In one of his affidavits, however, sworn on April 21, 1919, Mader says: "He the said Greene did not at any time consult me as to the advisability of commencing this or any other action against the defendant Dillabough and whenever he mentioned any such action to me I told him clearly that I would have nothing whatever to do with it."

It will be noted that he says: "whenever he mentioned any such action to me I told him clearly that I would have nothing whatever to do with it." The "he" above referred to is Greene, and although Mader immediately prior to the above quotation says that Greene did not consult him, yet I think there is an admission in the particular part I have refered to that Greene did consult him. Then, in a letter dated February 17, 1919, from Mader to Greene, he says: "I never got any writ from him or his lawyer and never thought for a moment but he got all was coming to him when he turned over the title of the Limerick hotel. As you know *I left it all to you* and never thought of anything like that happening."

The Judge before whom the application was launched, expresses the opinion that the above refers to the previous foreclosure action brought by Dillabough. I, however, with great deference, can only conclude that it refers to the action brought against Dillabough. Further down in the letter of February 17, Mader says: "Now regarding Limerick you can use your own judgment regarding what you consider is coming to me. I have had to collect this here and am not charging you anything for collection, and have been out of the use of $3,000, which you had right from the start. I consider you should at least give me $1,500 out of Limerick especially if I have to pay the $231 to Dillabough."

And further down he says: "I will expect to hear from you very soon on acct. of the Dillabough affair *as I would like to know if we owe him this or not.*"

In addition to this, Mader collected nearly $500 insurance on the Limerick Hotel. It is quite true he says that he obtained this because of his claim for the money which he says he advanced to Greene to assist him in paying for the Limerick Hotel. There

is no corroboration of Mader's statement in this respect, and it is extraordinary that the insurance companies should have paid the insurance to Mader unless there was some representation to them that Mader was interested and had a right to the insurance. It is not pretended that he had any assignment of the insurance, and the only right that he could have to it was as one interested in the property. An affidavit of Mrs. Greene was presented to the insurance company, shewing that the two Greenes and Mader were the persons interested. There is no evidence, however, that Mader knew of this affidavit.

On the whole, leaving out of consideration the affidavit of Collins which was sought to be read before us on behalf of the appellants, and without expressing any opinion as to the admissibility of that affidavit, I have come to the conclusion that the evidence establishes that Mader was interested in the Limerick Hotel as a partner of the Greenes, and that therefore Greene had authority to instruct the appellants to commence the action in the name of the three plaintiffs. Even if Mader was not interested in the Limerick Hotel, as a partner of the Greenes, I am of the opinion that there is ample evidence that he authorised Greene to commence the action against Dillabough out of which this appeal has arisen. Greene swears positively to this, and although Mader denies it, the various documents to which I have referred above appear to me to be inconsistent with his denial.

In my opinion, therefore, the appeal should be allowed with costs.

It was stated before us that, so far as Dillabough is concerned, he simply appeared on the application before the Judge of the King's Bench and stated that he knew nothing of the contention of the parties, but that, if any order was made, he should be protected in the matter of his costs in the action. I think under these circumstances, therefore, that, as between the appellants and Dillabough, Dillabough is equally responsible for the costs of this appeal, and therefore the appellants are entitled to their order for their costs of this appeal against both respondents.

So far as the costs of the application before the Judge of the King's Bench are concerned, the appellants are entitled to their costs of that application as against the defendant Mader.

Appeal allowed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. December 19, 1919.

PUBLIC UTILITY COMMISSION (§ I—1)—POWERS AND JURISDICTION OF BOARD —ALTERATION OF CONTRACTS—5 GEO. V., 1915 (ALTA.), CH. 6.

The powers and jurisdiction of the Public Utilities Board (Alta.), as laid down in 5 Geo. V., 1915 (Alta.), ch. 6, do not give the Board the right to alter or set aside the terms of contracts except under certain conditions therein provided for.

Statement.

APPEAL by the Attorney-General of Alberta from a decision of the Board of Public Utilities Commissioners upon a question of jurisdiction. Reversed.

I. B. Howatt, for Att'y-Gen'l of Alberta; *A. H. Clarke*, K.C., and *H. R. Milner*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal by the Attorney-General from a decision of the Board of Public Utilities Commissioners upon a question of jurisdiction which is the only question upon which an appeal lies.

The Board was constituted under the Public Utilities Act, 5 Geo. V., 1915 (Alta.), ch. 6. The Act was declared to come into force on a date fixed by proclamation. In the Official Gazette of October 30, 1915, is a notice of an order-in-council declaring the Act in force from October 7, 1915, and the same Gazette contains notice of appointment of members and officers of the Board on October 20, 1915. At about the same time and probably for some time prior thereto the above named company was negotiating with the City of Edmonton for a nutural gas franchise. An agreement was arrived at with the council which was submitted to the burgesses who approved by vote on November 8, 1915, and the by-law was passed and the agreement executed on November 16, 1915. On April 19 following the Legislature passed an Act, 6 Geo. V., 1916 (Alta.), ch. 29, entitled an Act to validate and confirm a certain by-law and agreement of the City of Edmonton in the Province of Alberta granting a franchise to the Northern Alberta Natural Gas Development Co. Ltd., for supplying gas to the said city and inhabitants thereof, and to authorise the said company to construct certain gas pipe lines and works in the Province of Alberta. The preamble sets out that the company's gas field and wells are outside the city and that a petition has been

presented to have the by-law and agreement validated and to grant the company certain rights outside the city. Section 2 of the Act confirms and validates the by-law and agreement. At the end of the statute is printed what purport to be By-law No. 662 of the City of Edmonton and an agreement between the city and the company. These no doubt, are and they were treated on the argument as being the by-law and agreement intended to be validated but there is nothing whatever in the body of the Act referring to or in any way identifying them other than is contained in their terms and the fact that the by-law mentioned in the preamble is declared to be No. 662.

The agreement gives the company the right to lay pipes in the streets, etc., for the purpose of supplying gas to consumers. Par. 5 provides that

> the maximum net price to be charged for natural gas supplied by the company to consumers in the city during the exclusive term of the franchise hereby granted shall be 25 cents per thousand cubic feet,

with a proviso for reducing the maximum to as low as 15 cents per thousand according to increases in the amount of gas consumed and also a proviso for a maximum price of 15 cents for gas for power or manufacturing purposes. In October last a petition was presented to the Board which purports to be the petition of the city and the company and is signed by the solicitors for both petitioners there being under the name of the city solicitor the words "resolution October 15, '19."

The petition sets out certain facts stating *inter alia* that the company has drilled wells and has now sufficient gas to justify the laying of pipes but that it has been precluded from proceeding with the work owing first to the impossibility of procuring material and latterly to the abnormal price of steel and other material and that "it is impracticable to construct the necessary plant and to successfully carry on the project at the prices set out in the said agreement."

The petitioners pray:—

> 1. That an order be made increasing the prices for the sale of gas as follows: (a) For domestic purposes 35 cents per thousand cubic feet. (b) For power purposes 20 cents per thousand cubic feet. 2. That a ready to serve charge of 50 cents per consumer per month be authorised to be charged if such charge is reasonable, usual and justified, or that a minimum charge be established.

As the city solicitor had signed the petition which purported to be the petition of both parties to the agreement there would

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appear to have been no chance for opposition to the petition but the Att'y-Gen'l intervened and appeared by counsel before the Board and questioned its jurisdiction. Objection was taken before the Board and before us that the Att'y-Gen'l had no status to intervene. The Board decided against the objection and its decision appears to be conclusive under sec. 69. I desire however to say that that decision appears to me to be unquestionably right. Sec. 40 provides for the Att'y-Gen'l making a substantive application and surely if that power is assigned to him the right of intervention on another's application would seem to follow. But the right rests on an even broader ground in my opinion. The Board is a statutory creation with a statutory jurisdiction conferred upon it by the Province. Surely the chief law officer of the Province has not merely the right but the duty to endeavour to see that that jurisdiction is not exceeded and the only way in which that can be done is the method adopted since prohibition and *certiorari* are taken away.

The ground upon which the Att'y-Gen'l chiefly relied was that the contract has the effect of a statute and to alter its terms would be a legislative act and beyond the competence of the Board. The Board decided that it had jurisdiction and held that the statute merely declared effective and binding an agreement already made, the intention of the Legislature being merely to confirm the act of the city and its authority to make the contract.

It may be difficult to determine in some cases whether a statute intends itself to confer rights and powers or merely to confirm the authority of some person or body to confer such rights and powers. I do not consider it necessary in the present case to examine the language with the care necessary to form a conclusion on this point because even if the latter, as is held by the Board, in my opinion that does not meet the whole objection to the Board's jurisdiction.

The judgment of the Board points out that sec. 43 of the validating Act, 6 Geo. V., 1916, ch. 29, expressly declares that nothing in the Act "shall be taken to impair, abridge, take away or affect in any way the jurisdiction and powers," of the Board. It may be noted that while the Act contains 44 sections, only one section has anything to do with this agreement, the remainder of the Act conferring rights and powers entirely outside the agree-

ment in the exercise of which the company would come under the jurisdiction of the Board. Nor is it questioned that in many respects in the operations of the company under the agreement the Board would have jurisdiction. Sec. 43 does not purport to confer jurisdiction but only to declare that it is not taken away. To ascertain what its jurisdiction is it is necessary to refer to the Act creating it.

The Act is by no means logical or accurate. The expression "public utility" has a well-known meaning in common use but sec. 2 of the Act defines it as meaning the person who owns or operates what we commonly call a public utility. Then the next section declares that the Act applies to "all public utilities *as hereinbefore defined*," owned or operated by certain specified persons which of course has no sensible meaning the term evidently being used in its ordinary sense though declared to be used with the meaning of the Act's definition.

Section 4 provides that the Act shall not apply to a public utility owned by a municipal corporation until brought under the Act in the manner specified. We can give the ordinary meaning to the term here since "the context otherwise requires" and I am by no means sure that the public utility under consideration does not fall within this section and so beyond the operation of the Act.

If it falls under sec. 2, 6 Geo. V., 1915, ch. 6, it is because the gas company in the words of the section

> owns, operates, manages or controls any system, works, plant or equipment . . . for the production, transmission, delivery or furnishing of a . . . gas . . . power either directly or indirectly to or for the public,

but the petition shews that the company has nothing but some wells containing gas.

This point was not raised in the argument and I do not propose to consider it further than in its bearing on one question discussed in the judgment of the Board as to whether there is any "existing rate" for the gas.

Section 20 specifies the conditions giving the Board jurisdiction and to some extent specifies the extent of the jurisdiction though it does not seem to comprehend all of either as there are other sections giving the circumstances and extent of jurisdiction. Paragraph (b) of sec. 20 gives the Board jurisdiction when on

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complaint it is made to appear that the tolls demanded are excessive and authorises the Board to disallow or change such tolls but

> however subject to such of the provisions of any contract existing between such public utility and a municipality at the time such complaint is made as the Board shall consider fair and reasonable.

It is thus clear that the Board cannot reduce rates below what has been agreed upon in a fair and reasonable agreement and that cannot mean that the Board may consider an agreement unfair or unreasonable simply because at the time of the complaint the rates provided by it may in the then conditions seem unfair or unreasonable.

The judgment of the Board refers to sec. 23 (c) as authority for increasing rates. It provides that

> The Board shall have power—(c) after hearing, upon notice . . . to fix just and reasonable . . . rates . . . whenever the Board shall determine any existing . . . rate . . . to be unjust, unreasonable, insufficient, etc.

It is not quite clear when this jurisdiction will arise; it is "after hearing" something, but what, is not stated. As I have already indicated sec. 20 (b) gives jurisdiction to deal with rates when a complaint is made and after hearing such a complaint the powers of sec. 23 (c) could be applied, but the only complaint specified there is a complaint that the rates are excessive. However, sec. 32 which deals with the same subject is a little more definite and provides that either upon complaint or upon its own initiative it may authorise increased rates, but that no increased rates shall be made by the public utility without the Board's authority.

The question to which I am now directing my attention is whether the Board has any jurisdiction to increase rates beyond those agreed on between the owner of the utility and the municipality granting the privilege. As already seen it cannot reduce them below such rate unless satisfied that the agreement is an unreasonable and unfair one. Section 20 which is the only section of the Act which in terms specifies the Board's jurisdiction while conferring the limited jurisdiction to reduce rates gives no express authority to increase rates though as I have already pointed out other sections state that the Board has that power. Section 20 however being the one section specifying the circumstances under

which the Board exercises jurisdiction as distinguished from its authority or the extent of its jurisdiction we naturally look for some provision of that section under which this jurisdiction is impliedly conferred and it appears to be found in par. (g), sec. 20, which specifies as one of the cases in which the Board has jurisdiction as follows:—

> Subject to the terms of any contract between any public utility and any municipality and of the franchise or rights of the public utility, to define or prescribe the terms and conditions upon which a public utility shall or may use for any of its purposes as a public utility any highway or any public bridge or subway constructed or to be constructed by the municipality, or two or more municipalities, and to enforce compliance with such terms and conditions.

For the operation of the common public utilities all a company needs to acquire from the Legislature, municipality or other authority is the right to use the streets and other highways and that is practically all a municipality can grant. In the contract under consideration that is what, and all, that, the contract purports to grant and the grant is declared to be "subject to the terms, conditions and provisions hereinafter contained." The maximum amount which the company may charge for the gas to be supplied under the franchise is of course one of the most important conditions of the grant of the franchise. This paragraph would thus seem to be much more comprehensive than at first appears and seems to include in general terms most of the other paragraphs which deal with specific points. But of course they may have operation independently of par. (g) in the case of any public utility not subject to a contract with a municipality. The petitioning company furnishes an instance, for under the Act in question it acquires the right to supply gas outside the City of Edmonton and in respect thereto the contract with the city has no application.

The special provision of (b) to which I have already referred extends the jurisdiction beyond that of (g) since it provides that in the case of a complaint that the rates are too high the Board is only bound by the terms of the contract in so far as it considers them fair and reasonable.

It would seem very strange indeed, if the Legislature had intended to give the Board the right to set aside the terms of contracts, that it would not have said so in plain words. There

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is no suggestion of any such intention beyond the limited right given by 20 (b) while 20 (g) shews a general intention to the contrary. I presume, though I have not the material before me to verify it, that the Canadian Public Utilities Acts find their prototypes in Acts of Legislature of States of the American Union and everyone familiar with the constitution of the United States knows that by its terms, every Legislature is prohibited from passing any law "impairing the obligations of contracts." Our Legislatures have no such limitation, but unless the power is expressly given to disregard contracts or effect can be given to the legislation only by implying that power a Court would be unwilling to construe an Act as having such an intention. There is plenty of scope for the operation of the Board without holding that a contract has no sanctity. Rates and tolls are amounts charged for the performance of the service. Many of the sections of the Act, *e.g.*, 26, 29, 32, shew that they are considered as something charged or imposed by the company though of course they might be fixed by agreement. The present contract fixes no rates or tolls. It states amounts in excess of which they shall not be fixed by the company. If this company had under normal conditions completed its works and been ready to deliver gas its first consideration in fixing its rates would have been to secure the largest monetary return for its service and for the purpose of attracting customers might have fixed a rate less than the maximum amount specified. Section 32 would stand in the way of its subsequently raising it but the Board would have power to allow an increase up to the maximum specified and of course as there is no minimum the Board's powers as respects decrease would not be limited by the contract.

There is one feature of this question that I have not dealt with and that is that both parties to the contract are declared to be petitioners. There is nothing however to shew that the municipality which granted the franchise is a party to the application to set aside its terms.

The petition is merely signed by the solicitor but his authority to represent the city does not appear though the note under the name seems to indicate that it rests on a resolution of the council. The by-law authorising the contract declares that it was referred to the burgesses pursuant to the Edmonton Charter and approved

by them. Section 243 of that charter provides that no by-law assented to by the burgesses can be repealed or amended except with the assent of the burgesses. It would appear therefore that the only person who could waive the benefit of this contract to the city would be the burgesses who authorised it. There is no suggestion that that has been done and therefore the petition cannot be deemed to be that of both parties to the contract and sec. 39 of the Public Utilities Act, 1915 (Alta.), does not appear to cover the case and even if its terms were wide enough it would be doubtful whether its general terms could be held to derogate from the special provisions of the Edmonton Charter.

For the reasons I have stated I think the Board has no jurisdiction to grant the prayer of the petition.

There is another objection too which appears to me to be fatal.

The Board in its judgment expresses the opinion that there is an existing rate for the service to be rendered by reason of the terms of the contract for it is to be noted that its power to increase rates only applies to "existing rates." With all respect I find myself unable to accept this view. The contract does not purport to fix rates but only amounts in excess of which rates shall not go. Of course if this were the extent of this objection the company might at once declare that it fixed the rates at the maximum amounts allowed by the contract. However, the company has not done that and in my opinion the objection goes much further. An examination of all the provisions of the Act relating to the alteration of rates convinces me that what is in contemplation by the term "existing rate" is a rate being charged for an existing service and as Mr. Howatt points out until such a condition exists there is no basis upon which the Board can safely work.

This view seems almost necessary too when one considers the definition of "public utility" to which the Act applies.

There is one other matter mentioned in the judgment to which I think I ought to refer. Attention is called to the fact that the approval of the Board to the agreement given on March 9, 1916, was a qualified one and expressly excepted approval of the rates. That approval was apparently given under sec. 37 of the Act which provides that:—

> No privilege or franchise hereafter granted to any public utility as herein defined by any municipality of this Province shall be valid until approved

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by said Board, such approval to be given when, after hearing, said Board determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public intents, etc.

The approval of the Board of March 9, 1916, does not purport to be an approval of the franchise but an approval of the contract with certain qualifications, it being stated "At the present time the Board manifestly cannot consider the contract as far as the question of rates is concerned."

The Board evidently then considered it manifest that it had nothing upon which it could form an opinion as to what should be proper rates, apparently considering that to form a proper conclusion there must be an existing service as I have concluded the Act contemplates.

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However, the statute does not call on the Board to approve the terms of a contract but to approve the granting of the franchise. The Board did or it did not approve. If it did the company received the franchise upon the terms on which it was granted. If it did not then the company has no franchise unless given by the validating Act and there is nothing for the Board to consider at the present time.

I would, therefore, allow the appeal and declare that the Board is without jurisdiction to grant the prayer of the petition.

By agreement there will be no costs.

Stuart, J.

STUART, J.:—This is an appeal by the Att'y-Gen'l of Alberta from a decision of the Board of Public Utility Commissioners whereby that Board adjudged that it possessed jurisdiction, under the Public Utilities Act, 5 Geo. V., 1915 (Alta.), ch. 6, to deal with a certain question relating to a franchise granted by the Corporation of the City of Edmonton to the respondent company.

The matter appears to arise in this way. By sec. 503 of the Edmonton Charter, it is enacted that "every highway within the limits of the city except so far as excluded by any special Act or agreement shall be vested in the city." By sec. 227 it is enacted that every by-law of the city council granting to any gas company any special franchise whether exclusive or not shall receive the assent of two-thirds of the burgesses acting thereon. On November 16, 1915, the mayor and clerk on behalf of the city executed an agreement with the respondent company, the first paragraph of which reads in part as follows:—

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The city hereby grants to the company its successors and assigns subject to the terms conditions and provisions hereinafter contained the full power right and liberty to put down, take up relay connect, disconnect repair, maintain and operate its gas pipe lines along through or under the streets squares, highways, lanes, alleys, grounds bridges, parks, thoroughfares and other public places within the limits of the city, etc.

After this first clause granting the above mentioned right, which is undoubtedly in the nature of a "franchise," as that word is generally understood in relation to municipalities and their highways, there followed a number of clauses containing stipulations which apparently contained the "terms and conditions" referred to in clause one of the agreement as being those upon which the franchise was granted. Clause 5 reads as follows:—

The maximum net price to be charged for natural gas supplied by the company to consumers in the city during the exclusive term of the franchise hereby granted shall be 25 cents per thousand cubic feet.

Clause 14 provided that the right to the use of the streets for the supply of gas for the purpose mentioned should be exclusive for a period of 20 years and the city covenanted that it would not itself use nor give the right to anyone else to use the streets of the city for the said purpose during that term.

This agreement had been already confirmed by a two-third vote of the burgesses of the city on November 8, 1915, and the by-law No. 662 thus voted on was finally, on November 15, 1915, passed by the city council and due authority given to the mayor and clerk to execute it.

The Legislature of Alberta in the session of 1916 passed a statute, 6 Geo. V., 1916, ch. 29, entitled an Act to validate and confirm a certain By-law and Agreement of the City of Edmonton, being the by-law and agreement above referred to. The Act contained a long preamble reciting the facts leading up to the making of the agreement and the passing of the by-law one clause of which preamble used the words

Whereas a petition has been presented praying for an Act to validate and confirm the above mentioned by-law and the agreement executed thereunder.

By sec. 2 of the Act it was enacted as follows:—

The said by-law and the said agreement executed by or on behalf of the said city granting a franchise as aforesaid and all the rights, powers, liberties and privileges, exclusive and otherwise, granted by, and all the terms, provisoes and conditions contained in, the said by-law and agreement are hereby declared to be in full force, virtue and effect and to be legal, valid and binding upon the corporation of the said city notwithstanding any informalities, irregulari-

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ties or defects therein, either in substance or form or any informalities, irregularities or defects in the passing thereof and notwithstanding that the said corporation may not have had the power to pass the said by-law or to enter into the said agreement or to grant the said rights, powers, liberties and privileges exclusive and otherwise, or any of them.

In the year 1915 the Legislature had passed an Act, 5 Geo. V., 1915 (Alta.), ch. 6, establishing a Board called the Board of Public Utility Commissioners, and by sec. 37 of that Act it had been enacted that no such franchise as was granted by the City of Edmonton by the aforesaid by-law and agreement should be valid until approved by this Board. This approval, with certain reservations not now material, was given by an order of the Board on March 9, 1916.

It appears that the respondent company has not yet brought any natural gas to the city or laid down any pipes or other equipment within the city for the purpose of exercising the rights and powers given it by the agreement.

In October, 1919, the City of Edmonton and the respondent company presented to the Board of Utility Commissioners a joint petition which, after reciting that the company had secured a sufficient supply of natural gas to justify the laying of a pipe line to the city, that the company had, however, been precluded from proceeding with such work first owing to the impossibility of obtaining the necessary material and latterly by reason of the abnormal price of steel and other material, that the company believed it impracticable to construct the necessary plant and to successfully carry on its project at the prices set out in the agreement, proceeded to request that the Board, in the exercise of certain powers assumed to be possessed by it under its constituting Act, should make an order

increasing the prices for the sale of gas as follows:—(a) for domestic purposes 35 cents per thousand cubic feet; (b) for power purposes 20 cents per thousand cubic feet.

By the petition the City of Edmonton also asked that if these requests were granted certain enquiries and orders should be made for the protection of the city's interests.

When the parties to the petition appeared before the Board, the Att'y-Gen'l of Alberta also appeared for the purpose of objecting upon certain grounds to the jurisdiction of the Board to make the order asked for in the petition. The respondent company objected that the Attorney-General was not a proper party

to appear before the Board and was without any status in the matter. The Board overruled the objection and decided that the Attorney-General was properly before the Board. They then heard argument as to their jurisdiction and in a written judgment giving reasons at length decided that they had jurisdiction under the constituting Act to make the order asked for.

The Attorney-General then applied to this Court under sec. 70 of the Act for leave to appeal from this decision which leave was given.

The contention chiefly pressed upon us by counsel for the Attorney-General was that the effect of the validating Act of 1916 was to make all the provisions of the agreement of November 15, 1915, including clause 5 respecting the maximum rate, statutory law and that therefore the Board could have no power to alter those provisions, whatever the position might have been had the validating Act not been passed.

With this contention, however, I am unable to agree. It seems to me to be quite obvious from the terms of sec. 2 of the Act which I quoted above, that all the Legislature did was to remove all doubt as to the agreement being valid and binding upon the city. In express words it says that it "shall be valid and binding upon the corporation of the said city." It does not refer in any express words to its binding effect *upon the company receiving the franchise* and undoubtedly leaves this to the original force and effect of the agreement itself as a contract. If it had been the intention to give the obligations of the company any statutory standing I think some such words as "and upon the company" would have been found in it, but no such words are found there. The reference to suggested defects and irregularities in the passing of the by-law and to a possible lack of power in the city to enter into the agreement seems to me to make it too clear for argument that the statute was a purely validating one and nothing more.

This view destroys the basis upon which certain other contentions as to the want of jurisdiction in the Board were rested and these need not therefore be further referred to.

There were however two other objections taken to the jurisdiction of the Board both of which are in my opinion sound and valid. The first was that inasmuch as the agreement of November 15, 1915, did not fix a rate to be charged for gas but only fixed a

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price beyond which the company when it came to make a charge could not go and inasmuch as the system is not yet constructed and no charge can yet possibly be made the conditions under which the Board is authorised to interfere with or control rates have not yet arisen. The second is that, in any case, even assuming that the maximum price fixed by clause 5 of the agreement is an "existing individual rate" within the meaning of the Act, yet the Act gives no power to interfere with a rate fixed by contract but only with a rate imposed or exacted, as it were, *ex parte* by the company when selling its gas.

I shall consider the second objection first.

It is clear, I think, upon a reading of the whole Act constituting the Board that the Legislature did not overlook the case of a contract entered into between the public utility enjoying a franchise and the municipality granting it. The powers of the Board are set forth in secs. 20-28 inclusive and secs. 32 and 37 of the Act. In two of the sub-secs. of sec. 20 there is to be found a direct reference to the case of contractual rights. The first is 20 (b) which ends with the words

> the whole, however, subject to such of the provisions of any contract existing between such public utility and a municipality at the time such complaint is made as the Board shall consider fair and reasonable.

But it will be observed that the power, thus impliedly given to the Board to disregard the terms of a contract which it considers unfair or unreasonable, is limited to the case where a complaint is made that the "tolls *demanded*" "*exceed* what is just and reasonable" and the Board is given power to "disallow or change as it thinks reasonable any such tolls or charges as in its opinion are excessive unjust or unreasonable." the whole subject aforesaid. It seems to me to be beyond question that the Board is given no power under sec. 20 (b) to increase any tolls or charges because its power to act under that clause only arises where there is a complaint that the tolls are excessive.

The other sub-section is 20 (g) which reads thus:—

> Subject to the terms of any contract between any public utility and any municipality and of the franchise or rights of the public utility (the Board shall have jurisdiction) to define or prescribe the terms and conditions upon which a public utility shall or may use, for any of its purposes as a public utility, any highway or any public bridge or subway constructed or to be constructed by the municipality or two or more municipalities and to enforce compliance with such terms and conditions.

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Now it ought not to be forgotten that the very essence of a franchise granted by a municipality is the right to use its streets and highways. If the use of these were not required a company could act, as any other industrial concern does, entirely by private contract and as a private trader and sell gas to householders just as it pleased. It is the unavoidable necessity of using the public streets to convey the gas that forces such a company to secure the right to use them and it is this right which in substance constitutes the "franchise." The very agreement itself by which the franchise now in question was granted contains as its principal and essential part the clause (clause 1) which I quoted at the beginning by which the right to use the streets is granted "subject to the terms and conditions and provisions hereinafter contained." And, as I also pointed out, by far the most important of the terms and conditions thereinafter contained is found in clause 5 which places a maximum price upon the sale of gas. I do not therefore think it at all allowable to read into sec. 20 (g) of the Public Utilities Act words which would except from its operation the question of the maximum price for gas which had been fixed in the agreement or contract by which a franchise has been granted or by a virtual judicial amendment to restrict the meaning of the sub-section to merely subsidiary questions regarding the terms and conditions upon which the right to use the highways has been given.

The Act has indeed, in sec. 20 (b) given a limited power of interference with contractual rights, but that power is clearly confined to a reduction of the rates. No power to increase a rate fixed by contract as one of the conditions thereof is anywhere given and sub-sec. 20 (g) clearly shews that such a power was withheld from the Board.

It may be contended that inasmuch as the secs. 23 (c) and 32 give a power of increasing rates that question must have been intended to be excepted from the term of 20 (g). But in my opinion there is ample scope left for the operation of the powers of the Board given in those sections without so restricting the meaning of 20 (g). I think both sec. 23 (c) and sec. 32 can have full effect and meaning given to them by applying them to cases where the company enjoying the franchise is imposing and charging existing individual rates within the field of variation permitted

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and allowed to it under its contract with the municipality when obtaining the grant of the franchise. Section 32 says that

> No change in any existing individual rates . . . shall be made by any public utility nor shall any new schedule of any such rates be established until such changed rates or new rates are approved by the Board,

and the Board is then given power "to hear and determine whether the proposed increases, charges or alterations are just and reasonable." Section 23 (c) gives the Board power "to fix just and reasonable individual rates" "whenever the Board shall determine any existing individual rate . . . to be unjust unreasonable, *insufficient* or unjustly discriminatory or preferential."

It must be remembered that the term "public utility" is wide enough to include many other things besides gas companies, including provincial railways and street railways owned by private corporations and the Act must be read in the light of this fact. The whole Act must also be read together and such a meaning given if possible to each part of section as will reconcile the one to the other without destroying the plain grammatical meaning of the different parts.

It will be observed that sec. 29 says:—

> No public utility . . . shall—(a) make, impose or exact any unjust or unreasonable, unjustly discriminatory or unduly preferential individual or joint rate,

and goes on to forbid many things which might work injustice to different members of the community. In view of this language I think the obviously proper interpretation to put upon secs. 32 and 23 (c) is that the Legislature was there dealing with rates which a public utility would otherwise be quite free to "exact" or "impose" without the restriction of any contract. This obviously furnishes a very wide field for the operation of the powers of the Board without infringing upon the limitation contained in clause 20 (g). Therefore as the maximum price to be charged for gas was one of the terms and conditions upon which the franchise in question was granted I think sec. 20 (g) withholds all power from the Board to interfere with such a contractual right.

At the very foundation of the whole case lies the statutory enactment in the Edmonton Charter that no such franchise as we have here in question shall be granted except upon a two-thirds

vote of the burgesses. I think that it would be strange indeed if the Legislature after taking this precaution in order to enable the ratepayers of the city to protect their rights by a popular vote should be found to have established a Board with power to disregard the necessity for such a vote. The main purpose of the Public Utilities Act seems to me to have been to establish a Board to protect public rights rather than to override them. It is true that sec. 20 (b) seems to give the Board power to make an agreement for the parties under certain circumstances where they are unable to agree. But the point here is that the parties have in fact agreed.

In the next place it will be clear already from what I have said that I do not think that the maximum price fixed in clause 5 of the agreement comes within the meaning of the words "existing individual rate," as used in the different sections of the Act. It is not so much that the company is not yet in a position to supply gas under its contract as that the rates which are under the control of the Board are in my opinion such rates as are "exacted or imposed" by the company. It cannot be said that the maximum price beyond which the company is not allowed by the contract to go under the terms and conditions contained it is in any sense an "existing individual rate" within the meaning of the Act. In my opinion it is not a "rate" but a contractual limitation of the rate, which is a very different thing indeed.

It seems to me to be not impertinent to make one further observation. The city has apparently joined with the company in its petition to the Board. It does not appear from the record whether this is an act purely of the council or whether the ratepayers by a vote authorised such a course. If the former is the case, then I venture very respectfully to doubt the authority of the council to act in this way. Section 39 of the Public Utilities Act seems by its language to be restricted to the case where there is a "question in dispute." It is difficult for me at any rate to discern from the record before us where there is any "question in dispute." Disputants rarely are found asking the same thing from a tribunal.

For these reasons I am of opinion with very great respect that the appeal should be allowed and that it should be declared that the Board has no jurisdiction to interfere with the terms of

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clause (5) of the agreement. It was agreed that there should be no costs.

SIMMONS, J.:—I am of the opinion that the conclusion of the Board of Public Utilities Commissions was correct as to the effect of the statute, 6 Geo. V., 1916 (Alta.), ch. 29, validating the agreement between the city and the company, namely: that it was not intended to have the effect of making the agreement itself have the force and effect of statute law. The reasons given by the Board, are, in my view, correct and it is unnecessary to repeat them, and the conclusion of the Board as to the right of intervention by the Attorney-General is one of law and final.

I am not able, however, to agree with the conclusion of the Board that sub-sec. (c) of sec. 23 of the Public Utilities Act, 5 Geo. V. 1915 (Alta.), ch. 6, gives to the Board any jurisdiction to hear that petition under consideration.

The city and the gas company entered into a binding agreement under which the city gave the company very important concessions in the way of using the streets for laying service pipes and mains. The city, obviously for the purpose of protection of the users and for their benefit, had a maximum price fixed for the supply of gas. The conclusions of the Board, that the private Act did not have the result of investing the agreement between the city and the company with any effect other than the contractual relation between the parties, in my opinion settles the matter of jurisdiction. To hold that sub-sec. (c) of sec. (23) of the Public Utilities Act gave the Board power to alter this agreement in so important a feature as to change the maximum price contracted for would be tantamount to holding that the Board could make a new agreement between the parties. This would be a wide power indeed and it would require clear legislative declaration assuming (which is open to argument), that the Legislature could delegate such extensive power; to confer such upon the Board.

It cannot be said the parties to the agreement have consented to have the same altered because the municipal council cannot give such assent under the Edmonton Charter. That assent can only be given by the burgesses when the same is duly submitted to them by a by-law for that purpose. The present application, if successful, would have the effect of substituting a new contract

for a former one without the consent of one of the contracting parties, and a new contract with less favourable terms for the party (the burgesses of the city), whose consent has not been obtained.

Section 43 of the private Act does not have any more effect than to declare that the Board shall have the same jurisdiction as it would have had over the agreement if the validating Act had not been passed.

I would, therefore, allow the appeal.

McCARTHY, J., concurred with Stuart, J.

Appeal allowed.

ASHDOWN AND McGUINNESS v. MILBURN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1919.

HUSBAND AND WIFE (§ I B—24)—DEBTS OF HUSBAND—PROPERTY OWNED BY WIFE—TRANSFER—UNDUE INFLUENCE—CONSIDERATION—VALIDITY OF TRANSFER.

Proof of false and misleading statements and undue influence on the part of a husband in whom the wife had confidence, in order to obtain a transfer of land by the wife who had no undependent advice, is sufficient to set aside the transfer.

[*Wingrove* v. *Wingrove* (1885), 11 P.D. 81; *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, followed].

APPEAL from the trial judgment in an action to have a transfer of land set aside. Affirmed. Statement.

F. L. Bastedo and *H. E. Grosch*, for appellants.

A. G. MacKinnon, for respondent.

HAULTAIN, C.J.S.:—The facts of this case are very fully stated in the judgment which is the subject of this appeal. Haultain, C.J.S.

While I am somewhat doubtful whether the evidence brings the case within the reasons for decision in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, I think that the plaintiff is entitled to recover on other grounds than that of undue influence. The evidence in my opinion discloses an absolute lack of consideration for the execution of the transfer by the plaintiff. There can be no doubt that there was only one transfer executed by the plaintiff, and that that document was executed by her *after* the "extension agreement" was executed and delivered by the creditors. The evidence shews that the "extension agreement" was entered into and completed on the faith of the deposit of the certificate

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of title, coupled with the representation of T. H. Milburn that the land really belonged to him and that he would obtain a transfer from his wife. This view of the evidence is strengthened by the fact that the business was carried on for several months before the transfer was finally completed and registered. The evidence further shews that, although Mrs. Milburn was named as a party to the extension agreement, no effort was ever made to secure its execution by her, nor was she ever made aware of its existence, except possibly, by a reference to it in the statutory declaration which she signed later on, under very peculiar circumstances. This declaration, however, never came into the possession of the creditors or their representatives after being signed by the plaintiff. The real consideration for the execution of the transfer was, the representation by the husband that an extension of one year would be given by the creditors if the transfer was made. This representation was false, as a very casual glance at the "extension agreement" will shew. The real agreement was never disclosed to Mrs. Milburn. On this point I disregard altogether the evidence of Hawthorne. He thinks he must have discussed this agreement at Elbow with Mrs. Milburn, but I agree with the trial Judge that there never was any meeting at Elbow at all. Hawthorne's letter of January 7, 1915, which was never delivered, not only makes no mention of the extension agreement, but undertakes to represent a liability on the part of Mrs. Milburn which in no way resembles the liability proposed to be created by the agreement. This letter confirms Mrs. Milburn's evidence, that she understood that a year's extension would be given and that she would only be liable if the creditors were not paid at the end of that period. This letter, which never reached its destination, and was obviously written after the event, affords a sufficient commentary on the nature of the "independent" advice which Mrs. Milburn is supposed to have received. It is quite clear from the evidence, therefore, that when Mrs. Milburn first signed the transfer and later on when she made the affidavit for the purpose of rectifying some errors in it, she was on both occasions led to believe that the transfer was given on conditions absolutely different from the conditions of the "extension agreement," and on conditions which cannot be fulfilled. There is therefore, in my opinion, an absolute failure of consideration.

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In fact, there never was any agreement between the parties, because there was never any *consensus ad idem*.

Mrs. Milburn cannot be held responsible for false statements made by her husband to the creditors of which she had no knowledge, neither can she be held bound by the terms of an agreement which she never saw. The creditors cannot say that they relied on the agreement as against her, because, apparently, they never made any effort to obtain her execution of the agreement. They also cannot say that they entered into the agreement and proceeded to carry it out relying on any act, or promise, made or done by her. They are, no doubt, not responsible in one sense for the false and misleading statements made to Mrs. Milburn in order to obtain the transfer, but they cannot be allowed to take advantage of them by setting up an agreement that was never made.

I would dismiss the appeal with costs.

Newlands J.A.

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

Elwood, J.A.

ELWOOD, J.A.:—I concur in the judgment of the Chief Justice in this matter.

I am also very strongly of the opinion that the facts of this case bring it within the reasons for the decision in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120.

The plaintiff had confidence in her husband's statement that the extension agreement was for one year. It was a false statement, although possibly made in the belief that it was true. But, being false, I am of opinion that the plaintiff should be relieved from the consequences of what she did as the result of that statement. Her subsequent actions when signing the declaration and the affidavit, cannot prejudice her position. The declaration never came into the possession of the creditors, and when the declaration and affidavit were signed she still believed that the extension agreement was for one year. The advice of Hawthorne was not that of an independent solicitor. He was her husband's solicitor, employed by him or the firm to advise her. He did not correctly advise her, if at all, as to the effect of the extension agreement. His evidence at the trial shews that he was of the opinion that the extension agreement did not better the debtor's position, and was one which he would not advise the debtors to sign. Hawthorne never explained to the plaintiff the true effect of the agreement.

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The whole circumstances surrounding the execution of the transfer shew that an unfair advantage was taken of the plaintiff's confidence in her husband. I would therefore dismiss the appeal with costs.

LAMONT, J.A.:—The question to be determined in this appeal is, whether the plaintiff is entitled to have a transfer given by her to the defendant Ashdown set aside, on the grounds that it was obtained by undue influence and was given without consideration and under a misapprehension.

What constitutes "undue influence" was stated by Sir James Hannen in his charge to the jury in *Wingrove* v. *Wingrove* (1885), 11 P.D. 81, at 82, in the following language:

> To be undue influence in the eye of the law there must be—to sum it up in a word—coercion . . . The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness sake, to do anything. This would equally be coercion, though not actual violence.
>
> These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say "this is not my wish, but I must do it."

He also points out that it is not sufficient to establish that a person has the power unduly to overbear the will of another, it must also be shewn that the power was exercised.

In *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, at 137, Lord Macnaghten, in giving the judgment of the Privy Council, said: "It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete."

In his judgment the trial Judge finds the following facts:

> She (Mrs. Milburn) did not wish to sign the transfer as she was afraid that by so doing she might lose the land, but her husband insisted that she sign it as he intimated that it was the only thing that would save the business. He kept at her, urging her to sign, for a couple of days. She was not in good health. During her 38 years of married life her relations with her husband had always been of a happy character. This day he prepared everything at a table in one room for her to sign and then left the room. She had a good cry and then signed the document. No witness was present at the time

and no one saw her sign. She left the document there, and the husband got it, took it to a notary who procured a handy person to sign the affidavit of execution to which the notary attached his certificate without any oath being in fact taken.

There is evidence to justify these findings. In her evidence the plaintiff was asked: "Q. As a matter of fact, you knew you did not have to sign it unless you wanted to? A. Well, I just knew it might be the means of making an unhappy home."

We have then this situation. Mrs. Milburn does not want to sign the transfer. Her husband urges her to do it. For 2 days she holds back and for 2 days he insists. Next morning he arranges everything on the table in the room for her to sign, and then leaves the room. She realises that her refusal to sign may be the means of breaking up their happy home life. She is in poor health. She has a good cry and then signs. Is anything lacking in these circumstances to bring her act in signing within the test laid down by Sir James Hannen, above quoted: "This is not my wish, but I must do it?"

I am of opinion there is not. The transfer of the land in question was immoderate and irrational as found by the trial Judge. The circumstances of this case to my mind bring it within the principles laid down by the above authorities. I would therefore dismiss the appeal with costs. *Appeal dismissed.*

HOWARD v. THE KING AND THE MUNICIPALITY OF PICTOU. Re STRATHCONA ESTATE.

Exchequer Court of Canada, Audette, J. November 24, 1919.

EXPROPRIATION (§ I D—55)—GOVERNMENT RAILWAY ACT, 1881, SEC. 18—VESTING OF PROPERTY IN THE CROWN—TITLE TO LAND—STATUTE OF LIMITATIONS—DISABILITY—ABSENCE FROM PROVINCE—GENTLEMAN'S RESIDENCE—INTEREST.

Under the provisions of sec. 18 of the Government Railway Act, 1881, the land taken for the purpose of a railway became absolutely vested in the Crown, not only by the deposit of the plan and description in the registry office, but also by the actual possession assumed by the Crown. The title to the land does not become vested in the Crown by the mere survey of the land, as provided by sec. 5 of the Government Railway Act.

Where the expropriating party has done all that could reasonably be expected of it to settle for the land taken, and that the delay in prosecuting the recovery of the claim may justly have been construed as an abandonment of the same, interest will only be allowed from the date on which the Petition of Right was filed in Court.

Under the circumstances of the case, the claim was not barred by the Statute of Limitations.

Statement.

A Petition of Right to recover the value of land taken by the Crown for the use of the Intercolonial Railway in the Province of Nova Scotia.

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The case came on for trial before Audette, J., at the City of Halifax, N.S., on June 9, 10 and 11, 1919.

E. M. Macdonald, K.C., *L. A. Lovett*, K.C., and *J. W. Macdonald*, for suppliants; *J. McG. Stewart* and *J. W. Mackay* for respondent; *R. T. MacIlreith*, K.C., and *J. W. Ross*, K.C., for third party.

The facts are stated in the reasons for judgment, which are printed below.

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AUDETTE, J.:—This is a Petition of Right, whereby it is sought, on behalf of the heirs of the late Lord Strathcona, who departed this life, testate, on or about January 21, 1914, to recover the sum of $10,000, as representing a claim for damages in respect of, and including the value of, the land taken for and in possession of the Crown and used as part of the Branch line of the Intercolonial Railway from Stellarton to Pictou, Nova Scotia.

The question of title is admitted by the Crown, subject to the right to plead that the suppliants' title is barred by the Statute of Limitations, or in other words, that the property at the time of the taking by the Crown, belonged to Lord Strathcona, and that the Crown reserves its right to plead the Statute of Limitations for the compensation claimed in respect thereof.

The particulars of the claim are as follows:

(a) The value of the land taken in so far as the soil is concerned, $1,500.00. (b) Damages for severance, $2,500.00. (c) Damages for destroying access to land fronting on the harbour of Pictou, $2,000.00. (d) Damages for interfering with access to the harbour by road, $1,000.00. (e) General depreciation to whole property as a result of the expropriation, $3,000.00 total $10,000.00.

It has been eventually admitted that the area actually taken by the Crown is 5.08 acres. This question of discrepancy as to the area, is explained by McKenzie's evidence. Under the first plan which was transmitted from Moncton to Pictou for registration, on June 6, 1886, but which was not registered, and which was filed as Ex. "H" herein, it appeared that the Crown at first took 5.97 acres; but this was subsequently changed upon representation made by Lord Strathcona, to 5.08 acres, under another plan, which was in turn sent for registration on June 13, 1886, meeting with the same fate as to registration.

The Crown by its statement of defence admits having taken the land in question herein for "the right of way and the use" of the Government railway which was being constructed at the time by the Dominion Government, and further alleges the registration of a plan and description of these lands, but has failed to prove it. The defence further pleads the Statute of Limitations to which reference will be hereafter made.

As far back as the years 1884 or 1885, the citizens of Pictou started an agitation in favour of building a branch line of railway from Stellarton to Pictou, and a committee of 5 citizens was appointed. Fraser, who at one time was Chairman of the Committee, testified that he went to Ottawa making due representation to that effect. Free from all unnecessary details, in the result it was agreed between the Municipality of the County of Pictou and the Crown, that the latter would build the railway, if the County would provide for the right of way by paying the amount necessary to acquire the lands. In accordance thereto, the necessary resolutions were passed by the municipality giving it authority to do so, which authority was afterwards confirmed by Acts of the Legislature of Nova Scotia, viz., 49 Viet. ch. 106 and 52 Viet. ch. 84.

The County, as will appear from Ex. "G", acquired the necessary land for the railway from the owners therein mentioned and settled with them, excepting, however, with Lord Strathcona, whose compensation of $350, fixed at the time but not accepted, appears on the last page of the list. A draft deed for such land and damages was forwarded to Lord Strathcona. By Ex. "P", on November 27, 1886, he acknowledges the receipt of such deed, and he states he has "no recollection of any such arrangement as to the amount of consideration money for the land and property so taken," adding that upon proper crossings and fencing would greatly depend the price he would expect to receive. No settlement was ever arrived at, the matter of compensation having been left in suspense ever since.

The first survey was made in 1885—and Fraser says the first survey destroyed the Norway property. Upon representation being made by Lord Strathcona, a second and final survey was made, the plan whereof was completed by McKenzie on June

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13, 1886, and transmitted from Moncton to Pictou for registration, but no such registration was ever made.

The construction of the road started in 1886, when the first sod was turned on June 3 of that year. While the first surveys were made in 1885, the change in the same with respect to the present property was only made on June 13, 1886, and the work of construction was started east of the Norway property.

Now it is contended that since the plan and description were not deposited in the Registry Office that the land did not vest in the Crown, as provided by sec. 10 of the Government Railway Act, 1881. However, by sec. 2 of ch. 13 of 49 Vict., the Minister is given, with respect to the Pictou Town Branch, all the powers and authority vested in him by the Government Railway Act, 1881. By sec. 10, the lands taken are to be laid off by metes and bounds, and from both plan "H", and the evidence of witness McKenzie, that appears to have been done. Then the section proceeds and says that where "no proper deed or conveyance of these lands to the Crown is made," etc., etc., "or where for any other reasons the Minister shall deem it advisable," a plan and description of such land shall be deposited in the Registry office, whereby such land shall become vested in the Crown. No plan and description were so deposited, probably the Minister did not deem it advisable to do so, and this Court has no power to sit in review of such statutory discretion of the Minister.

However, by sec. 18 of the Government Railway Act, any claim in respect of the compensation for the property taken, as respects the Crown, is converted into a claim for compensation money, and is void as respects the land and property themselves, which shall, by the fact of the taking possession thereof, become and be absolutely vested in the Crown, subject always to the determination of the compensation to be paid and to the payment thereof when such conveyance agreement or award shall have been made.

Therefore, following the decision in the case of *The King* v. *The Royal Trust Co. of Canada* (1908), 12 Can. Ex. 212, I find that under the provisions of sec. 18 of the Government Railway Act, 1881, the land taken for the purposes of the Branch of the Intercolonial Railway became absolutely vested in the Crown

at and from the time of possession being taken on its behalf. The case of *The Queen* v. *Clarke* (1896), 5 Can. Ex. 64, cited at bar has been satisfactorily distinguished in the latter case, for the obvious reason that the owners therein had remained in possession.

Moreover, the Court has additional specific jurisdiction to hear the present case, and the suppliants have the right to set up this claim, under the provisions of sec. 19 of the Exchequer Court Act, wherein it is, *inter alia*, provided that it (the Court) "shall have exclusive original jurisdiction in all cases in which the land, goods, or money of the subject are in the possession of the Crown." See upon this point Clode on Petition of Right, pp. 68, 70, and the numerous cases therein cited, Robertson on Civil Proceedings, pp. 332, 333, Hals. vol. 1, p. 18, vol. 10, pp. 26, 27.

Further it must be found, following the decision in the case of McQueen v. The Queen (1887), 16 Can. S.C.R. 1, 28, 102, 103, that the title in the property did not become vested in the Crown by the mere survey of the land as provided by sec. 5 of the Government Railway Act; but, that it did so by the actual possession taken some time later, when the construction of the road was started and completed by November, 1887.

Coming now to the question of the Statute of Limitations set up both at bar and by the pleadings, I will deal first with sec. 30 of the Government Railway Act, 1881. It appears from the evidence that the suppliants' land in question was first laid out by metes and bounds by the second plan made on June 13, 1886, that the first sod was turned on June 3 of that year, and that the construction was started east of the Norway property, and further that the road was completed by November 28, 1887. We have no evidence establishing at what actual date the possession of the land was taken. It is only established that the land in question must have been taken between June 13, 1886, and November 28, 1887. From Ex. "P", it would appear that Lord Stratheona received for the first time, on November 27, 1886, an intimation that a draft deed had been prepared for the land required for the railway, and in answer to the same he

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wrote that the amount of consideration money he would expect to receive would depend, among other things, upon the several crossings being made safe and commodious. The answer, in respect of these crossings, practically comes only by way of the undertaking filed by the Crown on September 9, 1919,—the matter having remained in abeyance in the meantime with respect to the settlement of the claim.

The evidence establishes that the lands were taken between June 3, 1886, and November 28, 1887. That the work of construction did not start at Norway. There is every reason to believe that the construction of the Branch was worked from Stellarton, where a railway was already in operation. In all probability the possession of the road was possibly taken in 1886, but also possibly in 1887, and possibly late in 1887. There is no such evidence, however, upon which I could name one day more than another between the dates above mentioned, with any certitude, and upon which may depend the life or death of the claim. I conclude that the benefit of that incertitude should be given to the conjecture that the lands might have been taken possession of only one month or one month and a half before the operation—taking in consideration that in all probability its construction was worked to Pictou from the other end, from Stellarton.

Moreover, there is no definite date to anchor on, between June 13, 1886, and November 28, 1887,—the date of laying out the property taken by metes and bounds and the date when the line was opened for traffic—whereby one could say that possession was taken on a given day. All we know is that possession was taken between these two dates. In view of all this, it would be impossible to declare the limitation mentioned in sec. 30 of the Government Railway Act, of 1881, as binding, because the circumstances contemplated by that section do not apply to the special circumstances arising in the present instance. The County first deals direct with Lord Strathcona, and then on October 1, 1887, previous to the completion of the road, the Exchequer Court Act came into force, and under sec. 33 thereof, as above mentioned, it is enacted that the laws relating to prescription and the limitation of actions, shall be the law of the

Province; and further, by that very Act, the Act respecting the Official Arbitrators is repealed and thereby the official arbitrators are abolished. In the light of these facts it would seem that sec. 30 of the Act, 1881, could not be made applicable—the arbitrators were then abolished, replaced by the Court, and no necessity arose to file the claim with the department. Furthermore, the proviso at the end of sec. 30 would also help to harmonize matters by suggesting the origin of sec. 33 of the Exchequer Court Act, which invokes the laws relating to limitation of actions in the Province as embodied in ch. 167 of R.S.N.S., 1900.

Legislation with respect to the Statute of Limitations is legislation dealing with procedure and is therefore retroactive. The *Idun* case, [1899] P. 236; *The Sydney & Cape B. Co.* v. *Harbour Commissioners of Montreal* (1913), 15 Can. Ex. 1; 20 D.L.R. 828, affirmed (1914), 20 D.L.R. 990, 49 Can. S.C.R. 627; and *The Royal Trust Co.* v. *The Baie des Chaleurs Ry. Co.* (1908), 13 Can. Ex. 9.

Moreover, if this claim, as hereinbefore mentioned is made at common law for land that finds its way into the hands of the Crown, under colour of eminent domain or expropriation, and is considered under the provisions of sec. 19 of the Exchequer Court Act, again the local law respecting the limitation of actions applies, and again we are driven to ch. 167 of R.S.N.S., 1900.

As the question of disability resulting from the absence from the Province arises with respect to Lord Strathcona, who never resided at Pictou, but who visited the place at some time, it is important to establish from the evidence the date at which he was at Pictou to properly adjudicate upon the question of prescription. Five witnesses testified upon this point:

Witness Webster, who was stationmaster at Pictou up to 1918, remembers that Lord Strathcona came to Pictou in 1909 by special train and left the same day. E. M. Macdonald, K.C., also testified that at no time did Lord Strathcona reside at Pictou, but that he came there in 1885, and was not there again until September 20, 1909, when he came by special train, arriving in the early morning and remaining at Pictou a couple of hours. He further says that Lord Strathcona was not at Pictou in 1886. Witness R. A. Fraser says he saw Lord Strathcona at

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Pictou previous to 1885, and in 1886 and 1909. He says Lord Strathcona was at Pictou on May 22, 1886, previous to the turning of the first sod, and that he also saw him there in September, 1909. Donald McLeod, who was at one time working at Norway, under caretaker Gillis, says he saw Lord Strathcona 3 times at Norway, but he is unable to mention any date, once about 35 years ago, the first time in August, the second time in the fall and the third time he was digging potatoes. Witness Mary Campbell, a daughter of Gillis the caretaker at Norway, who was married in 1892, says she remembers Lord Strathcona coming to Norway. She has no idea of the year,—about 6 years before she was married. It is impossible to build up anything with any satisfaction, upon the testimony of these two last witnesses. The most that can be found is that Lord Strathcona was in Pictou in 1885, on May 22, 1886,—although the last date is challenged by witness Macdonald,—but it is absolutely established he was there in 1909.

The lands in question were taken between June 13, 1886, and November 28, 1887. Therefore, Lord Strathcona's visits in 1885 or in May, 1886, have no bearing upon this question of limitation, but he was unquestionably in Pictou in 1909.

It was held in *Ross* v. *The G. T. Ry. Co* (1886), 10 O.R. 447, that the right to compensation for land taken by a railway company is not barred short of 20 years, and that decision was followed in the case of *Essery* v. *The G. T. R. Co.* (1891), 21 O.R. 225. See also *Roden* v. *City of Toronto* (1898), 25 A.R. (Ont.) 12. In the case of *The Cork & Bandon Ry. Co.* v. *Goode* (1853), 13 C.B. 824, an action of debt by a railway company against one of its members, for calls under the statute, it was held that a declaration in debt upon a statute, is a declaration upon a specialty, and if that were applied to the present case, the claim would fall, as a specialty, under sub.-sec. c of sec. 2 of ch. 167, of R.S.N.S., 1900, and would be prescribed by 20 years, also subject to sec. 3 and following the same Act in respect of disability.

However, I find that the present claim comes under sec. 9 of that Act, and is subject to a limitation of 20 years, and that as Lord Strathcona was under disability resulting from his absence

from the Province, that if we add 10 years to the date of his visit, in 1909,—his first visit to the Province after the expropriation of the property, that will take him to 1919. The Petition of Right was filed in the Court on July 31, 1916,—(it is not disclosed when it was lodged with the Secretary of State in pursuance of sec. 4 of the Petition of Right Act)—therefore the claim is not barred by the Statute of Limitations.

Mention should perhaps be made that the suppliants relied upon the two letters of the Minister of Railways, filed as Exs. 8 and 10, as interrupting the prescription, and that counsel for the third party contended that the Crown could not proceed with the construction of the railway until the right of way was acquired. This last argument, although plausible is not sound, because the agreement between the Crown and the Municipality was that the latter was only to provide for the right of way by paying the amount necessary to acquire the land, and the land owners had all been dealt with and paid with the exception of the present claimant. *De minimis non curat lex*,—This trifling difficulty was no reason to stop the construction of a railway for the welfare of a large community.

In the result the Crown took the suppliants' land and became liable therefor either under the Railway Act, 1881, or under sec. 19 of the Exchequer Court Act. The respondent took the land and the suppliants have a right to compensation. *De Keyser's Royal Hotel Co.* v. *The King* (1919), 35 T.L.R. 418, *Ross* v. *G. T. R.* (1886), 10 O.R. 447. The suppliants' right to compensation is a statutory right and the respondent's liability is a statutory liability. This right and this liability still exist and nothing has happened to destroy them. It is even contended in some States of the American Commonwealth that a claim for compensation for land expropriated cannot be taken away by the Statute of Limitations. *Delaware, L. & W. R. Co.* v. *Burson* (1869), 61 Penn. 369; *McClinton* v. *Pittsburg, Fort Wayne & Chicago R. Co.* (1870), 66 Penn. 404.

Coming to the question of the assessment of the amount of compensation it may be advisable, as a prelude, to state in a summary manner the result of the evidence adduced upon the value of the property in question, and the damages arising from

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the expropriation. On behalf of the suppliants, witness Ellis, speaking of values of to-day, values the property at $35,000 to $40,000, without the railway,—and with the railway at $17,000 to $22,000,—adding that his values are within 2 years, and he takes it that the land left by the railway on the water front is of no value and is no good. Then Senator Casgrain places a value of $25,000 upon the property before the coming of a railway, and $15,000 since,—valuing land and damages at $10,000. He also admits that the coming of the railway to Pictou is an advantage that would add to the value of property. Witness E. M. Macdonald contends the property has depreciated in value by one-third from the coming of the railway. On behalf of the Crown witness Fraser says that on the appraisal by their committee, they allowed $20 an acre for cultivated land and $5 for woodland, and that as far as he was concerned he had nothing to do with the valuation of the suppliants' property. Senator Tanner contends that the assesment of the Norway property is above its value and that the sum of $350 is and has always been a sufficient sum for the value of the land including the severance, which does not amount to much. He would allow $50 an acre, that is $250 for the land and $100 for damages, in all $350. He says that in 1886 there was no demand for such property, and that there has been no increase in the value of real estate at Pictou in the last 30 years. Witness Ives, heard on behalf of the third party, says that the assessed value of lower price property, say $1,400 is pretty near actual value, and that the higher price property is very small because we have no people to buy. The assessment is as much as it would bring at auction, and Lord Strathcona's property is assessed at all it could bring. That the business conditions at Pictou in 1886 were no better than they are to-day. A bank had failed there in 1883,—there was also the Campbell failure, and there were no industries there to employ people.

Suffice it to say on the question of values testified to, that the suppliants' evidence in that respect is so exaggerated and inflated, that it is beyond the pale of serious and earnest consideration especially if we consider the purchase price, the absence of fluctuation in the real estate market and the value placed by

the estate itself upon the property for succession duty. He who wants to prove too much proves nothing. Moreover, these values are not values given as of the date of the expropriation. On the other hand, I am unable to share Senator Tanner's view with respect to the damages to the property. His estimate is too low. Has it been offered to make up the amount appraised by the County years ago?

Undoubtedly the suppliants' property is a very desirable country residence for a gentleman of means. As was very justly said by Sir Glenholme Falconbridge, C.J.K.B., in delivering judgment in appeal re *Ruddy* v. *Toronto Eastern R. W. Co.* (1915), 7 O.W.N. 796:

> It is not a question of farm land to be valued at so much per acre as such. Nature had provided an ideal site for the particular purpose which the appellant had in view, and which he was carrying out with great judgment, viz., for a country residence of a man of means and good taste. It appears in evidence, and it is a self-evident proposition, that if it should become necessary or desirable for the appellant to sell the property, the existence of the railway, running where it does, would be a fatal objection in the mind of the only class to which he could reasonably look to find a purchaser.

While these observations, *mutatis mutandis*, are very apposite to the present case, it must not be overlooked that this judgment was reversed by the Judicial Committee of His Majesty's Privy Council (1917), 33 D.L.R. 193, 38 O.L.R. 556, upon the misapprehension by the Court of Appeal of Ontario, that the two arbitrators who had made an award for $3,500, as against that of the dissenting arbitrator for $13,500, had proceeded upon a wrong principle in not taking into consideration the elements above referred to. Their Lordships of the Privy Council found that the majority award had duly considered the same and restored their finding. In the result this judgment establishes that such elements of compensation must be taken into consideration, but that they must not be used to unduly inflate the same.

This property of an area of 113 acres was bought in 1881 and 1882 for the total sum of $6,990. It was assessed in 1885 at $11,500, and from 1886 to 1895 at $15,000. It was appraised for the purpose of succession duty in 1914 at the sum of $10,000.

The taking of this land from the suppliants results in a severance of the property, with a small parcel of land on the river side. Adjoining thereto he procured, in 1902, long after the

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date at which we have to assess, from the local Government, a grant for a water lot; the value of such grant it is unnecessary to consider, but it is only mentioned to shew what in futurity could be made of the piece severed. It appears from the evidence that two railway-crossings were, at some date, in the early period given to the suppliants; but they had not been maintained and while the remains at the time of the trial, were still perceptible, they were not of practical use. Therefore, the Crown, at trial, filed an undertaking, whereby it has undertaken to restore and maintain in good condition the two farm crossings indicated on a plan thereunto attached.

This undertaking has a very appreciable value, as was mentioned by Lord Strathcona in the correspondence of record, and must be taken into consideration, as well as the advantage resulting from the construction of the railway, making Pictou ever so much more accessible,—in assessing the compensation. The value of this property must be arrived at from the standpoint of its value to the owner and not to the party taking it, and its market value must be ascertained looking at it from that view, realising that that class of property is not in demand, it is the smaller class of property with reasonable rentals that is mainly in demand. For want of demand it is also well known that large properties of considerable value as far as the cost of construction and improvement are concerned realise as a rule but small prices.

Taking all the circumstances into consideration and duly weighing the evidence, I have come to the conclusion to allow for the land taken, the sum of $50 an acre, making the sum of $254, an amount which under the evidence would appear in excess of what was allowed for farm lands, and for all damages resulting from such expropriation arising from the severance and all other legal elements of compensation at the sum of $500, making in all the sum of $754.

Dealing with the question of interest it would appear to be out of the question under the circumstances to allow interest for a period running as far back as 1886 or 1887. The municipality at the time of the taking of these lands, did all that was reasonable to be expected from them. They had the land appraised, and a deed prepared which was sent to Lord Strathcona for execution. He never executed it. His laches in doing so or in

prosecuting his claim for such a long period, coupled perhaps with the general knowledge of the public-spirited character of Lord Strathcona, must with justification have led the municipality to believe he had abandoned the idea of making a claim. However, it is unexpectedly revived at his death. *Vigilantibus non dormantibus equitas subvenit.* This delay in prosecuting the recovery of the claim, which may justly have been construed as an abandonment of the same, affords a reason for me to allow interest upon the compensation money only from the date of the institution of the present action, namely July 31, 1916, to the date hereof.

The suppliants will be entitled to their costs as against the Crown. No costs as between suppliants and the third party, who is not to be taken as a co-defendant, although the suppliants have filed written pleadings joining issue with the third party.

The Crown will be entitled to recover from the third party the amount recovered by the suppliants in capital, interest and costs, together with the costs on the third party issue.

Therefore there will be a judgment, as follows: viz:

1. The lands in question herein are declared vested in the Crown from the date of the taking possession thereof. 2. The compensation for the land taken and for all damages resulting from the expropriation is hereby fixed at the sum of $754 with interest thereon from July 31, 1916, to the date hereof. 3. The suppliants, upon giving to the Crown a good and satisfactory title, free from all mortgages or encumbrances whatsoever, are entitled to be paid by and recover from the respondent, the said sum of $754 with interest as above mentioned. 4. The suppliants are further entitled to the performance and the due execution of the works mentioned in the undertaking above referred to. 5. The suppliants are furthermore entitled to recover from and be paid by the respondent, the costs upon the issue with the Crown. 6. This Court doth further order and adjudge that the Crown do recover from and be paid by and recouped from the third party the above mentioned sum of $754 with interest and costs, together with the costs on the issue as between the respondent and the third party, unless the Crown would, under the circumstances, elect to forego such last mentioned costs.

Judgment accordingly.

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BALDWIN & GRAHAM v. BRIANGER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. December 23, 1919.

SALE (§ I B—13)—OF ANIMALS—MONEY PAID ON ACCOUNT—LAPSE OF TIME—PRESUMPTION OF ABANDONMENT—RE-SALE—DAMAGES.

When a party to a contract for the sale of goods has by his conduct, practically abandoned the same, he cannot succeed in an action for damages, the other party in the meantime having made a re-sale; nor can he recover the money paid on account, unless he proves that such money is not a deposit.

[*Howe* v. *Smith* (1884), 27 Ch. D. 89; *Palmer* v. *Temple* (1839), 9 Ad. & El. 508, followed.]

Statement.

APPEAL by the plaintiffs from a judgment of a District Court Judge, in an action on a contract to purchase cattle. Varied.

F. W. Turnbull, for appellants; *A. L. Gordon*, K.C., for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—On June 8, 1918, the plaintiff Baldwin negotiated with the defendant for the purchase of 7 head of cattle at $80 per head, paid to the defendant $20 on account of the purchase price and received from the defendant the following document:—

June 8th, 1918.

I hereby agree to sell to Baldwin & Graham the following described stock at prices mentioned below:

No.	Sex.	Age.	Brands	Price per head	Total
4	M.	2		$80.00	$320
3	F.	3		80.00	240
					560
					20
					$540

I also agree to deliver the stock in good condition at Howey . . . on or before Aug. 1st, 1918, and hereby acknowledge receipt of 20 dollars on account of the purchase price.

(Sgd.) BRIANGER.

The plaintiffs claim that they went to the defendant's house on July 25 to notify him to deliver the cattle on August 1, but found nobody at home. The defendant's evidence goes to shew that the plaintiffs could not have been at his house on that date. However, it is quite clear that the defendant never received any instructions from the plaintiffs to deliver the cattle. On August 1 the defendant went to Howey, which is the place where the

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cattle were to be delivered, for the purpose of seeing if the plaintiffs were ready to take delivery, and for the purpose of making delivery in accordance with his contract. He found nobody there representing the plaintiffs, and apparently no arrangements were made to take delivery or to pay the purchase price. Thereafter he went to Howey every week during the month of August to see if any person was there to take delivery of the cattle and pay the purchase price, but the plaintiffs were never at Howey for the purpose of taking delivery or carrying out the contract, and the plaintiffs never notified the defendant at any time of their readiness or willingness to carry out the contract. The plaintiffs never tendered the balance of the purchase price, and on October 5 the defendant, not having heard from the plaintiffs in any way, re-sold the cattle at $80 per head. The plaintiffs subsequently in April, 1919, commenced an action for damages, particulars of which were the $20 paid on account and estimated loss of profits, $70; total $90. The District Court Judge dismissed the plaintiffs' action. The defendant, by counterclaim, claimed to retain the sum of $20, on the ground that the defendant was obliged to care for and maintain the cattle from August 1, 1918, to October 5, 1918, and also on the further ground that the $20 paid was forfeited on failure of the plaintiffs to complete their bargain.

The District Court Judge held that the defendant was entitled to retain the $20, on the ground that it was earnest money and, as such, forfeited, and that as this sum was claimed by the plaintiffs, it was not necessary to consider the counterclaim, as that was virtually all that the defendant was claiming under the counterclaim, and no costs were allowed the defendant upon the counterclaim. From that judgment the plaintiffs have appealed.

I am of the opinion, under the evidence that the defendant was justified in concluding from the conduct of the plaintiffs that the plaintiffs had abandoned the contract, and, that being so, the defendant was entitled, if he so desired, to accept the abandonment and re-sell the animals on his own behalf.

In *Howe* v. *Smith* (1884), 27 Ch. D. 89 at 105, Fry, L.J., says:

> But in my opinion there has been such default as justifies the vendor in treating the contract as rescinded; it affords the vendor

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an alternative remedy, so that he may either affirm the contract and sell under this clause or rescind the contract and sell under his absolute title. If he act under the clause, he must bring the deposit into account in his claim for the deficiency; if he sell as owner, he may retain the deposit, but loses his claim for the deficiency under the clause in question.

See also *Rhymney R. Co.* v. *Brecon* (1900), 83 L.T. 111, at 117.

The defendant having the right to treat the contract as repudiated by the plaintiffs, there was therefore no breach on the part of the defendant entitling the plaintiffs to recover damages. Are the plaintiffs, nevertheless, entitled to recover the $20 paid?

I am of the opinion that the proper construction of the document signed by the defendant and above set forth, is, that the $20 was paid not as a deposit, but on account of the purchase price. If it had been paid as a deposit, there seems to me to be no doubt that it would be forfeited to the defendant upon the plaintiffs' breach. See *Howe* v. *Smith, supra.* As it was not a deposit, however, but a payment on account of the purchase price, I am of the opinion that the plaintiffs are entitled to a return of it.

In *Palmer* v. *Temple* (1839), 9 Ad. & El. 508, at 520, Lord Denman, C.J., says as follows:

> The ground on which we rest this opinion is, that, in absence of any specific provision, the question, whether the deposit is forfeited, depends on the intent of the parties to be collected from the whole instrument: but, as this imposes on either party that should make default a penalty of 1000l., the intent of the parties is clear, that there should be no other remedy.
>
> This fact was mentioned when the rule nisi was obtained by Mr. Thesier for the plaintiff, in the course of the argument. The consequence appears to be that this vendor may sue for the penalty, and recover such damages as a jury may award; but he cannot retain the deposit; for that must be considered, not as an earnest to be forfeited, but as part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser.

See also *Howe* v. *Smith, supra.*

I am also of the opinion that the above cases are clear authority for the conclusion that where the vendor, as in this case, elects to treat the contract as at an end, he is not entitled to recover anything for the care and keep of the animals during the period of default. If he had elected to commence an action

for breach of contract, it is probable that these expenses would be considered in estimating the amount of damages he had sustained on account of the breach. But he did not so elect; on the contrary, he elected to treat the contract as at an end, and, in so doing, he disposed of the animals as his own.

In my opinion the appellants could have recovered the $20 by commencing proceedings under the small debt procedure. I would therefore allow the appellants judgment against the defendant for $20 and costs on the small debt procedure, the defendant to be entitled, as provided by the rules, to his costs of the action occasioned by the plaintiffs having commenced their action under the ordinary District Court procedure instead of the small debt procedure. The appellants are entitled to their costs of this appeal. One judgment to be set off against the other, and the one in whose favour the balance is to have execution.

Judgment accordingly.

HALIFAX SHIPYARDS, Ltd, AND MONTREAL DRY-DOCKS Co., Ltd. v. THE SHIP "WESTERIAN."

