Dominion Law Reports

CITED "D.L.R."

A NEW ANNOTATED SERIES OF REPORTS COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT AND THE RAILWAY COMMISSION, TOGETHER WITH CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

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EDITED BY

W. J. TREMEEAR

C. B. LABATT *and*

EDWIN BELL

ASSISTED BY A STAFF OF EDITORS

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

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CASES REPORTED
IN THIS VOLUME.

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DOMINION BANK v. MARKHAM.

Alberta Supreme Court, Harvey, C.J., Beck and Simmons, JJ. April 20, 1914.

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1. BANKS (§ VIII A—167)—EQUITABLE MORTGAGE—GIVING UP; INTENTION.

The giving up of property deposited for the purpose of creating a lien destroys the lien unless an intention to preserve it can be shewn.

[*Dominion Bank* v. *Markham*, 14 D.L.R. 508, reversed; *Re Driscoll*, Ir. R. 1 Eq. 285, applied.]

APPEAL from the decision of the trial Judge that the giving up of certain chattel mortgages deposited with a bank did not impair the latter's equitable lien thereon: *Dominion Bank* v. *Markham*, 14 D.L.R. 508. Statement

The appeal was allowed.

G. B. Henwood, for the Dominion Bank, respondent.

C. A. Grant, K.C., for the appellant.

The judgment of the Court was delivered by

HARVEY, C.J.:—There are many complicated facts which were before the trial Judge in this case, many of which have no bearing on this appeal. In 1911 or 1912, Bradley, one of the plaintiffs, deposited with his co-plaintiff, the Dominion Bank at Brandon, Manitoba, two chattel mortgages, one made and one assigned to him, and the trial Judge has held that he thereby created an equitable mortgage in the bank's favour. The defendants are execution creditors of Bradley, and in April, 1913, the sheriff, acting under this execution, seized some of the chattels covered by the mortgages which were found in the possession of Bradley in this province. Harvey, C.J.

The plaintiffs claim these goods as against the defendants. There were other claims and other goods to be considered at the trial, but this is the only claim for consideration on this appeal. There is only one ground of appeal that I find it necessary to consider, for on that ground I think the appeal should be allowed.

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In April, 1912, the chattel mortgages in question were delivered by the bank to its co-plaintiff and the following receipt taken:—

Brandon, Man., April 11, 1912.

The Manager, The Dominion Bank, Brandon, Man. I beg to acknowledge receipt of the following documents:—

Chattel mortgage, Chas. McDougall to John Bradley	$2,573.75
Chattel mortgage, Chas. McDougall to Dutton & Timson, assigned to John Bradley	3,905.00
Note No. 15/26, Chas. McDougall	1,183.55
Note No. 15/29	752.75
Note No. 15/30	752.75
Note No. 15/32	725.80
Note No. 16/09	1,705.45
	$11,599.05

It is argued that whatever claim the bank had was relinquished by that delivery. The learned trial Judge found himself unable to decide upon what terms this delivery was made, there being no direct evidence, and says:—

In the absence of clear evidence, I think the Court ought to assume that whatever possession of them was given to Bradley was given in order to allow him to proceed upon them and realize his claim. I do not think the bank thereby lost its lien.

I feel disposed to put the case the other way. The burden is on the plaintiff of establishing its case. The giving up of property deposited for the purpose of creating a lien destroys the lien unless there is an intention to preserve the lien. See *Re Driscoll*, Ir. R. 1 Eq. 285. If there is to be any presumption, therefore, it would appear to me to be in favour of the view that the lien was destroyed. But be that as it may, I feel satisfied from the evidence that there was no intention to preserve the lien.

Bradley says that the bank sent the mortgages to solicitors in Edmonton for enforcement, but the receipt shews that this is incorrect. Mr. Dickson, the solicitor in Edmonton who had them, states that they came to his firm from Bradley's solicitors for the purpose of enforcement on Bradley's behalf as against the mortgagor and this is borne out by the fact that they obtained a new mortgage on the property which was recorded in this province, but was never deposited with the bank. The

receipt also is not such as a bank would take if it intended to preserve its charge, and the entry in the books in respect to one of the mortgages is, "Given up April 11-12. Receipt filed."

When the mortgages were deposited with the bank, Bradley's indebtedness was about $70,000, while at the time they were delivered to him it was less than $37,000. This and the length of time which elapsed after the giving of them to Bradley and the fact that there is no evidence by any officer of the bank who has personal knowledge of the facts or any explanation of the absence of such evidence, though the later manager at Brandon was examined on commission, are, in my opinion, all circumstances pointing to the conclusion that when the mortgages were delivered to Bradley the bank had no intention of preserving its lien. From these and the other facts I feel satisfied that that is the proper conclusion to come to. The bank's claim, therefore, fails. There is no suggestion that Bradley has any claim of which the defendants, as his execution creditors, could not take advantage.

The appeal should be allowed with costs and so much of the judgment as is in favour of the bank should be set aside and judgment entered therein for the defendant with costs.

Appeal allowed.

FIRE VALLEY ORCHARDS v. SLY.

British Columbia Supreme Court, Clement, J. April 20, 1914.

1. CORPORATIONS AND COMPANIES (§ IV A—40)—RIGHTS AND POWERS GENERALLY—IMPLIED POWERS.

The objects which a company may pursue must be ascertained from its charter or memorandum of association, and the powers to be exercised in furtherance of those objects must either be expressly conferred by, or derived by reasonable implication from, the provisions of such charter or memorandum.

[*Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87, applied.]

2. CORPORATIONS AND COMPANIES (§ IV H—164)—PROMOTERS—SALES BY, TO COMPANY.

Shares in a company may be declared to have been allotted illegally and the certificate in favour of a promoter may be cancelled where such shares represent an illicit profit made by him as a vendor to the company out of a transaction of pretended sale not properly disclosed to the company inasmuch as the prospectus issued with the privity of the promoter and in which the latter's personal interest should have been disclosed had contained a statement that there were no

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promoters' shares to lessen the public's dividends, if in fact the transaction was a mere scheme whereby three promoters divided amongst themselves the shares ostensibly allotted to one of them for releasing his claim to the property which the company was to buy from the other two, subject to the payment of the real purchase price of the property.

Statement

ACTION by a company to set aside an allotment of its shares on the ground of fraud and *ultra vires*.

Judgment was given for the plaintiff company, setting aside the transaction and cancelling the stock certificate.

Tait, for the plaintiff.

Bucke, for the defendant.

Clement, J.

CLEMENT, J.:—This is an action by the company seeking a declaration that the allotment to the defendant Elmer R. Sly of some 35 shares in the capital stock of the company was illegal and fraudulent as against the company, and for an order for the delivery up and cancellation of the certificates issued for such shares; also for a declaration as against the defendant Edna H. Sly that an alleged transfer of the shares in question from the defendant Elmer R. Sly to her, was and is inoperative as against the company, and that an alleged certificate issued to her for said shares was void as issued without the company's authority by the defendant Elmer R. Sly.

In my opinion, the plaintiff company is entitled to the full relief asked. Shortly prior to February 4, 1911, Illingworth and Murphy had entered into an agreement for the purchase from one J. E. Annable of certain lands in Fire Valley in the Kootenay District of British Columbia; and on February 4, 1911, a memorandum and articles of association were subscribed by five persons, including Illingworth and Murphy and the defendant, Elmer R. Sly, looking to the incorporation of a company

> to acquire and take over certain of the lands at the present time held and controlled by Illingworth and Murphy . . . at a price to be arranged and settled by agreement between the company and the said Illingworth and Murphy.

The company was duly incorporated on February 22, 1911, and is the plaintiff company. That the defendant Elmer R. Sly and Illingworth and Murphy were the active organizers and promoters of the company is clear. It is also, I think (though the matter is not really material in the view I take of the case), undoubtedly the fact that the defendant Elmer R. Sly was from

the outset one of a syndicate interested in the venture who operated through Illingworth and Murphy. Pending the company's incorporation, the greed of these gentlemen seems to have run away with their intelligence. On February 8, 1911, the defendant Elmer R. Sly entered into an agreement with Illingworth and Murphy for the purchase by him from them of the property; upon what terms does not appear. In this transaction, as subsequent events shew, Sly was acting for his associates, including Illingworth and Murphy, and not entirely for himself. The effect of the transaction—if it had been a real one—was to put it out of the company's power to carry out the chief object of its incorporation; which was to acquire the property

> at a price to be arranged and settled by agreement between the company and the said Illingworth and Murphy.

After incorporation and at a time when the only shareholders in the company, including its directors, were—if we except one of the company's solicitors—its promoters and in real substance, its proposed vendors, the company purported to buy out the interest of the defendant Elmer R. Sly under his purchase from Illingworth and Murphy, for a cash consideration of $16,000. The company was ostensibly put in funds to make this payment by the receipt of worthless cheques given by the defendant Sly, and Illingworth and Murphy in pretended payment for $16,000 worth of shares in the company's capital stock; and the company did not apparently even go through the farce of issuing its own cheque to pay for the land, but simply returned to the defendant Elmer R. Sly the dishonoured cheques. The real transaction was that $16,000 worth of shares was divided up among these brilliant financiers as the consideration for the purchase by the company from the defendant Elmer R. Sly. The 35 shares (nominal value $3,500) in question in this action were Sly's share of the spoils. I say spoils, because the transaction was not disclosed to the company even if disclosure would have availed to validate a transaction so clearly *ultra vires* of the company.

The objects which the company might legitimately pursue must be ascertained from the memorandum of association, and the powers which the company might lawfully use in furtherance of those objects must either be expressly conferred or derived by reasonable implication from its provisions. This is but a para-

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phrase of the language of Lord Watson in *Wenlock (Baroness)* v. *River Dee Co.* (1885), 10 App. Cas. 354, which is quoted and adopted by Lord Macnaghten in *Amal. Soc. of Ry. Servants* v. *Osborne*, [1910] A.C. 87. What is "incidental" or "ancillary" or "conducive" to the company's business so as to bring it within the company's legal capacity is only what may be reasonably implied from the language of the company's charter, in this case its memorandum of association. It cannot, I think, be contended that a power to buy from A. at a price to be agreed on with A. carries with it on any reasonable implication a power to buy from B. at a price to be agreed on with B. This was what the company purported to do in this case, and, in my opinion, it was clearly an *ultra vires* transaction and the allotment of shares which was part of it cannot stand.

But even if *intra vires* the transaction cannot stand so as to enable the defendant Elmer R. Sly to retain the shares. They represent an illicit profit made by a promoter-vendor out of a transaction not disclosed to the company. That it was spread upon the minutes of the directors' meeting is not material; that simply means that these gentlemen in one character confessed to themselves in another what they were doing. As I have said, there were no other shareholders yet. They were to be sought for among the general public to whom a prospectus was issued which is not merely silent as to the purchase from Sly but untruthfully states that there was no promoter's stock to lessen the public's dividends. Under these circumstances the defendant Elmer R. Sly must disgorge. I need refer to no authority other than *Gluckstein* v. *Barnes*, [1900] A.C. 240 (H.L.), which shews that this action is properly brought, not for rescission but to compel relinquishment of illicit gain. I should, perhaps, have stated that the whole $16,000 was profit. The auditor of the company could find no trace of any actual outlay by the defendant Elmer R. Sly throughout the transactions of purchase. Sly described the $16,000 as profit on an examination under oath and was not present at the trial to give evidence to explain the transaction in further detail.

As to the defendant Edna H. Sly, on March 1, 1912, or at least by assignments bearing that date, the shares in question were assigned "for value received" by the defendant, Elmer R. Sly,

to his wife, the defendant Edna H. Sly. His reign at this time was nearly over. Other shareholders had risen in rebellion; and early in May, 1912, a new board of directors and a new secretary were installed. Informally they refused to recognize the transfer to Mrs. Sly; and so far as her title rests upon the assignments from her husband to herself, they confer no title as against the company. In fact, she has not put herself in a position to ask recognition as she never herself executed the assignments. Her real title, if any, is under a share certificate (the stub only of which is in evidence) for 34 shares, issued to her on April 15, 1912.

There is no indication in the company's books, of which to that date Sly was himself the custodian, that the issue of this certificate was ever authorized; and as I have said, the defendants did not appear to give evidence to meet this *primâ facie* proof that the certificate was the act of Sly alone, and the affixing thereto of the company's seal (if it were affixed) in effect a forgery. The certificate itself is said to be held by one Wright (father of Mrs. Sly), as security for a loan, but it was not produced. I must hold it as a void document: *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439.

There will, therefore, be judgment for the plaintiff company as indicated with costs. The certificates for the 35 shares in question will be delivered out of Court to the company for cancellation.

Judgment for plaintiff.

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Judicial Committee of the Privy Council. Present: The Lord Chancellor, Lord Dunedin, Lord Shaw, Lord Moulton, and Lord Parker, of Waddington. April 2, 1914.

1. CORPORATIONS AND COMPANIES (§ IV G 4—127)—DIRECTORS AND SHAREHOLDERS—FIDUCIARY RELATIONS.

Under ordinary circumstances no fiduciary relation exists between directors and shareholders of a corporation, but where directors of a corporation were approached with a view of merging or consolidating with similar interests by the merged interests purchasing the assets of the corporation, and the directors of said corporation secured the consent of a majority of the shareholders thereof for the sale and transfer of the plant and property of the corporation, and where said shares were surreptitiously acquired by the directors for their own profit, a trust or fiduciary relation was established between the directors of said corporation and its shareholders.

[*Hyatt* v. *Allen*, 8 D.L.R. 79, affirmed; *Percival* v. *Wright*, [1902] 2 Ch. 421, distinguished.]

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2. FRAUD (§ II—6)—ACTS OF DIRECTORS—CONCEALMENT.

Fraud may be predicated on the part of directors of a corporation, as against its shareholders, where transfers from the latter were obtained in favour of the directors and the true purpose of the transfers was either concealed or misrepresented or the transfers misapplied.

[*Hyatt* v. *Allen*, 8 D.L.R. 79, affirmed; *Percival* v. *Wright*, [1902] 2 Ch. 421, distinguished.]

3. CORPORATIONS AND COMPANIES (§ IV G 4—127)—AGENCY—DIRECTORS AND SHAREHOLDERS.

Where directors of a corporation were approached with a view of merging or consolidating with similar interests, by the merged interests purchasing the assets of the corporation, and the directors of said corporation secured the consent of a majority of the shareholders thereof for the sale and transfer of the plant and property of the corporation, and where said shares were surreptitiously acquired by the directors for their own profit, the directors are agents of the shareholders and cannot personally profit by the transaction in question.

[*Hyatt* v. *Allen*, 8 D.L.R. 79, affirmed; *Percival* v. *Wright*, [1902] 2 Ch. 421, distinguished.]

4. APPEAL (§ VII M 2—525)—WHAT ERRORS WARRANT REVERSAL—AS TO PLEADINGS—REAL ISSUE COVERED.

Where the statement of claim in an action as originally brought shews on its face non-joinder of parties, the defect in pleading is not ground for reversal of judgment by the final appellate court, if it appears that the courts below had the right to treat the defective pleading as amended so as regularly to cover the real issue, in a form which afforded the relief to which the plaintiffs were held entitled, and that no substantial injustice ensued by reason of the courts below proceeding on such footing.

[*Hyatt* v. *Allen*, 8 D.L.R. 79, affirmed.]

Statement

APPEAL from the judgment of the Ontario Court of Appeal in *Hyatt* v. *Allen*, 8 D.L.R. 79, 3 O.W.N. 1401, 22 O.W.R. 469, affirming the Ontario Divisional Court and Sutherland, J., at the trial.

The appeal was dismissed.

The judgment was delivered by the Lord Chancellor

Haldane, L.C.

HALDANE, L.C.:—The appellants were the directors of a company called the Lakeside Canning Co. Ltd. The capital of the company was $750,000 in shares, each of $250. Such shares were issued to the extent of $30,500, and in the year 1909 and for a short time in 1910 these shares were held to the extent of $10,000 by the seven appellants, and to the extent of $20,500 by the twenty-two respondents and certain other persons not parties to these proceedings. In January, 1907, a dividend of 15 per cent. had been paid, but no further dividend had since been declared.

In November, 1909, negotiations took place between the appellants as directors and one Grant, who was endeavouring to amalgamate the canning companies of Ontario. His purpose was to acquire the shares and undertaking of the Lakeside Co. After negotiation, during which the consideration asked by the appellants was increased, a transfer was finally agreed on at the following price:—

Cash for factory and plant	$33,750.00
Cash for raw materials	8,406.44
Allotment of preferred stock in Dominion Canners Ltd.	11,250.00
Allotment of common stock in ditto.	15,000.00
Total in cash	$42,156.44
Total in shares	26,250.00

The Dominion Canners Ltd. was the amalgamating company which Grant was forming. The transaction was carried through early in March, 1910.

In the interval the appellant directors took various steps which have given rise to this litigation. On the representation that it was necessary for the directors to secure the consent of the majority of the shareholders in order to effect the amalgamation, and before the price had been settled they approached individual shareholders, including the respondents, and induced them to give to the appellants options to purchase their shares at the par value of $250 with interest at 7 per cent. for the periods during which no dividend had been paid. About February 18, 1910, they exercised these options and paid the shareholders concerned $22,883.75. The shareholders endorsed their share certificates in blank and handed them to the appellants. The result of the transaction was that the appellants made what was apparently a handsome profit, measured by the difference between what they paid the other shareholders, and what they received from the Dominion Co. subject only to deduction of the debts of the Lakeside Co. which they had undertaken to the former company to pay, but which do not appear to have been large.

The action was brought by the respondents for a declaration that the appellants were trustees for the shareholders of the Lakeside Canning Co. of the profits derived from the Dominion Co. and for an account and consequential relief. Mr. Justice

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Sutherland tried the case and, after hearing evidence, found the facts substantially as follows: that general and similar representations were made by the appellants to each of the respondents, to the effect that the former as directors wanted the options from the shareholders in order to deal on behalf of all the shareholders with the representatives of the Dominion Co.; that the appellants expected to realize the par value of the shares, and the 7 per cent. interest and that all the shareholders including themselves were to share *pro rata* in the amount realized; that the appellants did not inform the other shareholders that they were buying their shares on their own account, and that they had entered into a secret arrangement by which they kept concealed from the other shareholders the information which it was their duty as directors to disclose, and that the appellants were thereby guilty of fraud. Objections were taken on behalf of the appellants at the trial to the form of the proceedings. It was said that the directors were trustees, if at all, for the Lakeside Co. and that the latter ought to have been a party either as plaintiff or defendant, and that in its absence the respondents were not entitled to sue on behalf of themselves and the other shareholders. There appears to have been some doubt as to whether the company had or had not been added as a party and the learned Judge inclined to think that, possibly because the Dominion Co. had by the time of the litigation acquired all the shares, it was not represented so as to enable him to deal effectively with the matters in question. He, however, seems to have considered that as it had been made out to his satisfaction, that the appellants were, on the footing that the transaction could not then be set aside, but must be treated as adopted by the respondents and the other shareholders, trustees of what they had received, the objection was not serious. He offered, if the respondents preferred it, to retain the record, and after any further trial that was necessary to put it into proper form, but expressed his willingness to give judgment as it then stood to the effect already indicated. The respondents elected to accept the second alternative. The appellants appealed to the Divisional Court, which affirmed the judgment [*Hyatt* v. *Allen*, 8 D.L.R. 79]. But as the learned Judges who heard the appeal

considered that the action was really one in which a group of individual shareholders had joined together, but were suing individually on separate causes of action, they amended his judgment by confining it to the plaintiffs on the record, and directing that the account taken should deal with the amount which each individual plaintiff was entitled to receive. From the judgment in this form the appellants appealed to the Court of Appeal for Ontario. This Court took the same view as the Divisional Court, and dismissed the appeal [*Hyatt* v. *Allen*, 8 D.L.R. 79.] They concurred in the findings of fact by the trial Judge just as the Divisional Court had done. They held that although under other circumstances it might be that the fiduciary duty of the directors was a duty to the company and not to individual shareholders, yet under circumstances such as those of the case before them, the directors became the agents in the transaction of the shareholders, when they took the options from them. They thought that the addition of the Lakeside Co. as a party, if made, had been irregularly made, having regard to the real character of the action as one brought by a group of individual plaintiffs with what were substantially similar causes of action, and they struck out the name of the company from the record in affirming the judgment.

Arguments have been addressed to their Lordships both on the question of procedure and on the substantial issue whether the appellants were properly found to have put themselves in the circumstances of this case in a fiduciary relation to the respondents. On the latter point their Lordships do not think it necessary to say more, so far as the questions of fact are concerned, than that, having heard the arguments and considered the evidence, they see no ground for not accepting the concurrent findings of the three Courts which have already decided this issue. They agree with the learned Judges of the Court of Appeal for Ontario in thinking that under the circumstances of the case the respondents were entitled to treat the appellants as trustees for them, and, subject to the question of procedure, to ask for the relief they obtained.

The appellants appear to have been under the impression that the directors of a company are entitled under all circum-

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stances to act as though they owed no duty to individual shareholders. No doubt the duty of the directors is primarily one to the company itself. It may be that in circumstances such as those of *Percival* v. *Wright*, [1902] 2 Ch. 421, which was relied on in the argument, they can deal at arm's length with a shareholder. But the facts as found in the present case are widely different from those in *Percival* v. *Wright*, and their Lordships think that the directors must here be taken to have held themselves out to the individual shareholders as acting for them on the same footing as they were acting for the company itself, that is as agents.

The question of procedure has, however, been strenuously argued, and their Lordships will deal with the points raised under this head. There is no doubt that on the statement of claim the action was originally brought as a class action by the plaintiffs on behalf of themselves and all the other shareholders. In the absence of the company itself, which does not appear to have been properly made a party, the claim was demurrable. Moreover, it appears on the face of the statement of claim that the shares of the plaintiffs had been transferred to the Dominion Co. so that, in the absence of a claim to set this transfer aside, a claim which could not have been successfully made in the absence of that company, the relief sought was demurrable on this ground also: The appellants, therefore, argued that as the proper plaintiff was the company and as the respondents had parted with their shares, the action must fail. It appears, however, that throughout the proceedings in the three Courts below the action was treated by these Courts, which had power to amend the pleadings if they thought it necessary, as one for a declaration that the appellants became, under the circumstances proved by the evidence, the agents of the respondents in dealing as they did with their shares, and that on this footing judgment was given in a form which afforded the relief to which the respondents were held entitled. In other words the action was treated as one in which the respondents had sued individually as co-plaintiffs, joining in asserting their causes of action. Their Lordships see no reason for holding that any substantial injustice has been done by the Courts below in proceeding on this footing.

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The rule of procedure in Ontario does not, in their Lordships' opinion, preclude the Court from amending or treating as amended the pleadings so as to enable relief to be given as though claimed in this fashion. It has been argued for the appellants that because of the original form of the pleadings and the joinder in one proceeding of separate causes of action injustice may have happened by the improper admission of evidence. Their Lordships are, however, unable to find that such a result was brought about, and they think that under the circumstances the procedure adopted in the Courts below was admissible.

They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

NOSLER v. THE "AURORA."

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Exchequer Court of Canada (British Columbia Admiralty District), Martin, L.J.A. November 12, 1913.

ADMIRALTY (§ II—5)—*Waiving preliminary proceedings.*]—Motion after default in appearance for immediate judgment in an action *in rem* for seaman's wages.

Sears, for the plaintiff.

No one contra.

MARTIN, L.J.A., held, that as the debt was practically admitted and the ship was in the marshal's hands for sale in another admiralty action in this Court, an order should be made on the material filed proving that circumstance and verifying the cause of action, to enter judgment and dispense with preliminary proceedings. He considered the case stronger, if anything, than that of *The "Juliana,"* 35 L.T.N.S. 410.

Order made.

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CRAM v. TINCK.

Saskatchewan Supreme Court, Brown, J. April 25, 1914.

1. VENDOR AND PURCHASER (§ I E—27)—FRAUD INDUCING CONTRACT—RESCISSION.

A contract for the sale of vacant land will be set aside at the instance of the purchaser, where he was induced to enter into the agreement by the material false representations of the vendor, upon which the purchaser relied, as to the character of its banks on an adjoining stream as affecting the desirability of the land for residential building purposes.

Statement

ACTION to rescind an agreement of sale.

Judgment was given for the plaintiff.

J. A. Allan, K.C., for the plaintiff.

J. F. L. Embury, for the defendants.

Brown, J.

BROWN, J.:—This is an action to rescind an agreement of sale for the purchase of certain lots situate along the Wascana creek, in the city of Regina, on the ground of misrepresentation and fraud. I accept the evidence of the plaintiff as to the representations made to him by the defendant Tinck at the time of the purchase, and which were in effect as follows: that the lots were a snap, that there were no bad banks on the creek, at this point, that the lots gently sloped to the creek, and that they constituted a good site for residential building purposes. These representations were relied on by the plaintiff, and he was induced to buy by virtue thereof. He himself made no inspection of the lots whatever. As a matter of fact the lots have some very bad banks, they do not slope gently to the creek, and are very unsuitable for residential building purposes. The plaintiff is, therefore, entitled to the relief sought. The agreement of sale will be cancelled, the plaintiff will have judgment for the sum of $824.73, being the amount of money which was paid under the contract, together with interest on $400, from March 20, 1912; on $200, from October 1, 1912; and on $224.73, from November 5, 1912, and his costs of action.

Judgment for plaintiff.

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Manitoba King's Bench, Mathers, C.J.K.B. April 29, 1914.

1. AUTOMOBILES (§ V B—460)—GARAGE—LIEN CLAIM OF PROPRIETOR.

The fact that an automobile was returned in a damaged condition to the care of the garage-keeper on the order of the conditional vendee to be left until repaired but without any change of the terms upon which the garage-keeper had theretofore taken care of it on a monthly engagement, will not change the latter's status to that of a warehouseman so as to entitle him to a lien for the fixed monthly compensation as against the conditional vendor.

Automobile and Supply Co. v. Hands, 13 D.L.R. 222, referred to.]

Statement

REPLEVIN for possession of a motor car detained by the defendant under an alleged lien for storage and repairs.

Judgment was given for the plaintiff.

H. F. Gyles, for the plaintiff.

A. H. S. Murray and *G. Culver*, for the defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—This is an action of replevin to recover possession of a motor car which the defendant detains under a claim of lien for storage. In September, 1912, the plaintiffs sold and delivered the car in question to one Jones for $2,000, of which he paid $500 cash and gave them a lien note, by the terms of which the property and right of possession of the car was reserved to the plaintiff, for the balance of the purchase price. The purchaser informed the plaintiffs at the time of the purchase that he was going to keep it at the defendant's garage. The defendant keeps a garage, in which he stores cars for the owners, sells gasoline and other automobile accessories and makes repairs. From on or about September 7, 1912, until sometime between October 27 and November 28 of that year, the car was kept in defendant's garage, when not in use by Jones. While in the garage it stood in the stall or space allotted to it by the defendant. This space was numbered and had Jones' name above it. The defendant's regular charge for storage of a car in use was $15 per month. There was no agreement between the defendant and Jones that the defendant should have a lien for either the storage, the gasoline or any other accessories supplied. The car was in daily use by Jones. He had a right to take it out and bring it in as he saw fit.

Some time after October 27, and before November 28, 1912, one of the wheels was broken. It was towed back to the garage

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and placed in its accustomed stall. The attendant states that Jones told him to leave it there until he got the wheel repaired. Jones at once communicated with the plaintiff's agent for the purpose of getting another wheel, but, failing, he, about December 16, decided to have a wheel made by a manufacturer in the city. The wheel was made, but, as the manufacturer refused to deliver it without payment, it was never received by Jones, and the car remained in the defendant's garage in the stall allotted to it until about October 14, 1913. It was, on or about that date, seized under an execution against Jones, and was then removed by the defendant from the stall and placed in another part of the garage, where it has since remained.

Jones made default in payment of the note mentioned, and about October, 1913, the plaintiffs attempted to resume possession of the car, but the defendant refused to give it up unless his claim for gasoline and other supplies, repairs and storage, at the rate of $15 per month from the time the car first came into the garage, amounting in all to $300.90, was paid.

At the trial the defendant's counsel abandoned his claim for a lien for either storage, supplies or repairs prior to the time the car wheel was broken. In this connection *Auto Supply Co.* v. *Hands*, 13 D.L.R. 222, may be referred to. His claim is that, when the car was returned to the garage with a broken wheel, he did not receive it in the capacity of a garage keeper, as he had hitherto done, but as a warehouseman, and that as such he has a lien for storage subsequent to that time as against the plaintiffs. The evidence on which the defendant relies as proof of a changed relationship and the establishment of the defendant as warehouseman of the car is that of an attendant, who says that Jones told him to "Put the car in its own stall and leave it there until I get the wheel repaired." I have great difficulty in believing that any such statement was made by Jones, but, even if it was, it was entirely insufficient to prove a warehousing agreement. It is quite clear that Jones gave up no control over the car that he had theretofore exercised. His full enjoyment of its use was suspended only by the lack of a wheel, and not because of any new right acquired by the defendant. When the new wheel would be made was not known. Jones did not know but that he might be able to get a new wheel

within a day or two. If it became necessary to have a wheel made, he had no means of knowing how long a time that would occupy; but, whether the time was long or short, as soon as that wheel was produced and he was able to take the car out, he was at perfect liberty to do so without let or hindrance from the defendant. I find as a fact that there was no change in the relationship between Jones and the defendant, and that the defendant at no time became a warehouseman of the car, and, therefore, that his claim in that respect fails.

The defendant further claims that, after the wheel was broken, he made two small items of repairs, for which he has a lien. When the man employed to make the new wheel called to get the hub of the old wheel, the defendant's workmen took it off and delivered it to him. For this he charges 75 cents. They also straightened the fender, which had been injured in the same accident which broke the wheel. For this he charges $1.90, making a total claim of $2.65. If there was any evidence that Jones ordered these repairs to be made, I think the defendant would be entitled to hold the car until they were paid for; but there is nothing to shew that Jones gave any such instructions.

I hold, therefore, that the plaintiffs are entitled to recover possession of the car freed from all claim or lien of the defendant.

There will be judgment that the car be replevied to the plaintiffs, with $5 damages and costs of suit.

The defendant's counterclaim against the plaintiffs is dismissed with costs.

Judgment for plaintiff.

LAURSEN v CORPORATION OF SOUTH VANCOUVER.

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British Columbia Supreme Court, Macdonald, C.J.A., Irving, Martin, Gallihcr, and McPhillips, JJ.A. November 21, 1913.

[*Laursen* v. *South Vancouver*, 14 D.L.R. 241, affirmed.]

ARBITRATION (§ III—17)—*Award—Grounds for setting aside —Mistake of law—Municipal Act (B.C.).*]—Appeal from the judgment of Murphy, J., *Laursen* v. *South Vancouver*, 14 D.L.R. 241, 25 W.L.R. 431, refusing to set aside an award made in respect of alleged land damages incident to a change of grade

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upon a street by the municipality. For the appellant municipality it was urged that sec. 396 of Municipal Act, R.S.B.C. 1911, ch. 170, giving power to set aside an award which had proceeded upon a wrong principle would be nullified if the arbitrators were not compelled to shew on what principle the award was based. It was argued that the effect of the majority award was to grant the claimant the estimated cost of excavating Laursen's property to the new street grade and to ignore the evidence of increase in value of his property by reason of the street grading.

R. W. Hannington, for the municipality.

Ritchie, K.C., for Laursen.

THE COURT dismissed the appeal, holding that it had no power to review the arbitrators' decision upon the facts.

If the Court had the right to look at the affidavits of the majority arbitrators, they appear to shew that the award had been arrived at, after taking into consideration the question of whether or not the value of the property had been diminished by reason of the grading.

Appeal dismissed.

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MELVIN v. McNAMARA.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ. April 25, 1914.

1. PARTIES (§ III—124)—INDEMNITY—RELIEF OVER—THIRD PARTY NOTICE BETWEEN DEFENDANTS.

The indemnity in respect of which a third party notice may be served by a defendant upon his co-defendant must be against some liability imposed upon the defendant serving the notice in favour of the plaintiff and not one against a mere failure of the plaintiff to pay him any costs which might be ordered.

[*Melvin* v. *McNamara*, 16 D.L.R. 65, varied.]

Statement

APPEAL from the order of Beck, J., *Melvin* v. *McNamara*, 16 D.L.R. 65, on the question of a third party notice served by one defendant upon a co-defendant.

The appeal was allowed and the third party notice struck out.

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O. M. Biggar, K.C., for the appellant McNamara.
Wm. Rea, for the respondent Melvin.
W. J. Hanley, for the respondent Grieve.

The judgment of the Court was delivered by

STUART, J.:—I think this appeal should be allowed. The plaintiff alleges that he is a purchaser under an agreement of sale of certain lands from the defendant McNamara. He alleges that the defendant Grieve was the agent of McNamara in arranging the sale. He alleges that he paid to McNamara, not to Grieve, the sum of $10,000 on account of the purchase price. He alleges that he was induced to enter into the contract by the false and fraudulent representations of the defendants. He claims cancellation of the contract, a return of the money paid and damages. By leave granted by an order of Mr. Justice Simmons the defendant Grieve served a third party notice on the defendant McNamara, claiming indemnity in respect of any liability attaching to him. An application was made by the defendant McNamara to strike out this third party notice. The motion was heard by Mr. Justice Beck, *Melvin* v. *McNamara*, 16 D.L.R. 65, and he allowed the notice to remain, but with respect only to a claim by Grieve over against McNamara as to costs. From this judgment McNamara appeals.

The learned Judge below, in his reasons for judgment, said (16 D.L.R. at 66):—

> The plaintiff can succeed in obtaining rescission if he proves a material misrepresentation inducing the agreement, although the representation was innocently made, whether by the principal McNamara or by his agent Grieve. The plaintiff cannot recover damages unless he proves that the misrepresentations were made fraudulently, in a wide interpretation of the word: see *Derry* v. *Peek*, 14 App. Cas. 337.
>
> So that, if the plaintiff's evidence proves a misrepresentation but falls short of proving that it was made fraudulently, the only result would be rescission. That would affect McNamara, the vendor, only, not Grieve, the agent, except with regard to costs.
>
> If the plaintiff's evidence shews a fraudulent misrepresentation and he asks rescission only, the result would be the same; but if he asks damages instead of rescission, or, as in case of a fraudulent misrepresentation, I suppose he can, in addition to rescission, then if the fraud was that of the agent, the latter would be liable personally for the damages and would have no remedy over against his principal, whether the principal was a party to the fraud or not; if the fraud were that of the principal only,

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the agent would not be liable and so, in that event also, he would have no remedy over unless it be in respect of costs.

Evidence brought out by the defence shewing fraud on the part of either of the defendants would leave the matter in the same position.

With these views I entirely agree except as to costs. There is really nothing which needs to be added except on account of some reference on the argument by the respondent to a possibility that the notice ought to stand in respect to the other ground of action, *i.e.*, for a return of the money paid. But the statement of claim alleges that any money paid was paid to McNamara. Any prayer for relief in that respect must, I think, be taken as asking for a return of the money from McNamara, to whom it was alleged to have been paid. If there had been any intention to claim a return of it or of any portion of it from Grieve, the agent, I think there should have been a specific allegation that Grieve still had some of the money in his possession. But no such allegation appears.

But it seems to me that when the learned Judge says (16 D.L.R. at 66) that

> if the agent *innocently* conveyed to the purchaser representations made by him by the principal which he shews were *on the part of* the principal fraudulent, then he is entitled to be indemnified by the principal to the extent of his liability for any costs he may be ordered to pay or may himself incur in this action,

there is this obvious answer to be made: In so far as costs given to the plaintiff against the defendant are concerned, it is, as the learned Judge had previously pointed out, impossible that he should have any judgment against him for damages if he were innocent, and if the defendant Grieve succeeds how can he be liable for costs? While, if he were personally concerned in the fraud he should have no indemnity any way. Then, with regard to his own costs, if the action is dismissed against him, I am unable to see how these could, by any possibility, be considered as being covered by the terms of the third party rule. The indemnity can only be, under that rule, against some liability imposed upon him in favour of the plaintiff, not, surely, against either his liability to his own solicitor or against a failure of the plaintiff to pay any costs which he might be ordered to pay to him, Grieve. The discretion of the trial Judge as to this is another matter.

In this view, it becomes unnecessary, really, to decide whether the rule would cover, in any case, merely costs recovered by the plaintiff, although I have most serious doubts upon this.

The appeal should be allowed with costs, the order below set aside, and the application to strike out the third party notice allowed with costs.

Appeal allowed.

BASKIN v. LINDEN.

Manitoba King's Bench, Galt, J. April 16, 1914.

1. DISCOVERY AND INSPECTION (§ IV—20)—INTERROGATORIES AND ORAL EXAMINATION.

The rights of discovery by interrogatories and by oral examination, given by the Manitoba rules, are cumulative.

[*Timmons* v. *National Life Assurance Co.*, 19 Man. L.R. 139, and 227, applied; *Brydone-Jack* v. *Vancouver Printing Co.*, 16 B.C.R. 55, considered.]

Statement

APPEAL from a referee's order requiring the plaintiff to submit to oral examination, after his delivery of answers to interrogatories.

The appeal was dismissed.

A. C. Campbell and *A. E. Moore*, for the plaintiff.

G. Moody, for the defendant.

Galt, J.

GALT, J.:—This is an appeal from an order made by the referee, on April 4, ordering the plaintiff to attend to be examined for discovery at his own expense. It appears that the defendant delivered certain interrogatories to be answered by the plaintiff, and default having been made by the plaintiff, the defendant moved to dismiss the action. Just before the motion was returnable, the plaintiff served answers to some of the interrogatories and an order was taken out by the defendant's solicitors, dismissing the motion with costs to the defendant in any event. The order contained a recital, "it appearing that the answers to the interrogatories have been served this day." Subsequently, the defendant moved to procure answers to such of the interrogatories as had been left unanswered by the plaintiff, but his motion was dismissed upon the ground that the previous order recognized that the answers already given were sufficient.

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The defendant then obtained and served an appointment for the examination of the plaintiff orally for discovery. The plaintiff refused to attend upon the ground that he had already furnished the defendant with all the discovery to which he was entitled. The defendant then moved to enforce the plaintiff's attendance and the referee made the order now in appeal.

The question is, whether the rights of discovery by interrogatories and by oral examination, given by the rules, are cumulative or alternative. It appears to me that this question has been settled in favour of the defendant's contention in *Timmons* v. *National Life Assurance Co.*, 19 Man. L.R. 139. The headnote is as follows:—

> A party may be required to answer interrogatories delivered pursuant to rule 407*b* of the King's Bench Act, as enacted by sec. 2 of ch. 17 of 5 and 6 Edw. VII., notwithstanding that he has also been ordered to attend and be examined for discovery under rule 387.

The argument in that case was the same as is put forward on the present appeal, namely, that the rules should not be construed to give the right to a double examination. The report is rather fragmentary, and no reasons appear to have been given by Metcalfe, J., who decided the case. A subsequent order made in the same case by the referee, and varied by Metcalfe, J., came before the Court of Appeal, and is reported, *Timmons* v. *National Life Assurance Co.*, 19 Man. L.R. 227. It would appear by the report that the defendant served a number of interrogatories, some of them were struck out by the referee; Metcalfe, J., varied the referee's order by directing certain particulars to be given. The Court of Appeal reversed both orders, excepting as to interrogatories Nos. 1, 2, 4, and 5.

The particular question with which I have to deal was not expressly dealt with by the Court of Appeal, but it is quite clear that they upheld the defendant's right in respect of some of the interrogatories.

In England, discovery is limited to interrogatories. In Ontario, it is limited to oral examination, so that one cannot look for any authority from those jurisdictions. In British Columbia, however, the Supreme Court Rules provide for both forms of

examination, but there the Supreme Court rule 343 provides that

> in any cause or matter, the plaintiff or defendant *by leave of the Court or a Judge*, may deliver interrogatories, etc.,

and rule 344 provides that

> on an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court or a Judge, etc.

These rules have been interpreted by the Court of Appeal in British Columbia to give a litigant the choice of one or the other mode of examination, see *Brydone-Jack* v. *Vancouver Printing & Publishing Co.*, 16 B.C.R. 55.

It is to be regretted that under our rules no such limitation has been placed upon the right to exhibit interrogatories, and so far as I can see the rights are cumulative rather than alternative. Under our rule 423, (2), (4) and (5), the costs of exhibiting interrogatories vexatiously may be ordered to be paid by the party in fault, or objection may be taken to answering any one or more of the interrogatories in the affidavit or answer; or interrogatories exhibited vexatiously may be struck out. Apart from these provisions, I see no restriction upon the right of a litigant to exhibit any interrogatories he pleases, whether an examination for discovery has already taken place or not.

For the above reasons, I think the defendant was acting within his rights in proceeding to examine the plaintiff as he did, and this appeal must be dismissed with costs.

Appeal dismissed.

HEPBURN v. MUTCH.

British Columbia Supreme Court, Murphy, J. April 28, 1914.

1. JOINT CREDITORS AND DEBTORS (§ I—2)—SEVERAL PROMISSORS—JOINING THE PROMISEE AS A PROMISSOR.

Where the obligation to pay is joint only, and not joint and several, it is an objection of substance and not of form that the promisee is joined as a promissor, but in a proper case the document may be rectified on the ground of mutual mistake.

[*Ellis* v. *Kerr*, [1910] 1 Ch. 529, 79 L.J. Ch. 291, referred to.]

ACTION on contract.

Statement

The action was dismissed.

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Murphy, J.

Tupper, K.C., for the plaintiff.

Griffin, *R. McDonald*, and *Robert Smith*, for the defendants.

MURPHY, J.:—I find it proven that plaintiff did advance the $2,600 in question. He so swears definitely and no one contradicted his evidence. I find also that the real transaction between the parties was a contract of guarantee and that it was this transaction which was intended to be reduced to writing. All parties were interested in a proposed brick company. A balance had to be made up in order to get the last lot of machinery. Plaintiff offered to furnish this balance if defendants would guarantee him against loss. It was objected that if the money was borrowed from a bank he would himself have to be liable for a one-seventh part and he, seeing the force of this position himself, also signed the writing. In consequence it is doubtful if he can sustain this action at all, for apparently when the document was executed he agreed to occupy the same position as all the defendants in reference to the guaranteed debt. That by no means meant that he would in any event be liable for only one-seventh thereof. If the money had in fact been borrowed from a bank and he had signed such a document and there was default he would be individually liable for the whole debt, with only a right of contribution against his fellow guarantors for the amount in excess of the one-seventh that he should have paid. In other words, if this is the true legal meaning of what happened—and from his own evidence I think it is—then he agreed to pay the whole of this money to himself, and apparently *Ellis* v. *Kerr*, 79 L.J. Ch. 291, [1910] 1 Ch. 529, decides an action on such an agreement is not maintainable. However that may be, I consider if the document cannot be construed in the light of surrounding facts at the time of its execution and of its peculiar wording to legally mean what I have no doubt it was intended by all parties to mean, viz., a contract of guarantee, then the Court should rectify it on the ground of mutual mistake.

But whether it be a guarantee or a direct contract for payment as therein provided I hold there has been no default. It expressly states that payment may be made in good merchantable brick. This was done. The output of the company plant was to an amount largely in excess of this claim shipped to

plaintiff who disposed of it as he saw fit. As he himself admits he could have paid himself over and over again, but to keep the company going he paid the proceeds into the company's bank account. Whilst this act might have benefited the defendants he could not in my opinion continue to hold them liable on the original contract which had thus been fulfilled unless an express bargain to that effect had been made. I can find no evidence on the record that would justify me in finding the existence of such a bargain. It was conceded on the argument that by the operation of the rule in *Clayton's* case, 1 Mer. 605, coupled with the fact that plaintiff must bear one-seventh of the loss and with the further fact of the Donnelly payment that plaintiff could in no event recover more than a small proportion of his claim.

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For the reasons above given, however, I am of the opinion the action must be dismissed.

Action dismissed.

RICH v. NORTH AMERICA LUMBER CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. November 23, 1913.

1. LOGS AND LOGGING (§ I—9)—QUANTITY TO BE ASCERTAINED BY OFFICIAL SCALER—LOSS OF SHINGLE BOLTS IN TRANSIT AFTER DELIVERY.

Where logs and shingle bolts are to be paid for as taken out and loaded, according to the quantities found by an official scaler, the buyers who took delivery of shingle bolts and placed them on a scow which drifted away before the contemplated scaling and was lost, will be liable notwithstanding the impossibility of scaling according to the contract if it did not result from any fault of the seller; the quantity will be determined in such case by the best available evidence apart from the official scaling which was stipulated for in the contract.

Statement

APPEAL from the judgment of McInnes, County Judge, dismissing an action upon a contract for sale of timber, as to a quantity lost in transit.

The appeal was allowed.

Ritchie, K.C., for plaintiff, appellant, referred to *Cameron* v. *Cuddy*, 13 D.L.R. 757; *Periard* v. *Bergeron*, 9 D.L.R. 537, 47 Can. S.C.R. 289; *Scarf* v. *Jardine*, 3 App. Cas. 345.

C. W. Craig, for the defendants, respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be allowed.

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As there is no question about the amount, assuming the plaintiff is entitled to succeed at all, we are relieved from any inquiry as to whether or not the amount sued for is the right one. There are only two legal questions involved in this appeal: first, was there a novation, so as to enable the plaintiff to sue? The defendant company's president in effect says that there was. The plaintiff himself has acknowledged that, by bringing this action against these defendants. The question of novation, it seems to me, is settled by the conduct of the parties.

Then as to the scaling: if the failure to scale was the fault of the defendants, they cannot set that up as an answer to an action for the price of the goods; if it were the fault of the plaintiff, then I think the plaintiff could not succeed. It does not appear in this case that it was the fault of the plaintiff. The bolts were placed upon the scows of the defendants by the defendants themselves; they took possession and had the property in their possession at the time they were lost. I gather from what counsel has said in the case, that the failure to scale was caused by misadventure; the scow drifted away and the bolts were lost, therefore it became impossible to scale according to the contract. In such a case the best evidence that can be got outside of that provided by the contract should be accepted of the measurement or quantum of timber.

Irving, J.A.

IRVING, J.A.:—I agree.

Martin, J.A.

MARTIN, J.A.:—I agree, though there is some difficulty about the case in view of the somewhat loose way in which it was presented in the Court below.

Galliher, J.A.

GALLIHER, J.A.:—I agree, shortly, on the grounds which have been put by the learned Chief Justice. I think there is, all told, sufficient evidence on the point of scaling, although on that I am not absolutely clear. I also think there is sufficient evidence, by conduct, upon which we may say there has been a novation.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I agree with the reasons for allowing the appeal as stated by the Chief Justice.

Appeal allowed.

VICTORIA MACHINERY DEPOT CO. v. THE "CANADA" and THE "TRIUMPH."

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EX. C.

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Exchequer Court of Canada (British Columbia Admiralty District), Martin, L.J.A. September 24, 1913.

1. ADMIRALTY (§ II—8)—SEIZURE OF SHIP—ACTION FOR NECESSARIES—ENGLISH COMPANY WITH LOCAL CANADIAN LICENSE AS SHIP OWNER.

As regards an action *in rem* for necessaries supplied to a ship, the owning company incorporated in England is not an "owner domiciled within Canada" within the meaning of the Exchequer Court Rules in Admiralty, rule 37, sub-sec. (*b*), so to bar an arrest of the ship in British Columbia waters for that cause of action, by the fact of the company having been licensed and registered to carry on business in British Columbia under the Companies Act, R.S.B.C. 1911, ch. 39.

2. ADMIRALTY (§ II—8)—SEIZURE TO ENFORCE LIEN FOR NECESSARIES.

The fact that the statutory lien for necessaries supplied to a ship away from her home port and in a country where her owner is not domiciled, may have to be postponed to a prior charge, is not a ground for setting aside the warrant of arrest in an admiralty action and does not prevent the enforcement of the lien for necessaries in so far as may be lawful upon the facts which may develop afterwards upon the trial or further disposition of the case.

[*The "Scio,"* L.R. 1 A. & E. 353, applied.]

3. ADMIRALTY (§ II—18)—AMENDMENT—OF PROOFS TO LEAD WARRANT.

The court may allow the respondent to an application to vacate warrants to arrest a ship in an action for necessaries, to file supplementary affidavits so as to shew jurisdiction in conformity with the Exchequer Court Rules in Admiralty, rules 35 and 36, and to establish that the case was one in which the registrar could properly exercise his discretion in granting the warrants.

[*Letson* v. *The "Tuladi,"* 4 D.L.R. 157, 17 B.C.R. 170, considered.]

Statement

MOTIONS to vacate warrants in admiralty actions brought against ships under arrest for necessaries supplied.

The motions were dismissed.

The applications were made on behalf of the receiver and manager of the British Columbia Fisheries Limited, the owners of the two arrested steamships and of the trustees of a debenture mortgage upon the ships. The decision of Martin, L.J.A., on the merits of the action is reported. *Victoria Machinery Depot Co.* v. *The "Canada" and the "Triumph,"* 14 D.L.R. 318, 18 B.C.R. 515.

W. J. Taylor, K.C., for the motion.

Bodwell, K.C., and *Moresby*, contra.

Martin, L.J.A.