Exchequer Court of Canada, Cassels, J. November 25, 1919.

ADMIRALTY (§ II—8)—EFFECT OF ARREST ON REPAIRS SUBSEQUENT THERETO —BENEFICIAL REPAIRS—POSSESSORY LIEN—PRIORITY.

A shipwright has a possessory lien for repairs done to a ship, and should be paid, *in priority*, not alone for such as were done to the ship, previous to her arrest, but also for such as were done after, and which are beneficial and necessary to and upon the ship. A reference should be made to the registrar to ascertain the extent to which the repairs after arrest are beneficial.

Statement.

APPEAL from the judgment of Drysdale, J., Local Judge in Admiralty, Nova Scotia Admiralty District. Varied.

C. J. Burchell, K.C., for appellant; *J. B. Kenny*, for respondent.

The facts are fully stated in the reasons for judgment which are as follows:

Cassels, J.

CASSELS, J.:—Appeal on behalf of The Halifax Shipyards, Ltd., Intervenors, from the judgment of the Local Judge in Admiralty for the Admiralty District of Nova Scotia, delivered on August 1, 1919.

The appeal was argued before me on October 28, 1919. Mr. Burchell, K.C., appeared for the appellants, and Mr. Kenny for the respondent.

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On behalf of the appellants Mr. Burchell requested that he might have the right to furnish a memorandum of further authorities. This request was granted, he being directed to deliver to the respondents' solicitors a copy of any such memorandum.

I have been furnished with a memorandum by Mr. Burchell, and also a memorandum on behalf of the respondents.

The facts connected with the appeal are simple, and there is no serious conflict in connection with them.

The ship "Westerian" was sold by the Montreal Transportation Co. to certain persons residing in Cuba. She was apparently a vessel plying in the inland waters. It was desired by the owners that the vessel should be repaired, and to a certain extent remodelled, to fit her for the ocean trade, and thereupon the owners in Cuba apparently turned over the work of reconstructing the vessel to McClelland & Co., who let the work to the Montreal Dry-docks Co., a company carrying on business in Montreal, and the work necessary to be done was carried out partially in Montreal. It is said that the Montreal company performed work amounting to somewhere in the neighborhood of $50,000.

It appears that McClelland & Co., ascertaining that the work could not be completed in Montreal within such time as would enable the ship to get down the St. Lawrence before the river froze up, the plaintiffs, The Montreal Dry-docks and Ship Repairing Co., Ltd., permitted the vessel to be taken from their works thereby losing their shipwright's lien. She was taken to the City of Halifax to have the work that had to be performed completed; and McClelland & Co. then made arrangements with the present appellant, The Halifax Shipyards, Ltd., to complete the work. The vessel was thereupon delivered to the Halifax Shipyards, Ltd., and remained in their possession until the works contracted to be performed were completed.

The action was brought in the Admiralty Court and the ship was arrested on January 17, 1919. At this time she was in the possession of The Halifax Shipyards, Ltd., undergoing repairs.

It is important to bear in mind that at the time the warrant

was served on the ship, namely January 17, 1919, the repairs required in order that the vessel could be classed for ocean going service, she having been previously classed for inland waters only, had not been completed. Although in point of fact the warrant was served on the ship on January 17, 1919—there was no change in the actual possession of the vessel—she was still left in the possession of The Halifax Shipyards, the Intervenors in the action. There was no notification given to them that they were not to proceed with the repairs, and The Halifax Shipyards, in perfect good faith continued to perform their contract. The work was finished on or about March 27, 1919. The repairs subsequent to the alleged seizure were repairs necessary, and were performed in continuance of the contract for the purpose of having the vessel classed for ocean going service. Had these repairs not been made the vessel could not have been so classed. It is claimed that these repairs amounted to the sum of about $15,000. The present appellants claim they are entitled to a shipwright's lien for this amount in addition to what has been allowed by the Judge.

The Deputy Marshal, Mitchell, states in the affidavit filed by him, that he

> personally served the writ and the warrant on the said 17th day of January, 1919, in the usual way, being the first writ and warrant served on the said ship. He states further, nobody was left in charge of the said ship by the Marshal during the time the said ship was under arrest, but I spoke to the Captain and told him the ship was under arrest and could not leave port without bonds being first provided.
>
> 4. When I made the arrest the ship was undergoing repairs and I saw workmen employed in making said repairs. I did not notify the said workmen that the ship was under arrest or to stop the making of said repairs, as I had no instruction to do so.
>
> 5. When the ship was arrested she was moored to the "Lake Manitoba" at the wharf of the Halifax Shipyards, Limited, at the dry-dock, Halifax.

The Judge states as follows, in his reasons for judgment, dated August 1, 1919:

> The only point remaining open in this case is in connection with the taking of accounts. The Shipyards Company intervening claim a possessory lien. At the time of arrest, January 17th, 1919, the ship was in the possession of the Shipyards Company, undergoing repairs. The Company will be protected in respect of any work done up to that time but they now assert a claim for work done after the

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arrest. This cannot be allowed. After January 17th the ship was in charge of this Court, and no orders were ever given for any work after arrest. I will see that the possessory lien is protected but claims for work done after the arrest cannot be allowed.

The appeal on behalf of The Halifax Shipyards, is from that part of the judgment which relates to the work done between the time of the arrest, January 17, 1919, and the date of the completion of the repairs.

It was stated on the appeal by respondent's counsel that the Judge did not intend to disallow these subsequent repairs, that all the Judge intended was that the privileged claim should be disallowed, and that for the balance of the work the Intervenors should rank *pari passu* with the other creditors. It was stated by Mr. Kenny that an application would be made to the Judge to have his judgment so varied. However, no such variation has been made, nor do I think the Judge intended that the order should be so varied. His reasons for judgment shew that the claim was disallowed by reason of the fact that after January 17, 1919, the ship was in charge of the Court and no orders were ever given for any work after arrest. The formal judgment directs as follows:

The Judge ordered that the District Registrar pay out of Court to the Intervenors or their solicitor the value of the work and labour done and materials furnished by the said Intervenors upon and to the defendant ship on and before the 17th day of January, 1919, to be found by the District Registrar and merchants.

And in his own handwriting he adds:

And that the Intervenors have priority therefor. And the Judge ordered that the claim of the Intervenors for work done and materials furnished after January 17th, 1919, be disallowed.

I listened carefully to the arguments of the counsel, and have considered the various authorities referred to by them upon argument, and in their written memoranda.

With great respect for the Judge who determined this case, and who has had a long experience in dealing with this class of case, I have come to the conclusion that he has erred in disallowing the lien for these subsequent repairs.

The vessel has been sold with these repairs and realised, it is stated, the sum of about $80,000. It seems to me very inequitable and unjust that this sum of money realised unquestionably in part by the enhanced value given to the vessel by reason of these

subsequent repairs, should all enure to the benefit of those creditors who had no special lien upon the vessel, and that that portion of the price which the vessel brought by reason of these repairs so made by the Intervenors should not enure to their benefit. Apparently, the reason for the disallowance was that the repairs were continued subsequent to the alleged seizure, and were proceeded with without the order of the Court.

There is but little doubt that had the Court been applied to, directions would have been given to the Intervenors to continue the work provided by the contract, and no question as to the right of the shipwrights to their lien would have been raised.

There seems to be no direct authority bearing upon the question. There are authorities, however, which seem to me to bear strongly upon the point before the Court. The *"Aline"* (1839), 1 Wm. Rob. 111, at 119, Lushington, J., says:

> Again, with regard to the case of the person who has received the damage, is not his interest benefited by the vessel being repaired and enabled to proceed to her port of destination? Is he injured in the amount of his indemnity fund? Not at all. His interest I have already stated, is co-extensive with the rights possessed by the owner of the vessel at the time when the damage is done, and his claim is paramount to the extent of her value at that period with respect to any subsequent accretion in the value of the vessel arising from repairs done after the period when the damage was occasioned, his claim to participate in the benefit of such increase of value must depend upon the consideration how that increase arises and to whom it in equity belongs. Against the owner who repairs his vessel at his own expense, the claim of the successful suitor would extend to the full amount of his loss against the ship and the subsequent repairs. Where, however, the repairs have been effected by a stranger upon the security of a bond of bottomry, the case is altogether different; and I cannot hold that universally bonds so granted must give way to prior claims of damage.

In the case of The *"Acacia"* (1880), 4 Asp. (N.S.) 254, Townsend, J., at p. 256, referring to the case of the vessel states as follows:

> The fact is, that in this case the vessel has never left the possession of the Messrs. Harland and Wolf, and is this moment fastened to their quay; the Marshal seems to have adopted their possession; his possession is merely constructive and technical, for the actual possession is still with the defendants.

The facts in the case before me are very similar.

In *Williams* v. *Allsup* (1861), 10 C.B., (N.S.), 417, Erle, C.J., referring to the facts of that case at p. 426, states:

CAN.

EX. C.

HALIFAX SHIPYARDS LTD. AND MONTREAL DRY-DOCKS CO. LTD. v. THE SHIP "WESTERIAN."

Cassels, J.

Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested; he puts her into the hands of the defendant to be repaired; and, according to all ordinary usage, the defendant ought to have a right of lien on the ship, so that those who are interested in the ship, and who will be benefited by the repairs, should not be allowed to take her out of his hands without paying for them.

Then at p. 427 the Judge states, as follows:

There, is, no doubt, some difficulty in the case. But it is to be observed that the money expended in repairs adds to the value of the ship; and, looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy.

In The *"Gustaf"* (1862), Lush. 506, Dr. Lushington, at p. 507, states as follows:

The present question, what claims shall be allowed to take preference of the lien by common law of the shipwright, who retains the ship in his possession *until the Court of Admiralty lays its hand upon it and orders it to be sold, is not without difficulty.* I am not aware that before I occupied this chair, any such question ever arose. Indeed, I may confidently say that none such ever did arise, and consequently I have no authority to resort to, beyond the proposition which is subject to no doubt—that certain liens, such as salvage and wages, attach to the ship.

On consideration, I think that, save in cases which may appear to have a paramount claim, the right of a shipwright—the common law lien—*ought not to be infringed upon.*

Then at p. 508:

I think it right to add, that the chief difficulty I have experienced is in satisfying my own mind that any claim at all could compete with the common law lien, which is, that the shipwright may hold till paid, *or until possession is forcibly demanded by this Court.*

In The *"St. Olaf"* (1869), L.R. 2 A. & E. 360, Sir R. Phillimore states as follows, at p. 361:

Another objection, however, was taken, and it was urged that at least in this case the value of £1,037, though admitted to be that of the ship at the time when she was arrested, is not the value at which she ought now to be released, and for this reason it appears that since the *lis* has been pending in this matter, application was made to the Court by the foreign owner of the *St. Olaf* to be allowed to make certain repairs in his vessel. Certain repairs were made, and I will take it that these repairs were without the consent of the opposite party. I am still very clearly of opinion that they could not prejudice any right which the owners of the *St. Olaf* possessed before they were made. I am clearly of that opinion myself, because the right of the plaintiff who proceeds against the *St. Olaf* was to have the value of the vessel at the time she was brought into court, as

far as the proceedings *in rem* are concerned. His right was to have this *res* made responsible for the damage inflicted upon his ship, so far as the value of it extended, and the repair of the vessel subsequent to the damage for the purpose of preventing a deterioration of the property could not in any way increase his right or the obligation of the other party. It left them, as I conceive, *in statu quo* in that respect.

These authorities indicate that the right of the plaintiff who seized the vessel is on the value of the vessel as at the date of the seizure, and not the value subsequently enhanced by the necessary work of the shipwright.

Analogous cases are to be found where a Receiver has been appointed of property and repairs have been made without the authority of the Court. In these cases while *primâ facie* repairs are disallowed, the Court directs a reference as to whether the repairs were reasonable.

In *Blunt* v. *Clitherow* (1802), 6 Ves. 799, the Master of the Rolls, Sir William Grant, points out that a considerable portion of the repairs was done previously to the appointment of the Receiver, and a reference was directed as to whether the repairs subsequently performed without the direction of the Court were reasonable, and upon a favorable report the claim was allowed.

In *Tempest* v. *Ord* (1816), 2 Mer. 55, Eldon, L.C., pointed out, that the usual course now is a reference to ascertain whether the repairs were beneficial and if so the claim is allowed, notwithstanding that the order of the Court had not been applied for.

I think the same course should have been followed by the local Judge.

The evidence is fairly voluminous as to the value of the work and the labour done between the 17th January, 1919, until the completion of the work, but if the parties cannot agree upon the amounts, I think the judgment of the Judge should be varied by ordering the District Registrar to pay out of Court to the Intervenors or their solicitors the value of the work and labour done and materials furnished by the said Intervenors, as may be reasonable and beneficial upon and to the defendant ship subsequent to the 17th January, 1919, as well as what has been allowed up to the 17th January, 1919, and that the judgment should be so amended.

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Cassels, J.

That portion of the Judge's order which directs the plaintiff to have the costs of this application to be taxed should be set aside, and in lieu thereof it is ordered that the Intervenors should have the costs of the application and of this appeal to be taxed and paid by the plaintiff. Subsequent costs of the reference to be reserved. *Judgment accordingly.*

SASK.

C. A.

Re BROWN ESTATE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1919.

WILLS (§ III G—120)—DEVISE OF LIFE INTERESTS—GIFT-OVER—CERTAIN CONTINGENCIES—PERPETUITY.

A gift-over of property, in which life interests have already been devised, contingent on the death of the parties having such life interests and failure of, or death of children during one of the life interests, does not transgress any of the rules against perpetuities.

Statement.

APPEAL from the decision of the Chief Justice of the King's Bench (Sask.) as to the interpretation of a will. Reversed.

D. A. McNiven, for appellant Downes; *H. E. Sampson*, K.C., for respondent.

The judgment of the Court was delivered by

Newlands J.A.

NEWLANDS, J. A.:—Certain questions as to the interpretation of the will of the above mentioned deceased were submitted to the Court for an opinion. The Chief Justice of the Court of King's Bench answered the questions, and from one of these answers an appeal has been taken to this Court. This answer was to the effect that the devise to John Dennis Downes was void as being against the laws relating to perpetuities.

The testator first gives his wife a life estate in all his property.

He then makes the following provision:

After the death of my wife, Ann Jane Brown, the rents or interest derived from all of my property (lands as above mentioned) stock, implements and my personal effects, I bequeath for the use of my daughter, Sarah Agnes McRann, and in the event of the death of her husband, John W. McRann, the said property, lands, stock and implements, personal effects, etc., are to be deeded to my daughter, Sarah Agnes McRann. In the event of her death, all of my before mentioned property or moneys derived from the sale of same, I hereby bequeath to the children of Sarah Agnes McRann for their use, and in the event of their dying or of the said Sarah Agnes McRann not having any children, all of my before mentioned property

or moneys from sale of the same; I hereby bequeath to my wife's nephew, John Dennis Downes.

In Jarman on Wills, 6th ed., ch. 56, p. 2151, it says:

It should be noticed, that the construction of the words, "in case of the death," which makes them provide against the event of the legatee dying in the testator's lifetime, applies only when the prior gift is absolute and unrestricted, and not where such legatee takes a life interest only; for, if a testator bequeaths the interest of a sum of money to A. expressly for life, "and in case of his death" to B., the irresistible inference is, that these words are intended to refer to the event on which the prior life interest will determine, and that the bequest to B. is meant to be, not a substituted but an ulterior gift, to take effect on the death of A. *whenever that event may happen.*

And further on the author says, p. 2151:

Where the prior gift, though not expressly for life, comprises the annual income only of the fund which is the subject of the bequest, the same construction seems to prevail as where the prior gift is expressly for life.

The devise to his daughter in the first place is of the rents and interest, that is, the income of the property, therefore the subsequent devises "in the event of her death" mean, not in the event of her death before the testator, but a gift to take effect on her death. The subsequent gifts are only in the event of her surviving her husband, because in the event of the death of her husband the whole property is to be deeded to her, and once she takes the absolute property there is nothing left for the subsequent legatees.

In referring to the death of her husband, the testator uses the same words, "in the event of" his death. These clearly mean his death during her lifetime, because there is no reason why the property should be given to her absolutely only if the husband dies during the life of the testator or during her mother's life estate.

It was clearly his intention to give her only the income during her husband's lifetime, and the property itself only in the event of his death during her lifetime.

The subsequent gift to her children is upon the same contingency, that is, in the event of her death during her husband's lifetime, because only during his lifetime would there be anything over to give.

This gift to the children is an absolute gift of the whole of his property, and, therefore, if she has any children and they

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survive her, her husband being still alive the gift over to Downes cannot take effect.

The gift to Downes is in the event of her death during her husband's lifetime leaving no children, the words of the will being "in the event of their (*i.e.*, the children) dying or the said Sarah Agnes McRann having no children," which clearly refers to their dying during the lifetime of Sarah Agnes McRann, and this interpretation is according to the above mentioned rule from Jarman on Wills.

I would therefore interpret the will to mean that:

1. Sarah Agnes McRann is to have the income of the estate during the lifetime of her husband, and in the event of his dying during her lifetime, the whole of the property of the testator; 2. In the event of her death during the lifetime of her husband, leaving children, they are to take the whole of the property of the testator, and 3. In the event of her death during the lifetime of her husband, leaving no children, then John Dennis Downes takes the whole of the testator's property.

This interpretation is, in my opinion, according to the intention of the testator, and does not offend against any of the rules against perpetuities.

The appeal should therefore be allowed. Costs of all parties to be paid out of the estate. *Appeal allowed.*

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K. B.

Manitoba King's Bench, Mathers, C.J.K.B. January 8, 1920.

ASSIGNMENTS FOR CREDITORS (§ VII B—61)—PREFERENCE BY INSOLVENT—ACTION AGAINST COMPANY—SALE TO CERTAIN CREDITORS—JUDGMENT AGAINST COMPANY—SEIZURE BY SHERIFF—INTERPLEADER.

The sale of an insolvent concern to certain of its creditors for good and valuable consideration cannot be impeached, provided that such sale is not made for the purpose of defeating the other creditors or any of them. [*Johnson, Golden* v. *Gillam* (1881), 20 Ch. D. 389; *Wood* v. *Dixie* (1845), 7 Q.B. 892; *Hopkinson* v. *Westerman* (1919), 48 D.L.R. 597, 45 O.L.R. 208, referred to.]

SHERIFF'S interpleader issue in which the execution creditor is plaintiff and the claimants are defendants. Statement.

W. S. Morrisey, for plaintiff.

F. M. Burbidge, K.C., for defendant.

MATHERS, C.J.K.B.:—On January 23, 1919, the plaintiff recovered a judgment against the Kensington Cafe Ltd. for $2,500, damage for personal injuries due to the company's negligence. An execution was issued upon this judgment on January 28, and on April 9, the sheriff seized. Mathers, C.J.K.B.

The defendants claim to have purchased the goods seized from the Kensington Cafe on January 18. A Bill of Sale from the company to them bearing that date was registered on January 28.

The sale alleged by the defendants is impeached on several grounds. In the first place the plaintiff says that it was not a real but a pretended sale. Secondly, that there was no immediate delivery followed by an actual and continued change of possession, so as to make the sale valid without a Bill of Sale, and that the Bill of Sale is void because of noncompliance with the Bills of Sale Act, R.S.M. 1913, ch. 17. Thirdly, that it is fraudulent and void both under the Statute of Elizabeth and the Assignments Act, R.S.M. 1913, ch. 12. Fourthly, that it is void because it does not comply with the Bulk Sales Act, R.S.M. 1913, ch. 23.

In the view I take of the case it will not be necessary to discuss any of these several Acts with the exception of the Statute 13 Elizabeth.

By 13 Eliz., 1570, ch. 5, sec. 2, every gift grant alienation or conveyance of goods or chattels made with intent to delay, hinder or defraud "creditors and others of their just and lawful actions, suits, debts, accounts and damages," etc., is as against the person delayed, hindered or defrauded "utterly void, frustrate and of

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none effect." Sec. 6 excepts sales and conveyances "upon good consideration" to a person not having notice or knowledge of the fraud.

It will be observed that this statute is not alone for the protection of creditors but of "creditors and others." It, therefore, protects the person who, at the time of the conveyance complained of, had a claim for unliquidated damages in respect of which judgment had not then been recovered. May's Fraudulent Conveyances, 102. *Barling* v. *Bishop* (1860), 29 Beav. 417. That was an action for damages for trespass. The action was at issue, and notice of trial had been given, but a few days before the trial at which judgment was recovered a voluntary conveyance was made by the defendant. This conveyance was held to be within the statute and was declared void at the suit of the plaintiff after judgment recovered in the damage action.

Then we have *Crossley* v. *Elworthy* (1871), 12 Eq. 158, where the plaintiff's claim consisted in a judgment for damages for false representation as to the solvency of a company. The action, in which judgment was recovered, was not commenced for about a year after the settlement complained of had been made, and yet it was held void under the statute as against the judgment creditor.

In all these cases the plaintiff had recovered a judgment before taking proceedings under the statute. The Court of Appeal in Ontario, in a very recent decision, *Hopkinson* v. *Westerman* (1919), 48 D.L.R. 597, 45 O.L.R. 208, has gone farther and held a person who has a right of action for a tort, though no judgment had been recovered thereon, is entitled to maintain an action under the statute.

The above cases all relate to voluntary conveyances, but where there is a valuable consideration the case is much more difficult to make out. The effect of there being a good consideration is discussed by Fry, J., in *In re Johnson, Golden* v. *Gillam* (1881), 20 Ch. D. 389. He says at 393:—

> The effect of a deed of this sort of its being for good consideration is very great. It does not necessarily shew that the deed may not be void under the statute, because in many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors; such has been, therefore, for an unconscientious purpose, and the fact that there has been good consideration will not uphold the deed. But nevertheless it is a material ingredient in considering the case, and for very obvious reasons; the fact that

there is valuable consideration shews at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult.

Similar language was used by Turner, L.J., in *Harman* v. *Richards* (1852), 10 Hare 81. The fact that there was a good consideration is not, therefore, conclusive in favour of the deed, but it throws a much heavier onus upon those who assert that it was made with an intent to delay or defraud creditors.

There is no doubt, also, that a debtor may, notwithstanding the Statute of Elizabeth, prefer some of his creditors over others. That is to say, he may lawfully convey his property to one creditor for the *bonâ fide* purpose of paying him what he owes, and such a conveyance is not void either at common law or under the statute merely because he thereby intended to defeat an expected execution. It was so held in *Wood* v. *Dixie* (1845), 7 Q.B. 892, followed in *Darvill* v. *Terry* (1861), 6 H. & N. 807, and *Mulcahy* v. *Archibald* (1898), 28 Can. S.C.R. 523.

Now what were the facts leading up to the impeached transaction? The Kensington Cafe Co. Ltd. was incorporated in 1916, by F. Nesti, A. E. Fulljames and F. Restivo, the intention being that $10,000 should be put in by each. Later on the amount of capital to be contributed by each was placed at $12,500. Nesti and Fulljames each paid in the amount named, but Restivo was unable to raise his share. When the company was organised, F. Nesti was appointed president and Fulljames secretary-treasurer, and they continued throughout to be executive officers of the company. It took over a lease of the building, known as the Kensington Block, on the corner of Smith St. and Portage Avenue. The front part of the ground floor was leased to a man named Gramms, to be used as a fruit store, and in the rear part of that floor the company conducted a restaurant.

In connection with this business they also occupied a portion of the second floor. All other parts of the building were sublet to various tenants. The company paid a large premium for this lease which became a total loss. At first business was fair on account of the number of soldiers in the city, but as they departed overseas business fell off, and in 1918 the company was in financial straits. Wholesale houses refused to supply goods unless payment was guaranteed by Nesti or Fulljames, and by the end of 1918 nearly all the large creditors were guaranteed in this way.

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From time to time Nesti and Fulljames supplied additional capital. Beginning with August, 1918, various attempts were made to sell the business but without success. After the signing of the armistice in November, 1918, business began to improve and improvement was steady until the time of the sale now attacked.

On December 31, 1918, the liabilities of the company amounted to $31,906, but as against that there was $4,226 cash in the bank. The $31,906 was made up of $8,880 due to Nesti Bros., and $8,880 borrowed by Fulljames from a Mrs. McNeil and loaned to the company, $2,376 wages, and $11,768 to trade creditors. It did not include a large claim due to the landlord for arrears of rent, nor did it include the plaintiff's claim.

The plaintiff had brought an action for damages against the company, and the trial was fixed for January 23, 1919. The company, through its solicitors, had made various unsuccessful attempts to settle with the plaintiff

On January 18, five days before the date fixed for the trial, a meeting of directors was called at the office of the company's solicitors. The only directors present were Fulljames and Nesti F. Restivo, though notified, did not attend. At this meeting Fulljames read a statement purporting to shew the liabilities of the company as of December 31, 1918. The statement included only the items above mentioned aggregating $31,906. As recorded in the minutes he "further pointed out that in addition to the above definite liabilities there was a large liability of the company under the lease of the Kensington Building on which a very considerable sum was now overdue, owing and unpaid." and "that the physical assets of the restaurant business carried on by the company, calculated at cost price with a fair amount deducted for depreciation, was approximately the sum of $15,000, and that there was $4,226 in hand at the end of 1918." He then made an offer on behalf of himself and Nesti to purchase from the company the restaurant business as a going concern as of January 1, 1919, and all the physical assets of the company used in the restaurant business and including the cash on hand, they to assume the liabilities set out, namely $31,906, and to obtain a release from all the creditors whose liabilities they were to assume, the company to lease to them the portion of the building used in connection with the restaurant for the balance of the term of the lease for

$1,400. It was then moved by Nesti and seconded by Fulljames that the offer be accepted. A bylaw of the company to carry the agreement into effect was then passed by the same two directors for the sale to themselves in accordance with the offer made. On January 20, the receipts for the 17th and 18th were deposited to the credit of the company. On the 23rd an account was opened in the bank for Nesti and Fulljames and on that day the receipts for the 19th, 20th and 22nd were deposited to their credit. In all other respects the business continued as before. Fulljames and Nesti continued to manage as formerly. The name "The Kensington Cafe Ltd." was not changed, even the counter order forms bearing that name were continued to be used. In fact, there was nothing to afford the slightest inkling that any change in the ownership had taken place.

On January 23, the plaintiff recovered judgment against the company for $2,500 and costs by consent. On the 28th a Bill of Sale from the company to the purchasers, executed on behalf of the company by Nesti as president and Fulljames as secretary-treasurer, under the company's seal, was registered. The affidavit of execution and *bona fides* all sworn on January 24, the day after the judgment was recovered. On January 28, an execution was issued and on April 9 a seizure was made by the sheriff of the goods in the restaurant. Nesti and Fulljames claimed to be the owners of the goods seized and an issue was directed to try the question of the validity of their claim as against the plaintiff's execution.

All the assets of the company were included in the sale to the defendants with the exception of the lease of the Kensington Block. It was admitted that this lease has no value, in fact that it is a liability rather than an asset as the rent received is heavily in arrear and exceeds the revenue derived from subletting.

I have no doubt the sale was made for the express purpose of delaying or defeating the plaintiff, but since it was for a good consideration, *Wood* v. *Dixie*, *supra*, and the cases which have followed it, shew that is not enough in itself to avoid the transaction under the Statute of Elizabeth. These cases, however, go no further than shewing that the mere intention of defeating one or more creditors is not enough. Before the statutes against fraudulent preferences a debtor might lawfully convey all his property to or for the benefit of one or more of his creditors to the

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total exclusion of others, provided the sale or conveyance was *bonâ fide* and for a fair consideration. As the law permitted the debtor to do this the validity of the transaction was not affected by his motive or intention. It would not, therefore, be impeached as fraudulent, although at the time he entertained the express design of paying some of his creditors and defeating the claims of others. In *Wood* v. *Dixie*, Lord Denman, after pointing out "that a mere intention to defeat a particular creditor does not constitute fraud," adds, "We do not say that many other considerations may not exist," which would justify another conclusion. And Williams, J., said that it had long been settled that "the mere intention to defeat an execution creditor did not in itself constitute a fraud." It follows that if in this transaction there appeared to be nothing more than a mere intention to defeat the plaintiff's execution the sale would have to be allowed to stand, but in the view which I take of the case, there was a great deal more than that mere intention. Its purpose was also to benefit the defendants at the expense of the plaintiff.

The defendant Nesti, or at least the firm of Nesti Bros., of which he was a partner, were creditors to the extent of $8,880. The defendant Fulljames, as the representative of the McNeil estate, had put into the business $8,880 of the moneys of the estate. As to this amount Mrs. McNeil stands in the books as creditor, but there can be little doubt about Fulljames' liability for this sum. The total liabilities assumed, after deducting the cash on hand, were $27,680, and of this $17,760 was made of the two sums above mentioned. The transfer was not as in *Wood* v. *Dixie*, *Darvill* v. *Terry*, and *Mulcahy* v. *Archibald*, made to a creditor, nor did the defendants constitute themselves trustees for the creditors. They merely took over the business as a going concern and procured all the creditors, with the exception of Penny and the landlord, to accept them in lieu of the company. It seems to me it is a fair inference that the dominant motive of Nesti and Fulljames was to secure a benefit to themselves by cutting out the plaintiff. Does a sale, though for good consideration made with such an intent, constitute a fraud within the Statute of Elizabeth?

It is very clear that the company could not make such a sale to the defendants and retain any interest in the purchase for itself.

Reserving such benefit would constitute a fraud as against a creditor who had been hindered or delayed by the transaction.

Is the position any different if the benefit is conferred upon the directors by whom the company is owned and controlled? Here the defendants controlled the company and could do what they liked with its property and assets. They might have made a conveyance to themselves as trustees for the creditors whose debts they assumed, in which case the law as stated in *Wood* v. *Dixie* would have applied. But they did not do that. They caused the company to sell all its assets of any value to themselves, without any other consideration than the assumption by them of some of the liabilities of the company, the greater part of which was owing to themselves, or, for which they were personally liable. The business was improving and might soon again become prosperous and they decided to take it into their own hands. If they delayed doing so it must inevitably become burdened with the judgment which it was anticipated the plaintiff must recover against the company in a few days. These I infer were the motives which actuated the defendants and through them the company.

The company intended to do more than merely prefer its other creditors over the plaintiff and the landlord, it intended to turn over to the defendants the whole business as a going concern, not for the benefit of its creditors, or any of them, but for the purpose of defeating the plaintiff.

The fraudulent intent was that of Nesti and Fulljames but is through them to be attributed to the company. The company was, no doubt, a distinct entity, but it was so owned and controlled by the defendants that their knowledge and intention with respect to its property must be attributed to it. *In re Hirth*, [1899] 1 Q.B. 612 at 625, *per* Vaughan Williams, L.J.

It was argued that if the company had made an assignment under the Assignments Act, before the plaintiff got judgment, instead of selling to the defendants, the plaintiff would have been in even a worse position, because, having only a claim for damages, he would not in that case have ranked as a creditor.

The fact that there was a method by which the company might have effectually defeated the plaintiff's claim without violating any law may be a circumstance to be considered in determining the intent with which the sale to the defendants was made, but it

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is nothing more. I am satisfied that that course was not pursued because of any tenderness for the plaintiff, but that the plan was adopted, which, while disposing of the plaintiff, would be most beneficial to the defendants.

For these reasons the sale to the defendants was void under the Statute of Elizabeth as against the plaintiff and must be set aside.

In view of this conclusion I have not found it necessary to consider the objections to the transaction founded on the Bulk Sales Act, the Bill of Sales Act, or the Assignments Act.

The plaintiff is entitled to the costs of the issue. Fiat for execution.

Judgment accordingly.

CAN.

S. C.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Supreme Court of Canada, Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 22, 1919.

HIGHWAYS (§ IV A—115)—REPAIR—NEGLIGENCE—ONTARIO MUNICIPAL ACT, R.S.O. 1914, CH. 192.

In an action for damages for injuries caused by the alleged negligence of a municipality to keep a highway in repair, the onus is upon the plaintiff to prove that the road in question was not in a proper state of repair; and when the weight of evidence is such as to shew that the road was in a reasonable state of repair, and that those requiring to use it might do so with safety upon using ordinary care, the plaintiff has not proved "want of repair" to be the cause of the accident.

[*Raymond* v. *Township of Bosanquet* (1919), 47 D.L.R. 551, affirmed; *Foley* v. *Township of East Flamborough* (1898), 29 O.R. 139, applied; *Magill* v. *Township of Moore* (1919), 46 D.L.R. 562, 59 Can. S.C.R. 9, referred to.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1919), 47 D.L.R. 551, 45 O.L.R. 28, reversing the judgment at the trial, 43 O.L.R. 434, in an action for damages for injuries sustained in a motor car accident. Affirmed.

J. M. McEvoy and *E. W. M. Flock*, for the appellants; *I. F. Hellmuth*, K.C., and *A. Weir*, for the respondent.

Davies, C.J.

DAVIES, C.J.:—This appeal is from the judgment of the 2nd Appellate Division of the Supreme Court of Ontario (1919), 47 D.L.R. 551, 45 O.L.R. 28, reversing the judgment of the trial Judge which had held the defendant municipality liable in damages for an accident which happened to the plaintiff appellant while travelling in a motor along a highway within the municipal boundaries.

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The gist of the action was the alleged want of repair of the road along which the motor was travelling and the want of repair consisted in what was for vehicular traffic an alleged dangerous curve in the road at the point where the accident happened leading up to and across a bridge. I consider that if the curve was so sharp, as contended for, as to be dangerous to vehicular, including motor, travel and was in the case in question the cause of the accident, the appeal should be allowed and the judgment of the trial Judge restored.

At the hearing in which we had the assistance of two plans prepared by surveyors, one on each side, shewing the curve, the bridge and the spot where the accident happened, the main question discussed and on which alone our decision must be based was whether or not this curve in the road was so sharp as to constitute a danger to a motor properly driven with necessary and prudent care.

That is the sole and only question we have to decide and whether the accident was caused by excessive speed of the motor or by unskilful driving are ancillary questions we are not necessarily called on to determine.

At the close of the argument I had formed a very strong opinion that the appeal failed and that the judgment of the Divisional Court was right.

In deference, however, to the very strong opinion of the trial Judge that the curve in the road was so sharp as to create a "want of repair" which constituted a breach of the duty of the municipality to keep in repair I felt myself obliged to consider most carefully the evidence given in this case.

In the first place, I find that the curve in the road and the bridge to which it led had been in the same position and condition as they were when the accident happened for the previous 9 years. During all this time they had been constantly traversed by motors, as many as 50 crossing over them on one day. The only change alleged consisted in the fact that some logs had been placed on the grass alongside of the *trita* and some 3 feet away from its edge with the intention of widening the bridge and were there at the time. These logs, however, did not in any way interfere with or encroach upon the *trita* along which the motors were driven.

After carefully examining and considering the evidence I have

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without reasonable doubt reached the conclusion that the curve was not a dangerous one to any motor reasonably and with proper care driven over it. Whatever may have been the cause of the accident, whether arising from excessive speed at the curve and approach to the bridge or from unskilful or careless driving of the motor, as to which I say nothing, not being called upon to decide, I remain clearly of the opinion that the curve in question did not constitute a want of repair for which the defendant, respondent, is liable.

I partly agree with the reasons of the Court of Appeal and with its conclusions.

The fact that for some years this curve had been constantly driven over by motors without any accident having happened except perhaps on one very doubtful occasion is a very strong reason, not perhaps a conclusive one, that the curve was not a dangerous one to motors properly driven.

Looking at this curve as shewn on the plans produced and applying such common sense and common knowledge as one possesses from seeing daily motors driven without danger and without accident along the streets of Ottawa, where the streets run at right angles one to the other, giving much sharper curves for motors to take in passing from one street to another street I cannot reach the conclusion that the curve in question was at all a dangerous one.

It is true two gentlemen did in their evidence, say that they always found it necessary and prudent as a matter of safety in traversing this curve to stop and back up before crossing the bridge. But that these two very cautious persons should have so acted, can by no means in the face of the evidence shewing that another did not find it necessary so to do but always passed by in perfect safety, overcome the mass of evidence shewing that the curve was not at all dangerous to motors properly driven. The conclusion I have reached without reasonable doubt is that the curve was not dangerous and that the accident must be attributed to some other cause or causes for which the defendant, respondent, is not liable.

I would, therefore, dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—The question raised herein is not one that necessarily turns upon the relative credibility of witnesses; in

regard to which, save in the exceptional cases I have frequently referred to, the trial Judge's opinion so far as that is concerned in any given case must be observed.

It should turn, in the ultimate result, upon whether or not the road in question was in such a state of repair as defined by the judgment of Armour, C.J., in the case cited below of *Foley* v. *Township of East Flamborough* (1898), 29 O.R. 139 at 141, as follows: "I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied."

If it was, then no action will lie even if an accident has resulted in damages in the course of its use; for accidents may happen merely from error of judgment on the part of him injured and he be without remedy.

The right to impute negligence in law to anyone else as the cause must rest upon other relevant facts and cannot be assumed merely from the accident and its consequences.

The question presented is one for the exercise of sound judgment, and I cannot say, though not entirely free from doubt, that the view of the majority of the Court below is wrong.

Hence I must agree in dismissing the appeal with costs.

DUFF, J.:—I have come to the conclusion that this appeal should be dismissed. Duff, J.

The appellant is entitled to succeed only upon shewing that the decision in the Appellate Division to the effect that the accident, out of which the litigation arose, was not due to a failure on the part of the municipality to observe its statutory duty in respect of the repair and maintenance of highways, was an erroneous decision. I think Mr. McEvoy has succeeded in shewing that there was some misapprehension of fact on the part of Kelly, J., as to the manner in which the car left the road, but the substance and pith of the judgment of the Appellate Division, 47 D.L.R. 551, 45 O.L.R. 28, lies in the weight attributed by the Court to the mass of evidence consisting of the testimony of motorists of unimpeachable credit and of competent experience who had motored over this road again and again.

It is arguable, of course, and there is much to be said in support of the view that all this testimony was before the trial Judge and

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that the weight of it is not sufficient to counter-balance his finding that the car was driven with care, and the deductions that would seem almost necessarily to flow from that finding. I am not, however, entirely confident of the soundness of the conclusion reached by looking at the case in this way. I should not feel justified in holding that the Appellate Division was wrong in attaching predominant importance to the general opinion derived from the general experience that motorists were not exposed to such exceptional risks arising from the narrowness of the bridge or the sharpness of the curve in the roadway approaching it, or from the piles of wood flanking the road, as to support a charge against the municipality of neglect of its duty in respect of highway maintenance.

Anglin, J.

ANGLIN, J.:—Seldom have I found it as difficult as in this case to determine what upon the evidence should be held to have been the true cause of an accident. The Chief Justice of the Common Pleas, a trial Judge of great experience, has attributed the misadventure here in question to the failure of the defendant municipality to maintain at the place where the plaintiff was injured a highway reasonably sufficient for the needs of the traffic over it as required by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192. The narrowness of the bridge over Duffus's creek or drain, the nature of the approach to it and the presence of a pile of bridge timbers or spiles on the road allowance close to the *via trita* are the features emphasized by the Judge, the combined effect of which, as I understand his judgment, in his opinion rendered the turn on to the bridge unnecessarily and unreasonably dangerous and was a proximate cause of the accident in which the plaintiff was injured. He deals with the driving of the automobile in which the plaintiff was travelling in these terms, 43 O.L.R. 434, at 437:—

> The driver of the car, and the other persons who were in it, testified that in all respects the car was brought to the bridge at a very moderate rate of speed and with due care in all respects. The testimony of the witness Mr. Flock especially, who is the plaintiff's solicitor in this action, seemed to me to be given with much candour, and to be worthy of credit, in this respect.

On the other hand, an Appellate Court of five Judges, with but a single dissent, has reversed this judgment, 47 D.L.R. 551, 45 O.L.R. 28, Kelly, J., who delivered the opinion of the majority, concludes his discussion of the case with this sentence, at p. 561:—

> After a careful analysis of the whole evidence, I am convinced that the

predicament in which the plaintiff and his companions found themselves on July 26th, 1917, must be attributed to some cause other than the width of the bridge, the curve from the roadway leading on to it or the presence of the piles or logs on the right of way.

The force of this conclusion would seem to be somewhat weakened, however, by a summary of the appellate Judge's reasons which immediately precedes it in these terms:—

With great respect I am of opinion that the learned trial Judge overlooked the inconsistencies in some of the evidence put forward for the plaintiff, such as that of Keene, and the effect of the uncontradicted evidence of the actual and continued use of this part of the highway by all kinds of vehicles, some of which, however, witnesses for plaintiff in effect say was impossible, as well as the evidence of McCubbin that this point presents the ordinary conditions found at a crossing of two roads in a rectangular system of surveys.

His explicit reference to and somewhat disparaging comment upon the evidence adduced by the defendants to prove that the approach to and crossing of the bridge presented no serious obstacle make it clear that this testimony was present to the mind of the Chief Justice and I cannot think that he overlooked whatever inconsistencies appear in the evidence put forward for the plaintiff. Neither does Dr. McCallum's testimony seem to be quite open to the criticism of it made by the appellate Judge in the course of his judgment.

Kelly, J., took the same view of the duty of the municipal council in regard to the maintenance and repair of highways as that held by the trial Judge, expressing it in these terms, at p. 558, in which I respectfully concur:—

The duty imposed by the Municipal Act upon municipalities in respect to keeping highways in repair is imperative and requires them to make the roads reasonably safe for the purposes of travel; and, motor vehicles being now an ordinary means of transportation, this would include travel by such vehicles. *Davis* v. *Township of Usborne* (1916), 28 D.L.R. 397, 36 O.L.R. 148; In *Foley* v. *Township of East Flamborough*, 29 O.R. 139, a judgment of a Divisional Court, Armour, C.J., in defining what is meant by "repair" said (page 141): "I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied." This judgment of the Divisional Court was reversed by the Court of Appeal (1899), 26 A. R. (Ont.) 43, but on altogether different grounds, the Court not dissenting from this opinion of the Divisional Court, which is in harmony with other decisions, and may properly be applied here.

The trial Judge based his judgment on the evidence of the plaintiff's witnesses that the narrowness of the bridge in connection with the sharp angle of the immediate approach to it and the adjacent pile of timber made the turn on to it from the south

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dangerous, if not altogether impracticable; the majority in the Appellate Court on the other hand placed more reliance on the testimony of numerous witnesses for the defence who deposed that they had made the turn with different motor cars driving at speeds varying from 10 to 18 miles an hour frequently and without experiencing any difficulty.

The question presented is not one of mere credibility—and by that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory—in a word, the trustworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence; it is rather a composite matter of credibility as to facts and of inferences to be drawn from and opinions based on facts found to be established that is involved in determining whether the highway provided met the test of reasonable sufficiency which the statute imposes. The duty of an Appellate Court under such circumstances has been defined in numerous cases. I mention such leading authorities as *Dominion Trust Co.* v. *New York Life Ins. Co.*, 44 D.L.R. 12, at 14, [1919] A.C. 254; *Montgomerie* v. *Wallace-James*, [1904] A.C. 73, at 75; *Wood* v. *Haines* (1917), 33 D.L.R. 166, 38 O.L.R. 583; and *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 116 L.T. 257, merely to make it clear that I have the governing principles, as indicated by our highest judicial tribunal, in mind in approaching the consideration of the problem with which we are confronted.

Having regard to the nature of the case and to the conflict of opinion in the Provincial Courts as to the result of the evidence, I have thought it my duty to adopt the course commended by their Lordships of the Judicial Committee in *Syndicat Lyonnais du Klondyke* v. *Barrett*, Cam. Sup. Ct. Practice (2 ed.) 385, (1905), 36 Can. S.C.R. 279, and have made an independent examination and analysis of the evidence bearing on the question at issue. I shall not attempt to set out that analysis in *extenso* but shall merely state the conclusions to which it has led me, indicating the reasons which have influenced me in reaching them.

In the first place, I am by no means satisfied that, if sitting as the trial Judge, I should have found that "the car was brought to the bridge at a very moderate rate of speed and with due care in all respects."

A very moderate rate is a relative term and largely a matter of opinion. The Chief Justice does not tell us what in his opinion would have been such a rate of speed under the circumstances. Nor does he find what the actual rate of speed was, although Flock, on whose candour and credibility he places great reliance, testified that "when we made the turn I would say he (the driver) was going 5 or 6 miles an hour, not faster than 6 miles an hour."

Raymond, the plaintiff, who would be most unlikely to exaggerate the speed, said on discovery that they were going 12 miles an hour; and at the trial he admitted having so deposed and then places the speed at from 10 to 12 miles. Keene, the driver, was not questioned on this very important point, nor was Routledge, the other passenger who gave evidence. On the other hand, Moody, a defence witness, testified that very shortly after the accident Keene said to him, "I was going so fast that I thought I would jump right over the ditch and go down the other road," and Keene was not called in rebuttal to contradict that statement. Having regard to all the circumstances—to the fact that Keene had not been over the road before, that the turn was visible to him for 250 or 300 feet before he reached it, that Flock sitting opposite him had warned him at that distance, saying, "that is a very sharp turn," to which he replied "yes, I see"—if the car was running 12 miles an hour when it reached the turn I should scarcely be prepared to find that such a rate of speed was "very moderate" or even moderate, or that the approach to the bridge had been made "with due care in all respects." The evidence as a whole leaves an uncomfortable impression that a speed too great under the circumstances may at least have been a contributing cause of the failure to cross the bridge in safety.

But, as the trial Judge points out, any negligence in that regard would not be imputable to the plaintiff and as mere contributory negligence is therefore not material. Unless it can be said to have been the sole proximate cause of the accident, excluding any contributing negligence ascribable to the defendants, it cannot serve them as a defence or preclude recovery by the plaintiff. While I am not prepared to find that this has been established, enough in my opinion has been shewn to make it impossible to infer from the mere fact that Keene found himself unable to bring his car on to the bridge that the conditions of the highway

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constituted a danger amounting to a lack "of reasonable sufficiency for the needs of traffic." That fact, if it existed, must be otherwise established.

If, owing to the narrowness of the bridge and the sharpness of the curve which had to be made in entering upon it, it was necessary for a driver of ordinary skill in handling an ordinary motor car to stop and back up in order to cross it safely, as three witnesses for the plaintiff have stated, I would unhesitatingly find that the highway at this point was not in a condition reasonably sufficient for the needs of the traffic over it since it could very easily have been improved and it would require more than ordinary care and skill to pass to and fro upon it in safety. Keene, the driver, says he went back and again tried to approach the bridge from the south on the afternoon of the day of the accident and then found he could not make the turn and enter on the bridge without backing up, and making a second turn. I can scarcely credit this statement, of which there is no corroboration, in view of the mass of testimony for the defence as to the facility with which the turn can be made even at comparatively high speeds and in cars having wheel bases of 112, 116 and 130 inches. Keene's Chalmers car had a wheel base of 124 inches. There is no suggestion that the cramping or turning capacity of this car was greatly or at all sub-normal. Of course, if it was unusually limited in that respect, the defendant would not be under an obligation to provide a turn which it could make. On the other hand, I can readily understand Keene's inability to make the turn on the morning in question having regard to what he tells us about the circumstances of his approach to the bridge.

Looking at either of the plans produced, which give somewhat different pictures (that of McCubbin, an engineer called by the defendants, seems to be the more precise and accurate), the making of the turn would appear to present little difficulty for a car following the gravelled roadway at its outer or right-hand side. As shewn on the plan produced by surveyor Farncombe, called by the plaintiff, the *via trita* lies 12 feet east of the ditch, which occupies the west side of the road allowance, and the *via trita* is itself 12 feet wide. A reasonably careful driver approaching at a moderate speed and taking full advantage of the roadway thus available should find no serious difficulty in bringing any

ordinary car safely on to the bridge. Even Flock admits that "if he had made a fuller curve and the spiles were not there he (Keene) might have got around."

This leads me to a passage in Keene's evidence to which little attention seems to have been paid, but which I think probably explains why he found himself unable to make the crossing when the plaintiff was injured. He says:—

> Partly down the hill coming towards this bridge, I could see that the road made a turn, at least it came to an end and made a turn somewhere. It was a few hundred feet away, I would say. I saw that there was a turn in the road. I could not say that it was a bridge at that time. When I got close down to it, I came down the hill with the brakes on on the flat part of the road, I watched very closely for how sharp a turn it was, or how I should turn, thinking it was only a common turn in the road. Getting down closer to the bridge *I made a turn out to get past a pile of spiles* which were on my right hand side, with the bridge on the left of me. My first wheel touched the bridge, the left hand wheel touched the bridge.

This pile of timber or spiles, according to the weight of the evidence, lay in the grass on the road allowance just about opposite to where the road began to turn towards the bridge and, at its nearest point, 3 feet to the east or right hand side of the gravelled roadway. Although Flock said on cross-examination that the piles were "on the gravel"—"3 or 4 feet out on the gravel"—this was probably a slip, since he said on examination-in-chief that they were "within 3 feet from the gravel," and Keene says they were 3 or 4 feet off the travelled roadway. George Jones, another witness for the plaintiff, says, "the one end I would judge to be 6 feet, and the other end 3 or 4 feet from the gravel, 3 feet anyway, away from the road where you turned down."

Neither Flock, Raymond nor Routledge says anything of the swerve to the left to avoid the piles of which Keene tells. They were not asked about it. It is quite probable that they would not have noticed it. Keene would of course know of it and would be more likely to remember it, and I therefore think it is reasonable to assume that it took place as he says—though the necessity for his making it is somewhat more difficult to appreciate since he tells us that the right wheels of his car were, if at all, only very slightly on the grass, and Flock says, "he took the turn to the extreme right of the gravel, or possibly a little beyond that."

Coming on this pile of timber as a stranger, however, Keene

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may on the spur of the moment have imagined that it encroached on the *via trita*, or was closer to it than was actually the case—so much so that, especially if he was travelling, as the plaintiff says, at 12 miles an hour, he may have thought that prudence required him to turn out when passing it. Swerving to the left—probably unnecessarily, or more than was necessary—he had not time or space sufficient to enable him to recover the position at the extreme right of the travelled roadway necessary to enable him to make a proper approach to the bridge and if he tried to do so he probably got too far to the north before beginning to make the turn to the left to enter on the bridge. This seems to me to be the most likely explanation of the predicament in which he found himself when the left front wheel of his car reached the bridge and he realized that he could not cross it—that his right wheels would not be upon it. Otherwise, I cannot reconcile his testimony with that of the defence witnesses—and the veracity of many of them there is no reason to doubt.

There remains the question whether the presence of the pile of timber 3 feet from the gravelled roadway opposite the point where the driver should have begun to turn on to the bridge was a breach of the defendant's statutory duty, as above defined. It undoubtedly was if the timber obstructed the turn and made it dangerous.

It had been there for several weeks and the evidence of the Reeve, establishes that the municipality was responsible for its having been placed there. But the great weight of the evidence is that it did not at all interfere with the turn on to the bridge when driving at a moderate speed. The defendant's witnesses all so testified, and Dr. Grant, a witness for the plaintiff, tells us. "I believe I have noticed them (the pile of spiles) but not to have them an incumbrance to me when turning."

Such an idea as that they were in a position to be of the least danger to anyone never entered his head. George Jones, also called by the plaintiff, says—the stringers or timbers were not so placed as to interfere with the turn. Dr. McCallum, the plaintiff's "star" witness on the danger of the turn, had no recollection of them although he drove over the bridge more than 4 times a week for 6 weeks every summer. Important as it is now sought to make them as adding to the danger, Keene tells us that when he

returned in the afternoon "somebody had pulled them around. I was not interested in how the spiles were."

On the whole evidence I find myself unable to reach the conclusion that the presence of the pile of timber constituted a breach of its statutory duty on the part of the defendant.

No doubt had the bridge been wider—say 22 feet instead of 13 feet, 6 inches—the accident might have been avoided. Had the curve in approaching its east end been the same as that at its west end the turn which Keene had to make would have been easier. But it does not follow that because both the bridge and the road might have been improved the municipality failed to discharge its statutory duty. On the contrary, looking at the plans and taking the evidence as a whole, if dealing with the case as a judge of first instance, I would incline to the view that the highway was in a condition reasonably safe for the passage over it of the traffic to be expected upon it and that a driver of ordinary skill proceeding at moderate speed—*i.e.*, at a speed suitable for making a right angle turn in a country road—and with reasonable care would experience no serious difficulty in making the turn in question and crossing the bridge in safety with such a car as Keene was driving. Neither could I find that the presence of the pile of timber rendered the turn unsafe or dangerous—still less that it prevented its being made at all as Keene would have us believe.

It was suggested by the Chief Justice in the course of the trial and by counsel for the plaintiff in argument here that the defendants should at least have set up a notice board or post at some distance warning travellers of the danger of the turn. But the absence of such a notice was not the cause of the accident now under consideration, since Keene was warned of the sharpness of the turn by Flock when several hundred feet away.

I do not place much reliance on the evidence given of the location of the tracks of the automobile wheels, nor do I consider it of much moment whether the corner post of the bridge was struck by the right front wheel or by the spring of the car.

On the whole case, although not entirely satisfied that if sitting in the Appellate Division Court I should have been prepared to hold that the judgment of the trial Judge was so clearly wrong that it should be reversed, neither am I convinced that the

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majority in the Divisional Court clearly erred in setting it aside and still less that their conclusion upon the evidence is so manifestly wrong that we should restore the judgment of the trial Court. The situation somewhat resembles that with which we had recently to deal in *Magill* v. *Township of Moore* (1919), 46 D.L.R. 562, 59 Can. S.C.R. 9, and I think the result must be, as in that case, a dismissal of the plaintiff's appeal.

BRODEUR, J.:—We are called upon to decide in this case whether the accident of which the appellant was a victim was caused by the bad nature of the road of the respondent corporation.

Raymond was driving in an automobile, and, having reached a place where the highway makes a curve to cross a bridge the driver of the automobile claims that he was unable, in view of the sharpness of the curve, to cross the bridge. The car went partly into the ditch and the appellant was injured.

The question is whether the bridge was of a sufficient width and if the nature of the curve did not render this highway a dangerous one for the motor cars to travel upon.

It was claimed by the appellant that piles of logs put on the highway rendered the ordinary condition of the highway more dangerous. But these piles do not seem to have been the proximate cause of the accident, and we have then to decide the case on the nature of the highway itself and we have to consider if the accident was not due to some carelessness on the part of the driver.

This road is very much frequented by automobiles. We have the evidence of a large number of persons, some with intimate knowledge of the locality and others who travelled it for the first time, who state they never experienced any difficulty in making the turn and passing the bridge. A few others however stated that they had to take extraordinary precautions to safely pass there.

In that regard, we may consider that the evidence is conflicting; but the weight of evidence is certainly in favour of the respondent.

We have at the same time the uncontradicted expert evidence of the engineer, McCubbin, to the effect that the curve along the centre of the gravelled roadway is 39 feet long and that the radius of curvature at the centre of the gravelled portion is 25 feet. These figures shew that there was ample space to make the turn for any automobile going at a moderate speed.

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It was found by the trial Judge that the appellant's car was going at a moderate rate of speed. Then, in view of this expert evidence, the accident must be due to some other cause than the negligence of the corporation. The *onus probandi* was on the plaintiff appellant and as he has not shewn that the decision of the Appellate Division was clearly wrong we should not interfere. The weight of evidence is that the road was kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass on the bridge in safety. *Foley* v. *East Flamborough*, 29 O.R. 139.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—After carefully reading all the evidence I fully agree with the conclusion of Davies, C.J., that the curve and the bridge were not dangerous to motors properly driven. That is the only question we have to decide. I do not think that because Keene's car went into the ditch we must conclude that the curve and bridge were dangerous. There is a great preponderance of evidence that a large number of cars crossed the bridge every day in perfect safety. The only accident in several years, outside of a rather doubtful case mentioned by one Murphy, is the one which caused the appellant's injuries. Looking at the condition of the road and bridge objectively—if I may use the term—I find that the appellant has failed to prove, as being the cause of the accident, a "want of repair," which alone could render the respondent liable. Whatever may have brought about the accident, it cannot, in my opinion, be attributed to the failure of the respondent to comply with any obligation incumbent on it.

The appeal should be dismissed with costs.

Appeal dismissed.

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SARE v. THE UNITED STATES FIDELITY & GUARANTY Co.

Nova Scotia Supreme Court, Harris, C.J., Longley, Drysdale and Mellish, JJ. December 20, 1919.

INSURANCE (§ V B—180)—DAMAGES TO AUTOMOBILE—CONDITIONS OF INSURANCE POLICY—OFFER MADE TO OWNER—ELECTION BY COMPANY TO REPAIR CAR—REFUSED BY OWNER.

The owner of an automobile cannot succeed in an action on a policy of insurance where his car has been damaged, if the insurance company has already made an offer to repair the damages in accordance with the insurance contract, and such offer has been refused by him.

Statement.

APPEAL from the judgment of Ritchie, E.J., dismissing with costs plaintiff's action on a policy of insurance whereby the de-

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fendant company, in consideration of the premium paid, agreed to indemnify the plaintiff against loss or damage to the plaintiff's Cadillac automobile, due to any accident occurring during the period of the policy and caused by collision with any object either moving or stationary.

Under the terms of the policy the company were given the right to replace or repair the damaged property or pay for it in money.

Subsequent to the accident in respect of which damages were claimed the car was examined by an agent of the company, who was of the opinion that the car could be satisfactorily repaired in Montreal, and, on behalf of the company, elected to repair the car there. Plaintiff refused to deliver the car for this purpose, but expressed willingness to have it sent to the factory of the makers at Detroit.

The Judge in the judgment appealed from held that the position taken by the company was the sound one, and that the company, having exercised its option, plaintiff was bound to deliver the car, if he desired to avail himself of his rights under the contract, and if, upon the return of the car, he was advised that the contract had not been complied with, he would then have his legal remedy.

Also that the election to repair having been made, a tender to pay in cash, made subsequently, was made without prejudice.

W. A. Henry, K.C., and *J. McG. Stewart*, for appellant.

L. A. Lovett, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—I agree with Mellish, J.

Longley, J.

LONGLEY, J.:—In this case I am compelled to follow the judgment given by the Judge who tried the cause. The plaintiff, of course, had his car insured in the defendant's company. A certain accident happened to his car. The agent of the defendant company came to Halifax respecting it, and, in accordance with the terms of the contract, the company may replace or repair the damaged property or pay for it in money. Rainville, on behalf of the company, examined the car, and then offered to take it to Montreal and have it put in first-class shape there. The plaintiff refused to do this, it is alleged, because he feared they would not repair it fully and completely; but it was too soon then to form any judgment whatever. Rainville, on the part

of the defendant, offered to take the car to Montreal and repair it in proper shape, and he would have returned it after it had been repaired, as he thought, in the proper shape to the plaintiff, when, if it were not in proper shape, he could refuse to accept it and could insist on it being repaired to his satisfaction. He came to his conclusion too soon, and there seems to be no reason whatever which justified the plaintiff in refusing to allow defendant to have the car.

For this reason I am in favour of dismissing the appeal.

Longley, J.
Drysdale, J.

DRYSDALE, J.:—I agree with the trial Judge. I accept his findings and would dismiss the appeal for the reasons stated by him.

Mellish, J.

MELLISH, J.:—This is an action brought by plaintiff against defendant company on an accident insurance policy whereby the defendant undertook "to indemnify the (plaintiff) assured against the loss of or damage to" his automobile. The policy also contained the following clause: "The company may replace or repair the damaged property or pay for it in money." The effect of these clauses, according to my view, will be considered later.

The plaintiff's car—a new and expensive one—was damaged by accident, entitling the plaintiff to be indemnified in accordance with the terms of the policy, and he brought an action to recover the amount of his loss.

The action, however, was dismissed by the trial Judge on the ground that the plaintiff had refused to deliver the car to the defendant to be repaired when requested so to do.

Some difficulties arise in considering the evidence, not, I think, from any lack of veracity in the witnesses, but in drawing the proper inferences from what actually occurred.

The accident happened on October 3, 1918, of which the defendant had due notice. In the latter part of the same month the plaintiff was interviewed by a representative of the defendant, a Mr. Rainville. I regret that I am unable to agree with the trial Judge in concluding, as he apparently did, that the company elected to repair the car through Rainville when so interviewing the plaintiff. I regard the conversations between Sare and Rainville simply as negotiations with a view to an amicable settlement.

It is quite evident, I think, even from Rainville's evidence,

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that it was not his intention then to give notice of any such election; and this view is confirmed by what afterwards occurred.

The plaintiff contends, and I think rightly, that he is entitled, if no cash payment is made, to have a car just as valuable as the car was before the accident. Considering the actual condition of the car with the body cracked through as it was, I think it is clear from Rainville's own testimony that it could not be repaired so as to make it as valuable as before. The plaintiff declined, and I think rightly, to accept such repairs in fulfilment of his rights, whether done here or in Montreal. It might be a wise and prudent thing for the owner of such a car, under the circumstances, to repair the body rather than replace it; but such repairs would not, I think, satisfy this policy. I am, therefore, compelled to disagree with the finding that the car could have been repaired "in compliance with the contract" if it is meant to be said that such repairs would satisfy the contract. In such a case as this I do not think the company had any right to insist on repairing rather than replacing the damaged top. They cannot elect, I think, to give repairs which would give a less valuable car and make up the difference in value by a money payment. They must do one thing or the other—pay in money the whole damage, or give a car as valuable as the one damaged. In the former case the assured might well receive less money than it would take to put his car by replacement of parts in as good condition as it was originally. I think the company was quite alive to this condition of affairs, and was naturally anxious to have the assent of the assured to what they might do in the way of repairs. Accordingly, we find that after the plaintiff's interviews with Rainville, in which plaintiff refused to accept the proposed repairs or the amount of Lamphier's estimate ($375) in settlement, the defendant made a formal tender, through their solicitor, Chipman, of $425 in settlement. The date of this tender is not very clear, but it was immediately after Rainville's interview with Sare at which Lamphier's estimate was refused—probably late in October. This tender was refused. The plaintiff then, no election having been made to repair or replace the damaged parts of the car, may have been justified in coming to the conclusion that as the matter was then in the hands of the parties' respective solicitors, that the company had elected to pay in money, especially as he

did not understand the tender to have been made without prejudice. It is true Chipman, who made the tender, states that he told Sare the tender was without prejudice. Assuming this to be the fact, I consider it would have been more in order if it were intended to reserve alternative rights under the policy to have expressly said so, but I am giving no definite opinion as to whether the plaintiff was justified or not in regarding this tender as an election. The very fact, however, that the tender was made is, I think, further evidence, if such be necessary, that no previous election had been made. Subsequently the following notice was sent by the defendants to the plaintiff:—

R. G. Sare, Esq.,
Halifax, N.S.

Dear Sir:—

Our offer of a cash settlement for damages to your automobile having been declined, the Fidelity & Casualty Co., of New York, under its automobile policy contract with you, hereby offers again to repair the damage to your automobile caused by the accident of October 3rd, 1918, and demand is hereby made that you authorise delivery of said automobile to the Fidelity & Casualty Company Representative, so that these repairs can be promptly attended to. Do not incur any expenses in regard to the damage with a view of being reimbursed by us.

Yours truly,
The Fidelity & Casualty Co., New York.
(Sgd.) Paul Rainville,
Examiner of Claims.

This notice was sent apparently on November 28 (see Exhibit 17). Before receiving it plaintiff had made other arrangements to make good the damage. It may be worth noting that the word "again" is interlined in the third line of the original notice E-A. I think the assured was justified in refusing for the following and other reasons: 1. I do not think the plaintiff was bound to take a "repaired" car in fulfilment of the contract which would, as proven in this case, have been of less value than the car was before the accident, as already pointed out. It was argued before us that if the repaired car were not of equal value to the car as it before existed, the plaintiff would still have recourse under the policy for the difference in value. This may be quite true; but, at the same time, I do not think the insurer has any right under the policy to put the assured in that position without his consent. I think the insured has a right to say "I won't have a car of less value on any terms." Different men might regard the situation differently,

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but the choice I think undoubtedly rests with assured and not with the insurer.

2. I think this notice of election, if it be regarded as such, was under all the circumstances unreasonably late.

3. I think that notice of an election, to bind the assured, and be effective as a basis for the forfeiture of his rights, must at least be capable of being construed as a *bonâ fide* and unequivocal expression of an irrevocable choice on the part of the assurer to *fully indemnify* the assured by reinstatement and not by a money payment. I do not think the notice in question is capable of such a construction. It is carefully worded and by the introduction of the word "again" above referred to expressly shews that the "repair" contemplated was that already referred to in Rainville's conversation with assured, and which on the evidence would be insufficient for reinstatement; and which under Rainville's evidence would, I think, at best be only experimental.

I think the assured, delivering the car in compliance with this notice, would thereby run a grave risk of waiving his full rights under the policy.

I think the plaintiff is entitled to recover the amount which his car was diminished in value by reason of the accident. The parties should be further heard as to how this value is to be determined, whether on the evidence before us or otherwise.

The appeal should be allowed with costs.

Appeal dismissed; the Court being equally divided.

MAN.

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Manitoba King's Bench, Mathers, C.J.K.B. January 23, 1920.

STATUTES (§ I C—20)—INJURY TO WORKMAN—ACTION—REMEDY—WORKMEN'S COMPENSATION ACT, 6 GEO. V., 1916 (MAN.), CH. 125—DISMISSAL OF ACTION—APPEAL—CONSTITUTIONALITY OF ACT—B.N.A. ACT, SECS. 96, 99, 100.

The enactment of legislation establishing a Workmen's Compensation Commission or Board is within the competence of a provincial Legislature. But the provisions of such enactment in relation to the appointment and payment of the salary of the Board are *ultra vires* as they conflict with the powers reserved to the Dominion under secs. 96, 99 and 100 of the British North America Act.

[*Colonial Investment Co.* v. *Grady* (1915), 24 D.L.R. 176, 8 Alta. L.R. 496; *Can. Northern R. Co.* v. *Wilson* (1918), 43 D.L.R. 412, 29 Man. L.R. 193; *Workmen's Compensation Board* v. *C.P.R. Co.* (1919), 48 D.L.R. 218, referred to.]

Statement.

ACTION for damages for personal injury caused by an accident while in the defendants' employment.

W. M. Crichton, for plaintiff; *A. A. Fraser*, for defendants; *John Allen*, Depy. Att'y-Gen'l for the Crown.

MATHERS, C.J.K.B.:—In this case the plaintiff brought an action in this Court for damages for a personal injury by an accident sustained by him while in the defendants' employment.

The defendants were contractors for a portion of the pipe line for the Greater Winnipeg Water District, in the execution of which they used and operated a railway alongside the work. While engaged in hauling material from one part of the work to another on the railway, the locomotive was derailed and the plaintiff, who was riding thereon, was seriously injured.

It is alleged that his injury was due to the negligence of the defendants in that the locomotive and car used by them were in an unsafe condition and unfit for the purposes for which they were used. In the alternative it is alleged that the damages were due to the negligence of the defendants' foreman, to whose orders plaintiff was bound to conform and to the negligence of the engineer in charge of the locomotive.

After a defence had been entered, the defendants applied under sec. 13, sub-s. 2 of the Workmen's Compensation Act, 6 Geo. V. 1916 (Man.), ch. 125, as amended by 9 Geo. V. 1919 (Man.), ch. 118, to the Workmen's Compensation Board for an adjudication and determination of the question of the plaintiff's right to compensation under Part I. of the Act and as to whether the action is one the right to bring which is taken away by the Act.

Upon this application, an order was made by the Compensation Board, on December 5, 1918, declaring that the plaintiff has a right to compensation under Part I. of the Act by reason of the accident and that the matter is one in which the right to bring action for or by reason of such accident is taken away by the Act.

Following this order an application was made by the defendants to the Referee in Chambers, upon notice to the plaintiff, to dismiss this action, and an order to that effect was made by him on March 21, 1919.

From this last mentioned order the plaintiff appealed to a Judge in Chambers. The appeal came on before my brother Galt and by him the plaintiff was allowed to amend his pleading so as to raise the constitutionality of the Act.

This amendment was made in the shape of a reply delivered

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on May 30, 1919. On June 7 following, the defendants amended their defence alleging that the plaintiff on May 29, 1918, shortly after the accident, made a claim for compensation under the Act, which claim was allowed by the Board and that before action he had received compensation to the amount of $187 and that he is now estopped from making any further claim on account of his said injuries. The amended defence also alleges the order made by the Board of December 5, 1918, and they plead not guilty by statute alleging 6 Geo. V. 1916, ch. 125, sec. 13.

On June 7, the Attorney-General of the Province, who is not a party to the action, also filed a statement of defence and counterclaim, alleging the claim made by the plaintiff to the Board, its allowance and payment of compensation, and the order made by the Board on December 5, 1918. It is also alleged that the Act is *intra vires* of the Legislature of Manitoba and has been adopted, homologated, ratified and sanctioned by the Statutes of Canada, 8-9 Geo. V. 1918, ch. 15. The counterclaim asks for a declaration that the Act is constitutional and valid and that the plaintiff's action be dismissed.

It is objected that the Attorney-General had no authority to deliver a defence or counterclaim. Sec. 28 of the King's Bench Act, R.S.M. 1913, ch. 46, requires that he be notified before any Act of the Legislature shall be adjudged to be invalid and that upon such question he shall be entitled as of right to be heard, notwithstanding that the Crown is not a party to the action. No provision is made for the Attorney-General in such a case filing a defence or counterclaim, nor is it necessary that he should do so in order to preserve the rights of the Crown. In my opinion the defence and counterclaim of the Attorney-General is unwarranted by the practice and should be stricken out. What with the filing of a reply and amended defence raising the constitutionality of the Act after an order had been made dismissing the action and pending an appeal from such order, there is sufficient that is unusual without further complicating matters by a further unauthorised and unnecessary defence and counterclaim.

The motion is in form an appeal from the Referee but as the question of the constitutionality of the Act was not before him but has been projected into the case since his order now appealed from was made, this motion is not in reality an appeal against any decision made by him.

The first question raised is, has the plaintiff elected his forum and thereby estopped himself from bringing this action. The defence alleges that he made a claim for compensation under Part I. of the Workmen's Compensation Act, that the claim was allowed by the Board and that he has been paid $187 of the compensation so awarded.

It seems to me that the question of whether or not the plaintiff has irrevocably elected to proceed under the Act, is one that cannot be disposed of by a summary application to dismiss the plaintiff's action. I have no doubt had the application been made to the Referee upon this ground alone, he would have refused it, and in my opinion he would have been right in doing so.

The next point is as to the constitutionality of the Act. The sections attacked are 11, 13, 28, 46 to 52, 55, 57, 58, 59, 61, sub-sec. 4 and 70.

It is objected that the Board is by the Act constituted in essence, if not in name, a superior court and therefore that the appointing of the Board and its remuneration is, by secs. 96 and 100 of the B.N.A. Act, assigned exclusively to the Dominion and a Board appointed by the Provincial Government is consequently without jurisdiction. The answer to this question will depend upon the powers conferred upon it by the Act.

Section 3 of the Workmen's Compensation Act provides, that where in any employment to which the first part of the Act applies, personal injury by accident arising out of, and in the course of, his employment is caused to a workman, his employer shall be liable to provide or pay compensation in the manner and to the extent mentioned in the Act, except where the injury does not disable the workman for a period of at least 6 consecutive days from earning full wages at the work at which he was employed, and except where the injury is attributable solely to the serious and wilful misconduct of the workman unless the injury results in death or serious disablement.

Section 11 says that:—

> No action shall lie for the recovery of the compensation but all claims for compensation shall be heard and determined by the Board, without the intervention of counsel or solicitors on either side, except with the express permission of the Board.

By section 13:—

> The right to compensation provided by this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his

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dependents are or may be entitled against the employer of such workman for or by reason of any accident which happens to him while in the employment of such employer, . . . and no action in any Court of law in respect thereof shall, . . . lie.

See amendments 9 Geo. V. 1919, ch. 118.

Sub-section 2 of sec. 13 provides for the case where a workman has brought an action at law for compensation. It says:—

Any party to such action, if brought, may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this Part and as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive.

Sub-section 4 of sec. 61 deals with the same subject. It says:—

Where an action, in respect of an injury, is brought against an employer, by a workman or a dependent, the Board shall have jurisdiction upon the application of the employer to determine whether the workman or dependent is entitled to maintain the action or only to compensation under this Part and, if the Board determines that the only right of the workman or dependent is to such compensation, the action shall be forever stayed.

Section 18 and its several sub-sections deals with the manner in which and time within which notice of an accident must be given, but says that

failure to give the prescribed notice or any defect or inaccuracy in a notice shall not bar the right to compensation if in the opinion of the Board the employer was not prejudiced thereby or if the Board is of the opinion that the claim for compensation is a just one and ought to be allowed.

Section 29 provides that where a claim for compensation is made, notice in writing shall be given to an employer carrying his own insurance or to the insurance company and sets out the form of notice. It requires the employer or insurance company so notified to in turn notify the Board within 6 days if they desire to be present at the hearing and determination of the claim. If no reply is received the Board may proceed *ex parte* "to determine the question of the right of the workman or his dependents to compensation and shall make an order for payment of any compensation awarded as hereinafter provided." If an affirmative reply is received, a date shall be fixed

and the Board shall, after fixing a time for such hearing and giving due notice thereof, proceed to hear and determine the matter of the said claim, and the amount of the compensation, if any, to be awarded and shall make an order for payment of any compensation awarded as hereinafter provided.

Sections 33 to 36 prescribe the scale of compensation to dependents when the accident has resulted in the death of the workman. Sections 37 to 43 deal with the scale of compensation

to be paid in cases of permanent, or temporary total or partial disability and the rules for determining the same.

The following sections dealing with the powers of the Board may also be noted:—

Section 52. The Board shall have the like powers as the Court of King's Bench in Manitoba or a Judge thereof, for compelling the attendance of witnesses and of examining them under oath and compelling them to answer questions and compelling the production of books, papers, documents and things.

Section 57. (1) The Board shall have exclusive jurisdiction to examine into, hear, and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority, or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any Court or be removable by *certiorari* or otherwise into any Court. (2) Without, thereby, limiting the generality of the provisions of sub-sec. (1), it is declared that the exclusive jurisdiction of the Board shall extend to determining: (a) The existence and degree of disability by reason of any injury; (b) The permanence of disability by reason of any injury; (c) The degree of diminution of earning capacity by reason of any injury; (d) The amount of average earnings; (e) The existence, for the purpose of this Part, of the relationship of any member of the family of a workman as defined by this Act; (f) The existence of dependency; (g) Whether or not any industry or any part, branch or department of any industry is within the scope of this Part, and the class to which any industry or any part, branch or department of any industry within the scope of this Part should be assigned; (h) Whether or not any workman in any industry is within the scope of this Part and entitled to compensation thereunder.

Section 58. The Board may award such sum as it may deem reasonable to the successful party to a contested claim for compensation or to any other contested matter as compensation for the expenses he has been put to by reason of or incidental to the contest and an order of the Board for the payment by an employer of any sum so awarded, when filed in the manner provided by sec. 60, shall become a judgment of the Court in which it is filed and may be enforced accordingly.

Section 60. An order of the Board for payment of compensation by an employer or insurance company or underwriter, who is liable to pay the compensation and any other order of the Board for payment of money made under the authority of this Part or a copy of any such order certified by the secretary to be a true copy may upon payment of a fee of one dollar be filed in the Court of King's Bench for Manitoba and when so filed shall become a judgment of that Court and may be endorsed accordingly.

The Act provides (see sec. 36, ch. 118, of 1919 amendments) for the establishment of an accident fund by an assessment and levy by the Board upon each class of employers rated upon the payroll, or in such other manner as the Board may deem proper,

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sufficient to meet all amounts payable from the accident fund during the year for which the levy is made including medical aid; to provide capitalized reserves sufficient to meet periodical future payments of compensation and to provide a general reserve fund to meet losses arising from any disaster or other circumstance.

It also provides for the establishment of an "Administration Fund" (see sec. 77) by an assessment of a sum not to exceed 7½% of the premiums charged by insurance companies or underwriters who have issued policies insuring the payment of the compensation which might become payable by an employer, or which the employer would have been charged had he insured against his liability to pay compensation. Sec. 65 provides for a contribution to this fund from the Consolidated Reserve Fund of the Province such annual sum as the Lieutenant-Governor-in-Council may deem to assist in defraying the expenses of administration.

Sections 46 to 51 provide for the constitution of the commission, its appointment by the Lieutenant-Governor-in-Council, the salaries of the members, their tenure of office, and their payment, together with the other expenses of administration, out of the administration fund.

The commission is to consist of a commissioner and two directors to be called the Workmen's Compensation Board and is created a body corporate. The Commissioner is to hold office during good behaviour but may be removed at any time for cause and his salary is to be $6,000 per annum. The directors are to be paid $1,000 each per annum with no fixed tenure of office.

If the establishment of this Board, the appointment and the payment of its members and the assessment and payment of compensation is within the powers of the Province, such power must be derived from sec. 92, sub-secs. 2, 13, 14 or 16 of the B.N.A. Act.

Under these sub-sections the Province may exclusively make laws relating to, (1) direct taxation within the Province in order to the raising of a revenue for provincial purposes, (2) property and civil rights in the Province, (3) the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction and including procedure in civil matters in these

Courts, and, (4) generally all matters of a merely local or private nature in the Province.

In view of the decision of the Judicial Committee in *Workmen's Compensation Board* v. *C.P.R. Co.* (1919), 48 D.L.R. 218; otherwise known as the *Sophia* case, reversing the majority judgment of the Court of Appeal of British Columbia (1919), 47 D.L.R. 487, it must, I think, be held that the enactment of legislation for the establishment of a commission or board with the powers above outlined is within the competence of the Legislature of the Province. That case decides that the assessments upon employers for the purposes of the accident fund is direct taxation for provincial purposes and that the right to compensation given by the Act to an employee is covered by property and civil rights within the Province.

I cannot bring myself to doubt that it is also competent for the Province to provide as this Act has done for the creation of a fund by an assessment against the employers for payment of compensation according to a specified scale to an injured employee or to his dependents in the event of the accident resulting in death, and to take away from him or them the right to proceed for compensation in any other way. Such legislation has to do with civil rights within the Province and does not entrench upon the powers of the Dominion nor any of the subjects reserved to it under sec. 91.

In my opinion secs. 11, 13, 28, 52, 55, 57, 58, 59, 61, sub-secs. 4 and 70, are all *intra vires* of the Province, but it by no means follows that the appointment and payment of the members of the tribunal by which these provisions are to be made effective also belong to the Province.

In *Re Small Debts Recovery Act* (1917), 37 D.L.R. 170, 12 Alta. L.R. 32, Harvey, C.J., succinctly deals with the power of the Province to create Courts. He says, at 171:—

> There is no doubt that it may create such tribunals and under the scheme of Confederation, it is the sole judge of the need of such tribunals. On it alone is imposed the burden of and responsibility for the administration of justice, and when in its wisdom it has determined that certain tribunals are necessary for the due administration of justice and has created them, if it has not the right to make these tribunals effective by the appointment and payment of the proper functionaries it is clearly the duty of the Dominion to assume that burden, or so much of it as is imposed upon it by the constitution.

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Even if the Workmen's Compensation Board provided for by the Act is, as was argued, a superior Court, its constitution, organisation, jurisdiction and power is within the competence of the Province; and were it not that the power of appointing Judges of superior Courts is reserved to the Governor-General, by sec. 96 of the B.N.A. Act, that power would also belong to the Province.

Then, is this Board a superior Court? If it is in essence no matter by what name it may be designated the appointment of its members, their tenure of office, and the payment of their salaries are by secs. 96, 99 and 100 of the B.N.A. Act reserved to the Dominion, and all acts performed by a Board whose members were appointed by the Lieutenant-Governor-in-Council would be without jurisdiction.

This question was not raised or dealt with in the *Sophia* case, 48 D.L.R. 218. The point there was whether sec. 8 of the British Columbia Act, 6 Geo. V. 1916 (B.C.), ch. 77, which is the same as sec. 5 of the Manitoba Act, R.S.M. 1913, ch. 209, was *ultra vires* of the Legislature in that it provided for payment of compensation to the dependents of seamen who lost their lives in foreign waters.

The same observation may be made with respect to *Canadian Northern R. Co.* v. *Wilson* (1918), 43 D.L.R. 412, 29 Man. L.R. 193, which involved the right of the Board to make an award against an employer without notice. Two cases which discuss the principle involved here are, *Colonial Investment Co.* v. *Grady* (1915), 24 D.L.R. 176, 8 Alta. L.R. 496, and *Re Public Utilities Act* (1916), 30 D.L.R. 159, 26 Man. L.R. 584. In the former the Court of Appeal of Alberta held that a provincial statute which purported to confer upon a Master of the Court the powers of a Judge in respect of actions for the enforcement of mortgages and agreements for sale of lands, was in conflict with the appointive power of sec. 96 of the B.N.A. Act and therefore *ultra vires* the Provincial Legislature. Stuart, J., who gave the judgment of the Court, points out that the Act conferred upon the Master powers as full and complete as those held by a Judge of the Supreme Court, which in his discretion he might exercise. He says, at p. 178:—

> He could indeed, if he thought best, direct an action to be brought or an issue to be tried, but it was still open to him to hear oral evidence as at a trial, and to give as full and as final a judgment as a Judge of the Court could give, no matter what issue of fact, *e.g.*, fraud or other ground, of defence, might have

been raised He was to do all this "in the Supreme Court." It seems to me that it is impossible to avoid the conclusion that by such legislation the Master was constituted in effect a Judge of the Supreme Court, with a jurisdiction limited, indeed, to its *extent*, but not in its *content;* that is, limited to a certain very important branch of litigation, but practically unlimited within that sphere, and subject only, with respect to his final judgment, to an appeal to the Appellate Division in the same way as a final judgment of any ordinary Judge of the Supreme Court.

In the *Public Utilities* case, *supra*, the jurisdiction of the Public Utilities Commissioner to make orders requiring the Winnipeg Electric R. Co. to so construct and maintain its tracks and system as to prevent damage to the underground cables and watermains of the City of Winnipeg from electrolysis, and to pay the costs of an investigation conducted by the Commissioner, was attacked on the ground that the Commissioner was in effect constituted a superior Court and that those portions of the Act, which provided for his appointment and payment of his salary by the Provincial Government, were contrary to sec. 96 of the B.N.A. Act. The orders were sustained by an equal division of the Court of Appeal. Howell, C.J.M., and Richards, J.A., were of opinion that the question of *ultra vires* was not open and did not consider that question. On the other hand, Perdue, J.A., now Chief Justice, and Haggart, J.A., thought the question was open, and held that the appointment of a Commissioner, with the jurisdiction conferred upon him by the Act, was *ultra vires* of the Province.

There is this distinction between the Public Utilities Commissioner and the Workmen's Compensation Board, that the former is by the Act creating it, constituted a Court of record, whereas, by the Workmen's Compensation Act the Board is not in express terms constituted a Court. The fact is not, I take it, conclusive, because a tribunal may be a Court, if it is vested with the powers and jurisdiction of a Court, although not so designated.

The first section of the Workmen's Compensation Act, 6 Geo. V., 1916, ch. 125, which it is argued confers upon the Board the powers and jurisdiction of a superior Court, is sec. 11. The material part of that section, for the purpose I am now considering, is that which provides that, "all claims for compensation shall be heard and determined by the Board." That, of course, only refers to claims which come within Part I. of the Act. Sec. 4 provides that employers included in Schedule I. shall be

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individually liable to pay compensation so that the first question the Board must determine is whether the employer belongs to any of the classes named in Schedule I. The next question is whether the claimant is a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business. If he is he cannot claim under the First Part. In either case the claimant would be relegated to whatever rights he might have to compensation apart from the first part of the Act.

Before deciding these or any other questions, the Board must now, by sec. 29 added to the Act in 1919, in consequence of *C.N.R. Co.* v. *Wilson*, 43 D.L.R. 412, 29 Man. L.R. 193, give notice of the claim to the employer if he carries his own insurance or to the insurance company or underwriter. At the time fixed for the hearing, if the employer, insurance company or underwriter, signifies a desire to be present or to give evidence, the Board shall "proceed to hear and determine the matter of the said claim and the amount of compensation if any to be awarded and shall make an order for payment of any compensation awarded as hereinafter provided."

Section 52 gives the Board the same power as the Court of King's Bench, or a Judge thereof, to compel the attendance of witnesses and their examination under oath, and to compel answers, and the production of books and documents.

It seems quite evident that the hearing under sec. 29 is to all intents and purposes a trial of the questions of law and fact involved upon evidence to be adduced before the Board.

Some of the questions of law and fact which, in addition to the preliminary questions already mentioned, the Board shall so determine, are those involved in sec. 3. The Board must determine whether the accident arose out of and in the course of the employment; whether or not it resulted in death or serious disablement; if not whether it was attributable solely to the serious and wilful misconduct of the workman. The Board's jurisdiction upon these questions is under sec. 57 exclusive, as it is also to determine all the questions set out in sub-sec. 2 of that section.

Section 3 of the Act is in terms the same as sec. 1 of the Imperial Act, 6 Edw. VII., 1906, ch. 58. The equivalent section of the English Act has given rise to a great deal of litigation, much of

which reached the House of Lords before final determination. The cases are collected in Knocker's Digest of Workmen's Compensation Law and in Butterworth's reports.

Speaking of the English equivalent to sub-sec. 1 of sec. 1, Dawbarn, on Employer's Liability, 4th ed., says, at p. 92:—

> In this part of the section nearly every word is of vital moment and certainly every word has been the subject of discussions which in many cases would fill volumes of considerable size. "Employer," "injury," "accident," "arising out of and in the course of," "workmen," etc., all have been fiercely fought and to be correctly understood must be read in the light of the decisions upon them.

Under the English Act all these questions are left to the decision of the Courts.

Prior to the enactment of this Act, such question could only be determined by the judgment of this Court or of the County Court, after a trial. The Act transfers this jurisdiction to the Board. If the jurisdiction of the Court over this limited but very important field of litigation may thus be taken from the Courts and vested in an official or officials appointed and paid by the Province, I can see no reason why the same thing may not be done with respect to any other subject matter, and so ultimately the whole jurisdiction now exercised by the Court. Before the Board the procedure may be less formal but the essential elements of a trial of the issues of law and fact are the same. There are the parties to the controversy, the claim made for compensation and the denial of liability, the hearing or trial, and the adjudication for or against the claimant, and the formal judgment or order. There seems to be no escape from the conclusion that the Board is constituted a superior Court for the purpose of administering this limited but extremely important branch of litigation.

The order complained of was made under sub-sec. 2 of sec. 13, which deals with the case where an action at common law or otherwise has been brought. The Board is empowered to make a final and conclusive "adjudication and determination" upon the plaintiff's right to compensation under Part I. of the Act, and as to whether the action is one the right to bring which is thereby taken away.

Such "adjudication and determination" involves a decision upon the questions of law and fact involved in sec. 3. The claimant's right to compensation depends upon a finding in his

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favor upon all these questions if there is any issue with respect to them. Such findings cannot in my opinion be made except in the exercise of the functions of a Superior Court Judge.

I come therefore, to the conclusion that the provisions of the Act respecting the appointment and payment of the salary of the Board are *ultra vires* of the Province as being in conflict with the powers reserved to the Dominion by secs. 96, 99 and 100 of the B.N.A. Act.

The defendants and counsel for the Attorney-General relied upon the Dominion Act, 8-9 Geo. V., 1918, ch. 15, as amended last year, 9-10 Geo. V., 1919, ch. 14. All that Act does is to place an employee in the service of His Majesty who is injured, or his dependents if he has been killed, in the same situation with respect to compensation as the employee of any other employer and to provide that such compensation shall be determined in the same manner and by the same board, officer, or authority, as that established by the law of the Province for determining compensation in similar cases, or by such other board, officer, or authority, or by such Court as the Governor-in-Council shall from time to time direct. It does not vest, nor would Parliament have the power to vest, in the Province the appointment and payment of Superior Court Judges.

I may say that I have arrived at this conclusion only after the most careful and painstaking consideration. I believe the Act is serving a good and useful purpose and I should have felt much better pleased if my deliberations had led us to a different conclusion.

The order made by the Referee will be set aside with costs against the defendants. *Judgment accordingly.*

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S. C.

MALOOF v. BICKELL & Co.

Supreme Court of Canada, Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 22, 1919.

BROKERS (§ I—2)—STOCK BROKERS—PURCHASE OF CORN ON MARGIN—FURTHER MARGIN CALLED—FAILURE TO COVER—SALE BY BROKER.

A person dealing in margins on the stock exchange is deemed to have knowledge of the rules which authorise brokers to sell stock carried on margin for their own protection, and failing to cover when called upon must bear the loss. Such a transaction is not within the provisions of sec. 23, Criminal Code.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1918), 14 O.W.N. 289, affirming, for a different

reason, the judgment at the trial which dismissed the appellant's action. Affirmed.

C. McKay, K.C., for appellant; *H. H. Dewart*, K.C., for respondents.

Davies, C.J.

DAVIES, C.J.:—I think this appeal should be dismissed with costs. I am of the opinion that the carefully reasoned judgment of the Appellate Division delivered by Ferguson, J., dismissing the plaintiff's action is correct. The Judge has in that judgment stated fully all the material facts and circumstances necessary to reach a conclusion on the points in controversy and as I am in full accord with his findings alike in law and in fact, I cannot see any useful purpose to be gained in again re-stating them with any fullness. In substance they were that the purchase by the respondents, Bickell & Co., of the 50,000 bushels of corn in question on the order given to them by the witness Symmes on August 26 was fully authorised by the plaintiff and that the subsequent sale by the defendants of that corn on August 28, owing to a sudden slump in its market price, was justified under the conditions subject to which the brokers transacted the business of buying and selling grain for the plaintiff. One of these conditions was that in marginal business which included the one in question the right was reserved by the brokers of closing the transactions without further notice when margins were unsatisfactory. The other finding, reversing the trial Judge, was that the transactions in question were not within the prohibitions of sec. 231 of the Criminal Code; that they were on the contrary *bonâ fide* transactions made for good consideration on the Chicago Board of Trade, and that there was no evidence of any express, implied or tacit understanding that the contracts so made were not enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences. *Nelson* v. *Baird* (1915), 22 D.L.R. 132, 25 Man. L.R. 244. In other words, that the purchase and sale of the wheat in question at the times and in the manner in which it was bought and sold were *bonâ fide* transactions authorised by the plaintiff and were not illegal gambling transactions within the provisions of sec. 231 of the Criminal Code. See *Forget* v. *Ostigny*, [1895] A.C. 318.

Idington, J.

IDINGTON, J.:—This appeal depends entirely upon a single question of fact on which the two Courts below have concurred.

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Idington, J.

That question is whether or not appellant authorised Symmes to employ respondents to make on his (appellant's) behalf the purchase of 50,000 bushels of May corn in question.

And its answer depends upon the veracity of Symmes in the circumstances.

If ever there was a case in which the trial Judge's opinion on the facts must be held, by reason of his seeing and hearing the witnesses, to have had such superior advantages that his opinion must be accepted, this certainly is one.

Symmes's mode of thought and manner of answering questions give rise to some suspicion of whether he was trifling with the Court and counsel, or merely beset by an absent-minded sort of condition which prevented him from concentrating his mind upon the questions put to him. The trial Judge alone of those having to consider these peculiar features could, from the advantages he had of watching and hearing the witness, rightly appreciate and determine what importance is to be attached thereto.

Sometimes, indeed often, there exists in a case some outstanding undoubted fact or set of circumstances which may enable an Appellate Court to overrule the trial Judge's appreciation of the credibility of the respective witnesses on either side of a case, but herein I am unable to find anything of that kind as a guide to support me in maintaining this appeal.

Indeed what there is seems to tend the other way. The witness Symmes says, and is not contradicted as he might easily have been if speaking untruly, that though an extensive dealer in the sort of bargaining involved in buying and holding by virtue of margins in and through a broker's office, he had not up to that time in question so dealt in grain but had confined his operations to dealing in stocks.

On the other hand the appellant had been for 5 months, previously, constantly dealing, through respondents, in grain chiefly if not solely.

Why he should not with such an amount as he had lying idle in respondents' hands, and not apparently needed for anything else, respond to the chance presented, I see no reasonable explanation for.

Moreover his conduct and expressions later hardly consist with what he now sets up.

And the transaction does not fit into the only suggestion made in the way of explaining why the witness Symmes should suddenly depart from his accustomed means of enjoying the excitement of the market and enter on a new field therein.

Moreover there is no explanation of why, if he did so, he should have reported such a deal to appellant on returning to his place.

That he did so is corroborated by another witness who could not testify to hearing appellant's answer, yet does confirm the fact of Symmes reporting it as he says he did.

The trial Judge's judgment having been concurred in by the Appellate Division I think we cannot reverse under such circumstances.

The respondents' right to resell the grain to protect themselves against loss, if it rested upon the elementary legal right which arises when A. tells B. to go and buy for him and pay so much on account of the purchase and hold it for him might give rise to difficult questions of law and the authorities which appellant's counsel cites as relevant would help perhaps to another solution of the case giving rise to this appeal than that reached by the Appellate Division.

I agree entirely with the view of the facts taken by the judgment of the Appellate Division, and think there is ample evidence from which it may and should be inferred that appellant knew and approved of the usual course of the respondents in conducting such like business as he entrusted to them and the right which they were likely to assert in case of necessity to protect themselves against loss on his account.

That was reduced to writing well known to appellant, according to my view of the evidence (though I admit it might have been better to have gone a step further in making the proof quite conclusive by calling the mailing clerk as to this transaction), which is set forth in Ex. 15, as follows:—

Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed, and also with the distinct understanding that actual delivery is contemplated and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon, or for a greater sum, all without further notice to the customer. It is further understood that on marginal

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business the right is reserved to close transactions without further notice when margins are unsatisfactory.

The 4 or 5 months of appellant's existence as a "roomer" so called in respondents' office, did not leave him ignorant of this basis of all his dealings with respondents including that in question, and he has not pretended to say he was ignorant or to deny the receipt of, I imagine, scores of such notices as governing the contractual relations between him and respondents so far as they concerned the brokerage business done by them on his behalf.

I cannot, therefore, discard that which is therein set forth as forming part and parcel of the understanding existent between these parties, or doubt the efficacy of the last sentence thereof as maintaining respondents' right to do as now complained of by appellant.

The judgment of the Appellate Division sets forth in more detail the facts and circumstances bearing on that issue of fact in such a forcible way that I need not enlarge by repetition of same here.

My view of the question of illegality raised by the trial Judge, so far as of any moment herein, is briefly this: that the counsel on each side being now agreed that if there was in fact an employment of the respondents, it was to conduct purchases on the Grain Exchange in Chicago; I am, therefore, unable to see how our Criminal Code can have any possible effect on contractual relations formed there.

We have no proof of illegality relative to the contracts of such a nature there.

I adhere to my view expressed in *Beamish* v. *Richardson* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595, relative to the law applicable thereto in circumstances such as in evidence in that case.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—This appeal turns upon the question whether the unanimous finding of the Appellate Division, 14 O.W.N. 289, to the effect that according to the terms under which the appellant and the respondents had conducted their dealings the respondents were entitled "to close transactions without . . . notice when margins are unsatisfactory."

I think this finding is adequately supported by the evidence and that the contracts acquired for his benefit under the transactions of August 21 and 26 were held under these terms.

It seems necessary to add a reference to the opinion of the trial Judge that on the authority of *Beamish* v. *Richardson*, 16 D.L.R. 855, 49 Can. S.C.R. 595, the orders given by the appellant were illegal under sec. 231 of the Criminal Code.

I am by no means certain that the transactions contemplated by the appellant's orders were in any relevant sense distinguishable from the transactions which certain members of this Court held to be illegal in *Beamish* v. *Richardson*. The purchases authorised by the appellant's orders were to be purchases in the corn pit of the Chicago Board of Trade and in the usual course of business, that is to say, by agents in Chicago; with the consequence that in the absence of agreement to the contrary, the agents would contract as principals and not as representatives, in other words, the purchases and sales would be purchases and sales enforceable only by the agent. *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802.

The contracts which were the subject of discussion in *Beamish* v. *Richardson*, were contracts subject to the "rules, regulations and customs" of the Winnipeg Grain Exchange and the Winnipeg Clearing House Association, and were contracts in which, by virtue of the rules of the Exchange, the brokers were necessarily principals on the one hand as buyers or sellers and the Clearing House Association on the other as seller or buyer; and it was made quite clear in the evidence that the vast majority of transactions in grain in Winnipeg at that time took place through the instrumentality of the Grain Exchange and the Clearing House Association, in other words, that the Grain Exchange and the Clearing House Association were not merely conveniences for speculation but together constituted a large market where a great deal of the grain and provision business in Canada was transacted, the brokers, Richardson & Co., being commission merchants trading very largely on their own account on this market. It was made quite clear also that a commission merchant entering into a contract with the Clearing House Association to buy or sell would understand that he must carry out that contract either by actual payment or delivery or by set-off payments against exigible obligations under some other real contract. Such a system of carrying on business of course affords opportunities for speculation and must largely be used for that purpose; and the contracts in question being of the character mentioned, it was held by some members of this Court

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in *Beamish* v. *Richardson*, *supra*, that because the customer's intention was by means of such contracts to speculate in futures merely, with no expectation either of delivering or taking delivery in kind of any commodity, the transactions fell under the ban of the section of the Criminal Code above referred to. *Beamish* v. *Richardson*, nevertheless, is not a decision upon any point as to the application of that section. My brother Idington and my brother Brodeur based their judgment, it is true, upon the view just explained of the effect of the Code, but my brother Anglin, though expressing an inclination of opinion in the same direction, explicitly stated that he did not rest his judgment upon that ground; while the remaining members of the Court (Davies, C.J., and myself) took the opposite view.

In these circumstances I should not consider these opinions (which did not form in whole or in part the *ratio decidendi*), to be binding on me judicially and I should not feel at liberty to act as if they relieved me from the responsibility of forming and giving effect to my own view: *Ex parte Willey* (1883), 23 Ch. D. 118, at 127.

I may add that I entirely concur in the opinion expressed in the judgment of Ferguson, J.A., that sec. 231 of the Criminal Code does not reach the transactions under consideration on this appeal.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.—I would dismiss this appeal for the reasons stated by Ferguson, J.A., in delivering the unanimous judgment of the Appellate Divisional Court to which I feel that I can usefully add nothing unless it be to supplement. *Nelson* v. *Baird*, 22 D.L.R. 132, 25 Man. L.R. 244, cited by the Judge on the question of the defendants' right for his and their protection to sell the plaintiff's corn, which they were carrying for him, by a reference to *Foster* v. *Murphy* (1905), 135 Fed. R. 47; *Leiter* v. *Thomas* (1905), 97 N.Y. Sup. 121; and *Belleau* v. *Lagueux* (1904), 25 Que. S.C. 91.

Brodeur, J.

BRODEUR, J.:—This is a suit between a customer and his broker concerning the purchase of corn on margin.

The transactions between them were very numerous and very extensive. It appears that at a certain date, on August 23, 1916, the plaintiff Maloof had to his credit a balance of about $2,000, and that the respondents, his brokers, were holding for him a corn purchase of 25,000 bushels of December corn. He left Toronto,

where these speculations were carried on, on the above date, for the Cobalt district, with some friends amongst whom was a Mr. Symmes who is also an active stock operator.

On August 26, Symmes called on the telephone the respondent firm to inquire about the market conditions; and, receiving a favourable reply, he gave instructions to purchase for Maloof 50,000 bushels of May corn. He claims that he was authorised by Maloof to give such instructions. Maloof denies it; but Symmes' story was accepted by the Courts below and I am convinced myself that if Maloof has not given formal authority to Symmes he has at least adopted the order which was given.

That was on a Saturday. On the following Monday the market turned for the worse and the brokers telegraphed to Maloof for margin money. No answer to their request being received, the respondent company sold the 75,000 bushels of corn they were holding for Maloof.

They claim having acted on a well known condition of their stock transactions and which are to be found on their confirmation notices of purchase which contained the following:—

It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities either for the sum due thereon or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close transactions without further notice when margins are unsatisfactory.

The plaintiff cannot very easily deny knowledge of those conditions. He was day by day, and week by week, in the office of the respondent company: in fact, his mail was being received there and undoubtedly he was aware, according to my opinion, of the conditions under which Bickell & Co. were carrying on marginal transactions. According to those conditions Bickell & Co. had the power to sell for the plaintiff the securities which they had in their possession. They asked for money on August 28. The market was then in a very bad condition; war had been declared the day before (August 27) by Roumania and on Monday morning corn in Winnipeg and Chicago opened 4 cents lower than the closing on Saturday. The decline was more than sufficient to wipe out the $2,000 that Maloof had to his credit August 23.

Another question has been raised in this case as to whether this

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transaction was a *bonâ fide* transaction or one in violation of the provisions of the Criminal Code.

I would be inclined to think that this case cannot be distinguished from the case of *Beamish* v. *Richardson*, 16 D.L.R. 855, 49 Can. S.C.R. 595, but it is not necessary for me to base my judgment upon this ground.

I am satisfied that the plaintiff has no case and that the judgment of the Courts below dismissing his action should be confirmed with costs.

Mignault, J.

MIGNAULT, J.:—The litigation here has arisen out of grain transactions on margin carried out by the respondents, who are stock and grain brokers, on behalf of the appellant, on the Chicago market.

As all the facts are fully stated in the judgments appealed from, I may very briefly say that the appellant was a large speculator in grain, and for several months—during the greater part of which he spent most of his time in the respondents' office, where he received his mail and was known as a "room trader"—he had bought and sold grain on the Chicago market through the respondents. On August 23, 1916, the appellant had a balance of over $2,000 in his favour in the respondents' books, and the latter had, on August 21, purchased for him, on his order, 25,000 bushels of December corn at 74. On the evening of August 23, the appellant left Toronto with a party, including H. D. Symmes, a prominent engineer, for Sesikinika Lake, in Northern Ontario, where he had a house. On August 26, a Saturday, Symmes telephoned to the respondents from Sesikinika, instructing them to purchase at the market price for the appellant 50,000 bushels of May corn, which the respondents bought at 78¾ and 78⅞, and of this purchase the respondents at once advised the appellant by a telegram sent to Sesikinika. On Monday, August 28, the news that Roumania had entered the war caused a break in the grain market and the respondents, in the forenoon of Monday, sent the following telegram to the appellant at Sesikinika: "Roumania declared war on Austria. Wheat broke nine cents bushel. December corn now seventy-three. May seventy-seven. Please let us have two thousand. Answer."

Receiving no reply, at about the close of the market, in the afternoon of August 28, Cashman, of the respondents' firm, gave orders to close out the appellant's account, and to sell his 75,000

bushels of corn. The December corn was sold at 72¼ and the May corn at 75½ and 75⅝, with the result that the balance standing to the appellant's credit on August 23, was wiped out, and he became indebted to the respondents in the sum of $156.62.

Two questions are involved on this appeal. 1. Was Symmes authorised by the appellant to order the purchase of 50,000 bushels of May corn? 2. Had the respondents the right to sell out the appellant's holdings?

The trial Judge found that Symmes was authorised by the appellant to purchase the 50,000 bushels of May corn, and in this finding the Judges of the Appellate Division concur. I would not disturb this finding of fact, the more so as the testimony of the appellant and of Symmes was directly contradictory on this point, and the trial Judge believed the latter.

The second question is not free from difficulty. The notice printed on the confirmation form, that on marginal business the right was reserved to close transactions without further notice where margins were unsatisfactory—assuming that the appellant had received several similar notices, which appears to be a fair inference—is printed in very small type and could be easily overlooked. But the appellant for months had been dealing on a large scale with the respondents, entirely on margin, spending most of his time in the respondents' office, and he had from time to time been called on to furnish margins, and I cannot believe that he did not fully understand, when he told Symmes to purchase 50,000 bushels of May corn, that additional margin, over and above the sum standing to his credit, and on the strength of which he no doubt considered the purchase of 25,000 bushels of December corn fully covered, would be required to carry so large a transaction, especially as he was far away and fluctuations in the market could be expected. For the respondents, the carrying of 75,000 bushels of corn in the sudden collapse of the grain market, meant a liability of $750 for each cent of decline, and I do not think that they were obliged, not having received an answer to their telegram demanding $2,000, to assume such a liability. It is true that the appellant did not receive the respondents' telegrams, including one of August 28, informing him of the sale of the 75,000 bushels, until the afternoon or evening of Tuesday, August 29, but that was the appellant's misfortune—being at a place where there was no telegraphic com-

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munication, and where telegrams had to be telephoned from Swastika some distance away—and not the respondents' fault. I find that the respondents did what was possible to advise the appellant of the situation that had suddenly developed, and the appellant cannot blame them if their efforts to reach him in time were unavailing.

The trial Judge dismissed the appellant's action and the respondents' counterclaim for $156.62 on the ground that the transactions in question amounted to gambling transactions, prohibited as such by sec. 231 of the Criminal Code. The Appellate Division, 14 O.W.N. 289, on the contrary, decided that they were real purchases and sales under the authority of *Forget* v. *Ostigny*, [1895] A.C. 318, and similar cases. In this I agree, but I think, for the reasons stated above, that the appellant's appeal here fails. The counterclaim of the respondents is no longer in question, the latter not having appealed from the judgment of the trial Court by which it was dismissed.

The appeal in my opinion should be dismissed with costs.

Appeal dismissed.

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EDWARDS v. PEARSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 20, 1919.

SALE (§ III A—57)—OF GOODS—WARRANTY—ALLEGED BREACH—REMEDY—CONDITIONS OF SALE UNFULFILLED—REMEDY.

When a sale of a chattel has taken place and warranty been given to the purchaser, he must claim under breach of warranty either setting up a reduction in the price or an action for damages; and he cannot, in an action against him for the purchase price, rely on the alleged breach to justify a defence of failure of consideration.

Statement.

APPEAL by plaintiff from the judgment of Ives, J., on an action on three promissory notes. Reversed.

F. E. Eaton, K.C., for appellant.

A. Knox, for respondents.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from the judgment of Ives, J., in favour of the defendants. The action is on three promissory notes for $1,450 and interest given for the price of a stallion sold by the plaintiff through his agent, one Jarvis, to one of the defendants. At the time of the sale a warranty was given in the following terms:—

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Cluny, Alberta, April 2, 1912.

Whereas, A. G. Edwards, of Cluny, Alberta, party of the first part, has this day sold to David Pearson of Bashaw, parties of the second part, one black Percheron stallion named Mulvani, recorded No. 60244, the said party of the first part guarantees said stallion to be a 60% foal getter, providing said stallion shall have received sufficient exercise and been properly handled and cared for; and should he prove not to be 60% foal getter, the said party of the first part hereby agrees to receive said stallion back, providing he is returned in as good and sound condition as when he sold him, and give a horse of equal value in exchange and should there be any controversy as to the value of any horse to be given in exchange, the party of the first part hereby agrees to select one man and the party of the second part agrees to select one man, and the two men so selected shall select a third man who shall decide the controversy, and their decision shall be final. The said parties of the second part shall have until March 1st, 19— in which to determine whether said stallion is a 60% foal getter or not; after this date, and without the party of the first part being legally notified as above stated this contract shall be regarded as having been fulfilled.

A. G. Edwards.
M. A. Jarvis.

The defendants lived at Bashaw, as did Jarvis who had the horse in his possession at, and for a year before, the time of the sale. The plaintiff's ranch was at Cluny, some considerable distance from Bashaw. In the spring of 1913, the defendant purchaser notified the plaintiff that there was a breach of the warranty and the latter made a trip to Bashaw to see about it. Something was said about an exchange as provided in the warranty but there is a decided conflict of testimony regarding it. Nothing definite appears to have been accomplished then or later and no exchange was ever made, nor was any portion of either principal or interest paid, although part of it was more than 5 years past due when action was brought.

The trial Judge finds that the warranty was not fulfilled, but he makes no finding of fact on the matters upon which there was conflict of testimony. He finds that there was no tender of a substitute horse at Bashaw, which is not disputed, and as a matter of law holds that that was the place where it should have been supplied. As a result he holds that the consideration for the notes failed and dismisses the action with costs and allows the counterclaim without costs.

The only counterclaim that appears to be raised is to be found in the last paragraph of the statement of defence. The other paragraphs set up the breach of warranty and allege that the

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plaintiff refused to give another horse in exchange and that "in consequence the defendants received no consideration." Then the last paragraph alleges "in the alternative" that, owing to breach of the conditions of sale, the defendants have suffered damage to the amount due on the notes and counterclaim therefor.

It is clear that this is only an alternative in the event of the failure of the defence of want of consideration and it is also clear that the result of the judgment in favour of the defendants upon both is that the plaintiff, instead of the defendants, is called on to pay the amount of the notes.

The clerk, who was at the trial, has endorsed on the record that the action is dismissed with costs and the counterclaim dismissed without costs, but notwithstanding this, formal judgment has been entered in accordance with the reasons as reported.

I think there can be little doubt that the note made by the clerk indicates the Judge's intention and that if he did use the word "allowed" it was a slip for "dismissed."

With all respect, however, I am quite unable to understand how it can be said that there was a failure of consideration for the notes. They were given for a particular horse which the defendants received and that it did not prove to be as good a horse as they had hoped, could not create a failure of consideration. Their resort must be to the terms of the warranty which was broken.

In 7 Hals., page 481, par. 978, note (*o*) it is stated that "breach of warranty is not failure of consideration"; and sec. 51 of the Sale of Goods Ordinance, Cons. Ords. 1911, ch. 39, provides the remedies for breach of warranty as (a) to set it up in diminution of the price, or (2) maintain an action for damages. In the present case, the defendants have adopted the second alternative and it is necessary to consider their rights.

The same section provides that the measure of damage is the estimated loss directly and naturally resulting, which in case of breach of a warranty of quality is *primâ facie* the difference between the value of the article and the value it would have had if it had answered the warranty.

The warranty in the present case, however, expressly provides the remedy in case of its breach and, in my opinion, until that failed the defendants could not resort to any other form of remedy and indeed they never did attempt to resort to any other, not even

in the evidence given at the trial. It provides that if the horse is returned "in as good and sound condition as when he sold him" the plaintiff is to receive him back and give a horse of equal value in exchange. This, as well as giving the defendants the right to another horse, gave the plaintiff the right to remedy his breach of warranty by such substitution. There was much conflict of evidence as to why the exchange was not made but unfortunately the trial Judge has given us no indication of which witnesses he was disposed to believe and it is necessary therefore for us to form the best conclusions we can without seeing the witnesses. Under these circumstances, I am disposed to attach much importance to the correspondence, which, though somewhat sketchy, seems to me to be important.

The defendants admit that in 1913 and 1914, though they did not use the horse for breeding purposes, they did use it for draying. Later a feed bill of $125 was allowed to be run up against it and they sold it for that amount to pay the bill, and it subsequently died.

It is apparent from the terms of the warranty that the obligation to give a horse in exchange does not arise until this horse is returned in good condition. The defendants gave no evidence to shew that this had been done; in fact, their counsel consistently objected every time plaintiff's counsel attempted to bring out any evidence as to the horse's condition, and the only evidence of any attempt to return the horse is the statement of the defendant to whom the horse was sold that he met the plaintiff at the hotel in Bashaw in July, 1913, and the following questions and answers appear:—

Q. Tell us what conversation you had at that time? A. I asked for another horse. Q. Yes? A. And I took Mulvani back. Q. Yes, what else? A. He said the horse had proved the year before with Jarvis and in Ponoka 60% foal getter, and he didn't see why he should be turned down in Bashaw. Q. Yes, what else? No answer.

It is apparent that the witness is relating a conversation and that there is some error in the reported answer, "and I took Mulvani back." It is probable that what the witness said was, "and to take Mulvani back." Certainly there is nothing in any other part of the evidence to suggest that the horse was ever actually taken or tendered back.

The plaintiff says that he offered the defendant another horse, and told him to select it out of 17 he had on his ranch at Cluny

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and 4 at Jarvis'. The case the defendants seek to make out is that he insisted on them taking the substitute at Cluny and that they insisted on having it delivered at Bashaw. So far as the evidence of the plaintiff goes, it never got to a question of delivering the horse but was always one of selecting it.

On December 7, 1913, the defendant purchaser wrote to plaintiff, evidently in answer to a letter which is not produced, and said:—

> Just got your letter to-day referring to interest, I will pay half of it this week, balance the end of month. How will you trade for Mulvani with one of those that Milton Jarvis has or one down at Cluny. It is impossible for me to go down to your place at present.

When he was asked what he meant by agreeing to pay the interest, he said that was if plaintiff gave another horse. It is quite evident that the answer is merely an attempt to explain something that seems to tell against him for the promise is to pay part of the interest that week, while he says he cannot go to Cluny to select a horse at that time. There was over $100 of interest due at that time as well as $450 of principal. What the reply to the letter was the evidence does not enable us to tell but it satisfied me that the plaintiff did, at some time, give him the privilege of selection which he asked for and that he never exercised it.

There is produced a letter of May 11, 1914, to the other defendant in answer to one evidently complaining of not being properly treated. The next letter we have is one from the plaintiff to the same defendant dated June 29, 1915, in which he says:—

> It is now 3 weeks since I saw you and think you have had ample time to have written me re our conversation. It looks to me as though you do not intend trying to make some arrangements as to the securing payment on these long past due notes. I have waited a long time and if some satisfactory arrangements are not made I shall proceed by law to enforce payment, *and at once*. So if you wish to save costs and unnecessary expense take my advice and get busy. Hoping to get a favourable reply without delay.

That is the last letter produced but it was not until May of last year that the action was begun, when the first note was 5 years past due.

The trial Judge based his conclusions on the fact that the plaintiff did not deliver to the defendants at Bashaw a horse in substitution but he appears to have overlooked the terms of the contract which did not require him to deliver any horse at any place until the horse sold was returned to him in good condition.

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The evidence satisfies me that he was willing to exchange, not for a horse he would himself select, but for one the defendants might themselves select and that they never made any effort to make such selection and that they never returned the horse sold, indeed, the evidence does not satisfy me that they ever could have returned him in the condition called for by the contract. I think, therefore, that the defendants have failed to establish any right to relief for the breach of warranty.

I would allow the appeal with costs and direct judgment to be entered in the action for the plaintiff for the amount of the notes and interest, with costs. *Judgment accordingly.*

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Quebec Court of Review, Archer, Greenshields, and de Lorimier, JJ. December 31, 1918.

COURTS (§ I B—10)—JURISDICTION—ATTACHMENT—SALARY OF NON-RESIDENT—POWERS AS REGARDS CORPOREAL AND INCORPOREAL THINGS.

The courts of the Province of Quebec have jurisdiction to maintain an attachment of the salary owing to a non-resident, provided that the garnishee was served within the Province and made no protest, and that the debtor did not dispute the jurisdiction at any time. But the Courts cannot order the sale or disposition of corporeal property, such as a moveable, situate wholly within another Province.

[*Bank of British North America* v. *Stewart* (1892), 1 Que. Q.B. 56, *Perkins* v. *Berman & Regal Films Ltd.* (1918), 56 Que. S.C. 28, referred to.]

Statement.

APPEAL by defendant from the judgment of the Superior Court (Que.), in an action in which the salary owing to the defendant, a non-resident of Quebec, was attached.

The judgment of the Superior Court, which is affirmed, was delivered by Mr. Justice Letellier, on December 19, 1917.

A seizure was made by the plaintiff on the salary of the defendant, working at Vancouver, in the hands of the garnishee, in virtue of a judgment obtained by the defendant, from the Superior Court, on July 4, 1917.

The garnishee declared that the defendant

is in the service of the bank at Vancouver, at a salary of $1,800 *per annum*, in addition to which he receives the British Columbia Allowance for married managers of $400 per annum, plus a special temporary war allowance of $200 *per annum*, the whole payable semi-monthly, on the 10th and 25th. Such salary and allowance are not paid from Montreal, but from and in Vancouver; the accountant there prepares the cheques which are signed and delivered in

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Vancouver. Defendant is engaged by the head office of the bank in Toronto, and this branch has no jurisdiction or authority over him. Defendant was formerly in employ of the bank, in Montreal, and was later transferred to Vancouver.

The Superior Court upheld the seizure as follows:—

Considering that the tiers-saisi has appeared and has not denied the jurisdiction of this Court;

Considering that the tiers-saisi can be condemned to pay what it owes to the defendant against whom there is a judgment within the limit of this jurisdiction;

Doth declare the said *saisie arrêt* tenante, and doth condemn the said tiers-saisi to pay 25% of the regular salary of $1,800 in accordance with the terms of the arrangement, etc.

R. D. Matheson, for plaintiff; *Blair, Laverty* and *Hale*, for defendant.

de Lorimier, J.

DE LORIMIER, J.:—The defendant appeals from a judgment of the Superior Court to the Court of Revision, and sets out his reasons for appeal thus:—

To summarize, therefore, we submit that the judgment appealed from is in error:

(*a*) Inasmuch as it constitutes a seizure of effects and moneys beyond the jurisdiction of our Provincial Courts;

(*b*) Because it exposes the tiers-saisi to be ordered to pay the amount awarded by our Courts a second time in the Province of British Columbia, where the debt due by the tiers-saisi to the defendant is properly payable and exigible;

(*c*) Because it exposes the defendant to the seizure of his salary in every Province of the Dominion, and in fact in every country in which the bank may establish an office and do business.

The first reason above is serious; the other two are only inconveniences which would result from the law, if our Courts have jurisdiction in a case of this kind. The defendant pleads that the plaintiff had no right to make a garnishment of movable goods and chattels found outside the limits of the Province of Quebec; in other words, that our Courts can only allow a garnishment of movable goods and effects situated in the Province of Quebec. It is necessary to make a distinction here between a corporeal movable and an incorporeal one such as a right to a salary. Our Courts have no power to order a garnishee, summoned by a garnishment after judgment, to bring into the Province of Quebec corporeal movables declared to be in his possession in another Province, by virtue of a contract made there; but I think that our Courts have the right to say to this bank that it must pay over to a creditor in the Province of Quebec to whom Gordon is

indebted for wages, an incorporeal movable which is or will be owing to this foreign debtor, especially when the garnishee and debtor were summoned regularly before the Court of their jurisdiction.

Let us examine, first, if the garnishee and the defendant have been regularly summoned, and next if our law applies to the salary seized by the plaintiff in this action. By art. 27 of our Civil Code, a stranger can be followed, although not resident in the Province of Quebec, "and made to carry out his contractual obligations, even in a foreign country." The garnishee bank who wishes to pass as a stranger can therefore be followed in this Province even if he has no domicile in Montreal. The defendant bank has been summoned, by a garnishee order after judgment, before the Superior Court in Montreal, where it has a business office. In the order it is described as being a body politic duly constituted, having for the Province of Quebec, its principal office in the City of Montreal. It has not taken exception to this description.

A copy of this garnishee order has been served on this office. The Court of Appeal, in a case of *Bank of B.N.A.* v. *Stewart* (1892), 1 Que. Q.B. 56, has held that this is equivalent to personal service. The garnishee, a legal person, has then been summoned at its recognized domicile, in the City of Montreal. It has appeared and answered twice to this order, and so it has submitted to the jurisdiction of the Court. Gordon was also named as a defendant in the records of the Court where the judgment was rendered. This is the legal domicile of the defendant, according to the meaning of art. 679 C.C.P. He has appeared by his attorneys, and has not taken exception to the jurisdiction of the Court, which decided against him in the original action. He has also submitted to this jurisdiction. All the parties are then regularly before the Court. We have seen that the bank has declared that the defendant was in its service at a salary of $1,800 per annum, payable every fifteen days. What is the law that should be applied to the garnishment of this debt? It is the law of the Province of Quebec.

Here is how art. 6, C.C., secs. 2 & 3 reads: "Movables are governed by the law of the domicile of the owner. It is the law of Lower Canada that applies where there is a question of the juris-

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diction of Courts, procedure, execution or distress. The laws of Lower Canada relating to persons are applicable to all those found there, even if they are not domiciled there."

And it is this way in France:—

Everyone is agreed to apply the French law to moveables of strangers insofar as personal effects, privileges and even executions are concerned, says Delsal (Tit. prel. sur art. 3 C.N., pp. 23 & 24). With more reason, says Roger (p. 402, bottom of No. 407 and No. 408 Traité de la Saisie Arrêt) and it is quite evident the execution will be valid if it is made personally on the third party defendant, domiciled in a foreign country, but found at the time in France.

But there is a difference between an execution obtained against a third party defendant not a citizen, and not served either at his domicile in France, or personally while in France, and one served either at his residence or personally out of the jurisdiction. For example: when the summons is served out of the jurisdiction it immediately stops all payment which is owing at home and out of France on the judgment, for the simple reason that nothing prevents the third party defendant or his clerk, who have money owing to the defendant, from complying with the notice of judgment, from the moment when it is served. On the other hand, when the summons is served at the domicile in France of the third party defendant, it stops all payment which would be made at that place, but when he owes money outside of France, he must have time to notify his agents or representatives who are in the foreign country, to pay the judgment. Before the expiration of this time it would be unjust to blame him, if his agents paid this money for him in ignorance of the garnishment which is found afterwards not to have any effect.

A garnishment says Dalloz (Rép. vo. Garnishments No. 9) is distinct from all other kinds of judgments in that it can only be exercised against things which are outside of the possession of a debtor. That is its essential character. But one of the means of executing judgments and of seizing movables in the possession of a third party is by garnishment after judgment (C.C. art. 670). It has the effect of placing the goods and debts which are owing from a third party under the control of the Court, and of sequestering the corporeal objects under this control so that the third party is constituted a guardian of them for the time being (C.C. art. 680).

Dorion, J., in a dissenting judgment in *Gault* v. *Robertson* (1877), 21 L.C.J. 281, has expressed the following opinion on the subject: "This Court has no more power over the property and effects situated in Ontario than if they were in China or in any foreign country."

According to this view, our Courts can only attach the goods or debts which are situated in the Province of Quebec. I conclude from that that if same goods situated at first in Ontario happen

to be brought at a given moment into Quebec in the possession of a third party who is passing through Montreal, our Courts have power to issue a garnishee order. For example, I suppose that the third party was in our case a person who was passing through Montreal having in his cravat a diamond of great value belonging to the defendant, then the plaintiff could, according to this view, attach it in his hands, because the diamond pinned to the defendant's cravat was no longer in Ontario, but in Quebec. These principles are followed in France (Dalloz No. 222):—

But if the third party has a domicile in France, although he does not reside there habitually, the existence of this domicile will permit of a valid service of a writ of attachment. When there is a question of a lien, a preference, or an execution against moveables of prohibiting their alienation or of pronouncing or declaring a moveable succession in a case of escheat for the benefit of the public treasury, or finally in the case of prohibiting the export of moveables, in all these cases the law of the place where the moveables are in fact found must be applied. That which is said of moveables applies not only to corporeal moveables but also to incorporeal ones for the same reasons.

Demolombe (No. 96, sub-title p. 103): "With the result that moveables considered individually are only governed by the law of their actual situation."

But the law applies to incorporeal goods also (C.C. art. 374). An active debt is an incorporeal moveable. The salary owing by the third party to the defendant is an active debt, a debt which follows the person who owes it. This debt is attached more closely to the person who owes it than the diamond pinned to a cravat. If then this person is found to be in the Province of Quebec, the debt which he owes is there with him. Our Courts have power to assume control over this debt which accompanies the person of the debtor wherever he goes.

In England the same principles prevail. We find in Dicey on Conflict of Laws, 2nd ed. 1908, p. 709, the following:—

First. English lawyers give the widest possible extension to the meaning of the term "procedure." The expression as interpreted by our Judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whole field of practice; it includes the whole law of evidence, as well as every rule in respect of the limitation of an action or any other legal proceeding for the enforcement of a right, and hence it further includes the methods, *e.g.*, seizure of goods or arrest of person, by which a judgment may be enforced.

Secondly. Any rule of law which solely affects, not the *enforcement* of a right, but the *nature* of the right itself, does not come under the head of procedure. Thus, if the law which governs, *e.g.*, the making of a contract, renders the contract absolutely void, this is not a matter of procedure, for it

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affects the rights of the parties to the contract, and not the remedy for the enforcement of such rights.

The plaintiff, by his garnishment, far from attacking the nature of the right of the defendant against the third party, desires on the contrary, that it be respected so that he can seize the fruits of the defendants labour which are owing to him by virtue of a hiring contract for personal services, namely, his salary, which is in the possession of a third party domiciled here, and that it be placed under the control of the Court before which both parties are regularly found. To sum up my opinion on the question submitted in this action, I would say that a distinction must be made between corporeal goods and incorporeal goods which consist of rights or debts. When it is a question of the first class of goods, our Courts cannot order them to be given up by a third party when the corporeal goods are not *de facto* under their jurisdiction. If the third party possesses goods out of the jurisdiction of our Courts, *e. g.*, in another Province of the Dominion, although the corporeal goods are in fact the property of a defendant against whom a judgment has been rendered by our Courts, nevertheless such a third party cannot be called upon to bring these goods into our Province so that they may be sold here, according to our laws of procedure and of execution of judgments. In this case the judgment creditor can only proceed by an action to declare an executory judgment in the Province where the corporeal goods are situated. On such a judgment the Court of the Province where the corporeal goods are situated will order a sale after judgment according to the laws of procedure of that Province.

But when, as in this case, it is not a question of corporeal goods or rights, but of an incorporeal right or debt owing by a third party to defendant against whom our Courts have rendered a judgment, then as it is not a question of a sale of corporeal chattels but only to declare valid a judicial assignment in favour of the plaintiff of an incorporeal debt due by the third party, such assignment resulting from a garnishee order (C.C.P. art. 692). Our Courts have in this case, jurisdiction over this third party, who owes this money, although the debt is owing to the defendant by virtue of a contract made in a foreign country, provided that the defendant and the third party have been legally summoned before our tribunals. In this case the defendant and the third party have

been legally summoned before this Court, and in fact have expressly accepted our jurisdiction.

The third party, a debtor of the defendant, does not suffer any prejudice through this garnishment, nor through the fact that it is absolved of its obligation in Montreal instead of in Vancouver. The judgment in declaring the garnishment valid, operates as a judicial transfer of the debt to the plaintiff, but it respects the terms of the contract; the third party can only be compelled to pay according to the terms of his argeement. If part of the debt is owing, judgment will be entered for this amount, and if the balance is not yet due according to the terms agreed on, at the request of the plaintiff, the garnishment is declared to be valid and binding, according to the terms and at the periods agreed on in the contract between the defendant and the third party. The defendant cannot suffer any prejudice either. No prejudice has been proven.

In these circumstances, I am of the opinion that the judgment of the Court below, which only gave approval to the principles of rights expressed here, should be confirmed with costs.

Since writing out these notes, the Court of Revision has come to a like decision, in a case of *Perkins* v. *Berman and Regal Films* (1918), 56 Que. S.C. 28, and the plaintiff-litigant refers to the authorities there mentioned and the law quoted.

GREENSHIELDS, J.:—The learned counsel for the defendant gives the Court the benefit of a number of citations from many learned judgments rendered both near and far. If I did not feel myself bound to distinguish these judgments from the present case, I would readily follow, but, with all respect, I must renew the expression of my opinion made at the argument at Bar, that it is not a case involving a question of civil rights as existing in the different Provinces, and as defined by the B.N.A. Act, but is purely and simply a question of jurisdiction of the Montreal Court.

Greenshields, J.

Let it first be observed that there is no statement in the record as to what the right of the defendant would be under the law of British Columbia. There is no proof of what the law of British Columbia is under circumstances as disclosed in the record. Therefore, in the absence of proof, we must assume, and I do assume, that the law of the Province of British Columbia is the same as the law of the Province of Quebec.

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We, therefore, have this situation: we have a tiers-saisie summoned before a Court that has complete jurisdiction, so far as the tiers-saisie is concerned; that tiers-saisie makes a declaration, which under our law amounts to a declaration of indebtedness. The defendant is legally summoned before the Montreal Court upon these proceedings, and does appear before the Montreal Court in these proceedings, and does not except to the jurisdiction. Therefore, and finally, we have a tiers-saisie declaring before this Court its indebtedness to a judgment debtor, the defendant, who happens at the time being to reside in British Columbia, and that indebtedness in law arose from a contract of engagement made in the City of Toronto, through what is called, the "Head office" of the bank.

I adopt the statement of de Lorimier, J., that while the Montreal Court would be without power to order the sale or disposition of movable property wholly situated in another Province, that the Montreal Court has full jurisdiction to order a tiers-saisie, who is properly before this Court, to pay to the seizing creditor, the plaintiff, moneys that it, the tiers-saisie, owes to the judgment debtor, the defendant, who happens to reside in another Province; and for that reason I would confirm the judgment *a quo* with costs.

The only case in our Court which would seem to be in conflict with the opinion expressed herein is the case of *Goodhue* v. *O'Leary & The Boston & Maine Railway* (1900), 17 Que. S.C. 201, a case in the Circuit Court for the County of Stanstead, White, J. In that case it was the tiers-saisie and not the defendant who raised the objection, and to that extent the case is distinguishable from the present.

The confusion into which the counsel for the defendant has fallen seems to be in the difference between domicile and residence. The defendant never changed his domicile: he did change his residence to another Province.

The counsel for the defendant would seem to seek comfort from the provisions of art. 6 of our Civil Code. It does provide that moveable property is governed by the law of domicile. What it means, I suppose, is that a person residing in Lower Canada, but not having his legal domicile there, the laws of his domicile govern his movable property, even if that movable property is

situated within the Province of Quebec. But the section adds that the law of Lower Canada is applied whenever the question involved relates to the distinction or nature of the property, to privileges and rights of lien, contestations as to possession, the jurisdiction of the Courts, the procedure and the mode of execution and attachment, etc.

Now once more, and at the risk of repetition, let me emphasize that, so far as this record shews, the amount of money seized is due by the tiers-saisie in Montreal: it could not be otherwise. It may be that tiers-saisie would pay it in Toronto: as a matter of convenience it might be paid in Vancouver; but so far as this record shews, the amount is due by tiers-saisie in Montreal and before this Court. If that be a correct statement of fact, then in my opinion, the whole matter is disposed of.

Much as I would like to give this case the international importance the counsel would apparently wish, I can see in it nothing more than a simple question of procedure and jurisdiction, and that entirely governed by the law of this Province.

Archer, J.

ARCHER, J.:—The rules concerning the service of ordinary writs of summons apply to the seizure by garnishment, art. 679 C.C.P. The garnishee has an office in the Province of Quebec, to wit, in the City of Montreal, where the writ was duly served. The garnishee is within the jurisdiction of this Court.

No exception to jurisdiction was taken, neither by the defendant, nor by the garnishee. The garnishee declared that it was indebted to the defendant in the sums therein mentioned.

We have not here to deal with property or effects situated in the Province of Ontario, but simply with the declaration made by the garnishee that it was indebted to the plaintiff in the sum mentioned in the said declaration. We have to deal with this case as presented.

Seeing the case of the *Bank of B.N.A.* v. *Stewart* (1892), 1 Que. Q.B. 56; *Chapman* v. *Clark* (1859), 3 L.C.J. 159; *Perkins* v. *Berman & Regal Films* (1918), 56 Que. S.C. 28, I am to confirm.

Appeal dismissed.

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Re RICHER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. November 28, 1919.

WILLS (§ III G—125)—CONSTRUCTION—DEVISE AND BEQUEST TO WIDOW—"FREE USE" OF ESTATE FOR LIFE—REMAINDER IF ANY TO CHILDREN—APPLICATION TO REALTY AND PERSONALTY.

A devise and bequest of the testator's realty and personalty to his widow who is to have the "free use" of the same for life, with what remains "unspent" to the children, has the effect of giving the widow a life estate only in the realty, with remainder to the children in fee, and whatever remains of the personalty on the widow's death will go to the children.

[*Re Johnson* (1912), 8 D.L.R. 746, 27 O.L.R. 472, approved.]

Statement. MOTION by the widow of Honore Richer, deceased, for an order determining a question as to the true interpretation of the will of the deceased.

The judgment appealed from is as follows:—

Motion for construction of the will of Honore Richer.

Mr. St. Jacques, who appeared for two of the testator's children on the argument, was then authorised to represent the other children as well, all being in the same interest.

What is to be determined is, whether the testator's widow takes, under his will, an absolute interest in his estate or only a life-interest. The question is one of construction, to be derived from the language of the will itself. The testator gave, devised, and bequeathed to his wife "the free use of all my estate both real and personal for her lifetime."

Had this been the only reference to the interest given her, doubt would not have arisen; but this provision in her favour is immediately followed by this other: "After my said wife's decease the balance of my said estate that will remain unspent, if any, I give, devise, and bequeath to my four children to be divided among them in equal shares."

The testator evidently contemplated his wife "using" and "spending" the estate at her discretion and without restriction as to amount or the purposes for which she was empowered to use or apply it. Reading the two provisions together, the true construction seems to be that, given this unqualified right to use and spend the estate, the interest she then acquired was not a mere life-interest or a life-interest with power of appointment over the corpus, but an unrestricted and absolute interest. What the four children would, on their mother's death, take, is, in view of the

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above disposition in her favour, too uncertain to create an enforceable trust in their favour.

There are many reported decisions on the construction of wills, in language nearly but not altogether similar to that employed here; but I can find none binding me to an opinion different from that I have already expressed.

On the argument an affidavit of the person who, on the testator's instructions, drew his will, was offered in evidence to shew what was his intention. That evidence is not admissible, and I did not accept it. The question is not what the testator intended, but what was his intention expressed in and to be derived from the will itself.

Order accordingly; costs of the motion out of the estate.

C. A. Seguin, for appellants; *E. R. E. Chevrier*, for respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The testator gave to his widow the free use of all his property, real and personal, for her lifetime; and he gave to his four children, to be divided among them in equal shares, the balance of his said property "that will remain unspent," after his widow's death, "if any."

Kelly, J., on a motion for the construction of the will, held that the widow took the whole property absolutely; that the gift to the children was void for uncertainty.

That ruling is obviously opposed to the testator's will: he intended, and said plainly, that his children were to get all that remained unspent by their mother, if any.

It has always been impossible for me to understand why the Court should not permit such a will to take effect; what very good reason there could be for considering a gift, which those concerned might find no difficulty in understanding, or giving effect to, void for uncertainty; and, in such a case as this, if what the widow is to take, in addition to a life-estate, is too uncertain, why it, not the gift over at her death, should not fail.

Most of the cases, in which the gift over failed, were cases in which, if given effect, it would cut down a prior certain gift, or else there were some special circumstances supporting the ruling.

The more recent cases in this Province, as well as elsewhere, incline more towards giving effect to that which the testator desired, and which he plainly said was his will: see *Bibbens* v. *Potter* (1879), 10 Ch. D. 733; *British and Foreign Bible Society* v. *Shapton* (1905), 7 O.W.N. 658; *Re Gouinlock* (1915), 8 O.W.N. 561; and *Matte* v. *Matte* (1915), 8 O.W.N. 605.

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Meredith, C.J.C.P.

The word "unspent" is applicable to many more things than money, things which would be unspent, as for instance household furniture, as long as they remained serviceable or useful.

If that were not so, the implied gift in question might be held to be applicable to money only, and the widow's right to spend confined to it.

My understanding of the will is that the widow is to have the use of all for her life, and all that remains at her death, unspent, in the sense of not worn out as to goods and chattels, and as to money all that is unexpended, if any, in both cases, is to go to the children. The word is quite inapplicable to the land.

The word "unspent" is applicable to all parts of the estate, except land, for all may be spent in the sense of "worn out," except money, and it only can be spent in the sense of "parted with," in exchange for other things; and in the way in which it is applicable to each it should be applied to each. It would be making, not interpreting, a will, to adjudge that, under the word "spent," land and goods could be sold and the money realised spent.

It ought to be too plain for any kind of misunderstanding, that the testator did not mean that the widow might, immediately after his death, sell all and squander the money realised. Yet the judgment in appeal gives her that power. If he meant to give her the estate in that way, he knew how to say so, and would have so given it.

I am in favour of allowing the appeal, and of giving to the word "unspent" the meaning I have indicated.

What is meant in such cases as this, *as* I understand it, is set out more fully in the *Shapton* case, 7 O.W.N. 658, before referred to.

There will be no order as to costs.

Riddell, J.

RIDDELL, J.:—The late Honore Richer made his last will and testament which (leaving out formal parts) reads as follows:—

"I direct that all my just debts, funeral and testamentary expenses, be paid and satisfied by my said executor as soon as may be convenient after my decease.

"I give, devise, and bequeath to my wife, Celanie Richer, the free use of all my estate both real and personal for her lifetime.

"After my said wife's decease the balance of my said estate that will remain unspent, if any, I give, devise, and bequeath to my four children to be divided among them in equal shares."

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Riddell, J.

His estate consisted of a small house and lot, worth about $500, and notes and cash about $1,400 or a little less.

Upon a motion at the Ottawa Weekly Court, my brother Kelly held that the widow takes "an unrestricted and absolute interest" in the said estate, and the children take nothing. The children now appeal.

Many cases were cited to us as deciding that "the free use" of an estate gives the beneficiary a fee simple in the estate: and it is quite beyond question that these words can bear this interpretation. But here there is in plain contemplation of the testator the chance, if not the expectation, of a "balance" remaining of the estate at the time of his widow's death. This would be quite inconsistent with the hypothesis that she took everything.

In *Coward* v. *Larkman* (1888), 60 L.T.R. 1, the majority of the House of Lords had occasion to consider words not dissimilar: and I prefer the judgment of the majority to the minority judgment of a very able and learned Lord Chancellor.

The balance is what "will remain unspent"—one spends money, not land—and the word "unspent" is quite inappropriate to land, while wholly applicable and appropriate to money.

The cognate word "expend" has the connotation of paying out, if not quite the original and etymological sense of weighing out—and "spend" implies the same conception. Selling land is no more spending it than is mortgaging "expending:" see *per* Kekewich, J., in *In re Marquis of Bristol's Settled Estates*, [1893] 3 Ch. 161, at p. 166.

I am of opinion that the widow, while she takes a life-interest in the land, cannot dispose of it, cannot "spend" it—and that the children take on her death.

As to the personalty, the late Chancellor's luminous judgment in *Re Johnson* (1912), 8 D.L.R. 746, 27 O.L.R. 472, is entirely correct, and it covers this case.

I would allow the appeal without costs here and below.

Middleton, J.

MIDDLETON, J.:—The widow is given "the free use of all my estate both real and personal for her lifetime," and "after my said wife's decease the balance of my said estate that will remain unspent, if any, I give, devise, and bequeath to my four children to be divided among them in equal shares."

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Middleton, J.

This case falls within the decision in *Re Johnson*, 8 D.L.R. 746, 749, 27 O.L.R. 472, 477: "Property may be given for life with a power to expend capital, followed by a valid gift over of the unexpended part." In that case the Court adopted the statement of James, L.J., in *In re Thomson's Estate*, 14 Ch. D. 263, 264: "The widow took nothing but an estate for life with a full power of enjoying the property in specie, so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie."

Here the widow may have the money and if need be spend it, but the land, which she cannot spend, must remain, and in it she has a life-estate only.

Each party may well bear its own costs of the appeal.

Latchford, J.

LATCHFORD, J., agreed with MIDDLETON, J.

Appeal allowed.

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McCABE v. CURTIS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 22, 1919.

APPEAL (§ XI—720)—TO SUPREME COURT OF CANADA—SPECIAL LEAVE—EXCEPTIONAL GROUNDS.

The mere fact of a difference of opinion, on a question of fact, among the members of the Court of Appeal for a Province is not a sufficient reason for granting special leave to appeal to the Supreme Court of Canada.

[*Milligan* v. *Toronto R. Co.* (1909), 18 O.L.R. 109, followed.]

Statement.

MOTION for leave to appeal to the Supreme Court of Canada from a judgment of the Saskatchewan Court of Appeal, (1919), 48 D.L.R. 767, in an action for seduction. Refused.

J. N. Fish, K.C., for appellant.

W. F. Cameron, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Newlands, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—In this case the appellant asks leave to appeal to the Supreme Court of Canada, the amount in controversy not exceeding $1,000. He also asks to have the time for appeal extended, 60 days having expired since our judgment 48, D.L.R. 767.

The rule in question provides that no appeal shall lie in such a case unless special leave is granted.

Now are there any special grounds in this case?

The trial Judge decided on a disputed question of fact that

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defendant seduced the plaintiff and granted her damages. This Court was equally divided upon the question of fact as to the defendant's liability. We were all of the opinion that certain evidence was inadmissible, but quite apart from that two Judges held that there was evidence shewing that defendant was liable.

The ordinary principle that the Court will not reverse the trial Judge on a disputed question of fact, is, in my opinion, applicable in this case, and the fact that the Court of Appeal was equally divided in their conclusions drawn from this disputed testimony emphasizes the fact that there was a disputed question of fact decided by the trial Judge.

I am of the opinion that the decision of the Court of Appeal in Ontario in *Milligan* v. *Toronto R. Co.* (1909), 18 O.L.R. 109, applies to this case, and that leave to appeal should be refused.

Lamont, J.A.