MARTIN, L.J.A.:—These are two separate motions on similar material, heard together for convenience, on behalf of the

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receiver and manager (appointed on August 13, 1913, by the High Court of Justice in England) of the British Columbia Fisheries Ltd. (owners of the steamships "Canada" and "Triumph"), and of the trustees of a debenture mortgage covering said ships, to vacate the warrants issued against the said ships now under arrest of the marshal, on the grounds that the affidavits to lead to warrant do not comply with rules 35 and 36, it not being stated therein, (*a*) what the "nature of the claim" is, but only that:—

2. The plaintiff has, at the request of the defendants or their agents, done work and rendered services to the "Canada," a British vessel, belonging to the port of Grimsby, England, to the amount of $3,217.37.

and, (*b*), if it can be assumed that the action is for necessaries, the domicile of the owner within Canada is not deposed to; and, (*c*), if it can be assumed that the action is for building, equipping or repairing, the fact that the ship is under the arrest of the Court is not deposed to.

My recent decision in *Letson* v. *The "Tuladi"* (1912), 4 D.L.R. 157, 17 B.C.R. 170, 21 W.L.R. 570, on the power of the registrar, under rule 39, to dispense with certain "prescribed particulars" in the affidavit, was relied upon by the plaintiff in answer to these objections, but it was submitted by the defendants, in reply, that though the registrar may so dispense, yet my decision does not go to the length of holding that such dispensation would confer upon this Court a jurisdiction which it did not in fact possess. This submission is, I think, correct, and according to the facts disclosed in the affidavits filed before the registrar and in support of this motion, this Court would not have jurisdiction to issue the warrant for arrest. But an application was made by the plaintiff, on the return of the motion, to file supplemental affidavits to prove such facts as would shew that in reality there was jurisdiction, and that the case was one in which the discretion of the registrar could be, and was, properly exercised, and I allowed the affidavits to be read for that purpose, and they did establish jurisdiction, shewing that the claim, or at least a large portion of it, was for necessaries (as defined by, *e.g.*, *Webster* v. *Seekamp* (1821), 4 B. & Ald. 352; *The "Two Ellens"* (1871), L.R. 3 A. & E. 345,

(1872), L.R. 4 P.C. 161; and *The "Riga"* (1872), L.R. 4 P.C. 516, 1 Asp. M.C. 246, approved in *Foong Tai & Co.* v. *Buchheister & Co.*, [1908] A.C. 458 at 466, and that "no owner or part owner of the ship (was) domiciled within Canada at the time of the institution of the action," because the owning company, having its head office in London, England, has its domicile there within the meaning of the authorities, which will be found conveniently collected in *Pearlman* v. *Great West Life Insurance Co.* (1912), 4 D.L.R. 154, 17 B.C.R. 417, where the question was recently considered.

I have not overlooked the fact that this company is licensed and registered to carry on business within this province, under sec. 152 of the Companies Act, R.S.B.C. 1911, ch. 39, and that it has "the same powers and privileges in this province as if incorporated under the provisions of this Act," but that language does not change or alter its constitution or domicile, and it is not one of the "privileges" enjoyed by British Columbia companies that they should have two head offices, one of which could, *e.g.*, be used as a means to pursue its debtors, and the other to evade its creditors. The distinction between the "head office of the company" (*i.e.*, its "home") and the "head office of the company in the province" is preserved in the form of the license and of certificate given in secs. 154 and 160, subsecs. (*b*) and (*c*).

But it is further contended, in support of the motion, that since at the time of arrest the ships were in the possession of the said receiver, under the said debenture mortgage, duly registered in the port of Grimsby, England, the registered port of the defendant ships, therefore, as the lien for necessaries is not a maritime one, and the possessory lien has been lost, there is no other lien that can be enforced in the circumstances, and the arrest is of no avail.

While it is true that the plaintiff herein has no maritime or possessory lien, yet, since he has supplied necessaries here to a ship which (I assume for the purposes of the argument, see *The "Ocean Queen"* (1842), 1 W. Rob. 457) though not a foreign one, is yet away from its home port and has no owner domiciled

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in British Columbia (which, under sec. 2, sub-sec. (3*a*), of the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict. ch. 27, must be substituted for "England and Wales" in the Admiralty Court Act, 1861 (Imp.) sec. 5), he had acquired a statutory lien for such necessaries when the ship was arrested under the warrant of this Court.

The fact that it may turn out that such lien may be postponed to a prior charge or charges, by way of lien or mortgage, or to the claim of a *bonâ fide* purchaser of the ship for value, does not prevent its enforcement so far as may be lawful upon the facts to be hereafter established either upon the trial or upon a subsequent motion furnishing "the necessary materials for a judgment," as has been done in many cases, *e.g.*, *The "Scio"* (1867), L.R. 1 A. & E. 353.

See also the following authorities, which justify my view: Abbott's Merchant Ships and Seamen, 14th ed., 42, 183, 1,023; Maclachlan's Merchant Shipping, 5th ed., 115-20; Williams & Bruce's Admiralty Practice, 3rd ed., 198; *The "Troubadour"* (1866), L.R. 1 A. & E. 302; *The "Pacific"* (1864), Br. & Lush. 243; *The "Aneroid"* (1877), 2 P.D. 189; *The "Rio Tinto"* (1884), 9 App. Cas. 356 at 362-3; *Foong Tai & Co.* v. *Buchheister & Co., supra,* and lastly and chiefly, *The "Cella"* (1888), 13 P.D. 82, applying the decisions in *The "Two Ellens"* (1871), L.R. 3 A. & E. 345, (1872), L.R. 4 P.C. 161; *The "Pieve Superiore"* (1874), L.R. 5 P.C. 482; and *The "Henrich Bjorn"* (1886), 11 App. Cas. 270; thus at p. 87, in *The "Cella"*:—

> They shew that though there may be no maritime lien, yet the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged by it to be due to the claimant.

And p. 88:—

> It appears to me that so long ago as 1842, Dr. Lushington, in *The "Volant,"* 1 W. Rob. 383, explained the principle upon which the Court proceeds, when he said that "an arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment." The arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment. That is Dr. Lushington's decision, and I think it is a right one.

With respect to the objection taken that promissory notes

had been accepted for the amount of the claim, the answer is, first, that the affidavits shew that the notes are only for a part thereof, the sum of $2,224.98 not being covered thereby; and, second, since the notes have been dishonoured, the ship may be sued for the original debt: *The "N. R. Gosfabrick"* (1858), Swabey 344.

The result is that the motions will be dismissed, with costs to the plaintiff in any event.

Motions dismissed.

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Alberta Supreme Court, Walsh, J. April 21, 1914.

1. LANDLORD AND TENANT (§ III D 3—110)—DISTRESS—TRESPASS IN EXECUTING.

Where there has been abandonment of a seizure under a landlord's distress warrant it would not constitute a defence to an action for trespass based on a subsequent removal of the goods, especially where the right to a fresh distress, if any, had expired.

2. LANDLORD AND TENANT (§ III D 3—110)—DISTRESS—ILLEGAL ACT BY BAILIFF—LANDLORD'S LIABILITY.

A landlord's warrant to his bailiff to distrain for arrears of rent does not authorize the latter to commit an illegal act, and trespass committed thereunder by the bailiff, not at the instance or for the benefit of the landlord, does not import any liability in trespass against the latter.

Statement

ACTION in trespass for alleged wrongful removal of goods under colour of a landlord's distress for rent and for alleged assault arising from resistance of the trespass, with a counterclaim by the defendant landlord for the rent in arrear.

Judgment was given for the plaintiff on the trespass and for the defendant landlord for the rent.

J. J. McDonald, for the plaintiff.

C. F. Adams, for the defendant Snider.

A. L. Smith, for the defendants Stahle and Graham.

Walsh, J.

WALSH, J.:—I find that the plaintiff Ritchie was the tenant of the premises on 12th Avenue west. It is quite true that the arrangement for her tenancy was made by her brother, and that some of the payments for the rent were made by him. I think it is quite plain though that he acted for her, in the arrange-

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ment for the premises, and in paying the rent. The receipts which were given by Snider are in the name of Mrs. Ritchie, and were accepted apparently without any question. I think the attempt to make the brother appear as the tenant of the premises was made with a view of strengthening the present action. I find that there was no seizure by the bailiff on the premises rented by Mrs. Ritchie from Mrs. Snider. I think that Graham went there with his distress warrant for the purpose of making a distress, but when he arrived and found the greater part of, at least the most valuable part of the furniture gone, he held his hand. I think he was, perhaps, overcome to some extent by the Christmas spirit, also, when he found that the rest of the goods would be needed in the new home, and for that additional reason he did not make a seizure. He took a list of the goods, of those which were on the premises as well as those which had gone away, but I fancy that was simply for the purpose of his own information. The inventory which he prepared, dated on December 26, speaks of a seizure having been made on that day, and that is an additional reason for coming to the conclusion that he had not made this seizure on the earlier occasion on the demised premises. I find that the goods were removed by the plaintiff Ritchie from the demised premises fraudulently with a view to avoiding a distress being made upon them for the rent which she owed Mrs. Snider. It is true that, before removal, she received notice to quit at the end of the month, but that notice gave her to understand quite plainly that she was to pay the rent then in arrears. She vacated some nine or ten days before the expiration of the month without any notice to Mrs. Snider or her son, and, in the face of her express promise, which I find that she made, that she would pay every dollar of rent before removal took place. No person interested for Mrs. Snider appears to have received any intimation of the fact that the goods were to be removed, or were being removed, until Graham arrived on the premises with his distress warrant, and the only conclusion I can reach is that she got these goods out of the demised premises, when she did, with a view to fraudulently depriving Mrs. Snider of her right to make a distress warrant upon them. I

find that there was a seizure made at the 23rd Avenue house of December 26. Graham went there purposely, I think, for the purpose of making a seizure and the most cogent evidence of what he did there is to be found in the writing, the inventory which he prepared on the premises and left with one of Mrs. Ritchie's sisters. I find that there was an abandonment of that seizure. There was no impounding of the distress when it was made. There was no man left in possession. That seizure was made on December 26, and the goods remained in Mrs. Ritchie's undisturbed possession from that time until the first of July following. It is true that Graham paid several visits to the 23rd Avenue house in the meantime, but with the exception of what took place when Grimsdall was there, Grimsdall being sent by him for that purpose, it does not appear that there was any very marked indication given of his intention to remove the goods. I think he went there from time to time in the hope of being able to get the money, perhaps, relying to some extent on the promises which Mrs. Ritchie made from time to time that she would arrange the matter, but it was made quite plain to Grimsdall when he went there, a considerable time before the 1st of July, that Mrs. Ritchie would not allow the goods to be removed, and still they remained there until the 1st of July without any attempt whatever to resume possession or remove them. I cannot imagine any circumstances pointing more clearly to an abandonment of the seizure than exist in this case. That being so I must hold that the acts committed by the defendants Stahle and Graham on the 1st of July amounted to a trespass. I do not think that they had any right to go there for the purpose of removing goods under a distress which had been made in the preceding December, because that seizure had been abandoned. The time within which they might have made a second distress, if they were ever in a position to do so, lawfully, had long since expired, so that they had no right to go there on July 1, for that purpose. The goods were, I think, unlawfully removed from the house on July 1. The plaintiff has regained possession of them by writ of replevin issued in this action, so all that is necessary to say with reference to the

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goods themselves is that plaintiff Frances Ritchie is entitled to retain them as against the defendant. There is the claim for damages to the goods, the claim for damages for trespass by defendants, and for assault alleged to have been made by the defendants upon the plaintiff in the process of their removing these goods.

So far as the plaintiff Lois Jennings, and Margaret Jennings are concerned, their only right of action is in respect of the assault which it is alleged was made upon them by the defendants in the course of the removal of those goods. I do not think either of them is entitled to anything at all. I do not think there was any assault committed on either of them. The only thing that had the appearance of an assault at all was the incident with reference to Lois Jennings. She has not satisfied me that the fact of her falling on the floor was the result of any force either accidentally or purposely applied to her by Stahle. She says that when he was in the act of removing the piano he applied such force to it that he over-exerted himself and came into physical contact with her, as a result of which she fell to the ground. He denies that, and he is corroborated in that by one other witness. There is no doubt she fell on the ground, but I do not think it was the result of any force exerted by Stahle. Neither of these ladies had any interest in this property. Their sister, the plaintiff Mrs. Ritchie, was alone interested in it. I think they purposely threw themselves in the way of the bailiff, and his man, perhaps, with a view to bringing forward such a claim as they have brought forward. There was no need for them to put themselves in the position they did put themselves in. They must have known that they three women had no possible chance of preventing these five or six or seven men from removing the piano and furniture from the house, and I think that everything that happened to either of these two women happened while they were voluntarily lending their services to their sister, Mrs. Ritchie, in what they must have known was a futile attempt to prevent these men from removing these goods. They invited what happened to themselves, I do not think they have any cause of action what-

ever in respect of it. Mrs. Ritchie is entitled to some damages. I am not at all impressed either with the position that she has taken or the action that the defendants Stahle and Graham took. I think these defendants acted in a somewhat high-handed manner, but there is not a great deal of merit about her claim. I have already practically found that she fraudulently put her brother forward as tenant of Mrs. Snider's house for the purpose of strengthening this action. I have found that she fraudulently removed the goods from the demised premises from the 23rd Avenue house. There is no doubt about the fact that she owed Mrs. Snider the sum of $135, and I think Mrs. Snider and her son were misled to some extent by the promises which Mrs. Ritchie from time to time made. I think she deliberately increased the work which the defendants undertook to do there by the resistance which she offered, the resistance which she must have known would be fruitless. The incidents of that occasion on July 1, when the stuff was removed were, I think, grossly miscoloured, at least by some of the plaintiffs. Miss Margaret Jennings spoke under oath of Stahle having thrown the piano across the parlor, and his attempt to throw the piano down the steps when the piano had not yet even reached the door. She refused to speak of Stahle by name, but she called him "that beast" and in other respects coloured her evidence in such a way that I cannot place any confidence in it at all. No damage was done to the furniture beyond the chipping of a piece off the piano frame, about three inches by an inch in diameter. Mrs. Ritchie was not injured at all. She resisted these men in the work they were doing and in this she exhausted herself physically to some extent. The goods were only out of her possession for a few days, and the actual financial loss which she suffered is practically nothing.

I think under all those circumstances, taking into account the facts which I have referred to, I will be doing her ample justice by allowing her $75 for all the wrong of which she complains. The judgment against the defendants Stahle and Graham will, therefore, be for the return of the goods which are already in the possession of Mrs. Ritchie, and $75 damages with

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costs taxable under column 2 of the schedule, that is, under $1,000. I do not think Mrs. Snider was responsible for these acts of the bailiffs. Her warrant which she gave them did not authorize them to commit an illegal act, and the evidence is, that from the time she gave them the distress warrant she did not interest herself in the matter at all. What they did was not done under her instructions and she has not benefited by their act in any sense at all. She will have the action dismissed as against herself with costs, and she is entitled to judgment against the plaintiff Frances Ritchie for $135 with costs on her counterclaim.

Judgment for plaintiff on the trespass and for defendant landlord for rent.

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PRENTICE v. BROWN.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ. April 25, 1914.

1. MECHANICS' LIENS (§ I—1)—CONSTRUCTION OF STATUTES.

Sec. 32 of the Mechanics' Lien Act, Alberta Statutes 1906, ch. 21, as amended by sec. 12, ch. 20 of 1908, is for the protection of an owner who is under a personal contractual obligation to pay and not otherwise.

2. MECHANICS' LIENS (§ I—1)—CONSTRUCTION OF STATUTES—"OWNER," A VARIABLE TERM, WHEN.

"Owner" is a variable term and as used in sec. 11 of the Mechanics' Lien Act, Alberta Statutes 1906, will include "leaseholder" when read with the interpretation clause, sec. 2, sub-sec. 4, extending the term "owner" to a person having *any* estate or interest legal or equitable in the lands.

[As to Mechanics' Liens generally, see Annotation, 9 D.L.R. 105.]

Statement

STATED case for an interpretation of secs. 11 and 12 of the Alberta Mechanics' Lien Act.

O. M. Biggar, K.C., for the appellant.

G. B. O'Connor, K.C., for the respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—A stated case was submitted in these actions for the opinion of the Court. The various plaintiffs claim

mechanics' liens upon the estate of the defendant Brown who holds a long lease of the premises from one Robert Lee.

The defendant's chief contention was that, although he did not himself have anything to do with the contracts or sub-contracts for the doing of the work, the contract having been made by a sub-tenant, he is yet entitled to the benefit of the provisions of sec. 32 of the Act, Alberta 1906, ch. 21, as amended 1908, ch. 20, sec. 12, which relieves the "owner" from liability unless notice is given him by the lien-holder of his claim. This contention is clearly unsound. Section 32 is for the protection of an owner who is under a personal contractual obligation to pay. If the "owner" in question has no such personal obligation the terms of the section cannot possibly apply to him. An owner who is made liable under sec. 11 because of his knowledge of the doing of the work is given protection by his right to serve notice disclaiming liability. It is admitted that there was knowledge and that no such notice was given.

It was further contended that Brown is not an owner within the meaning of sec. 11 because Lee was the registered owner and Brown only a tenant. But the interpretation clause sec. 2 (4) extends the term owner to a person having *any* estate or interest legal or equitable in the lands and this undoubtedly includes a leaseholder.

The question referred should be answered in the affirmative but with respect to the question of fixtures which was raised by the defendant in his factum this will depend upon the evidence as to each particular item. Owing to the terms of paragraph 4 of the stated case I do not think it was intended that the defendant should be taken as admitting that all the articles referred to in the claim of Bowcott, Dean & Roberts were worked into and became part of the building, notwithstanding the terms of paragraph 4 of the statement of claim.

In accordance with the terms of the stated case the plaintiffs in the several actions are entitled to a judgment declaring that they are entitled to a lien and for their costs with a reference as agreed to determine the exact amount.

Judgment accordingly.

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HOPKINS v. BROWN.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ.
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1. PARTIES (§ II B—119)—BRINGING IN PARTIES—JOINT AND SEVERAL NEGLIGENCE—ADDING PARTIES.

An owner who employs an architect to superintend the erection of a building on his land adjoining a public highway, and who through the agency of the architect employs land surveyors to survey and designate the site for the building, is not entitled, in defending the architect's suit for his fees, to counterclaim for damages on the ground that the building was erected so as to encroach upon the public highway owing to the negligence of the architect, the builder and the surveyor, or in the alternative from the negligence of some of them, and to bring them all in as parties defendant to the counterclaim unless he so counterclaims as to shew a contractual relationship or connection between the added defendants and the original plaintiff.

[*Hopkins* v. *Brown*, 16 D.L.R. 75, reversed in part; *Treleaven* v. *Bray*, 45 L.J. Ch. 113, 1 Ch. D. 176, applied: as to architect's duty to employers, see Annotation, 14 D.L.R. 402.]

Statement

APPEAL from the judgment of Scott, J., *Hopkins* v. *Brown*, 16 D.L.R. 75, 27 W.L.R. 99, adding parties in an issue between an owner and his architect.

The appeal was allowed.

O. M. Biggar, K.C., for the appellant, Prentice.

G. B. O'Connor, for the respondent, Brown.

W. G. Harrison, for the plaintiff, Hopkins.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The plaintiff Hopkins began an action against Brown for fees as an architect. He alleged that he had been employed by Brown to prepare plans and specifications for, and to superintend the construction of a building upon certain land in Edmonton, that he had done the work and had not been paid. He claimed payment of the sum of $4,775, and also asked for the enforcement of a mechanics' lien against the land which he alleged he had filed to secure his claim.

Brown put in the usual defences of general denials and also counterclaimed for damages for unskilful and negligent work, as a result of which the building had been erected four inches over upon the highway.

The Master in Chambers, on application by way of summons on the part of Brown, made an order permitting him to

add James Prentice, Frederick Driscoll, and Richard Knight, as defendants to the counterclaim, and to amend his counterclaim in a certain way. From this order of the Master the defendants, by counterclaim, Driscoll and Knight, appealed upon notice to Brown, Hopkins and Prentice, to Mr. Justice Scott in Chambers. Apparently, Prentice supported the appeal, for it is from the order of Mr. Justice Scott dismissing the appeal without costs that this appeal is brought by Prentice alone. The defendants Driscoll and Knight did not appeal nor did the plaintiff. Driscoll and Knight did not appear on the hearing before us, but Hopkins did, by his counsel appear, although he seemed to be but little concerned in the result, notwithstanding that one would have thought that he, above all others, would have been complaining.

On the hearing before Mr. Justice Scott, or possibly at some other time, the defendant Brown was allowed again to amend his counterclaim, and, as it now stands, it reads as follows:—

1. The defendant James Prentice was the contractor employed by the plaintiff (*i.e.*, Brown), who for reward erected the Brown building; the defendant Edward C. Hopkins was the architect employed by the plaintiff, who for reward superintended the surveying and designating of the site for the said building and the erection of the said building; the defendants Frederick Driscoll and Richard Knight are Dominion land surveyors and were employed by the defendant (*i.e.*, original plaintiff) Hopkins as agents of the plaintiff and who for reward surveyed and designated the site for the erection of the said building.

2. By reason of the negligence of the defendants, or by reason of the negligence of the defendants Edward C. Hopkins and James Prentice in erecting the said building, or by reason of the negligence of the defendants Edward C. Hopkins, Frederick Driscoll and Richard Knight in surveying and designating the site of the said building, or by reason of the negligence of the defendant, Edward C. Hopkins, or by reason of the negligence of the defendant James Prentice, or by reason of the negligence of the defendants Frederick Driscoll and Richard Knight the said building was erected so as to encroach upon the public highway adjoining the plaintiff's property to the extent of four inches.

3. By reason of such negligence the plaintiff will be compelled to remove the said building from the highway and to reconstruct the same; the plaintiff is in doubt as to which of the defendants is liable to him.

Wherefore the plaintiff claims:—

1. The sum of $25,000 damages from the defendants.

2. In the alternative the sum of $25,000 damages from the defendants James Prentice and Edward C. Hopkins.

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3. In the alternative the sum of $25,000 damages from the defendants Frederick Driscoll and Richard Knight and Edward C. Hopkins.

4. In the alternative, the sum of $25,000 damages from the defendant Edward C. Hopkins.

5. In the alternative, the sum of $25,000 damages from the defendants Frederick Driscoll and Richard Knight.

6. In the alternative the sum of $25,000 damages from the defendant James Prentice.

The right given to a defendant to make a counterclaim, not only against the original plaintiff but also against third parties not before joined in the action, rests upon sec. 24 (3) of the English Judicature Act of 1873 which is re-enacted by the Judicature Ordinance, see 8 (3). This section says that the Court may grant to any defendant

> all such relief relating to or connected with the original subject-matter of the cause or matter and, in like manner, claimed against any other person whether already a party to the same cause or not who shall have been duly served with a notice in writing of such claim . . . as might properly have been granted against such person if he had been made a defendant to a cause only instituted by the same defendant for the like purpose.

In the Yearly Practice (1911), pp. 267-8, it is said that this right is subject to two conditions: (1) that the plaintiff must be a party to the counterclaim; (2) that the relief must relate to or be connected with the original subject of the action.

The difficulty arises when we attempt to apply these rules to the somewhat bald allegations in the counterclaim. The counterclaim is one for damages for negligence throughout. The original plaintiff sues Brown for architect's fees under a contract between them. Clearly Brown has a right to counterclaim against Hopkins for damages for unskilfully and negligently performing his contract. And Hopkins would, no doubt, be himself liable for any unskilful or negligent work which was done by any of his servants or agents employed by him, Hopkins, to perform the architect's contract. And, assuming that Brown would have a right of action directly against any of Hopkins' servants or agents for their unskilfulness or negligence, he might, perhaps, have a right to join them as defendants to a counterclaim against Hopkins.

But it is not alleged that the appellant Prentice was a ser-

vant or agent of Hopkins. The allegation is that Brown himself employed Prentice to construct the building, and that he was so negligent in constructing it that it was put out upon the street. The situation, then, is that Brown had two contracts, one with Hopkins to draw plans and specifications and superintend the constructing, another with Prentice to do the actual work of construction. Hopkins sues for his fees. That is "the original subject of the action." Then Brown attempts to say, I counterclaim against Prentice, who had a separate contract altogether, for performing his contract negligently. Now, I think anything in the counterclaim which does not necessarily involve any relationship or connection between the added defendants and Hopkins should not be allowed: *per* Blackburn, J., in *Treleaven* v. *Bray*, 45 L.J. Ch. 113, 115, 1 Ch. D. 176.

It may be if Brown had set forth fully, as he clearly might have done, because they must be within his knowledge, the terms of the contracts between him and Hopkins and between himself and Prentice, and it appeared from the terms, particularly the terms of the latter, that Prentice agreed to place the building where directed by Hopkins; then, in so far as the misplacement of the building was alleged to be due to a failure of Prentice to follow the directions of Hopkins, whose duty under his contract was to specify the proper line, in such case the claim against Prentice might possibly (I go no further) be said to be related to or connected with the original subject of the cause or matter, which is an action for Hopkins' fees for his services, and if we take in the defence, Hopkins' liability for the mistake, not the mere fact of a mistake, was the subject of the cause. But, certainly, any allegation of a breach of duty by Prentice not arising out of any relationship with Hopkins, as, for instance, if the contract of Prentice placed the obligation upon him personally, regardless of any instructions from Hopkins, of placing the building on the proper line, could not, by any possibility, be said to be related to or connected with the original subject of Hopkins' action. That is to say, any direct charge against Prentice which did not involve bringing in

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Hopkins as the connecting link between them would obviously be one with which Hopkins would have nothing whatever to do.

So, with regard to Driscoll and Knight. But they have not appealed, and I see no reason to trouble about them, particularly as Hopkins does not seem to care.

But it is not for the Court to decide the matter merely upon pleadings which it conceives might have been drawn. It is for the defendant to make his allegations and it is only from these, as they are made and stand before us, that we can decide whether the Court should exercise the power given to it by the statute. Perhaps the defendant may say that he does not know what to allege. I cannot see that that position is justifiable. He certainly could have alleged a great deal more than he has with regard to things he must have known, that is, the terms of the contracts to which he was a party. Moreover, I am not aware that solicitors who draw pleadings are always so lacking in fertility of imagination as would seem to be the case here. This is certainly a case in which one would have expected some more carefulness in detail of allegation than is revealed in the very meagre suggestions in the counterclaim. Taking that counterclaim as it stands, I am of opinion that it contains no assertion of any such relationship between Prentice and Hopkins with regard to the duty of properly fixing the location of the building as would justify us in saying that the relief claimed against Prentice is related to or connected with the original subject of the cause or matter.

The appeal should be allowed with costs and the order below set aside and Prentice struck out of the counterclaim. He should have his costs below in any proceedings in which he appeared.

Appeal allowed.

SCANDINAVIAN AMERICAN NATIONAL BANK v. KNEELAND.

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Manitoba King's Bench, Curran, J. April 8, 1914.

1. COSTS (§ I—14)—SECURITY FOR—PAYMENT OUT OF SUCCESSFUL PLAINTIFF'S DEPOSIT—ON SUCCESS IN PROVINCIAL COURTS—FURTHER APPEAL TO SUPREME COURT OF CANADA.

A non-resident plaintiff who has given security for costs and has successfully appealed from a dismissal of his action and obtained judgment in his favour from the highest provincial Court is entitled to payment out of his deposit, although the defendant has launched a further appeal to the Supreme Court of Canada, the latter not being a step in the cause in which the security was given within the Manitoba K.B. Rules.

[*Day* v. *Rutledge*, 12 Man. L.R. 309; and *Hamill* v. *Lilley*, 56 L.T. N.S. 620, followed; *Canadian Land* v. *Dysart*, 11 P.R. (Ont.) 51, considered.]

Statement

MOTION by plaintiffs, who had succeeded in their appeal to the Court of Appeal for payment out of Court to them of their deposit for costs made on their bringing action in Manitoba as a foreign corporation. The motion was opposed on the ground that a further appeal was being prosecuted by the defendant to the Supreme Court of Canada.

Payment out was ordered.

O. H. Clark, K.C., for the plaintiff.

H. Phillipps, for the defendant.

Curran, J.

CURRAN, J.:—An application has been made to me in chambers for payment out to the plaintiffs of moneys which, in effect, have been paid into Court as security for costs, the action having been brought by the plaintiff bank, which is a foreign corporation and resident out of the jurisdiction.

The defendant succeeded at the trial and entered judgment for his taxed costs, $1,358.17. The plaintiff having allowed the prescribed time for prosecuting an appeal from this judgment to elapse, obtained an order extending the time for appealing upon the terms of paying into Court the amount of the judgment and an additional sum of $250 as security for costs of the appeal to the Court of Appeal, making in all $1,608.17. The plaintiff's appeal was successful, and the judgment of the trial Judge was reversed and judgment given against the defendant in the plaintiff's favour for $7,645.10.

From this latter judgment the defendant proposes to appeal

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to the Supreme Court of Canada, and has made an application to a Judge of the Court of Appeal to allow the security necessary for that purpose and for a stay of execution. It is admitted by counsel for both parties that such application is now pending for the decision of the Judge in appeal applied to. Meantime the plaintiff makes the present application and cites in support thereof *Day* v. *Rutledge*, 12 Man. L.R. 309.

The defendant's counsel has sought to distinguish this case; but I am unable to do so. By rule 1 of the rules of the Court of Appeal, an appeal to the Court is declared to be a step in the cause or matter in which the judgment or order complained of was given. Apparently an appeal to the Supreme Court of Canada is not a step in the cause: *Re Donovan*, 10 P.R. (Ont.) 71, where it was held by Proudfoot, J., that

> an appeal to the Court of Appeal is a step in the cause (R.S.O. ch. 28, sec. 31), but there is no such provision in regard to an appeal to the Supreme Court.

In my opinion, I am bound by the judgment in *Day* v. *Rutledge*, 12 Man. L.R. 309, which seems to me not to be distinguishable from the case under consideration, and I must hold that, as the proposed appeal to the Supreme Court is not a step in the cause in the original action, the money paid into Court as security for the defendant's costs has served the purpose for which it was so paid in, and ought now to be repaid to the plaintiff.

The case of *Hamill* v. *Lilley*, 56 L.T.N.S. 620, decided by the Court of Appeal in England, seems to be the authority relied upon by our Court *en banc* in *Day* v. *Rutledge*, 12 Man. L.R. 309, and a consideration of this case seems, beyond any question, to lead to the conclusion that the plaintiff here has a legal right to have this money repaid to it.

A somewhat different conclusion was reached in *Canadian Land & Emigration Co.* v. *Dysart*, 11 P.R. (Ont.) 51, where it was held that the same principles applicable to an appeal to the Court of Appeal should apply to an appeal to the Supreme Court, and that the discretion (assuming it to be a matter of discretion) should be exercised in the same way and an application for payment out of money paid in by way of security for costs was refused pending an appeal to the Supreme Court of Canada.

The reasoning in this case seems to me entirely consonant with justice, and I would follow it if I could. Why an appeal to our Court of Appeal should arbitrarily be set as the last act which can be considered a step in the cause I do not know. It does seem to me that, as long as resort to a higher Court than our Court of Appeal is properly open to a litigant, the proceedings in appeal to such Court might very reasonably be considered as a step in the cause.

However, this seems not to be the law, and, as I view the authorities binding on me, I think I have no discretion in the matter, but must make the order applied for, and it will go accordingly.

However, to enable the defendant, if so advised, to take the matter to a higher tribunal, I will direct a stay of proceedings for ten days, at the expiration of which time, if an appeal from my decision has not been taken, this order may be acted upon by the plaintiff, and the money in Court paid out to it.

Application granted.

COLGROVE v. GUNDY.

Alberta Supreme Court, Scott, J. April 14, 1914.

1. EVIDENCE (§ VI E—535)—INTERPRETING WRITING—DISCOUNT—PENALTY CLAUSE—CONDUCT OF PARTIES.

Evidence is admissible to shew from the dealing between the parties that a stipulation in a written contract for a discount on prompt payment was in fact a mode of stipulating a penalty for default and that the net amount was the actual purchase money.

2. FORFEITURE (§ I—4)—RELIEF AGAINST—CONTRACT STIPULATION—ADMISSION OF LIABILITY.

Relief may be granted in respect of a stipulation for a penalty in not paying within a fixed time although there was a subsequent admission by the promisor of indebtedness in respect of the penalty; the liability for the latter may be repudiated up to, but not after, actual payment thereof.

Statement

TRIAL of action for purchase money.

A reference was directed to take accounts and further directions reserved.

A. B. MacKay, for the plaintiff.

A. H. Clarke, for the defendant.

Scott, J.

SCOTT, J.:—I hold that the plaintiff is entitled to recover from the defendant company only the balance remaining unpaid upon the original contract price of $48,000 and interest thereon; that

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the further sum of $6,000 provided for in the agreement of November 1, 1911, which was treated therein as a discount to which the defendant company was entitled upon prompt payment of the instalment of $9,000 was, in reality, a penalty for the non-payment thereof at the time agreed upon, and, being such, the company should not be called upon to pay it. Some of the provisions of the agreement point strongly to that conclusion, but I think that the determination of that question should not depend entirely upon the construction to be placed upon the words of the agreement. Weight should be given to what was the intention of the parties, and I, therefore, admitted, subject to the objection of the plaintiff's counsel, evidence of the dealing between the parties relating to the transaction. If I was wrong in admitting such evidence, the plaintiff will have the benefit of his objection in case of an appeal from my judgment. That evidence satisfies me that their intention was such that the payment of the $6,000 must be taken to be a penalty for the non-payment of the $9,000 at the time agreed upon.

The fact that the company admitted its liability for the payment of the $6,000 shortly after they had, by the terms of the agreement, forfeited their right to deduct any portion of it does not appear to be material. If it is a penalty, the admission of liability is not conclusive. The company is entitled to repudiate its liability up to, but not after, the time the money is actually paid over.

I do not think there is any other question I should pass upon except this, that, in taking the account as between the parties, that the plaintiff should be entitled to recover up to the extent of $48,000, with interest at eight per cent. up to the time of the taking of the account for whatever amounts may be found to be in arrears, and that the computation shall be for simple interest at the rate of eight per cent. from the date of the agreement. I do not think there is anything further I should say. The costs will have to be reserved, because I am not at present aware what amount the plaintiff will be found entitled to recover. I direct the taking of an account by the clerk under the instructions which I have given as to the manner in which it shall be taken. I reserve further directions and the question of costs.

Judgment accordingly.

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Alberta Supreme Court, Harvey, C.J., Stuart, Simmons, and Walsh, JJ. April 25, 1914.

1. CORPORATIONS AND COMPANIES (§ IV G 5—137)—LIABILITIES OF DIRECTORS —WAGES.

A company director, under sec. 54 of the Companies Ordinance, N.W.T. 1901, ch. 20 [N.W.T. Ord. Alta. 1911, ch. 61], is practically a statutory guarantor of the wages due for services performed for the company to the extent and under the conditions prescribed by the section.

[*Guenard* v. *Coe*, 16 D.L.R. 513, reversed.]

2. JUDGMENT (§ II D 8—147)—CONCLUSIVENESS—WAGES CLAIM—DIRECTORS' PERSONAL LIABILITY.

In an action by a creditor against a surety, a judgment obtained by the creditor against the principal debtor is not evidence against the surety, on the maxim *res inter alios acta*, whether the defendant is a contractual or a statutory surety; consequently a judgment against a company sued for a labourer's wages for which the directors would be personally liable under the Companies Ordinance [Alta. Ord. 1911, ch. 61] is not conclusive as against the directors sued in a subsequent action.

[*Guenard* v. *Coe*, 16 D.L.R. 513, reversed; *Re Kitchin, Ex parte Young*, 17 Ch.D. 668, applied.]

Statement

APPEAL by the defendants from the judgment of Beck, J., *Guenard* v. *Coe*, 16 D.L.R. 513, striking out certain paragraphs of the statement of defence.

The appeal was allowed.

G. B. Henwood, for the tenant.

A. C. Grant, for the respondent.

Harvey, C.J.

HARVEY, C.J., concurred in the judgment of STUART, J.

Stuart, J.

STUART, J.:—This is an appeal by the defendants from a judgment of Mr. Justice Beck, *Guenard* v. *Coe*, 16 D.L.R. 513, delivered upon an application of the plaintiff to strike out certain paragraphs in the defendants' statement of defence.

The defendants are sued as being or as having been directors of a company called the Bawlf Collieries Limited. The plaintiff's statement of claim alleges that during the months of January, February and March, 1912, the plaintiff was employed as a miner and labourer by that company working in the company's mine at Bawlf during which time the defendants were directors of the company; that on November 26, 1912, the plaintiff recovered a judgment against the company for $159.20 for his said work

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and labour and $42.44 costs; that on March 25, 1912, execution issued for the said amounts which said writ has been returned unsatisfied by the sheriff and that under and pursuant to sec. 54 of the Companies Ordinance, N.W.T. 1901, ch. 20, the defendants, as such directors, are personally, jointly and severally liable "for the payment of the plaintiff's claim."

The plaintiff claims (1) "payment of the said sum of $201.64," (2) judgment against the defendants jointly and severally for the payment of the said sum, (3) interest, costs and such further relief, etc.

The statement of defence (para. 1) denies that the plaintiff was employed as a miner or otherwise by the company during the time mentioned or at any time; (para. 2) alleges that any work done by the plaintiff was done as an independent contractor and that the company never was indebted for wages; (para. 3) alleges that the defendants were not then directors of the company; (para. 4) denies recovery of the judgment; (para. 5) alleges that if any such judgment was recovered the defendants have no knowledge thereof, were not parties to the action and are not bound thereby; (para. 6) alleges payment in full of any claim for wages that plaintiff may have had and that the judgment was "wrongfully obtained"; (para. 7) denies the issue of execution; (para. 8) denies the return of the writ unsatisfied; (para. 9) alleges that if any such return was made by the sheriff it was an improper return, inasmuch as the company was and is possessed of goods more than sufficient to satisfy the claim; (para. 10) alleges that the defendants are not and have not become liable for the plaintiff's claim under sec. 54 of the Companies Ordinance as alleged in the claim; (para. 11) alleges that the statement of claim disclosed no cause of action.

The action was begun in the District Court of the district of Wetaskiwin, but, upon it appearing that there were some twenty-two other actions of a similar kind, it was transferred by Mr. Justice Beck to the Supreme Court with a view to a motion being made to strike out parts of the defence in order to raise certain questions of law, the early determination of which would tend to prevent costs in all the actions. Mr. Justice Beck heard this latter motion and ordered paragraphs 1, 2, 4, 5, 6, 9, 10 and 11 to be struck out. It is fairly clear that the striking out of

para. 4 of the defence which denied the recovery of the judgment was due to a misapprehension of some kind inasmuch as the reasons for judgment while indeed in one line including para. 4 do not contain any reasons covering that paragraph. Certainly the defendants must be permitted to put the plaintiff to the proof of the recovery of his judgment against the company. The production of the judgment roll might, no doubt, be conclusive evidence of the fact of the recovery of the judgment, but that is another matter. It is also another matter whether the judgment, when properly proved, is conclusive against the defendants.

The defendants appealed from this order. Their notice of appeal referred only to paragraphs 1, 2, 4 and 6, but at the hearing in appeal an application was made for leave to appeal against the order so far as it referred to paragraph 5 of the defence as well. I think the appeal should be allowed in so far as paragraph 4 is concerned. In my opinion, it is immaterial whether we allow an appeal to be considered with reference to para. 5 or not. In substance, it alleges as a matter of law that the defendants are not bound by the judgment recovered against the company. But paragraphs 1, 2 and 6, which were ordered to be struck out, seem to me to raise essentially the same general question as that raised in para. 5, viz., whether it is open in this action to the directors to dispute (*a*) the existence of the debt prior to the obtaining of judgment, (*b*) that the plaintiff was a labourer within the meaning of sec. 54 of the Companies Ordinance, and (*c*) that he was employed as such a labourer by the company. Perhaps (*b*) and (*c*) are in substance the same. Of course in so far as para. 5 merely alleges absence of knowledge of the judgment on the part of the defendants and the fact that they were not parties to the action, I think it is bad in any case because their lack of knowledge, not of the *action*, be it observed, but of the *judgment*, cannot on any conceivable ground be a good defence, and, as the learned Judge points out, they could not possibly be made parties to the action. If the paragraph had directly alleged want of knowledge, not of the judgment, but of the action, I can conceive a possibility of something being said in favour of allowing such an allegation to remain particularly if the directors had ceased to be directors when the action was brought, but that is not what is alleged. The remaining allegations in para. 5, viz., that the de-

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fendants are not bound by the judgment is in the form in which it is stated a pure question of law in any case. It could be raised upon argument, and in so far as the facts necessary to support it are concerned, these, so far as suggested at all, are alleged in other paragraphs of the defence with respect to which the original notice of appeal is sufficient.

The real question in issue on the appeal is whether the defendants can be permitted to go behind the judgment obtained against the company and deny that the plaintiff was a labourer in the employ of the company at the time alleged within the meaning of sec. 54 of the Companies Ordinance, or that the company was indebted to him for wages in any case.

In order to judge of the propriety of the defences raised we must understand first and very clearly the nature of the claim upon which the plaintiff sues. Does he sue upon the judgment or upon the original debt? Section 54 of the Companies Ordinance, N.W.T. 1901, ch. 20, says:—

> The directors of a company shall be jointly and severally liable to the clerks, labourers, servants and apprentices thereof for all debts, not exceeding six months' wages due for services performed for the company whilst they are such directors respectively; but no director shall be liable to an action *therefor* unless the company is sued *therefor* within one year after the debt becomes due nor unless such director is sued *therefor* within one year from the time when he ceased to be such director nor unless an execution against the company is returned unsatisfied in whole or in part; and the amount unsatisfied on such execution shall be the amount recoverable with costs from the directors.

Now that section contains expressions which cause me some embarrassment. The directors are in terms made personally liable, not for a judgment debt recovered against the company in respect of a claim of a certain nature, but for the original debt due for wages. Then it appears to contemplate an action against the directors for the very same thing for which the company itself may be sued. The repetition of the word "therefor" indicates this. On the other hand, the amount unsatisfied on an execution against the company, which would possibly include costs in the original action is made the amount recoverable from the directors. Or, inasmuch as a writ of execution generally distinguishes the amount recovered on the claim from the amount recovered for costs, it may be that the clause should be interpreted so as to make the director liable only for the amount unsatisfied

on the execution for the claim aside from costs. The expression "with costs" in the last line may refer only to the costs of the action against the directors. I think the principle upon which the statute should be interpreted is that it creates a statutory obligation quite apart from contract, and quite unknown to the common law. By statute the director is made, in effect, a surety. In a contract of suretyship it depends on the terms of the contract whether the creditor is at liberty to proceed in the first instance against the surety or guarantor, or whether proceedings must first be taken against the principal debtor before the surety can be sued. If the contract is of the former kind it is clear that if the creditor, without notifying the surety, proceeds first against the principal debtor and gets a judgment for claim and costs which he cannot realize and only then has recourse to the surety, the surety has all defences open to him and is not liable for the costs of the first suit even though judgment may go against him: Brandt on Suretyship, 3rd ed., sec. 124; Halsbury, vol. 15, pp. 483, 484. Where, however, the creditor must first sue the principal before proceeding against the surety the rule as to costs seems to be otherwise: Brandt, 3rd ed., sec. 143; Cyc., vol. 32, p. 120. This principle seems to be carried into the statute and is a perfectly good reason for making the director liable for the costs of the first suit as the statute apparently does.

But whether under a contractual suretyship which makes a suit against the principal necessary before proceeding against the surety, all defences are open to the surety does not seem so clear. Upon principle I do not see why all defences should not still be open, except in the case where the surety had been given notice of the action and had failed to intervene as he would have a right to do.

We have here of course not a contractual suretyship, but a statutory one. We have a statute, not a contract, to interpret, but it seems to me that the same principles might be applied in endeavoring to ascertain the meaning of the statute as in interpreting an agreement between the parties. Supposing the directors had given a written guarantee to the various plaintiffs in the exact words of the statute, what interpretation would the Court have put upon it? Whatever it would, I think it might not unreasonably put now upon the statute itself with the substitution

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of the intention of the Legislature for that of the parties. Even this may be unjust to the director because his own words in an agreement might not unreasonably be construed more strongly against him than the words of the Legislature. Supposing such an agreement had been made and the plaintiff had first sued the company without notifying the directors, who may have ceased to be such, and then finding their judgment fruitless had sued the directors on the guarantee, would the Court interpret the meaning of such a contract to be that in such an eventuality the judgment so obtained would be conclusive upon the directors? I doubt very much if it would.

It is, as I before suggested, an important question to decide whether the labourer's suit against the director under the statute is properly upon the judgment or upon the original debt. I think it must be upon the original debt. As I have said, the use of the word "therefor" indicates this and the addition of the liability for costs of a preliminary suit against the company is nothing more than is in some cases attached to a surety under a contract. I can find no precedent for a statement of claim against a surety in which the suit is upon an earlier judgment against the principal debtor. The case of *Welch* v. *Ellis*, 22 A.R. (Ont) 255, is authority for the proposition that it is still open to the director to dispute the position of the plaintiff as a clerk, labourer, servant, or apprentice. I am unable to see why it should not also be open to him to dispute the debt. Supposing he wished to shew to the Court at the trial that even if he was director at the time and indeed because he was, he recognized his liability and had paid the man out of his own pocket, that he was not a director when the company was sued and knew nothing of the action having been brought, is there any reason in justice that he should be precluded from raising such a defence? Or, there may have been contra accounts not known or the state of which was not appreciated by the directors in charge at the time of the suit. For my part, I think it would be very unjust if he were so precluded. The fact that the statute would apparently make him liable, not only for the costs of the action against himself if he failed, but also for the costs of the former action against the company, is sufficient answer to the contention that the plaintiff ought not to be put twice to the trouble of proving his claim.

The chief difficulty in the case arises from the wording of the last part of the section which says "that the amount unsatisfied on such execution shall be the amount recoverable with costs from the directors." I quite appreciate the objection raised by my brother, Walsh, to interpreting this clause as merely saying that the plaintiff *may* recover the amount unsatisfied on the execution, *as a maximum*. It is certainly true that such an interpretation makes the clause an unnecessary one. But I think it has happened before that the Legislature has enacted something which would be the law anyway. On the other hand, I think there is as grave a difficulty if you say that the director may dispute the existence of the debt but not the amount of it. The directors' plan of disproving the existence of the debt may just be to prove the payment of every individual item by which it is alleged to be made up. If he succeeds in disproving every item in shewing that everything was paid and there was no debt in existence at all, then the prior judgment cannot hurt him; but if he fails with regard even to 5 cents, then, though as a result of the contest, the plaintiff may only shew 5 cents to be due, still this shews the existence of a debt and thereupon after all the contest, the prior judgment for a much larger amount fixes the amount at that larger figure.

The only possible answer I can see to this is to say that the director may force the plaintiff to prove that he did do work and did earn wages, but that he is not at liberty to plead payment in full as is done in para. 6 of the defence, or to go into any question of accounts, all such questions having been finally settled by the former judgment.

With regard to the argument *ab inconvenienti* and of the hardship on the plaintiff if he is forced to prove his claim a second time, it is not so serious as might appear. There can be no question that the director ought to be allowed to dispute the status of the plaintiff as a clerk, labourer, servant, or apprentice. That is a condition precedent to his liability and his right in this respect was assumed apparently without question in *Welch* v. *Ellis*, 22 A.R. (Ont.) 255. The plaintiff must therefore come into Court and prove this. Certainly the mere allegations in his former claim are not conclusive as to this. Also the plaintiff must prove that he earned wages in the capacity mentioned. His former allega-

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tions are not conclusive of this either. It must be remembered that it is clearly upon the original debt that he must sue as I have pointed out. Then, if he is bound to come into Court and prove half his case over again, there is not much hardship in asking him to prove non-payment again. On the other hand, to make the director bound by a decision upon the amount of the debt made in his absence without notice to him in an action to which he was not a party and of which he had no knowledge whatever, is contrary to every principle of natural justice, and I think the Court should struggle to give such an interpretation to the statute, which is evidently very poorly drafted, as will be fair to both parties and do the least injustice, provided the interpretation is one which the statute may fairly bear. I think the interpretation that the clause merely fixes a maximum, no doubt unnecessarily, is a possible one and one which can fairly be attributed to it.

I have made some examination of the old procedure by *scire facias* and with much respect I think it is not very helpful. In most cases the party against whom *scire facias* was brought was the very same person against whom judgment had been obtained. And even with respect to joint stock companies it must be remembered that in the earlier stages of their history they were really nothing more than very widely extended partnerships with no limitation of liability. It is true the proceedings by *scire facias* did continue after limitation of liability, but shareholders were never in the position of sureties or guarantors. They were either liable for everything as partners as at first or, as at last, were liable as partners with a limitation to the amount they had agreed to subscribe. There is no English statute making directors liable as in the present case and I think the liability of a director under our statute should be dealt with as I have dealt with it, as a question of suretyship created by statute.

I think, therefore, the appeal should be allowed except as to para. 5.

It is always inadvisable to express opinions upon the rights of the parties before the trial and I do not think that anything I have said should be taken as deciding anything more than that the former judgment is not *necessarily* conclusive against the defendants. It might be that if they had notice of the action and failed to intervene a contrary result would be arrived at, but

that should be left to the trial Judge to decide after he has heard the evidence.

I think the appellant is entitled to his costs of the appeal and of the motion below in any event.

Since writing the foregoing judgment, it has been suggested to me that there is some misapprehension as to what was before my brother Beck for decision. It seems that he had before him, though we have not, the pleadings and proceedings in the former action and that some question of the burden of proof when the case comes to trial was considered and dealt with by him. In view of this, it may be advisable to point out clearly that we have here nothing to do with any question of burden of proof at the trial. As the case was argued before us, all we have to deal with is the question of the directors' right to raise a certain defence. It may possibly be, though I express no opinion upon it, because the question is not before us that when the case comes to trial all the plaintiff will need to do on the first instance is to prove his former judgment and the pleadings upon which it was based as well as the fact of the defendants having been directors at the time of the debt being incurred, and that then the onus may be shifted to the defendant. I say that this may be an arguable view, but we are not dealing here with any question of burden of proof at the trial. That is entirely for the trial Judge. We are dealing solely with the question of the defendants' right to go behind the former judgment.

SIMMONS, J.:—This is an appeal against the judgment of Mr. Justice Beck, *Guenard* v. *Coe*, 16 D.L.R. 513, in which he ordered that certain paragraphs of the statement of defence should be struck out. SIMMONS, J.

The contest arises out of the effect which should be given to sec. 54 of the Companies Ordinance, N.W.T., ch. 20 of 1901, which makes the directors of a company jointly and severally liable to the clerks, labourers, servants, and apprentices of the company for wages not exceeding 6 months, for services performed for the company, whilst they are such directors. Under the section, a condition precedent to bringing an action against the director is that the employee has sued the company and has obtained judgment thereon against the company, and unless an exe-

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cution has been returned against the company unsatisfied in whole or in part and "the amount unsatisfied on such execution shall be the amount recoverable with costs from the director." The effect of this section is this, that the return of the sheriff and the pleadings and judgment are *primâ facie* evidence of the claim against the director when an action is brought against him. The burden of displacing this *primâ facie* case is by the section placed upon the defendant director. To this extent and to this extent only, are the judgment and unsatisfied return of the sheriff binding and conclusive against the director.

In the result then it would be open to the director to allege any defence upon the merits, the onus of establishing his merits having been shifted upon him by the action in question.

On this view I therefore concur in the result of the judgment of Mr. Justice Stuart.

Walsh, J.

WALSH, J.:—The concluding words of sec. 54 of the Companies Ordinance, N.W.T. 1901, ch. 20, under which the action is brought are, "and the amount unsatisfied on such execution shall be the amount recoverable with costs from the directors." The only doubt which I have upon this appeal is raised by these words. It has been suggested that they amount to nothing more than a fixing of the maximum which the plaintiff can recover, but I think that cannot be so for without them the plaintiff could not recover more than that. In my opinion, it may be that they mean that when the plaintiff has proved everything else necessary to entitle him to a judgment the amount of that judgment is arbitrarily fixed for him by the section. Perhaps to that extent the judgment against the company is conclusive against the defendants in this action, but I do not think that it is as against them conclusive of anything else. At first sight it may appear an anomaly that the defendants in this action may shew if they can, notwithstanding the judgment against the company, that the company does not owe the plaintiff at all for wages, but that if they fail in this, they cannot dispute the amount of the plaintiff's claim. But may it not, after all, have been the intention of the Legislature while reserving to directors the right which they should in equity have to dispute their liability upon the ground that no debt of the character described in the section

exists, to say that once the existence of such a debt is established the directors must be bound by the recovery against the company? I do not think the words under consideration carry the matter any further than that. I think that the plaintiff must prove that he was a clerk, labourer, servant or apprentice of the company. He evidently thinks so too, for he has expressly alleged it in paragraph 2 of his statement of claim. In my opinion, the fact that he has recovered a judgment against it in another action to which these defendants were not parties does not establish that fact. In *Welch* v. *Ellis*, 22 A.R. (Ont.) 255; and *Herman* v. *Wilson*, 32 O.R. 60, decided under the corresponding section of the Ontario Act, which in all material respects is identical with our sec. 54, judgment went against the plaintiff because in the opinion of the Court, he was not a labourer, servant or apprentice. It does not seem to have been even suggested in either of these cases that the recovery of the judgment against the company was any evidence of the fact that the plaintiff occupied such a position.

The plaintiff must shew that the company was indebted to him for wages. I am not at all sure that there is so close an analogy between the old proceeding by *scire facias* and such an action as this as to warrant the application to this case of the principle laid down in the citation from Lindley upon which my brother Beck practically rested his judgment. Whether or not this is so, I prefer the other and I think more generally accepted view that the judgment against the company being *res inter alios acta* is inadmissible in evidence as against these defendants for the purpose of proving the existence of the debt. In Halsbury, vol. 13, par. 744, at page 542, the law is thus stated:—

> A judgment in *personae* is conclusive proof as against parties and privies of the truth of the facts upon which such judgment is based, but, excepting as above stated, to prove its existence, date and consequences, it is inadmissible in evidence as against strangers except (1) where it determines a question of public right and is admissible as evidence of reputation; (2) in bankruptcy or administration proceedings; (3) in divorce cases; and (4) to some extent in patent actions.

A company director is practically a statutory guarantor of the debts of the company to the extent and under the conditions prescribed by the section. When he accepts office, he, in effect, says to every employee of each of the favoured classes that if

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the company does not pay his wages he will do so to the amount and under the circumstances set out in the section. In an ordinary action by a creditor against a surety, a judgment or award obtained by the creditor against the principal debtor is not evidence against the surety. It is *res inter alios acta*. *Re Kitchin, Ex parte Young*, 17 Ch. D. 668. I cannot see why this principle is not equally applicable to such a case as this. If the judgment against the company is conclusive proof of everything except the fact that the defendants were directors of the company when the debt was incurred, some simpler method of enforcing payment by them would probably have been adopted than that which the plaintiff is now required to adopt. It does not follow that because the defendants were directors during the alleged period of employment, they were, therefore, in a position to see that the action against the company was strictly proved and that it would, on this account, be unjust to make the plaintiff prove it over again in this action. They may not, in fact, have been directors at all when the action was commenced against the company, for the plaintiff is given a year from the time that the debt became due within which to sue the company, and within that year the defendants may have ceased to occupy the office of directors.

The appeal, as originally taken, was against only so much of the order complained of as strikes out paragraphs 1, 2, 4 and 6 of the statement of defence. The order striking out paragraph 4 is obviously an error arising doubtless from some confusion in the numbering. It is perfectly plain from the reasons for judgment of my brother Beck, that he never intended to strike it out, although he expressly names it, and regardless of what is done with the other paragraphs, his order should be varied by striking from it the direction as to it. For the reasons which I have attempted to give, the appeal should be allowed as to paragraphs 1, 2 and 6. On the hearing of the appeal, counsel for defendants asked leave to amend his notice of appeal by appealing as well against that part of the order which strikes out paragraph 5 of the defence. I cannot see that it is at all material. The knowledge or lack of knowledge on the part of the defendants of the recovery of judgment can make no difference in their liability. It is not alleged by the plaintiff that the defendants were parties to the action in which it was recovered and so it is not necessary for them

to allege that they were not, and it is not necessary for them to allege that they are bound by it. They will have upon the record, if the other paragraphs stand, everything that is required to enable them to contest the plaintiffs' claim and I think that paragraph 5 might as well stay out.

Some reference appears in the appellant's factum to the part of the order which strikes out paragraphs 9, 10 and 11 of the defence, but as no appeal has been taken with respect to these paragraphs, we cannot consider them.

I would allow the appeal as to paragraphs 1, 2, 4 and 6 with costs.

Appeal allowed.

SMITH v. REID.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. March 16, 1914.

1. INFANTS (§ I C—11)—CUSTODY—PARENT'S CLAIM—CONSENT TO ANOTHER'S CUSTODY.

A father *primâ facie* has a right to the custody and control of his children and this right will ordinarily be accorded where there is no evidence (*a*) of his abandoning the child, (*b*) of his moral turpitude or misconduct, or (*c*) that the best interests of the child stand in the way.

[*R.* v. *Gyngall*, [1893] 2 Q.B. 232, applied.]

2. INFANTS (§ I C—11)—CUSTODY—PARENT'S RIGHT TO—RELINQUISHING AGREEMENT, EFFECT.

Parents cannot enter into an agreement, legally binding, to deprive themselves of the custody and control of their children, and if they elect to do so, can at any moment resume their control over the infants provided the best interests of the child, which are always the determining factor, do not conflict.

Statement

APPEAL from the order of Brown, J., in favour of the father of an infant upon the father's application by way of *habeas corpus ad subjiciendum* to compel the appellants to restore the infant to the father's custody and control.

The appeal was dismissed.

F. L. Bastedo, and *A. R. Brooksmith*, for the appellants.

A. E. Vrooman, for the respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an application by James Smith, the father of an infant, Bessie Smith, for a writ of *habeas corpus*

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ad subjiciendum directing Walter Reid and Bella Reid to have the body of the said Bessie Smith brought before a Judge in Chambers with a view of having the said infant restored to the custody and control of her father. The application was heard by my brother Brown, who made an order directing the respondents to deliver the child to the applicant within thirty days. From that order the respondents now appeal. They seek the reversal of the order on two grounds, first, that the father had abandoned his child, and secondly, that it is in the best interests of the child that she should remain where she is. The child in question was born on July 15, 1906. In giving birth to her the mother died. The evening after the mother's death the appellants were at Smith's house, and they say that Smith asked them to take the child and keep it until it could run around with the other children. The appellants asked him how long that would be, and Smith stated about a year. The parents say they agreed to this on the condition that if Smith did not take the child away by the end of the year the child was to be theirs, and that to this condition he agreed. Smith denies that he made any such agreement. At that time Smith had four other children, aged respectively 10, 8, 6, and 3 years. The appellants took the child home. At the end of a year it could not run around, and Smith did not come for it until it was fourteen months old, when he took it home. Mrs. Reid in the meantime had become attached to the child, and missed it very much after it was gone. For the next two months she, at intervals, went to Smith's place to see the child and had the child at her own home. At the end of two months Smith brought the child over to Reids one day and left her there. Shortly afterwards he came for her, but Mrs. Reid begged him to let the child stay with her, saying that the child was the brightest spot in her heart. Mrs. Reid had a short time before lost her only child. Smith, after considering the matter a few minutes, said, "All right," and went away. He says he left the child because of Mrs. Reid's importunity, and that he felt sorry for her. The child has ever since remained at the Reids, where she has been treated with great kindness. She is now seven years old. The two families live in the country, and about three miles from one

another. From the time the appellants took the child until last fall the families were friendly and frequently visited one another, and the child often went home to play with her brothers and sisters. No objection was raised by Smith as to the way the child was being brought up and cared for by Mrs. Reid. Last fall Smith's other children were attending what is known as the Percy school. The appellants sent the child Bessie Smith to the Kisbey school. Smith, on hearing of it, said he wanted Bessie to go to the school attended by her brothers and sisters. The appellants would not send her there. He then said he would take her home. The appellants refused to give her up. Smith has living with him a Miss Mitchell, who is between fifty and sixty years old, and his niece, aged 23, as well as his own children, and these persons, he says, can properly look after the child. Both families are well-to-do, and may even be called wealthy. Intellectually and socially they may be said to be on a par, and they both attend the same church. Under these circumstances are the appellants entitled to have the order reversed?

Primâ facie a father has a right to the custody and control of his children, and that right will not be interfered with unless he has abandoned or deserted his child, or has been guilty of moral turpitude or misconduct, or where, though he has not been guilty of misconduct, the Court is satisfied it would be detrimental to the best interests of the child that it should be restored to its father's custody: *R.* v. *Gyngall*, [1893] 2 Q.B. 232. I cannot in this case find any evidence of abandonment. The child was placed with the appellants in the first place under circumstances which undoubtedly made it in the best interests of the child that she should be so placed. What agreement, if any, was entered into at the time as to the child belonging to the appellants if Smith did not take her away at the expiration of a year it is unnecessary to consider. He took the child home when she was fourteen months old, thus resuming a father's relationship to and control over her. What took place subsequently had no relation to the original agreement. At Mrs. Reid's earnest solicitation, and because he had compassion on her loneliness, he subsequently left the child with her. Surely

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that cannot be considered as an abandonment by him of his child.

It was contended that as Smith had allowed the appellants to take charge of his child and to bring her up for the last five years, without interference on his part, he thereby lost his *primâ facie* right to her control. In Eversley on Domestic Relations, 3rd ed., 513, the learned author says:—

> Parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children, and if they elect to do so, can at any moment resume their control over them. If, however, as a matter of fact parents do relinquish their control (whether in pursuance of an agreement or not) and allow others to take charge of and rear them, they will not be permitted at the hazard of injuring the children to take them back into their own custody. The interests of the children are the sole guides of the Court as to what orders should be made: if the restoration to the parents' custody would be of manifest advantage to them, those in charge of them will be ordered to deliver them up to them, but not otherwise.

The interest of the child Bessie, therefore, is the determining feature in deciding whether or not her custody and control should be given to the father. If it is clearly shewn to be in her interest to remain in the custody of those who have brought her up, the Court should refuse to make an order directing her return. In this case I cannot see that there would be any advantage to the child to be left with the appellants. Both parties are well able to look after her material interests. Her surroundings, moral, intellectual and social, will be exactly the same with one party as with the other. With her father, however, it seems to me she would have this advantage—and I think, other things being equal, that it is a decided advantage—of being brought up in her own home and with her own brothers and sisters. Nothing is shewn to lead me to the conclusion that she would not be as well looked after at her father's house as at the house of the appellants. That being so, on what ground can we deprive the father of his *primâ facie* right to the custody of his daughter? It is said that the child has developed a great affection for Mrs. Reid, and that the Reids have a great affection for her. So far as the Reids are concerned, the Court cannot consider their sentiments or feelings. As far as the child is concerned, the rule is that where the child is very

young its wishes cannot be taken into consideration: Eversley, p. 523.

I am, therefore, of opinion that the order made by the learned Judge in Chambers is right, and should be affirmed. The appeal should be dismissed with costs.

Appeal dismissed.

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SMITH v. REID.

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British Columbia Supreme Court, Morrison, J. January 20, 1914.

1. HABEAS CORPUS (§ I B—7)—APPLICANT OUT ON BAIL—NON-DISCLOSURE.

The essential and leading theory of *habeas corpus* procedure is the immediate determination of the right to the applicant's freedom; and when a *habeas corpus* is obtained without disclosing so material a fact as that the applicant was not in custody at the time of the application, as he had been released on bail, it will be set aside.

[*Cox* v. *Hakes*, 15 App. Cas. 506, referred to.]

Statement

MOTION to compel an immigration official to make a return to a writ of habeas corpus.

The application was refused and the order for the issue of the writ was set aside.

J. E. Bird, for Bhagwan Singh, applicant.

W. B. A. Ritchie, K.C., for Inspector Reid of the Dominion Immigration service, respondent.

Morrison, J.

MORRISON, J.:—On October 7 last, upon the application *ex parte* of Bhagwan Singh, a writ of *habeas corpus* was ordered to be issued to Malcolm R. J. Reid, Dominion Government Immigration Superintendent and Inspector for the Port of Vancouver, B.C., directing him to have before a Judge of this Court, presiding at Chambers at Vancouver, forthwith on receipt of the said writ, the body of the said Bhagwan Singh, alleged to be detained in the custody of the said Reid. At the time this application was made Bhagwan Singh was not in custody, having been released on sufficient bail. This fact was not disclosed in the material read in support of the application nor by Mr. Steers, who then appeared for the applicant. This order lay dormant until November 19 following. Bhagwan Singh in the meantime changed his solicitors. On November 19 the writ was issued but not served on Reid, but by means of wireless message the fact of its issuance

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appears to have been communicated to him whilst en route to Victoria.

After arrival in Victoria, whence Bhagwan Singh was taken for deportation to Hong Kong, pursuant to the provisions of the Immigration Act, Mr. Reid applied for and obtained an order for another writ of *habeas corpus* from my brother Murphy there. This writ was issued and duly served. Notwithstanding all this, Bhagwan Singh was deported, and is now without the jurisdiction.

Application is now made to me upon motion served upon Mr. Reid requiring him to produce Bhagwan Singh "before the Court on Monday the 5th of January, 1914, and to make a return of the writ issued on the 19th of November, 1913." This notice is dated December 1, 1913. On December 4, another notice of a similar character, dated December 4, was filed and in due course served on Mr. Reid requiring him to appear on January 9, 1914.

From the material filed and submitted I am of opinion that the order of October 7 was obtained by the suppression or omission of a material fact, viz., that Bhagwan Singh was not in custody at that time.

"The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom": Halsbury, L.C., in *Cox* v. *Hakes*, 15 App. Cas. 506, 517, 60 L.J.Q.B. 89; *Barnardo* v. *Ford*, [1892] A.C. 326, 335, 61 L.J.Q.B. 728.

Then as to the subsequent course of the matter, I think the applicant has prejudiced his right to a return: *per* Lord Watson in *Barnardo* v. *Ford*, *supra*. As to the right to reverse an order obtained *ex parte*, see Hunter, C.J., in *Morrison, Thompson Hardware Co.* v. *Westbank Trading Co.*, 16 B.C.R. 33. The incident referred to in the material filed, that I was interrupted in my sittings at the Vancouver Criminal Assizes by a solicitor on the applicant's behalf for the purpose of instructing the registrar to forward a message to Mr. Reid that the writ had been issued, cannot, I submit, in any way be taken as a confirmation of my previous order. I merely told the registrar that if a writ had, in fact, been issued, I saw no reason why he should not state that fact in a telegram to whomsoever might be interested in that occurrence.

Considerable stress was laid in the affidavits filed on behalf of Bhagwan Singh upon the alleged contumely displayed by Mr.

Reid when told of the proceedings leading to the issue of the writ, and which allegations are denied by him. As to that phase of this matter, all I have to say is that Mr. Reid is a responsible officer of a great department of government, and doubtless the Minister in charge of that department will take proper cognizance of the incident if founded on facts. Under all the circumstances I do not think I am called upon to display any undue sensitiveness concerning it. The dignity of the Court in such cases usually takes care of itself. The order of October 7, 1913, upon which is based the writ of November 19, 1913, is therefore set aside.

Order set aside.

GALBRAITH v. CANADIAN PACIFIC R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 29, 1914.

1. CARRIERS (§ II L 1—245)—SAFETY AT STATIONS—AS TO THROWING OFF BAGGAGE.

Negligence cannot be predicated against a railway company merely on its failure to protect an intending passenger, standing on a station platform on its line, from injury due to the unauthorized action of a passenger, unconnected with the railway company, in throwing off his baggage while the train passed through without stopping.

[*Blain* v. *C.P.R. Co.*, 5 O.L.R. 334, distinguished.]

Statement

APPEAL from the judgment of Metcalfe, J., in the plaintiff's favour.

The action was for damages for injuries sustained by the plaintiff while he was standing on a station platform on the defendants' line.

The appeal was allowed.

M. G. Macneil, for the plaintiff.

W. H. Curle, for the defendant.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—This is an action claiming damages for injuries sustained by the plaintiff while he was standing on the station platform at Ponemah, intending to take the train for Winnipeg. Ponemah is on the defendants' line of railway between Winnipeg and Winnipeg Beach and is about two miles south of the latter place. It is not a scheduled stopping-place

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for trains. There is no station-house, but merely a platform. On June 7, 1913, at 10.30 in the evening, the regular passenger train for Winnipeg started from Winnipeg Beach. Although no baggage was carried on the train there was a baggage car attached next to the engine, as a "buffer." While the train was standing at Winnipeg Beach some young men placed in the baggage car two large bundles, one being tents and the other tent poles. This was done without permission from the defendants or their servants. The young men accompanied by several young ladies entered the baggage car, the party intending to get off with their baggage at Ponemah. Soon after the train started, the conductor came into the baggage car and the party of young people urged him to stop at Ponemah. This the conductor refused to do, as to do so would be a breach of his orders. While the conversation was proceeding the train reached Ponemah, and the young men, before they could be prevented by the conductor and brakeman, flung the bundles out of the open door on to the platform. The plaintiff who was on the platform intending to board the train if it would stop, was struck in the face by the bundle of tent poles and severely injured. The train went on to Whytewold station, a mile and a half further on, where the party of young people got off.

The plaintiff was lawfully upon the platform at Ponemah at the time he was injured and there is no question raised either as to his right to be there or as to any negligence on his part. The trial Judge refused to enter a nonsuit and left the case to the jury. A verdict was found for the plaintiff, the damages being assessed at $300. The defendants ask that a nonsuit or a verdict for them should be entered upon the ground that there was no evidence of negligence on their part, and that the act complained of was not done by them or their servants or agents, or in the course of employment of their servants or agents.

There was no evidence to shew that any authority had been given to put the bundles in the baggage car, or that any of the defendants' servants or agents were aware that the bundles had been put on the train until after it had started on its journey. The evidence shews that the conductor and brakeman, who were

both in the car at the time of the accident, gave no permission to anyone to throw the bundles off the train. The act was done without permission and without any warning or intimation to these officials that there was any intention of doing the act. The injury was clearly caused by the unauthorized action of persons, unconnected with the railway company, who were travelling on the train.

In *Cunningham* v. *Grand Trunk R. Co.*, 31 U.C.R. 350, the plaintiff was in the employ of a contractor engaged in building fences along the railway line. While at his work he was injured by a crow-bar thrown from the train by the baggage master of the defendants. It was found, as a fact, that the baggage master was acting for the contractor in throwing off the crow-bar and was not acting within the scope of his employment with the defendants. The railway company was held not to be liable for the injury.

In *Walton* v. *New York Central Sleeping Car Co.*, 139 Mass. 556, a sleeping car porter in the employ of the defendants threw from the car a parcel belonging to himself which struck and injured a track repairer working on the railway line. It was held that this act had been performed by the porter wholly for a purpose of his own and that it was not within the scope of his authority. On this ground the defendants were held not liable.

In both the above cases it was sought to fasten upon the defendants the liability for the accident upon the ground that the injury was caused by a servant while engaged in the performance of his ordinary duties. The relationship of master and servant does not exist as between the defendants and the parties who caused the injury in the present case. It was caused by the unauthorized act of persons who were on the train as passengers and the act was done without warning and before prevention was possible.

The plaintiff relied upon *Blain* v. *Can. Pac. R. Co.*, 5 O.L.R. 334. That was a case where an assault was committed by one passenger upon another while both were travelling on the defendants' train. The question in that case was whether the

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conductor in charge of the train had acted negligently in refusing or failing to take reasonable steps to protect the plaintiff while lawfully travelling as a passenger on the train, it being the defendants' duty to take reasonable care and diligence in providing for his comfort and safety while conveying him to his destination. The principle upon which the decision was based has no application in the present case. Other cases were cited by counsel for the plaintiff but they do not afford any assistance to the plaintiff in establishing a claim against the defendants.

The appeal must be allowed and a verdict entered for the defendants. As the defendants do not press for costs, no order is made in that respect.

Appeal allowed.

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CALHOUN v. WILLIAMS.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Simmons, JJ. April 25, 1914.

1. BILLS AND NOTES (§ VI C—167)—WANT OF CONSIDERATION—CONDUCT OF PARTIES—ACCOMMODATION PAPER.

In determining whether or not a promissory note was given only as accommodation, the inconsistency of the conduct of the party denying that such was the case will be considered in conjunction with the indefiniteness and improbability of the agreement which he sets up in answer.

Statement

APPEAL from the trial judgment in the plaintiff's favour in an action for reimbursement in respect of accommodation notes paid by the plaintiff on the defendant's account.

The appeal was dismissed.

O. M. Biggar, K.C., for the appellant.

J. E. Wallbridge, for the respondent.

Harvey, C.J.

HARVEY, C.J.:—I agree with the learned trial Judge as to the improbability of the agreement which the defendant attempts to set up. I also agree with him that the evidence of Vardon does not go so far as to prove such an agreement though it, no doubt, might be considered in some respects corroboration. If the statement made by the plaintiff, of which he gives evidence, had been made under some circumstances, it might amount to a

binding promise, while under others it would be nothing more than an expression of an intention to do a gratuitous kindness. The evidence does not suffice to shew which, but the latter seems much more probable. Therefore, without considering whether the alleged agreement would be incapable of being enforced by reason of uncertainty, I think, for the reasons given by the learned trial Judge that his conclusion was correct, and I would dismiss the appeal with costs.

Harvey, C.J.

STUART, J.:—I concur in the result.

Stuart, J.

BECK, J.:—Some knowledge of the country over which the automobile was used enables me, I think, to appreciate the evidence with regard to the results of its being used as it was better than those who lack that knowledge and with this knowledge my estimate of the probabilities would be quite contrary to that of the trial Judge. I think, however, that the agreement alleged and attempted to be proved by the defendant is so vague in its terms as to be ineffective as an agreement, and that the only claim the defendant can have is a claim for the use of the automobile and its depreciation during its use against either the plaintiff or the company, and that an action based upon such a claim still remains open to him as it is not set up and sufficient evidence has not been given to enable us to deal with it in this action.

Beck, J.

I therefore agree that the appeal should be dismissed with costs.

SIMMONS, J.:—Plaintiff's claim is upon two bills of exchange for $1,000 and $2,000 of March 29, and May 19, 1913, respectively, drawn on the plaintiff by the defendant, payable to the order of the Merchants Bank of Canada, and accepted by the plaintiff for the accommodation of the defendant, and which were paid by the plaintiff.

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The defendant denies that the bills of exchange were accepted by the plaintiff for his accommodation. The defendant alleges an agreement with the plaintiff whereby the plaintiff was to have the use of defendant's automobile for a livery business between Edmonton and Athabasca Landing, in consideration of the plaintiff paying the defendant for a new Cadillac car of

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1912 model. The defendant says the bills were accepted by the plaintiff in payment of the said undertaking of the plaintiff to pay for said new car. The plaintiff denies the existence of any agreement with the defendant to either purchase or pay for a new car. The evidence of the agreement is limited to the defendant's assertion of it and to certain statements alleged to have been made by the plaintiff to one Vardon, and at another time to one Randall, which are alleged to be admissions relating to the alleged agreement. Vardon says that between January and April, 1912, the plaintiff was telling him about plaintiff's prospects in the north of the Pelican Oil Co., and that Williams had put his car into *this* service, and that the plaintiff said:—

I told Mr. Williams if he used his car up I would get him a new one, and if it turns out as I expect it will, we can afford to buy him three.

At that time the plaintiff and defendant were interested in the Pelican Oil Co., and both were taking an active part in the operations of the company. In January, 1912, the plaintiff made a trip in defendant's car to the company's property some 75 miles down the river from Athabasca Landing. The defendant says the agreement in regard to the use of his car was that if it went through the ice on the river each would pay one-half the loss, and that the agreement to purchase a new car was subsequent to this trip. Vardon's evidence does not clearly indicate whether the remarks of the plaintiff referred to the arrangement under which he made the trip to the oil claims in January, 1912, or to a subsequent dealing, and is so indefinite that it may fairly be taken as an expression of the intention of the plaintiff or of the oil company. Randall's evidence is of the same character. He says:—

Mr. Calhoun told me in January that this car was to be used in the company's business, in the livery business, we were to get all the livery business we could to help to pay the expenses and that next spring he would give Mr. Williams a new car.

It further appears that the plaintiff had accepted a bill for $2,500, drawn by the defendant in December, 1911, upon him for defendant's accommodation, and then in May, 1912, accepted a bill drawn by defendant on him for $3,000. Payments were made on these two bills from time to time by the defendant, and renewals given by the plaintiff and defendant for the balances,

until the bills were reduced to $1,000 and $2,000 respectively. The defendant says that when the aggregate of the two bills was reduced to $3,000 he refused to make any further payments, as the acceptance by the plaintiff of the $3,000 draft was in payment of plaintiff's obligation to pay for a new car. Williams admits that in the previous November he had ordered two new cars—that there was no agreement as to the type or model of car to be supplied—but that he assumed it would be a 1912 model Cadillac, which would cost $3,000. Williams admits that no time was stipulated for the performance of the agreement—and he is not positive just when or where the agreement was made. The car which he says was to be replaced had been in use about a year, and according to the evidence was worth about $1,200 or $1,300.

The conduct of the defendant is not consistent with the existence of an agreement such as he alleges, and this, taken together with the indefiniteness of the alleged agreement and the improbability of the plaintiff making an agreement so disadvantageous to himself, fully justifies the conclusion of the trial Judge that the acceptances were given for the accommodation of the defendant.

The appeal should be dismissed with costs.

Appeal dismissed.

HAMANN v. GALBRAITH.

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Saskatchewan Supreme Court, Lamont, J. April 29, 1914.

1. VENDOR AND PURCHASER (§ II E—29)—RESCISSION—DEFECTIVE TITLE—PURCHASER'S RIGHTS.

A purchaser under an agreement for the sale of lands who has paid or tendered the purchase-price pursuant to the contract is entitled to have the contract rescinded and to be restored to his original position, if the vendor is neither ready nor able to make title to the property.

[*Forrer* v. *Nash*, 11 Jur. (N.S.) 789, 53 E.R. 854, applied.]

Statement

ACTION by a purchaser to rescind a realty contract of sale and for return of purchase payments and restoration to his original position, on vendor's failure to make title.

Judgment was given for the plaintiff.

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Lamont, J.

C. R. Morse, for the plaintiff.

T. Lynd, for the defendant.

LAMONT, J.:—The facts of this case are as follows: By an agreement in writing bearing date January 12, 1912, one Robert W. Caswell sold to one S. M. Bidwell the east half of section 7, township 37, range 5, west of the third meridian, for $120,000, payable $12,000 in cash and the balance by instalments spread over four years. The agreement contained a clause that the purchaser might subdivide the property, and upon registration of the plan or plans of subdivision the vendor agreed to execute a transfer of one or more entire blocks of not less than five acres upon certain terms and conditions therein specified. By another agreement in writing, Bidwell sold the said property to D. D. Campbell & Co. for $136,000, payable by instalments spread over four years. This agreement contained a clause that upon default in payment of any instalment of purchase money the whole amount thereof should become immediately due and payable. It also contained the same provision as to subdividing and making title to a block or blocks upon registration of the plan of subdivision as was contained in the agreement between Caswell and Bidwell. Campbell & Co. subdivided a portion of the land, but no plans or subdivision were ever registered. By an agreement dated November 1, 1912, Campbell & Co. sold to the defendant Galbraith lots 12 to 21 in block 36, Devonshire Heights Annex, as the subdivision was then called, for $1,646. Galbraith paid $1,540 and agreed to pay the balance of $106 in two payments, $53 and interest on May 1, 1913, and $53 and interest on November 1, 1913. On November 30, 1912, Galbraith entered into an agreement in writing with the plaintiff whereby the plaintiff agreed to trade him a five-passenger touring automobile for the said lots. The car was value by the plaintiff and accepted by the defendant at $1,540, and the plaintiff agreed to pay the balance of $106 on the days and times set out in the agreement from Campbell to the defendant. The plaintiff delivered the automobile to the defendant. On November 1, 1913, the last payment of purchase-money fell due. On November 6, the plaintiff went to the de-

fendant and tendered him $106 and interest thereon, and also a transfer of the lots for execution. Galbraith refused to take the money or execute the transfer, as he could not make title to the lots. On the same day the plaintiff went to D. D. Campbell & Co. and tendered to them the balance due on the lots and also a transfer for execution. They also refused to accept the money or sign the transfer, saying that they could not make title to the lots. The plaintiff then brought this action, in which he claims $1,540, the value of his automobile, and damages.

The evidence shewed that on November 13, 1913, one week after the plaintiff made a tender of the balance of the purchase money, Bidwell obtained an order *nisi* for foreclosure out of the Supreme Court which recited that there was then due to him under his agreement with Campbell & Co. the sum of $58,546.01, and which decreed that unless the said sum was paid into Court by January 2, 1914, all the right, title and interest of Campbell & Co. and those defendants claiming through or under them which were named therein (of whom Galbraith was one) would be foreclosed absolutely. Up to the time of the hearing of this action the money had not been paid, although no final order of foreclosure had been taken out. Under these circumstances, is the plaintiff entitled to a return of the amount paid by him on the lots? I am of opinion that he is. The time for the completion of the agreement had arrived. The plaintiff had paid or tendered everything he was called upon to pay in order to be entitled to a conveyance of the lots. Neither the defendant nor Campbell & Co. could make title to the property, presumably solely because Campbell & Co. could not provide the money necessary to make their payment to Bidwell. On November 6, when the plaintiff presented the transfer for execution, Campbell & Co., by their own admission, could not make title, and it has not been shewn that they were subsequently in a position to do so; in fact it was admitted on the argument that they were not at the time of the hearing able to make title to the lots. That being so, the plaintiff is entitled to have the contract rescinded and to be restored to his original position: *Forrer* v. *Nash*, 11 Jur. (N.S.) 789, 53 E.R. 854; *Bellamy* v. *De-*

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benham, [1891] 1 Ch. 412. The plaintiff being entitled to repudiate the contract, is also entitled to the costs he incurred in investigating the title and other expenses incurred in consequence of entering into the agreement: *Re Hare and O'More's Contract*, [1901] 1 Ch. 93 at 96. The costs the plaintiff was put to amounted to $10. There will, therefore, be judgment for the plaintiff for $1,540 and interest thereon at 5 per cent., and also for $10 damages, together with the costs of this action.

Judgment for plaintiff.

JOHNSON v. ROCHE.

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Nova Scotia Supreme Court. Trial before Ritchie, J. April 23, 1914.

1. CORPORATIONS AND COMPANIES (§ V C 1—186)—SALE OF SHARES BEFORE ISSUE—ORGANIZATION NEVER COMPLETED—DAMAGES.

Default under a contract whereby a fixed amount of common stock in a railway company was to be delivered within six months will entitle the purchaser to damages, although the organization of the company was never completed and the common stock was, in consequence, never issued.

[*Great West R. Co.* v. *Rous*, L.R. 4 H.L. 650, applied.]

2. DAMAGES (§ I—3)—NOMINAL DAMAGES—FAILURE TO PROVE SUBSTANTIAL DAMAGES.

Nominal damages only will be awarded for breach of a contract to transfer and deliver within a limited period, shares in a company thereafter to be organized and which was never organized, if no evidence is adduced to prove what the value of the shares would be if the organization were completed, having regard to issues of bonds or of preferred stock taking priority over the common stock in question.

Statement

ACTION claiming damages for breach of contract to transfer shares in a company known as the Margaree Coal and Railway Co., Ltd., tried before Ritchie, J.

Judgment was given for the plaintiff.

H. Mellish, K.C., and *E. P. Allison* for plaintiff.

T. S. Rogers, K.C., and *J. L. Ralston*, for defendant.

Ritchie, J.

RITCHIE, J.:—The plaintiff is the wife of W. H. Johnson. A contract was entered into between W. H. Johnson and the defendant which is as follows:—

It is hereby agreed by and between William H. Johnson of Halifax in the county of Halifax of the first part and William Roche of Halifax

aforesaid, of the second part: That the party of the first part agrees to sell and the party of the second part agrees to purchase four square miles of coal lands at Chimney Corner in the county of Inverness, Nova Scotia, now held by the party of the first part under leases Nos. 222, 223, 224 and 225 from the Government of Nova Scotia, and which were recently under option of purchase to Mr. E. L. Thorne, and in part held by the party of the first part under option of purchase from S. George Cook, at present of Sydney, for the price of eleven thousand dollars in cash and seventeen thousand dollars of common stock of the Margaree Coal and Railway Co. Ltd., said stock to be delivered within six months from date hereof. The cash to be paid on the delivery of the good and sufficient transfers for said coal areas and leases from the party of the first part and his co-owner, S. G. Cook, to the party of the second part.

Dated at Halifax this 5th day of November, A.D. 1909.

Signed, Sealed and delivered in the presence of ALFRED S. MORRISON. } WM. H. JOHNSON. (L.S.)

The rights of W. H. Johnson, under this contract, passed to the official assignee for the county of Halifax, under an assignment made by W. H. Johnson under the Assignments Act. And subsequently, the official assignee, in consideration of $100 assigned the rights of W. H. Johnson in the contract to the plaintiff. The $11,000 mentioned in the contract was paid to W. H. Johnson when the contract was entered into and the action is for damages for the non-delivery of seventeen thousand dollars of common stock of the Margaree Coal and R. Co. Ltd. The stock has not been delivered, in fact the company has never been organized. At the time when the contract was made, the defendant, I have no doubt expected that before the six months elapsed, money would be raised in England to float the company, in which event, the company would have been organized and the stock issued and delivered, this I have no doubt was what the defendant thought and intended to do. I am equally clear, that W. H. Johnson was fully aware of the position which I have indicated and that he also knew that at the time when the contract was made, the Margaree Coal and R. Co. had no property or assets of any kind. I am very confident that W. H. Johnson had full knowledge as to the position of the company and that it would not become a going concern until the money was obtained in London to float it.

Mr. Rogers, on behalf of the defendant, contends that, in

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view of the situation and Mr. Johnson's knowledge of it, the proper construction of this contract is that there is no liability on the part of the defendant to deliver the stock until the successful flotation of the company. I am unable to adopt this view, I have before me a contract absolutely clean cut, plain and simple on its face and without any ambiguity or room for conjecture or doubt as to its meaning. I must be guided by the plain, literal meaning of the words used, and I cannot go counter to them, even though I may think it very likely that both parties at the time contemplated the delivery of the stock when the company was on its feet, for this view I have the authority of Lord Westbury in *Great Western R. Co.* v. *Rous*, L.R. 4 H.L. 650. I refer particularly to pages 659 and 660. Lord Westbury was convinced that the literal meaning of the contract was being used for a purpose which it was never intended to have, and he would have been glad to get away from the literal meaning if he could have done so without violating well-known general principles of construction. I am in the same frame of mind in this case, but I cannot, by way of construction, make a contract for the defendant essentially different from the contract which he has made for himself.

Time is not made of the essence by the contract, and therefore the defendant was not tied down to the six months; performance within a reasonable time thereafter, while not in pursuance of the contract, would operate in satisfaction of the breach, and, of course, time may be made essential by either party to a contract requiring completion within a fixed time. In this case, more than a reasonable time has elapsed for performance and a notice requiring performance was given. I must therefore, entertaining the view which I have expressed in regard to the construction of the contract, hold that there has been a breach of the contract on the part of the defendant. In regard to the question of construction I may add that I have carefully considered the cases cited on behalf of the defendant, but I cannot see that any of them apply to a contract expressed in the language which the parties have used in the contract under consideration.

It was further contended that the contract had been performed by an allotment to Johnson by the promoters of the company of the right to get shares, and this was consented to by Johnson. Exhibit W/G is relied on in this connection. In my opinion, this was in no sense an allotment of shares, it was merely an ascertainment and consent as to the number of shares that the persons entitled to shares should have upon the basis of the value being in English money instead of Canadian money. As an authority for the proposition that exhibit W/G constituted an allotment equivalent to or taking the place of delivery of the shares, the case of *Mitchell* v. *Newhall*, 15 M. & W. 308, was cited. In that case, the defendant gave the plaintiff, a stock broker, an order to purchase for him 50 shares in a railway company; there were no shares of the company on the market, but the plaintiff procured letters of allotment for the shares; the evidence shewed that such letters of allotment were commonly bought and sold on the market as shares. The judgment was based on this rule of the Stock Exchange, and in view of this rule, the purchase of the letters of allotment was held to be a good execution of the order. I think this statement of the case is sufficient to demonstrate that it is not an authority for the proposition for which it was cited. I do not think that Mr. Thorne's undertaking to deliver shares when issued satisfied the defendant's obligation under his contract, nor do I think that the shares, which it was proposed at one time to issue to Mr. Johnson, were shares called for by the contract, as the company at the time was not in a position to issue such shares; it does not seem to me to be necessary to elaborate this.

There is an issue of fact between Mr. Johnson, on the one side, and the defendant and Mr. Morrison on the other side. Mr. Johnson says that Mr. Morrison and the defendant, both being present at the same time, told him that the stock in the company had been actually underwritten, this is denied by the defendant and Mr. Morrison, and I accept their testimony, I do not impute intentional untruthfulness to Mr. Johnson, I have no doubt that words of strong expectation were used, which, after the lapse of time, Mr. Johnson may now think were representations of an actual existing state of affairs.

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The remaining question is as to damages and here the burden is on the plaintiff to satisfy me as to what his damages are. This has not been done. I am not satisfied from the evidence that the plaintiff has sustained any damages by the non-delivery of the stock other than nominal damages. The damages to which the plaintiff is entitled depend upon the value of the common stock of this company which has never been organized and in which no stock has been issued. I must find out the value of the shares before I can assess damages, and it is impossible, so far as I can see, for me to ascertain whether the value of the shares, when issued would be nil, or par, or above or below par.

It is suggested that I should give the plaintiff the par value of the shares; I think not, unless I can gather from the evidence that they would be worth par.

It is further suggested that I can assess the damages by going to the value of the areas, which it is proposed to transfer to the company when it is organized, but it is the value of the shares I must ascertain, not the value of the areas. In ascertaining the value of the common stock of a company, it surely would be necessary to know what the bond issue was and how much preferred stock there was. A company may own very valuable property and still its common stock may be of no value.

I do not give the plaintiff damages because I do not know upon what principle I can assess them and I am not justified in making the defendant pay damages unless I do it upon some definite principle. It has been held that a Judge, in some cases, may make a guess at the damages, but I have no material upon which I could make a reasonable guess.

The plaintiff will have judgment for $1 by way of nominal damages and his costs.

Judgment for plaintiff.

WATERS v. CAMPBELL.

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Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ.
April 25, 1914.

1. CONFLICT OF LAWS (§ I B—11)—CONTRACT IN FOREIGN COUNTRY—ENFORCEMENT IN DOMESTIC FORUM—QUANTUM.

In fixing a foreign solicitor's fees as between him and his client for foreign legal services in an action on a so-called promissory note given by the client in payment thereof, the court will (in the absence of champerty) measure the reasonableness of the amount claimed on the basis of the rate or standard of payment at the place and in the courts where the services were performed as distinct from the standard for local legal services.

[*Waters* v. *Campbell*, 14 D.L.R. 448, reversed in part.]

Statement

APPEAL by the plaintiff from the judgment of Beck, J., *Waters* v. *Campbell*, 14 D.L.R. 448, 25 W.L.R. 838.

The appeal was allowed in part.

C. C. McCaul, K.C., for the plaintiff, respondent.

H. H. Parlee, K.C., for the defendant, appellant.

Harvey, C.J.

HARVEY, C.J.:—I would allow this appeal. Assuming that the learned Judge was right in all his legal conclusions, as to which I express no opinion, I can see no reason for interfering with the agreement between the parties, for it is quite apparent that the learned Judge accepted the plaintiff's evidence that the note sued on was given in payment for services. Considering the nature of the case and the character of the work that the solicitor had to and did undertake and carry through and the results which he accomplished for the defendant's benefit, I find myself unable to say, upon the evidence adduced, that the amount of compensation agreed on and expressed in the note or agreement sued on was unreasonable or unfair to the defendant. In view of the learned trial Judge's finding of fact, I quite agree with him that the plaintiff has failed to establish a lien upon the property.

I would allow the appeal with costs and direct judgment in the plaintiff's favour for $1,100 with interest at 6 per cent. from September 9, 1911, with costs.

Stuart, J.

STUART, J.:—I think this appeal should be allowed in part. With everything that is said by the learned trial Judge and my

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brother Simmons as to champerty and the relationship of solicitor and client I entirely agree. But with much respect I feel compelled to take another view as to the compensation that should be allowed to the plaintiff.

First, however, I would point out that the action was brought merely upon a promissory note or what was alleged to be one. The defence originally filed was denial of indebtedness and of consideration. There was no suggestion by either party in the pleadings that the note had its origin as payment for services between solicitor and client. During the trial, however, leave was given by the Court to amend the defence raising a plea of champerty. The trial was adjourned in order that evidence might be taken in Chicago as to the law of Illinois upon the question of champertous agreements, and it was to evidence then taken that I think proper weight has not been given.

I agree that the burden was upon the plaintiff of shewing that the sum of $1,000 was a reasonable allowance for the services performed. But, in my humble opinion, the measure of reasonableness is the rate or standard of payment at the place and in the Courts where the services were performed. With respect I do not think we are entitled to apply the standard which would be enforced as between a client and a solicitor for services performed in the Courts of Alberta to services performed in the Courts of Illinois. I think the matter should be treated exactly as if the plaintiff were suing a defendant whom he had succeeded in serving with process in Alberta for services performed, say, in regard to the erection of a building in Chicago, where the contract furnished no guide, and the standard of reasonableness had to be applied. The proper enquiry would be what was a reasonable remuneration according to the prices for such services prevailing in the place where the services were performed. Upon this point the evidence is all by commission and is all one way. It is true that much of the evidence is based upon the theory of a contingent fee and of agreement for a portion of the property recovered. But once we reject the champertous agreement I see no reason why the proportions given should not be taken as some guide as to what the services would there be considered worth in cash, without re-

ference to a share of the property. O'Reilly, a Chicago attorney, swore one-third or one-half would there be considered a reasonable fee if the property recovered were worth $14,000. On a question by the defendant's counsel, which, I think, minimized what was done very considerably, he said from $50 to $150 would be reasonable. Fred. C. Smith, another attorney who had much to do with the actual work performed, said that $1,500 would not be an unreasonable fee, in one place adding, it is true, "in view of the nature of the contract," *i.e.*, the champertous contract, but in another place making no such limitation. Frank D. Comerford, another attorney, said from twenty-five to fifty per cent. of the amount recovered would not be an unreasonable contingent fee. And the plaintiff himself gives similar evidence.

Now, no doubt all these statements are tinged with the idea of a champertous agreement, but at the same time, I think they furnish some guide, and in the absence of any other evidence, I think they alone and not our own ideas as to the value of the services if they had been performed here, should be the sole guide. And even in fixing counsel fees here our tariff of costs takes into consideration the amount claimed or recovered. There can, therefore, not be anything essentially illegal or unjust in considering the amount of the property recovered when we have to fix the amount of compensation which should fairly be allowed.

Taking the evidence before us I conclude that the amount charged is shewn to be reasonable according to the rate of remuneration prevailing in the Courts of Illinois.

With regard to the claim for a lien I am unable to say that the trial Judge was clearly wrong in his decision upon the facts.

The judgment should be set aside and judgment entered for the plaintiff for the sum of $1,109.94 with interest from September 9, 1911, at six per cent. until judgment, but dismissing the claim for a lien.

The plaintiff should have his costs of the appeal and of the action.

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Simmons, J.

SIMMONS, J.:—The plaintiff is an attorney in Chicago, U.S.A., and the defendant Katherine T. Campbell resides in Chicago. The claim of the plaintiff is upon a promissory note for $1,109.94, made by the defendant payable to the plaintiff, dated September 9, 1911, payable on demand after date at Edmonton, Canada. The plaintiff says a title deed to lots 1-12 inclusive, block 29, North Inglewood, a suburb of the city of Edmonton, was deposited with the plaintiff by the defendant by way of mortgage to secure the said note which is in the form here set out:—

Chicago, Ill., Sept. 9, 1911.

On demand, after date, for value received, I promise to pay to the order of John F. Waters, eleven hundred dollars at Edmonton, Canada, with interest at six per cent. per annum, after date, until paid.

And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of record to appear for me in such Court, in term time or vacation, at any time hereafter, and confess a judgment without process, in favour of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and fifty dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that he my said attorney, may do by virtue hereof.

(Sgd.) KATHERINE T. CAMPBELL.

Attest: George B. O'Reilly.

(Indorsed) Presented to acting postmaster Cairns, Nov. 3/11; no funds. R.C.D.

The defendant was then employed as a chorus girl and living separate from her husband against whom she had obtained from the Circuit Court of Cook County, Illinois, a decree of separation and alimony in the sum of $25 per month but she was unsuccessful in her attempts to collect anything from her former husband. The plaintiff, who was acquainted with the defendant, says she came to his office in April, 1910, and represented to him that she was in destitute circumstances and that she requested him to go and see Mr. Campbell and take her case against Mr. Campbell. The plaintiff alleges that he told Mrs. Campbell this was out of his line, but she insisted. He says he thought he would stop her by telling her his terms, namely, "I charge a half in all such cases." The plaintiff alleges that

she replied, "That is all right, I will give you one half." Plaintiff says he went to see Mr. Campbell then and was not successful in obtaining any payment from him. He reported this to Mrs. Campbell and she said to go after him. Plaintiff then prepared a petition for a writ of *ne exeat republica* and applied to the Court for the writ; the application though opposed, was, however, successful, and in pursuance of the writ the sheriff arrested Campbell and brought him to the plaintiff's office After some negotiation Campbell agreed to transfer to Mrs. Campbell his interest in a contract for the purchase of 40 acres in Baldwin county, Alabama, and in the title to 12 lots in Inglewood subdivision of Edmonton in full satisfaction of her claim against him for alimony. This was accepted by Mrs. Campbell and the plaintiff sent Smith, an assistant in his office, to have the terms of the settlement entered as a decree of the Court. Plaintiff says that shortly after this Mrs. Campbell came to his office, "and I saw that there was something in sight, and something tangible and I asked her to sign a written contract setting forth what my fee was to be, which she did," is the way plaintiff puts it. It was brought out, however, on cross-examination, that, before the plaintiff asked the defendant to sign a written agreement for a half interest that he had made inquiries and ascertained that the Edmonton property was valuable. The contract is as follows:—

> For and in consideration of one dollar to me in hand paid by John F. Waters, I hereby employ John F. Waters my attorney at law and in fact to institute and prosecute to final judgment, case I have pending in the Circuit Court of Cook county, Illinois, No. 266,872, or to compromise the same at such sum as he may deem right and proper; and for his services rendered and hereafter to be rendered, I agree to pay him a sum of money equal to one half of any sum that I may receive, either by suit or compromise. Dated Chicago, May 7, A.D. 1910. KATHERINE T. CAMPBELL. Witness: Fred C. Smith.