LAMONT, J.A., concurs with NEWLANDS, J.A.

Elwood, J.A.

ELWOOD, J.A. (dissenting):—This action, which is one for seduction, was tried before Bigelow, J., who awarded damages to the plaintiff, for the seduction of his daughter. Upon an equal division of this Court the appeal was dismissed with costs. The defendant now moves for leave to appeal to the Supreme Court of Canada.

With, I confess, considerable hesitation, I have come to the conclusion that leave to appeal should be granted. I have come to this conclusion because, upon reading the evidence, it is quite apparent that the child which was born, and, as claimed, as the result of the seduction, was born a very considerable period prior to the date upon which it would under ordinary circumstances be born if the defendant were its father. The evidence of Dr. Corbett, to my mind, very clearly establishes that fact, and his evidence also establishes the fact that if it were prematurely born there would be some evidence of that apparent at its birth. I am of the opinion that the onus was cast upon the plaintiff of shewing that the child was prematurely born. In the absence of evidence that it was prematurely born the presumption is that it was born after the usual period of gestation, and consequently the defendant cannot be the father. There was no evidence that the child was born prematurely. The question of upon whom falls the onus of proving the premature birth was not argued before us on the appeal.

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Elwood, J.A.

The trial Judge in his judgment says:—

Mr. Fish argued that the birth taking place before the usual period of gestation would raise a presumption against the seduction on the date alleged. But Dr. Corbett stated that it was not an impossible birth, but occurred before one would expect it. There is no evidence to shew whether the child is a nine months' child or not. The improbability on this point, to my mind, is not so great as to off-set the probabilities arising from the matters previously referred to.

The trial Judge does not seem to have considered the question of upon whom, under the circumstances of this case, falls the onus of proving that the birth was premature. He seemed to have been satisfied to rest his judgment upon the fact that a child might be born before the usual period of gestation had expired. If the child was not of premature birth, then the plaintiff's case undoubtedly fails, and if the onus is on the plaintiff to shew that the child was born prematurely the plaintiff has failed on that onus. This question of onus is, I apprehend, one of law, and is, I think, a proper question to be submitted to the Supreme Court of Canada. I would therefore grant leave to appeal.

Motion refused.

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FULLER v. BROMPTON PULP and PAPER Co.

Quebec Court of Review, Demers, Weir and de Lorimier, JJ. March 15, 1919.

WATERS (§ II D—95)—DAM—FLOODING WATERS—OVERFLOW—DAMAGE—PRESCRIPTION—QUEBEC STREAMS COMMISSION—C.C. ARTS. 503, 1053, 2261, R.S.Q. 1909, ARTS. 7295, 7296.

The owner of lands damaged by the overflow of water caused by the construction of a dam on a river can claim damages against the owner of the dam, notwithstanding art. 2261 C.C. Nor does the authority given by Parliament to the Quebec Streams Commission in relation to the damming of the river or the acquisition of works thereon, interfere with the rights of the owner whose lands are damaged or his right to claim further damages in the future.

Statement.

APPEAL from the judgment of the Superior Court (Que.) in an action for damages for injury to land. Affirmed.

The judgment appealed from is as follows:—

The action is in damages for $1,000, based on the following facts: The plaintiff is the owner of certain tracts of land on the shores of Lake Aylmer and St. Francis River. The defendant possesses, below plaintiff's properties, several mills, and across the river a dam to hold back and store the water for the use and benefit of its mills. The plaintiff alleges that this dam raises the water beyond the banks of the river and overflows his lands.

The defendant pleads that its dam and mills existed for more than 50 years, and that the company has done nothing, since the plaintiff acquired his properties, to cause said dam to hold back more water than before. More-

over, by virtue of the provisions of the Provincial Statute 5 Geo. V. 1915, ch. 4, certain powers were conferred upon a Commission, and the said Commission is proceeding to carry out works, and is acquiring works and improvements on the St. Francis River and tributary lakes, including the dam in question in this cause, and has entered into a contract for the purpose of building a storage dam at the outlet of the St. Francis Lake, which said dam will be built during the summer of 1916, and will have, amongst other effects, that of decreasing the flow of water during the spring freshets, the high water of the spring complained of by the plaintiff being caused, not by the said dam, but by the cutting of the forests and the sudden melting of the snow, and the more rapid precipitation of the water occasioned thereby, and the building of said dam, and the regulation of said water will prevent the extreme high water of the spring freshets.

The Superior Court maintained the actions for $500 in the following terms:—

Considering that, for the 5 years preceding the bringing of this action, which was commenced on September 29, 1913, and for many years before that, *i.e.*, since August, 1898, the plaintiff was the owner of the 3 lots concerning which damages are claimed in the present action.

That during that time and for a long time previous to that, the defendant owned a dam thrown across the St. Francis river which held and dammed up its waters as well as that of its tributaries, including Aylmer lake;

That the said lots are situated above the said dam;

That the defendant has always used the said dam to hold back water which it needed to feed the mills which it owned a little lower down the said river;

That in several years the defendant, in order to better hold and dam up the water which it needed, had raised the sides of the said dam several feet;

That during the 5 years aforesaid, the water thus dammed up by the defendant had risen and overflown on the said plaintiff's lots and had flooded them to a great extent;

That the plaintiff limits the damages which he suffered to the last 5 years, while at the same time claiming future damages;

That the flooding of the plaintiff's lots, which continued each year in the course of the said last 5 years, from the spring until late in the summer, had deteriorated and damaged them considerably, and had caused them to lose much of their value as building lots;

That it is established that these lots, before the flooding which the plaintiff complains of, were purchased by him for the purpose of speculation, that after being purchased at a low price, they then rose in value, and that before, and but for the flooding in question, and the damage which they suffered thereby, they were, and would be, worth at least $100 each.

[The recitals which follow only deal with the evidence of witnesses who have estimated the damages, and with other questions of fact.]

That the said sums of $325 for deterioration of the lots, $50 the cost of the wharf, $50 for repairs, and $75 for moving back the buildings on the lots, make up altogether the sum of $500 which the plaintiff has a right to, and which paid in a lump sum, is a sufficient compensation for all damages, past and future, by reason of the maintaining of the said dam by the defendant;

That this is not a case where art. 2261 C.C., applies, relating to prescription, as there is no question here of damages caused by a delinquency or

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quasi-delinquency of the defendant, but of damages resulting from an act rendered legal by a statute which gave the defendant the right to build the dam in question, free from responsibility for any damages suffered by riparian owners, arts. 7295 and 7296 R.S.Q., 1909.

That the defendant has not acquired and could not acquire a right by prescription to maintain the dam in question;

That there should be no reduction of damages suffered by the plaintiff by reason of his erecting his cottage and buildings in the place where he has erected them;

That the defendant has not proved that the plaintiff has committed any wrong which would render him liable for any imprudence in erecting his cottage at the said place;

That it has not been established that the plaintiff could have foreseen or had reason to believe that in placing his cottage and his other buildings at the place where they are, he exposed himself to the suffering of the damages complained of; That the plaintiff in exercising his right to the enjoyment of his property in an absolute manner, could in the present case, without being subject to any reproach, build his cottage wherever he pleased; art. 406 C.C. That the agreement between the defendant and the Quebec Streams Commission, to which the plaintiff was a stranger, could not absolve the defendant from the consequence of his acts which have given rise to damages claimed by the plaintiff; That the defendant has alleged that the works constructed to overcome the said inundations were done in the course of the summer of 1916, but that neither in the investigation which began on October 17, 1916, nor since then, has it established, or tried to establish, that these works were done; That, moreover, the object which the said Commission had in view in building these works to diminish the inundation of waters in the lake and in the St. Francis river, and to diminish the floodings which the riparian owners had suffered and would suffer, could never be carried out:

For these reasons the actions of the plaintiff is allowed, the defendant's statement of defence is thrown out, and the defendant is ordered to pay the plaintiff the lump sum of $500 for all damages past and future, to which he has a right by reason of the maintenance by the defendant of the said dam, and for the reasons mentioned in the action, with interest computed from this day, and with costs.

Campbell and *Gendron*, for plaintiff.

Cate, *Wells* and *White*, for defendant.

The judgment of the Court was delivered by

Demers, J.

DEMERS, J.:—I do not believe that under the circumstances the Judge has done wrong in allowing damages, once and for all. It is not proven that the defendant's works are temporary. Moreover the defendant should include in his damages the damage done by the neighbouring owners. But the plaintiff had no recourse against the Government unless the latter consented to it. As to the amount awarded, it seems to me to be justified by the evidence. For these reasons I would confirm the judgment appealed from with costs in the two Courts. *Judgment accordingly.*

BRAGG v. ORAM.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. November 28, 1919.

COSTS (§ II—28)—SCALE—ACTION IN SUPREME COURT—PROPER JURISDICTION IN COUNTY COURT—COUNTY COURTS ACT, R.S.O. 1914, CH. 59, SECS. 22 (1b) AND 28—SET-OFF—RULE 649.

When an action has been brought in the Supreme Court of Ontario, which might properly have been brought in a County Court by virtue of the County Courts Act, secs. 22 and 28, the costs will be taxed on the County Court scale, and the usual set-off under r. 649 granted.

[*Martin* v. *Bannister* (1879), 4 Q.B.D. 491; *Stiles* v. *Ecclestone*, [1903] 1 K.B. 544, referred to.]

Statement.

APPEAL by the defendants from the ruling of the principal Taxing Officer that the plaintiff's costs of this action, which was brought in the Supreme Court of Ontario, should be taxed on the scale of that Court.

The judgment appealed from is as follows:—

The plaintiff brought this action for an injunction against the defendants to restrain them from blocking, ploughing up, sowing grain upon, or in any other way interfering with the use of certain streets, and for a mandatory injunction requiring them to restore the said streets to the condition in which they were prior to the defendants taking possession thereof, and for damages for the loss sustained by the plaintiff by reason of the blocking of the streets.

In his statement of claim the plaintiff alleges that he is the owner of lots 663 to 688 inclusive, and lots 778 to 803 inclusive, according to a plan of subdivision of the west part of lot 67, concession 1, west of Yonge street, registered as No. 133 in the registry office for the north riding of the county of York, and that the defendants have closed the said streets shewn on the plan and interfered with his use thereof, by ploughing up the same and sowing grain thereon and making the same impassable, "thereby stopping the use of the said streets by the plaintiff and his tenants in going to and from the premises owned by him."

The judgment disposing of the action provides "that the defendants, their servants, agents, and workmen, be and they are hereby perpetually restrained from ploughing up or otherwise obstructing those parts of Madison avenue and Laurier avenue lying between Bathurst street and the east limit of Hastings street, and those parts of Main street and Hastings street lying between the south limit of Laurier avenue and the north limit

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of Madison avenue, as shewn on plan No. 133," and that the defendants should pay to the plaintiff his costs of the action.

Upon the taxation of the plaintiff's bill of costs, rendered on the Supreme Court scale, the Taxing Officer was proceeding to tax the bill on that scale, when objection was taken to his doing so on the following ground:—

"The defendants object to the taxation of the said bill of costs on the Supreme Court scale, on the ground that the plaintiff's action was of the proper competence of a County Court, and the Judge at the trial made no order that the costs should be on the Supreme Court scale, and the defendants object to the ruling of the said Taxing Officer that he is not entitled to a set-off for so much of his costs on the Supreme Court scale as exceeds the taxable costs of defence which would have been incurred in the County Court."

Evidence was offered on behalf of both plaintiff and defendants before the Taxing Officer as to the value of the lands of the plaintiff which were in question, and it disclosed that the lands, including the buildings, were worth from $700 to $1,800.

The Taxing Officer, in his reasons for determining that he should complete the taxation on the Supreme Court scale, as he did, says:—

"In this case I am asked to assume that, because of the comparatively low value of the land, any damage arising must necessarily have been trivial, and to find that in fact the judgment is one for nominal damages, which could have been recovered in a County Court. I fail to see why I should assume or find anything of the kind. It is true that the statement of claim asked for unstated damages, but this claim was not pressed, and would seem to have been entirely disregarded at the trial, where the action was proceeded with as if for an injunction only, and judgment delivered accordingly."

The contention of the defendants on this motion by way of appeal from said taxation is that the action was one for injury to land coming within the County Courts Act, R.S.O. 1914, ch. 59, sec. 22:—

"(1) The County and District Courts shall have jurisdiction in:— . . . (c) Actions for trespass or injury to land where the sum claimed does not exceed $500, unless the title to the land

is in question, and in that case also where the value of the land does not exceed $500, and the sum claimed does not exceed that amount."

I am of the opinion that the Taxing Officer was right in his conclusion that this action, though there was an incidental claim for damages, was in the main one to prevent the defendants from obstructing, to the detriment of the plaintiff, certain streets or highways leading to his land and affording access thereto. The injunction which was asked to restrain the defendants from this interference was the main thing in question. The judgment at the trial seems to make this plain.

I do not think, therefore, that clause (*c*) is applicable or conclusive against the plaintiff.

Clause (*i*) of sec. 22 (1), which is as follows, "All other actions for equitable relief where the subject-matter involved does not exceed in value or amount $500," would appear to be the one applicable, if any. But it is plain that it does not so apply, because the subject-matter involved is the land of the plaintiff, which is in excess of $500 in value.

I think the Taxing Officer proceeded on the right principle, and that the appeal must be dismissed with costs.

W. E. Raney, K.C., for appellants; *T. R. Ferguson*, K.C., for respondent.

MIDDLETON, J.:—The sole question upon this appeal relates to the scale of costs. The defendants contend that the action might have been brought in a County Court; and so, under Rule 649, the costs awarded must be taxed upon the County Court scale with a right of set-off. Middleton, J.

The plaintiff purchased certain lots laid out upon a subdivision plan, and the defendants have now acquired title to the remaining lots. The location is distinctly suburban, and the subdivision scheme was the dream of a promoter having a vision which has not ripened into realisation. The defendants have ploughed up the land, villa lots and streets, which are visible to the eye upon the plan, but not upon the ground. The plaintiff's land is in the centre of the block, and upon it is an old house. The mode of access to it when the place was a farm was over a farm-lane, but this lane is now owned by the defendants. The mode of access on paper is over the streets laid out upon the plan,

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and this is the only lawful means of access, and the one in actual use. If the defendants could acquire title to this house and land, the whole place could become a farm once more, but so long as the plaintiff refuses to sell he has the right to have these streets remain. The defendants having ploughed the highway, the plaintiff alleges this to be a nuisance, interfering with his rights in such a way as to entitle him, as particularly prejudiced, to maintain an action. Both parties assert that these streets are public highways, and for the purpose of this case I assume this to be the fact.

At the trial judgment was given in favour of the plaintiff, awarding an injunction restraining the defendants from further ploughing the streets or otherwise obstructing access to the plaintiff's land.

Upon the record it is hard to see what issue there was for trial. The plaintiff's title is admitted, the right to use the streets is not denied. All that is said is that it was not practicable to farm the defendants' lots without ploughing up the streets, and that the defendants were ready to permit the plaintiff to use the old farm-lane if he objected to going on the ploughed land.

The learned Judge below, affirming the ruling of the Taxing Officer, held that the action could not have been brought in a County Court, because the action concerned the plaintiff's land, which was worth over $500.

The case was argued before us as though it came under clause (*c*) of sec. 22 (1) of the County Courts Act or under clause (*i*) of sec. 22 (1).

I think that the action comes under clause (*b*), "Personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed $500," and that the action is a personal action within the meaning of that clause. It is nothing more than an action for damages for an obstruction to a highway and for the abatement of the nuisance caused by the obstruction.

Under sec. 28 the Court (County Court) can grant all appropriate remedies in any action where the cause of action is within its jurisdiction.

An injunction or a mandatory order is a remedy, and it is not a cause of action. At one time these remedies had to be

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sought in the Court of Chancery, but under the Common Law Procedure Act the Common Law Courts were given the right to grant injunctions, and by the Judicature Act of 1881 the power to grant all appropriate remedies was conferred upon the County Courts. This provision has been now transferred to the County Courts Act, and, modified in form, appears as sec. 28.

Martin v. *Bannister* (1879), 4 Q.B.D. 491, a decision of the Court of Appeal, deals with the whole subject, and is conclusive.

Clause (*i*) of sec. 22 (1) is not in this way rendered meaningless, as it applies to actions to set aside conveyances, to actions for specific performance, and all other actions for equitable relief where the subject-matter does not exceed in value the sum of $500.

So far as *Ross* v. *Vokes* (1909), 1 O.W.N. 261, is in conflict with the views expressed, it must be regarded as overruled by this decision. In the days of technical pleading the distinction between a trespass to the plaintiff's lands and a nuisance upon a highway interfering with access to his abode would have been regarded as too obvious to permit of discussion.

The appeal must be allowed with costs.

Riddell, J. Latchford, J. Meredith, C.J.C.P.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P.:—The single question involved in this appeal is: whether this action is one within the jurisdiction of the County Courts.

The action is entirely in respect of common law rights. The complaint is only of injury to the plaintiff's land, an obstruction of his right of access to it from a highway, such obstruction being a nuisance in such highway: and the redress sought is damages and an injunction.

The case is one of rather a trivial, and altogether a litigious, character.

The plaintiff is the owner of some lots in a subdivided plot of land, of most of which lots the defendants are still the owners. The highways in question had not been made into roads but still remained much as if part of the plot.

In war-time the defendants desired to make their land productive, and so ploughed it and put in a crop; and in doing so were obliged to plough through these nominal highways.

The plaintiff complained; and the defendants pointed to the

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impossibility of cultivating the land in any other way, and to the plaintiff having no real need, nor really any use, of these ways. They did not deny any right asserted by the plaintiff, and indeed said that he could go through the crops if he wished to insist upon exercising a needless right.

No question of title of any kind was in any way raised; on the contrary, the defendants admitted all the property-rights which the defendants claimed, as well as their own wrong in law in ploughing up the ways, objecting only, apparently, to the plaintiff's unreasonableness in going to law about such rights, under all the circumstances.

And the plaintiff's damages were so little in fact, if really any more than nominal, that he proved none, and took judgment for an injunction only: and I feel bound to say that I am unable to perceive why any such relief should have been sought or granted, as the thing complained of came to an end with the harvesting of that crop, and there was no suggestion, nor any ground for any reasonable suggestion, that the defendants threatened or intended to put in another; a thing not to be thought of after such litigation as this, and the position which the defendants took in and out of it.

It is said that in such a case as this an injunction is granted when and only when the complainant is specially injured, and it is necessary to preserve his rights from irreparable injury, in a plain case, having due regard to the public interests, and where he is not estopped: see the cases collected in the Cyclopædia of Law and Procedure, vol. 37, pp. 253-5.

The action is a personal action at common law for damages with a claim for the additional relief of an injunction, and none the less so though some may put the cart before the horse and call it an action for an injunction and damages—and in such an action County Courts have jurisdiction even for trespass or injury to land when the title to the land is not in question or if in question its value does not exceed $500—when the amount claimed does not exceed $500: the County Courts Act, sec. 22 (1) (*a*) and (*c*): and they have also the additional power to grant an injunction, in such a case, under sec. 28: see *McConnell* v. *McGee* (1917), 37 D.L.R. 486, 39 O.L.R. 460.

The plain words of the Act so plainly embrace this case as to exclude any need to look for any cases upon the subject; yet,

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as it is altogether in point and conclusive on the question, the case of *Martin* v. *Bannister*, 4 Q.B.D. 491, may be referred to usefully. There it was held that an injunction in such a case as this is a remedy only. It is thus put by the Court of Appeal, affirming the judgment of the Queen's Bench Division: "If there has been actual damage, there is but one cause of action for which there are two remedies; damages and an injunction. The County Court then has power to entertain a claim for damages and at the same time an injunction to prevent a repetition of the injury." The same ruling was made in the case of *Stiles* v. *Ecclestone*, [1903] 1 K.B. 544, in which the relief claimed and granted was injunction only. The words of sec. 89, of the enactment in England under which those cases were decided, are repeated in sec. 28 of the County Courts Act here, and so those cases are precisely in point.

The appeal should be allowed, and the taxation had on the basis of the case being one within the jurisdiction of County Courts; and the appellant should have his costs throughout.

Appeal allowed.

REX v. RUSSELL.

Annotated.

MAN.

K. B.

Manitoba King's Bench, Mathers, C.J.K.B., associate Justices sitting with him by request, Macdonald and Metcalfe, JJ. October, 1, 1919.

1. BAIL AND RECOGNIZANCE (§ I—16)—SEDITIOUS CONSPIRACY—FORMER MISDEMEANOUR—CR. CODE, SECS. 14, 134, 698.

Although seditious conspiracy (Cr. Code, sec. 134) was a misdemeanour and not a felony before the abolition of the distinction between felony and misdemeanour (Cr. Code, sec. 14), there is no absolute right after committal for trial to bail either on habeas corpus or on a summary application. In either case the question of bail is in the discretion of the Court under Cr. Code, sec. 698.

[See Annotation at end of this case on Right to Bail for a misdemeanour.]

Statement.

APPLICATION on *habeas corpus* to admit to bail certain persons committed to gaol to await trial on a charge of seditious conspiracy (Cr. Code sec. 134). Application granted.

E. J. McMurray, for applicants; *A. J. Andrews*, K.C., and *F. M. Burbidge*, K.C., for the Crown.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is an application for an order to admit to bail R. B. Russell and seven others who have been

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committed to the common gaol at Winnipeg to await their trial upon the charge that they

during the years 1917, 1918 and 1919 did conspire and agree with one another and with other persons unknown to carry into execution a seditious intention, to wit., to bring into hatred and contempt and to excite disaffection against the Government and constitution of the Dominion of Canada and the Government of the Province of Manitoba and the administration of justice and also to raise discontent and disaffection amongst His Majesty's subjects and to promote feelings of ill-will and hostility between different classes of such subjects and were thereby guilty of a seditious conspiracy.

Subsequent to the commitment a similar application was made by the accused's counsel to Cameron, J., of the Court of Appeal, sitting as a Judge of this Court, and was by him refused. In the argument before Cameron, J., counsel for the accused contended that they were entitled to bail as of right, but submitted that if a Judge had a discretion to grant or refuse bail that discretion should under the circumstances be exercised in favour of the grant.

The contention that bail is a matter of right was based chiefly upon *Ex parte Fortier* (1902), 6 Can. Cr. Cas. 191, 13 Que. K.B. 251, a decision of the Court of Appeal of Quebec. In that case the accused had been committed for trial upon two charges, viz., forging of an order on a post office savings bank and theft of a large sum of money. He subsequently applied to a Superior Court Judge for bail and was refused. Later he was brought before the Court of Appeal upon a writ of *habeas corpus* and was by that Court admitted to bail. In the judgment of the Court, delivered by Wurtele, J., it is stated that in the case of indictable offences which were classed as misdemeanours before the distinction between felonies and misdemeanours was abolished by the Code, the accused is entitled to bail as of right but that in all other cases the granting or refusing bail rests in the sound discretion of the Court. This statement of the law is a mere *obiter dictum*; as it was not at all necessary to the decision of the matter before the Court. Theft, one of the charges upon which Fortier had been committed, was, before the Code, a felony. At common law forgery was a misdemeanour, but forgery of a document such as Fortier was charged with forging had been made a felony by the Forgery Act, 1861. The case before the Court was therefore one which before the Code would have been classed as felony and consequently the question of whether or not bail in the case

of a misdemeanour was a matter of right or a matter of discretion was not in issue.

Although the *Fortier* case is not binding upon me, I would be very reluctant indeed to refuse to follow a decision in point of so distinguished a Court as that of the Court of Appeal of Quebec, arising upon a law common to both Provinces but a mere dictum is not entitled to the same consideration.

In England it is said that in cases of misdemeanours bail is a matter of right: Archibald, Criminal Pleading, 112; in cases of felony there is no doubt that it is discretionary. The same rule prevailed in Canada until 1869, when by the Act, 32-33 Vic. 1869, Can. stats. c. 30, s. 53, the question of granting or withholding bail was made discretionary in cases of misdemeanour as well as in cases of felony. Manitoba had not then been taken into the Dominion, but this particular section was re-enacted in the Code and so became the law of Manitoba. That section is the prototype of s. 698 of the Code, and since its enactment both classes of crime have been on the same footing with respect to bail. I have read the judgment of Cameron, J., and I entirely agree with him on that point.

Mr. McMurray urged the somewhat novel argument that although the Court had a discretion, if the application were made summarily under s. 698, yet it had no such discretion if the application were made by writ of *habeas corpus*. In other words, that the jurisdiction of the Court depended upon the avenue through which it was approached. The object of the writ is to bring the party into Court in order that he may make his application, but the law to be administered is the same as though the application were made in a summary way. I hold therefore that notwithstanding that the offence charged is a misdemeanour, the question of bail is in the sound discretion of the Court.

Upon the question of discretion Mr. McMurray contended that the only matter to be considered was whether or not the accused, if admitted to bail, would be likely to appear for trial. I am not prepared, without much fuller consideration, to hold that regard may not also be had to questions of public safety and that the Court would not be justified in refusing the application upon the sole ground that the public safety might be endangered by permitting the accused to be at large. That

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was apparently the ground upon which Cameron, J., refused to accede to the application made to him. He was influenced by the allegation that the accused had broken the undertaking upon which they were released when first taken into custody. Affidavits by T. J. Murray, one of the counsel for the accused, and by three of the accused, William Ivens, John Queen, and George Armstrong, were read before me. These affidavits are uncontradicted, and they explain the circumstances upon which that allegation was founded. They shew that after having been bailed upon their undertaking not further to participate in the strike then prevailing, certain statements were published which placed them, as they allege, in a false light. They then went to Mr. Andrews, the prosecuting counsel, and stated that they refused to be longer bound by the undertaking, whereupon, by arrangement with him, they again surrendered into custody and were unconditionally re-admitted to bail in double the amount previously fixed. The affidavits of the three accused further state that to the best of their knowledge none of them since that time have been active in promoting strikes or disturbances, although some of them did address meetings protesting against the recent amendment to the Immigration Act. This material was not before Cameron, J. No evidence was adduced before me upon which I could find either that the accused would not likely appear for trial if granted bail or that permitting them to be at large on bail would be likely to endanger the public peace, if that be a proper matter for consideration, as to which I express no opinion. Under all the circumstances I think bail should be granted. If when at large they or any of them do anything which brings them within the ambit of the criminal law they may be re-arrested upon that new charge.

Because of the great public interest involved in this prosecution and because bail had once been refused by a brother Judge, I asked my brothers Macdonald and Metcalfe to sit with me while hearing this application, and I have the satisfaction of knowing that they both concur with me in the views here expressed.

I therefore order that the accused be admitted to bail in $4,000 each, with two sufficient sureties in $2,000 each.

Application granted.

ANNOTATION. Annotation.

Right to Bail on Commitment for a Misdemeanour.

The criticism made in *R.* v *Russell*, reported above, of the *dictum* in *ex parte Fortier* (1902), 6 Can. Cr. Cas. 191, 13 Que. K.B. 251, appears to have no further authority than *obiter dicta*, for the Court having concluded to allow the bail to Russell and others charged with seditious conspiracy it made no difference in the result of the case whether the Court's conclusion was based upon a judicial discretion under Code, sec. 698, or upon the habeas corpus practice apart from that section under the Habeas Corpus Act, 31 Car. II., ch. 2, and the common law. The difference of opinion between the Court of King's Bench of Quebec and the Court of King's Bench of Manitoba may be said to depend upon the question whether or not Code sec. 698 (former sec. 602 of the Code of 1892), has any limitative effect upon bail of persons committed for trial who apply for bail by means of the writ of habeas corpus. If it does not, then the Habeas Corpus Act, 31 Car. II., ch. 2, has still to be construed in its reference to felonies and misdemeanours. As regards the mode of prosecution, the distinction between felony and misdemeanour was abolished by the Canadian Criminal Code of 1892, sec. 535, and this enactment is now sec. 14 of the Criminal Code, 1906. Notwithstanding the statutory abolition of the distinction, it may still be necessary to limit the effect of prior statutes dealing in terms with misdemeanours so that it will not apply to a Code offence which but for Code sec. 14 would be a felony. *R.* v. *Fox* (1903), 7 Can. Cr. Cas. 457, 2 O.W.R. 728. The Criminal Code did not re-enact or repeal the Habeas Corpus Act, and it may be questioned whether Code secs. 698-701 were intended to interfere in any way with the powers and duties of a superior Court exercising habeas corpus jurisdiction. The procedure appears to have been intended as an alternative one, involving less delay and expense than that of habeas corpus. The title to the first Canadian Act, in which these Code provisions appeared, 32-33 Vict. (1869), ch. 30, was "An Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences." The statutory power of bail to which the discretion was attached was not limited to Courts or Judges of Courts having power to entertain a habeas corpus motion. It included, with some limitation of the class of offences, Judges of the County Courts which had no habeas corpus jurisdiction, and as to Judges of superior Courts enabled them in their discretion to order bail before justices, which powers, before the enactment, might have been exercisable on habeas corpus by the Court in

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term or by a single Judge sitting for and exercising the functions of the Court, or by a single Judge in the special contingencies provided for by the Habeas Corpus Act. The distinction between the class of functionaries given special powers under Code sec. 698 and a provincial superior Court of criminal jurisdiction is made in Code sec. 699 in its reference to the "order of a superior court of criminal jurisdiction for the *Province* in which the accused stands committed." The statute from which Code sec. 698 is taken conferred its enabling powers in furtherance of the assimilation of the laws of Quebec, Ontario, Nova Scotia and New Brunswick (32-33 Vict. 1869 (Dom.), ch. 30), and the same phraseology has been followed throughout: "Any Judge of any *superior* or county court, having jurisdiction in the *district* or county within the limits of which the accused is confined." Compare 32-33 Vict. (1869) (Dom.), ch. 30, sec. 53; R.S.C. 1886, ch. 174, sec. 82; Cr. Code, 1892, 55-56 Vict. (Dom.), ch. 29, sec. 602; Cr. Code, R.S.C. 1906, ch. 146, sec. 698.

And throughout all this legislation is the enactment contained in the present Code, sec. 701, that the same order concerning the prisoner being bailed or continued in custody shall be made as if the prisoner was brought up upon a habeas corpus. This, it is submitted, was intended to preserve all the rights to bail which could be had on habeas corpus. The disposal of the case is to be in like manner to the disposal on a habeas corpus although the power under sec. 698 to direct that the justices take bail probably would not involve the penalty to which a Judge would be subject under the Habeas Corpus Act for improperly refusing bail for a misdemeanour.

Another consideration which favors the view that in Canada for a misdemeanour bail is a matter of right, is that sec. 23 of the Indictable Offences Act, 1848 (Imp.), which was probably the basis of the Canadian Act of 1869, was interpreted so as not to displace that doctrine in England. Under that Act it was declared that a justice of the peace might, *in his discretion*, admit to bail for certain felonies and certain misdemeanours; but it was held that such special power and discretion made it none the less obligatory on a Judge to bail on habeas corpus as theretofore in the case of a commitment for trial for a misdemeanour. *Reg.* v. *Bennett* (1870), 49 L.T.J. 387; *Reg.* v. *Atkins* (1870), 49 L.T.J. 421; and see *Re Frost* (1888), 4 T.L.R. 757.

CANADA and GULF TERMINAL R. Co. v. FLEET.

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Quebec King's Bench, Archambeault, C.J., Lavergne, Cross, Carrol and Pelletier, JJ. April 3, 1918.

CARRIERS (§ IV B—521)—PUBLIC UTILITIES COMMISSION, QUEBEC—AUTHORITY—SUBMISSION OF DOMINION COMPANY—RIGHT TO ORDER TRAINS OF ONE COMPANY TO RUN OVER LINES OF AN OTHER.

The Public Utilities Commission, Quebec, has no authority over Dominion utilities, but it has the right to order trains of a Dominion company to run over the lines of a company over which it has supervision, when the Dominion company does not question its jurisdiction, and is ready and willing to submit to its authority.

[R.S.Q. 1909, art. 742.]

Statement.

The facts are stated in the judgments following.

APPEAL from a decision of the Public Utilities Commission refusing a declinatory exception filed by the appellant against the application of the respondent. Affirmed.

Heneker, Chauvin and *Walker*, for appellant.

C. V. Darveau, K.C., for intervenant.

Archambeault, C.J.

ARCHAMBEAULT, C. J.:—This application, dated June 11, 1917, states that the Bay of Metis is a summer resort frequented by a large number of Montreal families; that, for several years past, the Intercolonial Railway had a right to run its trains over the line of the appellant company from Mont-Joli to Bay of Metis; that this year the two companies could not agree upon the amount to be paid for these running rights; that the appellant demands an exorbitant amount; and that the public will suffer greatly if the right is denied.

The application asks that the Commission make a provisional order, or adopt some other adequate means, to assure to the public the right to travel over the line of the appellant company during the summer tourist season of 1917.

The Commission allowed the justice of the application, and made an order compelling the appellant to allow the Intercolonial cars to run over its line from Mont-Joli to the Bay of Metis, on certain conditions therein mentioned, and summoning the two companies to appear before it on June 26th, in order to fix the amount which should be paid to the appellant by the Intercolonial.

On June 26, the matter was adjourned to July 10. On July 10, the appellant filed the declinatory exception now before us.

This exception sets up two grounds of want of jurisdiction: 1. The Intercolonial is a Dominion railway, and the Commission

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has authority only over Provincial utilities. 2. The Commission has no authority to order a railway company to allow the trains of another company to run over its lines.

I ought to mention here that the general manager of Dominion Government Railways intervened in the case on appeal, and it is he who now upholds the position taken by the respondent before the Commission. The respondent is disinterested in the matter. This is easily understood: He has obtained his ends; the Intercolonial cars have run upon the appellant's line during the whole tourist season of 1917 and it is now only a matter of determining the amount which should be paid to the appellant for such use of its line.

The appellant claims, in the first place, as I have just said, that the Commission has no authority in the present matter, because one of the two companies concerned is a Dominion company. The fact is that the Intercolonial Railway is not only a Dominion company, but is the actual property of the Dominion Government.

It is very true that the Commission has not supervision over Dominion utilities, and that it cannot issue any orders to compel them to execute, or refrain from executing, anything whatsoever. But I see nothing in the law which takes away the right of the Commission to exercise the power it possesses with regard to Provincial utilities, if it is asked by or for a Dominion company.

The chairman of the Commission rightly said, in his judgment, that the only question to decide here is what remuneration the Intercolonial Railway should pay to the appellant for its running rights over the line. There is no obligation imposed on the Intercolonial. It is a right which is given to it, upon its request, but it can only exercise this right on certain conditions, which it must fulfil.

The want of jurisdiction set up by the appellant should have been set up by the Intercolonial. If the Commission imposed running rights upon the Intercolonial Railway in favour of the appellant, the Intercolonial would be quite justified in denying the jurisdiction of the Commission. But in the present case it is the Dominion company which makes the application, and it is the Provincial company which claims that the Commission cannot compel the Dominion company to carry out what is asked for. The Provincial company therefore asks for a declinatory exception,

which the Dominion company could take advantage of, but which it cannot itself plead. In other words it would be a question here of want of jurisdiction *ratione personae*, which can only be pleaded by the party who claims that he is not subject to the jurisdiction of the Commission.

The second complaint of the appellant is that the Commission has not the right to order a company to allow another company to run trains over its line.

Art. 742 of the R.S.Q., as amended by 1 Geo. V., 1911, (2nd Sess.) ch. 14, sec. 4, states that "the Commission shall have general supervision over all public utilities subject to the legislative authority of the Province of Quebec." It adds that the Commission may, as to equipment, appliances, safety devices, extension of works or systems, reporting and other matters, make orders necessary for the safety or convenience of the public.

It is claimed that the words "and other matters" should be limited to matters of the same kind, *ejusdem generis*, such as those referred to in art. 742.

The provision has a more extended meaning, in my opinion. It must be read in its entirety to obtain the whole import. The enumeration which it contains is not specific. From the moment that the Commission has general supervision over Provincial utilities, and can make, with regard to the matters enumerated "and other matters," the necessary orders to insure the safety or benefit of the public, it seems to me that the powers of the Commission are not limited to matters of the same kind as those mentioned in the article.

The Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 176, contains an express provision conferring on a company power to run its trains over the line of another company, but provided that it first obtains permission for this from the Board of Railway Commissioners for Canada; and this Commission may, in such a case, determine the amount which should be paid, if the two companies do not agree upon it.

The appellant claims that, since there is no similar provision in the law respecting the Public Utilities Commission of Quebec, it must be concluded that the Commission has not such power.

I do not think that such conclusion can be drawn. If our Provincial law contains a provision sufficiently extensive to cover the matter, there is no need for a special provision.

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After all, we are not concerned here, as the appellant claims, with the exercise of some extraordinary power. From the moment that the Commission has general supervision of Provincial utilities, why should it not have power to impose on them every measure necessary for the benefit of the public? For these reasons I am of opinion that the decision of the Commission should be confirmed.

LAVERGNE and CROSS, JJ., concur with Archambeault, C.J.

CARROLL, J. (dissenting):—This is an appeal from a decision of the Public Utilities Commission refusing a declinatory exception.

The applicant, Fleet—in his name and in the name of others interested who live, in the summer time, on the shore of Little Métis—applied to the Public Utilities Commission of Quebec for an order directing the appellant to allow a certain Intercolonial train to run over its line.

On June 12, 1917, an interim order was issued allowing the justice of the request; but when the parties were before the Commission, on July 10, 1917, for the purpose of settling the amount to be paid by the Intercolonial, the appellant took exception to the jurisdiction, on two grounds: first, that the Intercolonial Railway is not subject to the legislative authority of the Quebec Government; and second, that the Commission has no power to compel a railway company to allow the trains of another company to run over its line.

The president of the Public Utilities Commission, whose opinion prevails upon questions of law, and who stated that the question submitted was one of law, based his judgment on the fact that the order, so far as it concerns the Intercolonial, is only permissive, and does not impose any obligation on that road, the general manager having, furthermore, announced, in writing, his intention to submit to the order of the Commission.

It is admitted that the acquiescence of the Intercolonial authorities cannot give jurisdiction to the Commission, and it would seem that the reason for the judgment is that, in this case, the Commission acted as arbitrator between the appellant and Intercolonial Railway.

I do not see any provision of law which allows the Commission to act as arbitrator between two railway companies, and as to the conclusions to be drawn from the acquiescence of the Intercolonial. I should say that the order contains no provision compel-

ling the Intercolonial to perform certain obligations which it cannot possibly fulfil, if it thinks it advisable, and as the order cannot be divided, since what is laid down for one relates to the other, the whole judgment is void.

On the second ground: The statutory provisions giving power to the Public Utilities Commission are contained in art. 718 *et seq.* of R.S.Q. 1909. In addition to the special jurisdiction given by this law, the Commission has also all the powers possessed, before its creation, by the Railway Committee of the Executive Council, and all the powers of the Minister of Public Works.

Let us see, first, if, under the special powers conferred on the Commission by art. 742, R.S.Q., the order in question in this case could be issued. This article reads as follows:—

> The Commission shall have general supervision over all public utilities subject to the legislative authority of this Province, and may make such orders regarding equipment, appliances, safety devices, extension of works or systems, reporting and other matters, as are necessary for the safety and convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

It is claimed that the words "and other matters" are sufficiently wide to justify the order. The above article, in my opinion, authorizes the general supervision of all public utilities, and the words "and other matters" should be restricted to things of the same nature as those enumerated in detail in the article. The rule *ejusdem generis* should apply in the interpretation of art. 742.

The powers of the Railway Committee are enumerated in arts. 670 to 706, R.S.Q. 1909.

The only article which might seem to give jurisdiction to the Commission is art. 6672, R.S.Q. 1909. But we see that it there relates to regulations respecting agreements voluntarily entered into between different railway companies. I think that it would be necessary, in the case before us, to exercise the joint authority of the two Commissions in order to remedy the grievances of which the applicant complains.

I would maintain the appeal.

PELLETIER, J. (dissenting):—The Public Utilities Commission does not appear to me to have power to order the appellant to allow entire trains of another company to run over the appellant's line. Pelletier, J.

In the second place, the Commission has still less jurisdiction

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in the matter of the Intercolonial Railway which belongs to the state. To-day it is not Fleet, the respondent, who upholds the jurisdiction of the Commission, it is the general manager of Government Railways who intervenes in the case, and who maintains that the provincial Public Utilities Commission can compel the appellant to receive Intercolonial trains, and that it can fix the sum the Dominion Government should pay therefor.

State railways are entirely free from the jurisdiction of the Public Utilities Commission of the Province of Quebec. The Commission could not compel the Dominion Government to pay any sum whatever to the appellant, and that is the whole question at issue. It is, therefore, clear that the Commission has not jurisdiction in the matter.

Neither do I see what legal standing the general manager of Government Railways can have, either before the Commission or before us; and it is he alone who upholds the judgment in which Fleet has ceased to have an interest.

I would maintain the appeal. *Appeal dismissed.*

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BEST v. DUSSESSOYE.

Manitoba King's Bench, Galt, J. December 23, 1919.

VENDOR AND PURCHASER (§ I E—28)—AGREEMENT FOR SALE OF LAND—ASSIGNMENT BY WAY OF SECURITY—DEFAULT IN PAYMENT—JUDGMENT—ORDER FOR PAYMENT INTO COURT—FAILURE—FORECLOSURE.

When the vendor obtains a judgment against the purchaser and other incumbrancers for default under an agreement for sale of land, and the judgment provides for the payment of all moneys due on a certain date, failing which the agreement may be cancelled and rescinded; the purchaser having failed to fulfil his obligation, the vendor may obtain the relief provided for in the judgment, and the matter cannot be re-opened.

[*Jackson* v. *Scott* (1901), 1 O.L.R. 488; *Clark* v. *Wallis* (1866), 35 Beav. 460, referred to.]

Statement.

APPEAL from an order made by the Referee, November 25, 1919, whereby it was ordered that one Muys be made a party defendant to the action and that upon payment by the Central Canada Investment Corporation Ltd. of $5,453.81 into the chief branch of the Bank of Hamilton at Winnipeg, to the credit of the plaintiff and the accountant of this Court, on or before December 2, 1919, the final order of foreclosure made herein on October 10, 1919, be vacated and set aside and that the plaintiff do stand redeemed.

C. H. Locke, for appellant; *J. D. Sutton*, for Central Canada Investment Corporation.

GALT, J.:—The statement of claim shews that on June 16, 1913, the plaintiff by agreement in writing agreed to sell to one Charles Muys, who agreed to purchase from the plaintiff, certain lands therein set out for the price of $12,000, payable $2,750 by the purchaser transferring to the vendor certain other lands, $1,000 on the first day of the months of January, March and May, 1914, $1,575 on December 1, in the years 1914, 1915, and 1916, and $1,525 on December 1, 1917, together with interest, etc., until the whole of said moneys were fully paid.

The said Muys covenanted to pay the said moneys and it is further provided that time should be the essence of the agreement.

The plaintiff alleges his willingness and offers to carry out said agreement on his part. He then proceeds to allege (par. 8); that on or about February 3, 1916, said Muys assigned all his interests in said agreement and lands to the defendant the Central Canada Investment Corp. by way of security, and that on or about July 11, 1918, said Muys executed a quit claim deed in favour of the defendant Dussessoye.

The plaintiff claims

(1) a reference to the Master to take an account of the moneys due to the plaintiff, and that a time be fixed by the Court for payment of the amount found to be due, and that in default of payment being made within the time so fixed, the payments already made under said agreement may be declared forfeited, and that said agreement for sale be declared cancelled and rescinded and at an end, and that the defendants do stand absolutely debarred and foreclosed of and from all rights, title, interest and claim to, in, for and out of the said lands referred to in the said agreement; (2) that for the purpose aforesaid all proper directions may be given and accounts taken; (3) that caveat filed by the Central Canada Investment Corp. be vacated; (4) further and other relief.

The defendant Dussessoye allowed judgment to go by default. The defendant corporation put in a defence disputing the amount claimed by the plaintiff and claiming an account. The action then proceeded to trial and judgment was pronounced declaring plaintiff entitled to have the agreement specifically performed and ordering an account; and it was further ordered that in the event of the defendants or the encumbrancers, if any, who prove their claim making default in payment according to the report of the

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said Master, that the said agreement for sale be declared determined, rescinded, cancelled, foreclosed and at an end and be delivered up to the plaintiff, and that payments made thereunder be declared forfeited, and that all improvements made upon the said lands be declared the property of the plaintiff, and that the defendants deliver to the plaintiff immediate possession of the said lands and that the defendants and the said encumbrancers, if any, who prove their claim stand absolutely debarred and foreclosed of, and from, all equity of redemption, in and to the said lands, and that any caveats filed by the said defendant or any person claiming through or under them be vacated and discharged and that the plaintiff shall be entitled to an order on application therefor.

The Master made his report on the reference, finding that there was due to the plaintiff for principal money, interest and costs, the sum of $5404.95, payable to the joint credit of the plaintiff and the accountant of this Court at the Bank of Hamilton, between the hours of 10 o'clock in the forenoon and 1 o'clock in the afternoon of October 8, 1919.

The Central Canada Investment Corp. intended to pay the above amount, but owing to the absence from town of Mr. McMurray and a misapprehension of the practice by Mr. Davidson (solicitors for the defendant corporation), default was made in paying the money into bank on the day fixed. The plaintiff was not in any respect aware of or responsible for the default.

On October 11, 1919, the plaintiff applied for and obtained an order from the Referee cancelling the agreement of sale, forfeiting the moneys theretofore paid and foreclosing all the defendant's equities of redemption. This order appears to have been duly entered on October 14, 1919. Thereupon the plaintiff entered into an agreement with Mary Muys, wife of Charles Muys, for the sale of the property to her and gave her an option for valuable consideration to purchase the lands at a fixed date in 1920 for the sum of $5,650.

On or about October 22, 1919, the defendant corporation applied to the Referee to re-open the matter and permit them to pay what was due to the plaintiff into the bank. It was on this application that the Referee made the order now in appeal.

The relationship existing between the vendor of real estate and

the purchaser has formed the subject of many decisions, especially in recent years. Several of these decisions have been collected by McCaul in his work on "Remedies of Vendors and Purchasers," 2nd ed., p. 116 et seq.

The analogy and also the distinction between cases of vendor and purchaser, and of mortgagee and mortgagor, have often formed the subject of comment in actions brought by vendors or purchasers. For instance, in *Seton* v. *Slade* (1802), 7 Ves. 265, Eldon, L.C., says, at p. 273:—

> To say, time is regarded in this Court, as at law, is quite impossible. The case mentioned of a mortgage is very strong; an express contract under hand and seal. At law the mortgagee is under no obligation to reconvey at that particular day; and yet this Court says, that, though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance; upon this ground; that the contract is in this Court considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine upon which this Court acts against what is the *primâ facie* import of the terms of the agreement itself, which does not import at law, that, once a mortgage, always a mortgage; but equity says that; and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord Thurlow, that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage; that you shall not by special terms alter what this Court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law. . . .
>
> But there is another circumstance. The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor, and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee, but may be to be discussed between the representatives of the vendee.

In *Parkin* v. *Thorold* (1852), 16 Beav. 59, the plaintiff agreed to sell to the defendant a freehold estate. The abstract was to be delivered within 10 days, and by the fifth condition of sale it was stipulated as follows: the purchaser shall pay a deposit, "and sign an agreement for completing the purchase and for payment of the residue of the purchase money on or before October 25 next," at the office of Mr. F., "at which time and place the purchase is to be completed." There was no stipulation in the agreement that time should be of the essence of the contract. Delays occurred on the part of the plaintiff in making title within the time but he succeeded in making title, notwithstanding objection of the defendant, within a reasonable time after the day

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fixed. Lord Romilly, M.R., granted to the plaintiff a decree for specific performance. He says, at p. 65:—

At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not a doctrine of a Court of Equity; and although the *dictum* of Lord Thurlow, that time could not be made of the essence of the contract in equity, has long been exploded, yet time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication.

Then again at p. 67:—

Neither will equity enforce a contract, where, though the Court considers the title good, yet considers it sufficiently doubtful that it might reasonably give rise to litigation hereafter between the purchasers and persons not bound by the decree of the Court in the suit for specific performance. It is, I apprehend, on a similar principle, that the Court has regarded the question of time in these matters, when it has not been specifically and precisely contracted for, as an essential clause in the contract. It then considers how far either party is injured by the delay, and will not permit one to insist upon that, which, although a formal part of the contract, would in reality, defeat the object which both had in view, at the time when it was made. It is, I apprehend, on a similar principle also, that the whole doctrine relating to equities of redemption, as administered by this Court, is founded. The contract between the mortgagor and the mortgagee is precise; if the money and interest is not repaid on the day twelve-month on which the mortgage is made, the estate is to be the property of the mortgagee; the contract is positive and unambiguous, but a Court of Equity will not permit that contract to be enforced, and will restrain the parties from enforcing it at law. It treats the substance of the contract to be a security for the repayment of money advanced, and that portion of the contract which gives the estate to the mortgagee as mere form; and accordingly, in direct violation of the contract, it compels the mortgagee so soon as he has been repaid his principal money and interest and the costs he has been put to, to restore the estate; and this, although the parties have acted on the contract, and the mortgagee has taken possession on the day when default arose, and has continued in possession for many years.

In *Laysaght* v. *Edwards* (1876), 2 Ch. D. 499, Jessel, M.R., says, at p. 506:—

It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events,

entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside.

The above authorities recognize an analogy in certain respects between the respective positions of vendor and purchaser and of mortgagee and mortgagor. In those respects in which the analogy holds good there would seem to be no reason for refusing to a litigant in one category the relief he would be entitled to in the other, for instance, where time has not been made of the essence of an agreement for sale, there would seem to be no reason for refusing relief to a vendor or purchaser even although the time specified for completion had passed, but where time is made of the essence of an agreement, Courts of Equity refuse to aid the party in default, even where it is clear that all parties concerned were anxious to carry out the sale and that the very slight delay was due to the unexpected illness of the solicitor for one of the parties. See *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599.

The relationship of mortgagee and mortgagor has always been regarded as anomalous. A Court of Equity will not regard even express stipulations by the mortgagor, either as to time or any other circumstances which would clog or fetter his right of redemption. The expression, "once a mortgage, always a mortgage," has passed into current use, and accordingly a mortgagee, even after obtaining a final order of foreclosure, is liable to discover that there is nothing "final" in his order except the word itself. See *Campbell* v. *Holyland* (1877), 7 Ch. D. 166.

In *Salt* v. *Marquess of Northampton*, [1892] A.C. 1, an agreement had been drawn up between the trustees of an Insurance Society and Earl Compton (son of the Marquess of Northampton), whereby the Insurance Society loaned certain moneys to Earl

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Compton and at the same time insured his life to the extent of £34,500. Earl Compton executed a bond charging his reversion (to which he would be entitled on the death of his father) in favour of the Society. Apparently great care was taken by the solicitors in the transaction to prevent the document from being in any way regarded as a mortgage. The Earl died in his father's lifetime, and the Marquess brought action to recover the insurance moneys which had been made payable to the Society itself, but the House of Lords held that the effect of the agreement was to create a mortgage, and for that reason the Marquess was found entitled to the balance of the insurance moneys after payment of the loan.

In delivering judgment, Lord Bramwell, [1892] A.C. 1, at 18, uses the following characteristic language with regard to the anomalous relationship of mortgagee and mortgagor:—

> My Lords, the first thing I find it necessary to do in this case is to learn and familiarise myself with the law which governs it, and its language. Of course, one knows in a general, if not in a critical way, what is an equity of redemption. It is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender, I suppose one may say by a debtor to a creditor, on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities were to be the absolute property of the creditor. This is now a legal right in the debtor. Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones, rather than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it.

It is not difficult to understand why practitioners and Courts should borrow terms originally applicable only to cases between mortgagee and mortgagor, and apply them where the positions happen to be analogous, to cases of vendor and purchaser. There is no authority for such a maxim as "once an agreement of sale, always an agreement of sale."

In the present case the judgment of the Court was delivered in March last, and expressly provided that in the event of the defendants, or encumbrancers, if any, making default in payment of the amount to be found due by the Master, the said agreement for sale be declared determined, rescinded, cancelled, foreclosed and at an end, and be delivered up to the plaintiff and that payments made thereunder be declared forfeited and that all improve-

ments made upon the said lands be declared the property of the plaintiff and that the defendants deliver to the plaintiff immediate possession of the said lands and that the defendants and the said encumbrancers, if any, who prove their claim stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands and that any caveats filed by the said defendants or any persons claiming through or under them be vacated and discharged and that the plaintiff shall be entitled to an order on application therefor.

Default having been made by the defendants, the plaintiff was entitled, under the last clause of the judgment, to apply for and obtain an order awarding him the relief recited in the judgment. Similar relief is recognized in Ontario, including both forfeiture of moneys paid, and rescission of the contract: see *Jackson* v. *Scott* (1901), 1 O.L.R. 488.

Such an order may be made *ex parte* as in *Clark* v. *Wallis* (1866), 35 Beav. 460.

If the order were a final order of foreclosure in a mortgage action the order re-opening the foreclosure would, under the circumstances disclosed before the Referee, be granted almost as a matter of course. But the order in question is of a wholly different character. The plaintiff's application for the order cancelling the agreement, etc., was strictly in accordance with the judgment of the Court; and when once it had been granted and entered the Referee's powers were exhausted and he became *functus officio*. The order could not in my opinion be set aside or varied except on appeal; and no appeal was taken.

In order to bring a case within the principles laid down by Jessel, M.R., in *Campbell* v. *Holyland*, *supra*, it is not sufficient that the case be merely analogous to the case of a mortgage, it must not merely be *ejusdem generis* but *sui generis*.

The litigation having come to an end by the order cancelling the agreement would be all reopened with an additional party added under the order in appeal. I think that the maxim *interest rei publicae ut sit finis litium* applies to such a case. As a result the appeal must be allowed and the order of the Referee discharged.

The appellant Mary Muys is entitled to the costs of the motion before the Referee and of this appeal.

Judgment accordingly.

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Quebec King's Bench, Lamothe, C.J., Cross, Carroll, Pelletier and Martin, JJ. November 20, 1918.

CRIMINAL LAW (§ II B—40)—EVIDENCE—ADMISSION BY ACCUSED—VOLUNTARY—PROMISE NOT ILLEGAL—NO THREATS OR INDUCEMENTS—ADMISSIBILITY.

A voluntary admission by the accused in a criminal case which has not been extracted by threats or illegal promises may be admitted as evidence in his trial.

Statement.

The facts in the case are stated in judgment of Cross, J.

A. Germain, K.C., for appellant.

F. J. Curran, K.C., for respondent.

Lamothe, C.J.

LAMOTHE, C.J., concurs with Cross, J.

Cross, J.

CROSS, J.:—The charge against the accused was:—

That Charles Edouard Gravel, on August 16, 1916, at the City of Montreal, stole $6,000 contained in a parcel sent by parcel post, addressed to the Union Bank of Canada at Winchester, Ontario, and the property of the Postmaster-General of Canada.

The accused, having elected to take a speedy trial, and his trial being heard, was convicted of the offence by the Judge of Sessions at Montreal. It is said in the stated case that counsel for the accused moved to have reserved, for the opinion of this Court, the question whether or not there had been error on the part of the Judge, in his having admitted evidence of a confession said to have been made by the accused, without his having been cautioned that what he might say, might be given in evidence against him at the trial.

The motion was granted and the evidence has been made part of the case for our consideration.

The facts are as follows: A money package containing $6,000 was put into the post at Montreal, on August 16, 1916, by the Union Bank of Canada, addressed to the same bank, at Winchester, in Ontario. The envelope reached Winchester, but instead of money there were in it only some newspaper clippings.

The authorities of the Post Office made inquiry, but at first with no result. The inquiry was renewed later. It was conducted or, at least, participated in on that occasion by Louis Joseph Gaboury, administrator-general of post offices for the territory in which Montreal lies.

The accused was a clerk in the post office at Montreal. He had been known to Gaboury and the latter had helped him into the service. There is no evidence upon which the conviction can rest,

if the confession or confessions here in question should not have been received in evidence.

Gaboury was a person in authority over the accused and his testimony contains all the evidence given at the trial. Having said, in examination-in-chief, that he had interrogated about 30 post-office clerks, and amongst them the accused, and that he had not made promises or threats to the accused, he was subjected to a preliminary cross-examination upon so-called *voir dire*, from which it appears that, in one of several interviews, he told the accused (as he had told the others), that it was preferable for him to tell the truth. The interviews to which the accused was called appear to have had no results in the sense that the accused disclosed nothing, but one Saturday afternoon, the accused went to Gaboury's office without being sent for, and said that he thanked him (Gaboury) for the latter's treatment of him and he said: "What do you think of me?" to which Gaboury answered that he had no thought about him, but that if he had a piece of advice to give the one who is guilty, the thing to do is to give back the money as soon as possible. On the Monday morning, a package of money ($4,005) was found by Gaboury on his desk. The accused being sent for, Gaboury said to him: "I received this package." The accused answered that he did not understand what Gaboury meant. Gaboury replied: "*Moi, je vous comprends*" [as for me, I understand you]. In a few seconds, the accused admitted having taken the money, and it appears that, in subsequent conversation, about paying back the balance of the money, on the same occasion, Gaboury told the accused that if he could assist him, he would do so.

On the same Monday, Gaboury sent to the accused a letter worded as follows:—

Montreal, March 8th, 1917.

My Dear Gravel:—With reference to our interview of the 6th inst. on the matter of reimbursing the $6,000 intended for the Union Bank of Canada, Winchester, Ont., I have your promise to attend to it as soon as possible; it is important not to neglect giving it your immediate attention.

As I must go away, tell me to-day where you are with regard to the arrangements you promised to make? Mark your reply "Personal," and do not send it to my office, but to my house and residence. Yours truly, L. J. Gaboury.

Charles E. Gravel, Registration Office, Post Office, Montreal.

An answering letter in the handwriting of the accused was received, worded as follows:—

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Montreal, March 8th, 1917.

Dear Mr. Gaboury:—I have received your letter delivered by Mr. Bennett to-day. I thank you with all the power of sincerity which my heart possesses, and I reckon that with God's aid, I shall be able, in the future, to prove to you my gratitude. I can assure you that I will be able to keep my promise, and fulfil my obligations shortly, namely, within a few days; the fortune which has guided me in the past seems to wish to assist me in repairing the evil which I did. My father is dying, and within a few days I expect his death, being so assured by the doctors. I will communicate with you as soon as possible to explain to you exactly the source of the money necessary for reimbursement, but by that time be assured that I shall have it. Trusting in Providence and in the friendship which you shew me, I hope that I shall be pardoned before long.

Believe, Sir, in my entire gratitude, and accept my respects. Yours truly, Charles E. Gravel.

P.S.—Do not fear, in a few days I shall have what is necessary, and you will have all the guarantees you desire.

Near the end of Gaboury's testimony, and after a passage in which he said that the letters were written after the accused had made verbal statements, there is a passage worded as follows:—

Q. Now, did you make any promise or any threat to Mr. Gravel before he made his statements? A. When he made his statements to me I told him that I would try to assist him as much as possible. Q. That was after he had sent you the $4,000? A. Yes, Sir.

It is upon that state of facts that we are to decide whether evidence of the confession has been wrongly admitted or not. But I take it that, in proceeding to consider that question, we should first address ourselves to the question upon which the whole issue turns, namely, the question whether or not there was evidence upon which the Judge could find that the prosecutor had proved that what was said by the accused, by way of verbal and written confession, was said voluntarily and without inducement held out by Gaboury, the person in authority.

If Gravel's letter was to be considered as standing by itself and as detached from what went before it, there would be reason to say not merely that the Crown had failed to establish the voluntary nature of Gravel's disclosure, but that the opposite had been proved, seeing Gaboury's promise of help in repaying, and seeing that Gravel's letter itself expresses gratitude to Gaboury, and intention to make return for the consideration shewn to him.

But it is important to consider what happened in its proper order. Gravel's case is that of a man forming one of a large group of persons amongst whom there is inferred to be one who stole the money. The individuals of the group are being questioned one by

one. In the first one, or two or perhaps three of the interviews he had with him, Gravel keeps himself clear of making any admission. Then, on the Saturday, having apparently become disquieted and anxious, he sought out his superior in service and opened up the matter by saying: "What do you think of me?"

Any one can see that that is not a mere question, but is an avowal, and, in a few minutes, the accused let out the whole story. In the natural course, it would be after and following upon that disclosure that the matter of restitution would come up, that is, restitution of the balance of $1,995, not given back.

At that point, and from thence onward, there is no doubt that the accused had the incentive of possible assistance from Gaboury. How should the instance of that incentive be regarded as affecting admissibility of proof of the written part of the confession?

One is struck by the analogy of the position in which Gravel was and that in which an accused person stands, who gives testimony on his own behalf at his trial. An accused person need not testify. Gravel need not have gone to speak to his superior on the Saturday. But when an accused person gives testimony, he subjects himself under our law, though probably not under the rules applicable in Great Britain, to be cross-examined in the same way as does any other witness, and, pursuing this analogy, the evidence of the confession in the letter followed naturally, and, as we were, in course of cross-examination, upon the verbal disclosure previously made, as it were, on examination-in-chief. There is, however, no occasion to press that analogy too far. What can be said with certainty is that it is for the trial Judge in his discretion, and according to the facts of the particular case, to decide whether or not the prosecutor has made out a case for admission of the evidence, and also that the trial Judge should guide himself by the consideration whether the inducement held out to the accused was of a nature to make his confession an untrue one.

These considerations are well set out in two passages which I venture to quote. The first is the passage from Taylor on Evidence, 9th ed., vol. 1, par. 872, p. 562, cited by Mr. Curran and which reads as follows:—

> As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules *à priori* for the government of that discretion; and the more so, because much must necessarily depend

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on the age, experience, intelligence, and character of the prisoner, and on the circumstances under which the confession was made.

The other is the summary of the purport of the decided cases to be found in Archbold on Criminal Plea and Evidence, 23rd ed., page 334:—

The only questions in these cases really are: Was any promise of favour, or any menace or undue terror made use of, to induce the prisoner to confess? and if so, was the prisoner induced by such promise or menace, etc., to make the confession attempted to be given in evidence? If the Judge be of opinion in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appears to him, from the circumstances that, although such promises or menaces were held out, they did not operate upon the mind of the prisoner, but that his confession was voluntary notwithstanding, and he was not biased by such impression in making it, the Judge will admit the evidence.

I would add but two quite recent instances of application of these principles.

In *Rex* v. *Cook* (1918), 34 T.L.R. 515 at 516, it was said in Court of Criminal Appeal on the subject of answers given to questions put by a constable before arrest of the accused:—

It would be a lamentable thing, if the police were not allowed to make inquiries, and if statements made by prisoners were excluded because of a shadowy notion that if the prisoners were left to themselves, they would not have made them.

A little earlier in the same year, in *Rex* v. *Voisin*, [1918] 1 K.B. 531 at 538, it was said in the same Court:—

It is desirable in the interests of the community that investigations into crimes should not be cramped. The Court is of opinion that they would be most unduly cramped if it were to be held that a writing voluntarily made under the circumstances here proved was inadmissible in evidence.

It is proper to observe that the case was tried without a jury and that, that being so, there was the less danger of undue might being given to the confession.

In the present case it may be said, in conclusion, firstly, that before any inducement was held out to him, the accused had made an unmistakable admission of guilty connection with the theft, and, secondly, that it can be inferred that the inducement arising from the assurance of assistance in repayment of the balance of the money, did not operate to make his confession an untrue one. The accused sat down in his own home to write a letter which he need not have written.

On the whole, it is our opinion that there was no error of law on the part of the trial Judge, in admitting evidence of the confes-

sion, that the question reserved should be answered in that sense, and that the conviction should be affirmed.

CARROLL, J., agrees with CROSS, J.

PELLETIER, J.:—It is evident that the result of this inquiry was to let the accused know that the thief was very nearly found, and his guilty conscience brought him to the house of Mr. Gaboury, Administrator-General of Post Offices for the Eastern Division of Canada.

It was Gaboury who had recommended Gravel for the advantageous position he occupied, and the latter, evidently, said that he was very much ashamed to have done this wicked deed, which threw discredit upon the Canadian Post Office administration, and implicated so painfully 29 other good employees upon whom suspicion would unjustly fall. It is then that, without having been in any way invited, using absolutely his own judgment, the accused presented himself at Gaboury's house, and asked the question, "What do you think of me?" Gaboury replied "I think nothing at all. If I had advice to give to a guilty person, it would be to return the money as soon as possible." The following day, Gaboury finds on his table a package containing $4,000; he evidently suspects that it was sent him by Gravel, and he asks him, saying; "I have received the package." The accused answers, "I do not understand you." Then Gaboury says: "But I understand you, I have received it," and then he reproaches Gravel with his ingratitude. Gravel admits the ingratitude, and plainly admits the theft, promising to soon return the balance of $2,000 remaining due. As he does not pay it, Gaboury writes him to return it; and the accused replies that he is not able to return the missing $2,000 at the moment, but that he will do so shortly.

The accused was found guilty by the magistrate upon the evidence of Gaboury and upon his letter promising to return the balance of $2,000. It is not surprising, in view of this overwhelming proof, that he was found guilty. However, the magistrate agreed to reserve for the decision of this Court the question of whether the evidence of which I have just spoken was legal. The accused tells us that he was not put on his guard, and that he was not informed that what he might say to Gaboury, his superior, might be used as evidence against him, and that in consequence what he had said and written, without having been put upon his guard, could not be taken as evidence.

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The first conversation, which I have just related, took place, not at the request of Gaboury, nor upon his invitation, but was the result of a spontaneous step on the part of the accused, who goes to see his superior, whom he asks "What he thinks of him." Had Gaboury not the right, and was it not his duty, to reply to this question, and has he not replied in a very prudent manner, first saying, "I think nothing at all?" He then gave advice which he had the right, and which was his duty, to give, and which applied not only to Gravel, but to the 29 other employees, namely; to return the money. Gaboury does not ask for a reply to this advice which he gives, and he makes neither promises nor threats; he does not accuse Gravel, seeing that he tells him that "He thinks nothing at all," that what he wants just then is that, for the honour of the country and of Montreal, the Union Bank should not lose the amount which it entrusted to the Post Office to be transmitted. Thereupon Gravel goes away. He makes no admission, no one has asked him for it, and consequently, he can stay at home and remain absolutely silent. Then Gravel deliberates from Sunday to Monday morning and on Monday morning he places $4,000, without the knowledge of Gaboury, upon the latter's desk; he had at that time no intention of admitting his fault, he did not admit it. In short, when Gravel next enters Gaboury's presence, and the latter says to him, "That he has received the package of money," the accused answers "I do not understand you." Gravel at that time intended to return the money anonymously, and thereby remedy in a polite manner, the evil he had done, but he cleared himself of responsibility from the point of view of a criminal trial.

Gravel then understands perfectly that he must not make any admission, if he does not wish to be prosecuted; that if he makes an admission, he does a dangerous action, which will be used against him. He is therefore upon his guard as much as possible. He knows perfectly what he is doing, and he knows the consequences of it, and his action is the fruit neither of threats nor promises. His own conduct shews that. It is only then, at the moment when he is reproached with his ingratitude, that Gravel admits his guilt. Later, Gaboury writes him asking him to remit the balance due. At the moment when he receives this letter, the accused has the opportunity for reflection, he can take counsel, he is not before his superior, and is not obliged to answer immediately; however, he

thinks it over and promises in writing to return the remainder of the money.

Gravel might have done something else instead of placing the money on Gaboury's desk: he could have sent it anonymously to the Union Bank; this was indeed the best way to follow the advice which Gaboury had given. Why does he make the money go through Gaboury's hands? It is evidently because, first, he wishes to try and keep $2,000 of the $6,000 he has stolen, and next, to buy the silence of Gaboury, who will say nothing in order to recover the $2,000.

He prepares—in order to protect his position—an accomplice in the person of his compromised superior. His action is not that of one who has received promises and who in consequence thereof makes admissions of a guilt which does not exist; it is the action of a thief who wishes to implicate his superior as an accomplice in the affair and thus to thank him for having given him his position by making him equally criminal with himself.

It is true that Gaboury told Gravel that he would try to help him as much as possible; these words—full of good intentions undoubtedly—were imprudent; but they were said only after the deposit of the money and the verbal admission of guilt.

The reason for the law preventing admissions as evidence, when the accused has not been put upon his guard, is in order not to risk an unfortunate man making, in circumstances stronger than his will, an admission of a crime for which he is not responsible.

This is not such a case, for his guilt is clearly proved and clearly admitted; this admission resulted, particularly, not by words spoken in fear but of a deed and action prepared and matured for two days, namely, the return of $4,000. What took place at that time was neither promises nor threats, it was only a conversation upon the question of finding out who had placed the money there. And then Gravel admits that it was he. A superior should have the right to counsel his employee to return money which he had taken. And if he follows this advice, if he returns two-thirds of the money and promises to return the other third, will he not have the right to prove such return? If it were otherwise, criminals would have the best of it; better than society, which becomes a powerless victim. The return of two-thirds of the money stolen is not a permission from an inferior to a superior; it is a deed, it is

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an action, it is no longer the thief who speaks, it is the stolen money which denounces the thief. Further it was the duty of Gaboury to write asking him to return the balance of $2,000.

If, on the one hand, accused persons should be protected, criminals should be punished, and when a Court is certain that the accused has not been misled by promises or threats, that he is, as in the present case, well on his guard, that he well understands the consequences of what he is about to do and say, that he has freely, spontaneously and voluntarily admitted his fault, I believe that it would press too far the strictness of the admissibility of evidence to admit the claims of the accused in the particular circumstances which we have before us.

We would remark that, at the time of his conversation with Gaboury the accused had not been arrested, that Gaboury had not accused him, that it is he himself who finding, probably—in view of his guilty conscience—that the result of the enquiry was not bright for him, attempted a step which, if he had succeeded, would have allowed him to remain at the post office and continue to rob the public. He wished to play this game; he lost; and I am not ready, for my part, to agree in letting him escape the just punishment which he deserves. I would answer "No" to the question as presented.

Martin, J.

MARTIN, J.:—The question submitted for our consideration therefore is:—

Did the trial Judge err in admitting the evidence of Gaboury, a person in authority, to prove the admissions or confessions made to him by the accused in respect to the charge subsequently laid against him? I am of opinion that he did not.

It is not contended that the accused was placed on his guard by Gaboury, but at the time he made the admission he was not accused, charged or arrested.

Taylor on Evidence, 9th ed., vol. 1, par. 872, says:—

> As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules *à priori*, for the government of that discretion; and the more so, because much must necessarily depend on the age, experience, intelligence and character of the prisoner, and on the circumstances under which the confession was made.