It may be noted that the written agreement is dated May 7, 1910, and on that date all matters in the suit as against Mr. Campbell had been settled and an agreement to this effect executed by Campbell and Mrs. Campbell on April 25, 1910 (see case, p. 10). On April 26, 1910, Waters mailed to the registrar of land titles at Edmonton for registration a quit claim deed

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from Campbell to Mrs. Campbell and this was returned to Waters by the registrar as it was not in the form required by the Alberta statute.

The plaintiff admits that at the time of signing of the memorandum Mrs. Campbell did not know the value of the Edmonton property. The plaintiff afterwards got a transfer from Campbell to Mrs. Campbell executed in accordance with the Alberta Real Property Act. In the meantime he was insisting upon the defendant giving him a transfer of a half interest in the Edmonton lots, but he says she kept putting him off. Subsequently Mrs. Campbell also got a transfer from Mr. Campbell to herself of the lots in question and had this transfer registered in the land titles office at Edmonton and a certificate of title issued to her for the lots. She informed the plaintiff of this fact in December, 1910. The plaintiff says that in September, 1911, when defendant signed the note sued on he realized that she had got the better of him for, as he says, "Well, I saw I was up against it," and that then she agreed to give him $1,000 for his services and $100 for money lent by him to her and the note was executed in pursuance of this agreement. The defendant's version of the transaction is quite at variance with that of the plaintiff. She denies the verbal agreement and she explains the written agreement by saying that the plaintiff told her it was not of any value. In regard to the note she says the plaintiff was to redeem the Alabama property by paying to vendors $2,200 and she was to pay one half of this sum and the plaintiff one half and each have a half interest in that property and that the note for $1,100 was given to the plaintiff in pursuance of this agreement.

The plaintiff says the quit claim deed for the Edmonton lots was deposited as a security for his claim under the agreement whereby he was to receive one half of the property. The defendant denies this and as to this feature of the evidence the learned trial Judge believed her statement in preference to that of the plaintiff.

The learned trial Judge has found the agreement of May 7, 1910, to be champertous and therefore not enforceable in this

Court so far as it affects the property in question. In regard to the claim arising out of the note although the judgment does not specifically say so, the inference is that the claim was dealt with as one between solicitor and client in which the Court in its equitable jurisdiction had the right of review and the amount was found to be excessive and reduced to $250.

The agreement, exhibit 2, is unquestionably one which, under our law, would be champertous: *Hutley* v. *Hutley* (1873), L.R. 8 Q.B. 112. This is the case whether the action is already in progress or agreed to be instituted or is only contemplated by the parties: *Sprye* v. *Porter* (1856), 7 El. & Bl. 58, 119 Eng. R. 1169. Any purchase of the subject-matter of an action by a solicitor who is engaged in carrying on the action whether as the solicitor on the record or not, from his client, is voidable at the client's option: *Simpson* v. *Lamb*, 7 El. & Bl. 84, 119 Eng. R. 1179. So also is a mortgage for money to enable a client to sue, which is to be repaid with a large bonus if the action succeeds: *James* v. *Kerr* (1888), 40 Ch.D. 449. The evidence of the plaintiff is that the agreement, ex. 2, is not champertous in the State of Illinois as there was no stipulation to pay costs. Champertous acts are contrary to public policy and come within that class which will not be enforced by our Courts whether valid or invalid in the territory or county where they are made: *Hope* v. *Hope*, 8 DeG. M. & G. 731, 44 Eng. R. 572; *Forbes* v. *Cochrane*, 2 B. & C. 456, 107 Eng. R. 450; *Grell* v. *Levy*, 16 C.B. (N.S.) 73; *Kaufman* v. *Jerson*, [1904] 1 K.B. 591; also Wharton on Conflict of Laws, vol. 2, sec. 490; Dicey on Conflict of Laws, 2nd ed., 551.

In *Hope* v. *Hope*, 8 DeG. M. & G. 731, 44 Eng. R. 572, an Englishman married a Frenchwoman and they resided in France where their children were born and suits were instituted in both countries between them and were compromised by an agreement, part of which was that the wife would facilitate proceedings for a divorce, and another part was that one of the children should remain with the mother, and a third part related to payment of an allowance to the wife, it was held that even if the parties were domiciled in France and the agreement to

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be governed by French law and to be valid in France, and to have been performed as to the parts which were invalid according to English law it could not be enforced in England as to any part of it.

The learned trial Judge has found upon the evidence that there was no deposit of title deeds as a security such as the plaintiff alleges.

The plaintiff does not allege in his statement of claim any claim for enforcement of a solicitor's lien upon the documents in question, and it does not arise out of the pleadings and need not be considered.

A difficulty arises in regard to the enforcement of the note since it was given after settlement of all matters in dispute in the action between Campbell and Mrs. Campbell and after the plaintiff had been unsuccessful in having the champertous agreement carried out by the defendant. It is true the plaintiff says it was given in lieu of the agreement, ex. 2, but the evidence of the plaintiff supports the view that the defendant refused to recognize the champertous agreement and the note was given for the amount which the parties agreed upon as the plaintiff's compensation. The defendant denies this but accepting the plaintiff's version as the one most favourable to him it does not appear that he can succeed. Standing, as he does, in a fiduciary relation towards his client, the amount of remuneration is not left to be determined by the ordinary rules of contract. On the contrary any agreement made with his client must carry with it certain conditions and the burden of sustaining the agreement, if impeached, will be thrown upon the solicitor: *Re Baylis* [1896] 2 Ch. 107, at 119.

The plaintiff admits that quite aside from the question of illegality on the ground that the agreement was champertous, that the Courts of the State of Illinois will exercise equitable jurisdiction and review, and, if necessary, rectify a claim such as the plaintiff's claim in this action. It may be as the plaintiff's counsel contends, that, if the plaintiff brought his action in the State of Illinois, that the Court of that State would refer the account to the proper officer of the Court for taxation. The

plaintiff has, however, elected to pursue his remedy in this Court, and it is obvious that this Court should not make such a reference as there is no means of enforcing the same and this Court is quite within its right in reviewing the contract, and if unfair and inequitable the Court should rectify it. The amount allowed by the judgment appealed from having in view the services rendered seems to be quite adequate and I would therefore dismiss the appeal with costs.

Appeal allowed in part.

HILL v. HANDY.

British Columbia Supreme Court, Gregory, J. March 5, 1914.

1. MORTGAGE (§ VII C—158)—FORECLOSURE—FINAL ORDER—RE-OPENING ACCOUNTS—PURCHASER.

A final order of foreclosure may be re-opened for concealment of material circumstances from the court in the foreclosure proceedings, where the motion is made promptly, and this although the mortgagee had purported to make an agreement for sale of the lands after the final order to a person having notice of the foreclosure proceedings, where there is evidence of collusion between the mortgagee and the purchaser.

[See Annotation on Re-opening Foreclosures at end of this case.]

2. MORTGAGE (§ VII C—158)—OPENING FORECLOSURE—SERIOUS ERROR IN PLAINTIFF'S ACCOUNTS.

A final order of foreclosure may be vacated and the mortgage account re-opened where there had been concealment from the court on the plaintiff's part of material circumstances on the application for the order *nisi* and serious error to the prejudice of the mortgagor is shewn in the plaintiff's account upon which the foreclosure is based, if there has been no laches on plaintiff's part in moving and he did not obtain information until after the making of the final order of the time fixed for redemption.

3. PARTIES (§ I A 2—32)—PURCHASER UNDER FORECLOSURE—VACATING FINAL ORDER.

On vacating a final order of foreclosure, notwithstanding an alleged sale made thereafter by the mortgagee, the purchaser taking with notice of the foreclosure may be added as a party plaintiff where the mortgage accounts are re-opened.

Statement

MOTION to vacate a final order of foreclosure and to re-open the mortgage accounts.

The motion was granted.

C. M. Woodworth, for the defendant.

W. B. A. Ritchie, K.C., for the plaintiff.

Gregory, J.

GREGORY, J.:—I think the foreclosure order and the accounting must be reopened.

The plaintiff, the defendant, and McDonell, who purchased

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under the foreclosure order, were all partners in the transaction out of which these proceedings arose. They were joint purchasers of the property in question. Their vendor offered them a discount if they would anticipate the future payments. Handy, being unable to take advantage of this, agreed to let the others do so, and, in carrying out the scheme, all previous agreements were cancelled, and Handy was given an agreement dated February 28, 1913, direct from Hill, for his share, and it was his interest under this agreement which was foreclosed. Prior to this, the partners had sold a portion of the property to one Randall; and the plaintiff, between the date of the registrar's certificate, October 9, 1913, and the date fixed for final payment, November 15, 1913, collected the sum of $625 from Randall on account of the purchase, the defendant's portion of which he failed to bring into the account.

He also, in effect, deprived the defendant of his proportion of the growing crops, and assumed to exercise acts of ownership over them, and did not bring the value of them into the account. The defendant's interest in the crops was about $1,000. The plaintiff's answer, that the Randall moneys did not have to be brought in because they did not come out of property included in the agreement of February 28, and that the crops had not yet been moved, is not, I think, tenable. The Randall moneys came from the property in which they were in fact dealing, and the defendant should not, as has been urged, be driven to a separate action to recover the same. It is quite clear that the plaintiff intended to appropriate the crops, and he cannot now say that he did not succeed in doing so. In any case he admits that he received three bags of apples, and, though of little value, he should have accounted for them.

None of these facts were disclosed to the Judge who made the final order for foreclosure; the agreement of February 28, was the only circumstance mentioned to him.

The final order was made on November 20, 1913, and the sale to McDonell on December 5, 1913, at a price and on such terms as, together with the other circumstances of the case, indicate to me that the plaintiff and McDonell were acting in collusion to injure the defendant.

McDonell had, I believe, full knowledge of all that was going

on; and, in any case, having knowingly purchased under an order of foreclosure, he must be taken to have understood, as all such purchasers must, that the matter might still be reopened.

Apparently one solicitor, Mr. McLellan, acted throughout the proceedings up to February 28, for all parties; and the attempt to make it appear in the argument before me that he represented only the defendant because he, as attorney-in-fact for him, signed the agreement of February 28, is, I think, another evidence of bad faith. I, of course, do not in any way reflect upon the conduct of Mr. Ritchie, who acted as counsel for Mr. Hill; he, no doubt, could not know the fact, but the hasty consultation in Court of his junior with Mr. Hill left him unable to state who had been Mr. Hill's solicitor, if not McLellan.

Through a combination of unfortunate circumstances, unnecessary to recapitulate, Handy was not apprised of the final order, and of the last date for making payment in order to redeem, until the date had passed, but he acted promptly upon becoming informed, and has been guilty of no laches whatever. There will be an order adding McDonell as a party plaintiff; the final order for foreclosure will be set aside; the accounts re-opened; and the defendant will have one month after the taking of the account to pay the amount found to be due by him to redeem.

I refer to *Campbell* v. *Holyland*, 7 Ch. D. 166; Fisher on Mortgages, ed. of 1910, pp. 1955, 1959, 1963.

Foreclosure order vacated.

Annotation—**Mortgage (§ VII C—158)—Re-opening foreclosures.**

Annotation

Re-opening mortgage foreclosures.

Where third parties have not acquired rights to the property, and the mortgagee can be recompensed in money, the foreclosure may be opened and the time for redemption extended. But some reasonable excuse must be shewn for not having redeemed by the time fixed: Bell and Dunn on Mortgages, 267.

Where it was shewn that the money was ready, but owing to illness and accident could not be paid at the exact time, this was held to be a sufficient ground: *Jones* v. *Creswicke* (1839), 9 Sim. 304. And the relief was given in a case in which it was shewn that the mortgagee had repeatedly stated, before and after the decree absolute, that he wanted the money, not the property, and the mortgagor was under a reasonable belief that the mortgagee would extend the time for payment and the value of the property considerably exceeded the mortgage debt: *Thornhill* v. *Manning* (1851), 1 Sim. N.S. 451.

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Annotation

Re-opening mortgage foreclosures.

Annotation *(continued)*—**Mortgage (§ VII C—158)—Re-opening foreclosures.**

A foreclosure was opened eighteen months after the final order, where the mortgagor was illiterate, and had no solicitor in the cause, and misunderstood the object of the bill, which was the only paper served on him, the value of the property appearing to be three times the amount of the mortgage debt: *Platt* v. *Ashbridge* (1865), 12 Gr. 105; see *Ford* v. *Wastell* (1847), 6 Ha. 229.

Where there has been actual, positive fraud, and not mere constructive fraud, on the part of the mortgagee, or where he has insisted on rights which upon due investigation are found to have been overstated, this relief may be afforded to the mortgagor: *Patch* v. *Ward* (1867), L.R. 3 Ch. 203.

This relief has been granted even as against the purchaser from the mortgagee after the final order of foreclosure. But there must be strong grounds for disturbing the purchaser. Thus, if the purchaser bought the lands within a short time after the final order was made and with notice of the fact that they were of much greater value than the mortgage debt, the foreclosure might be opened as against him. But the Court would be disinclined to interfere with a person who purchased the lands many years after the date of the order and without notice of any circumstances which might lead to opening the foreclosure: *Campbell* v. *Holyland* (1877), 7 Ch.D. 166.

And where there were such irregularities as were sufficient to give notice to the purchaser from the mortgagee that there was something unusual in the proceedings, and they were in fact irregular, the mortgagor was allowed to redeem: *Johnston* v. *Johnston* (1882), 9 P.R. (Ont.) 259.

The mortgagor must make his application to open the foreclosure within a reasonable time. What is a reasonable time will depend upon the nature of the property: *Campbell* v. *Holyland* (1877), 7 Ch.D. 166.

The terms are in the discretion of the Court. The mortgagor must satisfy the Court that he will be able to redeem if further time is allowed, and he may be required to pay the interest and costs by an early date; or to pay the costs forthwith; or to give security for costs in the event of default: see *Trinity College* v. *Hill* (1885), 8 O.R. 286; *Holford* v. *Yate* (1855), 1 K. & J. 677; *Whitfield* v. *Roberts* (1861), 7 Jur. N.S. 1268; *Howard* v. *Macara* (1859), 1 Chy. Ch. (U.C.) 27.

A long delay of nearly twenty years in moving to re-open a foreclosure on the ground of irregularities was held too late in *Hazel* v. *Wilkes*, 1 O.W.N. 1096, 16 O.W.R. 754.

Relief was given to execution creditors who had moved with reasonable promptness after the final order in *Scottish American Investment Co.* v. *Brewer*, 2 O.L.R. 369.

Under the provisions of sec. 126 of the Manitoba "Real Property Act," R.S.M. (1902), ch. 148, as amended by sec. 3 of chapter 75 of the statutes of Manitoba, 5 and 6 Edw. VII., the Court has jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under secs. 113 and 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a *bona fide* purchaser for value have not intervened. The judgment

Annotation (*continued*)—Mortgage (§ VII C—158)—Re-opening foreclosures.

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Re-opening mortgage foreclosures.

appealed from (19 Man. R. 560, 13 W.L.R. 451) was reversed: *Williams* v. *Box*, 44 Can. S.C.R. 1, 13 W.L.R. 451. Leave to appeal to the Privy Council was refused, 44 Can. S.C.R. 1.

An action upon a mortgage, for foreclosure, was begun in 1898, and the usual judgment was pronounced on January 30, 1899. One of the mortgagors defendants died on June 20, 1899, an infant, unmarried, and intestate. On May 2, 1900, a final order of foreclosure was granted, no notice being taken of the death of the infant, and he and not his personal representatives or those claiming under him being declared to stand absolutely debarred and foreclosed. It was held that the final order was irregular and was not binding on the infant's mother, who was not a party to the action, and in whom an undivided interest in the estate of her deceased son vested at the expiration of a year from his death; and that she was entitled to redeem and to be added as a defendant, upon her own application. *Campbell* v. *Holyland* (1877), 7 Ch.D. 166, was followed. An order was made adding her as a defendant, and directing that the action be carried on between the plaintiff and the continuing defendants and new defendant and that it stand in the same plight and condition in which it was at the time of the infant's death. The effect would be to require a new account to be taken and a new day fixed for redemption, of which all the defendants would be entitled to avail themselves: *Kennedy* v. *Foxwell*, 11 O.L.R. 389 (D.C.).

A decree dismissing a bill on default of payment of the amount found due in a suit for redemption of a mortgage is equivalent to a decree of absolute or unconditional foreclosure: *Patchell* v. *Colonial Investment and Loan Co.*, 38 N.B.R. 339.

The word "foreclosure" as applied to proceedings to enforce a mortgage under the Land Titles Act is apt to mislead if it is sought to treat those proceedings as identical with "foreclosure" proceedings where the mortgage conveys an estate in the land to the mortgagee with a defeasance clause in case payments are made as provided. The mortgagee has merely a lien until payment, and in case of default he can proceed to get an order either to sell the land or to have the title thereto vested in himself, and care must therefore be taken when endeavouring to apply to mortgages under the Land Titles Ordinance (N.W.T.) the rules and principles laid down in other jurisdictions. Where there was no evidence to shew that the plaintiffs intended when they obtained the vesting order to reserve the right to sue upon the covenant, the proper presumption was that the plaintiffs intended to take the land in full satisfaction and to abandon that right: *Colonial Investment and Loan Co.* v. *King*, 5 Terr. L.R. 371 (McGuire, C.J.).

A mortgagee having obtained a foreclosure order nisi, shortly afterwards, and before the period allowed for making absolute the order nisi had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs of the amount due under the mortgage, which was re-

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Annotation

Re-opening mortgage foreclosures.

Annotation *(continued)*—**Mortgage (§ VII C—158)—Re-opening foreclosures.**

fused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem:—Held, that the mortgagee could not, after the order nisi for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the Court: *DeBeck* v. *Canada Permanent Loan and Savings Co.*, 12 B.C.R. 409.

Plaintiff obtained an order nisi for foreclosure. After the order had been made he, under the terms of the mortgage, paid a further sum for taxes. There was, however, no evidence that such payment was necessary to protect the security. He now applied for an order increasing the amount to be paid upon redemption, and fixing a new date for redemption. The mortgagor had been served but did not appear:—Held, that as the mortgagor had not appeared and would in any event be required to pay the taxes and as reasonableness and convenience should be the basis of practice an order should be made for a new account and a new date for redemption. 2. That as it had not been shewn that the payment of taxes was necessary to protect the security and as the mortgagee could have insisted upon payment before redemption, the costs of the application should be borne by the mortgagee: *Mathew* v. *McLean*, 2 Sask. L.R. 301.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. January 6, 1914.

1. ADJOINING OWNER (§ I A—5)—DAMAGE FROM FALLING TREE—NEIGHBOURING PROPERTY—LAND IN ITS NATURAL STATE.

An owner of land which has been left in its natural state and on which a decaying forest tree remains is under no obligation, apart from negligence or nuisance being shewn, to cut down the tree to prevent its being blown over upon the house of an adjoining owner, although notified by the latter of the danger, particularly where on receiving notice he offered to allow the house owner to enter and cut it down.

[*Smith* v. *Giddy*, [1904] 2 K.B. 448; *Giles* v. *Walker* (1890), 24 Q.B.D. 656; *Crowhurst* v. *Amersham Burial Board* (1878), L.R. 4 Ex.D. 5, referred to.]

Statement

APPEAL from the judgment of McInnes, County Judge, awarding the plaintiff damages in an action against an adjoining owner for permitting a tree decaying on his land to remain so that it was blown over upon the plaintiff's house and damaged it.

The appeal was allowed, and the action dismissed.

McCrossan, for the defendant, appellant.

Mellish, for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The allegation in the plaint is that the defendant was, on December 31, 1912, the owner of and in

possession of lots contiguous to the house and premises of the plaintiff, at 2590 Napier street, in the city of Vancouver, and had been in possession of said lots and owned the same for a long time previous to said date. That he had on his land a number of standing trees, including decayed trees which were dangerous to the house and property of the plaintiff, and that the plaintiff in the previous October notified the defendant of the dangerous condition of the trees, but that the defendant negligently allowed the trees to remain in their dangerous state, and that on the said 31st December some of said trees were blown down, including a dead and decayed cedar tree, which fell on plaintiff's house and damaged it, whereby the plaintiff suffered loss. These allegations are not disputed.

The defence relied upon was, first, the act of God, or *vis major*, founded upon the allegation that the storm which blew down the trees was an unusual one, and secondly, that the defendant owed no duty to the plaintiff to cut down the decayed trees and thus protect him from injury or to make compensation in case they should fall upon plaintiff's premises: *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, was relied on. That case lays it down that the owner of land who brings or collects on it something of a dangerous character which if allowed to escape is likely to do damage to another must keep it at his peril. Here the tree which did the injury grew on defendant's land in a state of nature. It was blown down upon the plaintiff's property by the elements. The defendant did nothing either to cause it to fall, or to prevent it from falling, and the question is, under such circumstances, is he liable? We have been referred to no case, and I am unable to find one quite like this one. In *Smith* v. *Giddy*, [1904] 2 K.B. 448, the plaintiff was awarded damages for injury caused by the branches of defendant's trees overhanging the plaintiff's land, thereby causing injury to his crops. On the other hand, it was decided in *Giles* v. *Walker* (1890), 24 Q.B.D. 656, a case to which I have been referred by my brother McPhillips, that when an occupier of land allows it to become overgrown with thistles, and the seed is carried by the wind into his neighbour's fields to his great injury, no action will lie, because, as Lord Coleridge, C.J., and

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Lord Esher, M.R., said the thistles were the natural growth of the soil. Now, it does not appear to have been regarded as wrongful to allow branches to overhang another's land when no injury was occasioned thereby, It would seem that there must be something more than that. Kelly, C.B., in *Crowhurst* v. *Amersham Burial Board* (1878), L.R. 4 Ex. D. 5, at 9, said:—

> On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary that a Court of law ought not to decide that it can be made the subject-matter of an action, especially when an adjoining landowner, over whose property it grew, would, according to the authorities, have the remedy in his own hands by clipping.

And Kennedy, J., in *Smith* v. *Giddy*, [1904] 2 K.B. 448, at 451, said:—

> If trees, although projecting over the boundary are not in fact doing any damage, it may be that the plaintiff's only right is to cut back the overhanging portions; but where they are actually doing damage, I think there must be a right of action. In such case I do not think that the owner of the offending trees can compel the plaintiff to seek his remedy in cutting them. He has no right to put the plaintiff to the trouble and expense which that remedy might involve.

This is not a case of nuisance. If the defendant is liable at all it is for trespass, and if any act of his had brought about the falling of the tree on the plaintiff's house there would be no difficulty in the case.

The doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, is not one which must govern the decision of this case. There the defendant was liable because of his own acts irrespective of negligence. Here, clearly he cannot be liable unless he has been guilty of negligence.

My difficulty is to say, under the peculiar circumstances now arising for the first time, so far as any direct authority goes, that there was any duty on the defendant either to cut down the menacing tree or to make good the damage should it fall without any act of his. If the law does not reach such a case, then it stands thus: the owner of a lot in a city may maintain on that lot a primeval forest tree in such a condition of decay that it is a menace to a neighbour, and should it fall upon his neighbour without any inducing act of the owner of the tree, the

neighbour must bear the loss. If it were the case of an ancient building falling into decay, although not erected by the then owner of the lot, but by a remote predecessor in title, the owner would undoubtedly be liable, but there, there would be privity of estate between the person who erected the artificial structure and his successor who negligently maintained it.

I think there is no warrant for saying that, at common law, one who allows his land to remain in its natural state, neither he nor a predecessor in title having changed that state, is under any obligation to his neighbour in respect to what is standing or growing thereon. The neighbour must protect himself, if he can, or suffer the consequences. No precedent for such an action as this can be found in the books here or in England, or in the United States. This would not be fatal to the plaintiff's claim if some legal principle could be assigned in support of it It is not enough to say that a man is bound to use his own land so as not to negligently injure another; but is a man who becomes the owner of wild land on which there is a steep bank of clay which is being gradually undermined by a natural stream of water, and which may, and in all likelihood will, in heavy rain, slide upon the adjoining lands of another, and do him injury, bound to do something to protect his neighbour in such circumstances? I think not. That example is not different in principle to the case at bar.

I think, therefore, the judgment below should be reversed, and the action dismissed.

MARTIN, J.A.:—It is admitted that the tall, rotten cedar, about 75 feet high, which was blown down by a bad storm (as the plaintiff describes it) and did the damage complained of, was in an undisturbed state of nature, standing on the defendant's lot, which is not occupied, and has been left in said state of nature. In such circumstances it is clear that there is no duty owing by the defendant to the plaintiff, and the case cannot be distinguished in principle from *Giles* v. *Walker* (1890), 24 Q.B.D. 656, cited by the appellant, wherein damage done by thistles was sought to be recovered by an adjoining owner, but the action was dismissed because the thistles were "the

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natural growth of the soil" as are trees in this province. Indeed, the counsel for the plaintiff in that case admitted that if the land had been left in its natural state he could not recover, but sought to do so because the thistles had been caused to grow by cultivation, thereby "disturbing the natural condition of things." In the case at bar the defendant is in an even stronger position because he has done nothing in the premises, and it is according to the ordinary course of nature that trees should grow and decay, and it may be, do more damage than thistles as the result of that decay.

Galliher, J.A.

GALLIHER, J.A.:—The learned trial Judge has found as a fact that the tree which did the damage was a rotten high stump with no hold on the ground, and that the defendant knew of the danger. The plaintiff and defendant are owners of adjoining lots in a townsite subdivision, the plaintiff's house being damaged by the stump falling on it from the defendant's land. The defendant pleads *vis major*, and that the tree in question was in a state of nature. The immediate cause of the tree falling was a very high wind. One of the plaintiff's witnesses, Abbot, says: "Every year there is a bad wind storm such as this one," and Tellinck, a witness for the defence, says: "Worst storm I had seen here in fourteen years."

The real question is: Was there any duty incumbent on the defendant to remove the tree when he was aware of its dangerous condition? In the case of *Giles* v. *Walker* (1890), 24 Q.B.D. 656, Lord Coleridge, C.J., and Lord Esher, M.R., both held that there was no duty as between adjoining occupiers to cut thistles which are the natural growth of the soil. There would seem to be just as much carelessness in permitting thistles to ripen so that the wind would blow the seed over into a neighbour's land, doing damage thereto, as in allowing this tree to stand so that even an ordinary wind would blow it over, though the effect in one case might, of course, be more serious than in the other. But, whether it be carelessness in the one instance or the other, the question is, Was there any duty devolving on the defendant? Had the tree been a live growing one, the natural growth of the soil, would there have been any

duty cast upon the defendant to remove it because the plaintiff built a house on the adjoining property so close that it was in danger if the tree fell? I think not. Then, can it be said that because, in the course of nature, or by reason of some act over which the defendant had no control, the tree decayed and became less firm in its original bed and liable to do damage, that the defendant was charged with the duty of removing it? To do so might, in some cases, prove very onerous.

The point is a nice one, and I can find no case which exactly meets it, but, on the best consideration I can give to it, I am of opinion that the defendant is not liable. I would, therefore, allow the appeal.

McPHILLIPS, J.A.:—This action was one brought to recover damages for an actionable nuisance, or the negligence of the defendant in the management of his land, the learned trial Judge finding that

> the cedar tree was a rotten high stump with no hold on the ground, and that the defendant knew it was a danger to the plaintiff.

The land was in a state of nature, and the tree was a natural product of the land, the land being within the corporate limits of the city of Vancouver. The tree fell during a wind-storm, and fell upon the house of the plaintiff and did damage thereto, and judgment was entered for the plaintiff for $165, being the damages found by the learned trial Judge. It would appear that the plaintiff advised the defendant of the insecure condition of the tree, and the defendant gave leave to the plaintiff to cut the tree down, which the plaintiff did not do. This is not the case of an overhanging tree, and, in my opinion, the action brought is one unknown to the law.

It was held by Lord Coleridge, C.J., and Lord Esher, M.R., sitting as a Divisional Court, in *Giles* v. *Walker* (1890), 24 Q.B.D. 656, 59 L.J.Q.B. 416, that where an occupier of land allows thistles which he has not brought on the land, to seed, so that the seed is carried on to adjoining land which is thereby injured, no action will lie for the recovery of damages for the injury so caused. In considering this case we are really asked to establish, in my opinion, a new cause of action; this is really

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beyond the province of a Court of law; at times it may appear to have been done, but, if carefully examined, it would be seen that in all cases it as at most the application of the law to the different existing conditions not evolving new causes of action. It is interesting upon this point to refer to the case of *Smith* v. *Giddy*, [1904] 2 K.B. 448, 73 L.J.K.B. 894, a decision of a Divisional Court consisting of Wills, and Kennedy, JJ. That was an action brought for an injunction and it was held to lie against a person who allows the branches of his trees to overhang his neighbour's land, whereby his neighbour's trees are damaged. Wills, J., in the Law Journal Report, at p. 895, said:—

> I have come somewhat reluctantly to this conclusion, because I have a very strong feeling against the desirability of establishing new causes of action. There are plenty of persons in the world who are glad enough to torment their neighbours with all forms of action which have been established for centuries, and I always approach the notion of a new ground of action with much caution.

We find, though, in the judgment of Kennedy, J., at p. 896, a discussion of the law which clearly demonstrates, if authority were needed, that no right of action exists in the case before us:—

> It seems to me that in principle the action ought to lie, and I cannot differentiate this case in principle from the decision in *Crowhurst* v. *Amersham Burial Board* (1878), 48 L.J. Ex. 109, 4 Ex.D. 5. It is the law, I think, that, as long as the yew tree is proved not so to overhang and the yew tree leaves have not been so cut by the owner as to fall on the neighbour's land, there is no right of action, although the neighbour's cattle may be hurt by eating leaves from the yew tree. I suppose that no action would, under such circumstances, lie, because in a high gale (to take the simplest case) yew leaves are blown on to the adjoining land and cause injury to animals which eat them. No action, I take it, would lie for that.

I would, therefore, allow the appeal.

Appeal allowed.

Re McEWEN v. HESSON.

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British Columbia Supreme Court, Clement, J. April 17, 1914.

1. INTOXICATING LIQUORS (§ II B—41)—LICENSING BOARD—JUDICIAL SCOPE OF.

A board of license commissioners exercising jurisdiction under the Municipal Act, R.S.B.C. 1911, ch. 170, in connection with the granting transfer or renewal of liquor licenses, is, in effect, a court, and as such is bound by and subject to rules as to judicial notice and competent evidence.

2. INTOXICATING LIQUORS (§ II B—41)—LICENSING BOARD—JUDICIAL AND ADMINISTRATIVE FUNCTIONS.

That the proceedings of a Board of License Commissioners in granting a license for the sale of intoxicating liquors may be reviewed on *certiorari*, is inherent to the judicial as distinct from the purely administrative functions of the Board.

[*Rex* v. *License Commissioners of Point Grey*, 14 D.L.R. 721, applied.]

3. INTOXICATING LIQUORS (§ II B—41)—LICENSING BOARD—MUNICIPAL COUNCIL—RESPECTIVE FUNCTIONS IN GRANTING LICENSES.

The duties of the Board of License Commissioners sitting as a licensing court under sec. 330 of the Municipal Act, R.S.B.C. 1911, ch. 170 are, as set out in that statute, judicial in character, the administrative functions connected therewith being with the municipal council.

4. ESTOPPEL (§ III F—82)—APPEARING BY PARTY—LICENSING BOARD ISSUING LICENSE.

Upon a hearing before the Board of License Commissioners sitting as a licensing court on questions as to the renewal or transfer of liquor licenses under the Municipal Act, R.S.B.C. 1911, ch. 170, sec. 330, any person exercising his right to appear of his own motion as a party is estopped by his admissions there made as to the facts.

[*Stracey* v. *Blake* (1836), 1 M. & W. 168, applied.]

APPLICATION for the cancelling of a liquor license issued by a Board of License Commissioners sitting as a Licensing Court. The application was refused.

McDiarmid, for the motion.

Maclean, K.C., contra.

CLEMENT, J.:—In my opinion a board of license commissioners exercising jurisdiction under the Municipal Act, R.S. B.C. 1911, ch. 170, sec. 330 *et seq.*, in connection with the granting of liquor licenses and the transfer or renewal of same, constitutes a Court, and as such is bound by and subject to those fundamental rules which govern all Courts under our system of jurisprudence. The facts which must exist under the statute in order to the lawful exercise of the board's jurisdiction must

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be proved before it in open Court, and the board cannot lawfully act upon the knowledge or supposed knowledge of its members, except in so far as judicial notice may be taken by any tribunal of what may be called commonly or notoriously-known facts. It is not contended and could not be contended that the facts (of which it is complained there was no evidence before the board in this case) are facts of which judicial notice could be taken. Nor could it be contended that the rules of evidence governing the inspection of property, documents, or other things would justify the board in acting upon the knowledge gained by its members, all or some, upon a private view of the premises. The modes of proof left open are the sworn testimony of witnesses and the admissions made before the Court by those who are "parties" to the enquiry upon which the Court is engaged.

At first blush what I have said as to the impropriety in a legal sense of the board acting upon the private knowledge of its members, however gained, may seem opposed to what was said by Lord Halsbury in *Boulter* v. *Kent Justices*, 66 L.J.Q.B. 787, [1897] A.C. 556, as to the position of English justices of the peace sitting as a licensing meeting. In his view such a meeting was not a Court at all. Where, he says,

> justices are acting as a Court of any sort they must proceed according to the regular rules which are applicable to all Courts of justice; and in respect of an application for a license or its refusal they may and constantly do receive representations not on oath.

Notwithstanding this decision it has been held even in England that *certiorari* will lie to remove the proceedings of a licensing meeting as being, in some aspects at least, judicial and not purely administrative proceedings; the cases cited in *Rex* v. *License Commissioners of Point Grey* lately before the Court of Appeal of this province (reported in 14 D.L.R. 721), and I need not further refer to them. But, in my opinion, our statute governs, and its express provision (sec. 330) that licenses are to be

> granted or refused in open Court by a board of license commissioners sitting as a licensing Court

is not a mere piece of meaningless nomenclature, but must be

treated seriously as meaning what it says. The duties of the licensing Court as set out in the statute are not, so far as I can see, other than judicial; the administrative work is apparently in the hands of the municipal council and of officers appointed by it and not by the board of license commissioners.

But though the board must, in my opinion, act only upon proof adduced in the proper way, of all facts the existence of which is stipulated for by the statute, it is in no worse position than any other tribunal as to receiving and acting upon admissions made by the parties to the controversy before it, so far, at all events, as to bind and be conclusive upon such parties as to such controversy through all its stages. The English authorities emphasize the difficulty there is in these licensing cases in treating those who may object to the grant, renewal, or transfer of a license as parties to litigation as ordinarily understood. Any person may appear and object; but, in my opinion, anyone who does so appear must be considered a party to the enquiry which goes on before the board, so far at all events as to be bound by admissions express or implied made by him or by his counsel for him. He at least ought not to be heard to question a judgment founded in part upon facts admitted by or for him before the board. As to him the facts must be taken as proved to the satisfaction of the board: see Taylor on Evidence, 10th ed., sec. 783, and the cases there cited, particularly *Stracey* v. *Blake* (1836), 1 M. & W. 168; and *Urquhart* v. *Butterfield* (1888), 57 L.J. Ch. 521, 37 Ch.D. 357.

The applicant here complains that there was no evidence before the board as to the existence of the hotel premises for which a license was sought by Hesson, or that such premises had the accommodation required by law. It seems to me that, unless the attitude of this applicant and his counsel before the board is to be treated as a farce, worse still, as intended to raise a controversy before the board upon immaterial or unnecessary issues, that attitude justified the board in taking as admitted the very facts referred to. Why deal with a question as to which the board could exercise discretion, if the fact was that no such premises existed, or that, if existent, they did not possess the

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necessary requirements. Such a fact would preclude the exercise of any discretion whatever; and yet, as the record shews in a somewhat fragmentary way, the contest suggested upon the petitions sent in to the board and the contest upon which alone the members of the Court expressed themselves in giving judgment was as to matters which might affect the discretion of the board in dealing with Hesson's application. I think it should be assumed that those who have appeared and been heard before a Court were not playing fast and loose with it, but acted in good faith toward it. So assuming, I hold that as against this applicant, James McEwen, it must be taken that the Board had proof by the applicant's own admission, properly inferred from his attitude before the Court. Of the various matters of which he now contends there was no evidence. This motion savours too much of the card up the sleeve, which is not, in my humble judgment, to be commended as a suitable weapon in the armoury of those who would forward moral reform.

The further point is taken in support of the motion that the board had no jurisdiction to make an order of transfer (of Hesson's saloon license) and the grant of the hotel license in respect of the Wright block "by one and the same order." As to this, suffice it to say that as I read sec. 340 of the Municipal Act, it contemplates a change from a saloon license in respect of certain premises to an hotel license in respect of certain other premises—or, possibly, of the same premises if altered to conform to hotel requirements. This was what Hesson asked, and this was what was ordered by the board at the meeting of December 24, 1913.

I may add that, in my opinion, the course taken at the meeting of the board on January 13, 1914, would not have saved the situation if the order made on December 24, 1913, had been held invalid. But as I have upheld this latter order, I need say nothing further as to the proceedings on the later date.

The motion is dismissed with costs to be paid by McEwen to Hesson.

Application dismissed.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Beck, and Simmons, JJ. April 6, 1914.

1. SOLICITORS (§ I A—9)—STRIKING OFF FOR CAUSE—SUBSEQUENT APPLICATION TO RESTORE TO ROLL.

In considering the question of restoring to the rolls a solicitor whose name had been stricken off by order of the Court the Court will consider (*a*) the character of the charges which led to the disenrollment, (*b*) the sufficiency of the punishment by deprivation of the right to practise since the order was made, (*c*) the restoration made to the parties who had complained, (*d*) the probability of the solicitor not offending in the future.

[*Re Pyke*, 34 L.J.Q.B. 121, considered; *Re Solicitor*, [1912] 1 K.B. 302; and *Re Solicitor*, 29 Times L.R. 354, referred to.]

Statement

MOTION to restore to the roll of barristers and solicitors a solicitor whose name had been stricken off by order of the Court.

The order to restore was made, HARVEY, C.J., and STUART, J., dissenting.

George H. Ross, K.C., for the applicant.

C. F. Adams, for the Law Society.

Harvey, C.J. (dissenting)

HARVEY, C.J. (dissenting):—This is an application by the solicitor for reinstatement. He was struck off the rolls by order of this Court in June, 1911. The application upon which he was struck off was founded on three separate transactions, each of which related to the improper use or retention of client's money. In respect of one of these relating to one Reber an order was made for delivery and taxation of a bill of costs. In the other two the solicitor was found guilty of misconduct.

In the reasons given by my brother Stuart concurred in by all the other members of the Court except my brother Beck he states that the facts of one case (Balderson) indicate

> such a state of absolute moral obliquity that it becomes impossible to say that a solicitor who takes that position is a fit person to be a member of an honourable profession.

My brother Beck in his reasons says:—

> There being two charges against him and he having already on a previous occasion been found guilty of serious misconduct thus shewing an habitual course of conduct unbecoming a solicitor, I concur in an order that he be struck off the rolls.

Re Pyke (1865), 34 L.J.Q.B. 121, was an application for reinstatement as a solicitor by one who 20 years before had been

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disbarred for acting both as a solicitor and a barrister in two instances. The application was refused because he did not show that his conduct and character have been unimpeached and are unimpeachable by evidence of trustworthy persons, especially members of the profession.

Harvey, C.J. (dissenting)

Cockburn, C.J., at 123, says:—

On applications to strike an attorney off the roll, or to re-admit an attorney under peculiar circumstances we ought to bear in mind that it is not with regard to the individual himself or the punishment that he may have deservedly brought on himself that the circumstances are to be inquired into; we have a duty to perform to the suitors of the Court, and not only to the suitors of the Court but to the profession of the law, by taking care that those permitted to practice in it are persons on whose integrity and honour reliance can be placed. Nevertheless, I do not think that rule should be so inexorable as that after a man has undergone a long period of exclusion and punishment and suffering that that carries with it, if we are satisfied that his conduct has been such in the meantime as to insure confidence in his character we might not either admit him in the first instance or re-admit him.

In the case of a person guilty of only one act of misconduct a shorter period of probation and a less amount of evidence of good conduct might justify a confident expectation of future good conduct than in the case of a person who has been guilty of repeated, if not habitual, misconduct.

It appears that this solicitor has been repeatedly before this Court or its predecessor the Supreme Court of the North West Territories, there being no less than four applications, exclusive of the one on which he was struck off reported in the law reports. In 1897 *Re Harris*, 3 Terr. L.R. 70, he was ordered to pay over to a client the sum of $400 improperly retained, and in default of compliance with the order an application was authorized to be made to strike his name off the rolls.

In 1898 (*Re Harris*, 3 Terr. L.R. 105), another application was made against him and though an order to strike off was not made against him it was because an order that he should repay had not been previously made. It appeared that he had been paid some $641.25 for costs of an action, in which an appeal was entered, upon his giving his undertaking to repay the amount in the event of the appeal succeeding. The appeal did succeed, but he failed to repay the costs. The Court, for that reason, though refusing the order, refused the solicitor the costs

In 1906 (*Re Harris*, 3 W.L.R. 167), there was another application which was refused, the solicitor being given the benefit of the doubt on the evidence, but again because of the solicitor's conduct without costs, and one of the Judges intimated that if the conflict of testimony had been between the solicitor and a reputable person instead of between him and a convicted criminal, as it was he would probably have reached a different conclusion.

Again in 1910 (*Re Harris*, 2 A.L.R. 503), this solicitor was before the Court, and on that occasion was suspended from practice for a period.

In the case then before the Court it appears from the reasons given in which all the Judges concurred that, not only was the solicitor guilty of wrongfully retaining clients' money, but that in addition he had made false statements in his affidavit filed in answer to the application.

Notwithstanding all this, the Court took the most lenient view and instead of striking him off the roll merely suspended him from practice for a further period, as it was the first time any case had been proved against him, in the hope that such suspension would be a sufficient lesson to ensure his future good conduct. In the face of that judgment made by this Court on January 29, 1910, one month later a Mrs. Balderson consulted him as her solicitor about the payment of certain taxes, and he advised her to pay them and to give to him the sum of $42 that he might pay the same. He failed to pay the taxes, and subsequently refused to pay them or to return the money to her, and contended before this Court that his conduct was honest because he made some claim against her in respect of some other matter. For that he was struck off the roll, there being also another complaint which, however, the majority of the Court did not fully consider, though it was considered sufficiently to satisfy all the members of the Court that in respect of it also he had been guilty of misconduct.

Thus did he not only fail to justify the confidence in his regeneration which the Court had ventured to shew by the leniency of its judgment, but he even appears to have disregarded the spirit, if not the letter, of the judgment itself by advising as a solicitor while under suspension.

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On September 16, 1913, Mr. Harris sent Mrs. Balderson her money which he had wrongfully kept for more than three years, and on the same day wrote to the secretary of the Law Society advising him that he intended to apply for reinstatement. This Court was then sitting, and during the progress of that sittings an application was made which, however, was adjourned to the next sittings in December, owing to the Law Society not being prepared to meet the application on such short notice.

On December 4, when the matter was again spoken to it was learned that the applicant had contented himself with shewing the settlement of the cases for which he had been struck off, and the Court declined to consider the application until notice was given to the other persons who in former proceedings before the Court and in complaints to the Law Society had shewn themselves to be interested, and the application was adjourned to December 15 for that purpose. On the further hearing Mr. Harris produced evidence to shew that a few days prior to December 13 he had made a settlement in respect of the $641.25 of costs in respect to which the Court said, in 1898:—

> He is an officer of this Court and ought, beyond all question, to have carried out his undertaking and repaid the money long ago. The facts present no shadow of excuse or justification whatever for his not doing so.

There may be eleventh hour repentances, but there is no room for doubt that Mr. Harris settled this matter, not because he had any desire to do what an honest man should do, but because he knew that in no other way could he be reinstated as a solicitor. His payment to Mrs. Balderson at the last moment also indicates the same state of mind.

Mr. Harris has produced affidavits from several persons living in Lethbridge, where he practised, who state that they have known him for many years and that he has a good reputation for honesty and integrity. In view of the fact that all or most of the matters which I have heretofore mentioned relate to Lethbridge it is not surprising that I am unable to attach much value to any such recommendation.

By reason of the facts to which I have referred I find myself unable to conclude in the words of Cockburn, C.J., that the

solicitor's "conduct has been such as to insure confidence in his character."

In concluding, I wish to note that the Law Society strenuously oppose the application, indicating that in the opinion of the members of the profession his re-admission is undesirable, and this opinion Cockburn, C.J., points out is important. Fortunately for the credit of the profession there have been few applications to this Court to exercise its punitive powers against solicitors, but unfortunately for the present applicant there have been more complaints against him brought before this Court than against all other solicitors over whom the Court has jurisdiction, combined.

Harvey, C.J. (dissenting)

In my opinion the application should be dismissed, with costs.

SCOTT, J., concurred with BECK, J., in granting the application.

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STUART, J. (dissenting):—My view of this application is that it has been made too soon and should not now be allowed. I think an allowance of the application would be inconsistent with the severity of the language used by the Court, written by myself, in striking the solicitor's name off the rolls less than three years ago. Having said this, I can for my part see no reason to repeat my former fulmination. Neither do I think it quite fair to revive against the solicitor occurrences and applications made against him many years ago, two of them sixteen and seventeen years ago, which were then decided in his favour, merely because of some unfavourable observations then made by the Court. Surely the passing of that length of time with merely one unsuccessful attack upon him about the middle of the period should be equal to oblivion. A revival of those old observations must rest upon a greater confidence in the absolute accuracy of human judgment on questions of morality than I at least entertain.

Stuart, J. (dissenting)

In the next place, I wish to say that I have always read with some degree of incredulity the expressions used in a number of the English cases about solicitors who have been struck off the rolls exhibiting signs of repentance and of a determination to adopt a higher moral standard of action. They make me think

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at times of Pickwick and at times of Pecksniff. There is just a slight touch of the pharisaical about them. I should hesitate to sit solemnly in Court and scan the record for signs in a solicitor of fifty years of age of that spiritual change which is called repentance. Even if the anticipated change is merely to be a moral, as distinguished from a spiritual one, how is the Court to discern the signs of such an inward reform? From the sphere of action in which a solicitor moves and is judged the solicitor in question has in the meantime been excluded. If upon being struck off the rolls, a solicitor retires to a farm and follows the plough or handles the hay-fork, you do not have any very excellent opportunity of discerning signs of repentance and reform. In reality all you can say is that so far as reported he has done nothing dishonourable in the meantime.

In the next place, I think it is improper to say that there is nothing in the way of discipline or punishment involved. The jurisdiction of the Court to deal with these matters has long been called a "disciplinary" or "punitive" jurisdiction. What does that mean if it does not mean that the Court is inflicting punishment and administering "discipline" with a view to some effect upon the conduct of the individual solicitor? Are we to assume that discipline can never have any effect at all or that if the required effect is not produced by one infliction there must never be any hope or expectation of any good effect from a second and much severer infliction? Even among men whose outward conduct is of the highest there would, I think, be found considerable unwillingness to have a revelation of how much of it is superinduced by fear. And at this point I may observe that the severity of my language in giving the judgment of the majority of the Court in June, 1911, quite apart from the resulting action, is, in my view, to be considered in one aspect as disciplinary in the way of stern rebuke and not as an infallible, permanent and irrevocable moral judgment which has raised forever an impassable barrier. The Olympian thunder consigned the solicitor, in my opinion, not to an inferno but to a purgatorio. A return to the pure and rarified air of what is no doubt, to him, almost a paradise, is not eternally

shut off. The return, while not impossible, ought of course not to be too easy.

> Facilis descensus Averni
> Noctes at que dies patet atri janua Ditis
> Sed revocare gradum superasque evadere ad auras
> Hoc opus, hic labour est.

I hope I may be pardoned my confusion of pagan and Christian eschatology.

I do not wish by an appearance of inconsiderate cynicism to depreciate the importance of the sacred duty imposed upon this Court of insisting upon honourable conduct among its officers. But I would observe that other people beside Mr. Harris go astray: *Re Blaylock*, 16 D.L.R. 487.

To my personal knowledge also, the present solicitor was made the object of an attack by a motion to strike off the rolls by a Bencher of the Society some years ago upon the most frivolous grounds, when a more careful enquiry would have revealed the truth, and when the facts and the truth lay recorded in a document resting in the office of that Bencher himself. And, in opposition to this very application an attempt was made to resuscitate another old matter about a receivership, and to catch the solicitor in something wrong. Upon examination, the matter turns out to be a mare's nest. These two latter cases are clear examples, to my mind, of the well-known result of giving a dog a bad name.

The solicitor has practically made an appeal for mercy and has asked to be allowed the exercise once more of the only calling in which he is qualified and able to earn a living. In view of the gravity of his offence, I think the punishment should continue, that a refusal at present will serve to burn into the mind of the solicitor a realization of what is demanded of him, and that he should endure with fortitude the passing of, say, another year, when, if nothing dishonourable is reported in the meantime, he might be restored to the rolls.

I conclude by expressing my firm belief, arising out of certain memories of the past, that, had Mr. Harris been the happy possessor of more attractive qualities in social life, his sins would have been considered in many cases as peccadilloes, and

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would have met with a tenderer judgment at the hands of all concerned.

BECK, J.:—This is an application by Harris for the restoration of his name on the roll of barristers and solicitors.

He was struck off the roll of barristers and solicitors by order of this Court made at the sittings held in June, 1911. The complaints against him upon which the application of the Law Society was based were three—one by one Thomas L. Davies; another by one Mrs. Balderson, the third by one W. H. Reber. The *Reber* matter was finally disposed of at the previous sittings of the Court held in March, 1911, by an order directing Harris to deliver a bill of costs and referring it to taxation.

In the *Balderson* matter, Mr. Justice Stuart, in giving reasons for judgment, in which the Chief Justice and Scott and Simmons, JJ., concurred, looked upon the matter as a very grave one, so grave as to leave no course open to the Court but to remove the name of Harris from the roll. These members of the Court expressed an opinion in the *Davies* matter similar to my own. I myself expressed the opinion that the circumstances of the latter case justified a suspension for a considerable period, and, while being disinclined to take so serious a view as my brother Judges, of the *Balderson* matter, felt constrained, in view of both the offences established to concur in the order striking the name of the offender off the rolls.

The present application for reinstatement came before the Court first during the sittings in September, 1913; again in December, 1913; again in January, 1914, and finally during the present sittings. The Law Society has thus had the amplest opportunity of investigating and controverting, if it could be done, the evidence adduced by the applicant and of producing such evidence as could be obtained by way of answer to the application.

The material before us shews that the applicant since his disenrollment has not attempted to practise as a barrister or solicitor. It also shews—what certainly is, though not of paramount, yet is, of very great importance—that every person on whose behalf any well-founded complaint had at any time in

the past been made against the applicant has been settled with, and in most cases has expressed himself as hoping that the applicant will succeed in his present application.

In relation to the *Reber* matter, an affidavit by Reber is filed in which he says that Harris has settled all matters in difference to his entire satisfaction, and says that if he is reinstated it is his intention to employ him as his solicitor.

In the *Balderson* matter, it was the conduct of the present applicant, not the non-payment of the sum of money involved, that impressed the majority of the Court so unfavourably. The money has, however, since been paid.

In relation to the *Davies* matter, an affidavit by Davies is filed in which he says that the money involved—something between eight and nine hundred dollars—has in part been paid, and as to the balance secured to his entire satisfaction, and he respectfully asks the Court to reinstate the applicant.

Mr. Conybeare, K.C., a practitioner of many years' standing in the locality in which the applicant has also resided for many years, gave the applicant the following letter:—

Lethbridge, December 13, 1913. Mr. C. F. Harris, Lethbridge: Dear Sir,—Kindly inform the Honourable Court *en banc* on the return of your application for reinstatement on Monday next, that you have made satisfactory arrangements with me for the return of the full amount of the money paid you on account of the undertaking of Harris & Burne in the matter of the costs in *Patton* v. *Alberta Railway & Coal Co.*, and also that I am pleased as well as satisfied with your present action in the matter.

You are at liberty to inform the Court that I do not know of any objection to your being reinstated. On the contrary, I do sincerely hope you will succeed in your application, and that you will have an opportunity to enjoy the successful and honourable practice of your profession. C. F. P. CONYBEARE.

A number of affidavits, by other persons who have known the applicant for years, and who reside in the same locality, in which confidence is expressed in him, and the hope that he will be reinstated.

In view of the foregoing, it seems to me that we have but two questions to consider, namely, (1) has the applicant been sufficiently punished for his past offences? and (2) if he has, are the circumstances such that we have confidence that he will not offend in the future?

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The opinion of Cockburn, C.J., quoted by my brother the Chief Justice (*Re Pyke* (1865), 34 L.J.Q.B. 121), I am quite ready to accept in the sense in which it seems to me he must have intended it. I think that, either by a slip of himself or of the reporter, something has been dropped out—that he did not mean to exclude absolutely from consideration

> the individual himself or the punishment that he may have deservedly brought on himself.

That what he intended was:—

> We ought to bear in mind that it is not—*only* or *chiefly*—with regard to the individual himself or the punishment that he may have deservedly brought upon himself that the circumstances are to be inquired into: we have a duty to perform to the suitors, etc.

In any case, when considering the question of reinstatement it is obviously a necessity of justice that the character of the charges which led to the disenrollment should be enquired into and fairly judged.

The Chief Justice recalls a number of applications made to disenroll the present applicant.

1. *Re Harris & Burne*, 3 Terr. L.R. 70.

The Territorial Court, consisting of Richardson, Rouleau, Wetmore, and Scott, JJ., made an order that Harris pay $400 —moneys received by him on behalf of the applicant clients— to the registrar of the Court within a time limited by the order and that in default his name should be struck off the roll. It was said that this was in accordance with the Ontario practice as laid down in *Re Bridgman* (1894), 16 P.R. (Ont.) 232, adding:—

> The Court will, however, reserve to itself the right to depart from such practice under special circumstances and in very aggravated cases.

Evidently the Court was not of opinion that in the case before them there was either any special circumstances or any very aggravated circumstances.

Evidently, too, the money was paid by Harris in accordance with the order; for, as far as appears, nothing further was ever heard of the matter. This was over thirteen years ago.

Under these circumstances I think we may well leave this case quite out of consideration.

2. *Re Harris* (*No.* 2), 3 Terr. L.R. 105.

Harris was solicitor for one Patton in an action against the Alberta Railway & Coal Co. The plaintiff recovered judgment. The defendant company appealed. An order was made staying proceedings on certain terms, amongst others, that no execution should issue for the plaintiff's costs in the action (which had been taxed at $641.32) until after the expiration of five days after the plaintiff's solicitors (Harris and his partner) should have given to the defendants their personal undertaking to pay to the defendants these costs in the event of the defendants succeeding in the action.

The undertaking was given expressed to repay "when directed," and the costs paid to Harris' firm.

The company ultimately succeeded and demanded repayment of the costs. A direction to pay was made by a Judge; it was not complied with. A motion was made to suspend or disenroll. The Court held that Harris could not be attached, unless an *order*—and the "direction" was not such an order—were first made for payment. The Court also held that the statutory punitive powers of the Court did not authorize suspension or disenrollment for breach of such an undertaking.

Mr. Justice Wetmore in giving the judgment of the Court said (3 Terr. L.R. 110):—

> I am of opinion that the default in paying over moneys received by an advocate for which punishment is provided for in sec. 16 (of the Legal Profession Ordinance) is for default in paying over moneys which from the mere fact in itself that the advocate received them were required to be paid over—for failing to pay over moneys which the advocate received, *not to be used by him at all*, but to be paid over to some third person, as, for instance, to his client. *The provision does not apply to moneys which the advocate had the right when received to use for his own benefit. Now these moneys were not paid to Mr. Harris to be put away and kept untouched by him until the appeal was decided. They were given to him to be used; they were ordered to be given to him under the belief that prima facie he was entitled to them for his own purposes and he had the right to use them immediately on receiving them.*

It may be accepted as a fact that the defendant company did not pursue the matter further with the view of procuring an attachment; for we have heard of no such proceedings, and it is in connection with this affair that the letter of Mr. Conybeare, K.C., already quoted, was written.

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The affair then is by no means as serious a one as at first sight would appear.

3. *Re Harris*, 3 W.L.R. 167.

This was an application to suspend or disenroll.

The Court dismissed the application after a careful consideration and analysis of the evidence; and (a Court of five members) *unanimously found that the charge was not established*.

Why, in view of this decision, should *adverse comment upon a witness against Harris*, with the result that the witness was not believed, be ground for looking upon the result as one to Harris' disadvantage, I cannot see.

4. *Re C. F. Harris* (Jan. 29, 1910), 2 A.L.R. 503.

Harris was suspended by the Judge below on the 2nd December. The Court suspended him until the end of the sittings of the Court next after long vacation.

At which sittings such further disposition of the application will be made as shall seem proper, leave being reserved to either party to apply at such sittings, and it being a condition to any order terminating the suspension that it be shewn that the solicitor has paid to the Cardston Mercantile Co. Ltd., the sum of $98.20 being the balance of their moneys still in his hands, and to the Law Society their costs of the application.

The amount involved was, it appears, quite small. I understand that this amount and the costs were both paid, and the suspension removed at the conclusion of the sittings of the Court in September, 1910.

Reasons for the order were given by the present Chief Justice. On conflicting affidavits he finds some facts alleged by Harris to be disproved. He expresses the opinion that he should be struck off the roll. The majority of the Court, however, thought that suspension was sufficient. They would, I think, have agreed to disenrollment if they had thought Harris to have been guilty of wilful and corrupt perjury.

For my part, I think that Harris was amply punished for the offence established against him in that application.

I now revert to the matters of complaint upon which the order for disenrollment of June 17, 1911, was made.

Only the *Davies* and *Balderson* matters call for comment.

In the *Davies* matter it seemed, and still seems to me, that suspension for a time would have sufficed, and the rest of the Court took no stronger view.

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In the *Balderson* matter the facts briefly were: that Mrs. Balderson paid to Harris (who was then under suspension) $42, the exact amount (nothing being paid for costs) necessary to pay taxes on certain lands owned by her. This money was paid and received expressly for this purpose. Harris, claiming that Mrs. Balderson owed him $100 on account of one Harrison, decided to retain the $42, and did so.

My own view of the *Balderson* matter was expressed as follows:—

> I am disinclined to take so severe a view of this case as the other members of the Court. The amount involved is small. The applicant appears to be a person of bad reputation. Circumstances affording not a justification but some excuse are set up though denied. The solicitor's persistence in this ground of excuse as a justification, though quite untenable, has that element of the absence of hypocrisy about it that leads me to look upon it rather as an extenuation than an aggravation of his offence. Were the case an isolated one I should be in favour of suspending not disbarring the solicitor. There being, however, two charges against him and he having already on a previous occasion been found guilty of serious misconduct thus shewing an habitual course of conduct unbecoming a solicitor, I concur in an order that he be struck off the rolls.

I have never felt inclined to take any severer view of Harris' conduct than I then expressed. On the contrary, having now, with some more care, considered the earlier matters raised against him, I should eliminate the words "thus shewing an habitual course of conduct."

Mr. Justice Stuart, who gave reasons, with which the other members of the Court, except myself, concurred, says:—

> The fact that Mr. Harris reiterates again and again his belief that he had a right to take his client's money with a direction and upon a promise by himself to apply it in a particular way and then to retain it for another reason personal to himself and to refuse to so apply it, indicates to my mind such a state of absolute moral obliquity that it becomes impossible to say that a solicitor who takes that position is a fit person to be a member of an honourable profession.

I think it must be admitted that we are all liable at times to make use of or accept expressions which at other moments we should be glad had taken milder forms. There are those *qui dicunt malum bonum et bonum malum*, and even when, as here, there is no question but that the act in question is *malum*, different people will take different views of its gravity—differences

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arising from a difference in primary and fundamental principles, which it is useless to discuss.

In *Re a Solicitor*, [1912] 1 K.B. 302, a solicitor found guilty of professional misconduct, including champerty—two out of three Judges finding that the solicitor had in the proceedings perjured himself—was punished, not by disenrollment, but by suspension, for 12 months, and an order that he pay the costs of the enquiry before the committee of the Law Society, and of the motion.

In *Re a Solicitor* (1913), 29 Times L.R. 354, the offence charged was similar, but admittedly there was no perjury on the part of the solicitor, the Court thought it was sufficient to order the solicitor to pay the costs of the proceedings.

Looking at the applicant's history, it seems to me that his past has not been shewn to be nearly as bad as at first sight it might be thought to be, nor, consequently, the inference that any specially long time will be required for repentance and the forming of a fixed intention not to offend again. So far as the applicant himself is concerned he has, in my opinion, been amply punished; he has already been off the rolls for nearly three years. So far as the profession and the public are concerned, in view of the length of time the applicant has been disenrolled, of the favourable recommendations of the applicant from various sources and the evidence, which is not denied, that since his disenrollment he has not practised as a solicitor for reward, I am in favour of restoring the applicant to the rolls.

I would order Harris to pay the Law Society's costs of the application, but not as a condition precedent to reinstatement.

Simmons, J.

SIMMONS, J., concurred with BECK, J.

Order to restore.

LEIGHTON v. B.C. ELECTRIC R. CO.

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British Columbia Supreme Court, Macdonald, J. March 26, 1914.

1. CORPORATIONS AND COMPANIES (§ IV F—100)—LIABILITIES—FOR TORT —STATUTORY EXEMPTION.

Where an electric railway company is given authority by statute (B.C. statutes 1896, ch. 55) to construct, operate and maintain electric works, power-houses, generating plants, and such other appliances and conveniences as are necessary and proper for the generating of electricity or electric power, the erection of a power-house pursuant to such statute does not render the company liable, apart from any statutory right to compensation, for damages to an adjoining owner from the resulting noise and vibration, except upon proof of negligence.

[*London* v. *Truman*, 11 App. Cas. 45; and *Metropolitan* v. *Hill*, 6 App. Cas. 193, referred to; *Demerara* v. *White*, [1907] A.C. 330, distinguished; *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430, applied.]

Statement

ACTION by an adjoining owner against an electric railway company in damages and for an injunction for alleged nuisance in erecting and maintaining an electric powerhouse, the defence being statutory authority to maintain and the absence of any statutory right to compensation.

The action was dismissed.

W. B. A. Ritchie, K.C., and *J. G. Gibson*, for the plaintiff.

H. B. Robertson, and *G. Duncan*, for the defendant.

Macdonald, J.

MACDONALD, J.:—Plaintiff owned and occupied a house and lot on Earl's road, in the municipality of South Vancouver. In the year 1912 defendant erected a power-house on a lot adjoining such property of the plaintiff, and installed therein the usual machinery necessary in carrying on its business. The machinery has, since that time, been operated continuously, and occasioned a great deal of noise and vibration. Plaintiff alleged she had suffered therefrom, and this action is for damages on account of such nuisance and for an injunction.

At the close of the plaintiff's case the defendant applied for a dismissal of the action, on the ground that, in any event, there was no legal liability. I reserved my decision upon this application, and left the question to the jury as to whether a nuisance had in fact been created, and they found in favour of the plaintiff and assessed the damages at $500. They did not allow any damages for alleged trespass upon plaintiff's property by defendant during the construction of the power-house. Notwithstand-

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ing the finding of the jury, the defendant seeks to avoid liability on the ground that, as a matter of law, even if a nuisance arose owing to the operation of the machinery in the power-house, still it is protected by statutory authority and not liable in damages or otherwise.

Defendant company has acquired all the property, rights, contracts, privileges, and franchise of the Consolidated R. & Light Co., under the provisions of the Consolidated Railway and Light Co. Act, ch. 55, statutes of B.C. 1896. The defendant company is authorized by sec. 33 of such Act to construct, maintain, complete, and operate a street railway in the municipality of South Vancouver, along such road or roads as might be specified by such municipality, and to "supply electricity for lighting, heating, and other purposes, and maintain and construct all necessary buildings, appliances and conveniences connected therewith." The municipality has passed a by-law to comply with this section.

Then, by sec. 43 of the Act, the company is given authority to construct, operate and maintain electric works, power-houses, generating plants, and such other appliances and conveniences as are necessary and proper for the generating of electricity or electric power.

In my opinion, the construction of the power-house and installation of the machinery was a necessary and usual course to be adopted by the defendant company in carrying on its business. It had power to purchase land and utilize it in any manner authorized by the statute, provided that such utilization was not carried out in a negligent manner.

I think the whole question to be determined is whether the principle decided in *London, Brighton & South Coast R. Co.* v. *Truman* (1885), 11 App. Cas. 45, 55 L.J.Ch. 354, is to be applied whether the defendant company is liable, following the judgment in *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, 50 L.J.Q.B. 353. The distinction between a railway company which had a statutory power under an Act to create a nuisance and other bodies which had no such statutory power, is shewn by these two decisions.

The plaintiff contends that the judgment in *Demerara Elec-*

tric Co. Ltd. v. *White*, [1907] A.C. 330, 76 L.J.P.C. 54, is applicable to the facts in this case, so as to render the defendant liable. It appears to me, however, that the facts are so dissimilar to those in the present case that the judgment does not assist the plaintiff. The Demerara Electric Co. was operating under two authorities, one being a "lighting order," conferring the exclusive right to supply power, subject to the condition that nothing in such order should exonerate the company from any action for nuisance. The other authority obtained by the company at the same time was a license to operate tramways in the city of Georgetown, but the condition imposed by the lighting order was not repeated in such license. The company sought through this omission to escape liability for a nuisance to a neighbouring owner, created by the operation of the machinery in its power-house. This was somewhat similar to the present case, but the Privy Council held that the company was controlled by the terms of the lighting order. Lord Macnaghten, in delivering the judgment of the Court [in [1907] A.C. at 335], says:—

> It appears to their Lordships, however, impossible to infer from this circumstance that in connection with one of the two main purposes for which electricity was required by the appellants they are by implication relieved from an obligation imposed by a contemporaneous instrument, and accepted by them as applying to the production of electricity for every purpose, motive power as well as lighting and heating.

It is to be borne in mind that *Hammersmith R. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, 38 L.J.Q.B. 265, had been decided prior to the passage of the Consolidated Railway Companies Act (1896), 59 Viet. ch. 55. The legislature in granting powers and privileges to this railway company is assumed to have taken into consideration the effect of this decision. Cairns, L.J., in that case decided that it would be a repugnant and absurd piece of legislation to authorize by statute a thing to be done, and at the same time leave it to be restrained by injunction. Authority thus having been given to the company by the legislature, which is supreme, I do not consider that any actionable wrong has been committed by the defendant company. The principle upon which no right exists is referred to by Lord Hatherley in *Geddis*

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v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430 at 438:—

> If a company in the position of the defendants, there *Cracknell* v. *Corporation of Thetford*, L.R. 4 C.P. 629, has done nothing but that which the Act authorized—nay, in a sense may be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers.

I am of opinion that the only ground upon which the defendant could be held liable would be that the power-house was constructed in a negligent manner, or that the machinery therein was operated so negligently as to do damage to the plaintiff.

It is admitted on that part of the plaintiff that there was no negligence in the installation of the machinery in the power-house or in its operation. It was, however, contended that the power-house was unnecessarily located in too close proximity to the plaintiff's residence. But the statute not having placed any restriction on the defendant company as to the location of its power-house, it was entitled to exercise its own discretion in selecting a suitable site for that purpose. If a lot had been chosen with no house adjoining, then the owner of the adjoining lot would, according to the contention of the plaintiff in this action, be entitled to complain on account of the depreciation in the value of the property, through the construction and operation of a power-house. The statute not having afforded any remedy, as defendant acted within its legal rights, plaintiff cannot succeed. The action is dismissed with costs.

Action dismissed.

DORNIAN v. CRAPPER.

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Saskatchewan Supreme Court, Brown, J. March 9, 1914.

1. LANDLORD AND TENANT (§ I—2)—ATTORNMENT CLAUSE IN SALE AGREEMENT.

An attornment clause in an agreement for the sale of land whereby the amount of rent payable on the "crop payment" plan should be a yearly rental equivalent to and applicable in satisfaction of the instalments of principal and interest will be valid and support a distress thereunder where the share of the crop stipulated, namely, one-half, would not be an unreasonable rent.

[*Foster* v. *Moss*, 17 W.L.R. 174; and *Independent Lumber Co.* v. *David*, 19 W.L.R. 387, applied; see also as to such stipulations, *Hall* v. *Wehman*, 13 D.L.R. 17.]

2. TENDER (§ I A—2) — SUFFICIENCY OF — COUPLING WITH CONDITION, EFFECT OF.

A tender of an overdue instalment on the purchase-price of land under the "crop payment" plan is vitiated if coupled with an unreasonable condition.

3. CHATTEL MORTGAGE (§ VI — 55)—EXCESSIVE SEIZURE—CONCURRENT DISTRESS FOR RENT SECURED BY CHATTEL MORTGAGE.

Where a creditor, holding two distinct securities against his debtor, *i.e.*, by an attornment clause in the contract of sale and also by a chattel mortgage against specific goods, concurrently makes seizure under both, one of the seizures may be declared oppressive and illegal, when he knew or should have discovered (*a*) that his protection was ample without the double process, and (*b*) that serious inconvenience and loss would ensue to the debtor.

4. DAMAGES (§ III K 1—210)—ILLEGAL DISTRESS—QUANTUM.

The damages assessable to a debtor whose chattels are wrongfully seized and sold are based, not upon the price obtained at the forced sale, but upon the actual value of the property so taken.

Statement

ACTION in damages for alleged wrongful or excessive seizure of chattels under a chattel mortgage collateral to an attornment clause in a land purchase contract payable on the "crop payment" plan.

Judgment was given for the plaintiff in respect of the seizure and for the defendant on his counterclaim and on other issues.

F. W. Turnbull, for the plaintiff.

E. E. Turnbull, for the defendant.

Brown, J.

BROWN, J.:—The plaintiff in this case impressed me as being an intelligent man, and quite capable of fully appreciating what he was doing when he entered into the contract in question. He admits that the more important features of the contract were discussed at the time, and he seems to have clearly understood their purport. There was nothing said or done by the defendant

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or any of his agents that was not perfectly open and above-board; and under these circumstances I do not see how it can be contended that the plaintiff can escape from the consequences of his bargain. The plaintiff admits that he understood that the $500 which was paid in cash before the execution of the formal contract was to be regarded as a cash payment, and that the balance of the purchase-price was to be paid in crop payments. There is, however, not only this admission on the part of the plaintiff, but all the evidence points in the same way. The receipt and cheque given in connection with that payment, and the very fact of the payment having been made at the time it was, shew this to have been the intention of the parties. The failure to acknowledge receipt of this money in the contract itself was a mere omission; and when the defendant and his agent, Mr. McColl, stated that this amount would be credited, all they could have meant was that there would be due credit given on the agreement for this cash payment. It was never contemplated, nor was it understood by any of the parties, that this $500 was, as contended for by counsel on behalf of the plaintiff, to be credited on and deducted from the share of the crop to which the defendant would be entitled in the fall of 1913. The amount of grain grown on the place during the year 1913 was, according to the thresher's certificate, which I accept as the best evidence, 1,167 bushels of wheat and 4,380 bushels of oats. Under the contract the defendant was entitled to have one-half in kind of this grain delivered at the elevator at Balgonie in his name. The plaintiff, instead of so delivering the grain, as he knew he should have done, had at the time of the seizure hereinafter referred to, sold all the wheat except some 167 bushels, which were apparently retained for seed, and practically one-half of the oats, converting the proceeds to his own use, and not making any attempt to keep any record of the quantity of wheat or oats so sold or the price obtained for the same, as a person would be expected to do who honestly intended to account for the grain. In doing as he did, the plaintiff committed a flagrant violation of the terms of the contract, and left himself liable to action on the part of the defendant, both under the attornment clause of the contract and under the chattel mortgage. I find

the market value of the wheat at the time it was sold, and the price which the defendant might reasonably expect to have realized if he had sold it himself, to be 70 cents per bushel, or, for a total of 583½ bushels, his share of the wheat, $408.45. The defendant got 2,323 bushels of oats off the premises, but of this amount one hundred bushels had been left by the defendant on the premises from the preceding year, thus leaving 2,223 bushels obtained from the crop of 1913. He was entitled to 2,190 bushels as his half share of the oats, so that he took 33 bushels more than the half share, and must of course account to the plaintiff for that amount. The price which the defendant realized for the oats was practically 25 cents per bushel, making the total for the 33 bushels $8.25. This, deducted from $408.45, leaves $400.20 as the amount which the defendant would be entitled to from the proceeds of the crop as his share, after crediting the oats sold. But the plaintiff was to deliver the grain at the elevator, and the defendant will be allowed to offset his reasonable expenses for hauling 2,223 bushels of oats to the elevator, which I fix at 1½ cents per bushel, being the price allowed under the Thresher's Lien Act, R.S.S. 1909, ch. 152, and making a total of $33.34. This, added to the $400.20, makes $433.54. The plaintiff had paid the defendant $51.20, which, deducted from $433.54, leaves $382.34. So that, apart from expenses in connection with the seizure and sale, the total amount to which the defendant was entitled after crediting the proceeds of the oats, was $382.34.

Counsel for the defendant stated during the course of the argument, and in my judgment it was quite proper that he should do so, that the defendant would not rely on the acceleration clause of the contract to assist him. So, then, it is not necessary that I should consider that phase of the matter at all. The contract contains the customary attornment clause, in which it is provided that the amount of rent payable shall be the equivalent of the instalment of principal and interest falling due each year—in this case one-half of the crop. This is a valid attornment clause, and the amount of rent would not be unreasonable; in fact, during the year 1913, it would be very little more than enough to pay the interest. See *Foster* v. *Moss*, 17 W.L.R. 174; *Independent Lumber Co.* v. *David*, 19 W.L.R. 387.

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The plaintiff also at the time of the execution of the contract gave the defendant, by way of collateral and additional security, a chattel mortgage on a large proportion of his chattels. On November 24, the defendant, acting under the attornment clause of the contract, and also under the chattel mortgage, made a seizure of practically all the goods and chattels which the plaintiff owned or had on his premises, except his household effects, and including all the oats above referred to. The oats were hauled to market and sold as already indicated. The defendant very shortly after the seizure conveyed the goods seized, excepting the grain, to a neighbouring farm, which was owned and operated by the defendant, and later on, and before any sale of the goods, the defendant abandoned his seizure under the attornment clause of the contract and proceeded to realize solely under the chattel mortgage. Some of the goods so seized were returned to the plaintiff's premises before the sale; others, which were not sold, were retained until after the sale, and as to certain others there is no satisfactory evidence that they have ever been returned, although not sold. It is contended on behalf of the plaintiff, and there is some evidence to that effect, that the plaintiff tendered the defendant the full amount due him prior to the sale. I find, however, that this contention is not supported by the evidence; that whatever tender was made was a conditional one, the condition being that the defendant should pay the thresher's bill for threshing the grain, and which, according to the evidence, would be almost as much as the sum of money that was so tendered. At the time of the seizure the defendant knew, or could readily have learned, the quantity of grain to which he was entitled and the market value thereof. There was no necessity for haste on his part so far as anything outside of the grain was concerned, because he had security in his chattel mortgage which amply protected him. He could have marketed his share of the oats, and by so doing he would readily have discovered that the balance due him was in the neighbourhood of $382.34; and for the purpose of deciding the several points raised in connection with the seizure and sale of the chattels, I will therefore assume that the defendant knew that the above sum was the amount to which he was entitled. The following

goods, in addition to the grain, were seized and taken from the plaintiff's premises and possession: one black gelding, three bay geldings, one bay mare, two two-year-old colts, two spring colts, three cows, one yearling heifer, one yearling bull, two calves, 11 pigs, one binder, one disc drill, two Bain waggons, one gang plow, one disc harrow, one drag harrow, one buggy, two hay-racks, one bobsleigh, harness, forks, pails, and some other trifling articles. Some of these articles are not referred to in the pleadings at all, but I will allow any amendment that may be necessary to include them. Even at a forced sale—and I am bound to value the articles on that basis—a reasonable valuation of said goods and chattels, including also the wheat which was left on the premises, I find would be $1,645. On December 11, the following articles were sold under the powers contained in the chattel mortgage, and realized the amounts set opposite them respectively:—

1 bay gelding	$92 00
1 " "	95 00
1 " "	61 00
1 black "	73 00
1 bay mare	42 00
1 spring colt	29 00
1 " "	30 00
1 red cow	60 00
1 " "	61 00
1 " "	38 00
2 spring calves	36 00
Total	$617 00

All of these chattels so sold were covered by the chattel mortgage, excepting one spring colt. It was not included in the mortgage, and the defendant had no authority or right to sell it under the mortgage, as he purported to do. Apart from the chattels so sold, I find that the balance of the goods seized were returned to the plaintiff, except the following:—

1 disc harrow, value	$30 00
1 drag harrow, "	30 00
2 hay racks, "	24 00
1 bobsleigh, "	40 00
In all	$124 00

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There is no satisfactory evidence that these articles have ever been returned, and the only evidence of their value is that of the plaintiff himself as set out opposite each of the said articles respectively, and which valuation I accept.

The defendant incurred certain costs in connection with the seizure and sale of the said goods, a considerable part of which is not chargeable to the plaintiff in any event. The only costs which I will allow are as follows:—

Harwood, Dec. 11, railway fare and livery	$3 50
" Commission on sale to extent of, say, $440	13 20
Koch, moving stock and caring for same ($22 chgd.)	15 00
Leb, care of stock	10 00
Donnelly, the man in possession	15 00
Total	$56 70

This amount, when added to the $382.34, makes $439.04, and is the total amount to which the defendant would be entitled after crediting the oats for his claim and costs. No fees can be allowed for the appraisement, in view of the fact that the bailiff who made the seizure was one of the appraisers. This is not permissible. See 11 Halsbury 171. The action of the defendant in this case in seizing to such an excess was, in my judgment, most unjustifiable, unreasonable, and in fact extremely oppressive. Had he been reasonable at all in his actions he could have easily realized sufficient to pay his claim without much inconvenience or loss to the plaintiff. Although a large quantity of the chattels were subsequently returned, the plaintiff was deprived of their use for some time. I allow the plaintiff as damages because of the excessive distress the sum of $150. The defendant had no right to sell the spring colt which was not in the mortgage, and he must pay the full value of the same, which I assess at $60. Leaving out this colt, which realized at the sale some $30, when the defendant sold the horses and the other spring colt and one cow he had realized under the chattel mortgage $452, and this exceeded the amount of his just claim by $12.96. The plaintiff is entitled to recover this excess. But after realizing sufficient to satisfy his claim, the defendant went on and unnecessarily sold to the damage of the plaintiff two other

cows and two spring calves. I am of opinion that the plaintiff is entitled to recover for them not simply what they realized at the sale, but their actual value, which I assess at $190. The total damages, therefore, which I allow the plaintiff on his claim are as follows:—

Damages for excessive distress	$150 00
Value of colt sold	60 00
Excess realized on sale	12 96
Value of cows and calves wrongfully sold	190 00
Total	$412 96

The plaintiff will, therefore, have judgment for $412.96, and his costs of action on the Supreme Court scale. The defendant is also ordered to return, if he has not already done so, to the premises from which they were taken, within thirty days from this date, the disc harrow, the drag harrow, the two hay-racks, and the bobsleigh, and in default the plaintiff will have judgment for the value of the same as herein found, or the value of such thereof as are not returned.

As to the defendant's counterclaim: there cannot be any recovery for the failure to summerfallow, because the defendant was a party to seeding all the land that was put in crop for 1913, and all that was not in crop was summerfallowed. The plaintiff failed to fall-plough as agreed, but as there was no evidence as to the damage suffered in consequence of his failure in this respect, I can only allow nominal damages, which I fix at $10. I also allow $12.50 for hay taken from the defendant's place, and $25 for 100 bushels of defendant's oats which were used by the plaintiff for feed.

In the result the defendant will have judgment on his counterclaim for $47.50, and the costs exclusively applicable to the counterclaim. The amount so recovered by the defendant will be offset against that recovered by the plaintiff, and execution issue in the plaintiff's favour for the balance.

Judgment accordingly.

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FULTON v. MAPLE LEAF LUMBER CO.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Meagher, Russell, and Drysdale, JJ. April 4, 1914.

1. APPEAL (§ VII L 3—509)—TRIAL WITHOUT JURY—BASIS OF ASSESSMENT OF DAMAGE.

Although a jury is bound to assess damages for conversion of standing trees on timber land upon proper principles under judicial instructions, an assessment of such damages by the judge himself (without a jury) cannot be disturbed on appeal merely because such judicial assessment is made without indicating whether or not he himself is being governed by such principles.

Statement

APPEAL from the judgment of Longley, J., in favour of plaintiffs for the sum of $200, in an action claiming damages for breaking and entering upon plaintiff's land and taking and carrying away and converting to defendant's own use a large quantity of trees and logs.

Defendant denied the acts complained of, but, while denying liability, paid into Court the sum of $200 which it was alleged was enough to satisfy plaintiffs' claim.

The cutting which was the subject of the action was done by a contractor employed by defendant for the erection of a dam and the main contention was as to whether defendant was liable for the acts of said contractor or not.

The facts are more fully set forth in the judgments.

The appeal was dismissed, TOWNSHEND, C.J., and MEAGHER, J., dissenting.

S. Jenks, K.C., for appellant.

F. L. Milner, for respondent.

Townshend, C.J. (dissenting)

SIR CHARLES TOWNSHEND, C.J. (dissenting):—It would be rather a shock to one's sense of justice and right if the defendant company, in this case, could shelter itself under the plea that the serious damage to plaintiff's land was the act of an independent contractor, for whose wrongdoing the company were in no way responsible, and that this was so in face of the fact that the company employed a contractor admitted to be worthless, and of no financial means, and that the company received the full benefit of his unlawful acts. Under such conditions, it is no doubt our duty to scrutinize with great care, and very closely the whole transaction between the parties to prevent if possible such an inequitable and unfair result.

The company entered into a written contract with one Geldert, as already stated, a man of straw, to construct a dam according to certain specifications and to be built under the superintendence of the company's manager. One of the terms of the contract was as follows:—

> The company is to supply all trees, spikes, planks and boards and other material for the dam. Then follows:—The contractor, however, is to cut and haul all timber for the dam, including poles for bottom if the company so wishes, he obtaining timber within one-half mile of the coal company's railway. In case the timber is over half a mile from the dam, the contractor shall get same within one-half mile of the railway and deliver it and load it on cars on the railway and the company shall pay the cost of railway taking same down to near the dam.

Before commencing the work, the manager applied to plaintiff for leave to get the trees and lumber required off their lands adjoining or near to where the dam was to be located. The plaintiff, for reasons explained to the manager, refused to grant his request. In consequence the company purchased the right to get the trees from another proprietor further away and instructed the contractor to obtain them from this lot. The contractor, instead of following the manager's instructions, deliberately entered upon plaintiff's lands and cut down and carried away the trees required therein, and built the company's dam. The manager, although he was at the dam while being constructed a number of times, says he knew nothing of the contractor's act until after the work was completed. While the company have the full benefit of the contractor's illegal act, they decline to pay the damages, on the ground that Geldert is an independent contractor, for whose illegal act it is not responsible. This might be so if the contractor had agreed to supply the trees as well as to do the work of construction, but by the express terms of the contract, defendant company were obliged to furnish all trees and materials. Instead of using its own men and teams for this purpose, by a further term of the contract, it employed the contractor to cut down all such trees as were required and to haul them to the dam, the company paying railway charge, if any. Now, it seems to me when the defendant company employed the contractor to perform and carry

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out its portion of the contract, he became its servant and agent in this regard, and for any wrongful act he did in the course of this employment the defendant company are responsible and must pay the damages. If the law were otherwise, how easily could an individual, or company, evade responsibility for any wrong act done for his or its benefit by contracting with a man of no means.

This view of the transaction is, I think, consistent with all the authorities. I have examined the cases cited in defendant's very full brief. One of them lays down the law and points to the distinction between an independent contractor and a servant or agent. In *Pickard* v. *Smith*, 10 C.B.N.S. 470 at 480, Williams, J., in delivering the judgment of the Court says:—

> Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant, or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable.
>
> To this effect are many authorities which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor, by a parity of reasoning to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment whereby an injury is occasioned.

Now these words, it appears to me, exactly fit this case, where the contractor was employed to cut and haul the trees which the company were obliged to supply. There are, of course, many cases dealing with this subject as to when a man is acting as an independent contractor and when merely as a servant or agent, and it is frequently one of much difficulty to determine.

Reference to 31 Cyc. 1193 and 38 Cyc. 1040 will enable one to follow the numerous cases in which the question is dealt with, also Lindley on the Law of Companies, 6th ed.

As to the damages, I am of opinion that the amount allowed by the trial Judge is insufficient and should be increased.

The learned trial Judge has not informed us in his judgment by what process he fixed the damages at $200. After considering the evidence, I have come to the conclusion the plain-

tiffs are entitled to a large amount which should be estimated as follows:—

42,500 superficial feet at the rate of $8.50 per thousand, amounting in all to $361.25. Vide as to method of fixing the damages in trespass, *Glenwood Lumber Co.* v. *Philips*, [1904] A.C. 405.

Then there should be a further allowance for damages in trespassing on the land and damages in carrying on lumbering operations thereon. It is impossible to fix such damages by accurate calculations, but taking all the circumstances into consideration, I would allow plaintiff $50 for the same, making in all $411.25. The decision below to be varied accordingly, and this appeal allowed with costs, and costs of the trial. Of course the $200 paid into Court which plaintiffs are entitled to receive is to be deducted from the total sum awarded.

Townshend, C.J.

GRAHAM, E.J.:—I concur in the conclusions of Mr. Justice Russell and Mr. Justice Drysdale that the damages should not be increased, but I express no opinion on the question of whether Geldert was an independent contractor or not, as it is not necessary for me to do so.

Graham, E.J.

MEAGHER, J. (dissenting):—I am of opinion that the damages should be increased to $350 and that there should be judgment for plaintiff for that amount with costs.

Meagher, J. (dissenting)

RUSSELL, J.:—The defendant company made a written contract with one Manning Geldert to construct a dam across the river Hebert, on which they had a tract of timber lands. The plaintiff had land on the west side of the river, and an arrangement was made between defendant company and plaintiff for rights of flowage and for a small quantity of hardwood near the river. The defendant's superintendent wished also to purchase from the plaintiff the trees required for the construction of the dam, but plaintiff was unwilling to sell them and refused to do so. Under the terms of the contract, Geldert was to be supplied by the defendant company with trees, spikes, planks, boards and other materials for the dam, and the company accordingly made an arrangement with a landowner on

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the east side of the river for the requisite quantity of trees, of which they informed Geldert. But the latter, no doubt, found it more convenient to take the trees from the plaintiff's land and did so. The plaintiff has sued the company for trespass to the land and conversion of the trees.

The defendant company paid money into Court ($200) which the trial has found to be sufficient, and defendant has also denied liability on the ground that Geldert was an independent contractor for whose trespasses they are not liable. I am unable, for my part, to see why this defence was not sustained by the decision of the learned trial Judge. The reasons for holding that he was not an independent contractor do not convince me. It seems to me that under the contract he had the right to determine in what manner the end in view was to be accomplished without interference by the company or its officials, and I see nothing in the evidence to indicate that the defendants treated him otherwise than as the person responsible for the conduct of the work. Their superintendent, Soy, was no doubt interested in seeing that the work was properly done and frequently visited the place for that purpose, but I have not seen evidence of his giving any directions to Geldert or his workmen or doing anything that would not be done by an inspector of the work had such inspector been appointed. The only reason given for regarding him otherwise than as an independent contractor is that he was a person of not the slightest responsibility, and that he had not been paid anything on his contract. It is not proved that he was not paid anything. He admits that part of his pay has been kept back. He would not need to be a person of responsibility when all the materials were provided for him. It would be sufficient that he knew how to build a good dam and it is not shewn that he was not a good builder.

But assuming that this contract was a mere sham and that he was only an employee of the defendant company, the contention of the plaintiff is that the learned trial Judge has assessed the damages on a wrong principle, because he has allowed plaintiff for the stumpage merely, whereas he should

have allowed for the value of the trees taken as they lay on the plaintiff's premises after they had been cut down and trimmed and made into logs. The reason for this contention is that the property when reduced, or perhaps I should say improved, to that condition, was converted by the defendants, and that as the defendant company, being a wrongdoer, would have no lien upon the property for the labour and expenditure bestowed upon it, plaintiff would be entitled to its value in its improved condition without any deduction for the cost of putting it into that condition. The case of *Martin* v. *Porter*, 5 M. & W. 351, is cited as authority for this contention. If Geldert were being sued for the trespass and conversion the principle of this case would certainly apply. It would be the case of a wilful trespass committed against the positive refusal of the plaintiff to sell the timber. There may, however, be a difficulty in applying the principle to the circumstances of the present case. The company did not wish to take the plaintiff's property. They made a contract for timber to be procured from the other side of the river, expressly because the plaintiff had refused to sell them his trees. It is by no means clear to my mind from the evidence that Soy, their manager or superintendent, knew that Geldert was helping himself to the plaintiff's trees, or at least that he knew it until after the mischief was done. There is no evidence whatever that he authorized or encouraged Geldert to take the plaintiff's timber, and he expressed his regrets when he learned that it had been taken. I know of no reason for assuming that his regrets were simulated.

It is further contended by the defendant company that even if Soy, the company's agent, had authorized Geldert to take the plaintiff's timber the company would not be liable for the trespass, as it was not within the scope of any implied authority from the company any more than the arrest of a passenger for non-payment of his railway fares was within the implied authority of the guard in the case of *Poulton* v. *London and S.W.R. Co.*, L.R. 2 Q.B. 534. The cases seem to me very similar. At least, I am unable to perceive any distinction in principle between this case and the case just cited.

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But further, it is not clear that the trial Judge did not assess the damages on the principle contended for by the plaintiff, assuming that to be the proper criterion. It is true, that twice in the course of the trial he interposed a question during the examination of the witnesses with reference to the value of the stumpage, but that is not conclusive. There is a wide margin between the valuations made by the different witnesses, and the evidence as to the value of the logs as they lay on the plaintiff's premises just before removal is rather hazy, so much so that I do not, for my part, find it possible to say with certainty that the learned Judge did not apply his mind to the ascertainment of the value of the logs as they lay after they were cut and trimmed. If he did so, of course, his assessment of the damages could not be disturbed even if the plaintiff is right as to the principle that should be applied.

I cannot help remarking upon the disadvantage at which the plaintiff has been placed in contending for his supposed rights. Had there been a jury, the charge would have indicated clearly the principles on which the damages were to be assessed and if the jury had been misdirected, the plaintiff would have had a remedy. Had the learned trial Judge founded his decision on a reasoned opinion, the plaintiff would have known on what principles the assessment had been made and whether the Judge had or had not misdirected himself on the point. The decision does not indicate what measure of damages was adopted and plaintiff can only endeavour to establish the fact that what he regards as a wrong principle was applied by reasoning from the evidence and comparing the various estimates with the figure arrived at by the trial Judge.

If I were ever so well satisfied that the plaintiff is right in his contention as to the principle to be applied, I could not feel sufficiently certain that it had not been so applied to warrant me interfering with the assessment.

I think the appeal should be dismissed.

Drysdale, J.

DRYSDALE, J.:—The question of liability here is, I think clear. I have nothing to add to the statement of the case on the merits and the reviews of the authorities on the subject so fully dealt with by Mr. Justice Russell.

The only question remaining is as to the amount of damages. These were assessed by the learned trial Judge at $200. There is a volume of evidence on the question of damages and some of the independent witnesses are reliable lumbermen.

If a jury had assessed the damages at $200, I think under the evidence such an assessment could not be interfered with, and after carefully going over the testimony of all the witnesses touching the cutting and hauling away of the plaintiff's trees, I am unable to say that the trial Judge either acted on any wrong principle or arrived at an unreasonable amount.

The plaintiff, I think, obviously fixes unreasonable value on the trees as timber, and taking the weight of testimony as detailed by men who are independent, I am of opinion that the amount assessed should not be disturbed.

I would dismiss the appeal with costs.

Appeal dismissed.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Meagher, Russell, and Longley, JJ. April 4, 1914.

1. APPEAL (§ VII M 3—535)—AS TO EVIDENCE—REVERSAL REFUSED, WHEN.
A finding at the trial in the plaintiff's favour, on his claim of title to lands by possession, will not be disturbed on appeal, where, although the evidence is conflicting as to continuous possession, there was some evidence upon which to base the finding.

Statement

APPEAL by the defendant from the judgment of Drysdale, J., in favour of the plaintiff in an action claiming damages for trespass to land. The defendants denied the acts of trespass complained of and that plaintiff was owner or in possession of the land. They further pleaded that the land in question was the freehold of the defendant Caleb Atwell and that the other defendants entered by the authority of said Caleb Atwell and committed the acts alleged, if at all.

At the trial, judgment was given in plaintiff's favour on the ground that plaintiff traced his title to the original owner, who, in his lifetime, farmed the lot in question; that plaintiff at the time of the acts of trespass complained of had title and

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possession of the locus and that defendants had failed in their proof of title.

The appeal was dismissed.

W. E. Roscoe, K.C., and *H. W. Sangster*, for the appellant.

W. M. Christie, K.C., and *V. J. Paton*, K.C., for the respondent.

Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—I have no doubt the decision of Drysdale, J., in favour of the plaintiff was entirely right. The evidence of continued possession of plaintiff, and those through whom he claimed, for a period of over twenty years is abundant, and as it was accepted by the trial Judge as against such evidence as the defence gave, I think it conclusive.

Whether plaintiff's deeds really include, by actual measurement, the land in dispute becomes immaterial in view of the continued and notorious possession he had, and had at the time of the trespass.

Defendants, it is conceded, had no legal title whatever, and such acts as they did on the land simply amounted to trespass.

Plaintiff, in buying from Robertson, bought all Robertson's claims and rights in connection with the farm, and as it is clear that Robertson occupied and used this disputed area as part of his farm, plaintiff took just what he had.

This appeal should be dismissed with costs.

Graham, E.J.

GRAHAM, E.J.:—The lots of land of the plaintiff and the defendant Atwell, each 100 acres in extent, are supposed to be contiguous to each other, in fact, end to end, between the line of the old post road on the Gaspereaux mountain and a line parallel to it running north and south. The dispute is as to the whereabouts of the common boundary line. The defendants contend that it is represented by a blazed line across the parallel lines. The defendant's lot, originally at least, bounded on the plaintiff's lot to the south of it. The plaintiff claims to run north of that blazed line and as far as the little Chester road, which runs diagonally between the parallel lines and at an angle of about 45 degrees to them. There is thus a triangular piece of land in dispute, nearly 18 acres, about half of it a meadow of irregular shape, the rest upland.

The plaintiff's description since the year 1822 has been something like this:—

Deed, dated July, 1822. Made by William Creelman of Horton, King's county, to Robert Trenholm, of Falmouth, Hants county: "A certain tract of land lying on the South Mountain bounded on the east by the Post or Main road; on the south by lands of the widow Lyman; on the west by lands improved by Daniel Bishop, *and on the north by lands of Elisha DeWolfe to the road*, being part of the third division of farm lot No. 101, the original draft of Timothy Goodwin, being the same tract I purchased of Benjamin Sheldon, containing one hundred acres, *including about fifteen acres of common, more or less.*

In 1896, in the sheriff's deed to Leonard Duncanson, the acreage was put at 112 acres, possibly to include the land in dispute. The plaintiff did not prove his northern boundary, namely, the location of the "lands of Elisha DeWolfe." So far as the evidence goes, there has been no land of Elisha DeWolfe in that neighbourhood. But he contends, that the words "to the road" in the description meant the little Chester road, and that he is entitled to go that far as to a monument. But that is clearly not so. The little Chester road was not laid out until afterwards, only 65 years before the trial and could not have been intended. The description has just mentioned "the old Post road," and later, when "the road" is spoken of, it is obviously the road just mentioned, and not any other road. Besides, how much easier to use a monument like that, the little Chester road, for a boundary, without referring to the Elisha DeWolfe's land at all. Whatever the common boundary was, it is safe to infer that it was not a diagonal line like that and that the little Chester road, when it came to be laid out, would not follow a boundary line, but the best course for the road.

The plaintiff, not having proved the northern boundary of his land on the ground if he had been driven to resort as he might do to the element of quantity, namely the 100 acres, would be out of Court, because this triangular lot is over and above the 100 acres, and supports the defendant's contention. And in the absence of other definite description, quantity, though the last thing to be resorted to, may have a controlling force.

The surveyor's line, a blazed line across the land, with

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stakes across the meadow, between the two lines, is not referred to in either deed. But it is a surveyor's line. James Farrel, who had formerly with his father lived on the lot now the plaintiff's for 23 or 24 years, ending about 45 years ago, says that the lot had been surveyed twice, once by a surveyor named William Johnson, now dead, and this witness, Farrel, identified this line. He says that this was the line between the southern lot and a Mr. Fitch who apparently owned the other lot. Later, that is, 36 years before the trial, Mr. Leard, a surveyor ran this line out for Dr. Brown. Charles Brown and John Atwell were present at this survey. James Duncanson, a witness for plaintiff says there is a blazed line there now. I think there is a strong presumption that this line represented the boundary between the two farms. The plaintiff being without any proof as to the boundary of the older lot, the Elisha DeWolfe lands, is driven to rely upon acts of occupation to carry them north to the little Chester road. The defendants are in an unfortunate position in regard to their description.