And Coldridge, J., in *Rex* v. *Thomas* (1836), 7 C. & P. 345 at 346, said: "The only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one."

The admissibility of confession in each case must be decided according to its own circumstances: *Rex* v. *Spain* (1917), 36 D.L.R. 522, 27 Man. L.R 473, 28 Can. Cr. Cas. 113; *Rex* v. *Girvin* (1916), 34 D.L.R. 344, 27 Can. Cr. Cas. 265, 10 A.L.R. 324.

The authorities as to the admissions in evidence of a statement made by a prisoner are reviewed in a case of *Ibrahim* v. *The King*, [1914] A.C. 599, in which Lord Sumner says at 609:—

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him, unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

Or as it is sometimes put by the writers:—

> The ground for receiving a voluntary confession is that no person will wilfully make a statement against his interest unless it be true; while the ground for rejecting a confession as not voluntary is the danger that the prisoner may be induced by hope or fear to criminate himself falsely.

The point of the citation of Lord Sumner is that the statement must be a voluntary statement.

An intense anxiety to protect accused parties is some time evidenced They are entitled to protection under the law and the rules of evidence. But what about the general public and the other 29 employees of the Post Office Department against whom suspicion rested? Are they not entitled to protection against crimes and criminals, and is it desirable in the interest of the community that investigations into crimes should be hampered and innocent persons made to rest under suspicion for crimes that are not found out?

The accused wrote his letter quite voluntarily. It was not written in the presence of Gaboury nor under any duress on the part of the latter; he was not forced to write the letter at all, and I fail to see how it can be held that a writing voluntarily made under the circumstances here proved is inadmissible in evidence.

The latest pronouncement on the admissibility of a writing is found in the case of *The King* v. *Voisin*, [1918] 1 K.B. 531.

We are not to appreciate the sufficiency of the evidence, but we read the evidence to appreciate the circumstances under which the admissions of the accused, both oral and in writing, were made; and considering all the circumstances as disclosed by the evidence in this case, we cannot, in any view of the matter, conclude that there has been any miscarriage of justice substantial, grave or otherwise, and the conviction should be affirmed.

QUE.

K. B.

GRAVEL v. THE KING.

Martin, J.

Judgment. Having heard the said Charles Edouard Gravel, by his counsel on the merits of his appeal from the conviction pronounced against him by the Judge of the Sessions of the Peace on or about June 28, 1918, on the charge of having on August 16, 1916, stolen $6,000, the property of the Postmaster-General of Canada and in particular upon the question of law reserved for the opinion of this Court, by the said Judge of Sessions, to wit, the question whether there was error of law in the admission of evidence of a confession by the accused;

Having heard what was said by counsel appearing on behalf of His Majesty;

Having read the case stated by the said Judge of Sessions upon the said reserved question, and deliberated:

It is by the Court of Our Sovereign The King, now here, considered that there was no error on the part of the said Judge of Sessions, in having admitted the said evidence;

And it is accordingly adjudged and finally determined that the said appeal be dismissed and the said conviction confirmed, and it is ordered that an entry hereof be made of record in the Court of the Sessions of the Peace, at Montreal.

Appeal dismissed.

ONT.

S. C.

Re McDONALD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. November 12, 1919.

WILLS (§ III G—125)—DWELLING HOUSE OF TESTATOR DEVISED TO WIDOW FOR LIFE OR UNTIL SOLD AT DISCRETION OF EXECUTOR—LIFE ESTATE—WIDOW LIABLE FOR TAXES—LEGACY—INTEREST PAID BY EXECUTOR FOR ONE YEAR AFTER TESTATOR'S DEATH—EXECUTOR'S RIGHT TO RECOVER SAME OR APPLY IT ON PRINCIPAL.

A life estate terminable at the option of the executor is held, as long as it exists, subject to the incidents of a life estate, and the holder is liable for taxes. A legatee is not entitled to interest on a legacy until after the expiry of one year from the death of the testator, and the executor, who pays this interest, may recover the same or apply it on account of principal.

[*Bartels* v. *Bartels* (1877), 42 U.C.Q.B. 22, followed; *Barber* v. *Clark* (1891), 20 O.R. 522, 18 A.R. (Ont.) 435, referred to.]

Statement.

MOTION by the executor of the will of William McDonald, deceased, for the advice and opinion of the Court on certain questions arising upon the will.

The judgment appealed from is as follows:—

A motion at the instance of the executor for the advice and opinion of the Court on certain questions arising out of the will

of the late William McDonald. The clauses of the will necessary to be referred to are as follows:—

"I give devise and bequeath the sum of ten thousand dollars ($10,000) to my wife Bridget McDonald; I also bequeath all my household furniture to my said wife; also the right to occupy free of rent the dwelling in which we are now residing in the town of North Bay, or in which we may be residing at the time of my death, during the remainder of her natural life, or as long as she desires to continue occupying the said dwelling, excepting as hereinafter provided.

"I give devise and bequeath the balance of my estate both real and personal including all policies of life insurance to my five children, Catherine Anne Barclay, Sophia Baxter, Margaret Frederick, Flora McPeak, and William McDonald, equally to be divided between them. If my executor deems it advisable at any time after my death to sell the property in which I am residing, he is to do so, and my widow is to give up immediate possession without any claim for dower, and the proceeds of the sale are to be divided equally between my five children above mentioned."

The widow, upon the death of the testator, continued to live in the dwelling where he was residing at his death. The executor has paid the taxes thereon every year since the death of the testator on or about the 9th July, 1915. He was of the opinion that the estate should pay the taxes in full for the year in which the testator died, but not thereafter. When the tax-bill for 1916 was presented, he declined to pay it, being of the opinion that the widow, being allowed to occupy the premises free of rent, according to the terms of the will would be required to pay the taxes. She, however, declined, and he paid and continued to pay them.

The first question is: "Whether the taxes on the property devised to Bridget McDonald for life should be paid by the said Bridget McDonald or by the estate."

It seems clear that a tenant for life—unless the testator clearly indicates the contrary—must pay the "usual outgoings" such as land taxes: Jarman on Wills, 6th ed. (1910), p. 1214; and, consequently, if Bridget McDonald is a life-tenant under the terms of this will, she is liable therefor.

It is contended, however, that what might otherwise be a

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life-tenancy is cut down in this will by the exception mentioned therein, which gives the executor the right, whenever he deems it advisable, to sell the dwelling-house property, whereupon the widow must give up immediate possession without any claim for dower therein.

While life-estates are estates of freehold, and generally speaking continue as long as the life for which they are granted, some estates for life may come to an end sooner, being subject to future contingencies, as, for example, an estate granted to a woman during her widowhood: Armour on Real Property, 2nd ed. (1916), p. 86. I can hardly think, however, that it can be effectually contended that, where an executor has a right at any time to sell the real property, which is the subject of the alleged life-estate, the interest can properly be called a life-interest. It is a mere right to occupy the property until terminated by a sale which may take place whenever the executor deems it advisable to sell.

I am of the opinion, therefore, that the answer to the first question must be, that the taxes should be paid by the estate.

The second question is, whether the said Bridget McDonald is entitled to interest on her legacy of $10,000 before the expiration of one year from the death of the testator.

It appears, according to the affidavit of the executor, that at the time of the testator's death there was no ready cash available from which to pay the legacy. The widow having represented to the executor that she had no money to live on, he began paying her interest on the legacy monthly at the rate of 5 per cent. during the first year. Since that time he has been paying the legacy in instalments, and paying interest on the balance thereof from time to time remaining unpaid. There is still owing a balance of $1,000, and the executor is now in funds to pay the same.

In re Whittaker (1882), 21 Ch. D. 657, is an authority for the proposition that where a bequest has been made upon trust to invest upon mortgage and pay the interest as it should arise to a widow during her life and widowhood, the interest does not become payable to the widow except from the end of a year from the testator's death. Bacon, V.C., at p. 662, says: "Nothing can be more clear than the law as it stands upon the decided cases, that the first payment of interest upon a legacy does not become due until two years after the testator's death, and that in the case of a wife there is no difference whatever."

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It is clear, therefore, I think, that the executor could not have been compelled to pay interest to Bridget McDonald before the expiration of one year from the death of the testator. But it is contended that, where he has done so, he cannot recover payment—that he has paid such interest as has been paid expressly as interest, and cannot now recover it from the recipient. He did not pay it, it is argued, under a mistake either of law or fact: reference to *Maskell* v. *Horner*, [1915] 3 K.B. 106, at p. 117.

With some hesitation, I have come to the conclusion that the executor, having paid the moneys under the circumstances referred to, cannot recover the same from Bridget McDonald.

In addition to the real estate on which the dwelling referred to stands, the testator died seised in fee simple of other real estate. It is said that *primâ facie* any benefit given to a widow is in addition to her dower in lands which may be subject thereto, unless an intention to the contrary is indicated in the will. There is no such intention apparent in this will; and I think the answer to the third question should be that, while the widow cannot properly claim dower in the real estate on which the dwelling-house is placed, she can do so with respect to the remainder of the real estate, and is not put to an election: *Rudd* v. *Harper* (1888), 16 O.R. 422; *Re Shunk* (1899), 31 O.R. 175; *Re Hurst* (1905), 11 O.L.R. 6.

Costs of the motion will be payable out of the estate. Those of the executor as between solicitor and client.

Mr. Landriau, for appellant; *D. Inglis Grant*, for respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The first question involved in this appeal is, whether the estate or the widow should pay the municipal taxes imposed from year to year upon the testator's dwelling-house, during her occupancy—the right to occupy which, free of rent, he gave to her, by his will, "during the remainder of her natural life, or as long as she desires to continue occupying the said dwelling:" but subject to a right in the executor, if he should deem it advisable at any time, to sell it, in which event the widow is to give up possession without any claim for dower.

The will gives no power to the executor to pay these taxes; nor is there any fund out of which they could be paid: if paid out of the estate, they must be paid out of that which is expressly

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given to the widow herself or to some of the other beneficiaries; and the right to occupy is expressly made free of rent, but of nothing else.

The testator's intention was not, in my opinion, that his executor should pay, or intermeddle with the payment of, these taxes while the widow occupied the "dwelling." If the widow did not occupy, they would be payable out of the rents and profits of the property, which is said to be in the main business part of the town.

No one questions the rule that a life-tenant must ordinarily pay such taxes as well as other annual outgoings for the preservation of the property: and that the plaintiff took a life-interest in the "dwelling" in question is very plain: the words "during the remainder of her natural life" put that beyond controversy. The fact that that interest might be determined at any time, by a sale of the property, leaves it still a life-interest, determinable in that way.

What the exact character of that life-interest may be is not a controlling feature. Whether it is as much as was held, by the Court of Appeal of this Province, to have passed under the will of Fulton, upon which the rights of the parties in *Fulton* v. *Cummings* (1874), 34 U.C.Q.B. 331, depended, need not be considered: it was a life-interest in the land; not a mere license to occupy: see *Fountaine* v. *Pellet* (1791), 1 Ves. 337.

Upon the next question, it was not contended here, as it seems to have been in the Court below, that the widow was really entitled to interest upon her legacy during the year next following the time of the testator's death: what was contended is: that the payments in question were made as for interest during that time, and were made "voluntarily" by the executor, and so may be retained as interest, whether the widow was or was not lawfully entitled to interest: and that this applies also to the taxes which were paid by him.

But, whether they should, in the circumstances under which they were paid, be deemed to have been paid voluntarily, if the person who made the payment were not a trustee, so as to prevent recovery by him, is a question not at all involved in this case. The payments in question were made by a trustee, in breach of his trust, to one who, not only gave no consideration for the payments,

but also received them with full knowledge of all the facts which made the payments unquestionably breaches of trust. It ought not to be seriously contended that the widow may, in these circumstances, retain portions of her husband's estate given by his will to others.

I am in favour of allowing the appeal on both grounds. The costs should not, of course, come out of that part of the estate over which there was no contest, and which goes to others: they cannot be made liable for costs occasioned by an attempt to appropriate that which was theirs to the use of the widow. If they had sued for restitution, they should have had their costs. To make them payable out of that part of the estate which the widow gets would be to make them payable by her; and that would be unjust to the extent of the executor's costs, he being most blamable for the unwarranted payment.

The payments upon the legacy should have been and should be treated as payments of principal, not interest: the amount of the taxes improperly paid should be repaid by the widow, or else should be taken from her legacy; and there should be no order as to costs here or below.

MIDDLETON, J.:—The testator died in July, 1915, and by his will he bequeathed the sum of $10,000 and his household furniture to his wife, to whom he also gave "the right to occupy free of rent the dwelling in which we are now residing in the town of North Bay . . . during the remainder of her natural life, or as long as she desires to continue occupying the said dwelling, excepting as hereinafter provided."

Middleton, J.

The exception referred to is a proviso found later in the will: "If my executor deems it advisable at any time after my death to sell the property in which I am residing, he is to do so, and my widow is to give up immediate possession without any claim for dower."

The widow is still residing in the house, and no sale has been made or is yet contemplated.

The first question submitted is, whether the widow is entitled to occupy the property without paying the taxes upon it. The opinion expressed by Mr. Justice Sutherland was in favour of the widow's contention. With this finding I find myself unable to agree.

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Middleton, J.

In *Bartels* v. *Bartels*, 42 U.C.Q.B. 22, the testator devised his property to his sons, subject to the right of his daughters to "have at all times a privilege of living on the homestead and maintained out of the proceeds of the said estate during their natural lives." It was held that this gave the daughters a life-estate in the homestead.

It is argued that, even if this be so, the proviso that the estate given to the wife is to cease upon a sale being made by the executor, cuts down her estate as life-tenant in such a way as to relieve her from that which is incident to a life-tenancy—the obligation to pay taxes. No authorities were cited for this proposition. It is true that the life-estate is determinable at the option of the executor; but, so long as it exists, it is subject to the ordinary incidents to a life-estate—the obligation on the part of the life-tenant to pay the ordinary outgoings.

The second question arises from the fact that, on the death of McDonald, his widow was left without any ready money. The executor assumed that the legacy to her would bear interest, and paid her interest at the rate of 5 per cent. upon the legacy from the date of the death of the testator. The estate was not in such a position as to permit the legacy to be paid at the expiry of the year from the testator's death, and interest has been from time to time paid upon the unpaid balance. There is yet money due to the widow with respect to the legacy.

The executor now contends that the legacy did not bear interest until the expiry of the year from the date of the testator's death, and seeks to set off the $500 paid as interest for the first year against the balance that is due to the widow.

By the judgment in review, it is declared that the executor can neither recover this money so paid from the widow, nor set it off against moneys yet to be paid to her.

If the case has to be determined according to the strict rules of law applicable as between debtor and creditor, the widow's contention would be entitled to prevail. See *Stewart* v. *Ferguson* (1899), 31 O.R. 112, where it was held that interest paid by a mortgagor after the maturity of the mortgage at the mortgage rate, instead of the legal rate, could not be recovered back by him, nor could it be applied in reduction of the principal.

The same principle was applied in *In re Hatch*, [1919] 1 Ch.

351, where the overpayments were made with respect to income taxes. Such overpayments, it was held, could neither be deducted from future payments of the annuity nor recovered as a debt.

The principle, however, is different where the question arises with respect to payments made by an executor or trustee to a beneficiary entitled under the will or trust instrument. There the rule is as laid down in *Barber* v. *Clark* (1891), 20 O.R. 522; 18 A.R. (Ont.) 435. The overpayments may be credited, but the person who is accountable is not liable for interest upon the money improperly received. The trustee and the *cestui que trust* both innocently misapplied a portion of the trust fund paid over, and in equity the *cestui que trust* is liable to make restitution, but not liable for interest upon the sum to be restored.

In *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, accounts had been stated between a mortgagor and mortgagee, upon the theory that the mortgagee was entitled to receive compound and not simple interest. In allowing the settled accounts to be re-opened, the Privy Council states that there is a marked difference between the practice of the courts of common law and the courts of equity; that in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn as at law; and that in equity, where there has been a mere mistake of the law, relief has been given to a party who had dealt with property under the influence of such a mistake. The case of *Livesey* v. *Livesey* (1827), 3 Russ. 287, is cited as an instance. There an executrix, under a mistake in the construction of a will, had overpaid an annuitant, and was permitted to deduct the amount overpaid from subsequent payments.

In the result the appeal succeeds upon both grounds, and the order below should be varied accordingly.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J. Riddell, J. Latchford, J.

Appeal allowed.

CAN.
S. C.

SCOTLAND v. CANADIAN CARTRIDGE Co.

Supreme Court of Canada, Davies, C.J.; Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 22, 1919.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY TO WORKMAN — POISONOUS GASES — NEGLIGENCE — "ACCIDENT" — WORKMEN'S COMPENSATION ACT, 4 GEO. V., 1914 (ONT.), CH. 25.

A workman whose health is injured through inhaling fumes of poisonous gases while working in a munition factory is not barred from bringing an action even though an application was made for compensation under the Workmen's Compensation Act and refused by the Board. Such an injury is not one by "accident" within the meaning of that term in sec. 15 of Workmen's Compensation Act, 4 Geo. V. 1914, ch. 25.

[*Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640; *Innes or Grant* v. *Kynoch*, [1919] A.C. 765, referred to.]

[*Canadian Cartridge Co.* v. *Scotland*, (1919,) 48 D.L.R. 655, reversed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 48 D.L.R. 655, 45 O.L.R. 586, reversing the judgment at the trial in favour of the plaintiff.

The plaintiff, working in a munition factory, claimed damages from his employers for injury to his health caused, as he alleged, by inhaling gas fumes in doing his work. He claimed compensation under the Workmen's Compensation Act, 4 Geo. V., 1914 (Ont.), ch. 25, but the Board held that the injury was not caused by "accident" and that it therefore was without jurisdiction. He then brought an action in which the jurisdiction of the Board was made an issue. On the trial the evidence was conflicting as to whether or not the illness of the plaintiff was caused by poisonous gases, some doctors testifying that it was impossible, others that there could be no other cause. The jury found in favour of the plaintiff and judgment was entered for him for $3,500. The Appellate Division reversed this judgment and dismissed the action.

W. S. MacBrayne, for appellant; *S. Johnston*, K.C., and *H. A. Burbidge*, for respondents.

Davies, C.J.

DAVIES, C.J.:—This action was one brought by plaintiff appellant, a workman at one time employed by defendant company in operating an annealing bath or process in use in defendant's works in the City of Hamilton for the manufacture of cartridge shells and other war munitions.

It was the duty of the plaintiff who was known as a "dipper" to place the cartridge shells, which were made of brass and were at a high temperature, in what was known as a sulphuric acid bath and after a short time to remove them from this bath and place them in another bath known as the cyanide bath.

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On February 12, 1917, plaintiff became ill and unable to continue his work and was removed to the Hamilton General Hospital where he remained under treatment until June, 1918. His contentions on which he based his claims were that his illness was caused by strong, irritating and poisonous gases which were emitted from the baths in which his duty required him to place and remove the cartridge shells and which were inhaled by him in the discharge of his work; and that in addition to these alleged poisonous gases, natural gases of a poisonous character were emitted from and by the natural gas furnaces in close proximity to the baths used in heating the shells and became mingled with the other poisonous gases which he was forced to inhale, and that no system of ventilation of any kind was adopted or furnished by the defendant for the purpose of removing the gases plaintiff was compelled to inhale while at his work, the result being his illness and complete collapse.

The defence of the defendant not only put in issue the facts of the plaintiff's illness having been caused by irritating and poisonous gases to which his work exposed him and the want of ventilation in the building as charged but also set up as a defence that in any case the plaintiff's remedy was confined to that given by the Workmen's Compensation Act, 4 Geo. V., 1914 (Ont.), ch. 25, and that his remedy had, on plaintiff's application for compensation under the Act, been refused, which refusal was final as to his claim and without appeal.

As to this latter defence, I do not think the plaintiff's common law right of action was taken away by the statute under the circumstances of this case. The Board declined to entertain the claim on the ground that plaintiff's claim was not one which occurred "for or by reason of any accident which happened to him in the course of his employment" and I cannot but think in so deciding they were right. The Board therefore had no jurisdiction to award compensation in a case of this kind and the plaintiff was properly left to his common law right of action.

The latest case which I have been able to find on the much debated question of what is an "accident" within the meaning of the term accident in the English Workmen's Compensation Act, 6 Edw. VII. 1906, ch. 58, sec. 1, sub-sec. 1, is that of *Innes or Grant* v. *Kynoch*, [1919] A.C. 765, decided by the House of Lords.

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Their Lordships, in very lengthy reasoned judgments in which all the previous cases were referred to and analyzed, decided, Lord Atkinson dissenting, that the fortuitous alighting of the noxious bacilli upon an abraded spot of the plaintiff's leg, though it did not appear when or how he received the abrasion and it was impossible to say with certainty when the infection occurred, nevertheless constituted an accident within the Act.

In the case before us, of course, no such point or controlling fact arose and I take it from reading the judgments delivered that in the absence of proof of the abrasion on the plaintiff's leg which became infected by certain noxious bacilli, there would not have been any ground for the holding their Lordships reached.

Leaving that defence and turning to the substantial defences set up by the defendant company to the claim of the plaintiff arising out of the alleged emanation of noxious and poisonous vapours from the baths at which he was working and the absence of proper and efficient ventilation in the factory which would have rendered these gases innocuous, it appears that after a lengthy trial during which a great many witnesses, scientific and otherwise, were examined, the trial Judge charged the jury on all the disputed questions with a fullness and clearness which does not seem to have left room for any complaint on either side and submitted to the jury for answers a series of questions covering all the debatable issues or contentions. I venture, even at the risk of unduly prolonging my reasons, to transcribe these questions and answers in full rather than give a simple epitome of them because, if there was evidence to justify the findings on the two main points of the emanation and inhaling of noxious and harmful gases and the absence of proper ventilation, these are sufficiently clear and definite as to justify the judgment entered by the trial Judge but set aside by the Court of Appeal:

QUESTIONS FOR THE JURY.

Q. Were harmless gases generated in the defendants' factory while plaintiff worked there? If so, what gases? A. Yes. The 3 fumes of gases combined: sulphuric acid, cyanide of potassium and natural gas. Q. Was defendants' factory in which plaintiff worked ventilated in such a manner as to keep the air reasonably pure and so as to render harmless as far as reasonably practicable all gases, vapours or other impurities, generated in the course of the manufacturing process carried on by the defendants while the plaintiff was in the defendants' employment? A. No. Q. If you answer no, then what effect did such lack of ventilation have upon the plaintiff; answer fully?

A. The conditions in the factory where the plaintiff worked caused his present and possible future disability. Q. Was the defendant guilty of negligence that caused the injury to the plaintiff complained of? A. Yes. Q. If so, what was the negligence? A. Sufficient ventilation was not provided while plaintiff worked there. Q. Might the plaintiff by reasonable care have avoided the injuries complained of? A. No. Q. At what sum do you assess the damages? At common law? A. We assess the damages at $3,500 under the common law. Q. Under the Factory Act? A. $3,664.44.

QUESTIONS SUBMITTED BY MR. JOHNSTON.

Q. Was the risk of inhaling dangerous gases a necessary incident to the employment of the plaintiff? A. Yes. It was necessary for the plaintiff to breathe, and in so doing he inhaled the fumes of the gases. Q. Was the imperfect ventilation, if any, caused by any of the fellow workmen of the plaintiff in keeping the windows and doors closed? A. No. That the fumes were too heavy to be carried off by natural ventilation in the winter months. Q. Did the plaintiff, knowing the conditions, assume the risk connected with the employment? A. Not knowing that it was a dangerous position he did not assume the risk. Q. If the plaintiff was injured in the course of his employment was the plaintiff injured by accident? (No answer).

I frankly confess that after reading the reasons for judgment of the Divisional Appeal Court delivered by the Chief Justice of the Common Pleas, I felt in great doubt whether the judgment entered upon the jury's findings could be sustained.

The question, of course, for our determination is not what we would find as jurymen having heard the evidence and inspected the factory and its means of ventilation in the winter months, but simply and only whether the findings of the jury were such as reasonable men might fairly make on the evidence submitted to them.

Since the argument at bar at the conclusion of which I still retained my previous doubts, I have read over most carefully the evidence given on both sides and parts of it more than once, and I confess that if I had to give the verdict I would most likely hold that the evidence taken as a whole did not justify the finding of the emanation of noxious and harmful gases from the baths at which the plaintiff worked, especially having regard to the weak solution of sulphuric acid proved to have been in one vat or tank 5 gallons to an 80 gallon tank, and another solution of cyanide of potassium approximately 25 lbs. to a 75 gallon tank, and to the scientific evidence, not contradicted by any other such evidence, respecting the possibility of these solutions throwing off these alleged noxious gases.

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I say on this main and controlling issue I would as a juryman probably have found against the plaintiff. But that is not my province. I have only to determine whether in the conflict of evidence we have before us in this case, scientific and practical, we find enough to justify reasonable men in reaching the conclusion these jurymen did. After much consideration and thought I have reached the conclusion, though not without much doubt, that there is such evidence in the record and that I ought not, in view of the extreme jurisdiction which juries are permitted to have over questions of fact, to set aside their findings on mere doubts I may entertain or on my reaching on the reading of the evidence a conclusion different from that the jury reached. Now in this case the jury had the great advantage of seeing and hearing the witnesses and of judging how far and to what extent credit should be given to their statements. They had the whole history of the plaintiff's illness and the facts which preceded and were claimed to have led up to it, given by the plaintiff. They had the evidence, very strong and positive, of the 3 medical men who had examined the plaintiff most thoroughly. Dr. Martin was the physician who was consulted by the plaintiff when he first took ill and saw him many times, making, as he stated, a most special examination to determine whether he could exclude from consideration all possible causes, other than poisoning, of the symptoms of illness which plaintiff had and suffered from. In the result he reached the conclusion that poisoning by the inhalation of poisonous gases was the cause of the man's illness. This conclusion was, of course, founded partly on the plaintiff's history of his case, partly on the man's symptoms and partly upon the test of the patient's urine and blood made by him, excluding or "ruling out all other possible conditions." He called Dr. Nancekivell in consultation who also seems to have made a very thorough examination of the patient and reached the conclusion that the symptoms which the patient had were those of a man suffering from inhalation of poisonous gases and that those symptoms altogether pointed to nothing else. In cross-examination he expressed himself as willing to pledge his oath that the patient was suffering from gas poisoning and that his opinion was not a matter of conjecture but "the result of logical analysis, history, and his condition. There is no one disease you will get the

inflammation of all the mucous membranes and the symptoms that he produced. No one disease will give you all those symptoms, outside of gas poisoning."

Lastly we have Dr. Holbrook, a medical gentleman in charge of the Hamilton Sanitarium and who was called and examined pursuant to an order made by the Court to have an examination of the plaintiff with a view of giving testimony at the trial. The written report of Dr. Holbrook is very full and complete evidencing not a mere casual examination of his patient but a thorough and complete one. The report after describing in detail the history of the man given by himself and the physical examination made by the doctor, of the plaintiff and the conditions in which he found the different parts and functions of the man, winds up by saying:—

In addition to these conditions a serious condition has been set up probably due to the fumes from the cyanide tank and which might be described as the chronic effects from cyanide poisoning. It seems to have set up a debility which has affected the nerves and muscles by causing a peculiar change which might be described as a loss of tone. This is probably the chief factor in the heart lesion, but while the other tissues would probably in time regain their tone, yet I would consider that this condition in the heart had led to physical changes which will remain permanent. Thus, while I consider it absolutely impossible to make definite statements at this stage, I would consider that his occupation in the munition plant had led to a general debility probably the result of chronic cyanide poisoning; also to an increase of fibrous or scar tissue in the lungs and to some enlargement in the bronchial gland and to a decrease of tone of the heart muscle fibre with dilation of the heart. I would consider that the man is now unfit for any work and that in all probability he will never be able to return to any but very light work for which the remuneration in his case would be small.

The doctor's examination and cross-examination at the trial did not in any way alter or modify the report he had made; indeed it rather accentuated the opinion he had there expressed. He said, "now I think that the bronchitis and irritation of bronchial glands was set up by inhalation of the sulphuric acid, and to some extent, cyanide fumes;" and again, "I think the chronic cyanide poisoning is the chief factor. He may have been over working, too long hours and too hard, that may have had something to do with the breakdown, but the symptoms came on and suggested cyanide poisoning more definitely than any other thing. Of course it was a chronic poisoning, more from the inhalation of vapour."

In cross-examination he admitted not being an expert on toxicology or the science of the effect of poisons on the human

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body but gave with great lucidity the symptoms of cyanide poisoning and left the impression on my mind that, while not professing to be an expert in toxicology, he was well grounded on the subject generally and knew well what he was talking about.

The other two medical men I have spoken of, Drs Martin and Nancekivell, were even more emphatic than was Dr. Holbrook in ascribing the plaintiff's symptoms to noxious and poisonous vapours. It is true the evidence of these medical men was founded to some extent, possibly to a very large extent, upon the history of his case given to them by the plaintiff and that their conclusions as to these symptoms having been caused by noxious and poisonous vapours were most emphatically contradicted by Dr. John A. Oille, a medical gentleman practising for many years past in Toronto and who, at the request of the Workmen's Compensation Board, had made a very full examination of the plaintiff's physical condition. In fact, to my mind it is quite impossible to reconcile Dr. Oille's evidence with that of Drs. Martin, Nancekivell and Holbrook. In substance, Dr. Oille's evidence was that his diagnosis disclosed pleurisy and osteo-arthritis as the diseases from which the plaintiff was suffering when he examined him and he is emphatic in his statement that "neither of these diseases could have been caused by sulphuric acid or cyanide, as both of these diseases are infective in origin." By "infection" he explained that it "meant that bacteria get into the body tissues or blood and cause disease."

When to this positive and clear evidence of Dr. Oille is added that of Mr. Fertig, a chemist and chemical engineer, who came to Canada from the United States on Government work and whose duties as inspector for the American Government took him to the factory here in question very often, it will be understood why I entertained doubts as to defendant's liability as to there being evidence to sustain the jury's findings. Mr. Fertig said that a solution of sulphuric acid mixed with water in the proportion of five gallons to an 80 gallon tank, and the water heated to 200 degrees, would not give off any harmful fumes or gases, and that there was no doubt about it; and further that putting 20 lbs. of cyanide in the cyanide tank, 20 to 22, containing about 75 gallons, and the water heated to 100 or 110 degrees Fahrenheit, no harmful gas or fumes would be produced. As he put it, "no poisonous

gases would come off. That bath in itself would be a very dilute bath, 22 lbs. to 75 gallons would be a 3% solution."

In fact, in cross-examination Mr. Fertig went so far as to say that 24 parts of water standing there in place of these tanks containing sulphuric acid and cyanide, would be just as harmful and as harmless and that the combination of sulphuric acid and cyanide as proved was absolutely harmless and that made it unnecessary to make provision to carry off the fumes.

In addition to these conflicting statements of the medical men and the experts, there was, of course, the positive statements of the plaintiff himself as to the effect upon him at the time he breathed in the exhalations from the vats or tanks, and of such men as House as to their having had similar experiences when so employed, and evidence to the contrary by others equally qualified to speak from personal experience.

The discharge by the jury of their duties was not a light or easy one. I am not able to say that the evidence justifies me or justified the Appellate Division in setting aside their findings. I have discussed the branch of the case made on the noxious exhalations or fumes arising from the tanks, at some length, because probably it is the strongest for the defendant. I think there was sufficient evidence to justify the finding of the absence, under the circumstances as found by them, of efficient ventilation in the winter season.

For these reasons I would allow the appeal with costs and restore the judgment of the trial Judge upon the jury's findings.

IDINGTON, J.:—The appellant claims from the respondent damages for injuries received, whilst serving as a workman in its factory, at part of the process of making shells for use as war munitions. Idington, J.

He alleges that, instead of making the place in which he was set to work reasonably safe for those performing the part of the service he was engaged in, it allowed the air, especially in that part of the room where he worked, to be contaminated with poisonous gases, resulting from the operations in which he and others were engaged; and that for want of proper ventilation he was compelled to inhale such poisonous gases and thereby suffered in his health.

It is reasonably clear that the building was so constructed that generally speaking in the warmer seasons ample means of

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ventilation were supplied by means of open windows or doors for all those engaged in the room in question, unless possibly for those few engaged at serving in immediate contact with the source and cause of the noxious gases in question.

But in the cooler and winter months the windows and doors were kept closed.

Obviously if, as now pretended, there were no noxious gases of any kind generated, there might be enough fresh air enter the room through the seams of the metal structure, or round the window frames and doors, to keep the room in a reasonable condition to work in.

In resolving the legal problem now submitted to us it does not seem necessary to follow that branch of the inquiry at greater length.

The appellant was taken ill and submitted the case, which his condition presented, to a physician in Hamilton who seems to give his evidence in a fair and intelligent manner and he attributes the condition of the appellant to the inhalation of just such noxious gases as might arise from the process in which the appellant was engaged. Indeed he gives a very positive opinion, which, if correct, entitled the appellant to succeed, as he did, with the jury who found, in answer to the appropriate questions submitted, including a number proposed by respondent's counsel, sufficient facts to maintain the action and assessed the damages at $3,500 if based upon the common law or, alternatively, at $3,664.44 if based on the Factories Act.

The trial Judge entered judgment for the former sum.

Assuming the appellant told the truth and the whole truth as to his work and condition of his health, and his physical condition, the case is of a very simple and ordinary character so far as the relevant law is concerned, and in the result was necessarily committed to the determination of fact by a jury.

The physician is corroborated in all essentials by a brother practitioner knowing of and being consulted in the case at the time.

At a later time in the course of the proceedings in this suit an order was procured by respondent for the examination of the appellant by an independent physician selected by the Judge applied to therefor.

His report is in the case and he was called also by appellant on the trial.

His report and evidence go also a long way to corroborate the view taken by the other physicians called by appellant. He, in view of the examination which he made of appellant having taken place 16 months or more after his falling ill, properly speaks with caution as to the possibility of something else than the alleged gases producing the results he found. But so far as a skilled physician, not professing to be a profound toxicologist, could properly do so he leaves no doubt on the vital point of, in his opinion, sulphuric acid and cyanide having been a possible and probable cause of appellant's condition, and of the gases therefrom having possibly been and indeed probably inhaled in the way testified to by the appellant.

The basis for all that testimony of experts is, of course, what the appellant and his witnesses swore to.

The evidence of Husband, who was foreman in the room and had been discharged evidently for no other reason than that he did not get along with the men under him in a satisfactory way, seems, notwithstanding that incident, to have been given fairly and intelligently. If he and others are to be believed there is abundant evidence corroborative of appellant's story, and especially of the inhalation of noxious gases during the operations of appellant, and attributable thereto.

It would have been, in my opinion, unjustifiable to have granted a non-suit in face of such a case as thus presented, even if it had been moved for.

It is remarkable and indeed, in light of the subsequent development in the Second Appellate Division, amusing to find that able counsel, alert to take properly every possible arguable objection during the course of the trial, never thought of either moving for a non-suit at the close of plaintiff's case, nor at the close of the evidence for defence for a dismissal of the action.

The evidence for the defence apart from that of the expert evidence to which I am about to refer later, does not, to my mind, meet that of the appellant and his witnesses in any satisfactory way, much less overbear it in weight. Indeed much of it impresses me, after a perusal of the whole, given for the defence, with the view that it had better have been left aside and the defence rested

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upon the expert evidence alone, coupled perhaps with some few facts testified to by some of the other witnesses for the defence.

Turning to the expert evidence, it consists of the evidence of a physician of 16 years' standing who laboured under the disadvantage of not having seen the appellant until about 2 years after he had fallen ill, and of a chemist.

This physician had, I infer, seen but one case of acute cyanide poisoning, and none of the chronic cyanide poisoning from inhalation.

I submit that these facts coupled with the testimony he gives, evidently from reading, in regard to this lastly mentioned possibility, a text book, is not very convincing.

Another physician called gives unimportant evidence and admits that probably he knows little of the subject matter involved herein.

Then we have the evidence of a chemist who in a sentence or two denies that when cyanide is in specific proportions put into water of a certain temperature named, no harmful poison or poisonous gases could arise.

No accurate examination of the conditions of the water actually used was ever pretended to have been made by him or any one else, or of the actual condition of the cyanide used. The water was supposed to be of the limited temperature named.

The evidence discloses a possible cause of the water becoming overheated by reason of the haste of workmen, ignorant of the consequences, plunging into same many of the pieces to be dipped therein before being properly cooled off.

As a basis of scientific investigation, which the Appellate Division lays so much stress upon, I submit it would be difficult to found anything in support of the defence so far as rested thereon.

To my mind, especially in view of the fact that cyanide was not used by any others engaged in the same process, except one, and that not named, this sort of testimony is next to if not entirely worthless.

I agree in the desirability of the truth revealed by science, being, when possible, duly observed, but the process of scientific investigation requires a thorough investigation of all the facts, conditions and circumstances so far as possible, before proceeding

to determine and formulate any definite assertion of any supposed rule of action or scientific fact founded thereon.

It never seems to have occurred to any one concerned to have examined a single specimen of this so-called cyanide and ascertain thereby the quality of that used and then see what results would flow therefrom under such conditions as it was used herein or even approximately so.

Unless we are to overturn our system of jurisprudence and the one rule of reason governing in law the results of a jury's verdict I submit the judgment appealed from cannot be permitted to stand.

There was ample ground upon which the jury's verdict might well have been reached within that rule acting upon the evidence placed before them.

The Judge's charge was full, fair and unobjected to, save by suggesting what I am about to refer to, and respondent having let it go at that, ought not to have been heard to complain, unless upon the one question of whether or not the evidence did not disclose a mere case of accident.

I am of the opinion that the ruling of the Workmen's Compensation Board was right in holding that it was not a case of accident, in the sense in which that word is used in the Act in question, but, if anything, the result of a continuous and systematic method of carrying on the works in question, in violation of either common law or statutory law, or of both.

Had, for example, an explosion taken place by reason of the same method, if such a result is possibly conceivable, then I can conceive of a case so founded being within the term "accident" in the Workmen's Compensation Act. Not being so or akin thereto if as I suspect the injuries were the result of months of continuous defiance of nature's laws by respondent, the appellant's right of action is not barred by said Act

I think the appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the trial Judge be restored.

DUFF, J.:—I have little to add to the reasons given by the Chief Justice with which I concur on the point whether the injuries from which the appellant suffered were due to the inhalation of noxious gases while engaged in the performance of his duties under

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his employment with the respondents. I find it impossible to concur in the decision of the Appellate Division that the findings of the jury on this point can be set aside or disregarded as without reasonable foundation in the evidence.

A more serious question is raised by Mr. Johnston's contention that there is no evidence justifying the finding that by the negligence of the respondents the appellant was deprived of some protection to which he was entitled and through which he would probably have escaped the harmful action of the gases to which he was exposed.

The evidence on this point is very meagre. After carefully considering the testimony of Darling, who was called on behalf of the respondents, together with the evidence as to the state of the atmosphere in which the appellant was working, I cannot concur in the view that there is not some support for the jury's finding on this point.

I should add a single word upon the effect of sec. 15 and sub-sec. 1 of the Workmen's Compensation Act. I refrain from expressing any opinion on the question whether a claim for compensation having been rejected by the Board on the ground that the facts out of which the injury arose did not bring the case within the category of "accident," it is open to the employer to allege in an action by the employee based upon the charge of negligence that the same facts did constitute an accident bringing the case within the operation of the provisions of the Act, including sub-sec. 1 of sec. 15 which on that hypothesis would afford an answer to the employee's action, if such a contention were open to the employer.

It is unnecessary to pass upon this because, for the reasons given by the Chief Justice, I think the respondents' contention independently of the Board's decision must fail.

Anglin, J.

ANGLIN, J.:—Sec. 43 (1) of the Factory Act, R.S.O. 1914, ch. 229, as amended by 4 Geo. V., 1914, ch. 40, sec. 4, requires that

> the employer of every factory or shop shall ventilate the factory or shop in such a manner as to keep the air reasonably pure and so as to render harmless, as far as reasonably practicable, all gases, vapours, dust or other impurities generated in the course of any manufacturing process or handicraft carried on therein that may be injurious to health.

At common law an employer is bound to provide so far as practicable a reasonably safe place for his workmen to work in.

Ainslie Mining and Railway Co. v. *McDougall* (1909), 42 Can. S.C.R. 420.

The plaintiff complains that while engaged in the defendant's munition factory he was unnecessarily exposed to the inhalation of poisonous gases generated in the course of its manufacturing process; that such exposure was due to inadequate ventilation of the annealing room where he worked; and that it resulted in serious and permanent injury to his health. On the trial, before Clute J., a jury found these several allegations to be established. On appeal the judgment based on this verdict was unanimously set aside, the Chief Justice of the Common Pleas delivering the judgment of the Divisional Court and holding that on each of the three issues "there was no evidence upon which reasonable men could find in the plaintiff's favour," 48 D.L.R. 655, 45 O.L.R. 586.

On the plaintiff's appeal to this Court the defendant supports this judgment and also contends that if injury to the plaintiff's health was caused as he alleges, the case was one of "accident" within the provisions of the Workmen's Compensation Act, 4 Geo. V., 1914, ch. 25, and this action therefore cannot be maintained. It will be convenient to deal first with the latter defence.

The plaintiff duly presented a claim for compensation to the Workmen's Compensation Board and it was twice considered by that body. On the first occasion it was rejected, as the formal certificate says, on the ground that it did not appear that "the claimant sustained a personal injury by accident arising out of and in the course of his employment;" and on the second, because "the Board is unable to find that the claimant sustained personal injury by accident within the meaning of the Act."

The respondent contends that it is consistent with these certificates that the Board based its rejection of the claim on the view that the plaintiff had not in fact been injured as he avers, and did not determine that if so injured the case would not be one of accident within the meaning of the statute. The second certificate seems to me rather to indicate that the Board meant to hold that any injury the plaintiff sustained was not due to an accident and that it was therefore without jurisdiction. Any possible doubt on this point however is removed by these passages in the evidence given by Kingstone, one of the Commissioners, who made an investigation on behalf of the Board.

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Q. Did you find when you were inspecting that factory that there were sufficient methods provided by that company to remove sulphuric acid fumes from that room? A. Well, let me answer that by making this mention; I had this in my mind, I was naturally looking under the terms of the Act to see whether or not anything had happened which could be considered an accident, because under the terms of sec. 3 of the Act the claim could only be allowed if it could be found that there had been injury to this man by accident. Q. And you decided ultimately it was not an accident? A. I concluded there had been no injury by accident. Q. How did you conclude that the injury had been sustained? A. Having excluded the question of accident—His Lordship: The report is very explicit. (Reading report.) Then they found this case was outside the jurisdiction of the Board? Witness: Yes, when I found that I did not go so far into the investigation of what was the trouble with the man as I otherwise would have, had I been charged with the responsibility of getting at the whole trouble.

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Mr. MacBrayne: Q. Speaking as a witness on behalf of the defendants, can you say whether there was sufficient ventilation in this room or not? A. I would not want to express an opinion. Because from that point of view I do not know; all I do know it satisfied me there was no accident.

His Lordship: You were not there after September? A. I was just there in connection with another accident on another occasion. Q. You have no knowledge of the conditions in winter? A. No. Mr. MacBrayne: Did you inquire whether the conditions you saw in September were the same as in January and February of that year? A. Well now, I don't know that I can say that I did. I inquired sufficient to satisfy me that no accident had happened to this man, within the meaning of our Act.

By sec. 6 (1) of the Workmen's Compensation Act the Board is given exclusive jurisdiction to determine all matters and questions arising under Part I. of the Act. That part deals with workmen's rights to compensation. By sec. 64 the Board is empowered to determine, if an action is brought by a workman against the employer in respect of an injury, whether the workman is entitled to maintain the action or only to compensation under the statute.

By an amendment, 5 Geo. V., 1915, ch. 24, sec. 8 (2), any party to an action is enabled to apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation or as to whether the action is one the right to bring which is taken away by Part I.; and such adjudication and determination is declared to be final and conclusive. The re-consideration by the Board of the plaintiff's application for compensation was at the instance of the present defendant, and I agree with the learned Chief Justice of the Common Pleas that the Board's conclusion that the plaintiff's claim was not founded on a

personal injury by accident within the meaning of the Act is binding on the defendant and not open to review in this action.

If the question were open I should incline to apply and follow the decisions in *Steel* v. *Cammell, Laird & Co.*, [1905] 2 K.B. 232; *Martin* v. *Manchester Corporation* (1912), 5 B.W.C.C. 259; *Broderick* v. *London County Council*, [1908] 2 K.B. 807; and *Eke* v. *Hart-Dyke*, [1910] 2 K.B. 677, the authority of which, so far as they require proof of a particular occurrence causing the injury complained of, which happened within some narrow limitation of time, has not been materially affected, as I understand it, by the recent judgment of the House of Lords in the readily distinguishable case of *Innes or Grant* v. *Kynoch*, [1919] A.C. 765. I agree with the Chief Justice that the Workmen's Compensation Act "does not stand in the way of this action."

But, I am, with great respect, at a loss to understand how it can be said that there was not any evidence on which the jury could reasonably find as they did in favour of the plaintiff on each of the 3 issues involved in the question of the defendant's liability. There was, in my opinion, quite sufficient evidence, if the jury saw fit to credit it, to support their verdict on all 3 issues. This expression of opinion would perhaps suffice to dispose of this appeal, but, in deference to the Judges of the Divisional Court, I think I should indicate what the evidence is upon which the jury's verdict in my view should have been sustained.

Were there noxious fumes or gases given off from the sulphuric acid and cyanide vats in the defendant's annealing room?

The plaintiff gives this evidence:—

Q. What would be the effect on the sulphuric acid and the cyanide as you put these shells in there? A. Gas fumes, the hot shells going into the hot acid. Q. There were fumes? A. As soon as you put them in the acid there was fumes you could see. Q. That is steam? A. Yes.

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Q. Your work took you practically over those vats? A. Yes.

William Husband, formerly a foreman with the defendant, says:—

His Lordship: What was the effect of this closing of the windows? A. Why it would cause a kind of heavy cloud of steam; pretty hard to see through it. Q. From where? A. From the steam arising from the vats. The cold air would meet with the steam. Q. Was there an odour to this steam that came from the vats? A. Yes. Q. Having regard to the plaintiff's work, and his position during the work, what would you say as to whether or not he might or might not inhale any of the fumes? A. It is possible he may have. I have

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myself. Q. You were not working over them? A. No. Q. What do you say of the plaintiff in regard to his position and his work, whether or not he was in such a position that he would inhale it? A. Oh, yes, he would inhale it. He would inhale it more if the wind was on the west side. In the winter time it would blow up a sort of cloud.

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Q. Has the cyanide in solution an odour? A. It has. Q. What is it like? A. It is sickening to the head. Q. Is it an odour that you can readily distinguish? A. It is. Q. Then when you were using 20 lbs. of this cyanide to 80 gallons of water, was there a perceptible odour? A. There was when we were using the strong stuff. Q. And the strong stuff is the 20 lbs. to the 80 gallons? A. Yes. Q. Were there any fumes or odours from the sulphuric acid? A. Oh, yes. Mr. Johnston: That is clearly a leading question. Mr. MacBrayne: I don't know how I could ask the question in any other way. His Lordship: Q. Was there an odour from the cyanide? A. Yes. Q. What was it? A. A kind of sickening smell, and it used to affect my throat and lungs; if I got a good smell of it it would affect my throat. Mr. MacBrayne: How many cyanide baths were there in that room. A. Two. Q. And was the other being operated in the same way? A. Yes. Q. With the same strength of pounds? A. Yes. Q. Winter and summer? A. Yes. Q. You said something to His Lordship about the effect of the odour from cyanide; will you tell us what that was? A. It affected in such a way that it was a kind of sickening smell to the head, and also affected my throat and lungs; each time I worked on the cyanide I would have the feeling till such time as I had reduced the quantity of cyanide. Q. Was Scotland's work such as to keep him in this cyanide odour? A. It was such that there was 3 sets of vats he had to pass it to; he would be working there most of the time. Q. Did he have any other place to work? A. Well, he was changing around from the tanks. In the beginning he worked on sulphuric alone. After he was there a few weeks I put him to the cyanide tanks, because he was a smart man.

The strong mixture of cyanide, 20 or 22 lbs. to 75 or 80 gallons of water, was used during most of Scotland's period of work. A harmless soda mixture is generally used for the same purpose.

Husband adds:

His Lordship: What was the difference between the lesser and the larger amount, in regard to its effect? A. The fumes were stronger in the larger amount, and it left a kind of white substance on the cases.

James House, a fellow employee of the plaintiff, says:—

Q. All I want you to tell the jury is what was the condition of that room when you were working there? A. The condition of the room, you mean the air, and in regard to the acid and cyanide? Q. Yes. A. Well, in the cold weather the air was so thick with the sulphuric acid fumes and the cyanide that you could hardly see one another apart sometimes, and in inhaling the fumes it caused a bitter taste in the mouth, dizziness, headache, pricking of the eyes, and sleeplessness at night, and more tired when I got up in the morning than at night. When I went in I weighed 148, and when I came out I weighed 123 lbs. Q. During the winter season what method was there for removing these fumes and letting fresh air in? A. There was no method whatever. Q. Was there a window in the north side? A. No, the cold weather would

blow the fumes to you, and you could not see, and it was so warm you would get heated up so over the tanks that you could not stand the least cold draft on you. Q. What was your particular work? A. Packing the shells as they came out of the tank into the boxes. Q. They had been pickled or had their bath? A. Yes. Q. Why did you quit? A. Well, I quit on the doctor's advice.

Juror: Did you notice the fumes much more when the cyanide was being used? A. Well, you could taste it more.

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His Lordship: What do you say caused the tired feeling? A. Well, I believe it was the fumes of the sulphuric acid and cyanide, because before I went there I was in perfect health, could eat anything, and after being there 3 or 4 months I lost my appetite, and got up so cross and tired in the morning that I hated myself. Q. Might that be attributed to the hard work? A. No, I worked at harder work before I went there. Juror: Did you do any vomiting in the morning? A. Yes, shortly after I had eaten my lunch. Q. What was the cause of that? A. The fumes it must have been, a bitter taste in my mouth, and food would not digest.

John Roberts, another fellow employee, gives this evidence.

Q. That was the only thing that held you up? A. No, I used to be I couldn't eat, take a little milk food. Q. Did you lose any time during the 6 weeks except for this finger? A. No. I was not thinking the acid was doing any harm till people told me I was looking bad, and yellow in the face, and couldn't eat and sleep, so I laid off after Christmas. Q. Go to the doctor? A. No. His Lordship: What caused that? A. The work I done before I never felt as I did then, I believe my flesh was yellow, and a nasty taste in my mouth, couldn't eat or sleep, and always tired getting up, wasn't the same man anyhow.

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Q. That atmosphere is very heavy? A. Yes. Kind of hangs like that. A man inhaling that stuff it makes him sick. I could not eat, no taste of any food, just a little porridge that I had.

Husband also tells of an employee named Stirling who left the factory saying: "I can't stand these fumes and acid"—and went to a hospital.

Ernest Darling, a ventilating expert called for the defence, says:—

Q. And so you would expect that these gases that would be in this room should be diluted? A. Yes. Q. Why? A. If they are injurious to human health they should be diluted. His Lordship: Do you know whether they are injurious or not? A. From my knowledge I would know that cyanide gas is injurious, but sulphuric acid gases I don't believe are injurious to the same extent.

No doubt there is evidence from others, officers and employees of the defendant, that there were no perceptible fumes or gases in the annealing room; and one Fertig, a chemist called for the defendant, denied the possibility of fumes or gases arising from vats containing solutions of sulphuric acid and cyanide in the

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proportions and at the temperatures which the defendant company was supposed to maintain. In fact, he said these vats "were just as harmless as 24 pails of water. . . . Therefore why should any provision be made to take off the fumes"?

Of course the witness assumed that the solutions were always maintained in the proportions directed and that the temperatures never exceeded those prescribed. Either of these conditions might easily have varied from time to time.

But it was clearly within the province of a jury to determine what credence should be given to the very positive and sweeping testimony of this witness and whether it should or should not be relied upon in view of the actual experience of the presence of such fumes and gases deposed to by men who had worked in the factory. When to their testimony is added the evidence of the doctors who examined the plaintiff (to be more particularly referred to in dealing with the next question) I confess my inability to understand how it can be said that there was no evidence on which a jury could reasonably have found that harmful gases or fumes were given off from the sulphuric acid or cyanide vats.

Was the plaintiff's impairment of health due to the inhalation of these gases—was he a victim of chronic poisoning from them? Dr. Martin, who had the best opportunity of forming a reliable opinion since he saw the man immediately after he was obliged to quit work, is convinced that he was. "My diagnosis was poisoning from the inhalation of poisonous gases—that the man's condition is the result of inhalation of poisonous fumes."

He rests his opinion on the symptoms of his patient and the history of the case. How far the plaintiff could be depended upon to give a truthful history the jury had an opportunity of judging. They saw him in the witness box. Dr. Martin deposes that tests were made to eliminate the possibility of other diseases. No evidence of any other condition was found which would account for the symptoms as a whole, and while each of them, if taken separately, might be otherwise accounted for, the Doctor says that "the symptoms all together pointed to nothing else" than poisoning by the inhalation of poisonous gases, such as sulphuric acid and cyanide fumes.

Dr. Nancekivell, called by Dr. Martin in consultation, also examined the plaintiff two or three days after he was taken ill.

His conclusion was that he had been poisoned by poisonous gases. He adds that if the man had come to him and he had not known that he had been working in a brass foundry he would have pronounced it a case of gas poisoning. Asked to do so he pledged his oath that the man is suffering from gas poisoning; and he adds: "No one disease will give you all those symptoms (which the plaintiff exhibited) outside of gas poisoning."

Dr. Holbrook, the physician in charge of the Hamilton Sanitarium, who has had experience in gas poisoning cases with a number of returned soldiers, was appointed by the Court, at the instance of the defendant, to examine the plaintiff and report upon his condition. He made 3 examinations, but had not the advantage of seeing the patient soon after he became ill. He found conditions, however, which he ascribes to the inhalation of sulphuric acid and cyanide fumes.

It seems to me that cyanide fumes, the effect of that accumulated until a toxic effect was produced. . . . I think chronic cyanide poisoning is the chief factor . . . Of course it was a chronic poisoning, more from the inhalation of vapour . . . I think the conclusion I came to was that the cyanide poisoning was responsible for the different conditions he presented, and there was the general lowering of tone, nervousness, vomiting of food and irritability of the stomach . . . It might be possible to deny that any of the symptoms he had were due to cyanide poisoning, but I think that the general lowering of tone and the symptoms were caused by that and nothing else.

Q. It might have been caused by one hundred different things? A. Yes, but in fairness to the man I do not think it was.

Dr. Oille, a physician employed by the Workmen's Compensation Board, called by the defendant, on the other hand, found no conditions that could not be fully accounted for by other causes and an absence of some symptoms which, in his opinion, are characteristic of cyanide poisoning. Dr. Oille admitted, of course, that when sulphuric acid and cyanide fumes reach a certain percentage they become dangerous, and will make a man sick if the percentage is great enough. And according to Drs. Martin and Nancekivell, the plaintiff exhibited most of the symptoms which Dr. Oille states to be those of cyanide poisoning.

There is no suggestion that the plaintiff was exposed to the inhalation of poisonous gases anywhere else than in the defendant's annealing room.

The jury found that "the conditions in the factory where the plaintiff worked caused his present and possibly future disability."

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But the Chief Justice delivering the judgment of the Appellate Division, 48 D.L.R. 655, says, at 659:—

> All the symptoms of illness of the plaintiff deposed to were by *all* the physicians stated to be symptoms of a common everyday character that may arise from any one of many common ailments; they proved nothing.

With deference it would seem that some of the evidence above outlined must have escaped the Chief Justice's attention. Otherwise I cannot account for his comment.

He adds, at p. 660:—

> No other conclusion can be reached by me than that reasonable men could not find upon the evidence alone that the plaintiff was injured by poisonous vapours arising from these tanks; though reasonable men might be led by their impulses to do so . . .

With respect, it was clearly competent for the jury to find as they did on this branch of the case. Not only was there evidence to warrant their finding but the weight of the medical testimony supports it. In accepting the evidence of Dr. Oille and rejecting the opinions of the other three physicians because of their lack of "any special knowledge in chemistry or toxicology," the Appellate Court would seem to have usurped the functions of the jury. The same observation may be made upon their action in treating the evidence of the chemist Fertig ("the proper evidence" the Chief Justice terms it) as conclusive against the presence in the annealing room of cyanide and sulphuric acid fumes arising from the tanks, notwithstanding their actual experience deposed to by several men who worked there and the conditions found in the plaintiff by 3 reputable physicians ascribed by them to the inhalation of these gases and for the existence of which no other cause has been or can be suggested and also as to the effect given to the evidence of the defendant's expert in ventilation notwithstanding the weaknesses in it disclosed on cross-examination and the actual atmospheric conditions in the annealing room deposed to by several witnesses.

The evidence on this latter branch of the case must now be considered. Admittedly there was no artificial ventilation and little attention seems to have been paid to the need for it. Open doors and windows provided excellent ventilation during the summer but there is abundant testimony that these were all closed during the cold weather.

The plaintiff worked in the annealing room from October, 1916, to February, 1917.

Ernest Darling, the expert in ventilation called by the defendant, deposed that, owing to the character of the building—a shed with sides and ends of corrugated iron sheeting "the walls were not tight. . . . The building ventilates itself so to speak. . . . As far as ventilation is concerned it was very well ventilated. I think the trouble is that it is a question of heat and cold."

This expert made no examination of the building when the conditions prevailed under which the plaintiff was working. He never saw the factory in operation. On cross-examination it became apparent that he relied on open windows to take care of any noxious fumes that might arise in the room. The opening or closing of windows was left to the whim of the workmen, and some of them tell us that owing to the heat from the natural gas furnaces in the room—1200° Fahrenheit—and the character of the work they were engaged in they could not stand the draft from open windows during cold weather, working as they did in their shirts or with bare backs, and that consequently windows and doors were kept closed. The witness Darling criticizes their bad judgment in not opening windows on the side of the building on which there was no wind, but gives this significant testimony:—

Q. Wouldn't the air in this room if there were not sufficient ventilation, become very much vitiated after 10 hours' work, with the windows closed, the doors open occasionally? A. Yes. Q. And are you not trusting to a sort of accidental or providential ventilation when you speak of the doors being open? A. No. I think the men should use their judgment. Q. Then is it a good system of ventilation that leaves the question of shoving off the entire ventilation to the control of some workman? A. You would have a great deal of trouble if it is left in the hands of more than one man. Q. Shouldn't it be left in the hands of the management? A. No, the men should do it themselves. Q. Is a system which is left to the men themselves and which causes physical injury to a man, a good system of ventilation? A. Not necessarily, no. Q. It sounds rather bad? A. Yes. Q. Wasn't that the case here? A. Not necessarily. Q. These men who felt the cold should close the windows? A. The amount of gas— Q. I am not talking of that? A. The density of the gas is the main feature. Q. Is that system of ventilation which is left with workmen, entirely at the whim of any workman, to use or stop using it, a good and sufficient system? A. In that class of building, yes. Q. In any class of building? A. No. Q. Then with this building, why this building? A. Merely a shed. Q. Then the windows don't amount to anything at all? A. Sure they do. Q. Shut them and they still have good ventilation? A. Not necessarily. Q. And the ventilators are no good because the cold air is coming in? A. You have to take into consideration the whole operation of the building. Q. Because that is a shell of a building, built of corrugated iron,

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therefore the workman can close those windows or not, and it is still an efficient system of ventilation? A. An efficient system if properly used. You have to use your judgment.

Darling also states that "where you have concentration of gases—where they become dense or the air becomes saturated with gases"—forced ventilation is "a necessary part of factory construction" in order to carry those gases off; and, again, that some provision (should be made) "not carrying them off—dilution by supplies of cold air." He also says that for 90% of the time a building such as that of the defendant's would be satisfactory "and manufacturers find they can afford as a rule to use a building like that rather than go into a brick building, where it would be unsatisfactory in summer, just simply for a few weeks of cold weather in winter."

Mr. Kingstone, a member of the Board, testified to finding satisfactory ventilation when he visited the building. But his visit was paid in the comparatively warm weather of September, when windows and doors would be open.

Some of the evidence on the conditions of the atmosphere in the annealing room and its ventilation during the winter months is as follows:—

William Husband, a former foreman of the annealing department, tells of having complained of the ventilation in the winter of 1916, while Scotland was working there, to the superintendent, Embree, and suggested the introduction of suction fans. He says the reply was

the cold shoulder; if the men did not like it, get more men at the gate. Q. Was there any result from your complaint? A. No, not just then, not till the summer time. When the summer came they knocked off two sheets of galvanized iron on the north and the south and of the roof but not during the winter. Q. So the condition you complained of remained all that winter? A. Yes.

Embree denies this complaint.

Asked whether the windows were closed entirely during the winter months, Husband said: "It really depends upon the conditions of the weather. If the men are working in front of a draft they close the window. We could not keep them open in the winter, men working in their shirts or bare backs."

I have already quoted the passage in this witness's evidence where he describes the effect of the closing of the windows in winter and the atmospheric conditions in the building. To complete it I add this extract:

"Speaking of the winter season, that these places were closed, did you, as foreman, have these rooms ventilated in any way? A. I might have opened the windows occasionally myself, but they were soon shut, because the men got cold. Q. Would the day gang coming in start in with fresh air? A. Not on a cold morning. Q. And would the night gang start in with fresh air? A. Just come in with the same as the day gang left it."

I have already quoted from the evidence of James House, who was working in the annealing department at the same time as Scotland. To complete what he says I add this passage:

"Q. You could have opened the doors or windows at any time to get fresh air? A. Not very well in the winter. Because we could not stand the cold air. Q. The place was heated? A. It was not so hot, a person when perspiring cannot stand cold air. Q. You say you could not ventilate the place without getting cold? A. In the winter time."

From the evidence of John Roberts, also employed with Scotland, I extract the following additional questions and answers:

Q. Then I want you to tell the jury what you found the working conditions to be while you were there? A. Well, I found it a very hot place, very unhealthy. Q. Describe the conditions? A. There was two furnaces there in a very small room, about the size of this room, two annealing furnaces, and lots of vats. Two different sorts of vats, and lots of steam coming out of the vats. I did not stay there very long; I stayed there 6 weeks. Q. Was there any method of getting rid of the foul air that might be in the room? A. Yes, I guess there was. There was windows above and all around, and I never seen them open hardly, because we could not very well stand the cold air. It was the winter time, and with the sweat and the hot place the men could not stand the cold air. We were all in short shirts, just pants and boots on. We were so hot that we could not stand any cold air. We were working in just an undershirt. Q. Were all the men just working with the undershirt on? A. Yes.

* * * * *

Q. It was very hot there in winter in the Cartridge Company's factory? A. Yes, very hot. Q. Why didn't you open the windows? A. I was not the boss. Q. You would have opened the windows and Husband would not let you? A. If I had opened them you would not very well stand it in the winter time, and a gush of wind, zero weather, and us sweating, and the fumes, you could not stand it, we would be held up in another way. Q. So you say it was impracticable to open windows? A. Yes. Better if there had been a fan to take the fumes away. Q. Who told you about a fan? A. Nobody. I have been in different factories and seen them. Q. Where would you have put a fan? A. Well, I am not an engineer. Every man has a position. I would not know, but most likely some person would have picked up a place to put a fan. Q. Can you suggest any way in which the ventilation of that building could

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have been improved? A. No, sir, I was not getting that deep into it. I knew I had to quit because I was losing my health.

* * * * * *

Juror: Couldn't you have the top windows open in the winter? A. I could not tell you. I have seen them pulling the chain on the side to open them. Q. Do you know if they were opened; could you feel the draft from up there? A. No. But in the side-doors a man could not have the draft at his back. And a man sweating with two furnaces on each side of him. Q. If the top window was open there was quite a draft to drive up the vapours? A. No, I don't think it would. It seemed to work slowly. . . . Q. You were not over the tank all the time? A. Not the same kind of a tank as he was. Just on the wash-off tank and cyanide, and I would put it in there ready for the press room. His Lordship: Would you get as heavy fumes where you were as Scotland? A. No, because he was getting it all the time. I was getting a chance to get away from it. I was putting them in the clean water part of the time; I was not getting as much as him. He was in it all the time.

In view of all this evidence it is not at all surprising that the jury found that the defendant's factory was not "ventilated in such a manner as to keep the air reasonably pure and so as to render harmless as far as reasonably practicable all gases, vapours or other impurities generated in the course of the manufacturing process carried on by the defendant while the plaintiff was in its employment," that "the conditions in the factory where the plaintiff worked (had) caused his present and possibly future disability," and that the defendant was guilty of negligence which occasioned this injury in that "sufficient ventilation was not provided while the plaintiff worked there."

The finality of a verdict, where it is such as a jury viewing the whole evidence reasonably could properly find, is too well established to admit of discussion. As Lord Atkinson said in *Toronto R. Co.* v. *King*, [1908] A.C. 260, at 270: "The jury . . . is the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed, because they are not such as Judges sitting in Courts of Appeal might themselves have arrived at." In *Commissioner for Railways* v. *Brown* (1887), 13 App. Cas. 133, at 134, Lord FitzGerald, speaking for the Judicial Committee, said: "Where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand."

Here no exception is taken to the charge of the learned trial Judge.

As put by Lord Macnaghten in *Cooke* v. *Midland Great Western R. Co. of Ireland*, [1909] A.C. 229, at 233: "The only question before your Lordships is this: Was there evidence of negligence on the part of the company fit to be submitted to the jury? If there was the verdict must stand, although your Lordships might have come to a different conclusion on the same materials."

I reiterate my inability to understand how any answer can be given in the present case to the question presented by Lord Macnaghten other than in the affirmative.

I would allow the appeal with costs here and in the Appellate Division and would restore the judgment of the trial Judge.

Brodeur, J.

BRODEUR, J.:—The duty of a master towards his servants is to provide such appliances as are necessary for avoiding accidents and for preserving their health; and where there are special circumstances which are likely to cause injury the degree of care required is proportionately higher. Then consummate caution is required. *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640.

The respondent company was using in its manufacture acids which might produce fumes and gases injurious to the health of its employees. At common law, it was bound to see that its building would be properly ventilated in order that those fumes and gases should cause the least injury possible to its employees.

The statutory provisions in force in Ontario under the Factories Act, R.S.O. 1914, ch. 229, and the Public Health Act, R.S.O. 1914, ch. 218, required that the building in which the plaintiff worked should be ventilated in such a manner as to keep the air reasonably pure so as to render harmless vapours generated in the course of work done.

The evidence is rather conflicting as to whether there were harmful gases and proper ventilation. But it was for the jury to decide as to its value. The jury found that there was negligence. There was certainly sufficient evidence to justify such a conclusion. The Appellate Division came to a different conclusion.

The respondent relies upon what it calls the uncontradicted evidence of an expert chemist. It is true that this expert stated positively that no injurious gas emanated from the receptacles in which acids were diluted. But the evidence of the co-employees of the plaintiff and of the doctors who attended him shew con-

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clusively that his health has been injured by gases which evidently poisoned him.

In these circumstances the findings of the jury should not have been disturbed.

It is contended by the respondent that the plaintiff's right of action has been abolished by the Workmen's Compensation Act, 4 Geo. V., 1914, ch. 25, which established a new code of law respecting compensation for accidents to workmen. The statute provided that all claims for accidents to workmen should be dealt with by a Board and that employers would be required to contribute yearly to a fund which should be administered by the Board.

In this case the appellant applied to the Board for compensation; but the Board decided that it was not an accident which entitled him to compensation from the Board.

The word *accident*, on the construction of which the plaintiff's application was dismissed, has been more discussed than any other word.

It means some unexpected event happening without design and the time of which can be fixed.

The latter condition as to the time cannot be ascertained in the present case.

It has been decided that lead poisoning contracted gradually is not an accident. *Steel* v. *Cammell, Laird & Co.*, [1905] 2 K.B. 232.

The appeal should be allowed with costs of this Court and of the Court below and the judgment of the trial Judge restored.

Mignault, J.

MIGNAULT, J.:—For the reasons given by my brother Anglin, I am of opinion that the appeal should be allowed with costs here and in the Appellate Division and that the judgment of the trial Judge should be restored. *Appeal allowed.*

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Ex. C.

LIVINGSTON v. THE KING.

Exchequer Court of Canada, Cassels, J. December 13, 1919.

CONTRACTS (§ V C—260)—MINISTER OF CROWN—CONTRACTING WITHOUT AUTHORITY—PAYMENT OF PUBLIC FUNDS—APPROVAL OF GOVERNOR-GENERAL-IN-COUNCIL—VALIDITY.

The Crown is not responsible on a contract involving payments out of the public funds made by a Minister of the Crown without the authority of the Governor-General-in-Council and which has never been approved by him.

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Statement.

PETITION OF RIGHT to recover from the Crown damages for breach of contract made by a Minister of the Crown but without authorization or ratification by Order-in-Council.

The suppliant, in his petition of right in substance alleges that from 1898 to the date of the contract sued on he had always supplied the Royal Military College at Kingston from year to year with various articles of clothing and similar articles, without written contract. In 1911, after negotiations with the Department of Militia, a contract was signed. The contract is given at length in the petition of right and the principal sections thereof are reprinted here as follows:—

Memorandum of Agreement made this 9th day of August, A.D. 1911,

BETWEEN

HIS MAJESTY THE KING, REPRESENTED BY THE HONOURABLE MINISTER OF MILITIA OF THE DOMINION OF CANADA,

OF THE FIRST PART,

AND

Charles Livingston, doing business in the City of Kingston, under the style of C. Livingston & Bro., Merchant Tailors.

OF THE SECOND PART.

Witnesseth, (1) The Party of the Second Part contracts and agrees with the Party of the First Part to furnish the articles of clothing, and repair the clothing of the Cadets of The Royal Military College, as set out in the price list hereto annexed, dated February the first, 1911, at the several prices shewn and contained in the said price list.

(2) The Party of the First Part agrees with the Party of the Second Part that the articles of military clothing required by the Cadets of the Royal Military College, including repairs as shewn in the price list before mentioned, *the cost of same being payable from Public Funds, shall* be obtained from the Party of the Second Part exclusively.

. . . . .

(5) It is agreed that the Commandant may annul this contract at any time, subject to the approval of the Honourable Minister of the Department of Militia and Defence, if the conditions of same are not complied with.

(6) This contract to be in force from the date of its approval until the 30th of June, 1915, and hereafter from year to year. It shall terminate at any 30th June after 1914, provided 6 months' notice to that effect is given by either of the Parties hereto.