The earliest deed in the chain of title May 10, 1856, Hamilton to Brown, gave the southern boundary of this lot, the defendants', "as south by the Creelman farm." That is to say, the farm now the plaintiff's. That at least would have left the matter neutral. Brown sold to William Atwell and gave him the deed to himself, which I have just mentioned and containing that description. But it was to be paid for by instalments, or gradually and on completion of the payments he was to give Atwell a deed. He died suddenly, however, and when his executors, in July, 1890, gave Atwell a deed, knowing, I suppose, that there had been a dispute about this common boundary, they inserted in it, not the former but the following description:—

> Deed, dated July 7, 1890, made by Frederick W. Borden and Bessie B. Borden, his wife to John Atwell. "*All that farm* on Gaspereaux Mountain now *occupied by the said John Atwell* and bounded northerly by the Allen road, easterly by the Post road, so called, south by a road leading to Little Chester and west by the west line of the original lot as conveyed to Edward L. Brown, deceased, and by his executors conveyed to Frederick W. Borden aforesaid by deed recorded in book 48, pages 52 and 53 of the Records for King's county. Book 57, page 369.

In the next deed, that from John to Caleb Atwell of August

27, 1909, the older description was used, namely, "the Creelman farm" in lieu of "the old Chester road."

The defendants are thus driven to rely upon their possessure of the triangular area by acts of possession and, as they contend, colour of title. Having obtained Brown's deed with a description of the whole land up to the Creelman land, with a parol agreement to purchase that land described in that deed and having continued to pay the consideration, and having entered under Brown's deed, they had a good equitable title which could have been enforced in equity. That would, according to the decisions, constitute colour of title and this doctrine would extend the acts of occupation on the residential portion of the farm to this further part, the triangular area in dispute. The law is established that, as between the occupant and a stranger, an executory contract of that sort would confer colour of title.

I refer to *La Frombois* v. *Jackson*, 8 Cowen 589; and *Briggs* v. *Prosser*, 14 Wend. 227.

The predecessor in title of the defendant John Atwell thus went into possession 44 years before the trial, he says: "The next spring after the Saxby tide," *i.e.*, 1870. On July 7, 1890, he obtained his own deed from Brown's executors, that would be twenty years' possession and sufficient, but I think that a reasonable time to have the deed rectified in a Court of equity, after he discovered the mistake would carry the colour of title along even beyond the statutory period of 20 years.

The plaintiff must succeed on the title which James Jacob Robinson acquired by occupation during this period, that is, a *possessio pedis*, because he has no colour of title. This case is like that of *Wood* v. *LeBlanc*, 36 N.B.R. 47, on appeal, 34 Can. S.C.R. 627, in this respect neither party had a documentary title. It was a case between strangers to the title. This is, however, a case in which the plaintiff is trying to hold by acts of occupation beyond his boundary or beyond his quantity of 100 acres.

In that case Davies J., says, p. 633, that the question was whether the plaintiff

> has shewn such open, notorious, continuous, exclusive possession or occupation of any part of such lands as would constructively apply to all of

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them and operate to extinguish the title of the true owner and give plaintiff a statutory one.

The first question is, was the possession of James Jacob Robinson, in respect to the triangular lot, of that character. The meadow was never plowed. It was bog, too miry to plow. But a ditch was cut in it one summer, I think to the south of the blazed line. His son says it was only a short piece of ditch. "Q. How long? A. I couldn't say." And he could not say how long his father was working at it. On the land outside of the meadow there was a portion variously estimated by the different witnesses, as two to four acres; that had been plowed, and for two years, crops of buckwheat, or oats and potatoes had been raised upon it, afterwards, hay had been taken from it. It was about 26 years before the trial that manure had been purchased for this land from William Morine, and the plowing took place before that. William Morine says: "I never remember seeing it plowed after the manure was hauled on to it. I guess it growed up to bushes." There had been no cultivation for 20 years before the trial.

The evidence tends to shew that on the land outside of the meadow, John Atwell cut ship timber, also firewood and stave wood in different years during this period. In respect to the meadow, he cut the grass six or seven seasons. But Robinson seems to have cut the grass there more frequently during this period, one season it yielded about three tons and sometimes more. Lyman says: "It has not been cut for a good many years now."

In respect to cutting wood on the upland and the wild grass on the meadow, the decisions of the Supreme Court of Canada tend to shew that these acts of themselves are not of very serious importance on establishing a title by occupation without more; I refer to *Wood* v. *Le Blanc*, 34 Can. S.C.R. 367; *McInnes* v. *Stewart*, 45 N.S.R. 435, affirmed in the Supreme Court of Canada; *McIsaac* v. *McDonald*, 37 Can. S.C.R. 157; and upon such evidence the plaintiff would, in this case, fail.

But the plaintiff relies upon enclosure, that is to say, upon evidence tending to shew that Robinson kept a fence along the two roads bounding this triangular lot, with the exception of about three rods at the apex of the triangle, a pole fence

where the land was not in bushes, as where the meadows lay, and a brush fence through the woods. Some of this evidence is not very satisfactory, for instance, James Robinson, Jr., says:—

Q. All your father's lifetime, what kind of a fence did you have on the highways? A. Part pole, and when there was brush, we would have a brush fence. It went along the Post road and up the Chester road.

Turning to his age, the plaintiff elicited that he was 45, which would make him out to be two years old when he went to the place with his father and to remember a fence (there was none there before) would require great observation and powers of memory on the part of one so young. He must be speaking of a later period. The two years of potatoes and buckwheat, or oats, on the upland and the wild grass on the meadow would, however, necessitate a fence, at least around those portions and it may have taken the form of a fence along the roads. There is evidence tending to shew that there was a fence there of that character as far back as the seventies. This is stoutly denied by John Atwell and witnesses for the defendant. But, in view of the trial Judge's finding on this conflicting evidence, I am unable to disturb the judgment, although, in my opinion, the land in dispute originally belonged to the other lot.

MEAGHER, RUSSELL, and LONGLEY, JJ., concurred.

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Longley, J.

Appeal dismissed.

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Judicial Committee of the Privy Council. Present: Lord Atkinson, Lord Shaw, Lord Moulton, and Lord Sumner. Nautical Assessors: Vice-Admiral N. Ommanney, C.B., Commander W. F. Caborne, C.B., R.N.R. March 4, 1914.

1. APPEAL (§ VII L 5—515)—ON APPEAL FROM APPELLATE COURT—CONCURRENT JUDGMENTS BELOW, EFFECT—ONUS ON APPELLANT.

Where the question is whether concurrent judgments in the courts below shall be reversed on the ground that the judges have taken an erroneous view of the facts, it is incumbent on the appellant to adduce the clearest proof that there is error in the judgment appealed from.

[*Whitney* v. *Joyce*, 95 L.T.R. (N.S.) 74, applied.]

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APPEAL by the defendant from the judgment of the Supreme Court of Canada, affirming the judgment of Drysdale, J., sitting as deputy District Judge of the Exchequer Court of Canada (Nova Scotia Admiralty Division), in an action *in rem* for damages in a steamship collision.

The appeal was dismissed.

The judgment was delivered by LORD ATKINSON:—In this case the owners and the charterers of the steamship "Renwick" instituted on December 30, 1911, an action *in rem* against the defendant, the "St. Pierre-Miquelon" to recover damages for the loss sustained by them by a collision which admittedly took place between these two ships on December 27, 1911, off the coast of Nova Scotia, resulting in the sinking of the "Renwick." The charterers were the owners of the cargo which this ship carried.

The "Renwick" was a screw steamship about 130 feet long and 666 tons gross register. She was at the time of the collision, 2.45 to 2.50 a.m., on Thursday, December 27, 1911, bound on a voyage westward from Port Hastings to Bridgewater, a port about 37 miles distant, with a cargo of coals. The night or morning was at the time dark but clear, the tide was ebbing, but with little force, and there was a slight northerly wind. The speed of the "Renwick" was 8½ knots. Her course W. ½ N. by compass, W. ¼ N. magnetic, close to the line of buoys lying along the shore to her northward.

The "St. Pierre-Miquelon" is a French screw steamship about 948 tons gross and 400 tons net register, somewhat larger than the "Renwick." At the time of the collision she was on a voyage from Halifax to North Sydney (between which ports she regularly traded), carrying a general cargo. Her speed was 10 knots and her course was E ¼ S. by compass, E. magnetic. The courses of the two ships were therefore either directly opposing or parallel. The "St. Pierre-Miquelon" counterclaimed against the owners of the "Renwick" for the damages she had sustained by the collision.

The action was on the 5th and 6th February, 1912, tried before Mr. Justice Drysdale sitting as deputy District Judge

of the Exchequer Court of Canada (Nova Scotia Admiralty District). That learned Judge believed the story told by the witnesses examined on behalf of the respondents, found the "St. Pierre-Miquelon" alone to blame, found against her on her counterclaim, and awarded damages against her.

The appellant appealed against this decision to the Supreme Court of Canada. The appeal was heard before the Chief Justice and five of his colleagues when the judgment of Mr. Justice Drysdale was affirmed, Brodeur, J., dissenting. The Chief Justice and Mr. Justice Davies stated that, if they had to decide on the printed evidence, they would have been disposed to come to a conclusion different from that at which the learned trial Judge had arrived, and all of the learned Judges, with the exception of Mr. Justice Brodeur, expressly based their judgments on the fact that Mr. Justice Drysdale had had the opportunity of seeing the witnesses and judging of their credibility, and that therefore his decision should not be disturbed.

It will thus be seen that there were two concurrent judgments on two issues of fact, namely the culpability of the crews of each of the two ships. The rule observed by this Board in dealing with such cases has been laid down in many authorities. It is as clearly and succinctly stated by Lord Macnaghten in the case of *Whitney* v. *Joyce*, 95 L.T.R. (N.S.) 74, as in any other in the following words:—

> Now, it is well settled that when the question is whether concurrent judgments in the Courts below shall be reversed on the ground that the Judges have taken an erroneous view of the facts, it is incumbent on the appellant to adduce the clearest proof that there is an error in the judgment appealed from, and so to speak, put his finger on the mistake.

Acting upon that rule their Lordships are clearly of opinion that the finding of both Courts on the counterclaim of the "St. Pierre-Miquelon" cannot be disturbed. Mr. Laing, who opened the appeal, did not, as their Lordships understood, dispute the general applicability of this rule, but contended that it could not be fairly or properly applied to the claim of the "Renwick" in this case, inasmuch as the story told by the witnesses examined on her behalf could not be reconciled with certain physical facts admitted by both sides, namely, the pre-

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cise position of the two ships relatively to each other at the moment of collision, the spot and angle at which the "St. Pierre-Miquelon" had struck the "Renwick." Sir Robert Finlay admitted, as their Lordships understood, that this rule as to concurrent findings of fact could not be applied to a case where the testimony accepted as true would establish a conclusion which the admitted facts shewed to be impossible.

It is not disputed that the "St. Pierre-Miquelon" struck the "Renwick" with her stem on the port side of the latter vessel about the forerigging, nearly at right angles, the blow slanting forwards, so that the real question for decision resolves itself into this, is this an impossible result, if the story told by the respondents' witnesses be true, or is it reconcilable with that story?

Many questions were put to different witnesses as to the bearing of the ships the one to the other at different times, the distance of one ship from the other and from certain buoys along the shore, and the times which elapsed between different events, but in many cases, especially those in which the crew of the "Renwick" are concerned, the answers are mere approximate estimates, not ascertained or accurately determined by scientific measurements, and nothing could be more misleading than to treat them as if they were the latter and not the former.

There is no substantial difference between the crews of the two ships as to the place where collision occurred. It was at a point marked upon the chart somewhat to the south westward of the Middle Ledge or Country Harbour buoy, and about half a mile from it. It is also established by the evidence given on both sides that the white masthead light of each ship was first seen by the crew of the other when the vessels were four to five miles apart, and further that each ship proceeded on her course for a distance of from one to two miles before any other light of the one ship became visible to those on board the other. From this point onward the respective stories of the two crews diverge. Those on board the "Renwick" state that the second light shewn by the "St. Pierre-Miquelon" was her

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red or port light, bearing from a point and a half to two points on the port bow of the "Renwick" and broadening on that bow as the ships approached each other, through what has been styled the first stage of the transaction, that is up to the time when the "St. Pierre-Miquelon" shewed her green light to those on board the "Renwick." Those on board the "St. Pierre-Miquelon" state, on the other hand, that the second light shewn by the "Renwick" was her green or starboard light bearing first on the starboard bow of the former vessel and continuing so to bear up to a time immediately before the collision, when the "Renwick," as they alleged, shewed to them her red or port light. This latter story has been entirely rejected by the learned trial Judge who saw the witnesses. It would not be difficult to shew that it, too, is scarcely reconcilable with the admitted physical facts. It is, however, the account given by the respondents' witnesses of the second stage of the transaction rather than of the first, which Mr. Laing insists is so irreconcilable with the relative positions of the two vessels when they came into actual contact as to render it incredible. The two members of the crew of the "Renwick" whose evidence is material on this point are Angus Rudolph, the second mate, and Llewellyn Bragg, an able seaman. The first of these proved that he had been 24 years at sea; had a master's certificate for steamboats, tugs, and coasting trade; that he held this certificate for 2½ years, during which time he had been continually employed as an officer in different steamers; had joined the "Renwick" on the 28th of August previous to the collision; had made frequent trips on the route she was on at the time, and was well acquainted with this coast from "end to end"; that on the morning of the 27th of December about 2.30 a.m., when his ship was about square with the Country Harbour buoy or a little east of it, and about half a mile distant from it, he saw the masthead light of the "St. Pierre-Miquelon" about one point on his port bow and about, as he thought, 4 or 5 miles distant, that he then told the man at the wheel, Carl Abrahamson, to keep the ship steady as there was another vessel approaching; that the "Renwick" kept her course W. ¼ N. mag-

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netic, steering by the buoys along the shore as the mate had told him to do; that he then saw the red light of the "St. Pierre-Miquelon" bearing 1½ to 2 points on the port bow of the "Renwick" distant about 1½ to 2 miles and broadening on the latter's bow as the vessels approached each other; that after about 2 or 3 minutes, when the "St. Pierre-Miquelon" was about a quarter of a mile distant she suddenly shewed her green light; that he thought she was taking a bad yaw; that he told the man at the wheel to port a point and a half; that he blew a blast on the whistle to indicate this movement; that the "St. Pierre-Miquelon" answered with one short blast; that he then thought everything was all right; that the "St. Pierre-Miquelon" came on to within 40 or 50 yards of the "Renwick" still shewing her green light; that he then told the man at the wheel to put his helm hard-a-port, gave another blast of the whistle, and then rang the signal full speed astern. Now it is admitted by the "St. Pierre-Miquelon" that she heard the "Renwick" give a single blast of her whistle and that she herself gave a single blast also; the witnesses from each ship, however, state that their own ship whistled first. It is practically admitted that the head of the "Renwick" must, under the action of her port helm have gone to starboard. This witness gives in exhibit G3 a diagram shewing, according to his notion, the place at which the "St. Pierre-Miquelon" struck the "Renwick" and the angle at which the blow was struck, but it is obvious that the more the head of the "Renwick" went off to starboard under her port helm the less would be the arc of a circle which the "St. Pierre-Miquelon" must traverse to enable her to strike the "Renwick" stem on, at right angles. This witness was very properly cross-examined at considerable length. Many of the answers he gave were recast in form by counsel, made less favourable to the "Renwick" case, put to the witness in the altered form, and in that form adopted by him, the effort of counsel being steadily directed to get from the witness an admission that when he first saw the green light of the "St. Pierre-Miquelon" the latter was abreast of the "Renwick" on her port beam. It would appear to their Lordships

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that the whole contention of the appellants to the effect that the story told by the respondents' witnesses is refuted by the physical facts and rendered incredible, is based upon the assumption that the admission so struggled for had been in fact obtained. In none of the drawings on the exhibits is such a position of the vessels indicated. As a specimen of the cross-examination one may take the portion at the top of page 16, line 18:—

Q. Give me to the best of your recollection the time that elapsed between the time that you first saw the green light and the time that you first saw the red light? A. I judge roughly that it would be two or three minutes.

Q. When you first saw the green light, how far do you estimate the other ship was away? A. Somewhere around a quarter of a mile.

Q. She was then on your port beam? A. Yes, getting broad on our port bow.

Q. She was abreast of your bow? A. Yes.

Q. As the two vessels approached she was getting broader on your port bow? A. Yes.

It is quite obvious that the witness meant to say that the "St. Pierre-Miquelon" was bearing on the port bow of his own ship, and that the bearing was broadening as the ships approached each other, not at all that the "St. Pierre-Miquelon" was abreast of the bow of the "Renwick." On this occasion, however, the witness adopted counsel's modification of his answer. On page 18 counsel seemed to have renewed the struggle with equal success. The examination is as follows:—

Q. How far was the other steamer from you when you blew the whistle the first time? A. I allow that she was about a quarter of a mile; she may have been closer.

Q. How long would it take her to travel a quarter of a mile, suppose that she were going ten knots? A. About two minutes.

Q. She was then about abreast of you? A. Yes.

Q. Indicate by means of the models the positions of the two vessels when you first saw the green light? (Witness here indicates positions as shewn on G-b).

When exhibit G-b is referred to, however, it will be seen to be wholly misleading in this respect, that it only represents the bearings of the vessels towards each other, and gives a wholly inaccurate idea of their distance apart. In no sense does it indicate the respective positions of the two vessels, as the question in response to which it was made would lead one to suppose.

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The learned counsel appears to have renewed at page 19 the effort to get the desired admission from this witness. The cross-examination runs thus:—

Q. As I understand it, when you first sighted the white light of the "St. Pierre" coming up the coast she was about a point on your port bow? A. Yes.

Q. Then she got broader and broader on your bow? A. Yes.

Q. Now, when you first saw the green light, was she about opposite your bow? A. She *was a little aft of the bow.*

Q. Is it not a fact that, in order for the change from the green light broad on your port bow to suddenly seeing the red light aft on the port bow, she would have to describe a half circle? A. Yes.

Q. You thought that the sudden appearance of the green light was due to the steering of the boat? A. Yes, as if she took a bad sheer.

Q. She has to sheer badly for you to see her green light? A. A ship can sheer badly.

Q. When you saw the light as described on G-b, you did not know what the exact position of the ship was; all you saw was the light? A. Yes, about in that position.

Q. You did not know the position of the ship? A. She was not going the way we were.

Q. You suddenly saw the green light? A. Yes.

Q. You could not see the vessel? A. I could not see the hull.

Q. You don't know how she was heading at that particular moment? A. By the bearing of her light I could give a good idea. I saw the masthead light and the green light, and I saw the lights before.

It is obvious that in line 29 the word "green" is printed by mistake for "red," and in line 30 that the word "red" is printed by mistake for green. And from the whole passage it is, in their Lordships' view, perfectly clear that when using the words "aft of the bow" the witness was speaking of the bearing of the "St. Pierre" relatively to the "Renwick." It may possibly be, if the "St. Pierre" continuing her course parallel to that of the "Renwick" had reached a point where her bow would have been opposite to a point abaft the bow of the "Renwick," that before she could have traversed the arc necessary to bring her into collision with the "Renwick" at right angles, the latter vessel would have forged ahead sufficiently to have escaped contact, and the "St. Pierre" would have passed under her stern; but on the fair reading of the printed evidence of this witness it is clear to their Lordships that this is not the state of things which he deposed to, that the

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witness was dealing with the bearings of the two vessels to each other, and that he never meant to suggest that they were relatively in the positions contended for by the appellant. The assessors, by whom their Lordships have been fortunate enough to be assisted, concur with them in thinking that this is the true meaning of the nautical language used by the witness in this connection, and advise them that consistently with this evidence properly understood it was quite possible for the two vessels to have collided in the manner in which they admittedly did collide. The second witness whose evidence is material on this point, Llewellyn Bragg, was on the lower bridge of the "Renwick" on the look-out on that night. He deposed to the incidents of the first stage of the occurrence, as it was styled, to the same effect as Rudolph, though not with the same fulness or precision as to detail. He stated that when he first saw the masthead light of the "St. Pierre" it was bearing on the "Renwick's" port bow, that when he saw the red light it was broader on the port bow than the white light; that the last time he saw the red light "it was off on the port bow" of the "Renwick," broad on the port bow, not abeam. That answer is translated by counsel into "almost opposite your bow," and the question being put to the witness in that form he accepts it and answers "Yes," but the meaning of the witness is quite clear. He further states that when he saw the green light it was right on the side of the "Renwick"; that he could see the vessel, the "St. Pierre-Miquelon." She was heading for No. 2 hatch of the "Renwick," and struck her a foot or so aft of the fore-rigging. This witness went into the wheel-house to assist the man at the wheel, and is apparently referring to what he saw when he returned to the bridge immediately before the collision. It is contended by the appellant that this witness's evidence is discredited by reason of a certain statement which he made in his examination-in-chief, repeated on cross-examination. After having deposed to the whistle having been given, the helm of the "Renwick" put a point and one-half to port, and the whistle answered by the "St. Pierre-Miquelon," he said that he then heard another whistle and heard the order given, "hard-a-port"; that he went to help

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the man at the wheel to carry out this order; that when this was done he came out to the wheel-house door; that the "St. Pierre-Miquelon" was then approaching the "Renwick," coming in for her beam; that he saw the stern lights of the "St. Pierre-Miquelon." On cross-examination he deposed that when he came out of the wheel-house on to the bridge there was a boatswain's locker which shut out the side lights of the "St. Pierre-Miquelon," and that he looked behind this locker and saw the stern lights. At that time the "St. Pierre-Miquelon," as he had already mentioned, was coming in for their beam, and it may possibly be that what he meant was that he saw the reflection of the stern lights of the "St. Pierre-Miquelon," not that he saw the lights full and direct. He could not have any possible object in inventing this incident, and, moreover, the Judge who saw him and heard him give his evidence believed him. The captain only got on deck a few seconds before the collision occurred, and did not give any material evidence bearing on this decisive point, nor did the first officer.

Their Lordships, advised as they have been, are on the whole case, of opinion that there is not such irreconcilability between the story told by the respondents' witnesses and the physical facts of the collision as to render that story incredible, and they will accordingly, in pursuance of the rule already referred to dealing with concurrent findings of fact by the tribunals below before which a case has come, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 20, 1914.

AUTOMOBILES (§ III C—310)—PERSONAL INJURY—RESPONSIBILITY WHEN CAR IS BEING USED BY SERVANT FOR HIS OWN BUSINESS.

A master is responsible for the acts of his servant only so long as the servant can be said to be acting in the course of his employment as servant, so that a chauffeur driving his master's car on his own errand and intending afterwards to resume the carrying out of his master's instructions is not *primâ facie* acting in the course of the employment where he had no permission from his master to use the car for his own purposes.

[*Halparin* v. *Bulling*, 13 D.L.R. 742, reversed; *Storey* v. *Ashton*, L.R. 4 Q.B. 476, applied.]

APPEAL by the defendant from the decision of Prendergast, J., *Halparin* v. *Bulling*, 13 D.L.R. 742, 25 W.L.R. 317.

The appeal was allowed.

E. Anderson, K.C., for the defendant.

H. Phillipps, and *C. S. A. Rogers*, for the plaintiff.

RICHARDS, J.A.:—The defendant owned an automobile and employed one Stapleton as his chauffeur to drive it. He gave strict instructions to Stapleton that the latter was not to use the automobile for any other purposes than those of the defendant and his family, and that, when not in use, it was to be kept either in the garage at the defendant's residence, or in the Russell garage in Winnipeg.

On the evening when the injury occurred, Stapleton, at the request of the defendant's family, took them from the defendant's residence to the Walker theatre. At the theatre they left the automobile, instructing Stapleton to take it to the Russell garage, and to return to the theatre in time to take them home at the close of the performance.

Stapleton took the car to the Russell garage with the intention, apparently, of leaving it there. But a few minutes later, he decided to go on a matter of his own to a friend's house in the north end of the city, in practically an opposite direction from that of going to the theatre. He then took the car out, about two hours before the time at which it would be reasonably necessary to do so to meet the family as they came from the theatre. He drove north away from the direction of the theatre and, after stopping some time at a rink, met a friend, who got into the automobile with him to be taken home. This latter friend's home was in the direction, generally in which he had decided to go to see his first mentioned friend.

In taking home the friend whom he had invited into the automobile he crossed a bridge over the Canadian Pacific Railway Company's yards. In going down the incline at the north end of the bridge, and before he had reached the house of either friend, he was guilty of negligence in handling the automobile, which negligence injured the plaintiff. For that injury the plaintiff sued the defendant. The learned trial Judge gave judgment for the plaintiff.

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The evidence shewed that when Stapleton took the car out he had intended, after visiting his friend, to go back to the theatre without stopping again at the garage, and when at the theatre, of course, to take the defendant's family home.

The learned trial Judge held that Stapleton's only reason for taking the car out so early was to visit his friend; but he also found that the act of taking the car out was done with the primary object of going to the theatre, and consequently was performed in the course of Stapleton's employment, and he considered that this finding of fact brought the case within the law laid down in *Whatman* v. *Pearson*, L.R. 3 C.P. 422.

In *Whatman* v. *Pearson*, the defendant's servant, who worked for the defendant with a horse and cart, was allowed an hour for his dinner, but was not allowed to go home to dine, or to leave the horse and cart during the dinner hour. He, however, did go home to his dinner, leaving the horse and cart unattended on the street before his own door. The horse while so unattended ran away and damaged plaintiff's property.

With deference, I am unable to agree with the learned trial Judge as to the effect of *Whatman* v. *Pearson*, L.R. 3 C.P. 422. As I understand that case, the defendant was held liable because the injury was done at a time while the servant, according to the terms of his employment, was, or should have been, in charge of the horse and cart. It seems to me to be of the class of cases of which *Hill* v. *Winnipeg E.R. Co.*, 21 Man. L.R. 442, is one, where the liability arose because of the negligence of the defendant's servant in abandoning his duty: see also *Englehart* v. *Farrant*, [1897] 1 Q.B. 240.

I cannot see how it can be said that Stapleton at the time when the accident occurred was in charge of the automobile in the course of his employment. The effect of his terms of employment was that he was not only not authorized but was forbidden to take it out of the garage until necessary to go to the theatre to meet the defendant's family.

The case chiefly referred to, and which, apparently, up to the present time, has been held to be good law, is *Storey* v. *Ashton*, L.R. 4 Q.B. 476, decided by Cockburn, C.J., Mellor, Lush, and Hannen, JJ. There the defendant sent a clerk and

carman with a horse and cart to deliver wine at Blackheath. They delivered the wine and received some empty bottles. It was the carman's duty, after delivering the wine and receiving the bottles, to drive direct to the defendant's office and leave the empties there and then take the horse and cart to his employer's stables.

On the way back, and when within a quarter of a mile of the defendant's office, the carman, at the clerk's request, drove in another direction on the clerk's own business, which was in no way connected with their employer's, to fetch a cask from the clerk's brother-in-law's house. While driving to that house, they ran over the plaintiff, who sued the employer for negligence.

Cockburn, C.J., says at 479:—

> We cannot adopt the view . . . that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying if the servant when going on his master's business took a somewhat longer route, that owing to this deviation, he would cease to be in the employment of the master so as to divest the latter of all liability; in such case it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because, here, the carman started on an entirely new and independent journey which had nothing at all to do with his employment.

In *Irwin* v. *Waterloo, etc.*, [1912] 3 K.B. 588, the English Court of Appeal, while following the rule that, to make the master liable, the servant must have been acting in "the course of his employment," gave a very wide construction to that phrase. I mention it for that reason, though the holding there does not affect the present case.

The fact that Stapleton intended, after doing his own errand at the north end of the city, to go back and comply with the orders of his employer, by meeting the latter's family at the theatre, seems to me to no more render the defendant liable than did the fact, in *Storey* v. *Ashton*, L.R. 4 Q.B. 476, that the driver intended, after doing the clerk's business, to take the horse and cart to his employer's stables.

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There are several late cases in Ontario, which perhaps would, if followed, hold the defendant liable; but they are based upon a provision in the Ontario Motor Vehicles Act which is not contained in our Motor Vehicles Act. The Courts of Alberta, with a practically similar Act to that of Ontario, have refused to follow the Ontario decisions. In any case, owing to the absence, in our Motor Vehicles Act, 1908, ch. 34, R.S.M. 1913, ch. 131 of the provision in question, the Ontario cases, to my mind, are not applicable here. In all the cases of injury by automobiles the law, so far as the rule of *respondeat superior* is concerned, appears, apart from statutory provisions, to have been held to be the same law that applies where the accidents are caused by horse-drawn vehicles.

With deference, I would allow the appeal with costs, set aside the judgment in favour of the plaintiff and enter judgment for the defendant, with costs.

Cameron, J.A.

CAMERON, J.A.:—This action was brought by the plaintiff for injuries sustained by him by reason of being struck by an automobile owned by the defendant and driven by his chauffeur. The action was tried before Mr. Justice Prendergast, who gave judgment for the plaintiff for $3,060 and costs. On this appeal no question was raised as to the amount of the damages, the whole discussion being confined to the question of the liability of the defendant for the acts or negligence of his chauffeur in the circumstances of the case as they appear in the evidence.

The defendant, when engaging Stapleton, the chauffeur, gave him definite instructions that the car was not to be used except when required by his family, and under no circumstances was he to use it without authority on any other occasion. When the car was taken out at night as, for instance, to go to the theatre, it was to be taken back, either to his own garage on Roslyn road or to the Russell garage until it was time to use it again. The chauffeur slept in the defendant's garage, kept the key of it, and in taking care of the motor, exercised the ordinary duties of his calling.

On the evening of Saturday, September 16, 1911, the chauffeur, starting from the defendant's house at about a

quarter past eight o'clock, took the defendant's family and some friends to the Walker theatre, and leaving them there, went to the Russell garage, a block distant. He arrived at the garage, he says, about 25 minutes to 9. The trial Judge finds that he took the car out of the garage about "two hours" before the time when he should have done so, in order, pursuant to his instructions, to call for his charge at the theatre. This period of two hours does not seem to me to result clearly from his evidence. He says he stayed at the garage "for quite a while until just a few minutes before I went north" (p. 144). And, again:—

I remained there for a little while and I went up to the Arena rink. His LORDSHIP:—A little while? A. Yes, a short time.

On his examination-in-chief he says:—

After I was at the garage for a little while I remembered of having an appointment which I was to cancel with a friend of mine living down north.

His intention was to go up and see this friend and cancel the appointment and be back at the theatre in time to meet the defendant's family at the theatre,

and then as I had a few minutes to spare, I thought I would go up to the Arena rink for a few minutes.

At any rate, he did go to the Arena rink and other than the foregoing statement that he thought he would go up there for a few minutes, there is nothing in the evidence to shew how long he remained there. When leaving the rink he met a young lady who lived in that part of the city where his friend whom he was going to see resided and on his invitation she entered the car and went with him. He then proceeded north and it was while he was crossing the overhead bridge that the accident occurred. Afterwards he returned to the theatre and took his charge home. The accident happened at about 25 minutes past 10. The chauffeur appeared to be somewhat confused in the reasons assigned by him for his decision to cancel the engagement with his friend for the following (Sunday) evening. One reason given is that he wished to meet a friend of his who was coming to the city on the Sunday evening. It also appears that Mr. Bulling was returning to the city on

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Sunday evening and that he had been instructed to meet him at the train. Possibly both reasons were operating on his mind. In any event he is clear (whatever his motive) as to what his intention was.

The cases on this branch of law are numerous and the decisions at times appear to be based on narrow grounds. Our Motor Vehicles Act, statutes 1908, ch. 34, R.S.M. 1913, ch. 131, contains no provision affecting the common law rights of parties, at least so far as any matter here material is concerned. Section 24 was mentioned in connection with this branch of the argument and I allude to it hereafter. The fact that the motor vehicle is swift, powerful, noiseless and heavy has not altered the considerations which are to be applied. In order to hold an owner liable, the relation of master and servant must exist, and, in default of this relation being established, there arises no liability on the part of the owner. And not only must this relationship be shewn but

> It is further necessary to shew that the servant in doing the act which occasioned the injury, was acting in the course of his employment. If at the time when the injury took place he was engaged, not on his master's business, but on his own, the relation of master and servant does not exist, and the master is not therefore liable to third persons for the manner in which it is performed, since he is in the position of a stranger. In this case it is immaterial whether the servant is using his master's property with his master's permission, so long as he is clearly acting on his own behalf, or whether he is using it surreptitiously, and is therefore, as regards his master, a trespasser. When, however, the servant, whilst using his master's property in the course of his employment, embarks upon business of his own, and the injury is occasioned afterwards, the liability of the master continues, unless the servant, in deviating from the business which he was employed to perform, can no longer be considered to be acting in the course of his employment, and must be regarded as engaged in a separate transaction: Halsbury, Laws of England, vol. 20, 603.

Whether a servant, in the performance of a given act is acting in the course of his employment or is engaged in an undertaking of his own is generally a question of fact to be determined by a jury or by a Judge acting as such. If the servant acts without reference to his master's service, to effect some independent purpose of his own, the master is not liable. But if the deviation be slight, and is in the master's time and

constitutes only an interruption of the active service, the liability will arise. The difficulty is not in stating the general principles of law which are applicable, but in applying them to the circumstances of the different cases as they are given in evidence.

An important and often quoted case is that of *Joel* v. *Morrison* (1834), 6 C. & P. 501 at 503, a decision of Baron Parke at *nisi prius*, in which he stated:—

> If the servants being on their master's business, took a detour to call upon a friend, the master will be responsible. . . . If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable, but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.

This expression of opinion is referred to and approved in *Mitchell* v. *Crosswellor* (1854), 13 C.B. 237, subsequently regarded as a leading case. The judgments of Maule and Cresswell, JJ., in this case were expressly approved as properly enunciating the law by Cockburn, C.J., in *Storey* v. *Ashton*, L.R. 4 Q.B. 476:—

> The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant: p. 479.

To go on his master's business in a roundabout way, would not necessarily sever the relationship: that would be a question of degree. It was held in that case that the servant had started on a new journey entirely for his own business.

> Every step he drove was away from his duty: *per* Mellor, J., p. 480.

In *Rayner* v. *Mitchell*, L.R. 2 C.P.D. 357, it appeared that the servant took the defendant's horse and cart for his own use and, on his return, picked up two casks for which he received a small fixed remuneration. It was held by Lord Coleridge that he had not entered upon his ordinary duties and that the master was not liable. The picking up of the casks was immaterial.

We were also referred to *Stevens* v. *Woodward*, L.R. 6 Q.B.D. 318; *Coupé Co.* v. *Maddick*, [1891] 2 Q.B. 413; and to *Sanderson* v. *Collins*, [1904] 1 K.B. 628, in which the decision in the *Coupé Co.* case was distinguished, if not, indeed, over-

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ruled. In *Sanderson* v. *Collins*, the Master of the Rolls said at 632:—

> If the servant in doing any act breaks the connection between himself and his master, the act done under those circumstances is not that of the master.

And it was held that the defendant to whom the plaintiff had lent a carriage, was not responsible, when his coachman, without his knowledge, took the carriage out for his own purposes, and damaged it while driving.

The case of *O'Reilly* v. *McCall*, [1910] Ir. R. 2 K.B. 42, where an action was brought by a widow against the owner of a motor car to recover damages for the death of her husband under Lord Campbell's Act, was peculiar in its history. The jury found all the questions submitted to them, including one asking whether the chauffeur was at the time acting within the scope of his employment, in the affirmative and gave a verdict for £150. The King's Bench Division set aside the verdict and ordered a new trial on the ground that the trial was "unsatisfactory." The Court of Appeal directed a judgment to be entered for the defendant, but the House of Lords reversed this decision and restored that of the King's Bench Division. The decision of the House of Lords was that in view of the circumstances connected with the trial, with the pleadings and with the way in which the evidence was presented, that the case should be re-tried. The defendant himself did not appear at the trial, but in answer to interrogatories alleged that when the accident occurred, the chauffeur was returning from a journey to see his wife, a journey undertaken without the defendant's authority and entirely on his own account (p. 44). This was the effect of the chauffeur's evidence also, and the trial Judge told the jury if they believed his (the chauffeur's) evidence he was not acting on the defendant's business and he left it to them to determine the point saying that if they did not so believe, he thought there was evidence that he was acting in his master's business (pp. 52, 57). It was held by Lord Chancellor Loreburn, at 70, that

> There was evidence *primâ facie* that the driver was acting within the scope of his authority, driving as he was, the car of the defendant, in the

public street, going towards the defendant's house . . . while he was in the service of the defendant.

It was sought, he says, to rebut this by the chauffeur's evidence that he was driving for his own purposes, and he holds the question was whether the jury were entitled to disbelieve the chauffeur on this point and upon that question he refused to enter and thought that it, with other questions, should be reconsidered.

The general doctrine is thus stated in Labatt, Master & Servant, 2nd ed., at p. 6952:—

> Any acts of negligence of which a servant may be guilty in managing a vehicle or horse, after the personal or other extraneous affairs which constituted the object of his deviation have been disposed of, and he has begun to return to his master's premises, or to the point where he took his departure from the prescribed route, may warrantably be found to have been done within the scope of his employment.

This doctrine is distinctly recognized by Collins, L.J., in *Hatch* v. *L. & N.W.R. Co.*, 15 Times L.R. 246; *Merritt* v. *Hepinstal*, 25 Can. S.C.R. 150, is also referred to on the point, as also *Sleath* v. *Wilson*, 9 C. & P. 607, and several American cases. The author then observes that this doctrine has been seriously shaken in the United Kingdom by *O'Reilly* v. *McCall*, [1910] 2 Ir. R. 42, but that owing to the peculiar circumstances of that case, the adverse doctrine cannot be taken as settled. It is observed that it seems to have been assumed by the Lord Chancellor and by some of the Judges in the Courts below that

> the liability would be negatived if the deviation in question was in point of fact made for a personal purpose

and did not consider the suggestion made by Gibson, J., that the chauffeur when returning home might be considered as acting within the scope of his master's business.

It is considered by Labatt as fully settled that a master cannot be held responsible for negligent acts committed by his servant, while using his vehicle in a distinct and independent journey, and for some purpose unconnected with the master's business: p. 6956. Liability is not imported to the master when the servant, making a journey outside his duties, performs some acts similar to those arising in the ordinary course of his employment as in *Rayner* v. *Mitchell*, L.P. 2 C.P. 357.

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We were referred to *Patton* v. *Rea*, 2 C.B.N.S. 606. There the servant kept a horse and gig, his own property, on the defendant's premises, free of charge, and using them in transacting the defendant's business. In going on the defendant's business the servant drove against and killed a horse. It was held that the defendant was responsible, there being evidence that the servant had the sanction and authority of the master for his actions.

In *Englehart* v. *Farrant*, [1891] 1 Q.B. 240, the owner was held responsible for the negligence of a driver who carelessly left a cart in charge of a lad who, of his own motion, essayed to drive it when it injured a carriage. The liability was imposed on the defendant by reason of the driver's negligence as being the "effective cause" of the accident. The unauthorized act of the boy was not considered such.

The subject of the liability of the master for the chauffeur's acts is considered at length in Huddy on Automobiles, pp. 285, *et seq.*:—

> The test . . . is whether the act which occasioned the injury was within the scope of the servant's authority in prosecuting the business for which he was employed by the master: p. 286.

And at p. 295:—

> Any driving for the chauffeur's own pleasure at times or to places not authorized expressly or by implication does not constitute driving for the employer, and an injury occurring while so driving will not bind the employer.

The rule in New York referred to at p. 299, that the owner of an automobile should be responsible for injuries caused by the negligence of anyone whom he permits to run it in the public street, would seem to me a wholesome rule, compelling owners to exercise vigilance in the selection of those entrusted by them with the control of their motors, but it does not appear to have been generally adopted elsewhere.

Several Ontario authorities were discussed on the argument. In *Wills* v. *Belle Ewart Ice Co.*, 12 O.L.R. 526, where Chancellor Boyd held that the negligent driver was, in the language of Parke, B., "going on a frolic of his own." He alludes to *Storey* v. *Ashton*, L.R. 4 Q.B. 476, as the governing case, subsequently

followed and applied [in *Sanderson* v. *Collins*, [1904] 1 K.B. 628, and *Cheshire* v. *Bailey*, [1905] 1 K.B. 237, 245]. In *Mattei* v. *Gillies*, 16 O.L.R. 558, the owner was held liable because the chauffeur was on his master's business at the time in question though "he made a detour to give a ride to his friends." The jury had expressly found that the chauffeur was acting within the scope of his employment. In this case Chancellor Boyd discussed the provision of the Ontario Motor Vehicles Act as affecting the responsibility of the owner, but this provision is not in force here: In *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551, the Chancellor further elaborated the point, holding that it was the intention of the Legislature to abrogate to some extent the common law rule that the master is exempt from responsibility when the servant is at large on a frolic of his own and alludes to the requirements of sec. 14 of the Ontario Act, which corresponds with sec. 24 of our own, [R.S.M. 1913, ch. 131] requiring that every motor vehicle shall be provided with a lock or other device to prevent it from being used. But we have no similar provision to that in sec. 13 of the Ontario Act [1906, ch. 46] (quoted in *Mattei* v. *Gillies*, 16 O.L.R. 558, 562, note) [now carried into R.S.O. 1914, ch. 207, sec. 19] to which section, however, an entirely different interpretation has been given by the Alberta Courts. See *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, 5 A.L.R. 176; and *Lane* v. *Crandell*, 5 A.L.R. 42, 5 D.L.R. 580, 10 D.L.R. 763. But the absence from our legislation of any provision similar to the above Ontario sec. 13, renders it unnecessary for us to consider this question. It can hardly be argued that the requirements of sec. 24 are such as to override the common law and impose on owners of motor vehicles a liability heretofore unknown.

In *Bernstein* v. *Lynch*, 13 D.L.R. 134, 28 O.L.R. 435, a finding by a jury in a County Court case that the chauffeur was acting within the usual scope of his employment when the accident took place was not interfered with by the Divisional Court on appeal, mainly, it would appear, because the trial Judge had charged strongly the other way. In any event the judgment of the Court was further made to rest upon the above statutory provision:—

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The owner of a motor vehicle is not obliged to employ a chauffeur, but, if he does so, he is responsible for any violation by him of the Act: p. 440.

But, however sound and sane this may be as a matter of public policy, as a matter of law it does not affect us in this province without further legislative action.

Now, as to the application of the law to the facts of this case. There is no question here as to the general or specific instructions given to the chauffeur. We have the evidence of the defendant and of the chauffeur on the subject, and there is no evidence to contradict or cast doubt upon it. The learned trial Judge accepted that evidence. Nothing here arises as in *O'Reilly* v. *McCall*, [1910] 2 Ir. R. 42, or in some of the other cases where the jury has refused to accept the sworn evidence as to the instructions. Here the instructions were general, but so complete as to cover the occasion arising here for discussion. The chauffeur had no authority whatever to take the automobile from the Russell garage to use it for any other purpose than to go to the theatre and be there in proper and reasonable time to take Mrs. Bulling and her family and guests to her home. When he started out from the garage, at a time contrary to his instructions, he went in the direction of the Arena rink, also contrary to instructions with the clearly defined object ultimately to go to see a friend in the northern part of the city. This was not in line with his duty. "On the contrary," as so well said by Mr. Justice Mellor, in *Storey* v. *Ashton*, [L.R. 4 Q.B. 476], "every step he drove was away from his duty." When leaving the Arena rink he asked a young woman to accompany him as she lived near the residence of his friend in the north end of the city. This intention was subsidiary to his first and primary intention when he left the garage, which was to go to the residence of his friend Oliver. He went to the Arena rink as an afterthought after reaching his decision to go to see his friend. That was his real objective. It was his own business purely and had nothing whatever to do with the defendant. It was argued by counsel for the plaintiff that the point of departure to return might well be fixed as the Arena rink and that, therefore, having begun to return from

that point to the Walker theatre, whither his instructions called him, he became then and was when the accident occurred in his master's employ. That is to say, the relationship of master and servant, having been admittedly severed, by his taking the automobile out of the garage before the proper time and for his own purposes, contrary to his express instructions, became reconstituted as soon as he turned away from the Arena rink. But the indisputable facts preclude such a conclusion. The calling at the Arena rink and his taking the young woman with him from there were incidental episodes only. His true objective was his friend's residence on McAdam street, and until he reached there he was on an absolutely independent journey, entirely outside of, and opposed to the terms of his contractual relationship with his employer. Until he reached Oliver's residence the relation of master and servant no longer existed between the defendant and himself; in fact, he became, as to the defendant, a stranger and trespasser. In viewing the circumstances of the case in this light, I am compelled to differ from the learned trial Judge. As I view them there could not possibly be any resumption by the chauffeur of, or re-entry by him upon, his employment until at any rate, he had reached Oliver's residence. As the accident occurred before he did so, the question raised in the statement of the law contained in the citation from Labatt at p. 6952, above given, and the doubt cast thereon by the attitude of the House of Lords in *O'Reilly* v. *McCall*, [1910] 2 Ir. R. 42, need not concern us here.

I submit with deference that the judgment entered for the plaintiff must be set aside and a judgment entered for the defendant.

HOWELL, C.J.M., PERDUE, J.A., and HAGGART, J.A. concurred.

Appeal allowed.

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HEDICAN v. CROW'S NEST PASS LUMBER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. CORPORATIONS AND COMPANIES (§ IV G—115)—POWERS OF OFFICERS—IMPLIED AUTHORITY TO CONTRACT.

Whilst it is safe as a general rule, and in the absence of proof of direct authority, to ascribe an implied authority in the case of the managing director of a company, such a rule cannot be held to apply to a subordinate officer of a company, such as a logging superintendent of a lumber company.

[*Doctor* v. *People's Trust*, 16 D.L.R. 192, 18 B.C.R. 382, distinguished; *Wright* v. *Glyn*, [1902] 1 K.B. 745, referred to.]

Statement

APPEAL from the judgment of Murphy, J., in favour of the plaintiff in an action for breach of contract.

The appeal was allowed, MCPHILLIPS, J.A., dissenting.

Bodwell, K.C., for the defendant, appellant.

J. W. deB. Farris, for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred in the judgment of GALLIHER, J.A.

Irving, J.A.

IRVING, J.A.:—The judgment appealed from finds certain facts, viz.: (1) that the plaintiff did not abandon the contract; (2) that the contract was not terminated by reason of the unsatisfactory way in which it was being performed. With these I do no think we need interfere. But on what is referred to as the real defence I have, with every respect for the learned trial Judge, reached the conclusion that the appeal must be allowed.

The company is in the lumber business, having a saw-mill which is supplied with logs, some cut on the company's lands and some bought. Those cut on the company's lands are either cut by contract at so much per thousand or by the company's men. The general manager was P. Lund; the logging superintendent was Magoon, who was first employed by the company in November, 1911. His designation as "logging superintendent" amounts to nothing. In *Elk Lumber Co.* v. *Crow's Nest Pass Coal Co.* (1906), 12 B.C.R. 433, it was argued that the words "Land Commissioner," were sufficient in themselves, having regard to their association with great companies, such as the H.B.

Co., to indicate the authority to bind the principal. But in the Supreme Court of Canada, Davies, J., said:—

> In itself and apart from other evidence the title has no legal significance, and at any rate it does not *per se* imply an authority to sell lands: 39 Can. S.C.R.169, at 172.

Magoon's duties required him to provide between 25 and 30m. feet of logs for the company's mill, and to have them at the mill ready at all times during the sawing season, which lasts from April 1 to some day in November. Definite instructions were given him, with reference to the season of 1912, in a letter dated November 15, 1911 (p. 92, ex. 5), and that letter, the learned trial Judge thought, amounted to an authority to Magoon to make the agreement upon which the plaintiff bases his action. The letter in question, in my opinion, was looking to the operations for 1912 only. The first letter Magoon wrote the plaintiff (ex. 1, p. 88, March 29, 1912) was with reference to the plans for 1912 only, but when Magoon and plaintiff met, they proceeded to deal with the cutting of 25 to 30 million feet—something which could not be done, having regard to the fact that the plaintiff had no equipment in one season, and something which could only be done to the company's advantage, if the company could and would maintain a force of men to complete the delivery of the logs, after the plaintiff had sawn and limbed them. In short, the agreement that Magoon made with the plaintiff involved the tying up of the company for more than one season. Magoon says it is not a usual thing for a logging superintendent to do, unless he has direct authority from the company or general manager, to make such a contract: pp. 48-9. It is quite clear that Magoon had no such authority, as he never stated to Lund the nature of the contract he had given the plaintiff: pp. 49 and 50. The Judge so finds.

That Lund knew the plaintiff was getting out logs and was being paid for so doing is admitted, but the unusual terms were withheld from Lund, whether deliberately or by mere mischance it is not necessary to determine. At any rate until Magoon was discharged and the plaintiff's work was stopped, the managing director was not aware that the plaintiff claimed a right to cut all the logs on the company's land adjacent to camp 8, even

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though it should run into three or four seasons. The apparent acknowledgment by Lund of the existence of the contract sued on was not made on full information, and, therefore, cannot bind the company: *De Bussche* v. *Alt* (1877), 8 Ch.D. 286. I am by no means certain that the letter of May 1, 1912, ever contemplated cutting beyond the winter of 1912-13: see the terms of payment; but I shall accept for the purposes of this judgment the construction placed upon it by plaintiff's counsel. The letter of November 15, 1911, is not authority for making the contract, nor, if it is regarded as evidence of the nature of the logging superintendent's duties, does it go far enough to shew that a logging superintendent has power to make contracts of so large a character as the one now under consideration.