. . . . .

(8) It is agreed that the prices in the price list, hereto annexed, shall be subject to yearly revision by the Honourable the Minister of Militia and Defence, the year in such cases to run from the 1st of July to the 30th of the following June; provided that such revision shall only be made upon the recommendation of the Commandant, and that the Party of the Second Part, shall have at least three months' notice in advance of the change of prices.

Signed, sealed and delivered the day and year above mentioned.

(Sgd.) C. Livingston,
F. W. Borden.

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They further allege that the contract was acted on in good faith by both parties until April 1, 1912, when the Department of Militia purported to cancel the said contract by letter and without notice or just cause; and that the work was given to other contractors. All past work was paid for and that the said contract was binding upon the Crown; and he sues for damages for breach of contract.

The Crown in its defence in substance alleges that the agreement and contract in question, if made between suppliant and Minister of Militia and Defence as alleged, was not binding in law upon the Crown and that it should have been specifically authorized by an Order-in-Council, which was not done; that there was no appropriation of public moneys voted by Parliament and payable from public funds to meet the payments provided for in the contract and that any payments made to the contractor were paid and expended under the direction of the Commandant of the Royal Military College and out of moneys received from Cadets of said college under regulations covering the same and were not paid or payable out of public funds. They further state that the contract in question was not of a routine or departmental nature as would enable the Minister to fix liability upon the Crown.

By their reply, the suppliant states that public moneys were annually voted for said contract by Parliament and refer to the Auditor-General's reports and the public estimates; and that, even if the Minister of Militia had not inherent power to bind the Crown with respect to the contract in question, which is not admitted, the contract was ratified and approved of by Parliament by granting the moneys as aforesaid and by the fact that the suppliant was paid out of such grants and that the contract, to be binding, did not require the Order-in-Council.

J. L. Whiting, K.C., and *C. W. Livingston*, for suppliant.

Mr. Plaxton for respondent.

Cassels, J.

CASSELS, J.:—A Petition of Right filed by one Charles Livingston in the City of Kingston, Merchant, claiming that on August 9, 1911, an agreement was entered into between His Majesty the King, represented by the Honourable, the Minister of Militia, of the first part, and the petitioner of the second part, whereby the party of the first part agreed with the party of the second part, that the articles of military clothing required by the cadets of the Royal

Military College, including repairs, as shewn in the price list before mentioned, the costs of the same being payable from public funds, shall be obtained from the party of the second part exclusively. The agreement is set out *in extenso* in the petition of right.

The agreement provided by sec. 6, is as follows: "6. This contract to be in force from the date of its approval until the 30th June, 1915, and hereafter from year to year. It shall terminate at any 30th June after 1914, provided six months' notice to that effect is given by either of the parties hereto."

The allegations in the petition are, that on April 1, 1912, the Department of Militia and Defence purported by a letter dated April 1, 1912, to cancel the said contract without notice and without just cause.

The petitioner admits that all sums due him for work performed up to the cancellation of the contract have been paid, but he claims by his petition damages for breach of the contract.

By the 10th paragraph of his petition of right he alleges, as follows:—

10. That in addition to the damages claimed in paragraph 9 hereof, the suppliant claims to be entitled to damages which arise in the following manner: The suppliant had been accustomed to sell to the Cadets of the Royal Military College many articles of clothing and merchandise other than military supplies embraced in the contract in question, particularly civilian clothes and furnishings at the end of the college terms, as since April 1st, 1912, the Cadets were not required to come into the suppliant's store in connection with the purchase of military supplies, a large part of this trade has been lost as a direct result of the cancellation of the said contract. The suppliant claims damages for such loss.

This claim on the hearing was abandoned.

The Crown filed a defence in which they claimed the contract was not binding, the contention being that it had not the approval of the Governor-in-Council, as required by law.

It was agreed between the parties that the questions of law involved should be argued, and the case was set down to be heard on the legal questions, and came on for argument on November 28, 1919.

On the opening of the case it was suggested by counsel for both sides that in lieu of the points of law being argued, the hearing should be treated as if it were a trial of the action, it being agreed that no further evidence other than what appeared of record could be adduced; and it was also agreed that in the event of the Court

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being of opinion that the plaintiff was entitled to damages, the question of *quantum* of damages should be referred.

For the purpose of the trial it was also admitted that the agreement in question never received the approval of the Governor-in-Council.

After the best consideration that I have been able to give to the case, I am of opinion that the contention of the Crown is well founded. I do not think it was within the powers of the Minister to enter into a contract binding the Crown for a term of years without the approval of the Governor-in-Council.

I do not think the Regulations of the Royal Military College, rr. 14 to 22, affect the case. The funds referred to are payable to the Receiver-General. The contract in question provides for the payment out of the public funds.

Reference may be had to the Consolidated Revenue and Audit Act, R.S.C. 1906, ch. 24, secs. 2a, 35, 41 and 42; the Act relating to the Royal Military College, R.S.C. 1906, ch. 43; the Militia Act, R.S.C. 1906, ch. 41; and also *Jacques-Cartier Bank* v. *The Queen* (1895), 25 Can. S.C.R. 84, and especially at page 88.

The petition is dismissed with costs.

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SHILSON v. NORTHERN ONTARIO LIGHT & POWER Co.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 22, 1919.

NEGLIGENCE (§ I C—69)—ELECTRIC POWER—PIPE LINE ON TRESTLE—WIRE ABOVE PIPE—BARRIERS AROUND TRESTLE—WARNINGS POSTED—BOY CROSSING ON TRESTLE—INJURIES—DUTY OF POWER COMPANY.

A boy who is injured by an electric wire which crosses over a pipe line on a trestle cannot recover damages from the power company owning the wire, for children were not in the habit of crossing this trestle, and as the company had no reason to suppose that anyone would cross this trestle, it did not fail in any duty owing to the boy.

[*McDowall* v. *Great Western R. Co.*, [1903] 2 K.B. 331; *Maritime Coal Co.* v. *Herdman* (1919), 49 D.L.R. 90, 59 Can. S.C.R. 127, referred to.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1919), 48 D.L.R. 627, 45 O.L.R. 449, affirming the judgment at the trial which dismissed the plaintiff's action.

Aug. Lemieux, for appellant; *R. S. Robertson*, for respondents.

Davies, C.J.

DAVIES, C.J.:—I agree with Anglin, J.

Idington, J.

IDINGTON, J.:—The appellants in support of very numerous complaints of error on the part of the trial Judge in directing, or

failing to direct, the jury, are unable to point to any objection by counsel at the trial in regard to any of these alleged misdirections or non-directions which are now for the first time as to the greater part of them brought forward as grounds for relief.

Needless to say such grounds are too late and must be discarded. They are, moreover, in substance, so far as I have heard in argument, quite untenable.

There seems no ground upon which relief can be given for the reason that the judgment appealed from is right.

The rather startling proposition that there were regulations expressly applicable which had been overlooked by solicitors in bringing the action, and counsel in conducting it, and the Judge in trying it, held our attention for a time, but it seems to turn out to be quite unfounded in fact.

The appeal should be dismissed with costs.

DUFF, J.:—I concur in the view of the Chief Justice of the Appellate Division that an insuperable obstacle to the appellant's success lies in the finding of the jury that boys were not in the habit of frequenting the place where the unfortunate appellant was injured.

Mr. Lemieux contends that the admitted facts give rise to liability under sec. 37 of the Power Commission Act, R.S.O. 1914, ch. 39, as amended by 6 Geo. V., 1916, ch. 19, sec. 10. His contention is that the wires from contact with which the appellant received the injuries from which he suffers, were not insulated as required by the regulations under this statute and that the respondents are answerable for the consequences in damages.

I do not find it necessary to consider the construction of sec. 37 with a view to ascertain whether a right of action is given in respect of the harm caused in consequence of the default of companies or individuals in observing any duty arising out of regulations brought into existence under the authority of the enactment. The regulations produced are "printed by order of the Legislative Assembly," are stated in the preface to "have reference only to inside work in ordinary buildings," and moreover, it is explicitly declared that electric work involving potentials exceeding 5,000 volts are not taken into consideration; and further the notes attached to the rules (A) and (B) upon which Mr. Lemieux desires to base his claim, make it quite clear that these rules apply only

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to conditions obtaining in some place which in ordinary language would be described as a building.

It is quite clear that we should not be justified in granting a new trial to enable Mr. Lemieux's client to put forward a claim based upon these regulations.

ANGLIN, J.:—A perusal of the evidence has satisfied me that the trial Judge was right in holding that it discloses no duty owing to the plaintiff by the defendant which it failed to perform and therefore dismissing this action. I agree that there was no evidence proper to be submitted to the jury in support of the plaintiff's charge of negligence.

In view of the improbability of even a venturesome and mischievous boy seeking to walk across a ravine 17-19 ft. deep and 300 ft. wide on a 12 in. pipe carried on trestles, and of the precautions which the defendant had taken by posting conspicuous "danger" notices near the place where the plaintiff's son was injured, which he saw and understood to be such, and making it still more difficult of access by the placing of barricades which any person travelling along the pipe would be obliged either to climb over or to swing around, there was no reason to apprehend that children might find an opportunity of making the company's high voltage wire crossing nearly 4 ft. above its pipe line a source of danger to themselves or others such as led this Court to find negligence and consequent liability in the recent cases of *Salter* v. *The Dominion Creosoting Co.* (1917), 39 D.L.R. 242, 55 Can. S.C.R. 587. The principle of the decision in *McDowall* v. *Great Western R. Co.*, [1903] 2 K.B. 331, there distinguished, I think governs this case. As put by the Chief Justice of Ontario, 48 D.L.R. 627 at 630

> It seems to me that . . . what the respondents did was just the same as if they had a patrolman who said "don't go over into that enclosure, it is dangerous to go there," and it shocks my common sense to think that a boy or a person who has been warned in that way and chooses to go there, and is injured by something that he did not expect to find, should be entitled to recover.

In this Court, however, the plaintiff asks that if he should not be entitled to judgment on the case as presented at the trial he should be granted a new trial to enable him to bring before a trial Court certain rules and regulations of the Hydro-Electric Power Commission made under the authority of sec. 37 of the Power Commission Act, R.S.O. 1914, ch. 39, as enacted by 6 Geo. V.

1916, ch. 19, not adverted to in the Courts below, which he maintains either directly impose a duty on the defendant which it failed to fulfil or afford evidence of a standard of due care, omission to observe which would constitute negligence on its part. A copy of these regulations "printed by order of the Legislative Assembly" has been furnished to us.

In the first place sub-sec. 8 of sec. 37 itself provides that "nothing in this Act shall affect the liability of . . . any company, firm or individual for damages caused to any person or property by reason of any defect in any electric works, plant, machinery, apparatus, appliance, device, material or equipment or in the installation or protection thereof."

Secondly, in the preface to the rules and regulations so published we are informed that they "have reference only to inside work in ordinary buildings, *e.g.*, residences, workhouses, factories, etc., and such work may be attached to the outside of such buildings and to the wiring of electric railways, cars and car houses," and all that electric work involving potentials exceeding 5,000 volts is not taken into consideration. Finally, in the notes appended to the particular rules (a) and (d) found under the heading "High Potential Work, (650-5,000 volts)," which the appellant seeks to invoke it is again made clear that they relate to high potentials in buildings.

We are here concerned with an outside transmission line far distant from any building and carrying a current of 11,000 volts. In my opinion these rules and regulations could not be successfully invoked by the appellant for any purpose in this case.

The appeal fails and should be dismissed with costs.

BRODEUR, J.:—I am of opinion that this appeal should be dismissed for the reasons given by my brother Anglin. Brodeur, J.

MIGNAULT, J.:—The appellant, a boy of 12 years, was injured by falling from a pipe line of the respondent crossing a ravine and on which he was walking. At about 4 ft. above the pipe line were high voltage wires, and the appellant having touched these wires received a shock which threw him to the ground, causing h s injuries. Mignault, J.

The appellant's action having come to trial before Masten, J., and a jury, the latter answered the questions put to them as follows:

Q. Was the plaintiff on the pipe line where the accident occurred with the knowledge or permission of the defendants? A. No. Q. Were children and

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other persons in the habit of walking on the defendants' pipe lines to the knowledge of the defendants? A. Yes. Q. And if so where? A. Principally on the main line. Q. If so, did the defendants object or seek to prevent that practice? A. No. Q. Were children or others in the habit of walking on the defendants' pipe lines at the place where the accident occurred? A. No. Q. If so, were the defendants aware of the practice? A. No. Q. Was the plaintiff aware that the barricade and notice thereon was intended to warn persons not to walk on the pipe line at that place? A. Yes. Q. In the construction or maintenance of their lines, were the defendants guilty of any negligence which occasioned the accident? A. Yes. Q. If so, in what did such negligence consist? A. In the electric wires being too close to the pipes. Q. If you find that the defendants are liable, at what sum do you assess the damages? A. To the infant plaintiff $2,500, to the father $410.

At the close of the plaintiff's case, the respondent had moved for a non-suit. This motion was reserved until the evidence for the defence had been put in and the case had gone to the jury. The motion was then renewed and the trial Judge, without determining whether the plaintiff was a trespasser or a licensee when walking on the pipe line of the defendant, found that the evidence did not disclose any duty owing to the plaintiff by the defendant which the latter failed to observe and perform. He also found that there was no evidence proper to be submitted to the jury in support of question No. 7 or upon which they could find as they had. The motion for a non-suit was therefore allowed and the action dismissed with costs. This judgment was upheld, on appeal, by the Appellate Division, 48 D.L.R. 627, 45 O.L.R. 449.

Taking the findings of the jury as they are, the answers to questions 7 and 8, in my opinion, impute no negligence to the respondent on which legal liability can be predicated against it. The jury found that children or others were not in the habit of walking on the defendant's pipe line at the place where the accident occurred, and also, in answer to question 1, that the plaintiff was not on the pipe line where the accident occurred with the knowledge or permission of the defendant. Even if the answer to question 2 could by itself be taken as a finding that children and other persons were in the habit of walking on the defendant's pipe lines generally to the latter's knowledge, the reply given to question 4 shews clearly that the answer to question 2 should not be construed as a finding that children or others were in the habit of walking on the branch pipe line where the accident happened. Taking all the answers together, it would seem, although the trial Judge did not think it necessary to determine the point, that the plaintiff

was a trespasser on the pipe line where he was injured, and the jury's answer to question 6 seems to put this beyond any doubt. This would defeat his action under the authority of *Maritime Coal Co.* v. *Herdman* (1919), 49 D.L.R. 90, 59 Can. S.C.R. 127, unless the respondent failed in a duty which it owed him as such trespasser.

I cannot find that the respondent failed in any such duty. At the argument, the appellant's counsel referred to the rules and regulations issued by the Hydro-Electric Power Commission of Ontario, under the authority of the statute 6 Geo. V. 1916, ch. 19, sec. 10, and asked this Court to order a new trial so as to permit him to file these rules and regulations in the record. But if the rules in force in 1916, and of which he sent us a copy, prohibited the respondent from maintaining the high voltage wires where they are over the pipe lines, effect could probably be given to them without ordering a new trial, unless more testimony than that actually given were required. Unfortunately, however, for the appellant these rules and regulations, which were framed for the purpose of inside electrical installations, do not apply to the respondents' wires or to their installation and maintenance where they are. Moreover, as shewn by sub-sec. 8 of sec. 10, the intention of the statute was not to affect the liability of the company for damages caused by reason of defective installation or protection of electric works or appliances.

The question therefore remains whether it was negligence to have these wires at a distance of 4 ft. or thereabouts above the pipe line where the accident occurred. In the absence of any statutory prohibition, and in view of the jury's finding that children or others were not in the habit of walking there, I am clearly of the opinion that this question must be answered in the negative.

The pipe over which the plaintiff attempted to walk was a 12-in. pipe carried on trestles, and in the deepest part of the ravine was 17 ft. above the ground. To walk on it, even without the high voltage transmission wires, was extremely hazardous to say the least. A sign had been placed at this spot with the words "Danger, 11,000 volts" in large letters, and a barricade had been erected to prevent anyone going along the pipe. The defendant certainly could not have anticipated that any one would walk over this pipe and be injured by coming in contact with the wires. Under these circumstances, a verdict of negligence against the

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defendant is one which the jury, considering the whole of the evidence, could not reasonably find.

In my opinion the appeal fails and should be dismissed with costs. *Appeal dismissed.*

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Ex. C.

MARCONI WIRELESS TELEGRAPH Co. v. CANADIAN CAR & FOUNDRY Co.

Exchequer Court of Canada, Audette, J. December 9, 1919.

PATENTS (§ V—50)—INFRINGEMENT—FOREIGN VESSELS—CONTRACT WITH BUILDERS—LIEN—SECURITY—INTERPRETATION OF CONTRACT—VESSELS PROPERTY OF EMPLOYER—PROTECTION—PATENT ACT, R.S.C. 1906, CH. 69, SEC. 53.

The title to vessels built in Canada for a foreign power, even though apparently remaining in the builders according to the terms of the contract as a guarantee for payment of moneys owing, and reverting to the foreign power upon final payment, really rests in the true owner from the beginning, and this owner is entitled to the protection afforded by the Patent Act, R.S.C. 1906, ch. 69.

[*Varasseur* v. *Krupp* (1878), 9 Ch. D. 35, referred to.*]

Statement.

ACTION for alleged infringement of a patent.

E. Lafleur, K.C., and *C. Sinclair*, for plaintiff.

A. Wainwright, K.C., for defendant.

Audette, J.

AUDETTE, J.:—The plaintiff brings this action, against the defendants, for an alleged infringement of the Canadian Patent No. 62,963, bearing date April 17, 1899, for improvements in "Transmitting electrical Impulses and Signals and all apparatus therefor," and further of the Canadian Patent No. 74,799, bearing date February 18, 1902, for "Improvements in Apparatus for Wireless Apparatus."

These two patents, as said by witness Cann, are similar in that they both radiate electric magnetic waves and the difference consists in the method of tuning. Patent No. 62,963 has the direct method of excitation and consists of one circuit only; and patent No. 74,799 consists of two circuits which are tunable one to the other.

Upon this it would appear that the patent is a narrow one, and one requiring careful examination in respect of its subject matter.

Patent No. 62,963 had already expired by lapse of time before the institution of the present action. Counsel at bar for the plaintiff abandoned all claims thereunder. It therefore follows that every claim mentioned in that patent now belongs to the public.

Under a previous judgment rendered herein the issues as between the plaintiff and the defendant Simon have been disposed of.

*See (1918), 43 D.L.R. 382, 44 D.L.R. 378, 18 Can. Ex. 241.

The issues in the present controversy are only between the plaintiff and the Canadian Car & Foundry Co., Ltd.

Under a contract or agreement, dated February 1, 1918, between the Republic of France and the said Canadian Car & Foundry Co., Ltd., which for the purposes of brevity will hereafter be called "the Company," the Company agreed to build for the Republic of France 12 steel mine sweepers, complete and ready for sea. The Company built these vessels at Fort William, Ont., and agreed, *inter alia*, to deliver them, at the place of construction or at salt water, at their option, at least 6 days prior to the closing of the locks by ice, etc. These vessels which were all delivered at Fort William were required for war purposes and were as such enrolled as part of the French navy.

This contract, which may be called the original contract, did not call or provide for the installation of wireless telegraph apparatus on board these war vessels. Atwood, a witness, states he could not say when the arrangement was made with respect to this installation, but it was made verbally between Mr. Park, Captain Denier and himself some time after the original contract had been in existence, and finally covered by the letter of November 25, 1918, ex. No. 8,—but this second contract was drawn after the apparatus had been installed. It is not in evidence at which date these war vessels were delivered to the Republic of France. Some had been delivered at this date of November 25, 1918, but we have no evidence of the delivery of each vessel. The apparatus was installed when 95% of the works had been done in the building of these vessels.

By this second contract, the Company was to install this wireless apparatus and supply labour and material for such installation. This labour and material would have practically been the same to install what is covered by patent No. 62,963 already lapsed and which invention belonged to the public at the time of this installation, and all the required material was bought in open market. Therefore there could not in any manner be an infringement in so doing.

The apparatus itself, or the cabinet, was the property of the French Republic having bought it in New York. When this apparatus was thus its property, the French Republic shipped it to itself—under its own address care of the Company,—at Fort

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William, Ont., where it was placed in the Company's warehouse, which under arrangement with the Canadian Government, was virtually a bonded warehouse.

In this letter of November 25, 1918, ex. No. 8, we find the following paragraph: "Except as hereby specifically modified, all terms, conditions and provisions of the said contract shall remain unchanged and in full force and effect,"—from which the plaintiff seeks support for the contention that the property of the apparatus became the property of the Company. I cannot accede to this contention because it is not in harmony with the facts. The apparatus was installed on the vessels when this contract, with such a clause, was completed and when some, if not all, of the vessels had been delivered and paid for.

The ownership of the apparatus was at all times in the French Republic who bought it, shipped it to Fort William, and had it installed under the direction and superintendence of officers of its own navy. How could the defendant Company be said to infringe any patent involved in this apparatus? At no time did they have control or ownership of it and none of their acts could amount to a user of the patent.

In re *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, we find a very interesting judgment with some analogy to the present case, and where the facts and language used by the Judges is quite apposite. The plaintiff in that case had brought an action against Krupp, of Essen, Germany, and its agent in England, and also the agents for the Government of Japan, claiming an injunction and damages for the infringement of the plaintiff's patent for making shells and other projectiles. These shells had been made in Essen, Germany, had been there bought for the Government of Japan, had been brought and landed in England to be put on board 3 Japanese ships of war which were being built there for the Government of Japan and to be used as ammunition for the guns of those vessels.

A preliminary injunction, without prejudice to any question, had been granted restraining the defendants, etc., forbidding the parting with, selling, or disposing of the shells. The Mikado of Japan and his Envoy Extraordinary were made parties to the suit, and moved to dissolve the injunction and to remove the shells in question the property of His Imperial Majesty. The application was granted and that judgment was immediately taken to appeal. James, L.J., prefaced his finding by saying, at page 354:—

I am of opinion that this attempt on the part of the plaintiff to interfere with the right of a foreign sovereign to deal with his public property is *one of the boldest* I have ever heard of as made in any Court in this country.

And his reasons for judgment all through shew that such an abuse of the help of the Court should not be encouraged. The patented shells were ordered to be handed over to the Japanese Government and on the merits the action was discontinued, *Varasseur* v. *Krupp* (1880), 15 Ch. D. 474. Likewise is not the present case tainted with an undue desire to overstretch the monopoly and privilege given a patentee under the old statute of James I., as modified by subsequent legislation?

On the question of infringement in the present case, counsel at bar contends, not without some colourable reason, that he has made a *primâ facie* case; but the evidence in that respect is so weak and so meagre that my common sense rebels in making a find ng in that sense. We are not dealing with a pioneer patent, and in determining the question of infringement all the circumstances of the case must be regarded. The first patent No. 62,963 has given the public so much to work upon, and the evidence upon the merits of the second patent, as compared with the first, is so little convincing, as well as that which tends to shew that the apparatus on the "Navarrine" at Montreal is an infringement on patent No. 74,799, that feeling as I do in the view I take of the case, I find it unnecessary to adjudicate finally upon that question. I wi'l refrain from so doing. It is indeed impossible under the circumstances of the case to find that the Company did as required by sec. 30 of the Patent Act, R.S.C. 1906, ch. 69, make, construct or put in practice the apparatus installed upon these war vessels, beyond the testing of the same by the naval officers of the French navy. Then the apparatus in question was the property of the French Republic and has always been, ever since it was purchased in New York. The defendant Company never had any control of the wireless apparatus.

Having said so much that takes us to the consideration of sec. 53 of the Patent Act which reads as follows:—

> No patent shall extend to prevent the use of any invention in any foreign ship or vessel, if such invention is not so used for the manufacture of any goods to be vended within or exported from Canada.

It is beyond reasonable controversy and doubt that the Republic of France did construct these 12 war vessels in Canada and paid

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for them in the manner provided by the contract. However, with the obvious view of guaranteeing the payment to the builder, the following clause was inserted in the contract between the Republic of France and the Company, viz., art. II.—par. 8:—

Both parties agree that the title of each vessel herein contracted for shall be and *remain* in the builder until the full purchase price for each vessel is paid in cash by the purchaser, less any deduction agreed upon.

Armed with this protecting clause giving the builder a lien for his work and material, an arrangement having privity between the contracting parties, the plaintiff contends the vessel became thereunder the property of the defendant Company and not of the Republic of France and is not therefore protected by sec. 53.

Before coming to any conclusion it is well to mention also that under art. 9 of the contract the Company was obliged to insure the vessels and that provision pursues and says:—

Loss if any, shall be made payable to the purchasers and the builders, as their respective interests may appear . . . and if said vessel and material on hand are not kept fully insured as above specified, the buyers may take out such insurance and the premium paid therefor shall be deducted from the next payment or payments due the builder hereunder.

This provision further establishes by the contract itself the interest the Republic of France had in these war vessels, and it was indeed the true owner subject to the lien for payment. The ownership is not in the Company, but held by it for its lien. If for the sake of argument one might concede the apparent title to the vessels was in the builder, the ownership of the vessels, on making final payment, followed by delivery, reverted to the French Republic from the beginning of the contract.

To come to a proper conclusion under the circumstances, I must consider both the spirit of the law together with the spirit and the true meaning of the contract. It is the intention of the parties that must guide. In seeking any conclusion in the present case one must guard against taking the shadow for the substance. Contracts must not be construed with technical narrowness. Right and justice must not be defeated by mere technicalities considered *strictissimi juris*. A Court is entitled to look at the substance of the transaction.

These war vessels to all intents and purposes were built, to the knowledge and acquaintance of all concerned, by the Republic of France, for its navy. They were enrolled as units of the same for the purposes of the Great War, no registration being required

for war vessels, and it would be pedantic for me to both ignore these facts and find accordingly. Under the circumstances I am unable to find, as asked by the plaintiff, that these vessels which were built and paid for by the Republic of France were not its property—even after paying 60% of their costs as the building progressed, or may be the whole purchase as in the case of the "Navarrine." The dates of the delivery of the other vessels are not disclosed.

I, therefore, find that the war vessels in question were under the circumstances foreign vessels coming within the ambit of the protection given under the provisions of sec. 53 of our Patent Act.

This legislation giving a foreign vessel this immunity has comparatively a modern origin, and it will be interesting to know its *raison d'être*. This legislation, in derogation of a monopoly, as enacted by sec. 53 of our Act, dates back to the English Patent Act as amended in 15-16 Vict., 1852 (Imp.), ch. 83, as a result of the decision given in 1851, in the case of *Caldwell* v. *Vanvlissengen* (1851), 9 Hare 415, wherein a Dutch vessel coming into an English port, an injunction was granted against her for using on board an invention protected by an English patent.

From a perusal of the Hansard's Parliamentary Debates in the House of Lords and House of Commons in England at page 1116, 1221, 1298 and 1229, it appears in the discussion which then took place in the Imperial House of Commons, that if the law were to remain as it was it would greatly interfere with and hurt trade and commerce as between England and the other countries and with a view to abate such danger, the monopoly of the patent law was curtailed in a manner to protect foreign vessels. The legislation was promoted to foster trade and commerce and the present instance comes within that class since it will encourage foreign countries to take advantage of our natural resources and build some of their vessels in our country, protected as they will be by our sec. 53—with the Courts of the land seeing that it is duly enforced in its spirit as well as in its substance.

Action dismissed.

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S. C.

BIRDSILL v. BIRDSILL.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. November 28, 1919.

DEEDS (§ II E—45)—CONSTRUCTION—CONVEYANCE OF LAND—RECONVEYANCE—LIFE ESTATE OF WIDOW—ESTATE TAIL IN REMAINDER—BAR OF ENTAIL—ESTATE IN FEE SIMPLE—ESTATES TAIL ACT, R.S.O. 1914, CH. 113, SECS. 9, 19.

A widow who is protector of a settlement must give her consent to a deed of the lands in which she has a life estate in order to give this deed a disentailing effect. If her consent is not given, the estate tail "quoad" remainders and reversions is not destroyed. But, the issue in tail being barred, and there remaining over only the estate to one person in default of issue to another, the latter had the whole fee; and his conveyance to a third party conveyed the fee which he took which was a fee simple.

Statement.

APPEAL by the plaintiff from the judgment of MASTEN, J., 45 O.L.R. 307, in an action to recover possession of certain land. Affirmed.

J. E. Jones, for appellant; *T. J. Agar*, for defendant, Birdsill, respondent; *H. S. White*, for the other defendants.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment of Masten, J., reported in 45 O.L.R. 307. The will under which the dispute arises is sufficiently set out in the report, as are the material facts.

It is obvious that the widow had a life-estate in the lands, with remainder over—it is equally obvious that the sons had an estate in fee tail in the lands allotted to them respectively. This is admitted, and it is unnecessary to cite authority.

Then, under our statute, the Estates Tail Act, R.S.O. 1914, ch 113, sec. 9, the widow was protector of the settlement—and her consent was necessary to give the deed a disentailing effect (except as to the issue in tail or other persons claiming by force of the estate tail): sec. 19. This consent was not obtained; and the deed, therefore, did not destroy the estate tail *quoad* remainders and reversions. But, the issue in tail being barred, there remained over but the estate to James in default of the issue of Edward—and the result is that Edward had in himself the whole fee, unless the special terms of the conveyance prevent this result.

I am unable to see that the actual object of the grantor was important: he must take the effect in law of his conveyances: *Lawlor* v. *Lawlor* (1881), 6 A.R. (Ont.) 312; (1882), 10 Can. S.C.R. 194; *Culbertson* v. *McCullough* (1900), 27 A.R. (Ont.) 459, and cases cited.

It is argued that, the grant being "subject to the terms, con-

ditions, and charges and legacies concerning the same expressed in the last will and testament of James Birdsill," the estate tail cannot be enlarged by this deed. But I think that "the terms, conditions, and charges and legacies" are those specifically mentioned in the will—"on condition that James . . . shall . . . pay . . . unto" the children named each the sum of $100. I am, therefore, of the opinion that Edward took a fee simple. His conveyance to James Birdsill the younger conveyed that fee—the judgment of the learned trial Judge is, in my opinion, right, and the appeal should be dismissed with costs.

Latchford, J.
Middleton, J.
Meredith, C.J.C.P.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

MEREDITH, C.J.C.P. (dissenting):—Under the will in question —which is not within the provisions of sec. 33 of the Wills Act, having been made in the year 1866—subject to the life-estate devised to their mother, the testator's two sons each took an estate in tail in the land devised to him, with a gift over to the other in fee simple upon failure of the entail.

The son James died without issue, and the son Edward is still living; therefore, if the will govern, Edward became entitled to the land in question in fee simple, and the plaintiff should have succeeded in this action. The rule against perpetuities does not apply to such a case: see Challis on Real Property, p. 146; and *In re Mountgarret*, [1919] 2 Ch. 294.

But it is said that by a deed made in the year 1873 by James to Edward the entail was barred and the gift over cut off. That, however, has not been proved: the contrary has. The deed was made for the purpose of protecting the land against an action for breach of promise of marriage brought against James; and so all that needed protection, and all that it was desired to be protected, was just such interest as James had in the land, and the less he had the better, so that enlarging his interest was out of the question.

The evidence at the trial makes this quite plain, as well as does the deed itself, upon its face. The son Edward proved it at the trial, and the main witness for the defence, who was examined on a commission after the trial for the purpose of disproving it, really only substantiated his testimony, though opposed to him, and more so towards his wife. The testimony of this witness, who is a sister of Edward and James, makes it very plain that the purpose of the deed was merely to defeat the claim for damages;

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and that the only money transaction in connection with the whole matter was a loan by another sister to James to enable him to satisfy this claim, which he did at a cost of $400. The case seems to have gone to trial, and the verdict to have been for $200; the rest of the $400 going no doubt in payment of costs. The smallness of the damages is accounted for by this woman witness in these words: "That is all they gave her: she wasn't of much account."

And, if there could have been any doubt on this subject, the writing itself should have prevented it. The parties were careful that there should not be: the land was conveyed "subject also to the terms, conditions, charges and bequests concerning the same expressed in the last will of James Birdsill, late of the township of Townsend, deceased."

Instead of there being any bar of the rights of others by the grantor, abundant pains were taken to make it plain that none was intended: that the terms of the will were to govern in all respects, except that James's personal interest in the land, liable to execution, should pass. I can find no justification for cutting down these wide words so as to embrace two small legacies only, which one of the words alone more than covered; and when the circumstances make it plain that the words were to have their fullest meaning.

Then it was contended, and indeed has been so decided, that by a reconveyance to James by Edward, after the satisfaction of the promise of marriage claim, Edward's right under the will in respect of his property passed. If so, that would be so plainly contrary to the intention of the parties and the whole purpose of the deed and transaction that it should be promptly rectified. But plainly it is not so: the conveyance was made solely for the purpose of reconveying to James that which James had conveyed to Edward, and no more. The purpose of the conveyance having failed through the settlement of the claim, matters were put back to the same position as before this precautionary transfer was made; and this too appears upon the face of the deed in the same words as in the other deed: the lands were reconveyed "subject to all the terms, conditions, charges and legacies set out in the will;" and so all rights are now governed by the terms of the will only.

It is unbelievable that Edward meant to bar all his rights in

the property given to James; and leave unfettered all the like rights which James had in the property willed to Edward.

Some suggestion was made that these deeds might evidence a real transaction, perhaps an exchange of properties; but, if it were a real transaction, what difference could that make, in view of the reservation of rights under the will? And how can any such suggestion be made? Both deeds are of the one property: a conveyance and a reconveyance of it only. The fact that Edward and his wife at one time lived on the land willed to James affords no ground for the suggestion. The mother had a life-estate in all the land: the home of the family was on the land willed to Edward: the whole family lived there. In anticipation of the mother's death, and each son then taking his land, a house was built on the land willed to James. Edward, when he married and needed a house to live in, was of course given that house: all was the mother's then, and she and the rest of the family lived in the house which was to become Edward's; and on the mother's death he moved into it, and the rest of the family had to go to the smaller house on the land of James; and hence, doubtless, the evident antipathy of the sister-witness towards Edward, and more so towards his wife, whom she spoke of as "she."

Then it was said that the plaintiff cannot set up an illegal transaction in support of his claim; but the only "transaction" he is setting up in support of his claim is the will in question. He is not relying upon the deed of James to him, nor, need it be said, upon his deed to James, and, if he were, would not be setting up the invalidity; on the contrary, his contention is, on the authority of such cases as *Haigh* v. *Kaye* (1872), 7 Ch. App. 469, *Symes* v. *Hughes* (1870), L.R. 9 Eq. 475, and *Wilson* v. *Strugnell* (1881), 7 Q.B.D. 548, that there was no illegality in the transaction; that, the purpose of the deed from James to him having been abandoned and the claim paid, it was not only right that Edward should reconvey, but that he might have been compelled to do so. Nothing prevented him shewing that no consideration was given for either conveyance, though it could make no difference in this case if there had been: the same consideration on each occasion would just as well shew the formality of the transaction, a conveyance for a temporary purpose. The words of the deeds, however, render everything else unnecessary; yet it may be useful to quote

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these very appropriate words of the judgment by the Judicial Committee of the Privy Council expressed in the case of *Plomley* v. *Felton* (1888), 14 App. Cas. 61, 68: "The proviso for redemption refers back to the will as the origin of the title, and necessarily brings in the whole series of limitations contained in the will, including the reciprocal limitations between the beneficiaries as tenants in common in tail *inter se*, which are commonly known as cross-remainders:" p. 68.

So, too, something was made of allegations that the purpose of this litigation is to defeat legacies which James by his will purported to charge upon the land in question: but how can that, if so, prevent or stand in the way of the plaintiff succeeding in this action? If James had no power to charge the land, why should the plaintiff be bound by his attempt to do so?

The appeal, in my opinion, should be allowed and judgment should be entered for the plaintiff for possession of the land in question. *Appeal dismissed.*

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Re BY-LAW 92, TOWN OF WINNIPEG BEACH.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Dennistoun, JJ.A. October 14, 1919.

1. MUNICIPAL CORPORATIONS (§ II C—63)—BY-LAW—REASONABLENESS.
A municipal by-law is not unreasonable, merely because particular Judges may think that it goes further than is prudent or necessary or convenient or because it is not accompanied by a qualification which some Judges may think ought to be there.
2. MUNICIPAL CORPORATIONS (§ II C—66)—BY-LAW—BUILDING PERMITS REGULARLY ISSUED—CANCELLATION BY MAYOR—ULTRA VIRES.
A municipal by-law is *ultra vires* the council in so far as it authorises the cancellation by the mayor of building permits which have been regularly issued under the by-law, and even if power to cancel a permit under the by-law pertains to the council that power cannot be delegated without statutory authority. The power to fine which is given to a municipal council by sec. 579 of the Municipal Act, R.S.M. 1913, ch. 133, does not include a power to forfeit in the absence of clear statutory authority.

Statement.

APPEAL from an order of Galt, J., dismissing an application to quash a by-law of the town of Winnipeg Beach. Reversed.

W. J. Donovan, for W. J. Wood.

L. D. Smith, for the municipality.

The judgment of the Court was delivered by

Dennistoun, J.

DENNISTOUN, J.A.:—This is motion to quash a by-law of the town of Winnipeg Beach and is by way of appeal from an order of Galt, J., who dismissed the application when it came before him.

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The by-law was passed under the provisions of sec. 581 of the Municipal Act, R.S.M. 1913, ch. 133, as amended by 4 Geo. V., 1914, ch. 66, sec. 10 (r); 5 Geo. V., 1915, ch. 43, sec. 15; and 9 Geo. V., 1919, ch 62, sec. 10, which now reads:—

581. The council of every municipality may also pass by-laws,—(r) for licensing and regulating or preventing and prohibiting or restricting buildings and structures partly of wood, partly of canvass felt or other light materials, tents and other similar structures, or additions thereto or alterations thereof, in specified parts of the municipality.

The by-law provides that the word "tent" shall include erections commonly known as tents and also temporary structures as set forth in the statute. It limits the number and size of tents which may be erected on town lots and provides that on lots where there is no summer cottage or other permanent building one tent only may be erected, but such tent shall not be erected or used until a written permit shall have been obtained from the secretary-treasurer of the town, for which a fee of 50 cents is payable. Permits may be granted by the council on special terms in respect to lots containing more than 11,250 square ft.

The town of Winnipeg Beach is a summer resort which it is stated at times contains as many as 15,000 temporary inhabitants, while at other times the resident population falls to less than 100.

The by-law contains clauses which relate to sanitary arrangements and to scavenging, to which objection has not been taken. It is manifest that its whole object is to protect the health of the inhabitants and by reason of the nature of the circumstances surrounding the occupation of this summer town it is difficult to frame regulations which will bear equally on all classes of property owners.

Such discrimination as does exist in this by-law does not appear to be unreasonable, and in any event it is not the duty of Judges to determine with meticulous care what is and what is not reasonable in a case of this kind. Municipal by-laws as Lord Russell of Killowen remarked, are not like the laws of the Medes and Persians—they are not unchangeable: *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at 98. The municipality has power to make by-laws from time to time as shall seem meet, and if experience shews that in any respect they work hardly or inconveniently, the municipal council, acted upon by public opinion, has full power to repeal or alter them.

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Such by-laws are in a different position from those of corporations carrying on business for profit, though incidentally for the advantage of the public. In this latter class of case it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. By-laws of a municipal character, such as the one under consideration, ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted and credit ought to be given to those who have to administer them that they will be reasonably administered.

A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary, or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. In matters which directly concern the people of the municipality who have the right to choose those whom they think best fitted to represent them in their council, such representatives may be trusted to understand their own requirements better than most Judges. There is a wide diversity of judicial opinion on such subjects and Judges can lay down no definite principle or standard by which reasonableness or unreasonableness may be tested.

The applicant asks that the by-law be quashed upon the following grounds: (1) that it is ambiguous and unreasonable in its terms; (2) that it discriminates as between property owners in fixing the areas of the lots to which the restrictions shall apply; (3) that there is no statutory authority for the cancellation of a license or permit issued under a by-law of this character; (4) that the council had no authority to delegate to the mayor power to cancel such a license or permit; (5) that the penalty provided by the by-law for an infraction thereof, "$50 and costs, upon conviction before a magistrate, and in addition any permit issued hereunder may be cancelled and declared null and void by order of the mayor" is *ultra vires* of the council, being in excess of what is authorized by sec. 579 (*a*) of the Municipal Act.

Objections (1) and (2) are governed by the remarks previously made and may safely be left to the ratepayers of the town for such action as they may see fit to take through their representatives in the council. These objections are not of a character to call for judicial interference.

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Objection (3) is of a more serious character.

In *Bannan* v. *Toronto* (1892), 22 O.R. 274, it was held by Boyd, C., that the power given to municipal corporations under sec. 285 of R.S.O. 1887, ch. 184*, to determine the time during which victualling licenses shall be in force "does not confer any power to forfeit such licenses, but merely to fix the duration of the license" (*headnote*). The power to create a forfeiture of property is one which must be expressly given to a corporation by the Legislature, and such an extraordinary power is least of all to be inferred where the Legislature has provided other means of enforcing by-laws by means of fine and amerciament.

This by-law seriously interferes with the common-law rights of property owners and while it must be benevolently construed in so far as the health and the general welfare of the community are concerned, it must be strictly construed in so far as it derogates from private rights. The owner cannot place a temporary building or a tent upon his own land except by permit, which may be withdrawn by order of the mayor. Such drastic action must be clearly authorized by the Legislature. The absence from the statute of express power to cancel such a permit cannot be supplied by analogy from what may be done in other cases which are specifically provided for.

The by-law entrusts the issuing of the license to the secretary-treasurer, but in a ministerial capacity only. On discharge of certain reasonable sanitary obligations by the owner of the land the license will issue apparently as a matter of right, and not of discretion. It is to be presumed that the secretary-treasurer will not act in an arbitrary manner and such delegation of authority to him is unobjectionable.

But the power to cancel given to the mayor is of a different character. He may use his discretion and cancel or not as he sees fit, after conviction of the owner of a violation of the by-law, and thereby deprive him of the right to use his land in an unobjectionable manner. The opinion is therefore expressed that it was *ultra vires* of the council to make provision for the cancellation of permits regularly issued under the by-law.

The fourth ground of objection is to the delegation of power to cancel permits to the mayor, and is a valid objection for the reasons

*See R.S.O. 1914, ch. 192, sec. 253.

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given in respect to objection (3), and for the further reason that even if power to cancel a permit under this by-law should be held to pertain to the council, that power could not be delegated without statutory authority. Powers which are given to a council constituted to act as one deliberative body to the end that the members may assist each other by their united wisdom and experience cannot even by vote be delegated to the mayor alone: Dillon on Municipal Corporations, 5th ed., vol. 1, sec. 244.

By this by-law the permit may be revoked by the mayor even though all the requirements necessary to obtain that permit have been maintained unimpaired. For an offence committed in respect to matters outside what is authorized by the permit, say the erection of an additional tent, the permit regularly granted may be revoked in respect to the tent or building as to which no offence has been committed. This ground of objection should therefore prevail.

The fifth and last ground of objection that the penalty provided is *ultra vires* is also well taken.

Sec. 579 (*a*) of the Municipal Act provides that "the council of every municipality may also pass by-laws, (*a*) for inflicting reasonable fines and penalties, not exceeding fifty dollars, in addition to costs, for breach of any of the by-laws of the municipality."

This by-law provides for a penalty "not exceeding fifty dollars and costs, upon conviction before a magistrate, and in addition, any permit issued hereunder may be cancelled and declared null and void by order of the mayor."

That a power to fine does not include a power to forfeit in the absence of clear statutory authority is strikingly illustrated by the case of *Heise* v. *Town Council of Columbia* (1852), 6 Rich. (S. Car.) 404, quoted by Dillon on Municipal Corporations, 5th ed., vol 2, sec. 618. There the town council had power to enforce obedience to their ordinances "by fine not exceeding fifty dollars." Special authority was given to municipal corporations to grant licenses to retail liquor. The council passed an ordinance relating to this subject, the penalty for violating which was a "fine of not more than $50 for each offence, and also a forfeiture of the license." It was held that the license which was granted and paid for was essentially *property;* that the council could only impose fines, and that it had no power to ordain a forfeiture of the license, there being

no difference between the forfeiture of a license and of goods and chattels. This reasoning appears to be sound and in accordance with the principles governing the administration of municipal law in this Province.

Opinion is therefore expressed that upon the fifth ground of objection the by-law is defective.

The following authorities were referred to upon the argument: *Re Taylor and Winnipeg* (1896), 11 Man. L.R. 420; *Reg.* v. *Webster* (1888), 16 O.R. 187; *Rex* v. *Pope* (1906), 7 Terr. L.R. 314; *Re Maycock & Winnipeg* (1914), 24 Man. L.R. 646; *Dunn* v. *Rural Municipality of St. Anne* (1914), 20 D.L.R. 987; *Re Crabbe & Swan River* (1913), 9 D.L.R. 405, 23 Man. L.R. 14; *Slattery* v. *Naylor* (1888), 13 App. Cas. 446; *Kruse* v. *Johnson, supra, Wood* v. *Leadbitter* (1845), 13 M. & W. 838.

It does not appear that any useful purpose would be served by separating the clauses of this by-law so as to leave the unobjectionable clauses unaffected by this application. The by-law as a whole is of a useful character and will no doubt be re-enacted in amended form.

The appeal should be allowed and the by-law quashed with costs. *Judgment accordingly.*

ROYAL BANK OF CANADA v. WAGSTAFFE.

Ontario Supreme Court, Appellate Division, Riddell, Latchford and Middleton JJ., and Ferguson, J.A. November 28, 1919.

PRINCIPAL AND SURETY (§ I B—12)—PROMISSORY NOTE—USED AS COLLATERAL FOR NOTE OF SMALLER AMOUNT—POSITION OF MAKER OF LARGE NOTE—SURETY—NO NOTICE TO BANK—RENEWAL OF SMALLER NOTE—RELEASE OF SURETY.

If the creditor grants an extension of time to the debtor, as a rule the surety is released on the presumption that such extension so incommodes the surety as to deprive him of his rights against his principal; but when the creditor does nothing to prejudice the surety after learning of his suretyship, the latter is not discharged.

[*Frazer* v. *Jordan* (1858), 8 El. & Bl. 303, referred to; *Bailey* v. *Griffith* (1877), 40 U.C.Q.B. 418; *Devanney* v. *Brownlee* (1883), 8 A.R. (Ont.) 355, distinguished.]

Statement.

APPEAL by defendant from a judgment of a County Court Judge in an action to recover the amount of a promissory note. Affirmed.

The judgment appealed from is as follows:—

On the 10th August, 1917, James Wagstaffe gave to his co-defendant J. H. Richard his promissory note for $1,000, payable

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9 months after date, at the Bank of Hamilton in Hamilton, with interest, as I decipher it, at 6 per cent. per annum. Wagstaffe says that it was agreed between them, at the time, that this note was not to be negotiated until a company called "Richam Machine Company Limited," which was being promoted by Richard, and in which Wagstaffe had taken stock, became a paying concern. The written agreement does not specifically state that the note was not to be negotiated, but that it is to be "null and void" if the company is not a paying proposition. From what was said it appears that this company never started operations. In the spring of 1918, the defendant J. H. Richard, who owned a fruit farm at Burlington, in which he estimated that he had an equity of $6,000 or $7,000, and also some chattel property—of small value, however—applied to L. M. Hillary, the manager of the plaintiff bank at Burlington, for a loan on his own note of $400. Security was asked for, and finally, on the 4th May, 1918, a note made by J. H. Richard and Alice Richard, for $400, payable two months after date, with interest at 7 per cent. per annum as well after as before maturity, was given to the bank, and at the same time, as collateral security, Wagstaffe's note, above mentioned, was endorsed over or hypothecated by Richard to the bank as set out in an hypothecation agreement.

I find on the evidence, and indeed it is not disputed, that at the time this note was handed over to the bank, the manager, Hillary, with whom the whole transaction took place, had no notice of the agreement between Wagstaffe and Richard nor of any other condition affecting the validity or negotiability of the note. The bank got it before maturity, and became holders in due course.

In my view, as far as the bank is concerned, the note, at the time it was hypothecated, represented a straight debt payable by Wagstaffe to Richard. The note was payable at the Bank of Hamilton; and Wagstaffe says that, as he did not trust Richard, whom he considered "slippery," he, some time before his note would fall due, notified the Bank of Hamilton, both at their head office and east end branch in Hamilton, not to pay this note if it were presented for payment. It became due on the 13th May, 1918, and, on the 7th May, Hillary sent it to the Royal Bank in Hamilton; and that bank, in the usual course of business, presented it to the Bank of Hamilton,

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but it was not paid, and was sent back to Hillary with the word "return" on the advice-sheet.

At this time Wagstaffe was away in California, and he says that the Bank of Hamilton did not notify him that his note had been presented for payment. The note given by Richard and his wife on the 4th May, 1918, fell due on the 7th July following, and, not being paid, by agreement was renewed on the 8th July for a further period of two months, on the same terms—the amount at this time, with interest added, being $405; and, Richard being unable to pay this at maturity, on the 11th September it was again renewed on the same terms until the 15th November following—the amount with interest added being $410. This last renewal was not paid, nor any part of it. Richard wished another renewal, but was refused. Correspondence then took place between Hillary and J. H. Richard, and also between Hillary and Wagstaffe and his solicitors. The first notice, however, to Wagstaffe that the plaintiffs held his note was given about the 31st November.

After getting this notice, Wagstaffe and his solicitors did try to get Richard to pay his note, but without result; and finally, on the 11th February, 1919, the solicitors wrote Hillary denying liability.

This action was commenced on the 22nd February, 1919, against J. H. Richard and Alice Richard for the amount of the note of the 4th May, 1918, and also as against Wagstaffe for the same sum, being the amount for which the plaintiffs were holders for value of his note. J. H. Richard and his wife did not enter an appearance or defend the action in any way.

For the plaintiffs, Mr. Cleaver refers me to secs. 56 and 129 of the Bills of Exchange Act and to Falconbridge on Banking and Bills of Exchange, 2nd ed., pp. 708 and 723.

For the defendant Wagstaffe, the only ground urged by Mr. Counsell is that he, Wagstaffe, was "clearly a surety, and the plaintiffs, by extending the time for payment by the renewals mentioned, have done so to his (Wagstaffe's) detriment and loss, as Richard and his wife have parted with or lost their property, and nothing can now be realised from them, and consequently Wagstaffe is released from liability." I think this argument would be sound if in the first instance Wagstaffe had joined in the note of the 4th May, 1918, as an accommodation maker and surety only, and the extensions were made without his knowledge and consent.

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This situation generally arises when the principal and his surety go to the bank and join in a note for a period agreed upon—the fact that one of them is merely a surety being known to the bank. It is a contract; and, when the note matures, it is the legal right of the surety, if the principal has not paid, to pay the note himself and then take such proceedings as may be necessary to protect and reimburse himself out of the principal's property. But if, without his consent, the bank makes a binding contract with the principal to extend the time for payment, then he, the surety, is deprived of his contract-rights, may have to suffer loss, and so is released from liability.

But this case, I think, is different. Wagstaffe was no party to the original arrangement on the 4th May. There was no contract between him and the bank as to the term of credit to be given to Richard, and I do not see that there has been any breach as far as he is concerned on the part of the bank. He had nothing to do with the bargain.

If, instead of the note of the 4th May being made payable two months after date, it had been made payable (as it could have been if the bank wished) on the 15th November following—the time when the last extension fell due—what, in these circumstances, could Wagstaffe have urged as against the rights of the bank as holders of his note in due course? The loss of property on the part of the Richards and their inability to pay would have arisen just the same meanwhile.

Again, assume that the note for $1,000 had been given by Wagstaffe to J. H. Richard for something he had bought from him, and was an undoubted and unequivocal debt owed by him, how could he urge that in such case he was prejudiced by the time for payment being extended? It would simply be giving him so much more time to pay his debt, which he should attend to when it falls due; and it is to be noted that, as between him and the bank, the bank had no notice when they took it of any condition attaching to it. They were holders in due course, and, as far as they were concerned, it represented a straight debt from him (Wagstaffe) to J. H. Richard.

For these reasons, I think the defence fails.

There is a further element, however, in the case that occurs to me, though I do not in any measure rest my decision upon it.

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Wagstaffe says that, soon after his note fell due, he instructed his solicitor to get the note from Richard, who in response to his letter promised to bring it in, but did not do so. Wagstaffe himself thereupon wrote to Richard and telephoned him. Richard again promised to bring in the note, but did not do so.

Wagstaffe did not follow this up, as I think he should have done, as there was sufficient to arouse his suspicions, knowing, as he says, the character of the man he was dealing with. I think this was negligence on his part. Had he pushed his inquiry, he would soon have learned where his note was, and then could have taken such steps as he might have been advised to protect himself.

As stated above, the judgment will be for the plaintiffs against the defendant Wagstaffe for the sum claimed, $400, with interest at 7 per cent. per annum from the 4th May, 1918, to date—$30.22—a total of $430.22 and costs.

J. L. Counsell, for appellant; *E. H. Cleaver*, for respondents.

Riddell, J.

RIDDELL, J.:—The facts of this case, so far as material, are few and clear—indeed they are not in dispute.

Pursuant to an agreement made between the appellant and the defendant J. H. Richard, the former, on the 10th August, 1917, gave Richard a promissory note for $1,000 and interest at 6 per cent., payable 6 months after date. Richard desiring to borrow $400 from the plaintiffs, the manager asked for security, and on the 4th May, 1918, Richard gave him the note for $1,000 as collateral security for Richard's own note for $400, payable on the 7th July, 1918, with interest at 7 per cent.—the appellant's note being endorsed over to the plaintiffs, and notice of protest waived. Richard received a loan of $400, but did not pay his note when due. The plaintiffs had no notice or knowledge of the agreement made between Richard and the defendant that the note was not to be negotiable except in the happening of an event which has not happened—or (if such be the effect of the agreement) that it was to be void if such event did not happen.

Before the appellant's note became due, he notified the officers of the Bank of Hamilton, where it was made payable, not to pay it when due. Richard's note was renewed twice, and is still unpaid.

On action brought by the Royal Bank of Canada, the learned County Court Judge directed judgment to be entered for the plaintiffs for the $400 and interest, etc.

The defendant Wagstaffe now appeals.

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He places his defence on the extension of time given to Richard to pay the loan of $400—but this is clearly untenable.

The rule that giving time to a principal releases the surety is based upon the fact that by so doing the creditor ties his hands so that he cannot sue the principal, and consequently the surety is deprived of his right to pay the amount as originally agreed, and use the creditor's name to enforce payment from his principal. The principle has been well established from the time of *Frazer* v. *Jordan* (1858), 8 El. & Bl. 303, and for some time before.

In the present case, on Richard giving his own note for $400 and the note of the defendant for $1,000 as collateral, there were two contracts: the one, with which the appellant had nothing to do, for Richard to pay $400; and the other for the defendant or Richard to pay $1,000. If the extension of time on the former contract had the effect of suspending the remedy upon it beyond its due date, no doubt (assuming as I do that the relation of principal and surety existed to the knowledge of the bank) the appellant would be discharged.

But that was not the effect of the extension of time: the appellant could, if he wished, have come in and paid the bank and then compelled the bank to realise the amount of the note for him. It is an everyday experience in financial circles to take what are called short collaterals, i.e., securities maturing before the principal debt. The lender is not obliged to wait for the maturity of the debt before realising on the securities—of course he has no right to apply the proceeds on the principal debt before it is due, but that is quite another matter.

There was never any extension of time for the payment of the $1,000 note, and consequently the principle of *Frazer* v. *Jordan* does not apply.

Any other result would have extraordinary consequences—it would follow that a bank or other financial institution could not take as security for a loan an accommodation note at a shorter date than the loan.

We are pressed with the decision of the Court of Appeal in *Devanney* v. *Brownlee* (1883), 8 A.R. (Ont.) 355.

Of course we are not, when dealing with the facts of a particular case bound by the judgment of any other Court or our own on questions of fact in another case. We are bound by the law as

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laid down by the Court of Appeal upon facts taken by the Court of Appeal as established.

In the case just mentioned, it was considered by the Court of Appeal that the defendant E. B. was a surety for W. H. B. in respect of a certain note to which they were both parties, and that the holder of the note, knowing the relation, when it became due received a payment upon it and took a renewal note for the balance, still retaining the original note for the balance. Obviously time was given for the payment of the balance—the plaintiff could not sue W. H. B. until the lapse of that time, and the surety was therefore relieved.

There is another ground which is equally available to the plaintiffs: admittedly they had no notice or knowledge that the appellant's note was not a debt from the appellant to Richard, or anything else than a promise to pay without condition.

No notice was given by the appellant or any other person of anything concerning the note until March, 1918, and then the only notice was an order by the appellant not to pay it. The next notice was by the solicitor for the appellant, on the 11th February, 1919, asserting that the note had been left with the bank for safekeeping; and no other notice was given till after the writ commencing this action was issued. All this is very far from affecting the plaintiffs with notice that the appellant was a surety for the debtor.

The appeal should be dismissed with costs.

A third party notice was served, but the issue was not disposed of—no order seems to have been taken out for that purpose, under Rule 169. We are informed that the learned County Court Judge considers himself *functus officii*, and that he cannot now dispose of this. It is probable that there has been a misunderstanding: there is no reason why the Judge should not now proceed with the third party matter and finally dispose of it.

It may be that Richard will consent to judgment and so save costs—in any event the expense of a fresh action should be avoided.

LATCHFORD, J.:—I concur in the result.

Latchford, J.

MIDDLETON, J.:—The law applicable in this case is well stated in the head-note to *Bailey* v. *Griffith* (1877), 40 U.C.Q.B. 418: "Where *after* a right of action accrues to a creditor against two or more persons he is informed that one of them is or has become a surety only, and *after that* he gives time to the principal debtor with-

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out the consent and knowledge of the surety, he thereby discharges the surety, even though he may not have assented or been a party to the change of relationship between them."

The case of *Devanney* v. *Brownlee*, 8 A.R. (Ont.) 355, was one in which the finding of fact was that Mrs. Brownlee was a surety only, "to the knowledge of the plaintiff" at the time the note was discounted, and so was discharged.

Here nothing was done by the bank to the prejudice of Wagstaffe after they learned that he was in the position of a surety only.

The appeal fails.

Ferguson, J.A.

FERGUSON, J.A., agreed with MIDDLETON, J.

Appeal dismissed

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LUCKING v. THOMAS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

MASTER AND SERVANT (§ I D—22)—ABSENCE WITHOUT LEAVE—MISCONDUCT —DISMISSAL—JUSTIFICATION.

A servant who absents himself from work without leave for two weeks and three days is guilty of misconduct justifying dismissal unless he can satisfy the burden which is on him of proving that he had leave to go on this vacation.

Statement.

APPEAL by plaintiff from the dismissal of an action for damages for wrongful dismissal from employment. Affirmed.

S. H. Potter, for appellant.

A. L. Gordon, K.C., for respondents.

The judgment of the Court was delivered by

Lamont, J.A.

LAMONT, J.A.:—This is an action for damages for wrongful dismissal.

The plaintiff established his employment by the defendants as grocery manager and his dismissal from service without notice. The defendants admit dismissing the plaintiff, but say they dismissed him because he voluntarily withdrew from their employment, absenting himself from their place of business for 2 weeks and 3 days immediately prior to his dismissal.

To this the plaintiff replies that he was absent on his vacation with the permission of A. H. Thomas, one of the partners of the firm. A. H. Thomas denied that he gave the plaintiff such permission, although he admitted that the plaintiff asked for it. The trial Judge in his judgment stated that either the plaintiff or

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A. H. Thomas was deliberately lying, but that he was unable to determine which one it was. He therefore fell back on the burden of proof, and held that the burden was on the plaintiff to establish that he had leave to go on his vacation, that he had failed to establish that leave and that, therefore, the defendants were entitled to judgment. The plaintiff now appeals, contending that the burden is on the defendants to justify dismissal.

In 20 Hals., page 110, the author says: "To entitle the servant to sue for damages two conditions must be fulfilled, namely; (1) the servant must have been engaged for a period fixed or determinable upon notice, and dismissed before the expiration of the period, if fixed, or without the requisite notice, as the case may be; (2) his dismissal must have been wrongful, that is to say, without just cause or excuse on the part of the master." And in note (*f*) to this paragraph, he adds: "When the first condition is proved the burden of proof seems to be on the master to justify the dismissal."

In 26 Cyc. 1006 (Evidence), the rule is laid down as follows: "In the first instance, the burden is on plaintiff to prove his contract and its performance up to the time of his discharge, and where the contract of hiring is indefinite, the burden of shewing the hiring to have been for a certain term rests on the servant.

"Where a servant enters upon his duties and continues until he is dismissed he need not prove that he performed his services faithfully, as a presumption arises that such is the fact, and the burden of proving a sufficient cause for his discharge is on the master."

The master in this case says he was justified in dismissing the plaintiff, because the plaintiff absented himself from his work from June 26 to July 15. That the plaintiff was absent is established. That absence amounted to misconduct on his part sufficient to justify dismissal, unless he had his master's permission to be away. *Clouston* v. *Corry*, [1906] A.C. 122.

The defendants having established a failure on part of the plaintiff to perform the services for which he was hired from June 26 to July 15, the burden, in my opinion, was on the plaintiff to establish leave of absence for that period. That leave not being established, his action fails.

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

Appeal dismissed.

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Re RUSSELL AND TORONTO SUBURBAN R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Latchford and Middleton, JJ., and Ferguson, J.A. December 11, 1919.

APPEAL (§ I B—18)—RIGHT OF APPEAL FROM AWARD BY ARBITRATION UNDER ONTARIO RAILWAY ACT, R.S.O. 1914, CH. 185—JUDGE OF HIGH COURT DIVISION—FURTHER APPEAL TO DIVISIONAL COURT.

Compensation for land compulsorily taken by a railway under the Ontario Railway Act, R.S.O. 1914, ch. 185, is fixed by arbitration as provided for in this statute.

An appeal from the arbitration award lies, first of all to a Judge of the High Court Division in the Supreme Court of Ontario, and a further appeal from his order to a Divisional Court of the Appellate Division.

[*Birely* v. *T.H. & B.R.Co.* (1898), 25 A.R. (Ont.) 88, distinguished.]

Statement.

APPEAL by the railway company from an order of SUTHERLAND, J., dismissing an appeal by the company from an award of arbitrators determining the compensation to be paid for part of a farm taken for the company's railway and for loss and damage by severance, injurious affection.

R. S. Robertson, for respondent; *R. B. Henderson*, for appellants.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The respondent's objection to the hearing of this appeal is based upon the judgment of the Court of Appeal for Ontario, given in the case of *Birely* v. *Toronto Hamilton and Buffalo R. W. Co.* (1898), 25 A.R. (Ont.) 88, but that judgment is quite inapplicable to this case: it was decided under federal enactments, widely different from the Provincial enactments by which this case is governed; and federal enactments which have since been changed so as to leave no excuse for holding that they lead to such extraordinary results as those which flowed from that decision, some of which were referred to in it.

We must look elsewhere to find what right of appeal there is in such a case as this: a case in which compensation, for land taken compulsorily by the appellants from the respondent under the provisions of the Ontario Railway Act, R.S.O. 1914, ch. 185, has been fixed by arbitration in the manner provided for in that enactment: and in which there has been a hearing and determination in the High Court Division of this Court of an appeal by the present appellants against the award made in that arbitration.

The Act gives a right, to any party to the arbitration, within a month after receiving notice from the arbitrators of the making of the award, to "appeal therefrom upon any question of law or fact to the Supreme Court:" sec. 90 (15): and the words "Supreme

Court" mean this Court—the Supreme Court of Ontario: the Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (*dd*).

There are other provisions of the Act in question which seem to me to point expressly to the manner in which such right of appeal is to be exercised, and so to determine the question under consideration; but, as we are not all in accord as to that, it may be well to consider, in the first place, just what the result would be if that were not so.

Looked at in that way, the question is: what is meant by the words the "Supreme Court of Ontario" apart from any context? There is but one such Court, but there are two Divisions of it, and the question is, which is meant—the Appellate Division or the High Court Division.

In the year 1912 wide-reaching changes in the constitution of the Superior Courts of the Province were made, one of the main purposes of which was the reduction of the number of appeals which might have been had in some cases, and, as far as practicable, to reduce them to "one only." A much larger appellate Court was provided for, to which appeals generally, even from the lowest Court, were to be made, and made once for all so far as the provincial Courts were concerned.

But all appeals were not included: appeals from masters, referees, and other judicial officers, who are not Judges, were retained in the High Court Division, the Court of which is, under this practice, always composed of one Judge only.

To which of these Divisions then did the Legislature mean that such an appeal as this should go? The answer is to be found in the like legislation constituting the Courts, and providing for the distribution of judicial duty and power, among other things—the Judicature Act of the present day, R.S.O. 1914, ch. 56.

Those who contend that the appeal in question should be, in the first instance at all events, to the High Court Division, rely upon sec. 12 of the Judicature Act,* asserting that the case falls within the residuary clause of the section—sub-sec. (2).

*12.—(1) The Appellate Division shall exercise that part of the jurisdiction vested in the Supreme Court which, on the 31st day of December, 1912, was vested in the Court of Appeal and in the Divisional Courts of the High Court, and such jurisdiction shall be exercised by a Divisional Court of the Appellate Division, and in the name of the Supreme Court.

(2) Except as provided by the next preceding sub-section, all the jurisdiction vested in the Supreme Court shall be exercised by the High Court Division in the name of the Supreme Court.

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But, assuming, without considering, that to be so, it is far from being conclusive: for sec. 12 is not the only section conferring jurisdiction on the Appellate Division.

Under sec. 26 the Appellate Division has also jurisdiction as provided by the numerous enactments therein set out "and (*t*) any other Act of the Parliament of Canada or of this Legislature."

So we should be thrown back to the legislation in question, and obliged to consider whether, under it, jurisdiction is conferred on this Division.

Among a good many things which lead to an affirmative answer to that question, these occur to me at the moment: this is the court of appeals: one appeal only, as far as practical, has been the aim of recent legislation: the appeal provided for in the legislation in question is one generally involving a considerable amount of money, and sometimes a great amount, as well as questions of importance and difficulty: an appeal lies to the Appellate Division, and to that Division only, from all appealable judgments of Division Courts—as well as from other inferior courts—in which the amount involved must be small: an appeal from these arbitrators, more conversant with the values of property than a Judge may be, to such a single Judge, is not that which should be expected when the appeal may just as easily be to a Court of five, or four, Judges: prior to the year 1913 the appeal was given, expressly, to "a Judge of the High Court," and in 1914 that was changed to "the Supreme Court;" and in the same year the one appeal only practice was given effect, as before mentioned: and all appeals against awards of official arbitrators are direct to the Appellate Division: the Municipal Arbitrations Act, R.S.O. 1914, ch. 199, sec. 7. It may be observed that in the Ontario Railway Act, 3 & 4 Geo. V. ch. 36, assented to on the 6th May, 1913, the appeal was (by sec. 90 (15)) given to the High Court instead of to a Judge of the High Court, as it had been so long before; and that in the Revised Statutes, 1914, brought into force on the 1st May, 1914, the change was made to the Supreme Court (R.S.O. 1914, ch. 185, sec. 90 (15)): so that the first change from a Judge was to the High Court, not to the Supreme Court. It may also be pointed out that under the Judicature Act which was superseded by that now in force, it was provided that proceedings directed by any statute to be taken

before the Court in which the decision of the Court should be final should be heard and determined by a Divisional Court (R.S.O. 1897, ch. 51, sec. 67 (1) (*a*)); and that, under the existing Judicature Act, sec. 12, the jurisdiction of such Divisional Courts is to be exercised by the Appellate Division of the Supreme Court of Ontario.

Against all such considerations these two only occur to me: under the Arbitration Act, R.S.O. 1914, ch. 65, in cases in which the parties to the arbitration have agreed that there may be an appeal against the award, that appeal "shall lie to a Judge of the Supreme Court and to a Divisional Court in the same manner, and subject to the same restrictions, as in the case of a reference under an order of the court:" sec. 17: and under the compensation and arbitration clauses of the Municipal Act, R.S.O. 1914, ch. 192, when the award is not one of an official arbitrator, an appeal lies from every award, in the like manner as under sec. 17 of the Arbitration Act, except where the submission is in writing and does not provide for an appeal (sec. 345).

It will be observed that, though in these few cases an appeal to a single Judge is provided for, there is nowhere anything that prevents an appeal to the Appellate Division, first or last.

If, therefore, the question had to be determined on such or the like considerations, my conclusion would be that the appeal given is to the Appellate, not the High Court, Division.

But, as I have intimated, the enactment in question (the Ontario Railway Act, sec. 90) seems to me expressly to point the way.

It provides (clause 16) that the appeal to the Supreme Court which it permits (clause 15) shall be, as nearly as may be, in accordance with the practice and proceedings upon an appeal from an award under the Arbitration Act, that is, under sec. 17, the provisions of which I have set out.

It will be observed that the enactment in question does not give *an* appeal, or an appeal to one Division only, or in any manner indicate that the appeal is to be one only, but rather the contrary: any party may appeal; and upon such appeal the practice and proceedings under sec. 17 of the Arbitration Act are to apply.

The "practice and proceedings" mentioned embrace the

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practice and proceedings in appeals from referees, which must be first to a Judge of the High Court Division, and afterwards to a Divisional Court of the Appellate Division; and that is also expressly provided for in sec. 17. "Proceedings" is a word of widest import; and, apart from that, the purpose of the Legislature was plainly, I think, to make appeals from awards under the Railway Act, appeals from awards under the Municipal Act, when not made by an official arbitrator, and appeals from awards generally, under sec. 17 of the Arbitration Act, alike in all respects, as they should be, though it would be better if they were all brought within the one appeal only, and that to the highest Court, rule.

I am therefore of opinion that the appellants' "proceedings" upon this appeal in this case have been quite regular, and that the objection to them must be overruled, and the appeal heard on its merits: an opinion which is quite in accord with the unreported ruling of the First Divisional Court in the case *Re McAllister and Toronto Suburban R.W. Co.*,* 19th February, 1917; a ruling which necessitated an appeal to a single Judge of the High Court Division first and then an appeal to a Divisional Court of this Division.

The costs of this part of the appeal should be costs in the appeal to the appellants in any event.

Latchford, J.

LATCHFORD, J.:—Mr. Robertson raises the preliminary objection that no appeal lies from the judgment of Mr. Justice Sutherland, who in the Court below heard the appeal from the arbitrators. Counsel contends that the railway company, having made one appeal, have no further redress, and relies on the decisions in *Birely* v. *Toronto Hamilton and Buffalo R. W. Co.*, 25 A.R. (Ont.) 88, and *James Bay R. W. Co.* v. *Armstrong* (1907), 38 Can. S.C.R. 511. In these cases it was held that under the Dominion Railway Act an appeal lay in Ontario either to a Divisional Court of the High Court or to the Court of Appeal. The right was to be exercised alternatively, and not in succession. If the appeal was taken to a Divisional Court in the first instance, a further appeal could not be had to the Court of Appeal.

But the principle of these decisions has no application to the present case. By sec. 26 of the Judicature Act, an appeal lies to

*The case is reported (1917), 39 D.L.R. 207, 40 O.L.R. 252, 22 Can. Ry. Cas. 272, but not on this point

a Divisional Court of the Appellate Division from any judgment of a Judge of the High Court Division in Court. The judgment rendered below is that of a Judge of the High Court Division in Court, before whom the appeal from the arbitrators was properly brought under sec. 90 (15) of the Ontario Railway Act, R.S.O. 1914, ch. 185.

The preliminary objection, therefore, fails.

MIDDLETON, J.:—Appeal by the railway company from the judgment of Mr. Justice Sutherland, delivered on the 11th July, 1919, dismissing the appeal of the railway company from the award of arbitrators upon expropriation proceedings under the provisions of the Ontario Railway Act.

The preliminary objection was taken by Mr. Robertson that, under the provisions of the statute, no appeal will lie to this Court from the decision of the Judge.

The statutory provision governing the right of appeal is found in the Railway Act, R.S.O. 1914, ch. 185, sec. 90 (15), which provides that any party to the arbitration may within the time thereby limited appeal from the award "to the Supreme Court," i.e., to the Supreme Court of Ontario: see the Interpretation Act, R.S.O. 1914, ch. 1, sec. 20 (*dd*).

This contention is based upon the decision in *Birely* v. *Toronto Hamilton and Buffalo R. W. Co.*, 25 A.R. (Ont.) 88, where it was held that, under the corresponding provision of the Dominion Railway Act, there was an appeal to either a Divisional Court of the High Court or to the Court of Appeal; but that, if an appeal was taken to the High Court, there was no right of appeal by either party to the Court of Appeal.

At first sight the provision of the Dominion Railway Act there in question appears strikingly similar to the provision of the statute now in question. By it there was given a right of appeal to "a Superior Court" of the Province where the land was situate. By the interpretation clause of the Act this expression was said to mean, in the Province of Ontario, the Court of Appeal for Ontario and the High Court of Justice for Ontario. There was, therefore, given an alternative right of appeal to either of two tribunals, which, for the purpose of the Act, were co-ordinate, and there was not given any right of appeal from the High Court

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to the Court of Appeal. The holding was that this indicated that the Court to which an appeal was had was by the statute created a special appellate tribunal for reviewing the decision of the arbitrators. The Court selected by the appellant then became, so far as the Province was concerned, the final tribunal. This, it was pointed out in the judgment, was in accordance with the decision in the earlier case of *In re Canada Southern Railway and Norvall* (1877), 41 U.C.Q.B. 195, where it was held that, under a statute which permitted an appeal from the award "to a Judge of any of the Superior Courts of Law or Equity," the decision of the Judge was final. This holding is not reported, but is recited in the judgments in *Norvall* v. *Canada Southern R. W. Co.* (1880), 5 A.R. (Ont.) 13, and *Norvall* v. *Canada Southern R. W. Co.* (1884), 9 A.R. (Ont.) 310.

It will be observed that fundamentally these two decisions, each denying the right of appeal, proceeded upon different grounds. Where, under the earlier statute, the appeal was to a Judge, there was no right of appeal from his decision because he was acting as *persona designata*, and not as the Court. Under the later statute, the ground upon which the right to a second appeal was denied was that the statute indicated that there was an alternative right of appeal to either one tribunal or the other, but no suggestion that in case the inferior Court was selected there should be a right of appeal to the higher Court from its decision.

The decision in the *Birely* case has the approval of the Supreme Court of Canada in *Ottawa Electric Co.* v. *Brennan* (1901), 31 Can. S.C.R. 311, and in *James Bay R. W. Co.* v. *Armstrong*, 38 Can. S.C.R. 511, and of the Privy Council in the same case, [1909] A.C. 624.

It has, however, been uniformly held that when the appeal was taken to the Court of Appeal for Ontario a further appeal lay to the Supreme Court of Canada, for by the Supreme Court Act—subject to exceptions not now material—a right of appeal was given from all decisions of the provincial Court of final resort.

Seeking to apply the principles underlying these decisions to the statute in question, it is first to be noted that the right of appeal given is to the Supreme Court of Ontario. This precludes at once the idea that the Judge entertaining the appeal is acting as *persona designata*. The appeal is to the Court, and not to any individual Judge, so that the *Norvall* case has no application.

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The *Birely* case also has no application, for there is not any alternative right of appeal. The parties have no option or choice. The appeal is to the Supreme Court of Ontario, and the mode of exercising that appeal is that pointed out upon an appeal from an award under the Arbitration Act. This reference to practice and procedure under the Arbitration Act does not appear to me to throw much light upon the situation. The only provision in that statute, R.S.O. 1914, ch. 65, is that found in sec. 17, which provides that, where it is agreed by the terms of the submission that there may be an appeal, an appeal shall lie to a Judge of the Supreme Court and to a Divisional Court in the same manner as if the case were one of a reference under an order of the court.

The provisions of the Judicature Act which are material are, first, sec. 43, which provides that every proceeding in the High Court Division of the Supreme Court shall be heard, determined, and disposed of before a Judge, and that "where he sits in Court he shall constitute the Court." Section 26 (1) then provides that "an appeal shall lie to a Divisional Court from (*a*) any judgment, order or decision of a Judge of the High Court Division in Court, whether at the trial or otherwise."

The effect of these sections is, it appears to me, to provide that, wherever any application may be made to the Supreme Court of Ontario, it shall in the first instance be made to a single Judge sitting in Court, who for the purpose of the application is the Court, and that any decision made by a single Judge in Court is subject to appeal to a Divisional Court of the Appellate Division.

The series of decisions holding that there is an appeal to the Supreme Court of Canada from the decision of the Court of Appeal for Ontario and from the Divisional Courts of the Appellate Division shews that the appeal from the arbitrators under the Railway Act is a matter in the Supreme Court, and that the right of appeal to the Supreme Court of Canada can be exercised with respect to such decisions. It follows that the right of appeal to a Divisional Court from the decision of a single Judge is also exercisable. It is singular that so slight a difference in the wording of the statute should bring about so widely different a result, but it is obvious that the difference is in the vital point.

I should have been pleased had I been able to arrive at the conclusion that there was only one right of appeal by virtue of the

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provincial statutes, but it appears to me that the Divisional Courts of the Appellate Division have only a statutory jurisdiction, and that no other jurisdiction than an appellate jurisdiction, in the case of matters previously dealt with by a single Judge, is conferred by the provisions of the Judicature Act, and the Railway Act does not itself confer the direct right of appeal from the arbitrator to a Divisional Court.

The preliminary objection, therefore, fails, and should be overruled, with costs to the railway company in any event of the appeal.

Ferguson, J.A.

FERGUSON, J.A., agreed with MIDDLETON, J.

Preliminary objection overruled.

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PUDWILL v. FOLKINS & CAMPBELL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

INTERPLEADER (§ III—30)—ISSUE AS TO OWNERSHIP OF GOODS—ONUS OF PROOF—EVIDENCE.

In an interpleader issue, where the burden of proof is upon the plaintiffs, and the only evidence given at the trial of the issue, as to the ownership of the goods, is given by the defendant and her husband, to the effect that the goods are the property of the defendant, this evidence being disbelieved by the trial Judge, the issue is left without any evidence and the plaintiff must fail.

Statement.

INTERPLEADER between execution creditors as plaintiffs and claimant as defendant, as to the ownership of goods seized in execution. Reversed.

J. F. Frame, K.C., and *L. McK. Robinson*, for appellant.

A. McWilliams and *C. E. Bothwell*, for respondents.

The judgment of the Court was delivered by

Newlands J.A.

NEWLANDS, J.A.:—This is an interpleader issue, in which the execution creditors are the plaintiffs and the claimant the defendant, the issue being as follows: The plaintiffs affirm and the defendant denies that certain goods and chattels seized in execution were at the time of the seizure the property of A. D. Pudwill (the execution debtor) as against the said Ethel Pudwill, the defendant herein. The only evidence given at the trial of the issue as to the ownership of the goods in question is given by the defendant and her husband, and is to the effect that the goods are the property of the defendant. The trial Judge says that he does not believe this

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evidence, and therefore finds for the plaintiffs that the goods are the goods of the execution debtor.

In this issue the burden of proof is upon the plaintiffs. The effect, therefore, of the Judge disbelieving the evidence on the part of the defendants, leaves the issue without any evidence as to the ownership of these goods. That being the case, the plaintiffs, the parties asserting the affirmative upon whom the burden of proof is, must fail. The trial Judge was therefore wrong in giving judgment for the plaintiffs, and his judgment must be set aside.

The appeal should be allowed with costs.

I can see no reason why the sheriff should have appeared as a party to this appeal, and I would therefore not allow him any costs.

Appeal allowed.

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REX v. COLLIER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ., and Ferguson, J.A. November 28, 1919.

CRIMINAL LAW (§ II B—48)—PROCEDURE—THEFT—PROPERTY OVER $10—ACCUSED CHARGED BEFORE MAGISTRATE—PLEA OF "GUILTY"—NO ELECTION—JURISDICTION OF MAGISTRATE—CRIMINAL CODE, SECS. 773, 778, 782, 783—NEW TRIAL.

A Police Magistrate cannot accept a plea of "guilty" from accused persons brought before him charged with theft of goods over $10 in value, unless such persons have elected to be tried by him, Criminal Code, secs. 773, 778, 782 and 783.

Statement.

APPEAL by stated case from the decision of a police magistrate, on a charge of theft of goods exceeding $10 in value.

On the 21st April, 1919, an information was laid before Thomas Kelly, Police Magistrate in and for the Town of Petrolia, by John Atkinson, agent of the Michigan Central Railroad Company, who said that on or about the 1st March, 1919, John Collier and Lorne Collier did steal from a building of the aforesaid company at Petrolia, Ontario, a quantity of material, the property of the company, to the value of $75, without colour of right so to do.

On the same day, the defendants were brought before the Police Magistrate. His record of the proceedings was as follows:—

"Defendants pleading 'guilty' to the charge, by consent of the plaintiffs, restitution being made, sentence was suspended during good behaviour."

The further proceedings are detailed in a case stated by the magistrate, on the 22nd October, 1919, as follows:—

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"This is a case reserved by me, Thomas Kelly, Police Magistrate in and for the Town of Petrolia, in the County of Lambton, under the provisions of sec. 1014 of the Criminal Code, for the purpose of obtaining the opinion of the Appellate Division of the Supreme Court of Ontario on questions of law which arose before me as hereinafter stated.

"At a sittings of the police court holden at the Town of Petrolia, before me, the said Thomas Kelly, on the 21st day of April, 1919, an information preferred by John Atkinson against the said John Collier and Lorne Collier, charging that they the said John Collier and Lorne Collier, on or about the 1st March, 1919, did steal from a building of the Michigan Central Railroad Company at Petrolia, Ontario, a quantity of material the property of the Michigan Central Railroad Company, to the value of $75, without colour of right so to do, was heard, and upon such hearing the said John Collier and Lorne Collier pleaded 'guilty' to the said charge, and were duly convicted by me of the said offence, and I did suspend sentence upon them.

"And whereas the said John Collier and Lorne Collier, being dissatisfied with my determination upon the said hearing of the said information as being erroneous in point of law, duly applied to me to reserve and sign a case, but I refused to reserve and sign such case.

"And whereas the Appellate Division of the Supreme Court of Ontario, by order dated the 15th day of September, A.D. 1919, has directed me to state a case as hereinafter set forth.

"Now therefore I, the said Thomas Kelly, in obedience to the said order of the said Appellate Diyision of the Supreme Court of Ontario, do hereby state and sign the following case:—

1. Had I jurisdiction to convict under the circumstances disclosed at trial?

"And I make the information and conviction part of the said case."

The following sections of the Criminal Code, contained in Part XVI., "Summary Trial of Indictable Offences," are applicable:—

773. Whenever any person is charged before a magistrate,—(*a*) with theft . . . where the value of the property does not, in the judgment of the magistrate, exceed $10 . . . the magi-

strate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way.

778. Whenever the magistrate, before whom any person is charged as aforesaid, proposes to dispose of the case summarily under the provisions of this Part, such magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him.

2. If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused—

(*a*) That he is charged with the offence, describing it:

(*b*) That he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction. (As amended in 1909, by 8 & 9 Edw. VII. ch. 9, sec. 2 and schedule.)

3. If the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the magistrate to try it does not depend on the consent of the accused, the magistrate shall reduce the charge to writing and read the same to such person, and shall then ask him whether he is guilty or not of (*sic*) such charge.

4. If the person charged confesses the charge the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act; but if the person charged says that he is not guilty, the magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence the magistrate shall hear such defence, and shall then proceed to dispose of the case summarily.

782. When any person is charged before a magistrate with theft . . . and the value of the property stolen . . . exceeds $10, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears

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to him to be one which may properly be disposed of in a summary way, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who, under section 775, can be tried summarily without his consent, shall then put to him the question mentioned in section 778, and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course.

783. If the person charged as mentioned in the last preceding section consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not guilty of (*sic*) the charge, and if such person says that he is guilty, the magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, he shall be remanded to gaol to await his trial before him in the usual course.*

J. E. Corcoran, for defendants; *E. Bayly*, K.C., for the Crown.

Riddell, J.

RIDDELL, J.:—In this case the defendants were charged with stealing property of the value of $75; they were brought before the Police Magistrate at Petrolia, and pleaded "guilty." They were released on suspended sentence on making restitution. Afterwards, on the 15th September, 1919, they applied for a reserved case, contending that they could not be convicted, even on their own confession, without their consent having been first given. We granted a case, and it came on for argument before us.

Counsel representing the Crown consents that the conviction be quashed, and on that consent the Court has acted. I do not decide that, had the Crown not consented, the conviction could not stand. As at present advised, I am not prepared to say that a plea of "guilty," made in open court, is not a consent within the Criminal Code.

But, acting on the consent of the Crown, I think this is a case where we should order a new trial under sec. 1018(*b*) of the Code—†

*See amendment, 7-8 Edw. VII., 1908, ch. 18, sec. 11.

†1018. Upon the hearing of any appeal under the powers hereinbefore contained, the court of appeal may,— . . . (*b*) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, direct a new trial; . . .

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nothing is of more evil effect than an encouragement of the idea, that prevails all too commonly, that a guilty man may escape through the technicalities of the law or the neglect or ignorance of prosecutors.

LATCHFORD and MIDDLETON, JJ., and FERGUSON, J.A., agreed with RIDDELL, J.

MEREDITH, C.J.C.P. (dissenting as to a new trial):—Mr. Bayly very properly stated that it was plain that the conviction in this case could not be supported; plain that the magistrate had not taken the necessary steps to acquire summary power in it.

But that does not relieve us from the duty to consider and answer the question submitted to us, and to dispose of the case in the proper manner: a duty which is very simple and very easily performed.

The accused were charged with an indictable offence: one over which the magistrate could have no summary power except upon their consent given in the manner provided for in the Criminal Code; and the manner there provided is such as to prevent any doubt that the accused, with a full knowledge of their right to be tried by jury, consented to a summary trial by the magistrate.

Section 778 provides that, whenever the magistrate proposes to dispose of the case summarily, he shall, after ascertaining the nature and extent of the charge, and before calling on the person charged for any statement he wishes to make, state to such person the substance of the charge against him; and, if the charge is one which cannot be tried summarily without the consent of the accused, the magistrate shall state to the accused—(*a*) that he is charged with the offence, describing it: (*b*) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction (sub-sec. 2 of sec. 778, as amended in 1909, by 8-9 Edw. VII. ch. 9, sec. 2 and schedule). Then, if the accused consent to summary trial, the magistrate shall reduce the charge to writing and read the same to the accused, and shall then ask him whether he is guilty or not guilty of the offence charged. And, if the accused confesses to the charge, sentence shall then be pronounced.

And sec. 782, which is applicable to charges of theft such as that in question, theft of property exceeding $10 in value, provides

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also that the magistrate shall reduce the charge to writing and shall read it to the accused and shall then put to him the question mentioned in sec. 778, "and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course." Then, under sec. 783, if the accused consents to be tried by the magistrate, the magistrate shall ask him whether he is guilty or not guilty of the offence charged.

Then the form of conviction set out in the Criminal Code, for such a case as this, requires a recital of the facts that the accused consented to a trial of the charge summarily by the magistrate and then pleaded "guilty;" leaving no excuse for any contention that without such consent before plea there was jurisdiction.

In this case nothing of the sort took place: that which did take place, as related in the uncontradicted affidavits filed in support of the application to this Court to require the magistrate to state a case, is not very creditable to the administration of justice. All the circumstances must be looked at so that we may give a proper answer to the question which depends upon them.

It was this: a charge of theft from a railway company, who were the masters of the accused persons, was laid against these men: but, before the case came on for investigation, a representative of the company saw them and promised them that if they would plead "guilty" no punishment would be inflicted upon them, and that they would be retained in the company's service.

They accordingly appeared before the magistrate, and that arrangement was carried out. A plea of "guilty" was noted by the magistrate, but without first proceeding in the manner required by the Criminal Code, and without any intimation that the magistrate had no power to hear the case summarily without their consent, or that they had the right of trial by jury, and without the consent which must be first had; and upon that plea so obtained sentence was suspended, but the accused were ordered to make restiuttion, by which it was really meant that they should pay for the "quantity of material" which they were charged with having stolen.

No formal conviction has been drawn up, no doubt because it was impossible to make it in the form required by the Act: or in any truthful manner that would not disclose its invalidity.

The convicted men afterwards, being dissatisfied, consulted a solicitor; and, now asserting their innocence, desire to have the conviction quashed; and, if further proceedings be taken against them, to be tried by jury.

And that I should have thought obviously their right: and should have been surprised if the Crown had sought in any way to prevent it.

I should have thought it obvious that without power to try there could be no power to convict, or punish.

The question submitted should, in my opinion, be answered, "no;" and the conviction should be quashed, leaving it open to the Crown or the company to carry on their prosecution in a regular manner if they desire to do so.

That is a matter entirely in their discretion: we have no power over them; so that to intermeddle would justify the usual rebuke. We have power to direct a new trial after there has been a mistrial; but it would be a fatal mistake to deem this such a case: there has been no trial; there can be no summary trial without the consent of the accused, and they will not consent: if a new preliminary investigation of the charge take place upon it, the accused may be discharged without trial: if sent for trial, they cannot be tried without the consent of the grand jury; and, after all that, there may be no trial if the Attorney-General see fit to discontinue the prosecution, as he may very well do. To quash the conviction because there has been *no trial*, and never could have been *any trial* without the consent of the accused, and then to direct a *new trial* as if there had been a mis*trial*, seems to me to be quite too inconsistent and self-contradictory; as well as being without power and impossible, because it cannot take place before the magistrate; he has no jurisdiction without the consent of the accused, which they will not give: and before any other court it can be only on a true bill found by a grand jury.

Nor is there any power to compel any one to proceed with the preliminary investigation, and futile orders should not be made, if there were. *New trial directed.*

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BOYLE CONCESSIONS LTD. v. YUKON GOLD Co.*

Supreme Court of Canada, Fitzpatrick, C.J., Idington and Anglin, JJ. May 2, 1917.

MINES AND MINERALS (§ I C—15)—YUKON PLACER REGULATIONS—EXTENSION OF "CREEK CLAIM" ACROSS RIVER—RIVER CLAIM—SUBMERSION OF RIVER BANK—TRESPASS—DAMAGES—"HARSHER RULE."

What is known as a "creek claim" in the Yukon Placer Mining Regulations of 1901 does not extend across a river. A river claim which includes parts of a river bank, extends also to those parts within the boundaries of the claim, which may have become eroded or submerged imperceptibly, and the existing dredging lease of the river-bed does not extend to this accretion.

The "harsher rule" of fixing damages for trespass to a mining claim is applied.

[*Lamb* v. *Kincaid* (1907), 38 Can. S.C.R. 516, applied; *Yukon Gold* v. *Boyle Concession*, 27 D.L.R. 672, affirmed.]

Statement. APPEAL by defendant from dismissal by the Court of Appeal of British Columbia (1916), 27 D.L.R. 672, 23 B.C.R. 103, of an appeal by defendant from a judgment of Macaulay, J. (1914), 19 D.L.R. 336, in an action for trespass upon mining concessions. The facts and the questions in dispute appear in the judgments of the Court of Appeal of British Columbia, *supra*. Affirmed.

W. Nesbitt, K.C., and *C. C. Robinson*, for appellant.

F. T. Congdon, K.C., for respondent.

Fitzpatrick, C.J. FITZPATRICK, C.J.:—The plaintiff and defendant are two companies operating adjoining mining concessions in the Yukon Territory and disputes as to their respective boundaries have produced a protracted litigation out of all proportion to the importance of the subject-matter involved.

In the early days following the discovery of gold in the Territory the absence of means of communicating readily with this distant part of the country added to the difficulty of regulating the mining industry which had sprung up so suddenly. Enterprising individuals who went up to seek fortunes by simple manual labour were quickly followed by speculators and capitalists who introduced machinery to supersede the crude methods of the pioneers. The establishment of order and system by the Dominion Government was a vast and complex business. Orders-in-Council were issued frequently of an elaborate character but often requiring immediate alteration to adapt them to the conditions of which so little could be known for a long time.

Under these circumstances it would be idle to expect to find such well ascertained rights of property and smooth working of

*Reasons for judgment in this case were not available before 1919.

legal machinery as in a long and permanently settled part of the country. To the present day the door is left open to many doubtful questions and endless disputes to parties willing to embark in a sea of litigation. To be satisfied of this we have only to look at the present rather petty suit in which the appellant assigned no less than 105 points of error in the judgment whilst the appeal to this Court from the Court of Appeal of British Columbia, 27 D.L.R. 672, 23 B.C.R. 103, comes in a record of some thousand printed pages and accompanied by a whole series of elaborate maps and plans.

We cannot expect to find that all possible conditions have been foreseen and provided for or that there will be perfect harmony between such regulations as there are. It behooves the Court therefore in view of the position of affairs to look to the general intentions of this quasi-legislation and to give them effect by an interpretation occasionally perhaps more liberal than in the ordinary case of the construction of carefully drafted and considered statutes. The interpretation must be guided largely by prevailing practice and the knowledge of those having experience in the subject, though in saying this I do not mean that evidence offered by the appellant with regard to what was done in a particular case was not rightly excluded.

The findings of fact of the trial Judge are never to be lightly interfered with and in this case there are exceptional reasons why they should not be. The view of the *locus* must have been an advantage the importance of which can hardly be exaggerated.

I agree with the Court of Appeal that there is no reason to question the conclusions of fact found at the trial and accepting these the questions for decision are simple and there is, I think, little substance in the ingenious arguments put forward by counsel for the appellant.

What seems to me to be a fact of outstanding general importance is that the respondent alone is able to shew a grant with defined boundaries; the appellant has to rely on physical changes and conditions and disputed constructions of the regulations to establish its claim to defeat the respondent's rights within the area granted.

Dealing first with what has been called the south trespass: It must be immediately apparent that the regulations do not

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anticipate and provide for the phenomena of the particular case and the attempt to argue any result from the literal wording must involve contradiction and absurdity. The regulations do not provide for the exceptional case of conflict between overlapping river and creek claims.

We have to look at both the dredging and placer mining regulations and it is clear that they contemplate the grants of distinct mining rights, the former of subaqueous mining by dredging the beds of rivers, the latter of different kinds, including creek or gulch claims and river claims.

I do not think we are really concerned with the policy which dictated the scheme provided for regulating mining operations. there is not in fact a provision for mining in rivers which I think is necessarily exclusive of any right under a creek claim.

It has been found that the slough is in fact a part of the Klondyke River and this really concludes the question for even assuming that a creek claim can extend to the banks of a river, no case has been made out for the suggestion that passing over the river it can extend to the lands on the opposite side which is expressly prohibited even in the case of a river claim.

That the result may perhaps be as the appellant suggests apparently as a *reductio ad absurdum* that "no one could acquire the mineral rights in the bed of the slough at all" presents no objection to the conclusions that I can see.

As regards to the north trespass: It was found at the trial and not disputed on this appeal that the erosion of the river bank had been sudden which at common law would not deprive a riparian owner of his rights in the land submerged. The appellant has, however, put forward the extraordinary if ingenious suggestion that the erosion was caused by the bank being imperceptibly undermined and that only the actual caving in of the surface being perceptible there was no perceptible erosion of the bank. I am unable to appreciate this fine distinction and I am disposed to think that it is by undermining that erosion commonly takes place whether on the banks of a river or the cliffs on the sea coast.

As to the validity of the respondent's title to the submerged land I agree with the opinion of Macdonald, C.J.A., in the judgment appealed from and I may add that I doubt whether the appellant would have had a right in any case to dredge such land.

It is not uncommon for a river that has suddenly changed its bed to return to its original one. Whether under a power to dredge to the natural banks of a river the land which might temporarily form its bed could be dredged of its minerals might raise an interesting and doubtful question.

I am of opinion that the appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—To maintain the propositions, necessarily involved, in upholding appellant's pretensions herein, relative to the boundaries of the lower half of creek claim 105, it seems to me would lead to absurd results. To act herein upon such a construction of the several regulations in question would probably disturb many other titles resting upon an entirely different view of the law relevant thereto.

Nor can I assent to the propositions that a grant of minerals, lying in or under a specifically described parcel of land, must necessarily be affected, or the boundaries of such a grant necessarily be disturbed, by any erosion or submergence of the superficies such as might affect or have affected the title thereto, of the owner thereof.

Nor can I find in the conduct of the appellants, in light of the inherent absurdity of the claim, and the long history thereof and all relevant thereto, together with the harsh and illegal methods pressed in asserting its alleged rights, even if the appellants had had a better title than appears, enough to warrant it in claiming as of right a less severe rule than has been applied below, and we applied in the case of *Lamb* v. *Kincaid* (1907), 38 Can. S.C.R. 516, in assessing the damages.

The appeal should, therefore, be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The able argument presented to us on behalf of the appellant and subsequent consideration of the voluminous record have failed to convince me that a case has been made for disturbing any of the findings of fact of the trial Judge, 19 D.L.R. 336, unanimously affirmed by the Court of Appeal of British Columbia, 27 D.L.R. 672, 23 B.C.R. 103. I therefore deal with the case upon the facts so established.

As to the south trespass, I doubt whether the appellant's claim, lower half No. 105 below discovery on Bonanza, can properly be regarded as a gulch or creek claim. But, if it can, I am satisfied that it does not extend across what has been found to be an arm

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of the Klondyke River lying between it and Lee Pate's Island, and that the land in question formed part not of the appellant's claim 105 but of the respondent's claim No. 12.

As to the basis on which damages should be assessed, I should on the whole have been better satisfied had the appellant been given a further opportunity to convince a referee that he had kept an accurate separate account of the gold which he obtained from the land in dispute and of the cost of winning the same so that the amount of both might be determined with reasonable accuracy. If able to do so he should not be subjected to what is termed the "harsher rule" as to damages, applied in *Lamb* v. *Kincaid*, 38 Can. S.C.R. 516, but should be given credit for the actual and reasonable expenses of winning the gold and charged only with its net value. The facts bearing upon this aspect of the case were gone into, however, at the trial and there is no assurance that they could be further developed. Upon the evidence before the trial Judge I am not satisfied that he was wrong in applying the so-called "harsher rule." I am, therefore, not prepared to dissent from the opinion of the majority of the Court that on this point we should not disturb the decision of the trial Judge unanimously affirmed on appeal.

As to the north trespass, I think the appellant must also fail for the reasons stated by Galliher, J., to which I cannot usefully add anything. *Appeal dismissed.*

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HARVEY v. THE DOMINION TEXTILE Co.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. 1918.

HIGHWAYS (§ I A—2)—USER—PRESCRIPTION—"CHEMIN DE TOLÉRANCE"—DEDICATION—CANADA, 18 VICT. 1855, CH. 100, SEC. 41—ARTS. 749 AND 750 (QUE.) MUNICIPAL CODE.

The sub-sections 8 and 9 of 18 Vict., ch. 100, sec. 41 (Municipal and Road Act of Lower Canada), are still in force, but apply only to roads in existence and in public use for ten years prior to 1855. A road open at each end and having a fence on one side and a sidewalk on the other, is not necessarily a public road under art. 749, Quebec Municipal Code.

Statement.

APPEAL from a judgment of the Court of King's Bench, appeal side, (1915), 25 Que. K.B. 294, Province of Quebec, reversing the judgment of the Superior Court sitting in review, at Quebec, restoring the judgment of the trial Judge, and maintaining the respondent's action. Affirmed.

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A. Taschereau, K.C., for appellant; *A. Rivard*, K.C., for respondent.

FITZPATRICK, C.J.:—The action is really for trespass although referred to throughout as an *action négatoire*. No question of servitude arises, the plaintiffs, now respondents, complain that the defendant entered on their land and pulled down some fences. The appellant, defendant below, pleads that there is a road across the plaintiffs' property which he is entitled to use as one of the general public. It is admitted that the road exists and has been for some years used as a thoroughfare by the public on sufferance, as alleged by the plaintiffs and as of right as the defendant contends, and that is the sole issue.

The road was admittedly laid out and built by the plaintiffs, and to succeed the defendant must shew that it became a public highway, either by dedication or by prescriptive user during the statutable time;—assuming the statute of Canada 18 Vict., 1855, ch. 100, sec. 41, sub-secs. 8 and 9 to be in force and applicable.

My brother Brodeur discusses so ably and fully the legal effect of arts. 749 and 750 M.C. that it will be unnecessary for me to do more than refer to what he says on that aspect of the case.

Were it not for the judgment of the Court of Queen's Bench in *Mignerand dit Myrand* v. *Légaré* (1879), 6 Q.L.R. 120, I would be disposed to doubt that the principle of dedication as applied in English law is known to the civil law, and to hold that, in the absence of statute, the right of road in Quebec must be based upon the fact of user by the public, as a matter of right, for the full period of the long prescription, 30 years. Contrary to the rule of the English law when a road became a public highway in Quebec the soil of the road was, before the Municipal Code, vested in the Crown, arts. 400 C.C. and 743 M.C., *Chavigny de la Chevrotière* v. *La Cité de Montréal* (1886), 12 App. Cas. 149, at 159, and a deed of gift must under pain of nullity be executed in notarial form (art. 776 C.C.). But the rule in *Myrand* v. *Légaré*, *supra*, has been adopted and followed in the Quebec Courts so universally and for such a length of time that it must now be accepted as definitely fixing the law and I feel bound to hold that a public right of way may be constituted in Quebec by direct or indirect dedication.

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There has been considerable diversity of opinion amongst the Judges of the Courts below. I have perused those opinions with much advantage and have with great care considered the opinions of those from whom I differ. In the result I have come to the conclusion that the judgment of the Court of Review is right and should be restored.

The trial Judge seems to have assumed that in the absence of evidence of direct dedication made by deed or declaration of the owner the public could acquire no right in the highway. He does not appear to have considered the possibility of an implied dedication presumed from an acquiescence by the owners in the use made by the public of the highway which they themselves laid out. The uniformly accepted doctrine is thus expressed in Smith's Leading Cases (1915), vol. 2, at 166:—

> Except where it is expressly created by statute, a highway derives its existence from a dedication to the public by the owner of land of a right of passage over it. This dedication, though it be not made in express terms, as it indeed seldom is, may and generally will be presumed from an uninterrupted use by the public of the right of way claimed.

In *Rex* v. *Lloyd* (1808), 1 Camp. 260, at 262, it was held: "If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public."

In *Mann* v. *Brodie* (1885), 10 App. Cas. 378, at 386, Lord Blackburn quotes the passage in *Poole* v. *Huskisson* (1843), 11 M. & W. 827, at 830, where Parke, B., states the principle of the law and then says:—

> But it has also been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.

And in *Folkestone Corporation* v. *Brockman*, [1914] A.C. 338, Lord Atkinson, referring to Taylor on Evidence, 9th ed., par. 131, adds, at p. 368: "The statement of the law contained in that paragraph is perfectly accurate, and is supported by the six authorities mentioned in the notes. It is to this effect that the

uninterrupted user of a road justifies a presumption in favour of the original *animus dedicandi* even against the Crown."

The doctrine of dedication, as had been recently said, is based in all the decided cases, upon the proposition that a person cannot lead the general public or a local public, to base their action, and build up their fabric of life upon the theory of permission of a certain kind, on his part, in respect of his land, and when they have thus accommodated their affairs to this expectation, violate the confidence thus invited. I admit, of course, with my brother Anglin, that theoretically there must be intention on the part of the private owner, but such intention may be and in almost every instance is, shewn exclusively by his physical acts; and the requirements of intent on his part is hardly more than theory. Indeed, the private owner's action is ordinarily such that he would be estopped to deny the existence of an intention on his part.

In that view of the law, are we, in presence of the conflicting findings of fact in the Courts below, in a position to say, that the defendant, upon whom lay the burden of proving dedication, has satisfied his obligation? As Sir Montague Smith said in *Turner* v. *Walsh* (1881), 6 App. Cas. 636, at 642:—

> The proper way . . . is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made then, is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses.

Considering the whole evidence in the light of that doctrine and with great deference for the opinions of those who differ from me, I am driven irresistibly to the conclusion that the defendant has made out his defence.

The facts proved and as to which there is practically no dispute are: that the plaintiff company, owners of large cotton mills, for their own benefit and incidentally for the convenience of their employees, built upon the lot of land known in these proceedings under the No. 59 (a), and across which the road in question runs, two rows of houses facing the river and separated by a road. To enable the employees, occupants of the houses, to reach the mills situate below, on the shore of the river in the village of Montmorency Falls, a road or way was necessary. But it was equally important that those employees should have a

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means of access to the public road above known as "Côte à Courville" which winding down the hillside led from the village known as St. Louis de Courville to Montmorency village. Otherwise they would be cut off from communication with the centres upon which they were dependent for the daily needs of themselves and their families. All their purveyors, such as the baker, butcher, etc. . . . lived in those villages. To provide those necessary conveniences, a macadamized road 36 ft. wide was built. This road started from the "Côte à Courville" to the north and continued down below the houses built for the employees where it was connected with a plank board-walk which in turn opened into a stairway leading down the steep hillside to the public road below. So that the Company built a continuous way leading from one public road to another and which is proved to have been travelled for 14 or 15 years openly, freely and without objection during all seasons and at all hours of the day and night, not only by those who had business with the Company's employees but also as a way of access to the villages of Montmorency Falls and St. Louis de Courville.

The plaintiffs, respondents, in their factum say that as originally built the road did not extend to the brink of the hill and that up to June, 1905, it terminated at "a grassy ground where the children of the employees could play and amuse themselves at ease and that that construction of the stairs is posterior to June 14, 1905." Admitting this to be the fact, there may be a highway through a place which is no thoroughfare, as Campbell, C.J., said in *Bateman* v. *Bluck* (1852), 18 Q.B. 870 at 876. Take the case of a large square with only one entrance, the owner of which has, for many years, permitted all persons to go into and round it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers. That case seems to be on all fours with the case which the plaintiff Company present in their factum. But in fact it appears by the plans filed and from the description of the locality given by the witnesses that without the stairs the road would not give the employees the convenience of access to the mills; which was the chief object of the Company. And one rather expects to hear such witnesses as Mailloux, the superintendent of the mill, Coté who actually built the stairs for the Company, and Curé Ruelle who sold them the land, frankly

say, when examined as witnesses, that the stairs were built at the same time as the houses, that is to say, 14 or 15 years before the suit was brought.

We have, therefore, a road built by the plaintiffs admittedly to connect the "Côte à Courville" with another public road at Montmorency village having all the outward physical characteristics of a public highway, without a gate, barrier, sign-post or anything to indicate an intention on the part of the proprietor to limit its use. It is also in evidence that the road was used from the very beginning not only by the local public for their convenience but also by those who travelled by the electric railway to and from the City of Quebec. Leclerc, the instigator of this suit says, in answer to a question: "Il vient des voitures de tout bord et de côté."

Curé Ruelle says in effect, when examined for the plaintiffs, that this road is used by the public in preference to the "Côte à Courville," because it is a short cut, and without objection until these proceedings were started. It is also worthy of notice, as evidence of the intention of the owners of the land to dedicate to the public the highway they had opened, that they did not reserve the use of all the lodgings in the buildings for their employees. One of the tenements was rented to a grocer named Vachon, who did business with all those from the outside that he could reach, and it is proved that scores of people, who had no connection whatever with the Company or its employees, used the road to come to his store. To the east of the highway in question, a hospital and a laundry had been built with access to the road, and those who had business with either used the road at will. The appellant Harvey had a blacksmith shop on the land he still occupies and he tells us that the public used this road without let or hindrance to reach that shop which was afterwards rented to Vachon, the Company's tenant, and he, Vachon, used it as a storehouse to which his customers from the outside had access. It would be difficult to find a case in which a highway had been used more universally and for more varied purposes by the people of the neighbourhood. If, as the evidence, establishes, the Company built a road of the regulation width, of the material usually employed in the construction of public thoroughfares to connect two public municipal roads and permitted the general

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public to use it as of right for over 12 years, the presumption of dedication is, in my opinion, irresistible. In *Dovaston* v. *Payne* (1915), 2 Smith L.C. 154, eight years' user was held to shew sufficient acceptance and in the much-litigated case to which I have already referred of *Bateman* v. *Bluck*, *supra*, 6 years sufficed. The creation of a public lane in private land by informal dealings of the land owner with the public over as short a period as 18 months, was held sufficient. In *North London R. Co.* v. *Vestry of St. Mary* (1872), 27 L.T. 672, and in *The Queen* v. *Petrie* (1855), 4 El. & Bl. 737, the Court permitted a jury to find an instantaneous dedication. Mere occasional use had been held to support a title in the public, *Mildred* v. *Weaver* (1862), 3 F. & F. 30.

There is no evidence here that the Company ever seriously objected to the use of the road by the public as of right. It is on the contrary established that this whole difficulty has arisen out of a conflict between one of the tenants of the Company, not an employee, who complained of the business competition the defendant gave him.

I am of the opinion that there has been such evidence of user by the public of the right of way with the acquiescence of the owner as to justify the defendant's plea and that this appeal should be allowed with costs.

Davies, J.

DAVIES, J.—The substantial question between the parties to this appeal is whether a certain roadway running through plaintiff's land was a public road or not.

There was much difference of judicial opinion in the Courts below, the trial Judge holding the roadway not to be a public way, the Court of Review reversing that judgment and holding it to be a public way and the Court of King's Bench (Pelletier, J., dissenting), 25 Que. K.B. 294, in turn reversing the latter judgment and restoring that of the trial Judge.

The appellant relied largely upon the statute of Canada, 18 Vict., ch. 100, sec. 41, sub-sec. 9, which he held applicable to the road in question and contained the law on the subject.

That section and the preceding one, which must be read with it, are as follows:—

8. Every road declared a public highway by any *Procès-Verbal*, By-law or Order of any Grand Voyer, Warden, Commissioner or Municipal Council, legally made, and in force when this Act shall commence, shall be held to be a road within the meaning of this Act, until it be otherwise ordered by competent authority;

9. And any road left open to and used as such by the public, without contestation of their right, during a period of ten years or upwards, shall be held to have been legally declared a public highway by some competent authority as aforesaid, and to be a road within the meaning of this Act.

The question which immediately arises is not whether those sub-sections are in force for the purposes and objects for which they were passed but whether they were intended as a general law and operative as such until repealed expressly or impliedly.

As a fact they have not been expressly repealed but they do not appear in the later statute of 1860 which was an Act to consolidate the Act 18 Vict., 1855, ch. 100 and its amendments, or in any later Act as one would suppose they would if they were not merely temporary provisions but general ones.

They are both sub-sections of sec. 41 of the Municipal Road Act of 18 Vict., 1855, ch. 100, and are connected together by the conjunction "and." They deal with the same subject matter, *roads*, and, it seems to me, must be read and construed together.

Sub-section 8 enacted that every road declared a public highway by any "procès-verbal, by-law, . . . legally made, *and in force when this Act shall commence*, shall be held to be a road, etc."

Sub-section 9 enacts that "any road left open to and used as such by the public without contestation of their right during a period of 10 years shall be held to *have been legally declared* a public highway by some competent authority *as aforesaid*." These last words "as aforesaid" clearly refer to the authorities expressly mentioned in sub-sec. 8. Under the one sub-section the declaration of the *procès-verbal in force when the Act began* to run declaring a road to be a public highway was sufficient. Under the other sub-sec. (9) after 10 years uncontested user by the public of any road it "shall be held to have been legally declared a public highway by some competent authority *as* aforesaid." Sub-sec. 8 was clearly a temporary provision having reference only to roads in existence at the date of the coming into force of the Act and, as I have said, I think sub-sec. 9 should be read with it and construed as limited to roads which had on July 1, 1855, been left open and used as such by the public without contestation of their right for 10 years and upwards. That view of the scope of their provisions would account for their non-appearance in subsequent revisions of the statute as also for their not having been expressly repealed. This was the

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view expressed by Burbidge, J., in the case of *Bourget* v. *The Queen* (1888), 2 Can. Ex. 1, at 7, 8.

Several Quebec authorities were cited as shewing that a contrary view was held as to the scope of sub-sec. 9 by several Judges. But I do not think that in any of the cases cited the express question I am now dealing with had been raised. The general character of the sub-section was assumed. Of course, if there had been decisions establishing a jurisprudence on the point in the Province, I would not venture to challenge it. Mr. Taschereau, however, also relied upon arts. 749 and 750 of the Municipal Code of Quebec as a second string to his bow. He contended that these articles did not abrogate sub-secs. 8 and 9 of sec. 41 of the Municipal Act of 18 Vict., 1855, although they contain no limit as to time.

He was obliged, however, to concede that for the greater part of its length this road in question was not "fenced on each side or otherwise divided from the adjoining land," as required by the Statute to make it a statutory road. As I understood him, however, he contended that for the comparatively short distance it was so divided, the road would be held to be a public road. I cannot agree with such an interpretation and can see that it might, if adopted, lead to great injustice. It was suggested, but I do not think pressed, that the sidewalk would be such a division as the Statute contemplates. I cannot accept the suggestion. The "otherwise divided" in the article means by fences, as expressed, or something equivalent to fences and having the same effect, such as buildings, etc.

I will not labour this branch of the case further than to say that upon it I fully concur with the reasons stated by Cross, J., in his judgment in the Court of King's Bench.

For the foregoing reasons, I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J. (dissenting):—I am of opinion that 18 Vict., 1855, ch. 100, sec. 41, sub-sec. 9, was not intended to be merely retrospective and is still in force and operative as each occasion or situation created by the development of facts fitting its terms arises; of which those bearing upon the existence of the road in question for the prescribed term of 10 years seem to be such as to establish at least the greater part of the road now in question as a public road.

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The law relative to dedication has always been somewhat difficult of application by reason of its requiring evidence of the intention in the mind of the owner to dedicate, and again of an acceptance thereof by some authority representing the public to establish dedication.

The said section seems designed to simplify the means of proof and by such an enactment to establish by way of prescription a road when it has been used by the public for 10 years without contestation by the owner.

Is it possible that the simplicity of the enactment so perplexed those judicially or legislatively concerned in its application as to render its efficacy a matter of doubt?

However that may be, I think the enactment is not in conflict with arts. 749 and 750 of the Municipal Code, and both standing together render the road in question a public highway.

The difficulty about it not being throughout a road over which teams can pass seems imaginary, for a public road may be a cul-de-sac, or its width, capacity or utility be measured by that kind of traffic for which it has been used by the public without contestation for 10 years and upwards.

I think the appeal should be allowed with costs and the judgment of the Court of Review be restored.

DUFF, J.:—This appeal should be dismissed with costs.

Duff, J.

ANGLIN, J.:—The question to be determined in this action is whether a road opened in 1900 by the Montmorency Cotton Co., the predecessors in title of the plaintiff Company, on cadastral lot 59a, owned by them, is now of such a public character that the plaintiff Company cannot control its use or exclude the public therefrom.

Anglin, J.

The Montmorency Cotton Co. acquired lot 59a from Joseph Cauchon on December 23, 1899, for the purpose of constructing dwellings thereon for the employees of its mills. It proceeded immediately to carry out that purpose and erected two blocks of apartments each facing on a cross-road laid out by it. Each of these cross-roads debouches at its eastern end into the road in question. This latter road is 36 ft. wide and runs southerly some 283 ft., along the eastern side of lot 59a, from the "Côte à Courville," a public highway, out of which it opens at its northern end. To the south it terminates in a field, part of lot 59a, about

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125 ft. north of the edge of a precipitous cliff. Beneath this cliff are situated the mills of the Company, the church of the Parish of St. Grégoire, the electric railway station and the "Côte à Courville," which descends from the point at which the road in question leads from it, sweeping in a semi-circle first easterly, then southerly and finally westerly. At some later date not distinctly shewn, but apparently shortly after its purchase from Cauchon, the Montmorency Cotton Co., in order to establish more direct communication for its employees between their dwellings on lot 59a and the Company's mills, acquired from the Catholic Episcopal Corporation a right of way, together with the right of constructing a stairway down the face of the cliff. In June, 1905, the Montmorency Cotton Co. sold its undertaking, including lot 59a, to the plaintiff Company.

To the north of the plaintiff's property and above the "Côte à Courville" was the village of St. Louis de Courville, which had a population of some 200 to 300 families, and the Beauport Road. To the east of the road now in question and between it and the "Côte à Courville" lay private property from which it was separated by a fence maintained with indifferent care.

The defendant Harvey is the proprietor of a grocery shop built facing the east side of the road in question on property purchased by him in 1907 from M. le Curé Ruelle. With this property he acquired a lane or passage giving him access to the "Côte à Courville" to the east. Used for a short time as a forge, Harvey's building was afterwards rented as a storehouse for several years to one Vachon, who kept a grocery shop on the plaintiffs' property on the opposite side of the road in question. Harvey resumed possession of his premises and opened a grocery business there during the fall of 1913. The entrance to his shop was from the road in question through a break in the fence between it and the plaintiff's property. One Leclerc subsequently leased the Vachon shop from the plaintiffs for a similar business. Wishing to destroy the competition of Harvey, through Paul Leclerc, his brother, one of its employees, he urged the plaintiff Company to take steps to exclude Harvey from access to the road in question. The Company first formally contested the right of user of the road by the public on May 30, 1914, by placing at its entrance in the "Côte à Courville" a notice, "Chemin Privé," and about the

same time it caused a barrier to be erected closing the opening in the fence opposite Harvey's shop. This action *négatoire* was begun on June 15, 1914, and the trial took place in October, 1914.

Such, in outline, are the essential facts. While other facts which appear to be material will be noticed in dealing with the several aspects in which the defence is presented, for a more detailed and complete statement, reference may be had to the opinions in the Courts below.

The plaintiffs having shewn that the property covered by the road was conveyed to them as part of cadastral lot 59a, the burden is on the defendant to establish his right to use it. Not alleging anything in the nature of a private right of way over it, he has undertaken to prove that the public has had from the time of its opening, or has since acquired, rights in the road of such a nature that the plaintiffs cannot now prevent their exercise. This he has endeavoured to do on three distinct grounds. (a) That dedication to the public has been shewn; (b) That under arts. 749 and 750 of the Municipal Code the road has become a municipal road. (c) That under art. 9 of sec. 41 of 18 Viet., 1855, ch. 100 (hereinafter referred to as art. 9) it has become a public road.

Assuming that under the law of Quebec, notwithstanding the provisions of arts. 549 and 776 C.C., dedication of a road to the public may be proved by evidence of conduct and acquiescence, as some authorities entitled to great weight indicate, I need only refer to *Chavigny de la Chevrotière* v. *La Cité de Montréal*, 12 App. Cas. 149, at 157; *Mignerand dit Myrand* v. *Légaré*, 6 Q.L.R. 120, at 122, *et seq.*; and *Rhodes* v. *Perusse* (1908), 41 Can. S.C.R. 264, at 273, any intention on the part of the respondent Company or its predecessor to dedicate the road in question as a highway is, in my opinion, rebutted by the circumstances in evidence before us—notably by the facts that the purpose of the Company in opening the road was to afford to its employees for whom it had constructed dwellings on lot 59a direct and convenient access to and from the "Côte à Courville" above and that its purpose in acquiring a right of way and constructing a stairway down the cliff on the property of the Episcopal Corporation was to afford the same employees a direct and convenient means of communication between their dwellings and the Company's works; that the Company constructed and has since maintained and cared for

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the road and the sidewalk upon it as well as the stairway down the cliffside at its own expense; and that a fence was erected and maintained shutting off the property on the east side of the road from access to it except where breaks were from time to time made, *Roberts* v. *Karr* (1808), 1 Camp. 262 (see note), whereas it was left open and directly accessible from the remainder of lot 59a. There is in addition the cogent evidence of the appellant himself and of M. le Curé Ruelle that until quite recently, when the idea was spread abroad that 10 years' user had made of it a public road, the road in question was regarded by them as a private road, the property of the Company, to which the one had not the right to take, or the other the right to give, an exit from the lot bought by Harvey from M. le Curé, and the further important fact, not contested, that Harvey himself, as recently as 1914, took part with an official of the plaintiff Company in defining the line between properties lying to the east of it, including his own, and the roadway in question for the purpose of having the fence separating them from the roadway rebuilt on the correct line of the eastern limit of the Company's lands.

We have the authority of the Privy Council for the proposition that, although the law of Quebec as to the ownership of the soil of a road differs from the law of England (p. 159), in the matter of dedication to be presumed from long continued public user and absence of contestation evidencing an abandonment of right by those who might have disputed that user "there seems to be no difference between the law of Lower Canada and the law of England and Scotland. *Chavigny de la Chevrotière* v. *La Cité de Montréal*, 12 App. Cas. 149, at 157. Long continued user by the the public is only evidence of the intention to dedicate. Its value depends on the circumstances. *Folkestone Corp.* v. *Brockman*, [1914] A.C. 338, at 352, 363-6; *McGinnis* v. *Létourneau* (1891), 14 Leg. News 314. Abandonment or dedication to the public will not be lightly presumed. *Chamberland* v. *Fortier* (1894), 23 Can. S.C.R. 371; *Peters* v. *Sinclair* (1913), 13 D.L.R. 468, 48 Can. S.C.R. 57, affirmed by the Privy Council (1914), 18 D.L.R. 754; *Corp. of St. Martin* v. *Cantin*, (1878), 2 Leg. News 14.

Viewed most favourably to the defendant, the facts here in evidence are as consistent with an intention not to dedicate as with an intention to dedicate; and that will not suffice. *Piggott* v.

Goldstraw (1901), 84 L.T. 94, at 96. But, as I have already said, the circumstances under which, and the manner in which the road was opened, I think, actually rebut an intention to dedicate it to the public, and the presumption to be drawn from long continued user is of "a complete dedication coëval with the early user," *Turner* v. *Walsh*, 6 App. Cas. 636 at 642.

It must always be remembered that we are here dealing with a question of presumed intention, not with one of prescription. Dedication must rest upon intention. The clear and unequivocal proof from which intention to dedicate might properly be presumed in my opinion is not found in the record. Upon this aspect of the case I therefore agree with the views expressed in the Court of King's Bench by Carroll and Cross, JJ.

Nor does the evidence bring the case within arts. 749 and 750 of the Municipal Code. I find no difference, such as Flynn, J., suggested in the Court of Review, between the English and the French visions of those articles. "Fenced on either side" means not on one side or the other, but on each side, *i.e.*, on both sides, and is the equivalent of "clôturés de chaque côté." While the road in question was not habitually kept closed at its extremities, it was, in my opinion, not "fenced on either side or otherwise divided off from the remaining land" within the meaning of the articles under consideration. The fence on the east side of the road, though merely a line fence between adjoining properties of different proprietors, and not meant to define or separate it as a road from the adjoining lands but rather to exclude the owners of those lands from access to it, was possibly sufficient to meet the requirement of arts. 749 and 750 as to that side of the road. But on the west side, except possibly for a few feet at the extreme north end, there was no fence at all. The sidewalk was built on the roadway. The line of the buildings was not continuous, nor does it appear that they came out to the street line. There is no evidence of a ditch or other boundary mark. The road on this side was not "fenced or otherwise divided off from the (Company's) remaining land" in any manner which met the requirements of arts. 749 and 750. On the contrary, it was enclosed as part of one property or holding with the remainder of lot 59a, by the fence which separated it from the properties to the east. There is no suggestion of any separation of the southerly 25 ft. where a

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footpath or walk led across a field from the end of the defined roadway to the head of the stairway. Moreover, although those articles declare that lands or passages used as roads by the mere permission of the owner or occupant (*chemins de tolérance*) are "municipal roads" if they fulfil the prescribed conditions it may not follow that the owners have lost all control over them or the right to close them. They retain the property in the soil and are subject to the obligation to maintain them. (Arts. 749 and 750 M.C.; compare arts. 748 and 752 M.C.) The municipality is liable for injuries sustained through defects in such roads (arts. 757 and 793 M.C.) and is, no doubt for that reason, empowered, not to close them itself, as it would probably have been authorized to do had they ceased to be "chemins de tolérance," but to order the owners or occupants to do so. Without further consideration I am not prepared to disagree with the view of Malouin, Carroll and Cross, JJ., that if the road in question was a municipal road within arts. 749 and 750 M.C., that fact would not prevent the owner exercising the right to close it or to forbid its use as a "*chemin de tolérance.*"

The defence chiefly relied on, however, is that a prescriptive public right has arisen under 18 Vict., 1855, ch. 100, sec. 41, art. 9. The English and French texts of arts. 8 and 9 of sec. 41 of this statute are as follows:—

8. Every road declared a public highway by any *Procés Verbal*, By-law or Order of any Grand Voyer, Warden, Commissioner or Municipal Council, legally made, and in force when this Act shall commence, shall be held to be a road within the meaning of this Act, until it be otherwise ordered by competent authority.

9. And any road left open to and used as such by the public, without contestation of their right, during a period of ten years or upwards, shall be held to have been legally declared a public highway by some competent authority as aforesaid, and to be a road within the meaning of this Act.

8. Tout chemin déclaré grand chemin public par un procès-verbal règlement ou ordre d'un grand-voyer, préfet, commissaire, ou conseil municipal, légalement dressé et en vigueur au moment où cet acte entrera en opération, sera considéré comme chemin suivant l'esprit de cet acte, jusqu'à ce qu'il en soit autrement ordonné par l'autorité compétente;

9. Et tout chemin ouvert et fréquenté comme tel par le public, sans contestation de son droit, pendant l'espace de dix années ou plus, sera censé avoir été légalement reconnu comme grand chemin public par quelque autorité compétente comme susdit, et être un chemin suivant l'esprit de cet acte.

Three questions are involved in this branch of the case: (1) Is art. 9 still in force? (2) Does it apply to roads not already in

existence for 10 years when it was enacted? (3) Does the evidence establish a user by the public of the road as such for 10 years prior to May 30, 1914?

Art. 9 has not been expressly repealed and I find nothing in the Municipal Code or in any other Act to which our attention has been directed so repugnant to it or so inconsistent with it that repeal by implication would follow therefrom. I accept without hesitation the unanimous opinion of all the Judges of the Provincial Courts who have dealt with this question in the present case, that art. 9 is still in force, which follows a practically uniform line of decisions extending from *Parent* v. *Daigle* (1871), 4 Q.L.R. 154, to *Nolin* v. *Gosselin* (1912), 24 Que. K.B. 289, if we except doubts expressed by Ramsay, J., in *Guy* v. *City of Montreal* (1880), 3 Leg. News 402, and by Bossé, J., in *Fortin* v. *Truchon* (1888), 15 Q.L.R. 186.

The other two questions cannot be so easily disposed of. For convenience I propose to deal with them in inverse order.

I am, with deference, unable to accede to the "*considérant*" in the judgment of the Court of Appeal expressed in the following terms: "Considérant que le public ne peut prescrire un chemin par l'usage qu'il en fait, en vertu de la loi 18 Vict., ch. 100, sec. 9, à moins que cet usage ne soit exclusif de celui du propriétaire qui possède à l'encontre du public."

We are now dealing not with a question of intention to dedicate, but with one of prescription. The statute does not exact a user exclusive of that of the owner of the soil and of his tenants as members of the public. For aught that appears there was nothing to distinguish their user of the road in the present case from the user by other members of the public. It did not amount to a contestation of the public right. All that the statute requires is a user of the road as such by the public without contestation of its right during 10 years. I am, with great respect for the Court of King's Bench, in which the contrary view prevailed, of the opinion that the evidence fully establishes such a user.

Had the traffic on the road been solely to and from the dwellings of the Company's employees it might be urged with much force, notwithstanding its extent, that it was throughout a private user by permission of the Company. I am not certain that traffic to and from Vachon's shop, since he was a tenant of the Company, might not be viewed in the same light.

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But the traffic of the residents of St. Louis de Courville to and from the railway station and to and from the church was certainly not of that character. It was undoubtedly a user of the road as such by the public. There is a mass of evidence that this user has been very extensive and has been going on without let or hindrance for over 14 years.

From the wording of the transfer of the right of way down the face of the cliff in the deed from the Montmorency Cotton Co. to the Dominion Textile Co. Carroll, J., has drawn the inference that the stairway down the cliffside was built after that deed was executed (June 15, 1905) and that the traffic to and from St. Louis de Courville therefore began within 10 years before the present action was instituted. But, although if that were the fact it could have been readily established, there is not a tittle of actual evidence to that effect. The deed of the right of way from the Episcopal Corporation to the Montmorency Cotton Co. is not in evidence. Even its date has not been given. The description of the right of way in the deed of June, 1905, was not improbably copied from the deed given by the Episcopal Corp. It bears some internal evidence that it was. The words "by the said company," if in the earlier deed, would there refer only to the purchasers, the Montmorency Cotton Co. No other company was a party to that deed. In the deed of 1905 the reference is ambiguous. It may be either to the vendor company or to the purchaser company. Both were parties to it. If the description was copied from the earlier deed the use of these words is accounted for and the presence of the words, "by a flight of steps or footpath *to be made*, placed and maintained thereon," in the deed of 1905, notwithstanding that the stairway had already been constructed, is also explained.

But any inference from the language of that deed cannot weigh for a moment against such positive and uncontradicted testimony as that of Philippe Côte who says that he has used the stairway for 14 or 15 years, that it was built at the same time as the block of dwellings, and that it was he who arranged the foot of the stairway where it joins the "Côte à Courville." Antoine Mailloux, the plaintiff Company's superintendent, though he cannot say just when the stairway was built—a little after the block he thinks—says the public has made use of the road and stairway for 15 years. M. le Curé Ruelle says the road has been built as it now is for about

15 years and has been used by the public with the stairway during that period in coming to and going from his church. There was no church at St. Louis de Courville until recently. The road and stairway were also used in going to and from an hospital which was situated for a couple of years on its east side near the north end. Vital Giroux says many people arriving by the electric cars used the stairs and road for 15 years past and that they were also used by the public in going to church. J. W. St. Pierre says everybody (tout le monde) has used the road like any other public road since the stairway was built—for 15 years—and he refers specially to the traffic of residents of St. Louis de Courville to and from the electric cars. Adelard Lortie, Mayor of the Village of Montmorency, says that for 15 years the public has treated the road as a public road without any hindrance. Even Paul Leclerc admits that the road was used for traffic of all kinds publicly, openly and without obstruction, and that it was regarded as a public road.

These are all witnesses called for the Company. Taken with the evidence given for the defendant their testimony puts beyond doubt the character and the extent of the user by the public of the road as a public road, without any contestation of its right, for a period upwards of 10 years. On this point I find myself in accord with the conclusion of Pelletier, J., and the Judges who sat in the Court of Review.

It therefore becomes necessary to decide whether art. 9 of sec. 41 of the 18 Vict., 1855, ch. 100, applies to a road first opened, as was that here in question, in 1899 or 1900. The appellant insists that it should be held that it does both upon the proper construction of its terms and because, as he maintains, that view has been taken of it in a long and unbroken series of decisions in the Quebec Courts and has thus become a recognised rule in regard to public rights and property which should not lightly be broken in upon or disturbed.

Without questioning our right to review and, if thought proper, to overrule even a long series of provincial decisions based on an erroneous construction of a statute, *Hamilton* v. *Baker*. *"The Sara"* (1889), 14 App. Cas. 209; *Maddison* v. *Emmerson* (1904), 34 Can. S.C.R. 533, [1906] A.C. 569, at 580: having regard to the nature of the subject and to practical results, although the doctrine of *stare decisis* has

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not been accepted under the French system to the same extent as in English jurisprudence, I should probably have thought it the better course not to interfere with a uniform and unquestioned line of decisions which people had considered as having settled the law on a particular subject and had acted on for a long period. *London County Council* v. *Churchwardens etc. of Erith*, [1893] A.C. 562, at 599; *Morgan* v. *Fear*, [1907] A.C. 425, at 429; *Cohen* v. *Bayley-Worthington*, [1908] A.C. 97, at 99. But it is necessary to examine with some care the line of cases alleged to be numerous and uniform, because a decision, though followed, if it has been often questioned and doubted is clearly open for reconsideration in a Court of superior jurisdiction. *The "Bernina"* (1888), 13 App. Cas. 1, at 9; *Pearson* v. *Pearson* (1884), 27 Ch. D. 145, at 158, (overruled on other grounds); *The Queen* v. *Edwards* (1884), 13 Q.B.D. 586, at 590-1, 593, 595. I shall therefore briefly refer in chronological order to the cases cited in the judgments below and in the factums.

In *Johnson* v. *Archambault* (1864), 14 L.C.R. 222, the Court of Queen's Bench dealt with a lane which it held to have been a public street long before 1834. No reference is made to art. 9. In *Parent* v. *Daigle*, 4 Q.L.R. 154, Meredith, C.J., and Stuart, J., treated art. 9 as in force and applicable to the road there in question, which, however, "had been used . . . as a public road for thirty years and upwards, in fact as long ago as the time to which the memory of the oldest witnesses examined in the case can extend." In *Théoret* v. *Ouimet* (1878), M.L.R. 1 S.C. 275, the road dealt with had always served the purposes of the neighbouring proprietors and the Court held that the defendant had obstructed this road without any right or title. No allusion is made to art. 9.

Turning to the consideration of the statute itself, we find art. 9 connected with art. 8 by the conjunction "and," which affords at least an indication that the Legislature understood that in these two articles it was dealing with cognate matters, viz., road conditions existing at the time when the statute was passed, to which art. 8 is explicitly restricted. The use in the descriptive terms of art. 9 of the past instead of the future-perfect tense ("left open to and used," not "which shall have been left open to and used") points in the same direction, though not at all conclusively in view of the rule of interpretation that a statute is to be regarded

as always speaking. In the Municipal and Road Act, 18 Vict. 1855, ch. 100, revised and consolidated by 23 Vict. 1860, ch. 61, and embodied in the Consolidated Statutes of 1860 as ch. 24, sec. 41 became sec. 40. Arts. 8 and 9 were entirely omitted therefrom and are not found elsewhere in these statutes. The Consolidating Act, 23 Vict. 1860, ch. 61, contained no repealing provision and the two articles, 8 and 9 of sec. 41 of the Act of 1855, were omitted, no doubt because the revisors and the Legislature deemed them applicable only to roads which had been in existence and in public use for 10 years before July 1, 1855. By the 34 Vict., ch. 68, the municipal laws of the Province of Quebec were consolidated in the Municipal Code. The repealing section (No. 1086) has, I think, properly been held not to have affected art. 9 of sec. 41 of the 18 Vict. 1855, ch. 100. Neither in the revision of the statutes of 1888 nor in that of 1909 has that article been reproduced, however, although it may fairly be assumed that the Legislature was apprised of the conflict of judicial opinion as to its scope and application. If applicable to roads coming into existence since July 1, 1845, and if the prescriptive period which it provides is still current, the article should be found either in the Municipal Code or in the revised statutes. Its absence from both under the circumstances affords almost conclusive proof that the Legislature has thrice recognized that the article was properly omitted from the 23 Vict. 1860, ch. 61, as spent or effete because applicable only to conditions existing on July 1, 1855. I agree with the view expressed by the late Burbidge, J., in *Bourget* v. *The Queen*, 2 Can. Ex. 1, at 7, 8.

For these reasons, expressed, I fear, at inordinate length, I would dismiss this appeal.

In *Myrand* v. *Légaré*, 6 Q.L.R. 120 at 127, 128, the Court of King's Bench, Dorion, C.J., presiding again applied the same statute: but the road dealt with had been open and in public use for over 60 years and both the Chief Justice and Tessier, J., who alone delivered judgments, upheld the public right as having been acquired by prescription "de droit commun."

In *Guy* v. *Cité de Montréal*, 3 Leg. News 402, the decision rests on dedication and Dorion, C.J., refers to *Myrand* v. *Légaré* as an authority that for dedication a title in writing is not necessary. The street in question had been referred to as a highway in a

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petition made in 1831. In this case Ramsay, J., who had sat in *Myrand* v. *Légaré*, questions whether art. 9 is in force, and is not prepared to say that he "feels bound by the dictum in *Myrand* v. *Légaré*."

In *Chavigny de la Chevrotière* v. *La Cité de Montréal*, 12 App. Cas. 149, the statutory provision dealt with is not art. 9 of sec. 41 of 18 Vict. 1855, ch. 100, which does not apply to Montreal, but a somewhat similar provision of 23 Vict., 1860, ch. 72, which is the charter of the City of Montreal and applies to it alone. As such its non-inclusion in the revised statutes of course lacks the significance which attaches to the omission therefrom of art. 9 of sec. 41 of 18 Vict. 1855, ch. 100. Their Lordships held, at page 157, that there was "evidence of a long continued user by the public and an abandonment of right by those who could have disputed the user by the public, sufficient to sustain at common law the public right." This case affords no assistance in the construction of art. 9.

In *Bourget* v. *The Queen*, 2 Can. Ex. 1, Burbidge, J., having held that the dedication was established, added, at page 7, that in his opinion art. 9 was a temporary provision having reference to roads in existence at the date when it came into force and in public use for 10 years theretofore.

In *Fortin* v. *Truchon*, 15 Q.L.R. 186, the Court of King's Bench held that the evidence did not establish a 10 years' user without contestation of right. But Bossé, J., who alone appears to have delivered reasons for the judgment, said, in the course of his opinion, "It is a very dubious question of knowing whether or not the section cited from 18 Vict. has been in force under our Municipal Code."

In *Childs* v. *La Cité de Montréal* (1890), M.L.R. 6 S.C. 393, Pagnuelo, J., although he disposed of the case on the ground of dedication, refers incidentally, at p. 398, to art. 9 as being in force and as having been reproduced in the charter of Montreal, 23 Vict. 1860, ch. 72. In *Léveillé* v. *Cité de Montréal* (1892), 1 Que. S.C. 410, at 419-20, Mathieu, J., makes a similar passing reference to the statute. In *Lavertu* v. *Corporation de St. Romuald* (1896), 11 Que. S.C. 254. Andrews, J., at 260, cites *Myrand* v. *Légaré*, 6 Q.L.R. 120. *Guy* v. *Cité de Montréal*, 3 Leg. News 402, and *Childs* v. *La Cité de Montréal*, M.L.R. 6 S.C. 393, as authorities on the effect of user of a road opened in 1870—a question, he adds, not before him.

Westmount v. *Warminton* (1898), 9 Que. Q.B. 101, was also a case of dedication, (destination) Blanchet, J., who alone delivered reasons for the judgment of the Court of Queen's Bench, said, at page 114, that in his opinion art. 9, though not repealed, is restricted in its application to roads existing before July 1, 1855, the date of its adoption.

In *Banque Jacques Cartier* v. *Gauthier* (1900), 10 Que. K.B. 245, Ouimet, J., in giving the judgment of the Superior Court, at page 251, refers to art. 9 as applicable to a modern street on the authority of *Mignerand dit Myrand* v. *Légaré, supra*; *Childs* v. *La Cité de Montréal, supra*; *Bourget* v. *The Queen, supra*; *Johnson* v. *Archambault*, 14 L.C.R. 222; *Guy* v. *Cité de Montréal, supra*; *Westmount* v. *Warmington*, 9 Que. K.B. 101. His judgment was reversed, however, in the Court of Appeal on other grounds, and no allusion is there made to art. 9.

In *Jones* v. *Village of Asbestos* (1901,) 19 Que. S.C. 168, Lemieux, J., refers to art. 9 as not abrogated and an existing means by which the public may acquire a highway. The Judge, however, held that dedication was established and the report does not shew when the user of the highway in question had begun. In *Shorey* v. *Cook* (1904), 26 Que. S.C. 203, Dunlop, J., held a road to be established as a highway by dedication. He also expressed the view that art. 9 was in force and applicable to a street in use since 1892. In *The King* v. *Leclaire* (1906), 15 Que. K.B. 214, Lavergne, J., says, at 219: "The prescription established by 18 Vict., ch. 100, art. 40 of sec. 9 as to possession during 10 years by a municipal corporation must be restricted to roads existing before the 1st July, 1855." In *Rhodes* v. *Perusse*, 41 Can. S.C.R. 264, this Court held that there was complete, clear and unequivocal evidence of dedication, and there had been public user for over 30 years. No reference is made to art. 9. In *Nolin* v. *Gosselin*, 24 Que. K.B. 289, a road in public use for 10 years after an attempt had been made in 1856 by the council of the municipality to abolish it was held by the Court of King's Bench to be a public highway, presumably under art. 9. But the Court also held that the road had not been in fact abolished within the meaning of art. 753, M.C.; Carroll, J., is of the opinion that art. 9 was inapplicable, but agreed in holding that the road had not been abolished.

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In applying the doctrine of *stare decisis* it must always be borne in mind that only that part of a judicial decision is binding as authority which enunciates the principle on which the question before the Court has been actually determined, *G. & C. Kreglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd.*, [1914] A.C. 25, at 39-40, and that mere dicta, even in speeches of individual members of the House of Lords, while no doubt entitled to the greatest respect, do not bind even the lowest Courts. *Latham* v. *R. Johnson*, [1913] 1 K.B. 398, at 408.