Wright v. *Glyn*, [1902] 1 K.B. 745, is a useful case on the authority of a servant to bind his master.

I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I agree entirely with the findings of fact of the learned trial Judge, but I cannot agree with his interpretation of the letter of authority from Lund to Magoon, dated November 15, 1911, ex. 5, A.B. 92, nor with his application of the principle laid down in *Doctor* v. *the People's Trust*, 16 D.L.R. 192, 18 B.C.R. 382.

Had the plaintiff been dealing with the managing director, as in the case of *the People's Trust*, it may very well be that, in the absence of proof of direct authority, implied authority could be assumed (see also remarks of North, J., in *Re Cunningham* (1887), 36 Ch.D. 532, at 539), but to carry the doctrine further and to say that implied authority could be assumed in the case of a subordinate officer (such as Magoon) is, I think, unsound. Assuming that Lund could clothe Magoon with authority to make the contract, has he done so? The oral testimony is against that conclusion, and we have then only to look at the letter, exhibit 5, and construe it. I agree with the learned trial Judge that that letter is wide in its scope, and, considering the nature of the business carried on, might be deemed to give quite extended powers to Magoon, but, with the exception of one paragraph, which I will presently refer to, must, I think, be limited to the sawing season of 1912, and it is, I think, clear

on the evidence that the contract entered into extends beyond that season.

The paragraph I refer to starts at the top of page 94, A.B., as follows:—

> It is also possible that a contract can be let to log off the two limits near Wasa. I think you should endeavour to get in touch with some reliable logger who possesses sufficient equipment and means to handle this contract. There is other timber in that vicinity that could be added, so that the right man could have permanent work for some time to come, and I think it is highly desirable that we endeavour to get one or more strong logging contractors into the district, who are in a position to carry on both winter and summer logging. These should be men of ample experience who can be relied upon to do the work satisfactorily and profitably both for the company and themselves.
>
> In any event you should endeavour to provide between 25 and 30 million feet of logs for the Wardner mill during the next 12 months, and take the responsibility of having logs at the Jack ladder on April 1st next and a continuous supply at the mill for the entire sawing season, which usually closes some time during the month of November.
>
> I am giving you a general outline on these matters as they occur to me, and I shall expect you to do the rest.

It is to be noted that reference is there made to a contract to log off. Magoon is requested to get in touch with a strong logging outfit, with means and equipment to log both summer and winter, an entirely different contract, as I view it, to the one under which the plaintiff was engaged. Moreover, there is no authority given Magoon to enter into such a contract—in fact, the very wording of the clause assumes a reference to Lund before any contract is made. "To get in touch" does not imply authority to enter into the contract nor does the reading of the other part of the letter, restricted as it is to a particular season, advance matters in plaintiff's favour.

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

McPHILLIPS, J.A. (dissenting):—This is an appeal from the judgment of the learned trial Judge, the Honourable Mr. Justice Murphy, judgment being entered for the plaintiff (respondent) against the defendant company (appellant) for the breach of a contract entered into with the plaintiff, in writing, as contained in a letter of May 1, 1912, addressed to the plaintiff, and signed by Walter Magoon, logging superintendent of the defen-

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dant company, who was acting under a letter, of date November 15, 1911, of instructions from P. Lund, the managing director of the defendant company, whereby the plaintiff was to cut for the defendant company all timber owned by the defendant company adjacent to their camp No. 8, the defendant company agreeing to pay therefor at the rate of $1.20 per thousand feet —Doyle's scale—the plaintiff to furnish at least 30,000 feet per day. If at any time too many logs were cut in the woods, the defendant company could place the plaintiff's men at other work —the work to be done to the satisfaction of the camp foreman and logging superintendent, and if at any time the work was not being done satisfactorily, the contract would become null and void after fifteen days' notice, the contract to continue as long as the work was satisfactorily carried on. Apparently there was a memorandum of the contract as contained in the letter of May 1, 1912, in triplicate, forwarded with the letter to the plaintiff for signature, he to return two of them to the office of the defendant company, the plaintiff to retain one of them. It is not shewn in the evidence that this memorandum in triplicate was signed or returned, nor was it put in evidence, but it was not contended that it was not, rather that it was assumed to have been done. The terms of the contract were accepted by the plaintiff, and he entered upon the work until the defendant company refused, on or about September 15, 1912, but without giving the fifteen days' notice, to further continue plaintiff in the work.

The learned trial Judge held, against the defence set up, that the plaintiff abandoned the contract, and it was further held by the trial Judge that the contract was not put at an end because of the plaintiff's work being unsatisfactory; that the fifteen days' notice required for its termination was not given; that Magoon, the logging superintendent, had authority to make the contract under express instructions in writing from Lund, the managing director of the defendant company, as contained in the letter of November 15, 1911, and that there was a proper delegation of authority from the managing director to the logging superintendent to enter into the contract, especially wherein it was insisted upon that the logging superintendent was to provide 25 or 30 million feet of logs within twelve months. The learned

trial Judge admits that the managing director was referring only to the Wasa timber limits, but that the authority conferred even extended to entering into contracts of a wider scope than that sued upon. The learned trial Judge, in his judgment, quotes an excerpt from the letter of the managing director to the logging superintendent as follows:—

> I am giving you a general outline of these matters as they occur to me, and I shall expect you to do the rest.

The judgment, as entered, directed that it be referred to the district registrar of the Supreme Court at Cranbrook to enquire into and state the *quantum* of damages the plaintiff sustained by the breach of the contract by the defendant company; the measure of damages to be the amount of profit the plaintiff would have made if he had been allowed to complete the contract. It would not appear that any evidence was given as to the memorandum or articles of incorporation of the defendant company, and as to the corporate powers of the company, its directors or officers, other than that the company was carrying on active operations in the cutting of timber, and the manufacture of the same in a large way.

The appellants, the defendant company, set up by way of defence that the contract was entered into without their knowledge, and was entered into without authority, and that it was not binding; that the work was unsatisfactorily done; that the plaintiff abandoned the contract; that the plaintiff, on September 10, 1912, accepted $383 in full satisfaction of anything due under the contract; that the contract was then terminated, and that the plaintiff, in any event, sustained no damages in respect thereof.

It will be seen that the learned trial Judge, in his findings, held against all of these contentions of the defendant company, except that no reference is made to the contention which is upon the pleadings—but evidently not pressed at the trial—that the receipt by the plaintiff of the $383 was in any way a satisfaction of the plaintiff's claim.

The able argument of the learned counsel for the appellants was made with much ingenuity—that the extent of the authority conferred upon the logging superintendent was exceeded, and at best could not be held to extend beyond the right to enter

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into a contract for one season's work—and not more—relying greatly upon *Re Cunningham and Co., Ltd., Simpson's Claim* (1887), 36 Ch.D. 532, 57 L.J. Ch. 169. This is a decision of North, J., and, in effect, held that, under the circumstances, it not being shewn that the giving of the note was necessary or that the giving of it was within the ordinary business of the company—the note was not binding on the company. North, J., at p. 172, said:—

> What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test . . . Had Hunter authority to do what he did? In the first place, was it necessary for the carrying on of the business of the company that this contract with Liberos should be entered into?

In my opinion, applying the tests put by North, J., the letter of the managing director, Lund, to the logging superintendent, previously herein referred to, amply satisfies the requirements of the law as stated by North, J., to authorize the contract being entered into, and to establish liability thereunder upon the defendant company. It is manifest that the contract was in relation to essentials in the business of the defendant company, the cutting of timber to provide the necessary logs for manufacture into lumber in the ordinary course of the business of the company. It is trite law that a company is liable for the acts of its agents, undertaken by them for and on behalf of the company, and in the course of the business of the company; it is true, perhaps, that this proposition may be stated too broadly at times—no doubt the surrounding circumstances must be looked at, and in some cases the scope of authority may be exceeded. Lord Cranworth, in dealing with the liability of a company in *Ranger* v. *G.W. Railway Co.* (1854), 5 H.L.C. 72, at 86, 10 Eng. R. 824 at 830, said:—

> But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals.

It is not the law that persons dealing with companies must inquire into what Lord Hatherley called "the indoor management." There is the right to presume that that which is being done is done with all due regularity: *Royal Bank* v. *Turquand* (1856), 6 E. & B. 327, 119 Eng. R. 886; *Mahoney* v. *Holyford*

Mining Co. (1875), L.R. 7 H.L. 869; *Bargate* v. *Shortridge* (1855), 5 H.L.C. 297, 10 Eng. R. 914; *Re Land Credit Co. of Ireland* (1869), L.R. 4 Ch. 460; *Re Country Life Assurance Company* (1870), L.R. 5 Ch. 288.

In the present case, whilst there is no evidence that the plaintiff inquired into the authority of the logging superintendent, the fact that the logging superintendent presumed to act for the company in regard to the ordinary business of the company, and with the precision of having the contract in triplicate, to be of record with the company—in my opinion, the *onus probandi*, if at any time upon the plaintiff, was shifted, and it rested with the company to displace the right in the plaintiff to insist that the logging superintendent was clothed with the necessary authority to make the contract, and one binding upon the company.

Maule, J., in *Smith et al.* v. *The Hull Glass Co.* (1852), 21 L.J.C.P. 106 at 110, said:—

> This is a case of persons or a body corporate carrying on business at a certain place by persons authorized by them and acting with their apparent knowledge.

In the present case, we have a managing director acting and deputing to the logging superintendent the entry into contracts in the ordinary course of the business of the company, and upon all the facts, the part performance and payments by the company which reasonably could only have been made as referable to some contract made with the plaintiff, is it now open to the company to successfully contend as a matter of law that no sufficient power was delegated to the logging superintendent to enter into the contract? I would say it is not open. Unquestionably, the contract under consideration in the present case is one within the objects of the company. Lord Cairns, in *Ferguson* v. *Wilson* (1866), 2 Ch. App. 77 at 89, said:—

> The company itself cannot act in its own person for it has no person; it can only act through directors, and the case is as regards those directors merely the ordinary case of principal and agent.

Blackburn, J., in *McGowan & Co. Ltd.* v. *Dyer* (1873), L.R. 8 Q.B. 141 at 145, 21 W.R. 560 at 561, said:—

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Christie as managing director had a most extensive authority to act for the company, and we do not at all question that the company must be bound by every act of his when acting for them within the scope of that extensive authority.

In the present case it cannot, upon the evidence, be contended that Lund did not have extensive authority—in fact, he admitted this—and, when it is considered that in the particular operations of the company it was, it may be said, as of necessity that extensive powers should be exercisable by the managing director, and when the managing director expressly imposes upon the logging superintendent the responsibility to have a continuous supply of logs at the mill, it seems to me that it is impossible to contend that the contract was not within the scope of the logging superintendent's authority, being one in the ordinary course of the business of the company.

Upon the question of damages, I do not think that there should be any difficulty in assessing them nor can they be said to be merely speculative or too remote: *Simpson* v. *London & North Western R. Co.* (1876), 45 L.J.Q.B. 182, 1 Q.B.D. 274.

It, therefore, follows that, in my opinion, the decision of the learned trial Judge was right, and the appeal should be dismissed.

Appeal allowed.

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ROOTS (defendant, appellant) v. CAREY (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 3, 1914.

1. CONTRACTS (§ I D 4—61)—OPTION—ACCEPTANCE.

The relation of vendor and purchaser is not established by a mere option given for value; there must be an unqualified acceptance of the option to found an action for specific performance upon it.

[*Carey* v. *Roots*, 11 D.L.R. 208, 5 A.L.R. 125, 23 W.L.R. 890, reversed.]

2. SPECIFIC PERFORMANCE (§ I A—14)—CONDITIONS OF CONTRACT—CLAIMANT NOT HIMSELF IN DEFAULT.

An action for specific performance at the suit of the alleged purchaser is defeated by non-performance by him of one of the essential conditions of his right under the contract, such as punctual payment under an option; and the fact that the vendor had during the currency of the option, conveyed the land to another will not excuse the plaintiff from strict performance on his part of the conditions of the agreement unless he can shew that the defendant's default had prevented him. (Per Duff, J.)

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APPEAL from the judgment of the Supreme Court of Alberta, *Carey* v. *Roots*, 11 D.L.R. 208, 5 A.L.R. 125, 23 W.L.R. 890, by which, Simmons, J., dissenting, the judgment of Stuart, J., *Carey* v. *Roots*, 5 D.L.R. 670, was affirmed.

The appeal was allowed.

Travers Lewis, K.C., for the appellant.

A. H. Clarke, K.C., for the respondent.

FITZPATRICK, C.J.:—This is an action for specific performance of an alleged contract for sale. The question is: Was there a concluded agreement between the parties? It appears by the evidence, written and oral, that on November 26, 1910, the appellant gave to the respondent a memorandum in writing, in the following terms:— Fitzpatrick, C.J.

> In consideration of a payment of $10, I agree to give to Major A. B. Carey, the option of my quarter section—N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅓ on the last day of January of each year till paid.

This written instrument contains no date, nor does it say when the first cash instalment is to be paid, but the respondent admits, in his evidence, that the first payment was to be made on January 31, 1911. I read the memorandum as an offer which, to become a contract, required to be accepted, and nothing appears to have been done by the respondent to manifest any intention to accept until January 20, 1911, when his solicitor wrote to the appellant to say:—

> Major Carey is prepared to make payment of one-third of purchase price, and we are anxious to close the matter out at once. We would suggest that, rather than give an agreement for sale, you execute a transfer of the land in favour of our client, and take a mortgage back for unpaid balance. We would be *obliged if you would let us hear from you at once.*

The suggested modification of the terms of the option required the assent of the appellant. No answer was given to this communication, although acknowledged to have been received within the time, and no tender of the cash payment was made until the 20th of March following.

I cannot find in the solicitor's letter evidence of such an unqualified acceptance of his offer as the appellant was entitled to in view of the speculative character of the market in which

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the transaction took place, and there is no justification of the respondent's failure to pay the first instalment when it fell due.

Briefly, my opinion is that, in the absence of unqualified notice of acceptance within the time (*en temps utile*), and in view of his neglect to pay or tender the money at the date fixed for the first payment, the relation of vendor and purchaser was never established between the parties and, as there was no concluded contract of sale, the foundation of an action for specific performance fails.

I would allow the appeal.

Davies, J. (dissenting)

DAVIES, J. (dissenting), agreed with ANGLIN, J.

Idington, J.

IDINGTON, J.:—The respondent claims to be entitled to specific performance of an alleged contract of sale and purchase which rests upon the following memorandum written by him in his note-book and signed by the appellant Roots:—

> In consideration of a payment of $10, I agree to give to Major A. B. Carey the option of my ¼ section, N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅕ on the last day of January each year till paid. E. H. ROOTS.

This remarkable document, it may be observed, can only be made operative and given some sensible meaning by virtue of the implications therein.

To begin with, it does not express that the option is to be one of pre-emption. That may be implied in the phrase "at the rate of $25 per acre." No time is expressed for its acceptance. That also must be supplied by implication. Is it to be taken as within a reasonable time? Or is it to be determined by acceptance on the part of the respondent on or before January 31 then next, or acceptance and payment of a cash instalment before that date?

It is clear from the evidence of the respondent that the transaction took place in a speculative market. And that being the case, if a reasonable time is taken as a test, I think that the respondent was too late on March 20 following with his then tender of the cash instalment and a binding agreement signed by himself accepting the proposal.

If it is, however, to be taken that an acceptance and payment

of the cash instalment on or before January 31 are implied as conditions precedent, then, clearly, the respondent is out of court, for no money was offered till March 20. Looking at the surrounding circumstances, I incline to the opinion that such payment on or before January 31, or tender thereof and acceptance of the proposal were implied.

The parties were entire strangers to each other, and the nominal payment of ten dollars on a transaction of such magnitude suggests, in such case, that it was within the reasonable expectation of the appellant (Roots) that he should not be long bound until something more was forthcoming than mere acceptance by one who might, for aught he knew, be a man of straw.

But, even if this be not quite clear, surely Roots was entitled, at least, to an absolute acceptance before he could be held bound by the establishment of the relation of vendor and purchaser between him and the respondent. Such relationship has always been held as necessary before the offer can be treated as a concluded dealing to which to apply the principle and authorities upon which Courts have proceeded in holding that non-payment on the days named was not necessarily fatal.

If January 31 is to be taken as the time fixed for the cash payment, then it clearly would be implied that before any such principle can be resorted to enabling waiver or postponement of such fixed date, there must have been ere that an unconditional and absolute acceptance.

But it may be said that this phrase: "Balance to be paid 1-3 on the last day of January each year till paid," has no relation to the cash payment and that, for this, no time was fixed.

I, however, interpret this language so used, under the surrounding facts and circumstances, as clearly pointing to the cash payment of one-third on January 31 as being intended thereby.

And, although the interpretation of the writing cannot be affected by the respondent's opinion, it is satisfactory to find from his evidence that this interpretation does him no injustice. He says:—

Q. You were to pay the money by the 31st of January? A. Yes; but there was no discussion about that in that way. . . .

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Q. When was your money to be paid over? A. On the 31st of January.

It may also be fair to infer such was also the understanding of Roots.

In the case of *Morrell* v. *Studd & Millington*, [1913] 2 Ch. 648, at p. 658, Astbury, J., points out that when a written instrument contains no date parol evidence may be given to shew when it was written and from what date it was intended to operate.

In short, I conclude that, in any case, the appellant, Roots, was undoubtedly entitled to an absolute unconditional acceptance on or before January 31, or to be thenceforward released from his offer.

All he got was the following letter:—

Calgary, Canada, Jan. 20, 1911.

R. Roots, Esq.,
Medicine Hat, Alta.

Re Major A. B. Carey and yourself—our file, 9,588.

Dear Sir,—We are acting for Major A. B. Carey, who secured an option from you on the north-east quarter of section twenty (20), township twelve (12), range five (5), west of the 4th meridian.

According to the terms of option, Major Carey has to pay one-third of the purchase price on the last day of January each year till the purchase price is paid in full, the purchase price for the land being at the rate of $25 per acre.

Major Carey is prepared to make payment of one-third of purchase price and we are anxious to close the matter out at once.

We would suggest that rather than give an agreement for sale, you execute a transfer of the land in favour of our client and take a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We will be pleased to prepare the necessary documents and you can submit same to your solicitor at Medicine Hat.

Yours faithfully,
H. A. ALLISON.

This was received by Roots within the time, but never answered. Can it be said that this forms an acceptance of the offer? Let us test it by seeing how Roots could have availed himself of it in any way.

Could he have acted upon this and succeeded in an action by him against the respondent for specific performance of the contract?

It seems to me it would have been impossible for him to have succeeded in such an action; apart altogether from any question of the Statute of Frauds.

The letter is framed in such equivocal terms that it could not be said to evidence a contract, sought to be specifically performed, such as Lord Hardwicke said when remarking that "every agreement of this kind ought to be certain, fair and just in all its parts." See Fry on Specific Performance (5th ed.), part iii., ch. 3, p. 165."

It may have been the purpose of the solicitor writing this letter, in the event of the non-acquiescence of Roots in all he suggested therein, to recede. It may have been that he intended the perfectly proper suggestion he made to be only tentative. How could any Court reading the letter say otherwise?

How could any Court say that the respondent intended thereby, if and when he found this modification impossible, to submit to the obvious risks and embarrassments of carrying out this contract as set forth in the meagre terms of the option.

This letter was, evidently, an effort to extricate the respondent from the consequences of his foolish form of contract.

It seems to me clear that no action for specific performance would lie in such a case; even if the requirements of the Statute of Frauds were waived and merely the question of a contract or no contract raised.

I have not only considered the cases cited to us, but also a great many more, in the hope of meeting something like this case. I have failed to find one where such an acceptance has been found effective on such a basis as rested upon herein.

Numerous cases can be found wherein mere notice of acceptance of an offer has been held sufficient.

But, in all these the terms of the contract, either expressly or impliedly, when read in light of the surrounding facts and circumstances, including in many cases the actual dealings of the parties, clearly pointed to notice of acceptance as all that was required to make effective the establishment of the relation of vendor and purchaser as between the parties.

This peculiarly ambiguous form of option now in question does not lend itself to such a method of dealing.

I think it called for an express and absolutely unconditional acceptance of the proposal to make it effective.

And it is to be observed that the solicitors of the respondent

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in this case, when it came to a question of closing the matter, adopted, by tendering an agreement executed by the respondent, this very method.

The tender thus made was, I must hold, too late.

It is not necessary to decide whether or not the acceptance must, in such a case as this, comply with the requirements of the Statute of Frauds and bind the acceptor in that sense. I incline to think the acceptance in such a case as this should so comply. All I am, however, holding is that a contract is needed and here there was none.

I have purposely abstained from heretofore entering upon the conduct of the appellants in going through the form of Roots selling to Brown. It seems to me that this cannot have anything to do with the disposal of the merits of the case. I can conceive of such conduct having influenced one in the position of the respondent, and thus become an element to consider.

But the respondent frankly says, in regard thereto, as follows:—

> Q. When did you discover that the defendant Brown had intervened? A. It was after the last day of January, but I cannot give you the date without reference to correspondence.

Certainly he was not influenced, within the time limit in question herein by such transactions as the appellant entered into.

It appears that the respondent had, on December 3, after getting this option on November 26, registered a caveat to protect it. And, on January 26, Brown's solicitor mailed to the respondent's solicitors a notice calling upon them to proceed to enforce same.

So far from that being an excuse for not acting more promptly, it seems to me it ought to have operated, if properly heeded, as an incentive to take steps to make the acceptance of the option by respondent fall within the time which I hold he was limited to.

The conveyance to Brown was subject to the rights of the respondent. A tender of acceptance of the option and of the cash payment ought (as best answer to Brown's solicitor) to have been made to Roots and, possibly, as a precaution, also to Brown as his assignee. There was ample time (if mail, as is to be pre-

sumed, in due working order) to have done something on or before the 31st of January, but nothing was done. And there is no evidence that the respondent's solicitors knew of the transaction between the appellants. For aught that appears, the claim by Brown might have rested on an independent title altogether.

We may surmise they searched the registry, but, if so, they acted rather as if abandoning any claim for their client than otherwise. In this whole phase of the matter we are left entirely to conjecture.

I submit, therefore, we are bound to look to the actual knowledge of the respondent and the time thereof relative to any contention on his behalf founded upon the conduct, or misconduct, if you will, of the appellants, as dispensing with anything implied in the contract. That, I repeat, was after the respondent's rights had ceased. I am unable to see what right any one can rest upon the misconduct of another unless by way of clear proof that it has misled him.

I may respectfully observe that the judgment providing for interest or possession seems to savour of making a contract and not that exercise of discretion the Court has in such cases.

I think the appeal should be allowed with costs.

DUFF, J.:—I have come to the conclusion that the rights of the respondent lapsed on January 31, 1911, for non-compliance with the conditions of the memorandum signed by the appellant in November, 1910. From the beginning the respondent has put forward and acted upon the view that this memorandum constituted an offer by the appellant which was to be open for acceptance until the end of January, 1911; and the basis of his case is that this offer was accepted by a letter addressed to the appellant on January 20. As his case was presented both in the Courts below and here it must fail, if that letter was not an unqualified acceptance of the appellant's offer. The memorandum of November is in the following terms:— Duff, J.

Exhibit 1.

In consideration of a payment of $10 I agree to give to Major A. B. Carey the option of my ¼ section, N.E. ¼ of 20, Tp. 12, Medicine Hat, at

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the rate of $25 per acre. Balance to be paid 1/5 on the last days of January each year till paid. E. H. Roots.

Construing this memorandum as the respondent construes it, as expressing an offer to enter into a contract of sale and purchase on the terms stated, it seems to me that the letter of January 20 was not an acceptance of that offer. I take it to be indisputable that an acceptance, in order to be effective, must be an unconditional acceptance in the sense that the person to whom the offer had been made declares his intention presently to enter into a contract with the offeror in the terms of the offer.

Now, the last paragraph of the letter in question is in the following terms:—

> We would suggest that rather than give an agreement for sale you execute a transfer of the land in favour of our client and take a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We would be pleased to prepare the necessary documents and you can submit same to your solicitor at Medicine Hat.
>
> Yours faithfully,
> H. A. ALLISON.

This paragraph seems clearly enough to amount to a statement that the writer considers something more must be done before any of the purchase money is to be paid. It implies very plainly indeed that Roots is to be called upon to execute an agreement for sale. And there can be no manner of doubt that this was entirely in accordance with the expectation of Carey and with the advice which Mr. Allison, the writer, had given to Carey already. It is stated by Carey in his evidence in the most unmistakable way that he did not expect any part of the purchase money to be paid until some further document had been signed by Roots. The memorandum in his possession, he says, was not, as evidence of his interest, sufficiently complete for the purpose of enabling him to dispose of that interest with facility, and he was, of course, as he admits, buying the property only with the object of selling it again at a profit in the immediate future. Carey saw Mr. Allison the day after the memorandum was signed and the subsequent correspondence between them shews that Carey's views were understood by Allison at the time and shared by him. In a letter written on January 21, Allison says:—

Exhibit 10.

Major A. C. Carey, January 21, 1911.
209 Lendrum St.,
Winnipeg, Man.

Dear Sir,—Referring to your letter of the 11th inst. and my reply thereto, I beg to say that I infer from your letter that you do not desire to pay for land in full, especially as option does not say anything in regard to interest, and that you only desire to pay one-third of the purchase price and enter into an agreement for sale, or accept title and give a mortgage for unpaid balance.

The subsequent proceedings shew that Mr. Allison fully realized the importance of getting from Roots a document more precise and more serviceable for Carey's purposes than the one he already had.

To return to the letter of January 20: The last paragraph being such as it was, let us read the preceding paragraph in connection with it.

> Major Carey is prepared to make payment of one-third of purchase price and we are anxious to close the matter out at once.

The writer, in this paragraph, does not declare in terms that he accepts the offer or that he there and then binds himself to a contract in the terms of the offer.

Then, is an acceptance of the offer necessarily implied in the statement that Carey is prepared to pay one-third of the purchase price, and that the solicitors are anxious to "close the matter out" at once? There seems to be no such implication. The letter is not accompanied by a cheque for the instalment of the purchase money which, assuming the offer accepted, would be payable on January 31, and the letter does not appear to have reached its destination until January 24. In the circumstances "we are anxious to close the matter out at once," especially when taken with the paragraph to which I have just referred, would seem calculated to convey an intimation that, in the view of the respondent's solicitors, the payment of one-third of the purchase money to which the letter refers was a part only of some operation described as "closing out the matter," which operation would involve the execution of some additional document. In a word, I do not think this letter does express unequivocally an intention to assume *simpliciter* the obligations involved in the

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acceptance of the offer, viz., to pay the residue of the purchase money according to the terms stated; and, looking at all the circumstances, I think the proper inference is that it was not intended to do so. On this ground alone, I think the appeal ought to be allowed.

There is, however, another possible construction of the memorandum of November on which, perhaps, something ought to be said. It seems capable of being read as intended to embody a present agreement in consideration of the payment of ten dollars on the part of Roots to convey to Carey the lands mentioned, on the payment of the purchase price according to the terms stated. According to this view, the document would express the terms of a concluded bargain under which Carey had assumed no obligation for the future. On this construction of the document, punctual performance by Carey of the conditions as to payment according to the letter of the agreement would be an essential condition of his right to demand a conveyance; and as the payment due on January 31 was not made, it would be incumbent upon the respondent to establish facts precluding the appellant from insisting upon the strict performance of the condition. The learned trial Judge appears to have held that, inasmuch as Roots had, in December, conveyed the land to the defendant Brown, he had thereby disabled himself from carrying out the contract and that this would be sufficient to excuse the respondent from the strict performance of the condition. It may very well be that on discovery of the conveyance to Brown, the respondent could have treated the execution of the conveyance as a breach of the contract embodied in the memorandum of November and have sued for damages; but the respondent comes into Court declaring that he has a subsisting and binding agreement of sale and purchase; and non-performance of one of the essential conditions of his rights under that contract must be fatal to him unless he can establish some valid ground of dispensation. The fact that the appellant has made default in the performance of his obligations even though it should be of such a character as to entitle the respondent to treat the agreement as rescinded, does not afford such a ground unless the respondent can also shew that he was thereby prevented from performing the condi-

tion in respect of which he is in default himself. The respondent has made no attempt to shew that. We do not know even that he was aware of the fact of the conveyance having been made before January 31. If he did, as Chief Justice Harvey appears to assume, receive notice of the conveyance, there was nothing to prevent him paying the money to Brown, as he clearly would have been entitled to do: *Ex parte Rabbidge*, 8 Ch. D. 367, at 370; *Re Taylor*, [1910] 1 K.B. 562, at 573. If he was not aware of it, then there is no explanation of his failure to pay Roots which would have been perfectly safe, of course, in absence of any intimation from Brown that he had become the owner of the property. In my opinion, the truth is, as I have already intimated, that, on the 31st of January, when the first instalment of the purchase money became due, the respondent had no intention of taking up the option unless he obtained some further instrument which would afford entirely satisfactory evidence of a concluded agreement of sale and purchase, having regard to the object he had in view, viz., a re-sale of the property at the first favourable opportunity.

It ought further to be observed that the respondent does not by his pleadings allege that he was prevented from performing his condition by the act of the appellant or that the appellant's conduct was such as to preclude him from alleging non-performance of the condition. He alleges a contract concluded by the acceptance (so called) of January 20. The paragraphs of the statement of claim bearing upon this point are paragraphs 4, 5 and 6, as follows:—

4. Prior to January 31, A.D. 1911, the plaintiff duly accepted the said option or agreement.

5. The said defendant Roots refused to carry out the terms of the said option or agreement, and, by transfer bearing date December 3, A.D. 1910, transferred said land to the said defendant Brown, which said transfer was registered in said land titles office on December 17, at 12.40 p.m., as 1,659 AF., and the defendant Brown thereby became and still is the registered owner of said land.

6. On March 21, A.D. 1911, the plaintiff tendered the defendant Roots an agreement for sale and purchase in duplicate, covering the said lands and embodying all the terms of said option or agreement, both copies of which said agreement for sale and purchase were duly executed by the plaintiff, and, at the same time, tendered to the said defendant Roots the sum of $1,347.19 and demanded execution of said agreement for sale and

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purchase, and the said defendant Roots thereupon refused to execute said agreement and to accept the said sum of $1,347.19.

No amendment was asked for at the trial and I am unable to find, from a careful perusal of the record, that it was suggested at the trial that any act done by the appellant had prevented the performance of the condition by the respondent. It is important to note this for this reason. In the Court of Appeal, the learned Chief Justice appears to have considered he was justified in inferring that the notice sent by Brown to the respondent was the cause of the failure on the part of the respondent to pay the purchase money. I have already said that, in my opinion, such is not the proper inference from all the evidence. What I now desire to emphasize is that no such inference ought to be drawn unless it were clear that all the material evidence was before us, as the point was neither pleaded nor was the evidence directed to it at the trial.

In these circumstances I think the appeal should be allowed and the respondent's action dismissed with costs.

Anglin, J. (dissenting)

ANGLIN, J. (dissenting):—I regard the plaintiff's solicitor's letter of January 20, 1911, as an unconditional acceptance of the option given to the plaintiff by the defendant. The mere suggestion that the transaction should be carried out by the exchange of a deed and mortgage did not make the acceptance conditional. The contention that it did is purely an afterthought.

It was not so regarded at the time. As the defendant, Roots, himself admitted on his examination for discovery, he proceeded, on a statement of Brown, to whom he had resold the land before January 20, that the option given Carey was no good, and he adds that his sole ground for repudiating his contract with Carey was that he was obtaining $1,000 more for the land from Brown.

Payment of the money due on January 31, 1911, was not a condition of a valid acceptance under the terms of the option. From the time of the receipt by the defendant of the letter of January 20, the relation of vendor and purchaser subsisted between the parties.

Time was not expressly made of the essence of the agreement so constituted. But if, for any reason, it should be deemed to be so, I am of the opinion that the defendant waived tender of

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the instalment due on January 31. He handed over to Brown the plaintiff's letter of January 20, telling him that it was his business to attend to it. Brown, on January 26, caused a notice to be sent by mail to Carey requiring him to take proceedings within sixty days to establish his right to maintain a caveat which he had lodged. The Chief Justice, sitting in full Court, expressed the view that Brown's notice reached the plaintiff's solicitors on or about January 28. That notice informed the plaintiff that Roots had transferred his interest in the land to Brown and that the plaintiff's rights under his own option were contested. It was tantamount to a repudiation of Roots's contract with the plaintiff and, under the circumstances, may well be regarded as the act of Roots himself. I think the plaintiff's right of action accrued immediately upon this notice being given and that he was not obliged to make tender before bringing it. Tender was in fact made on March 20. The reason for the delay is not explained though it is more than suggested that an explanation might have been given by the plaintiff's solicitor, who was, unfortunately, ill and not available as a witness.

In my opinion there was a binding contract, and no good reason has been shewn why it should not be carried out.

I would dismiss the appeal with costs.

Appeal allowed.

[Leave to appeal from the above decision was refused by the Privy Council.]

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 7, 1914.

1. MASTER AND SERVANT (§ II A 4—60)—SAFETY AS TO PLACE AND APPLIANCES—SCAFFOLD.

A finding of the jury under sub-sec. 3, of sec. 3, of the Employers' Liability Act, R.S.B.C. 1911, ch. 74, will not be disturbed where the defendant employer, a contractor erecting fire escapes on the walls of buildings, through his foreman (who knew or ought to have known of the danger) required the plaintiff employee to do certain work on a scaffold platform used in erecting the fire escapes, without (*a*) warning the employee that according as he did the work so directed the platform would become unsafe, or (*b*) taking precautions to secure the platform.

2. APPEAL (§ VII M 4—594)—AS TO INSTRUCTIONS—NEGLIGENCE OF MASTER—MISDIRECTION, WHEN IMMATERIAL.

On an appeal in a negligence action, an erroneous direction to the jury on the facts is not ground for reversal, where the misdirection appears not to have influenced the jury's finding.

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APPEAL from the judgment of Morrison, J., in favour of the plaintiff in an action brought under the Employers' Liability Act, R.S.B.C. 1911, ch. 74.

The appeal was dismissed, GALLIHER, J.A., dissenting.

H. S. Wood, for the defendant, appellant.

J. W. de B. Farris, for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The jury found the defendant negligent "through his foreman not seeing that the platform was properly secured." The defendant was contractor for the erection of fire escapes on the walls of the New Orpheum theatre in the city of Vancouver. The plaintiff and one Fleck, both helpers, that is to say, men who were learning their trade, not journeymen in that class of work, were working on one of the landings of the fire escape, which consisted of an iron grating supported at one end by a bar of angle iron with a 2-in. face, and at the other by a similar bar with a 3-in. face. Riveted to the latter were upright posts of similar iron, supporting and forming part of the railing guarding that end of the platform. While these upright posts remained in place, the grating was secure, but if they were removed, the grating might slip forward and lose its hold of the 2-in. rest at the other end, and fall.

Johnson, defendant's foreman, ordered the plaintiff and Fleck to go upon the said grating and drive out the rivets which fastened one of the upright posts, and while Fleck was doing this the grating fell and precipitated both men to the platform at the storey below, injuring the plaintiff.

On cross-examination, Fleck testified:—

Q. This is your theory then, see if I am right that on the instant you gave the last blow to the rivet which knocked it through this upright sprang away, and the other thing (the grating) came with it? A. I believe it did.

This theory, I think, is borne out by the evidence. No other explanation of the fall of the grating except by other interference with it by these two men, which they deny, was offered, and I think the jury might reasonably conclude that the release of the upright post brought about the fall of the grating.

The action is brought under the Employers' Liability Act, [ch. 74 R.S.B.C. 1911] and the finding of the jury above set out must, I think, be referable to sec. 3, sub-sec. 3, of that Act.

What then was the negligence, if any, of Johnson? Two inexperienced men, paid apprentices I should call them, were ordered to go upon a grating using it as a platform or scaffold from which to work on a railing which, while safe in its then position, would become unsafe when the rivets were driven through and the upright released. They were not warned of the danger, and had no knowledge that the driving out of the rivets would render the platform unsafe. The skilled foreman knew, or must be presumed to have known, of the danger he was subjecting them to. He neither warned them of it nor took precautions to otherwise secure the platform as he might easily have done, and which the jury have found he ought to have done. I think it cannot therefore be said that the jury had no legal evidence upon which to found their verdict. These men were not erecting the grating, they had had nothing to do with its erection, they were using it as a scaffold from which to work upon the railing, which was their business there, and which, so far as they knew, had nothing to do with the stability of the platform.

Defendants also complain of misdirection on the part of the learned Judge in that he directed the jury as follows:—

> Now, where the thing or the appliance or the erection or whatever you may call it—in this case the fire escape—is shewn to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management take care—take reasonable care—it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care.

Assuming that to be an erroneous direction on the facts and in the circumstances of this case, the jury's verdict is not *res ipsa loquitur*. The negligence is definitely assigned, so that this direction apparently did not influence them in coming to their conclusion.

I think, therefore, the appeal should be dismissed.

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IRVING, J.A.:—*Brannigan* v. *Robinson*, [1892] 1 Q.B. 344, cited by Mr. Ruegg in part 9 of Master and Servant in Halsbury, at p. 146, as an authority for the proposition that buildings in the course of erection are the works of the person erecting them, and so, within the Employers' Liability Act, puts an end to one contention of the appellant's counsel. There we have the verdict, finding it was the fault of the plaintiff's foreman: *Reynolds* v. *Holloway* (1898), 14 Times L.R. 551, seems to cover that aspect of the case.

Dealing with the ground that verdict was against evidence. In *Paterson* v. *Wallace* (1854), 1 Mac. 748, it was said this maxim has no application to a question between master and servant. That, of course, was at common law, and was inapplicable by reason of the doctrine of common employment, but under Employers' Liability Act, where servant is in same position as an outsider, there is no longer the same wide exemption under the fellow-servant doctrine, and therefore there is no reason for the complete restriction of the maxim.

It, after all, is a mode of proving negligence and where warranted by the facts it will apply: see *Huxam* v. *Thoms* (1882), 72 L.T. 227.

In *Smith* v. *Baker*, [1891] A.C. 325, Lord Halsbury, L.C., at 335, pointed out that the unexplained and unaccounted for fact, that the stone was being lifted over a workman and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation. See also *Walker* v. *Olsen* (1882), 9 Sc. Sess. Cas. 946, cited by Minton Stenhouse, where tackle for hoisting buckets became loose for some unexplained cause, it was held *primâ facie* evidence that the tackle was defective.

The learned Judge in his charge, at p. 75, did not say more than Lord Halsbury said in *Smith* v. *Baker*, [1891] A.C. 325, and he immediately added,

> but if you think the accident was caused by a fellow-workman, viz., Fleck, the defendants would not be liable.

As to p. 76, I do not think, with deference to the learned trial Judge, that he put (p. 75) the instruction as to drawing an inference of *volens* quite fairly to the jury, but later on, at

the instance of defendant's counsel, he modified his instruction to meet the views of defendant's counsel.

I would dismiss the appeal.

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GALLIHER, J.A. (dissenting):—I would allow the appeal and dismiss the action with costs.

Galliher, J.A. (dissenting)

I can find no evidence of negligence on the part of the defendant or the foreman, Johnson.

In this view I express no opinion on the other points raised by the appellant.

Appeal dismissed.

GILBERT v. STORE.

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Saskatchewan Supreme Court, Lamont, J. April 14, 1914.

1. PRINCIPAL AND AGENT (§ III—34) — SECRET PROFIT BY AGENT — REAL ESTATE BROKER—NON-DISCLOSURE ON GETTING OPTION FROM PRINCIPAL.

Where a real estate broker, holding an option from his principal for the purpose only of satisfying prospective purchasers that he could carry out a sale, reports to his principal that he had been unable to get the price but would take the property himself and charge no commission, and the principal acquiesces, the agent must account to the principal for the profit made on an undisclosed re-sale which he had already effected at the time when he got his principal to sell to him.

[*Andrews* v. *Ramsay*, [1903] 2 K.B. 635, applied.]

Statement

TRIAL of action against a real estate agent to recover an alleged secret profit made by the agent.

Judgment was given for the plaintiff.

J. F. Frame, K.C., for the plaintiff.

A. Casey, for the defendants.

Lamont, J.

LAMONT, J.:—The question at issue in this action is, was the defendant the plaintiff's agent when he purchased the lots set out in the statement of claim? The plaintiff says that in July, 1911, he met the defendant in the office of Balfour, Martin & Co., and that the defendant wanted a listing of these lots and asked to have the listing put in the form of an option so that he could shew intending purchasers that he was able to deliver the property, and stating at the same time that he did not intend to purchase himself. To this the plaintiff says he agreed, and the defendant drew up an option on the property in which the

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price was stated to be $4,000. He further says it was agreed that the defendant was to get 2½ per cent. commission if a sale was made. The defendant admits taking the option, but says he took it for himself as prospective purchaser, and not as agent for the plaintiff. The option was for two months. The defendant, after getting the option, listed the land for sale with other real estate agents. No sale, however, was made within the two months specified in the option. In the early part of December, 1911, the defendant saw the plaintiff again about these lots; and they tell different stories as to what occurred on this occasion. The plaintiff says the defendant asked him if he still had the land for sale, and that he replied that he had, that the defendant asked him if he would still take $4,000 for it, and that he replied that he thought he ought to get a little more, but would take the $4,000, and that the defendant said he would try and get him more and that he thought he could sell the property. The plaintiff further says he was to give the defendant $100 commission for selling it. About ten days after this conversation, namely, on December 16, the defendant again saw the plaintiff, and, according to the plaintiff's story, the defendant said that he had been unable to find a buyer for the property but would take it himself at the $4,000 and not charge any commission. To this the plaintiff agreed, and an agreement for sale of the lots was made between the plaintiff and the wife of the defendant Store, Store acting for his wife throughout.

The defendant's story is that, when he met the plaintiff in the early part of December, he took from him an option on the lots at $4,000 for thirty days, and that he took over the property under this option and was not acting at all as agent for the plaintiff. The question is, whose story is to be believed? The defendant produced two witnesses to support his story that he got an option in December. As to the witness Yongren, I place absolutely no reliance upon his evidence. The witness Hefferman impressed me more favourably; but the short option on the paper with the letterhead which he claims to have seen in December, and of which he has such an indefinite recollection that he cannot say whether it was written or typewritten, can hardly be said to be the formal document drawn up by the North-West Canada Land Company as testified to by the defendant. The

question, then, has to be determined on the evidence of the plaintiff. His story, to my mind, is more probable than that of the defendant, and his conduct throughout has been consistent with his story. As soon as he became aware that the defendant had made a sale of the lots before he purchased them from the plaintiff he immediately made a demand for the difference received by the defendant, and, getting no satisfaction, at once brought action. On the other hand, the defendant is unable to produce the option. His listing of the land after obtaining, as he says, an option, corroborates the plaintiff's story that he did not intend to buy the property himself, but simply had it for sale. Furthermore, failing the production of the option which he says he got in December, or reliable evidence of its contents, I should have thought the evidence of the stenographer who prepared it and the shorthand notes from which it was prepared, would have been useful testimony as establishing the date and contents of the option and the fact that one had been drawn up. The defendant admits that he has made no effort to produce this evidence. On the whole, therefore, I accept the story of the plaintiff, and find that, in the early part of December, the defendant did agree to try and sell these lots for the plaintiff, and was to receive a commission of $100, and that, on December 16, he came back and told the plaintiff that he was unable to sell them, but would take them himself. I further find that at the time he so agreed to buy them himself he had already made a sale of them for $9,000, and had $3,000 of the purchase-money in his pocket. He therefore purchased the lots while he was acting as agent for the plaintiff, and did so not only without making disclosure of the fact that he had already sold the property, but representing that he was unable to find a purchaser. The plaintiff is, therefore, entitled to the profit made by the agent on the sale of the lots: *Andrews* v. *Ramsey*, [1903] 2 K.B. 635. He bought at $4,000, and had already sold at $9,000. The plaintiff is, therefore, entitled to the difference, or $5,000. There will be judgment for the plaintiff for $5,000 and the interest thereon received by the defendants, and costs. There will be a reference to the local registrar, to ascertain the amount of the interest received.

Judgment for plaintiff.

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TAYLOR v. WADDELL.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Elwood, JJ. March 16, 1914.

1. CONTRACTS (§ VI A—410)—MONEY PAID TO THE USE OF ANOTHER.

Where the defendant has taken upon himself, by agreement with the plaintiff, the duty of discharging a liability which would otherwise fall on the plaintiff, and by reason of the defendant's breach of such agreement the plaintiff has been compelled to pay, he may recover the amount as money paid to the defendant's use.

[See *Royal Bank of Canada* v. *The King*, 9 D.L.R. 337.]

Statement

APPEAL from the judgment of Wood, Judge of the Weyburn District Court, dismissing the plaintiff's action upon an alleged agreement by the defendant with the plaintiff whereby the former took upon himself the duty of discharging a liability otherwise falling on the plaintiff.

The appeal was allowed and a new trial granted.

A. R. Tingley, for the appellant.

H. N. Morphy, for the respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—Sections 2, 3 and 4 of the statement of claim, in my opinion, state sufficient facts upon which to found an action for money paid to the defendant's use. The assignment by Ennals to the plaintiff should not have been pleaded, and the plaintiff by pleading it is at least partially responsible for the significance which was attached to that transaction by the learned trial Judge. A statement of the law bearing on this case may be found in 7 Halsbury 466:—

> The defendant may have taken upon himself by agreement with the plaintiff the duty of discharging a liability which would otherwise fall on the plaintiff, and if by reason of his breach of such agreement the plaintiff has been compelled to pay, he may recover the amount as money paid to the defendant's use.

In my opinion an agreement by the defendant with the plaintiff to discharge the plaintiff's liability to Ennals when the charcoal is sold is clearly proved. In any event, such an agreement may fairly be implied from the special facts of the case. (See cases cited in note in Halsbury, *supra*.)

The appeal must therefore be allowed, and a new trial ordered. The defendant will pay the plaintiff his costs of this appeal and of the first trial.

Appeal allowed.

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GAUTHIER v. CANADIAN NORTHERN R. CO.

DAGENAIS v. CANADIAN NORTHERN R. CO.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ.
April 25, 1914.

1. EMINENT DOMAIN (§ III D—161)—RAILWAY EXPROPRIATION—AWARD—SEPARATE CLAIM FOR OCCUPATION PRIOR TO AWARD.

An award in expropriation proceedings under the Railway Act (Can.) fixing the compensation for land taken for the railway and the damages to the remainder of the land, does not include the damages to which the owner is entitled for the company's wrongful use and occupation of the lands prior to the expropriation.

[*Gauthier* v. *Canadian Northern R. Co.*, 14 D.L.R. 490; and *Dagenais* v. *Canadian Northern R. Co.*, 14 D.L.R. 494, varied.]

2. LIMITATION OF ACTIONS (§ I E—30)—RAILWAY ACT (CAN.) — CONSTRUCTION AND OPERATION—OCCUPATION.

An action for damages suffered by the landowner which could not be included in the award on expropriation of the land under the Railway Act (Can.), *ex. gr.*, for a wrongful occupation by the railway prior to taking expropriation proceedings, is not within the limitation of one year prescribed by sec. 306 of the Railway Act, R.S.C. ch. 37, as such injury arises merely out of the occupation by the railway company and not out of the "construction or operation" of the railway.

[*Gauthier* v. *Canadian Northern R. Co.*, 14 D.L.R. 490, varied.]

3. COSTS (§ I—8)—OF ARBITRATION—RAILWAY EXPROPRIATION.

The costs of an arbitration in expropriation proceedings under the Railway Act (Can.) are fixed and payable under the terms of that statute, and are not subject to variation in an action by the landowner for trespass and compensation in which the expropriation and award are set up in defence.

[*Gauthier* v. *Canadian Northern R. Co.*, 14 D.L.R. 490, and *Dagenais* v. *Canadian Northern R. Co.*, 14 D.L.R. 494, varied.]

4. COSTS (§ I—8)—IN EXPROPRIATION FOR RAILWAY—STATUTORY LIABILITY—AMOUNT OF AWARD.

The taxed costs of the arbitration are not to be added to the amount of the award in fixing the liability for costs of the arbitration under sec. 199 of the Railway Act, R.S.C. 1906, ch. 37, in expropriation proceedings. (*Per* Simmons, J.)

Statement

APPEALS from the judgments of Beck, J., *Gauthier* v. *C.N.R. Co.*, 14 D.L.R. 490, 25 W.L.R. 955; and *Dagenais* v. *C.N.R. Co.*, 14 D.L.R. 494, in favour of the plaintiffs.

O. M. Biggar, K.C., for the appellants.

E. B. Edwards, K.C., for the respondent.

Harvey, C.J.

HARVEY, C.J.:—I am of opinion that the amount allowed by the learned trial Judge to the plaintiffs in respect of the deprivation of this land and the consequent damage to his other

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property by the manner in which it was used, should not be interfered with.

I do not think that interest upon a sum fixed upon the valuation at a period long subsequent to the commencement of the occupation by the defendants is necessarily a proper amount upon which to base a conclusion, but, owing to the conduct of this case I think it should be deemed not improper here. The learned trial Judge said he fixed $5 as the amount of damages not covered by the award. It is quite clear, however, from what follows that he did not mean this to include what I have referred to above, and that he gave the amounts he did, which he arrived at on an annual percentage of the amount of the award, to meet this claim.