An analysis of the Quebec cases in which art. 9 has been referred to shews that in only one instance—and that as late as 1912—*Nolin* v. *Gosselin*, *supra*, has the Court of Appeal held it applicable to a road opened after it was enacted. In two other Court of Appeal cases, *Fortin* v. *Truchon*, 15 Q.L.R. 186, and *Westmount* v. *Warminton*, 9 Que. Q.B. 101, the sole opinion delivered in each casts doubt on the point, Bossé, J., in the former questioning whether the provision is in force and Blanchet, J., in the latter expressing the view that it applies only to roads existing before its enactment. In one of the two remaining cases referred to, *Myrand* v. *Légaré*, 6 Q.L.R. 120, the question now under consideration did not arise, and in the other, *Guy* v. *Cité de Montréal*, 3 Leg. News 402, Ramsay, J., referring to the view expressed in *Myrand* v. *Légaré*, that the article in question is in force, as a *dictum*, was not prepared to say he felt bound by it.

In 4 cases in the Superior Court, art. 9 has been treated as applicable to roads opened since 1855. *Lavertu* v. *Corporation de St. Romuald*, 11 Que. S.C. 254, (Andrews, J.); *Banque Jacques Cartier* v. *Gauthier*, 10 Que. K.B. 245, (Ouimet, J.); *Shorey* v. *Cook*, 26 Que. S.C. 203, (Dunlop, J.), and *Jones* v. *Village of Asbestos*, 19 Que. S.C. 168, (Lemieux, J.). In *Childs* v. *Cité de Montréal*, M.L.R. 6 S.C. 393, and in *Léveillé* v. *Cité de Montréal*, 1 Que. S.C. 410, Pagnuelo, J., dealt with it as in force but did not pronounce upon its applicability to roads opened since 1855. On the other hand, in *Bourget* v. *The Queen*, 2 Can. Ex. 1, Burbidge, J., and in *The King* v. *Leclaire*, 15 Que. K.B. 214, Lavergne, J., expressed positive opinions that art. 9 has no application to roads opened since it was enacted. The Privy Council case, 12 App. Cas. 149, and the early decision in *Parent* v. *Daigle*, 4 Q.L.R. 154, threw no light on the question. In this state of the authorities, it is certainly

not possible to say that the applicability of art. 9 to the road here in question is not open in this Court.

BRODEUR, J. (dissenting):—An action *négatoire* was commenced by the respondent against the defendant, appellant, under the following circumstances:

The respondent, the Dominion Textile Co. owns a factory near Montmorency Falls, in the Village of St. Gregoire de Montmorency. Wishing evidently to make things more comfortable for its employees, it built two rows of houses capable of accomodating fifty families on land which it acquired in 1899, and it opened, facing these houses, splendid streets which it macadamized, and on which it constructed sidewalks. At the same time, it opened a cross road communicating with a public road called the "Côte à Courville"; and, besides that, as the houses were on high ground, it constructed, on the slope of the cliff, steps, which connected the cross road with the village situated below, so that merchants, visitors and friends of the employees could communicate easily with them. These roads were not used by the employees and their visitors only, but were also used by persons living farther up the "Côte à Courville" and on the Beauport Road, and who had to go to the village below the cliff. They became public roads used by everybody without any hindrance on the part of the Company, and without any indication that they were not public.

To the east of this cross road there was a piece of land which belonged at one time to M. l'Ablé Ruelle. This land, known as lot No. 63, in the Register of Beauport, had been partly sold to the defendant in the present action, who had built a private house, and a blacksmith's shop there. This shop was on the cross road in question and he had constant communication with the street by it. Access to the shop was obtained through an opening in the fence which had been broken down.

It was in 1907 that Harvey acquired this land and built this store. No objection was made at the time by the respondent when Harvey made the opening and went out directly on the street.

Two years after, this shop was let as a grocery store to a merchant, who was one of the tenants of the respondent Company, living in the row of houses which had been built on its land. This merchant necessarily went to and from his store to the street without hindrance or difficulty.

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Later Harvey retook possession of his shop, which was made into a store, and commenced to do business there; and the Company, for reasons which do not appear to be clear in this case, closed the fence which separated the street from the property of Harvey, preventing him from going out on the street. Then followed the breaking of the fence, and the action of the Company against Harvey, the defendant pleaded: 1. Use for 10 years under 18 Vict. 1855, ch. 100, sec. 41, sub-sec. 9; 2. That there had been a dedication of the street in question to the public.

He pleaded, besides, that under the provisions of art. 749 M.C. this street or road had become a municipal road to which he should have access the same as any other person.

The first question which presents itself is, to ascertain if this provision of the statute 18 Vict. is still in force, and if it applies to roads opened since 1855. The effect of this legislation was considered by the Court of Appeal in 1879 in the case of *Myrand* v. *Légaré*, 6 Q.L.R. 120, and it was stated by Dorion, J., who delivered the judgment of the Court, that

> this provision determines the period after which a road opened to the public becomes a public road. It has been alleged that this provision had been abrogated by the Municipal Code. It is possible that such has been the intention, but I do not find anything in the Municipal Code, which expressly or by inference has had the effect of abrogating this provision. This is also what the Court of Review decided in the case of *Parent* v. *Daigle*, 4 Q.L.R. 154.

This opinion has not been accepted by all the Judges, but it has been generally followed, as may be seen by consulting the following cases:—*Guy* v. *Cité de Montréal* (1880), 1 D.C.A. 51; *La Chevrotière* v. *La Cité de Montréal*, 10 Leg. News 41; *Fortin* v. *Truchon*, 12 Leg. News 280; *Childs* v. *Montreal*, M.L.R. 6 S.C. 393; *Léveillé* v. *Cité de Montréal*, 1 Que. S.C. 140; *Westmount* v. *Warminton*, 9 Que. Q.B. 101; *Banque Jacques Cartier* v. *Gauthier*, 10 Que. Q.B. 243; *Jones* v. *Corporation du Village d'Asbestos*, 19 Que. S.C. 168; *Dame Nolin* v. *Gosselin*, 24 Que. Q.B. 289.

But in this case of *Myrand* v. *Légaré*, referred to above, the only question which presented itself was to ascertain if the law had not been actually repealed. This appeal was not to decide if a road built since 1855 was governed by this law, for the road in question in this case existed some time before 1855. In this case, we have to decide, not only if the Statute 18 Vict. is still in force, but also if it applies to a road opened in the last 20 years.

I am constrained to believe that roads opened since 1855 are not governed by the Statute 18 Vict., but having regard to the conclusion I have reached on the last point raised by the appellant, I do not believe that it will be necessary for me to express a definite opinion on the question of use for 10 years.

As for the question of dedication or destination which the English authors call "common law dedication" I have also such serious doubts that I prefer not to express an opinion.

"Common law dedication" presumes the gift of land on which the road is. May a gift of land be made without title? Art. 776 C.C. states that gifts of land *inter vivos* must be in notarial form under pain of nullity. It seems to me that this formal provision of the Civil Code renders the gift of a way when there is no title illegal. But, however, that does not hinder this road from becoming the property of the municipal corporation if during 30 years it has had the usage of the same by the interposition of the public, for, in this case, the legal relations of the parties will be governed by art. 2242 of the same Code, which does not oblige the receiver to shew titles. As for the question of user for 30 years, it was not put forward in the present case seeing that the possession of the public did not go beyond 15 years.

Now comes the question, is the street in this case a municipal road under art. 749 of the Municipal Code and may it be closed?

Roads are divided into public and private roads. The former are under the surveillance of municipal or Government authority while private roads are those used by private parties, and are not frequented by the public. Roads, on which the public are allowed. passing over the land of an owner, who keeps them open at his pleasure, are also called private roads.

A public road is ordinarily opened by a sovereign power such as a municipal council. However, a road may become public by a 30 years use of the same under the provisions of art. 2242 C.C., which states that "all things, rights and actions in which prescription is not otherwise governed by the law, are prescribed by 30 years, otherwise title must be obtained, and the exception deduced from dishonesty can be raised."

In the case of usage of a road by the public during 30 years, not only the right of passage on the road is acquired by the public, but also the ownership of the road itself vests in the municipal authorities (art. 752 M.C.).

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This question of 30 years prescription is generally admitted by the doctrine of law.

Proudhon, Domaine public, vol. 2, page 372, says:—

When a road which serves as a communication between several places has been publicly opened, and freely used that is to say, peacably possessed by collective beings which we call the public, during more than 30 years, which is the extreme term to-day of our longest prescription, the right is acquired by those who find themselves able to make use of it.

Do roads become public roads by the action of the municipal authorities or by prescription? Can they become so otherwise? Certainly, and that is what is laid down in art. 749 of the Municipal Code when it states that: "Lands or passages used as roads by mere permission of the owner or occupier are municipal roads if they are fenced on each side or otherwise separated from the rest of the land, and are not habitually kept closed at their extremities, but the ownership of the land and the duty of maintaining continues to belong in all cases to the owner or occupier."

The expression "Chemin de Tolérance" is one sufficiently vague and indefinite in law. But this expression has reference evidently to roads opened by the consent of the owner on the ground over which they pass. This is a private road over which the municipality has no right of ownership nor control. But this roadway loses its character of a private road, if it is reconciled to the conditions laid down by art. 749 of the Municipal Code, that is to say, if it is open at both ends, and if it is fenced or otherwise separated from the rest of the property.

Proudhon, page 373, tells us that the solution of the point whether or not a road can be characterised as a public road presents many difficulties, and he adds that one should examine among other things, "if it has been paved or covered with stones, which would place it outside the category of simple 'chemins de tolerance.'" Le Nouveau Denisart, vo. Chemin, has a whole paragraph on "chemins de tolérance." This is one of the few authors who deals with the question fully. The others only comment a little, and pass on without appearing to go into the subject deeply. In dealing with these roads Denisart tells us that "chemins de tolérance" can be opened or closed at the pleasure of the owner, and he bases his opinion on a decision of July 10, 1782, which he refers to on page 527 of vol. 4, where it has been decided that a "chemin de tolérance" crossing the park of the Chateau Champigny, and

going to the St. Maur Bridge at the Chenevieres gate, even though it has been paved, and even though it has existed for a very long time, can be closed up at the pleasure of the owner.

The principal argument put forward by M. de Champigny was, that by art. 186 of the Custom of Paris, no use can be established without title, and that immemorial possession of the same does not suffice. It is evident by principle and modern jurisprudence that a road privately owned only allows a user.

Proudhon, in his treatise on Public Domain published in 1833, says at No. 631, page 368, that if a road is made across ground so that it serves as a communication between two living places, or from a village to another village, there is acquisitive prescription of the road by 30 years possession, and that art. 691 of the Code Napoleon, which is the same as art. 186 of the Custom, does not apply. Public roads are governed by another law than that of user.

This opinion is also held by Massé and Vergé sur Zachariae, vol. 2, par. 336, noted and by Demolombe, vol. 2, No. 792.

The principle enunciated in the reported decision in Denisart has not been accepted by authors who wrote at the beginning or the middle of the last century.

It is not surprising that the editors of the Municipal Code have made a decision with reference to the question in stating in art. 759, when a private road can become a public or municipal road. This legislation appears to me to be based on a judgment given in 1832 by the Court of Appeal, in 2 cases, the first *Porteous* v. *Eno* (1832), cited in 6 Q.L.R. at 125, where it has been stated that a road, which appeared to have been first of all only a private road closed at each end by barriers, but on which the public had been in the habit of passing from time immemorial, cannot be closed to the public, when the barriers have been down for 9 years, and the owner has put up a fence to separate the road from the rest of his property.

The article also appears to me to conform to a decision given by the Court of Appeal in the case of *Johnson* v. *Archambault*, 14 L.C.R. 222.

In declaring these "chemins de tolérance" municipal roads, the Municipal Code has put them under the control of the municipality (art. 757 M.C.), and makes the latter responsible for accidents which may befall, for lack of repair. It is the duty of municipal corporations to see that roads are kept up, whether

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they are owners or not and whether the roads are open by consent of the owner or by municipal by-law.

It is the duty, I say, of municipal corporations to keep their roads in good order (art. 793 M.C.) and if they are negligent in fulfilling this obligation, they are liable for penalties and damages. In the case of a road under art. 749 M.C. corporations will then have recourse against the owner, but they are none the less directly responsible to those who have experienced damages. If they find this obligation too onerous, they can close the road (art. 749 M.C. 525-527 M.C.). These provisions of the law, apply equally to streets of villages (art. 765 M.C.).

One must not forget that according to the provisions of the law, the streets of villages are kept up, in the absence of by-laws, by the owner of the property which fronts on these streets (art. 824 M.C.), and then one must not find unreasonable this provision which puts roads in art. 749 M.C. in charge of him who builds them on his property.

In this case the road is open at its ends, at one end, it communicates with the "Côte de Courville" which is a municipal road, and at the other, it joins a public street by means of steps.

No one will pretend that this does not constitute an exit.

The authors of Nouveau Denisart, vo. Chemin, par. 3, No. 4, say that "ordinary pathways . . . should also be put in the category of public roads, when the public has had the use of them for a long time."

That the exit may only be used by the foot-passengers does not make any difference. It is not necessary that vehicles should pass over it. The street is fenced on one side, and on the other there is a sidewalk which separates it from the rest of the property. It has then all the conditions necessary under the law to become a public street.

I may add that our art. 749 of the Municipal Code is in our law what is known as "statutory dedication" in English law. Then as a "statutory dedication" it is irrevocable, the road should remain a public road, and the owner cannot do anything to prevent an adjacent owner from having the right to use this road. For these reasons, I am of the opinion that the action *négatoire* instituted by the respondent is not well founded, and that the appeal of the plaintiff should be allowed with costs in this Court and the Courts below. *Appeal dismissed.*

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. December 23, 1919.

LANDLORD AND TENANT (§ I—4)—CREATION OF THE RELATION—AGREEMENT —RIGHTS OF PARTIES—WAR RELIEF ACT, 1918, 8 GEO. V. (MAN.), CH. 101, SEC. 10.

A clause in an agreement for the sale of land covenanting that the relationship of landlord and tenant is constituted between vendor and purchaser is good and creates such a relationship. The landlord or vendor may maintain an action for rent or payments due under this agreement under sec. 10 of the War Relief Act, 1918, even though the tenant or purchaser is a privileged person under the statute.

[*Hobbs* v. *Ontario Loan & Debenture Co.* (1890), 18 Can. S.C.R. 483; *McDermott* v. *Fraser* (1915), 23 D.L.R. 430, 25 Man. L.R. 298, referred to.]

Statement.

APPEAL by defendant from the trial judgment in an action for the recovery of moneys due under an agreement. Affirmed.

C. P. Wilson, K.C., for appellant.

A. B. Hudson, K.C., and *H. E. Swift*, for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—The War Relief Act, 5 Geo. V., 1915, (Man.) ch. 88, barred during the continuance of the war the bringing of any action or proceeding against a person who was or had been since August 1, 1914, a resident of Manitoba and had either enlisted and been mobilised as a volunteer in the forces raised to serve in the war or had left Canada to join the army of His Majesty or of any of his allies, or against the wife or any dependent member of the family of such person for the enforcement of payment of his debts, liabilities and obligations existing or future, or for the enforcement of any lien, encumbrance or other security or for the recovery of any goods, lands or tenements in his possession. By sec. 9 an exception was made whereby a person having a charge or security upon land had the right to collect the "rents or rentable value" of the land over and above an amount equal to $2,000 per annum.

In 6 Geo. V., 1916 (Man.), ch. 22, an Act was passed which amended the Act of 1915 by extending in some respects the protection afforded by the earlier Act to persons engaged in military service. The Act of 1916 also provided further exceptions in favour of mortgagees, vendors and other persons as against the persons for whose benefit the original War Relief Act was passed. Section 9 of the Act of 1915 is repealed by the Act of 1916 and very material exceptions are added in place of those contained in the original clause. On the other hand, the period of time during which

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proceedings are stayed as against persons engaged in military service is extended in respect of the provisions contained in secs. 2, 3, 5 and 7. Section 5 of the Act of 1916 amends the corresponding section of the earlier Act by adding a clause that the provisions of the section in the original Act shall not apply to the case of joint debtors who were such at August 1, 1914, one of whom is a person for whose benefit this Act is passed, but, in such case, the provisions of sec. 2 hereof as amended shall apply for the relief of all the joint debtors and their wives and dependent members of their families.

Section 10 of the Act of 1916 is as follows: "10. This Act shall apply to any actions or proceedings now pending."

It is clear that the provisions of the Act of 1916 were retrospective. Section 5 is made so by its express words. Section 9 of the later Act relating to sales of land by municipalities for arrears of taxes, declares that: "This amendment shall be construed to have been in force since the first day of April, 1915." Section 10 applies the provisions of the Act to pending suits.

In 1918, the Act 8 Geo. V., 1918 (Man.), 101, was passed. This Act repealed the existing Acts and was substituted for them: sec. 23. The Act came into force on March 6, 1918. It makes it unlawful to bring any action or take any proceedings against a person who is or has been at any time since August, 1914, a resident of Manitoba and has either enlisted or been mobilised as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in the war, adding to the branches of service mentioned in sec. 2 of the Act of 1915 aviation services and persons who were drafted under the Military Service Act. Section 2 provides that:—

If any such action or proceeding was pending on April 1, 1915, or is now pending against any such person, the same shall be stayed until the expiration of a period of one year after the termination of the said war.

Section 6 of the new Act corresponds to sec. 5 of the original Act as amended in 1916.

Section 8 suspends the running of all statutes of limitations of actions in favour of the persons benefited by the Act, during the period from August 1, 1914, to one year after the termination of the war or from the time of the first accruing of the rights of action to one year after the war whichever shall be the shorter period.

Section 12 of the new Act corresponds to sec. 10A added by the Act of 1916 relating to proceedings commenced before or after the passing of the first War Relief Act.

Section 13 of the 1918 Act repeats sec. 9 of the Act of 1916, the retroactive effect given to the section being in these words: "This sub-section shall be construed to have been in force since the first day of April, 1915." The other sub-section is new.

Section 14 declares that "secs. 10 and 12 and sub-sec. (1) of sec. 13 of this Act shall apply only to any actions or proceedings pending on or after March 10, 1916."

It appears to me that the Act of 1918, 8 Geo. V., ch. 101, like the Act of 1916, 6 Geo. V., ch. 122, which it replaces, is clearly retrospective in its operation. The intention of the Act is to reaffirm and continue the protection given by the Acts of 1915 and 1916 to persons engaged in military service for His Majesty, or any of his allies, and to supplement and more clearly define the extent of the protection already existing and the manner of exercising it. It repeals the War Relief Act and amendments in force when the present Act came into operation. It deals with and continues rights acquired under the repealed Acts. It declares rights as existing from a time anterior to the passing of the Act. Both the words of the statute and its declared object shew that it is retrospective in effect. If it is retrospective in regard to the benefit and protection conferred upon persons engaged in military service it is also retrospective as to the exceptions. Section 10 of the Act of 1918 does not confer new rights of action on the plaintiff. The War Relief Acts barred the legal remedies of the creditors for a certain period and sec. 10 has merely removed the bar in certain cases so that pre-existing rights to sue might be restored to the extent mentioned in the section. The section really affects procedure only and that in itself makes the section retrospective in effect, 27 Hals., par. 308, 161:—

> An enacting clause which interferes with existing rights must be construed strictly, while the largest and most liberal construction is given to an exception which protects such rights.

27 Hals. pars. 306, 160. Section 10 of the Act of 1918 declares that the Act shall not prevent a mortgagee or vendor or other person having a charge or security on land "from the right to collect and receive" the rents or rentable value of the land to the extent of the interest due and all taxes, etc.,

> and such rents or rentable values shall be recoverable *from the tenant* or other person liable to pay the same or occupying the land or part thereof, by any remedy or proceeding as between landlord and tenant, or in any Court in this Province.

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The plaintiff in the present case is the vendor, and the defendant is the purchaser of certain land and the latter is a person entitled to the protection afforded by the War Relief Act, 1918. In the agreement under seal which was executed by the parties and which contains the terms of the agreement it is declared that,

the purchaser (the defendant) shall hold the said land and premises as tenant to the vendor (the plaintiff) from the day of execution hereof at a yearly rental equivalent to, applicable in satisfaction of and payable at the same times as the instalments of principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the vendor and the purchaser.

As between the parties to the instrument this covenant is good, there being no collusion between the parties to interfere with the rights of third parties. In *Hobbs* v. *Ontario Loan & Debenture Co.* (1890), 18 Can. S.C.R. 483, it was held by Strong, Fournier, Gwynne and Patterson, JJ., Ritchie, C.J., and Taschereau, J., dissenting, that a clause in a mortgage similar in effect to the above and purporting to create the relationship of landlord and tenant between the mortgagee and mortgagor failed to give to the mortgagee a right to distrain for arrears of rent *as against the execution creditors of the mortgagor*. In that case the mortgagee had not signed the mortgage. It was, however, conceded by the Judges forming the majority of the Court that the relationship of landlord and tenant might be created as between the parties to the mortgage if the deed were executed by both mortgagee and mortgagor. Strong, J., said, at 507-508:—

The mortgagor himself would be considered as having incapacitated himself from asserting the invalidity of what he had deliberately affirmed to be the true relation between himself and the mortgagee in an instrument under seal, but as regards third parties interested in so doing I know of no reason why it should be confined to any particular class such as assignees in bankruptcy.

Patterson, J., said, at 522:—

A mortgagor is at perfect liberty to agree that the mortgagee may distrain for all the mortgage moneys, principal as well as interest, without any regard to the value of the land, and whether the goods are on the mortgaged premises or elsewhere.

Ritchie, C.J., with whom Taschereau, J., agreed, held that the execution of the mortgage and the continuance in possession by the mortgagee constituted the relation of landlord and tenant and that there was nothing to prevent the parties from making such a contract.

In *Linstead* v. *Hamilton Provident & Loan Society* (1896), 11 Man. L.R. 199, it was held by Killam, J., that a special attornment clause whereby the mortgagor became tenant to the mortgagee, but which had not been executed by the latter, validly created the relationship of landlord and tenant between the parties. This case was followed by Curran, J., in *McDermott* v. *Fraser* (1915), 23 D.L.R. 430, 25 Man. L.R. 298.

Section 10 of the War Relief Act, 1918, was not intended to confer upon a mortgagee or a vendor any other or greater rights or remedies than those which he possessed under the mortgage or the agreement. It would be strange indeed if in an Act specially intended to protect from his creditors a man engaged in performing military service for His Majesty, there should be contained a new and drastic form of remedy which did not exist in respect of the original contract. The right here sought to be enforced was created by the agreement executed by the parties.

I think that the relationship of landlord and tenant had been validly created between the plaintiff and defendant, and that sec. 10 permitted the plaintiff as landlord to pursue his remedy against the defendant, as tenant, by a suit in the Court of King's Bench, to recover the rent due to the plaintiff under the terms of the agreement, to the extent allowed by that section. In this view the plaintiff would be entitled to recover to the extent of the interest, taxes, insurance and any other moneys paid by the plaintiff in respect of charges payable by defendant; but as no cross-appeal was brought by the plaintiff the judgment entered by the trial Judge will have to stand. That judgment should be considered as a recovery *pro tanto* only, and should be without prejudice to the plaintiff's right to sue for the remainder of his claim.

The War Relief Act, 1918, was amended at the late session of the Legislature: 9 Geo. V., 1919, ch. 111. By sec. 5 a new sec. (19A) is added which empowers a Judge of the Court of King's Bench or the Registrar-General by order to dispense with all or any of the restrictions, prohibitions and conditions contained in the Act, and permit an action or proceeding to be commenced, or carried on, or taken on such terms as he may think fit, as if the War Relief Act had not been passed. This Act came into force prior to the trial of this action, so that the trial Judge might have made an order under

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the new section, if an application for that purpose had been made to him and he saw fit to grant it. In *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672, an action had been brought by a landlord to recover the demised property under a proviso for re-entry for breach of a covenant to insure. The plaintiff recovered judgment and defendant appealed. A stay of proceedings was granted so that the plaintiff did not obtain possession. On January 1, 1882, the Conveyancing and Law of Property Act, 44 & 45 Vict., 1881, ch. 41, came into operation, after which the appeal was heard. It was held that the Act was retrospective and extended to breaches committed before the Act and to proceedings pending when the Act came into operation. The Court of Appeal held that it could grant to the tenant the relief to which he was entitled according to the law as it stood at the hearing of the appeal, the Court of Appeal having power to make such further or other order as the case may require. But under the view I take of the present case it does not seem necessary for the plaintiff to apply for and procure an order under sec. 19A dispensing with the restrictions and permitting the action to be carried on.

I think the appeal should be dismissed with costs, but that a clause should be added containing the proviso above mentioned, saving the plaintiff's right to sue for the remainder of his claim.

Cameron, J.A. Dennistoun, J.A.

CAMERON and DENNISTOUN, JJ.A., concurred with Perdue, C.J.M.

Fullerton, J.A.

FULLERTON, J.A.:—By an agreement dated November 25, 1912, the defendant agreed to purchase from the plaintiff certain property for the sum of $30,000. When this action was brought on June 6, there was admittedly due under the agreement the sum of $13,820.55, made up of two instalments of principal due November 25, 1914, and November 25, 1915, of $5,625.40 each and interest from November 25, 1914, making up the balance.

The defence raised is that the defendant is a volunteer within the meaning of the War Relief Act and that under the provisions of the Act and the several Acts amending the same the action is not maintainable.

The trial Judge has found as a fact that the defendant on or about February 1, 1916, enlisted and was mobilised as a volunteer and was on February 16, 1916, appointed an honorary captain and quartermaster of the 183rd Overseas Battalion, Canadian Expeditionary Forces.

The agreement between the plaintiff and the defendant contained the following provision:—

And it is further agreed between the parties hereto that until the completion of the purchase, the purchaser shall hold the said premises as tenant to the vendor, from the day of execution hereof, at a yearly rental equivalent to, applicable in satisfaction of and payable at the same times as the instalments of principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the vendor and the purchaser.

On August 16, 1917, the defendant made a lease of the premises to one Moore for a term of 8 months computed from August 1, 1917, the rental being the sum of $300.

On March 1, 1918, the defendant made a lease of the premises to Moore for a term of one year, the rental being the sum of $500. In addition, the defendant received $6 a month for 6 months for the use of a stable and $5 a month for the use of a house for 3 or 4 months.

The trial Judge arrived at the conclusion that the case was governed solely by the War Relief Act, 1918, 8 Geo. V., ch. 101, and construed sec. 10 of that Act to mean:—

That if the property sold or mortgaged has a rental value, the vendor or mortgagee has a right to such rent and the maximum amount that can be collected as rent shall not exceed the interest due, but if the rental value is less than the interest due, then such vendor or mortgagee is entitled to the actual rental value, and such rental value under sec. 10 shall be recoverable from the person liable to pay the same.

He then refers to the leases above mentioned and holds that plaintiff is entitled to recover against the defendant,

rental values as proven by the leases referred to and the rentals received by the defendant from the occupation of the stable and house, in all, $856.

The defendant contends that in so far as the first lease is concerned the rights and liabilities of the parties are governed by the provisions of the War Relief Act, 5 Geo. V., 1915, ch. 88, and the several amendments thereto.

The submission of the plaintiff, on the other hand is, that the War Relief Act, 1918, alone is applicable.

I think there can be no doubt whatever that if the plaintiff is driven to rely on the War Relief Act, 1915, and the amendments thereto, he cannot recover in this action.

The War Relief Act, 1918, repeals the War Relief Act of 1915. Section 23 enacts:—

The War Relief Act, being ch. 88 of 5 Geo. V., Statutes of Manitoba, and the Acts amending the same are hereby repealed and this Act substituted therefor.

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Section 2 provides that:—

During the continuance of the said war, and for a period of one year thereafter, it shall not be lawful (save as hereinafter provided) for any person to bring any action or take any proceedings, either in any of the civil Courts of this Province, or outside of such Courts, against: (a) a volunteer.

Section 10:—

(1) This Act shall not prevent a mortgagee or vendor or other person having a charge or security on land from the right to collect and receive the rents or rentable value of such land to the extent of the interest due, and all taxes or levies and prer iums of fire insurance payable by the mortgagor or vendee under any instrument affecting land, and also to the extent of all moneys which shall have been paid by a mortgagee or vendor in respect of any prior mortgage or charge upon such lands, and for the payment of which the mortgagor or vendee is liable, and such rents or rentable values shall be recoverable from the tenant or other person liable to pay the same or occupying the land or part thereof, by any remedy or proceeding as between landlord and tenant, or in any Court of law in this Province.

Provided that, when the actual rents of any such property are less than the net rentable value, the mortgagee or vendor or other person having a charge on the land shall be entitled to collect and receive the net rentable value in manner aforesaid.

(2) Provided that the right to distrain shall not be exercised against the goods of any person for whose benefit this Act is passed, but the mortgagee or vendor or other person having a charge or security on the land shall, if such rent or net rentable values be not so paid, have the right to resort to all other remedies for the recovery of possession of the property notwithstanding anything contained in this Act.

The defendant maintains that this section creates a new cause of action and is not therefore retroactive.

In so far as it gives a vendor a direct remedy against the tenant it has been argued that it creates a new cause of action.

The question, however, with which we are concerned here is the effect of the section on the respective rights of the vendor and vendee.

Under the facts of the present case the plaintiff, if no legislation had been passed, would have been entitled to sue the defendant for the instalments of principal and interest from time to time as the same matured. He could also by virtue of the attornment clause in the agreement distrain for or bring an action to recover amounts of rentals equivalent to the instalments of principal and interest as the same from time to time matured.

Before any such proceeding was taken the War Relief Act of 1915 was passed, which prevented the plaintiff from bringing any action or taking any proceeding until one year after the termination of the war.

In the language of McCardie, J., in *Merchants Bank of Canada* v. *Eliot*, [1918] 1 W.W.R. 698, at 700, this Act

> does not invalidate any bargain; it does not limit any contractual rights; it does not affect the substance of any agreement; it merely precludes the creditor from commencing legal proceedings.

The War Relief Act, 1918, sec. 2, above quoted, prevents action or proceedings save in the cases therein provided.

Section 10, above quoted, permits a mortgagee or vendor to take proceedings for the recovery of rents or rentable value. Whether or not as between vendor and vendee this section gives a new cause of action or merely removes to the extent provided the bar raised against the vendor's right to enforce his remedies depends on the construction of the section.

The section begins: "This Act shall not prevent a mortgagee or vendor . . . from the right to collect and receive the rents or rentable value of such land."

The Legislature assumed that but for the provisions of the Act itself the mortgagee or vendor could collect and receive the rents of the land. As between the parties this could only have been done by virtue of the attornment clause in the mortgage or agreement.

As between the mortgagee and tenants of the mortgagor the mortgagee at common law might on default give notice to the tenant to pay the rentals to him.

Possibly a vendor, occupying, as he does, a position analogous to the mortgagee, might do the same.

Exactly what the Legislature had in view when it said that the Act should not prevent a mortgagee or vendor—from the right to collect and receive the rents, etc., is difficult to make out, but I think it fair to assume that it at least had in mind the common practice in Manitoba of inserting attornment clauses in mortgages and agreements for sale.

The section then provides that:—

> Such rents or rentable values, shall be recoverable from the tenant *or other person liable to pay the same* or occupying the land or part thereof by any proceeding as between landlord and tenant, or in any Court of law in this Province.

The question is whether the words "other person liable to pay the same" include the volunteer. Unless they do, they are mere surplusage.

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Provision is made for the liability of the tenant and the party occupying the land or part thereof. The only other person who could possibly be liable would be the mortgagor or vendee. Sub-section 2 of sec. 10 appears to me to shew that sub-sec. 1 covers the case of a mortgagor or vendee.

It says that the right to distrain, which is of course one of the remedies given by sub-sec. 1, shall not be exercised against a volunteer.

In lieu of the right to distrain the mortgagee or vendor is given the right to recover possession from the volunteer.

I think on the true construction of sec. 10 the words "other person liable to pay the same" refer to, or at least include, the volunteer.

If the construction which I have put upon the section is the correct one, then the effect of the section is simply to restore in part the right to exercise the remedies which were suspended by the previous Acts and the section would, in so far as the parties themselves are concerned, affect remedies only and not rights.

Another construction that might well be put upon the section which would lead to the same result and a construction which would seem to be a reasonable one, is that the word "tenant" in the fourth line from the bottom of the first part of sub-sec. 1 is intended to mean and include the volunteer himself when he is occupying the premises as tenant under such an agreement as that in question.

The trial Judge construed the section in question as giving the vendor or mortgagee the right to recover from the mortgagor or vendee the rental value of the property up to the amount of interest due. The evidence in the case is directed mainly towards shewing the rental value of the property.

With deference, I am of opinion that under the facts of this case the plaintiff is entitled to recover the rentals fixed by the agreement and not the rentable value of the property. There has been no cross-appeal entered, and we would not, therefore, I think, be justified in entering judgment for the plaintiff for the full amount to which he is entitled.

The appeal will be dismissed with costs.

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 22, 1919.

MASTER AND SERVANT (§ V—340)—COMPENSATION—INJURY TO EMPLOYEE—ELECTION—WORKMEN'S COMPENSATION ACT, 4 GEO. V., CH. 25 (ONT.)—SUIT AGAINST THIRD PARTY—RIGHT OF ACTION.

A workman injured in the course of his employment, and entitled to bring an action against a person not his employer, may bring such action or elect to claim compensation under the Workmen's Compensation Act. On obtaining permission from the Compensation Board to withdraw his election, his right of action is not barred.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1919), 49 D.L.R. 216, 45 O.L.R. 550, varying the judgment at the trial in favour of the plaintiff by directing that the damages awarded should be paid to the Compensation Board to be dealt with under the Act. Affirmed.

The only question for decision on this appeal is whether or not the plaintiff's right of action was barred by his election to claim compensation under the Workmen's Compensation Act, 4 Geo. V., 1914 (Ont.), ch. 25.

H. H. Dewart, K.C., and *G. S. Hodgson*, for appellants.

W. Proudfoot, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—This was an action brought by the plaintiff against the railway company to recover damages for injuries received by him from the negligent running of the defendant's railway and in which the jury assessed $2,500 as the damages and found "excessive speed" of the car as the negligence.

During the trial, it came out in evidence that plaintiff had elected before beginning his common law action to claim compensation under the Workmen's Compensation Act, whereupon after the jury had been discharged the defendant applied for and obtained leave to add a plea to its other defences that such election had released the defendant from any right of action against it in respect of the injuries he sustained and that his claim for such damages was barred by the provision of the Act.

An appeal from the judgment entered by the trial Judge on the jury's findings was taken to the Appellate Division, but the only point raised and argued on the appeal there and afterwards on appeal to this Court was as to the effect of the plaintiff's election and whether it barred plaintiff's right to recover in this action.

The Appellate Division based its judgment, the reasons for which were stated by Hodgins, J.A., 49 D.L.R. 216, at 227, upon

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the fact "that the only right given to the Board by the election is that of subrogation," and when once that has arisen "the person possessed of the cause of action . . . can do nothing to prejudice the person subrogated."

He further stated that:—

> The situation created by the election spoken of in the statute and its consequences cast no additional burden upon the wrongdoer, nor any which differs in any way from that which he has brought on himself by his wrongful act. He has no concern with the dealings of the Board and the claimant; and, unless he is prejudiced, he has no right to complain. In this case the respondent's cause of action is not divested: it exists still in him, but, if enforced by him, it must be for the benefit of the Board if he has signed an election.

As a result, he stated, at page 228, "that the dismissal of the appeal should be preceded by a direction that the amount of the judgment should be paid to the Board to be dealt with by it in due course."

With these conclusions of the Divisional Court I am in full accord.

I agree with the reasons stated by my brothers Idington and Mignault which I have had the opportunity of reading and considering for dismissing the appeal to this Court.

If the plaintiff had obtained the express authority of the Board to bring the action or a ratification subsequently of his having brought it, that, in the view I take of the legal effect of an election under the Compensation Act, would have been a sufficient answer to defendant's amended plea, because I am clearly of the opinion that such an election cannot and does not discharge a wrongdoer whose negligence has caused damage to another or afford any defence to such an action as the plaintiff's.

I cannot, however, accede to the conclusion reached by my brother Anglin that proceedings in the action should be stayed until plaintiff had obtained and filed an authorisation of the Board for the bringing and maintenance of the action with the consequence that the plaintiff should be deprived of his costs on this appeal.

There are no merits in the appeal. It rests entirely upon what under the circumstances must be called a technical point, and in my judgment the direction in the judgment appealed from, 49 D.L.R. 216, at 228, "that the amount of the judgment should be paid to the Board to be dealt with by it in due course," amply protects the defendant from any of those injustices which the

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ingenuity of counsel has conjured up as possible consequences of the absence of express authorisation or ratification of the bringing and maintenance of the action by the plaintiff.

I may add that I do not assent to the assumption of the Court of Appeal that the power of the Board to sue in its own name is necessarily given to it by virtue of the subrogation. On the contrary I incline to think that such a suit or action must be in the name of the party injured to whose rights the Board by virtue of his election is subrogated.

Idington, J.

IDINGTON, J.:—The respondent recovered judgment for injuries caused him, whilst in the employment of the Canada Bread Company as a driver, by negligence of the appellant.

For these injuries he would have been entitled to compensation under the provisions of the Workmen's Compensation Act of Ontario, 4 Geo. V., 1914, ch. 25.

The appellant discovered at the trial that respondent had signed a document purporting to elect to receive from the Board administering said Act, such compensation as he would be entitled to under the provisions of said Act.

That election, even assuming it to have been operative and effectual, would neither bar nor extinguish the right of action herein in question, but would entitle the Board to continue the action if it so chose.

Section 9, sub-sec. 3, of the Act is as follows:—

(3) If the workman or his dependants elect to claim compensation under this Part the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund shall be subrogated to the rights of the workman or his dependants and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund.

The employer concerned herein was not individually liable and hence his rights are eliminated from consideration herein.

The Board under such circumstances became the beneficiary and entitled to proceed in respondent's name to recover the damages for the benefit of the accident fund.

Moreover this sub-section expressly declares that the Board shall be subrogated to the rights of the workman.

The rights of the workman at the time when discovery was made of the alleged election were in law to recover herein and the respondent a mere trustee of the Board.

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Idington, J.

Instead of adding the Board as a party to the action to make all this clear and instantly effective as I submit might, and perhaps should, have been done, there was adopted a rather roundabout series of unnecessary steps, which, however, resulted in the Court of Appeal modifying the terms of the judgment so as to render it clear that the recovery was on behalf of and for the Board.

The matter should have ended there.

The appellant never had any concern in the question of who was to get the money and was only concerned to have all doubt removed as to the possibility of its being called upon in another action using the respondent's name to re-open the litigation.

This it cannot, in face of its resolution put on record herein, purporting to revoke the election made by the respondent, now by any pretence attempt.

No doubt it was a proper shrinking from the risks of litigation that led to its adopting the course it did, instead of expressly adopting and ratifying the proceedings, as I hold it was entitled to have done.

The election made was something with which appellant had no concern, for that neither helped nor hindered it in any way.

And if those relying upon the doctrine quoted from Lord Blackburn's judgment in the case of *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, at pages 360-1, will examine the quotation put forward, they will find not only that that able and accurate Judge's accurate expression of the law not only fails to help appellant in the case of such an election as this was, but, even in a proper case, the election only becomes helpful when "communicated to the other side in such a way as to lead the opposite party to believe that he has made that choice."

The election here in question was something between respondent and the Board which in no way altered the rights or obligations of appellant and never was communicated to it, the opposite party in question herein.

And as the delimitation of rights given the Board by the subrogation which the Act expressly gives and defines, requires the application of the proceeds receivable thereby to go to the accident fund, it is to be regretted that through inadvertence the the sum of $352 was deducted; presumably from what the verdict should have been.

The appeal should be dismissed with costs.

DUFF, J.:—The decision of this appeal turns upon certain provisions of the Ontario Workmen's Compensation Act, that is to say, of sub-secs. 1, 2, 3, 4 of sec. 9, 4 Geo. V., 1914, ch. 25, and these provisions are in the following words:—

9. (1) Where an accident happens to a workman in the course of his employment under such circumstances as entitle him or his dependents to an action against some person other than his employer the workman or his dependants if entitled to compensation under this Part may claim such compensation or may bring such action.

(2) If an action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependants are entitled under this Part the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such workman or his dependants.

(3) If the workman or his dependants elect to claim compensation under this Part the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund shall be subrogated to the rights of the workman or his dependants and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund.

(4) The election shall be made and notice of it shall be given within the time and in the manner provided by sec. 7.

The accident in respect of which the action was brought occurred on April 17, 1918. On May 12, the plaintiff made a claim upon the Workmen's Compensation Board for compensation under the Act and on that day executed a document by which he professed to elect to claim compensation from the Board and to forego for the benefit of the Board all rights of action against third parties arising out of the accident. The plaintiff's claim was allowed by the Board and compensation was awarded to him as from April 17, the date of the accident, and for some months was paid, the first payment having been made on May 22. The present action was brought on June 20, 1918.

The action was tried on December, 1918, and judgment was given on December 18, against the appellants and after this date certain proceedings were taken by which in effect the Board professed to grant permission to the plaintiff to pursue for his own benefit any right of action he might have against the defendants, notwithstanding his election, and for that purpose giving permission to plaintiff to withdraw his election. It is not disputed that the action was in fact instituted by the plaintiff without the permission of the Board and on his own initiative and for his own benefit.

The appellant company contends that the plaintiff conclusively

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elected to claim and accept compensation from the Board and that by force of the statutory provisions quoted above the plaintiff's right to recover reparation from the appellant company became beneficially vested in the Compensation Board and that the plaintiff's action (admittedly as already mentioned instituted on his own behalf) cannot be maintained. The Appellate Division has rejected this view of the effect of sec. 9 and I concur with this conclusion.

In sum my view of sec. 9 is this: Its subject matter is the reciprocal rights of the claimant on the one hand and the employer and Compensation Board on the other. The effect of the section may perhaps be more conveniently considered with reference to the case of the employer. As between the employer and the claimant then, the claimant is entitled to choose one of two alternatives. He may claim compensation or he may elect to pursue his remedy against the third party. If he elects to claim compensation, the employer becomes subrogated to the claimant's rights against the third person; in other words, he becomes entitled to enjoy the benefit of them and may enforce them in the name of the claimant. But all this is intended to be and is a disposition as to the rights of the employer and the claimant *inter se*. A dispute may arise upon the point whether or not an election has taken place within the meaning of the enactment, but that is a matter to be settled as between employer and claimant. No other party is interested except, of course, a party claiming through one of them

After the claimant has elected to claim compensation and to give the employer the benefit of his action, it is still open to the employer to allow him to withdraw his election and no third party is entitled to intervene.

This view is beset with no difficulties in point of interpretation. The argument advanced on behalf of the appellant rests upon a view of the effect of the word "subrogated" in sub-sec. 3 which makes it equivalent to "transferred." But that is not the necessary meaning of the word "subrogated" which points merely to the enjoyment by the party entitled to the subrogation of the rights affected by it. In this view of sec. 9 the third party is amply protected. The term "subrogation" in one very important field of its application, the law of insurance, does not confer upon the person enjoying the benefit of subrogation the right to take pro-

ceedings in his own name. *King* v. *Victoria Ins. Co*, [1896] A.C. 250; *Simpson* v. *Thomson* (1877), 3 App. Cas. 279. It seems a reasonable construction to read the words "may maintain an action in his or their names" as explanatory of the preceding phrase, "their names" obviously relating back to "dependants." This construction finds no little support in the circumstance that the notice of election provided for in sub-sec. 4 of sec. 9 is a notice only to the employer or to the Board.

It follows, of course, that the transactions between the Board and the plaintiff are transactions to which for the purpose of this litigation the appellant company is a stranger and that they do not afford any answer to the respondent's claim in the action.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The effect of sec. 9 of the Workmen's Compensation Act, 4 Geo. V. 1914 (Ont.), ch. 25, is neither to extinguish the workman's cause of action upon his making an election to claim compensation under that statute nor to vest his right of action in the Workmen's Compensation Board, but rather to transfer to the Board the right to control any action brought or to be brought in the workman's name. The Board is subrogated to his rights and empowered to use his name for the purposes of suit. I doubt whether it can sue in its own name as appears to have been thought in the Appellate Divisional Court.

While, therefore, an absence of authorisation of it by the Board is not a defence to the plaintiff's action, it affords in my opinion a ground upon which that action, carried on without the sanction of the Board, should, upon the application either of the Board itself or of the defendant, be stayed until such an authorisation has been obtained and filed with the Court in order to prevent possible abuse of its process. Sub-sec. 1 of sec. 9 gives the workman the right either to claim compensation or to bring his action. Read with sub-sec. 3, in the light of sub-sec. 2, however, the effect of this provision would seem to be not entirely to deprive him of the right to sue when he has claimed compensation, but to suspend his right to prosecute an action until the sanction of the Board to his doing so has been secured.

Both the Board and the defendant are interested in the action of a man who has claimed compensation being under the control of the Board. Although the appellant asks the dismissal of this

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action on the ground that under the statute the cause of action is vested in the Board, I think we may not unfairly consider an application for a stay as included in the relief it seeks.

Had the Board granted in the terms in which it was made the application of the plaintiff's solicitors of the 8th of January, 1919: "for a consent by the Board ratifying all proceedings that have been taken or may hereafter be taken in this action by or on behalf of the plaintiffs," tardy as it would have been, I should have been disposed to accept such an authorisation as sufficient to warrant allowing the proceedings to be carried to completion. The defendant would thereby have been given all the protection to which it was entitled. But the Board instead of taking that course sought to put the plaintiff, for the purposes of this action, in the same position as if he had not claimed compensation under the statute, at the same time seeking to reserve under his election to claim such compensation its own right to maintain an action against the present defendant should the plaintiff's action fail. I cannot think it was competent for the Board to take that course. But whether it was so or not, the document of February 13, 1919, signed on its behalf by its secretary is not an authorization of the plaintiff's action nor a ratification or adoption of it. On the contrary, it is a very plain intimation that the plaintiff's action must be treated as entirely his own and not as authorised by, or under the control of, the Board.

In my opinion proceedings in the action should be stayed to enable the plaintiff to procure and file an authorisation of the Board substantially in the terms of his solicitor's application of January 8. Upon such authorisation being filed the appeal should be dismissed but without costs.

Brodeur J.

BRODEUR, J.:—I concur with Davies, C.J.

Mignault, J.

MIGNAULT, J.:—The sole grounds of appeal of the appellant company—which, on the jury's verdict, was condemned to pay $2,500 to the respondent—are based on sec. 9 of the Workmen's Compensation Act, 4 Geo. V., 1914, ch. 25.

At the trial it was disclosed that the respondent had elected to claim compensation under the Act, his election being in the following terms, 49 D.L.R. at 218:—

Whereas on or about April 17, 1918, I, Alexander Hutton, employed by Canada Bread Co., of Toronto, received injuries by accident arising out of and in the course of my employment, as follows:—compound fracture of the

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leg. And whereas it is alleged that such accident and injuries were caused by the negligence or wrongful act or breach of duty of some person or persons other than my said employer. Now, therefore, I, the said claimant, do hereby elect to claim compensation for said injuries under the provision of Part I. of the Workmen's Compensation Act, 4 Geo. V., ch. 25, Ont., and I hereby forego any and all my right or rights of action whatsoever against such third party or parties in respect of such accident and injuries, it being understood that by this election the Workmen's Compensation Board is subrogated to all my rights, rights of action and remedies which otherwise I would have against such third party or parties in respect of said accident and injuries.

The appellant contends that this election of the respondent is a complete discharge in its favour. I take it that it does not amount to a discharge, but rather that its effect is that the respondent subrogated the Workmen's Compensation Board to any right which he had against the appellant. Moreover, in my opinion, such an election must be read with sec. 9 in order to determine its legal effect.

There was some discussion as to the construction of sec. 9, but upon full consideration it appears to me that this section has not the meaning which the appellant puts on it, and which would in such a case vest the right of recovery solely in the Board.

In no way can sec. 9 be considered to be enacted for the benefit or protection of the wrongdoer. It starts out by stating that the injured party, who has by law, and independently of the statute, a right of action "against some person other than his employer," may, if entitled to compensation under the Act, claim such compensation or bring such action.

Then if the action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependants are entitled under the Act, the difference, between the amount recovered and collected and the amount of the compensation under the Act, shall be payable as compensation to the workman or his dependants.

If the workman or his dependants elect to claim compensation under the Act, the employer (if individually liable to pay it) and the Board (if the compensation is payable out of the accident fund) are subrogated to the rights of the workman or his dependants, "and may maintain an action in his or their names against the person against whom the action lies, and any sum recovered from him by the Board shall form part of the accident fund."

While following, although not very closely, the language of the

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statute, I think I have indicated its meaning. It is clear that the election to claim compensation under the Act does not discharge the wrongdoer, for sub-sec. 3 expressly says that the employer or the Board may maintain an action against him in the name of the workman or of his dependants. And sub-sec. 4, as to the notice of the election to claim compensation under the Act, shews that the election is without any effect *quoad* the defendant, for notice must be given to the employer or to the Board and never to the wrongdoer. The subrogation mentioned in sub-sec. 3—and perhaps a better word than subrogation could have been used, for at first this term gave me some difficulty—gives the employer or the Board the control of the action of the workman or of his dependants, but does not divest him or them of their right of action against the wrongdoer, or give the latter the right to treat the election to claim compensation under the Act as a discharge from liability. This election does not ensure the granting of compensation by the Board, and therefore it cannot have been intended that by itself it would bar any action against the wrongdoer.

So far there appears no serious difficulty, but the appellant having amended its statement of defence at the close of the trial in order to claim that the respondent's election to take compensation under the Act barred his action against the company, the respondent after the judgment applied to the Board to obtain its consent ratifying all proceedings that had been taken or might be taken in this action by or on behalf of the plaintiff.

The Board thereupon made the following order:—

In the matter of Claim 74319—Alexander Hutton and—

In the matter of an action in the Supreme Court of Ontario, between Alexander Hutton, plaintiff, and the Toronto Railway Company, defendant.

Upon the application of the plaintiff made unto the Workmen's Compensation Board on Tuesday, the 14th day of January, 1919, and upon hearing counsel for both parties.

The Workmen's Compensation Board hereby consents and agrees that, for the purposes of the said action, the said plaintiff be permitted to withdraw his election to claim compensation from the said Board, and for the said purposes the said Board hereby releases and assigns to the said plaintiff as from the date of the said election all its rights and title to proceed against the said defendant for the cause of action involved therein, provided that, in the event of the said plaintiff's action failing by reason of the right to bring such action being vested in the said Board, and not in the said plaintiff, the said Board is to be entitled to bring such action as it would have been entitled to bring if this consent and agreement had not been given.

The Board's consent as given goes beyond the relief applied for, and erroneously assumes that the election to claim compensation under the Act vested in the Board any right of action against the wrongdoer, and it unnecessarily purports to assign to the respondent a right of action which he had not lost, the only effect of his election being that the control of his action passed to the Board. I do not, therefore, think that the Board's order can in any way help the appellant.

The Appellate Division varied the judgment of the trial Judge so as to order that the appellant do pay to the Workmen's Compensation Board the damages recovered by the respondent, to be dealt with by it pursuant to the Workmen's Compensation Act. The respondent has not cross-appealed and the appellant appears to me without interest to complain of this modification of the judgment. By paying the damages according to the judgment it will be discharged from any possible claim either by the respondent or by the Board. The whole ground of its appeal to this Court was that the election of the respondent to claim compensation under the Act barred his action, and in that the appellant fails, so that in my opinion the appeal should be dismissed with costs.

Appeal dismissed.

BOGAERT v. KEENEY.

Saskatchewan King's Bench, Macdonald, J. December 10, 1919.

AUTOMOBILES (§ III B—221)—ACCIDENT ON HIGHWAY—CAR PASSING ANOTHER — COLLISION — DUTY OF OPERATOR — NEGLIGENCE — PERSONAL INJURIES—MOTOR VEHICLES ACT, 8 GEO. V. 1917 (SASK. 2ND SESS.), CH. 42, SEC. 38, SUB-S. 1.

Notwithstanding the negligence of the injured parties in not complying with sec. 38 of the Motor Vehicles Act, when the accident is caused solely by the carelessness and negligence of another party, that party is liable in damages to the parties injured.

[See annotation on Automobiles, 39 D.L.R. 4.]

Statement.

ACTION for damages for injuries received by the female plaintiff and for damage done to the automobile of the male plaintiff and loss of time and expenses incurred in connection therewith, said injuries and damage alleged to have been caused through the negligence of the defendant.

A. G. MacKinnon, for plaintiff.

J. N. Fish, K.C., and *G. A. Ferguson*, for defendant.

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Macdonald, J.

MACDONALD, J.:—Briefly stated the facts are as follows:—On the evening of July 5, 1919, the plaintiffs were going home from the town of Davidson in a Chevrolet automobile, and, in doing so, were proceeding south on a graded road. The plaintiffs' automobile was driven by the female plaintiff who sat on the left of the front seat; her husband, the male plaintiff, sitting on the right of the front seat, and there were no other occupants of said car. About a mile and a half from the town of Davidson on said road the defendant's car overtook the plaintiff's car. The defendant was driving a light six McLaughlin touring car. The car was driven by the defendant who sat on the left of the front seat, and on the right of the front seat was seated his wife. In the rear seat on the left was a Mrs. Timleck; in the middle, her baby, and on the right of the rear seat, Mr. Timleck. There was a strong wind blowing, and a rain storm was threatening. At the point where the one automobile overtook the other, the road was about 35 ft. wide from the bank on the one side made by the use of the grader to a similar bank on the other. The main track followed by traffic on the road was at least partially to the right of the centre of the road as one proceeds south; that is, to the west of the road. That is to say, the centre line of the main track would be some distance to the west of the centre line of the road measuring from bank to bank as aforesaid. The evidence of the defendant is that from the easterly track of the main travelled portion of the road as aforesaid to the bank on the east was a distance of 16½ ft., and from the westerly track to the westerly bank, 13½ ft., the track itself being 5 ft. wide. The defendant desired to pass the plaintiff and blew his horn. The plaintiffs testify that they did not hear the horn sounded which is probably correct as there was such a high wind blowing, but the plaintiffs saw on the road, either ahead or alongside of their car, the light of the defendant's car, and so knew there was a car behind them. The plaintiffs did not turn out of the main track, so the defendant turned his car to the left and proceeded to pass the plaintiffs. He having partially passed the plaintiffs, the defendant then turned his car to the right to get on the main beaten track, and a collision occurred between the two cars. Just how the collision occurred is a matter about which there is a conflict of evidence between the witnesses on behalf of the plaintiffs and the witnesses on behalf of the defendant. Both plaintiffs testify

that when the defendant turned to the right, after having partially passed the plaintiff's car, the rear right wheel of the defendant's car struck the front left wheel of the plaintiff's car, turning said front wheels to the right, with the result that the plaintiff's car ran off the road diagonally until the right front wheel struck and mounted the bank on the west side of the road, the steering knuckle being bent so that the wheel was turned in under the car, the front axle bent, and the right front spring broken. In this they are corroborated by Timleck who, on account of his position in the defendant's car, would, in my opinion, be in a most advantageous position to see how the collision occurred.

The defendant's evidence is that he successfully passed the plaintiff's car, and that the plaintiff then speeded up and struck him, and that the plaintiff's car was thrown off the road as aforesaid in consequence of said collision.

Between these two stories I accept the version given by the plaintiffs. It is the more reasonable one to accept. It is corroborated by Timleck who, as aforesaid, was in the best position to observe what took place, and who impressed me as a fair and impartial witness. Moreover, according to the evidence, it was the hub of the two wheels in question that came together. If the plaintiff's car had struck the defendant's car, the tendency would, in my opinion, be to turn the front wheels of plaintiff's car to the left, instead of to the right; whereas, if the defendant's wheel struck the plaintiff's wheel, the tendency would be to turn the front wheels of the plaintiff's car to the right as they actually did turn.

The question that arises is whose negligence was responsible for the accident in question. The defendant argues that the accident was due to the negligence of the plaintiff in not turning to the right when the defendant desired to pass. The Vehicles Act, (Sask. 2nd Sess.) ch. 42, sec. 38, sub-sec. 1, of 8 Geo. V., 1917, reads as follows:—

> Every person driving a motor or other vehicle or riding or driving an animal upon the highway, shall upon meeting another person so using such highway, seasonably turn to the right of the centre of the highway so as to pass without interference; and, upon overtaking any other person so using the highway shall so pass to the left, and the person overtaken shall as soon as practicable turn to the right so as to allow free passage on the left. A person operating a motor or other vehicle shall, at the intersection of highways, keep to the right of the intersection of the centres of such highways when turning to the right and pass to the right of such intersection when turning to the left.

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It will be observed that the person overtaken is required as soon as practicable to turn to the right so as to allow free passage on the left. It is true that, according to my finding, the plaintiff's car was not entirely to the right of the centre of the highway, but it is also undisputed that there was ample room to the left of the plaintiff's car to allow free passage to the defendant's car, and even if the plaintiffs were negligent in not turning to the right, so as to have their car wholly to the right of the centre of the highway, nevertheless such negligence did not cause the accident. The accident was, to my mind, caused by the negligence of the defendant in turning to the right before he had proceeded so far as to be clear of the plaintiff's car, and after such negligence on the part of the defendant arose I am satisfied that there was nothing that the plaintiffs could do to avoid the accident. I am therefore of the opinion that the defendant's negligence was responsible for the collision.

As to damages: It cost the male plaintiff $51.65 to repair the car. He incurred a doctor's bill of $20 and a hospital bill of $14 in connection with the care of his wife as hereinafter related. He, also, on account of the injuries to his wife, had to hire a maid for two months at a monthly wage of $40 and board, and the cost of such board he estimates at $20 a month, which, I think, is a reasonable estimate, so that the cost of engaging the maid would be approximately $124. His wife was unable to do any work for some 8 days during part of which she was in the hospital and the male plaintiff had to do housework and also had to pay a number of visits to her in the hospital in the town of Davidson. I think a reasonable sum to allow him under the head of "loss of time" would be $50.

There will therefore be judgment for the male plaintiff for $259.65 and costs.

The female plaintiff, on the evening of the day of the collision, which was a Saturday, began to feel pains which became worse on Sunday and Monday, and on Monday she began to suffer from a flow of blood also. On Thursday she was removed to the hospital at Davidson and the next day she suffered a miscarriage. She remained in the hospital until Sunday evening when she was taken home but was not able to do any work for the 2 months and 2 days during which the maid was engaged as before stated. There was

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some question raised as to whether the miscarriage was caused by the accident, but I am satisfied that it was. The female plaintiff is now in good health except that her menses are, she states, accompanied by more pain than before the accident. The evidence does not satisfy me that such additional pain has any connection with the miscarriage. It is somewhat difficult to estimate what would be reasonable damages to allow her. From the best consideration I can give the case I think that $500 will be a fair and reasonable amount, and there will be judgment accordingly with costs.

There will be a stay of execution for 30 days.

Judgment accordingly.

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Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 10, 1919.

INTOXICATING LIQUORS (§ III H—90)—SEIZURE OF LIQUOR—GOVERNMENT RAILWAY—NOVA SCOTIA TEMPERANCE ACT, 1 GEO. V., 1911, CH. 33—PROVISIONS AS TO CARRIERS.

The provisions of the Nova Scotia Temperance Act authorising the seizure of liquor in transit or on the premises of any carrier do not apply to liquor in the custody of the Crown, on the premises of a Government Railway.

[*The Queen* v. *McLeod* (1883), 8 Can. S.C.R. 1; *Gauthier* v. *The King* (1918), 40 D.L.R. 353, 56 Can. S.C.R. 176; *Ex parte McGrath* (1919), 31 Can. Cr. Cas. 10, referred to. See also *In re Nova Scotia Temperance Act* (1917), 36 D.L.R. 690, 28 Can. Cr. Cas. 176.]

Statement.

APPEAL from a decision of the Supreme Court of Nova Scotia (1919), 45 D.L.R. 364, 31 Can. Cr. Cas. 51, reversing the judgment at the trial in favour of the plaintiff. Reversed.

Liquor shipped from Montreal and consigned to the plaintiff company at Sydney was seized there by an inspector, under the provisions of sec. 36 of the Nova Scotia Temperance Act, 1 Geo. V., 1911, ch. 33 (repealed 8-9 Geo. V., 1918, ch. 8), on the premises of the Dominion Government Railway by which it had been carried from Montreal. The company issued a writ of replevin on the trial of which it was held that the transaction was *bonâ fide* and came within the saving clause, sec. 4, of the Act 10 Edw. VII., 1910, ch. 2. His judgment for the plaintiff was reversed by the full Court and the action dismissed.

J. McG. Stewart, for appellant.

Finlay McDonald, K.C., for respondents.

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Davies, C.J.

DAVIES, C.J.:—The sole question raised and argued on this appeal was whether a seizure of certain liquor by an inspector under the Provincial Temperance Act of Nova Scotia, 8-9 Geo. V., 1918, ch. 8, in the freight sheds of the Intercolonial Railway where it had been carried by the railway and was awaiting delivery to the consignee, was a legal seizure or not. In other words, whether the Crown in right of the Dominion was a "carrier" within the meaning of the Provincial Temperance Act or not. I am of the opinion that the Crown in right of the Dominion was not such a carrier, that the Act in question did not pretend to extend its provisions to the Crown in right of the Dominion and that the Legislature of the Province had no power to so extend it even if it had tried to do so. I concur with Anglin, J., in the reasons stated by him in allowing the appeal and restoring the judgment of the trial Judge, and would refer to the case of *The Queen* v. *McLeod* (1883), 8 Can. S.C.R. 1, where it was held the Crown was not liable as a common carrier for the safety and security of passengers using its railway.

Idington, J.

IDINGTON, J.:—Counsel for the appellant wisely abstained from pressing many points taken in the Courts below and confined this appeal to the single neat point of whether or not by virtue of the Nova Scotia Act which, neither by express words nor by any legal implication in those used, pretended to so extend them as to include the Crown and its possessions when giving the powers of entry and seizure it conferred on inspectors named pursuant to the provisions of said Act, can be held to have given them such powers as asserted by invading in the way in question the premises of the Crown, commonly known as the "Intercolonial Railway" and taking therefrom the cases of liquor in question.

I am of opinion his point is well taken. We have repeatedly held that most beneficient legislation of local Legislatures could not give a remedy for grievous wrongs suffered on, or in and by, operations carried on upon said railway, and other like public works vested in the Crown. The like holding has been adhered to in analogous cases.

There is a double difficulty in respondent's way herein, because the Act in question fails to use express language extending it to include the Crown property, and he is invoking it to assert a power to enter that property vested in the Crown on behalf of the Dominion.

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The counsel for respondent urged that the point taken here was not taken below, but clearly he is in error for the amended pleadings distinctly raise the issue presented here by appellant.

It may well be, as so often happens in every Court in too many cases, that the one issue upon which the case should turn, gets so befogged by raising irrelevant issues of law or fact, or both, that its import is apt to be overlooked; and possibly this is another of the same to be added to the long list of those which have preceded it.

I think this property now in question never got, except by an illegal act, where respondents had a legal right to deal with it, or by the appellant's own act when he might, if he had taken it there, presumably to be held to have rendered it liable to such seizure as made.

The appeal should be allowed with costs and the judgment of the trial Judge be restored.

Duff, J.

DUFF, J.:—This appeal raises a question under sec. 59 of the Nova Scotia Temperance Act.

By sub-sec. 1 of that section:—

> Where any inspector, constable or other peace officer finds liquor in transit or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place, and reasonably believes that such liquor is to be sold or kept for sale in contravention of this Act, he may forthwith seize and remove the same.

The section goes on to provide for proceedings before a magistrate for the purpose of hearing and determining the claim of the owner that the liquor is not intended to be sold or kept for sale in violation of the Act and authorises the destruction of the liquor in the event of the disallowance of this claim by the magistrate or in the event of no person appearing to make such a claim.

Certain liquor in the freight sheds of the Intercolonial Railway, there awaiting delivery to a consignee after carriage on the railway, was seized by an inspector professing to act under the authority of this enactment. Proceedings having been instituted before a magistrate under the Act, the consignee demanded delivery of the liquor, the property in which in the meantime had passed to him by payment of the vendor's draft attached to the bill of lading; the assignee's demand was refused and the liquor was destroyed.

The proceedings including the destruction of the liquor were taken professedly under the authority of sub-sec. 1 of sec. 59 and it

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is not suggested that the acts, of which the appellant complains as wrongful acts, could be justified under any other provision of the Act, and the defence must fail unless the seizure was authorised under sub-sec. 1. It is contended on behalf of the appellant: 1st, that this sub-section does not authorise the seizing and removing of such property from premises which are occupied by the Crown in connection with and for the purpose of the working of a Government railway, and 2nd, that if the scope of the sub-section is broad enough to give such authority it must be restricted in such a way as to exclude from its operation the premises of the Intercolonial Railway as being a railway owned and worked by the Government of Canada on the ground that if such were the effect of the enactment it would be *ultra vires* of the Provincial Legislature. I think the appeal should be allowed on the first mentioned ground and I desire to say as regards the second ground that questions touching the authority of a Provincial Legislature purporting to exercise the jurisdiction it possesses concerning civil rights or local and private matters within the Province or the administration of justice to pass legislation incidentally giving rights of entry upon property connected with a Dominion railway or Dominion Crown property for purposes not otherwise affecting any interest of the Crown in the right of the Dominion or in conflict with any Dominion enactment may have to be considered by reference to the Dominion authority respecting the public property of the Dominion or by reference to the Dominion authority in relation to Railways or Trade and Commerce. But such questions can more satisfactorily be considered (presenting as they frequently do difficult and important points) after full argument upon them, and on this second ground we virtually have had no argument. I therefore pass no opinion upon it as I find it unnecessary to do so.

It is quite clear, I think, that sec. 59 does authorise the taking of goods out of the possession of a carrier in derogation of any possessory lien or other right of possession the carrier may have in relation to them. It is therefore, if applicable to the Crown as carrier, an enactment in derogation of the rights of the Crown and upon settled principles for which it is unnecessary to cite authority it must not be given this application unless (there being no express words requiring it), the Crown is reached by necessary implication. The words of the section are general and there is nothing in it to

indicate any intention on the part of the Legislature that the authority conferred is to be exercisable in relation to goods in possession of officials of the Government in their capacity as such.

The appeal should be allowed and the judgment of the trial Judge restored.

ANGLIN, J.:—The Nova Scotia Temperance Act, 1 Geo. V., 1911, ch. 33 (repealed 8-9 Geo. V., 1918, ch. 8), by sec. 36 authorised the seizure by an inspector of liquor in transit or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place, if reasonably believed by him to be intended or kept for sale. Liquor of the defendant, consigned to him from Montreal, was seized by an inspector under the Temperance Act in the freight sheds of the Intercolonial Railway at Halifax after property therein had passed to the defendant by the payment of the vendor's draft attached to the bill of lading.

Questions agitated in the Provincial Courts arising under sec. 4 of the Temperance Act were not pressed by counsel for the appellant, who rested his appeal solely on the ground that goods in the custody of the Crown (Dom.) as a carrier and awaiting delivery are not within the provisions of sec. 36, invoking the familiar rule of construction that "the Crown is not reached (by the statute) except by express words or by necessary implication," and also contending that it would be *ultra vires* of a Provincial Legislature to authorise such interference with the undertaking of a Dominion railway and that a construction involving such authorisation should not be placed on the statute unless inevitable. I am inclined to think both points well taken. The Crown in right of the Dominion, although a carrier, was not within the purview of the Nova Scotia Statute and the impeached seizure on its premises was unlawful.

Authorities on the first branch of the argument are collected in Maxwell on Statutes (5th ed.), at page 220, and Craies Hardcastle (2nd ed.), at pages 376 and 386-92. On the second branch reference may be made to *Gauthier* v. *The King* (1918), 40 D.L.R. 353, 56 Can. S.C.R. 176.

The original capture of the liquor having been illegal the defendant cannot, in my opinion, successfully set up in answer to the plaintiff's action for replevin that since he might have proceeded rightfully to take it as soon as the plaintiff had removed it from the railway premises, the case may be treated as if he had seized

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the goods after they had in fact been removed from the railway premises, whether rightfully or wrongly, and the detention of them were thus legal. The inspector in seizing was a mere trespasser *ab initio*. All the acts he did were trespasses. He was in the same position as a mere stranger without any legal authority whatever. The plaintiff is entitled to say: "Let me be put in the position in which I stood before your illegal act." *Attack* v. *Bramwell* (1863), 3 B. & S. 520.

I agree with the view expressed by the majority of the Judges of the Supreme Court of Nova Scotia in *Ex parte McGrath* (1919), 31 Can. Cr. Cas. 10.

The appeal should be allowed with costs here and in the Court *en banc* and the judgment of the trial Judge restored.

Brodeur, J.

BRODEUR, J.:—This is an appeal from the Supreme Court of Nova Scotia, 45 D.L.R. 364, 31 Can. Cr Cas. 51, *en banco*, reversing the judgment of Chisholm, J.

In the Courts below the question which was mainly discussed was whether or not the sale of liquor was a *bonâ fide* one within the meaning of sec. 4 of the Nova Scotia Temperance Act.

The trial Judge held that the transaction was a *bonâ fide* one and that therefore the Statute did not apply.

Upon appeal this decision was reversed and the Court held that the transaction ended in Sydney, when the draft was paid at the bank, and that sec. 4 of the Nova Scotia Temperance Act did not apply.

Before this Court, the above question was not pressed and the only point which was raised by the appellant for our consideration was whether under the provisions of the Nova Scotia Temperance Act authorising the seizure of liquor in the hands of a common carrier, that seizure can be legally made when the liquor is in the hands of the Crown as owner of the Canadian Government Railways.

It is an elementary principle of law that no legislation can affect the Crown without formal reference to it in the statute. Moveable property in the possession of the Crown cannot be seized or removed without its consent, or without some law being passed to that effect; and the Crown is not bound by Statute, unless expressly, or by necessary implication. There is no power or authority in this Dominion capable of binding the Sovereign, save only the

Sovereign himself in Parliament, and then only by express mention or clear implication. *Gorton Local Board* v. *Prison Commissioners*, [1904] 2 K.B. 165, n.

The Nova Scotia Temperance Act could very well authorise the seizure of liquor in the hands of an ordinary common carrier; but if the carrier is the Crown itself, I do not think the statute could apply.

In the present case, the officers charged with the carrying out of the Nova Scotia Temperance Act thought it advisable to go and seize in the hands of the Crown the liquor in question. That seizure was illegal and the action instituted by the appellant to claim the goods is well founded.

The appeal should be allowed with costs of this Court and of the Courts below and the judgment of the trial Judge restored.

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

Mignault, J.

Appeal allowed.

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