There seems no doubt that the award which provides for the value of the land at the time it was made and also includes the damages of the owner to the remainder of his land cannot include the damages for the preceding years. This damage is a continuing one and ordinarily will not materially vary from year to year. The value of the land taken, however, may, and probably would, vary between the time the defendants first occupied it and the time of the award, but this being farm land the variation would probably not be very great. The defendants during these years should not have the land and the money and the plaintiff have nothing. When the award was based on the value of the land and damages at the time of the filing of the plan, interest on the amount of such award was deemed the proper basis of compensating the owner under such circumstances. On the same principle, the value should be ascertained as of the time of the filing of the plan, or, perhaps, more logically, as of the time of the defendants' occupation, but it would probably not vary greatly from the amount of the award and, by reason of the manner in which the case was conducted, I think that may be taken in this case.

I think there is no warrant for saying, however, that the provision of the Act for fixing the compensation at the time of making the award is intended to deprive the owner of the right to be compensated for damages suffered before, which cannot be included in the award.

As to the defendants' claim to set up sec. 306, [Railway Act, R.S.C. 1906, ch. 37] as a bar, I am of opinion that the section has no application to this case. The damages do not arise out of the construction or operation but merely out of the occupation by the defendants.

The plea of the Statute of Limitations to the allowance for damages for trespass by cattle, in my opinion, cannot prevail. This plea was set up with a plea of payment in after the amount had been determined by the learned trial Judge. The plaintiff had the right to accept it, and only if he disputed the amount could the plea prevail. He has not questioned this amount at all and therefore is entitled to the amount.

I am of opinion that the learned trial Judge had no jurisdiction to make any order as to the costs of the arbitration. They are fixed and payable under the terms of the statute, and any interference with them is unwarranted.

I think the appeal should be allowed, and the judgment set aside in so far as it affects to deal with the costs. In other respects the appeal should be dismissed. I would allow no costs to either party.

Simmons, J.

SIMMONS, J.:—Each of the plaintiffs owned farms near Morinville in the Province of Alberta in the year 1905, and at that time the Edmonton and Slave Lake R. Co. were authorized by the Canadian Parliament to construct a railway, the proposed location of which passed through the plaintiffs' said farms. Before the commencement of this action the said railway company was amalgamated with the defendant company pursuant to the provisions of the Railway Act of Canada. In September, 1905, one C. R. Stovel, a right-of-way agent of one or the other of these companies (which one does not seem very clear), obtained from each of the plaintiffs a contract in writing under seal. The contract with Gauthier is as follows:—

Right of Way, etc. The Canadian Northern Railway Company. Know all men by these presents, that I, Alexander Gauthier, of Morinville, hereby agree to sell and convey, by good and sufficient deed and conveyance, free from encumbrance, to the Canadian Northern Railway Company, their successors and assigns, for the purpose of the railway proposed to be constructed by the said company, all right, title and interest in and to,

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all the land required by the said company for the right-of-way, also for station or for any other railway purposes, on and upon northeast quarter, section 33, township 55, range 25, in the Province of Alberta, at and for the sum of — free . . . (dollars) per acre of lawful money of Canada, payable on completion and acceptance of the title by the said company. The company may in the meantime proceed with the construction of their railway on the said land.

Witness my hand and seal this 20th day of September, 1905.

Signed and sealed in the presence of ALEXANDER X. GAUTHIER. (Seal).
M. GUERTIN.

The contract with Dagenais is of the same import. The plaintiffs allege that the consideration in each case for the grant of the right-of-way to the defendants was a verbal promise of said Stovel that the railway company should construct and maintain on the said lands a railway station for the village of Morinville; and that the establishment of such railway station on their lands would greatly enhance the value thereof. The railway was constructed in 1906 and 1907, and, apparently, operated by the defendant company since the completion of construction, but the said railway station was not located on the plaintiffs' lands. In January, 1913, the plaintiffs began actions, alleging the agreements hereinbefore referred to, and further alleging that when said agreements were obtained from the plaintiffs that the latter had no authority to construct a railway over their said lands, and that the defendant company since the date of entering upon the lands of the plaintiffs were and are trespassers. The plaintiffs claim damages; and an injunction restraining the defendants from registering any instrument affecting the title to said lands; in the alternative, compensation for the lands taken, and for damages to the remainder of the plaintiffs' lands; also damages for the breach of the agreement to establish and maintain such station on plaintiffs' lands. The defendants pleaded the right of the Edmonton and Slave Lake Railway Co. to enter upon plaintiffs' lands under the agreement in writing above set out, and that by mistake the same was reduced in writing on a printed form referring to the Canadian Northern R. Co., and that the two companies were amalgamated on January 4, 1911, but denied the verbal undertaking alleged by plaintiffs as to the construction

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and maintenance of a railway station. Subsequently to the commencement of the plaintiffs' actions the defendants commenced expropriation proceedings under the Railway Act of Canada and obtained an order staying the proceedings in the original actions pending the arbitration proceedings, and arbitration proceedings had taken place in the presence of counsel for both parties, and the arbitrators had made and published their award whereby the plaintiffs were awarded the sums of $2,500 and $1,750 respectively by way of compensation for the taking of their lands pursuant to the Railway Act. It appears that the defendant company offered to pay these amounts to the plaintiffs, but some question arose as to costs and also as to interest on these amounts and nothing further was done till the parties went to trial on the original actions on October 13, 1913. Mr. Biggar, counsel for the defendant, then made application for leave to file an amended statement of defence setting up the arbitration proceedings and payment into Court thereunder of the amount of the awards and setting up sec. 306 of the Railway Act of Canada. After some discussion, this amendment was allowed by the trial Judge and also an amendment allowing the defendant company to bring into Court in these actions with an amended statement of defence a sum for damages in satisfaction of plaintiffs' claim. The defendant company had not at this stage paid into Court in the arbitration proceedings the amounts of the awards but it was agreed for the purpose of this trial, that the sum should be treated as if paid into Court in the arbitration proceedings and such payment pleaded in the amended defence which the defendants were allowed to set up. The respective plaintiffs were then called to give evidence on their own behalf and the trial Judge refused to admit evidence of the alleged agreement in 1905 to purchase the right-of-way through the plaintiffs' lands on the ground that the arbitration proceedings had settled the amount of compensation the plaintiffs were to receive for the taking of their land. A considerable discussion proceeded between counsel and the learned trial Judge and it was finally agreed that the defendants should pay into Court in the arbitration pro-

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ceedings the respective amounts of the awards with interest from the date of the award, and also to pay into Court in the present action the sum of $5 in the *Gauthier* case and $150 in the *Dagenais* case. The learned trial Judge then said, "That leaves the question whether you are entitled to interest from possession or from the award." Counsel then argued this question and judgment was reserved.

It is important to note that the defendant had not yet drawn his amended statement of defence and the trial proceeded on the understanding that amendments raising the issues agreed upon during the discussion should be made, as indeed they were subsequently made. The trial proceeded on this basis it seems, namely, whether the plaintiffs should have compensation for the use and occupation of their lands by the defendants from the time the defendants entered into possession in 1906 until the award in 1913. It is somewhat unfortunate that we have not got the argument of counsel upon this question, but I am of the opinion that the argument was confined solely to the question as to whether the plaintiffs were entitled to a sum for occupation and use of their lands represented by interest upon the amount fixed by the arbitrators. No other basis of fixing the amount (if any) was suggested and no evidence was adduced as to actual value of the rents and profits of the lands during the period of occupation nor was there any evidence to indicate that the lands had either increased or decreased in value during this period.

At an earlier stage of the trial the learned trial Judge said:—

> Well, I have a view upon it; I have already in one or two, perhaps more cases, followed Ontario decisions, deciding that the award carries interest. If that is right, then the amount of the award should be accompanied by the interest up to the date of payment into Court to make a complete defence; then, there would be the other question as to whether that is a complete defence to the action, or whether it is a defence to all but what might, perhaps, in almost all cases, be a nominal amount, which gave the right to the plaintiff to bring the action, unless, at least, proceedings were taken; and this question of pleadings really affects the substantial contest in this action, because they cover the question of costs too. The defendant is now the owner of the lands in question—they do not say they paid the money into Court in this action. The proper place

to pay that in is to pay it into Court in the proceedings under the Railway Act.

The learned trial Judge had already ruled that the plaintiff could not proceed upon his claim under the contract as title to the lands and price were now *res judicata*, having been determined by the arbitration and the plaintiff having failed to appeal against the order appointing arbitrators.

The above remarks of the trial Judge, however, indicate that, in his view, the defendants in the arbitration proceedings should pay into Court not only the sums awarded by the arbitrators and subsequent interest, but, in addition, interest from the time of taking possession and the inference is that the award and the amounts to be paid in thereunder were not necessarily to be treated as a complete defence to plaintiffs' claim but only to that part of their claim which alleged an agreement to purchase upon the terms therein set out and for damages for breach thereof, and that the claims of the plaintiffs arising out of the occupation of their lands prior to the award of the arbitrators remained to be disposed of. Another issue seems to have been interjected though it is not clear just how, namely, the right of the plaintiff to add the costs of the arbitration to the amount of $1,750 fixed by the arbitrators in the *Dagenais* case, with the result that the addition of these costs which had been actually taxed prior to this trial by the learned trial Judge brought the amount of the award to a greater sum than that named by the arbitrators, and that therefore, under sec. 199 of the Railway Act, the defendants should pay the costs of the arbitration.

I propose to deal first with what sum, if any, the defendants should pay for the occupation by them of plaintiffs' said lands from 1906 until the date of the award.

It is quite clear that the trial Judge intended the pleadings should be confined to two issues, namely, (1) "whether interest on the amount awarded runs from the time the company took possession or from the date of the award," and (2) "whether the costs of the arbitration proceedings—which in fact had been fixed—ought to have been paid in." (Reasons for judgment in *Gauthier* case).

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It is obvious that the trial proceeded on this basis, namely, to what extent, if any, is the award of the arbitrators an answer in law to the plaintiffs' claim. The trial Judge held it was an answer to plaintiffs' claim for the price of his land, but not an answer to the claim for occupation and use prior to the award. He also held that the amount fixed by the arbitrators carried with it interest for the period of occupation of the lands as compensation for that occupation prior to the award, following *Re Clarke and Toronto, Grey & Bruce R. Co.*, 18 O.L.R. 628, 9 Can. Ry. Cas. 290. The trial Judge observes:—

> There may be some question whether I should give this as damages or whether this interest is a necessary consequence and incident of the award attaching itself inseparably and effectively thereto in such sense as to increase "the sum awarded" or "the compensation" by that amount. I, indeed, took the latter view in interpreting sec. 199 on the question of costs of the arbitration in the case of *Dagenais* [14 D.L.R. 492].

I have read the cases cited by the learned trial Judge and by counsel on the argument, and they seem to bear out this conclusion, namely, that, assuming an agreement to purchase lands, whether statutory or by consent of the parties, then if the purchaser enters into possession the purchaser may properly be held liable for interest on the purchase price during the period of occupation until the purchase money is paid.

None of the cases go so far as to say that, assuming a possession quite outside of the agreement to purchase and then a subsequent contract to purchase—that interest on the purchase price for the period of occupation prior to date of purchase is an incident of that contract. It, indeed, could not have anything to do with the contract unless it is a part of it. Having in view the issues at the trial, this conclusion does not imply by any means that the plaintiffs fail to recover from the defendants for the occupation. They do not get it as an incident of or arising out of the award, but they are undoubtedly entitled to recover. The defendants took the lands in 1906 under what purported to be a grant to them of the same. No offer of compensation was made or negotiations suggesting that they intended to pay plaintiffs. After occupation for some six years when the plaintiffs bring an action to enforce their rights, the

defendants repudiate the agreement and resort to their rights of acquirement of the lands under the Railway Act. The compensation fixed by the arbitrators not having been paid at the date of the trial they were at that date in wrongful possession of the plaintiffs' lands. The plaintiffs objected to the arbitration proceedings, and, while the trial Judge was right in his conclusion of the law, that the arbitration proceedings were a bar to recovery under their agreement since the plaintiffs did not appeal from the order appointing the arbitrators, yet the arbitration proceedings decided the price to be paid as of the date of the arbitration. The recovery for the illegal occupation prior to the arbitration was quite properly left open to be pursued by them in this action. While I do not agree with the conclusion of the trial Judge that the interest would attach to the award in the technical sense as an incident of the award arising out of the Railway Act, yet, no doubt, it is still open to the plaintiffs to say that it is a fair amount. It is such amount as the Courts have deemed to be fair and equitable under circumstances where the purchaser is in rightful possession. Surely, in the absence of any evidence that such sum would be too large, the Court may fix the amount of compensation for use and occupation on this basis when the defendants are wrongfully in possession.

In a case where the company took possession under statutory powers, but the exact amount of the compensation was not satisfactorily decided till long afterwards, Bacon, V.-C., held that interest ran from the date of taking possession and not from the date of the verdict: *Rhys* v. *Dare Valley R. Co.* (1874), L.R. 19 Eq. 93.

I conclude that the amount found by the trial Judge in each case which should be recovered by the plaintiffs is fair and reasonable. The question of costs arising out of the arbitration in so far as it affects the issues upon this action does not occur in the *Gauthier* case as the award was greater than the amount offered by the company.

I am of the opinion that the conclusion of the trial Judge in the *Dagenais* case that the taxed costs of the arbitration should

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be added to the amount of the award for the purpose of fixing the liability for costs of the arbitration under sec. 199 of the Act cannot be sustained. The principle underlying that section is that the costs of an arbitration would have been avoided if the owner had asked what, in the opinion of the arbitrator was a fair price for his land. The owner had an action then pending for the recovery of an amount over and above this to which he might be entitled, and obviously it would be a departure from the very purpose of the section to add the costs to the amount of compensation and then hold that the company should have paid sufficient to cover both the value of the lands and the costs of an arbitration.

I would, therefore, dismiss the appeal in the *Gauthier* case and vary the judgment in the *Dagenais* case in accordance with the above conclusion as to costs, the defendants to pay the costs of the appeal.

Stuart, J.

STUART, J.:—I concur in the result.

Judgments varied.

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RINGWOOD v. GRAND TRUNK PACIFIC R. CO.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ.
April 25, 1914.

1. RAILWAYS (§ II D—37)—PERMISSIVE USER OF RIGHT OF WAY—CONTRACTOR PLACING GRAVEL AT HIGHWAY CROSSING—WORKMEN'S COMPENSATION.

The placing of gravel at a highway crossing is not work "in the way of" a railway company's business, so as to make the latter liable under the Workmen's Compensation Act (Alta.) for an injury to an employee of its contractor for such work, although the accident arose out of the operation of a train.

[*Skates* v. *Jones*, [1910] 2 K.B. 903, referred to.]

2. MASTER AND SERVANT (§ V—340)—INDEPENDENT CONTRACTOR—WORKMEN'S COMPENSATION.

The liability to others than employees (*ex. gr.*, employees of contractors of the principal employer) under the Workmen's Compensation Act (Alta.), 1908, ch. 12, is limited by the character of the work with relation to the principal employer and not to the manner or nature of the accident.

Statement

APPEAL by the defendant from the award of Taylor, District Court Judge, as arbitrator under the Alberta Workmen's Compensation Act.

The appeal was allowed.

O. M. Biggar, K.C., for the defendant, Grand Trunk Pacific R. Co., appellant.

T. D. Byers, for the defendant, Kerr Bros., appellant.

G. B. O'Connor, for the plaintiff, respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—The applicant was injured by an accident on the G.T.P. Railway on August 13, 1912. On October 2 he gave a notice to both defendants stating the fact with particulars of the accident and ending as follows: "At the time of the accident I was employed by Kerr Brothers, contractors to the Grand Trunk Pacific Railway Co."

Paragraph 3 of the particulars is as follows:—

3. At the time of the accident the applicant was employed as labourer under the respondent, Kerr Brothers, contractors, with the respondent Grand Trunk Pacific R. Co. for the execution of work upon the railway of the said Grand Trunk Pacific R. Co.

On the opening of the trial on January 23, 1913, the applicant swore that he was hired by Mr. Earl Kerr to work for Kerr Brothers. After the applicant and Kerr Brothers had given their evidence and just before counsel for the railway company had called witnesses there was a little discussion during which His Honour Judge Taylor, the arbitrator, said:—

It seems to me under the evidence that is before me that Mr. Kerr was a sub-contractor of the Grand Trunk Pacific

and at the close of which the applicant was permitted to amend paragraph 3 of his particulars to make it read as follows:—

At the time of the accident the applicant was employed as labourer under the respondent Kerr Bros., contractors with the respondent Grand Trunk Pacific R. Co., for the execution under the contractor James Kerr of work undertaken by the Grand Trunk Pacific Railway which is in the way of the trade and business of the Grand Trunk Pacific R. Co.

On September 18, 1913, the arbitrator made his award in which he found that

James Kerr was not a contractor, but only an employee of the railway company, therefore the applicant was an employee of the railway company.

I am of opinion that it was not competent to the arbitrator to make any such finding of fact on the case before him. It is

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directly opposed to the case set up and sworn to by the applicant and is not anything that the railway company was called on to meet.

It remains to consider whether the company may not still be liable though the applicant was employed by a contractor under sec. 6 of the Workmen's Compensation Act, ch. 12 of 1908, which is the only case which is set up by the particulars and which was especially in consideration when the amendment of paragraph 3 was made.

Under this section the principal, the railway company in this case, would be liable for injury to an employee of the contractor when the contract is made

> in the course of or for the purposes of his trade or business contracts with any other person for the execution by or under the contractor of the whole or any part of any work undertaken by the principal which is in the way of the principal's trade or business.

The work in question which the contractor in the present case was doing was putting gravel on the approaches to the crossing by the railway for a highway which had been ordered by the Board of Railway Commissioners. This work may, it appears to me, be said to be for the purposes of the company's trade or business undertaken by the company, but can it be said to be in the way of its trade or business? In the English Act the words "in the way of its trade or business" do not appear, but it has been held in the recent case of *Skates* v. *Jones & Co.*, [1910] 2 K.B. 903, that even without these words the operation of the section is limited to cases where

> the work is such as the person employing the contractor usually undertakes for another in the ordinary course of his trade or business.

It is pointed out that while a builder whose ordinary business is building would be liable to the employee of a person who contracts with him to do part or all of a building, a banker, for example, would not. The words "in the way of his trade or business" seem to emphasize this view. Now, it seems quite clear that the placing of gravel at a highway crossing is not work in the way of a railway company's business (which is the operation of trains) and is not undertaken by the company within the meaning of the section as interpreted by the above case. In

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Spiers v. *Elderslie Steamship Co.*, 2 B.W.C.C. 205, it was held that ship-owners who contracted for the cleaning of the boilers in one of their vessels were not liable to an employee of the contractor and Cozens-Hardy, M.R., in the *Skates* case quotes with approval from that case the statement of the Lord Justice Clerk:

> It was part of their business to have their boilers in good condition, but not to do the operations to put them into good condition.

This interpretation of the section was adopted by Carpenter, District Court Judge, on a recent case decided by him, *Donaldson* v. *H. B. Co.*

The fact that the accident in this case actually arose out of the operation of a train by the railway company does not, it appears to me, affect their liability under the Act, for their liability to others than employees appears to be limited by the character of the work with relation to the principal and not to the manner or nature of the accident.

I think, therefore, that the award against the defendant company cannot stand. The appeal should be allowed with costs and the award set aside with costs.

Appeal allowed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Hodgins, J.A., Sutherland, and Leitch, JJ. December 23, 1913.

1. INTEREST (§ III—75)—COMPOUND INTEREST—BANK—AGREEMENT FROM COURSE OF DEALING ACQUIESCED IN.

Where a bank takes to a trustee for itself a mortgage from its customer as collateral to his indebtedness then past due, as represented by the customer's bills and notes, a series of statements of account by the bank to the customer in which the latter is charged with interest compounded from time to time on his debit balances and to which the customer, with full knowledge of the mode of computation, gave his written assent (although marked "E. & O. E."), must be taken as constituting a stated account in respect of such interest claim and as evidence of an agreement to allow compound interest, although the original authorization of interest merely fixed the rate and was silent as to compounding, where the bank might have closed the account had the customer declined to assent to the compound interest charge.

[*Thomson* v. *Stikeman*, 14 D.L.R. 97, 29 O.L.R. 146, affirmed.]

2. PAYMENT (§ IV—31)—APPLICATION—BETWEEN SECURED AND UNSECURED CLAIMS—INTENTION.

Payments credited in a running account are not necessarily to be credited on an earlier and secured part of the account so as to leave

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the balance unsecured; the appropriation of the payments is a question of intention, and the presumption in favour of appropriating the credits to the earlier debits may be rebutted by shewing a contrary intention.

[*Thomson* v. *Stikeman*, 14 D.L.R. 97, 29 O.L.R. 146, affirmed; *Cory Bros. & Co.* v. *SS. "Mecca,"* [1897] A.C. 286, applied; *Deeley* v. *Lloyds Bank Ltd.*, [1912] A.C. 756, distinguished; and see Falconbridge on Banking, 2nd ed., 284.]

3. BANKS (§ VIII B—172)—LAND MORTGAGE—MORTGAGE TO SECURE PAST INDEBTEDNESS—EFFECT OF INCLUDING FUTURE ADVANCES.

A mortgage taken by a bank on land as security for a large past due indebtedness is not invalidated as to the past indebtedness because it purports to be also for such further and future advances as should be made from time to time to the mortgagor, or which might be represented by bills or notes made or endorsed by the latter, or any renewals thereof, by reason of the prohibition of sec. 76 of the Bank Act, R.S.C. 1906, ch. 29, 3-4 Geo. V. (Can.) ch. 9, against lending money on land, where the instrument was not intended by the parties as a mere colourable or collusive scheme to defeat the restrictions of the Act, and no future advances were contemplated or made except in so far as they might be incidental to the working out of the past due account.

[*Thomson* v. *Stikeman*, 14 D.L.R. 97, 29 O.L.R. 146, affirmed; and see Falconbridge on Banking, 2nd ed., 188, 202, 210.]

Statement

APPEAL by the plaintiffs from the judgment of MIDDLETON, J., *Thomson* v. *Stikeman*, 14 D.L.R. 97, 29 O.L.R. 146.

The appeal was dismissed.

Argument

J. W. Bain, K.C., for the appellants. The mortgages were given to secure future advances and past indebtedness. Mistakes occur in the accounts—*e.g.*, the Durham rents should have been credited to the mortgage account, and deposits made by Stratford have not been properly credited. The bank is precluded from altering in 1904 the appropriation of the moneys to the mortgage account which it made in 1897, even if the customer signed the account: *Simson* v. *Ingham* (1823), 2 B. & C. 65, 73; *Deeley* v. *Lloyds Bank Limited*, [1912] A.C. 756, 770. The mortgage accounts may be re-opened: *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181; *Tompson* v. *Leith* (1858), 4 Jur. N.S. 1091; *Thornhill* v. *Evans* (1742), 2 Atk. 330; *Brown* v. *Barkham* (1720), 1 P. Wms. 652. They also referred to *Biggs* v. *Freehold Loan and Savings Co.* (1899), 26 A.R. 232, which was reversed 31 S.C.R. 136, but not on the point in question here. [MULOCK, C.J.Ex., referred to *Clarkson* v. *Henderson* (1880), 14 Ch.D. 348, which seemed to dispose of the *Thornhill* case.] Not, however, in cases where oppression has been exer-

cised as here. [MULOCK, C.J.Ex., further referred to *National Bank of Australasia* v. *United Hand-in-Hand, etc., Co.* (1879), 4 App. Cas. 391, and *Crosskill* v. *Bower* (1863), 32 Beav. 86.] We also refer to *Mosse* v. *Salt* (1863), 32 Beav. 269, on the question of interest, especially *per* Romilly, M.R., at p. 273, where he says, "It is necessary, in all these cases, to distinguish between what is a banking account, as between banker and customer, and what is an account as between mortgagor and mortgagee." It is further submitted that the bank went into possession of the mortgaged premises and sold them at a sacrifice, and the plaintiffs are entitled to a reference to shew that such was the case. The whole circumstances and the evidence shew that great pressure was exercised by the bank, and that the defendants, being in possession, were in a position to exercise complete domination over the plaintiff Stratford, who was practically a tool in the bank's hands. The mortgages in question were illegal and void under secs. 76, 78, 80, and 146 of the Bank Act. Reference was also made to *Stewart* v. *Stewart* (1891), 27 L.R. (Ir.) 351, at pp. 359 *et seq.*, where *Mosse* v. *Salt* is explained and followed.

G. L. Smith, for the defendants, the respondents. The plaintiffs cannot go behind the account which was settled at the end of 1904—the mortgages in question were long prior to that date, and were a "floating security," so far as such mortgages can hold that position. They were not taken for "new advances," in any sense, except in so far as they were for advances growing out of and necessitated by the original advance. On such advances the rate of interest may be changed from time to time. The case at bar is quite different in its circumstances from the *Deeley* case, in which a second mortgage was given, of which the second mortgagee gave notice to the bank, which disregarded it, so that the same point arose as in *Hopkinson* v. *Rolt* (1861), 9 H.L.C. 514. They also referred to *Commercial Bank* v. *Bank of Upper Canada* (1859), 7 Gr. 423; *Grant* v. *La Banque Nationale* (1885), 9 O.R. 411; *National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299, 309; *Clancarty* v. *Latouche* (1810), 1 B. & B. 420, at p. 428; *Montgomery* v. *Ryan* (1908), 16 O.L.R. 75; *McHugh* v. *Union Bank*, [1913] A.C. 299, 10 D.L.R. 562; *Johnson* v. *Curtis* (1791), 3

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Argument

Bro. C.C. 266 (as to effect of an "errors excepted" clause). The onus is on the plaintiffs to prove any errors in the account; and, if any opening up is to be done, it should only be by way of surcharging and falsifying, as no full opening up could now be justly made.

Bain, in reply, referred to *Bank of Toronto* v. *Perkins* (1883), 8 S.C.R. 603. Stratford's evidence is that he never had any idea that he was being charged compound interest on the account.

Sutherland, J.

December 23. The judgment of the Court was delivered by SUTHERLAND, J.:—In the action the plaintiffs claimed to be the owner of certain real estate in the city of Brantford and in the township of Brant, in the county of Brant, or of the equity of redemption therein. The original plaintiffs in the action were Robert G. O. Thomson and Graham K. Stratford, who were grantees of the lands in question from Joseph E. H. Stratford, who had made the mortgages in question, and who was added as a party plaintiff during the trial of the action.

A careful perusal of the judgment herein and a consideration of the findings of fact, which seem fully warranted by the evidence, oral and documentary, leads me to the view that the appeal is in reality without merit, and that, unless the appellants have shewn clear error, we should not give effect to their contentions.

The trial Judge has, in his judgment, gone very fully into the facts, and the reasons for his conclusions are set out lucidly and comprehensively therein.

In the notice of appeal the appellants assert that the mortgages on the property in question held by the defendants were given for an illegal consideration and are not enforceable. Little real stress was apparently laid on this objection to the judgment on the argument. The trial Judge has found "as a fact that the mortgage in question here was not taken for the purpose of enabling the bank to make a loan upon real estate, but for the purpose of securing the indebtedness of Stratford to the bank, and was in no sense a colourable and collusive scheme for the purpose of defeating the restriction imposed by the Act. The

whole idea at the time of giving the mortgage was to secure the large past-due indebtedness and such further indebtedness as might arise in connection with the working-out of the account, which it was the intention both of Stratford and the bank to reduce, and not to increase, save as any increase might be incident to the carrying of the security and the small allowance contemplated to Stratford for his actual maintenance" (29 O.L.R. at p. 160.) He refers to *Brown* v. *Moore* (1902), 32 S.C.R. 93; and *Commercial Bank* v. *Bank of Upper Canada*, 7 Gr. 423. In view of this finding of fact, the appeal on this point must fail.

Apart from this contention, the other objections to the judgment are met and disposed of by the finding of the trial Judge as to the account being stated, and as to the knowledge and acquiescence on the part of the plaintiff Joseph E. H. Stratford. It was admitted during the argument that the other plaintiffs could stand upon no higher ground than he could. The account was, in my opinion, clearly stated by the memorandum of February, 1905, signed by Stratford. It is quite apparent from the evidence and documents that during the subsequent years he was well aware that compound interest was being charged, and that the account was being dealt with as the defendants now contend. The case of *Deeley* v. *Lloyds Bank Limited*, [1912] A.C. 756, much relied upon by the appellants at the trial and in appeal, is, upon the different facts in this case, quite distinguishable, as the trial Judge has pointed out. The case of *Cory Brothers & Co.* v. *Owners of S.S. Mecca*, [1897] A.C. 286, referred to by him, is more applicable. Reference also to *McHugh* v. *Union Bank of Canada*, [1913] A.C. 299, 10 D.L.R. 562.

It would not, I think, be either proper or expedient to open up accounts extending over a long period of years, at the instance of either Stratford or those who seek to claim through him, when he was aware of the state of the account from month to month and year to year and acquiesced therein. I can add nothing useful in support of the judgment to the very full and satisfactory reasons given therein.

Appeal dismissed with costs.

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FULLER v. GRAND TRUNK PACIFIC R. CO.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Simmons, JJ.
April 25, 1914.

1. ARBITRATION (§ III—15)—EMINENT DOMAIN—AWARD—APPEAL.

Where a case has been referred back to the arbitrator for further expert evidence to be obtained and his decision on the second hearing is appealed against the appellate court may deal with the case finally rather than again remit in the hope of getting more satisfactory evidence on which to base a conclusion.

[*McHugh* v. *Union Bank of Canada*, [1913] A.C. 299, 10 D.L.R. 562, applied.]

Statement

APPEAL from the award of His Honour Judge Taylor, acting as a referee or arbitrator in expropriation proceedings.

The finding appealed from was varied.

J. R. Lavell, for the plaintiff, respondent.

O. M. Biggar, K.C., and *F. Craze*, for the defendant, appellant.

Harvey, C.J. (dissenting)

HARVEY, C.J. (dissenting):—I am of opinion, as I was when this case was before this Court on a former occasion, that the valuation should be of the land and not of the gravel. It was land when the defendants took it, and it did not become merchantable gravel until they used it. Notwithstanding the opinion expressed that evidence should be given of the marketable value of the land as bearing gravel rather than as gravel taken in the quantities actually extracted from the land, the plaintiff contented himself with giving on the second reference practically the same sort of evidence as was given on the first, and the learned referee contented himself with making his award on the same basis as before.

There is undoubtedly more evidence of the value of gravel than of land. There is, however, some evidence of the value of gravel-bearing land. This land was bought by the plaintiff for $9.50 an acre at a time when the C.N.R. survey passed through it. That is some evidence of its market value, particularly as it was in the direct line of two railways and the gravel was not concealed. Then there is the evidence of one, Murphy, that he reported that gravel land could be procured in this vicinity for $15 an acre. He states that he has had many years' experience with defendant company and the C.P.R. Company concerning gravel land, and that the highest price he ever knew being paid for such

land was $300 per acre, which was paid in Ontario, near Guelph, for five acres under exceptional circumstances. There is evidence of some other witnesses for the defence giving a valuation of $15 to $25 an acre for such land as this. The area containing the gravel is 8.4 acres. The report of the referee allows more than $16,000 or approximately $2,000 an acre. In my opinion this is quite ten times too much. As I am in a minority there is no particular advantage to be gained by my definitely determining what the proper amount in my opinion should be, but on the evidence I doubt whether I could honestly put it at one-tenth of that amount, but at such a figure I think the plaintiff would be amply paid for the land.

Harvey, C.J.

STUART, J., concurred in the judgment of BECK, J.

Stuart, J.

BECK, J.:—This matter came before this Court in June, 1911, by way of an appeal from the award of his Honour Judge Taylor, as a referee who was, however, to ascertain damages and values upon the same principles as if he were an arbitrator acting under the Railway Act. On that occasion the order of the Court was that the questions should be referred back to the learned Judge for further consideration for the purpose of hearing the evidence of such witnesses as might be called by either of the parties or directed to be called by the referee as to the value of the lands having regard to their situation and to the fact that they contain gravel. The costs were reserved. On that occasion reasons for judgment were given by myself in which the Chief Justice concurred and by my brothers Stuart and Simmons. It is unnecessary to repeat what was then said.

Beck, J.

At the second hearing before the referee it was admitted by counsel for the railway company that the number of cubic yards of gravel taken from the land in 1909 was 115,725 and in 1910 105,875, making a total of 221,600. This admission substantiated the practical correctness of the estimate of the amount given by Mr. Knight, a civil engineer, called on the first hearing by the plaintiff.

This amount being thus definitively ascertained the referee proceeded to value the gravel on the same basis as he had valued it on the first hearing with the following result:—

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13,442 cubic yards at 5 cents	$672 10
208,158 cubic yards at 7½ cents	15,611 85
Total amount	$16,283 95

On this finding, the plaintiff moved for judgment for $16,283.95 and the defendant company moved to remit the matter to the referee for further consideration on the ground that the amount was excessive. Both applications were referred to the Court and it is these applications we have to consider.

On the hearing of the appeal from the first finding of the referee the opinion of the Court was that the evidence on both sides was left in such an unsatisfactory condition—though the evidence of Knight was considered the least unsatisfactory—that the matter should be remitted to the referee with a recommendation as already mentioned that further evidence of experts on the valuing of land should be obtained. Practically no further expert evidence was produced. It appears to me that it is best that we should now attempt to deal finally with the question involved, namely, the value of the land rather than again remit it in the hope of getting any more satisfactory evidence on which to base a conclusion. We are entitled to do the best we can (see *McHugh* v. *Union Bank of Canada*, [1913] A.C. 299 at 309; 10 D.L.R. 562; and under the circumstances I think we should make the attempt. It seems to be conceded that the land was of no value apart from the value of the gravel. On the evidence before us it seems that we are driven to find the value of the gravel. The contention on the defendant's part is that the gravel was of no value for anything else than ballast and not of much value for that by reason of the quantity of clay with which it was mixed. On the other hand, it is contended that, although this may be truly said of what the company took out and used, that condition of the gravel was brought about by its being taken out by a steam shovel in large quantities without any attempt to separate the clay from the gravel which might well have been done by stripping the layers of clay from the layers of gravel had the purpose been to get the gravel out in a clean condition for such uses as clean gravel is put to. I think that to support this contention on the part of the plaintiff there is plenty of evidence; that of the plaintiff, pp. 20, 21; Patterson, pp. 31-2-3; 36; 38-9, 45; Knight, pp. 49,

52, 56; Charles H. Dunn, p. 88; Murphy, pp. 103, 105, 106, 112, 115 (particularly) 120, 121, 128, 129, 130, 131, 133; Carter, pp. 149, 154; Fuller, p. 158; Knight, pp. 167-8, 169, 190; Rule, pp. 224, 225, 226; Mullen, pp. 246, 247; Fuller, pp. 253, 254; Callahan, p. 307 (particularly); Mann, p. 312. Mr. Knight says that 15 per cent. might be taken off his calculation for waste (p. 236); of the remaining 85 per cent. he says one-half—42½ per cent.—would be "useful without treatment" (p. 237) and the other would probably have to be washed.

Taking all the evidence relating to washing, screening and transportation I have come to the conclusion that we cannot find that there remained any commercial value in this portion of the gravel.

I can find no more satisfactory estimate of value for the gravel that can be utilized—though perhaps I should not reach the result by the same method of calculation—than that fixed by the referee, namely, 7½ cents per cubic yard; for substantially that for which he allows 5 cents is what I consider commercially valueless.

I therefore estimate the amount which the plaintiff is entitled to as follows:—

Total number of cubic yards		221,660
Deduct for waste 15%	33,240	
Deduct 42½% of the total for portion that would require to be treated at a prohibitive cost	94,180	127,420
		94,180

I would allow for this at 7½ cents, making $7,063.50, to which should be added interest from September 13, 1909. There should be judgment for this amount with costs below. There should be no costs of either appeal.

I would deprive the company of the costs of the first appeal because it has turned out that the evidence on the plaintiff's behalf then given was substantially correct and the evidence on the company's behalf was then wholly unsatisfactory, although it was in its power and was its duty to give very much more information than it did give. As to the present appeal, though the company succeeds, its contention has been that only a very

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small sum should be assessed against them. There has in effect been a divided success.

SIMMONS, J., concurred in the judgment of BECK, J.

Judgment accordingly.

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SMITH v. ALBERTA CLAY PRODUCTS CO.

Alberta Supreme Court, Stuart, Simmons, and Beck, JJ. April 25, 1914.

1. MASTER AND SERVANT (§ II A 4—60)—SAFETY AS TO PLACE—DEFECTIVE TRACKS USED IN CONSTRUCTION WORK.

A brick-making company operating tracks on its premises for its undertakings is liable for damages in a personal injury accident to a licensee upon the premises resulting from non-repair of the tracks particularly where it had knowledge of the lack of repair, although such licensee was in the direct employment of a third party doing construction work on the premises in the course of which work the track in question had to be used, it appearing that such third party with whom the plaintiff was employed had not assumed any responsibility as to the maintenance of the track.

[*Smith* v. *Alberta Clay Products Co.*, 14 D.L.R. 296, affirmed.]

2. MASTER AND SERVANT (§ II A 4—60)—SAFETY AS TO PLACE AND APPLIANCES —LACK OF REPAIR.

Although where an independent contractor is employed to do a lawful act and in the course of the work he commits some "casual" act of negligence the principal who bargained with the contractor to do the work is not liable, the rule is different and the principal is liable if, under the contract between the principal and the contractor, works are erected by the principal for the express purpose of accommodating workmen engaged by the contractor to do work there, and injury arises to a workman through a defect in the works so erected.

[*Smith* v. *Alberta Clay Products Co.*, 14 D.L.R. 296, affirmed; *Heaven* v. *Pender*, 11 Q.B.D. 503, applied; *Pickard* v. *Smith*, 10 C.B. (N.S.) 470, specially considered.]

Statement

APPEAL from the judgment of Harvey, C.J., *Smith* v. *Alberta Clay Products Co.*, 14 D.L.R. 296, in favour of the plaintiff for $5,000 damages in an action for personal injury.

The appeal was dismissed, STUART, J., dissenting.

Geo. H. Ross, K.C., for the appellant.

J. J. Mahaffy, for the respondent.

Stuart, J. (dissenting)

STUART, J. (dissenting):—I have had considerable hesitation as to the proper disposition of this appeal.

The plaintiff sues the defendant company for damages alleged to have been caused to him on account of their negligence. He sets forth in his claim that he was an employee of the defendants

and, while working at his employment in running a small car full of clay from clay pits belonging to the defendants over a track which led to the railway line where the car was to be emptied into a railway car, he was injured by the overturning of this small car on account of the improper construction and the defective condition of the track which was due to the defendants' negligence.

At the trial it appeared, and it was so found by the trial Judge, that the plaintiff was not in the defendants' employ at all but was employed by one Roeder who had a contract with the defendants to dig out the clay from the pits and to deliver it at the freight cars at a price per car. Roeder was not called as a witness and the only attempt made to shew the nature of the contract between the company and Roeder was by the evidence of one White, who was business manager of the company at the time of the accident, but who had had nothing whatever to do with making the contract with Roeder. This had been made by one Overpack, who was stated to occupy the position of general manager. White had had to do personally with the payment of Roeder and was therefore able to say that Roeder was paid on the footing of a contract, but counsel for the plaintiff in his cross-examination was careful to press the point that White knew nothing of the terms of the contract. It seems to have been assumed, however, that White knew enough of the company's affairs to be able to give admissible testimony that Roeder, in performing his contract, made use of cars, rails or track and tools belonging to the defendant.

The learned Chief Justice who tried the action held that the relationship of master and servant did not exist between the defendants and the plaintiff and that therefore there could not be on the part of the defendants any duty arising out of such a relationship to use reasonable care, as for example, in furnishing safe appliances for the defendant to work upon. But he was of opinion that quite aside from the relationship of master and servant a duty towards the plaintiff rested upon the defendant because the former was doing work upon the premises of the latter for their benefit and was using their appliances. He applied, I think, in effect, the principle of *Heaven* v. *Pender*, 11 Q.B.D. 503.

It was contended by the defendant appellant that he had not been brought into Court to meet any such case and it seems to

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me that there is much in this contention. The statement of claim as I have pointed out rests clearly upon the ground of the existence of the relationship of master and servant and of a duty arising therefrom. It is true, a general allegation of defective condition and construction is made in paragraph 4, but that paragraph obviously is merely a completion of the statement of the general ground of action which was begun in the previous paragraphs. I think it was unfair to the defendants for the plaintiff to confine himself, as he did, in his statement of claim, to the relationship of master and servant as shewing the source of the alleged duty to take care and then to obtain a judgment for a breach of duty arising out of another set of circumstances altogether. As was said by Lord Shand in *Caledonian R. Co.* v. *Mulholland*, [1898] A.C. 216 at 230:—

> A pursuer in circumstances such as these is bound not merely to say that there is a duty but to give the grounds from which that legal duty is to be inferred.

There is not a hint in the statement of claim that the plaintiff intended to come into Court and say against the defendants:—

> You supplied your contractor, who you knew would be employing workmen, with defective appliances, or, if they were not defective at first, you allowed them to become defective and it was your duty to see that they did not become defective. You committed a breach of that duty which you owed to me, not as your employee, but as one of the workmen who you knew would be using them and therefore you are liable to me in damages.

That I take to be an entirely different ground of action from that set up in the statement of claim. The evidence was not by any means clearly directed towards that basis of a claim and in my view the case is in this respect not distinguishable from *Walton* v. *Ferguson*, 16 D.L.R. 533, which we decided a few weeks ago.

I should not perhaps be inclined to insist so strongly upon this view of the appeal were it not that I entertain the very gravest doubt as to the applicability of the case of *Heaven* v. *Pender*, 11 Q.B.D. 503, to the present case. I quote from the statement of facts which is given in the report:—

> The defendant was the owner of a dry-dock used for the painting and repairing vessels, and as incident to its being so used he supplied and put up the staging necessary to enable the outside of the vessel to be painted and repaired when in the dock, but after the staging had been handed over to the ship-owner it no longer remained under the control of the defendant.

The plaintiff was a ship painter in the employ of one William Gray, a master painter who had contracted with the owner of a vessel in the defendant's dock to paint the outside of the vessel and on April 8, 1882, whilst the plaintiff was engaged in painting the vessel and using for that purpose the staging *which the defendant had put up on that same day* one of the ropes by which it was suspended from the vessel gave way and the plaintiff was injured. The ropes had been supplied by the defendant as part of the machinery of the staging and there was evidence that they had been scorched and were unfit for use with safety *at the time the staging was put up and that reasonable care had not been taken by the defendant as to their state and condition at that time*.

This is the way Lord Herschell explains *Heaven* v. *Pender* in *Caledonian R. Co.* v. *Mulholland*, [1898] A.C. 216 at 227:—

> This particular appliance was in such a condition that a person going upon it trusting as he would have a right to trust that he might go upon it safely because it would bear his weight, was led into what has been called a trap by which he sustained an injury. . . . It was said that they had invited the plaintiff to come upon that staging and that they were responsible if the man so invited was led into a trap by means of which he was injured.

And Lord Shand said at 532:—

> The particular defect complained of there was in a part of the general works which the dock company was obliged to keep up or kept up for the use of the workmen injured.

Now I can easily conceive the possibility that if the evidence had been fairly directed to the subject a very different situation might have been shewn here. Indeed, taking even the evidence we have, it is obvious that it is already distinguishable. In *Heaven* v. *Pender*, 11 Q.B.D. 503, the defect was shewn to have been there at the beginning, the staging had been put up the very day the accident happened. In the present case there can be no question of a trap. The plaintiff had been going over the place from twenty-eight to thirty-six times a day for two weeks before any accident happened at all, and Pfeifer, another workman, had been there six weeks. Aside from this there is no evidence at all as to how long Roeder had been working at his contract and had had possession of the tools, cars and track before the accident happened. For all that appears he may have been using them all for months, nor is there any evidence at all as to their condition when he received them. I do not thinkit can be said with certainty that there could have been no possible arrangement between the company and Roeder which would relieve the company from a duty to

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keep the track in repair no matter how long that arrangement had continued. The position of Aylesbury was left uncertain. A casual suggestion in Roeder's absence to one of Roeder's workmen that he had better repair the track is, in my view, too slender a thing from which to infer either an obligation or a custom on the part of the company to look after the repair of the track.

I do not think it proper to attempt to express a final opinion upon the question of the existence of a duty on the defendants because I think that, owing to a red herring having been drawn across the track by the setting up of the relationship of master and servant as a source of a duty, the defendant was never fairly warned of and presented with the case upon which judgment was eventually given against him and in consequence the full facts necessary to decide such a case were never brought out. I do not think the defendants' statement of defence went any further than to meet the plaintiff's claim.

For this reason I think the proper course is to allow the appeal with costs and to direct a new trial after permitting the plaintiff to amend his pleadings as he may be advised with a consequent right of amendment by the defendant. The defendant should have the costs of the first trial and of the amendments in any event. I might refer to *Smith* v. *Onderdonk*, 25 A.R. (Ont.) 171.

Simmons, J.

SIMMONS, J.:—This was an action tried by the Chief Justice without a jury in which the plaintiff recovered the sum of $5,000 for damages incurred while at work upon the premises of the defendant. The plaintiff's claim alleges that the injuries were received while the plaintiff was in the employ of the defendant on or about May 30, 1912, while the plaintiff was running a car loaded with earth down a grade, and which overturned and fell on the plaintiff, and that the overturning of the car was due to faulty construction of the track down which the car was being conducted. The learned Chief Justice found, upon the evidence, that the plaintiff was not employed by the defendant, but that the plaintiff was doing work on the premises of the defendant company for their benefit and was using the defendants' appliances and equipments, out of which arose a duty of the defendant toward the plaintiff.

It appears that one Roeder employed the plaintiff and Roeder

contracted with the defendants to take clay from defendants' pit, over a track owned by the defendants and unload the earth in railway cars. The track over which the earth was taken in defendants' car was about 2½ feet wide and the cars started down an incline from the pit and the acceleration obtained in descending carried the cars up an ascending grade to the railway line, where they were unloaded.

The track had sunk on one side and this caused the car which the plaintiff was taking from the pit to overturn and break the plaintiff's leg. The defendants say there was no liability on them as the plaintiff was employed by Roeder who contracted with the defendants to load the cars and convey them to the C.P.R. Railway line. It is quite clear that where an independent contractor is employed to do a lawful act and, in the course of the work, he or his servants commit some casual act of negligence, the principal who bargained with the contractor to do the work is not liable. *Pickard* v. *Smith*, 10 C.B. (N.S.) 470. But on the other hand, if, under the contract between the principal and the contractor, works are erected by the principal for the express purpose of accommodating workmen engaged by the contractor to do work there, and injury arises to a workman through a defect in the works, the principal will be liable: *Heaven* v. *Pender*, 11 Q.B.D. 503; *Coughtry* v. *Globe Woollen Co.* (1864), 56 N.Y. 124; *Indermaur* v. *Dames*, L.R. 2 C.P. 311.

The defendants' manager, Conrad White, said that the defendants owned the rails, the plant and the cars and Roeder, the contractor, used them and received so much a car for loading the earth; also that the defendants had the right to employ Roeder's employees to build or extend spur tracks in connection with the defendants' works under which circumstances Roeder would act as defendants' foreman. Aylesbury, an employee of defendants, had general supervision of the operations at the pit. Pfeifer, a fellow-employee of the plaintiff, was told by Aylesbury to repair the track and he heard Aylesbury instruct Roeder to have the track fixed. The evidence fully warrants the conclusion that the works (the track in question and car) were constructed and owned by the defendant and that the defendant exercised a control over the tracks while in use and knew of the defects which caused the injury, and these facts bring the defendants within the rule above

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enunciated and render them liable. The defendants, however, contend that the plaintiff did not, in his claim, allege any such liability, having claimed that he was employed directly by the defendants. I am of the opinion, however, that paragraph 4 of the claim quite sufficiently alleges a liability arising out of defendants' negligence in the maintenance of the works of their plant and the course of the trial indicates clearly such an issue.

There was no argument that the damages were excessive. The plaintiff has been in the hospital nearly a year, has lost his leg, his health has been impaired and the amount unquestionably is not excessive.

I would dismiss the appeal with costs.

BECK, J.

BECK, J., concurred with SIMMONS, J.

Appeal dismissed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. STREET RAILWAYS (§ III C—47)—AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—LOOKING BOTH WAYS.

A person about to cross a railway track is under a duty not to be guilty of negligence, but what is the exercise of reasonable care is a question of fact to be decided by the jury, according to the facts of the case, and failure to look just before crossing a street railway track is not, as a matter of law, negligence *per se*.

[*Grand Trunk R. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838, considered.]

2. STREET RAILWAYS (§ III B—28)—EXCESSIVE SPEED AND LACK OF WARNING—CROSSING STREET WITH REASONABLE CARE.

Where the substance of the jury's findings in an action against a street railway for running down and killing a foot passenger crossing the street, is that the death was caused by negligence in operating their car at an excessive rate of speed and in failing to give due warning of the approach of the car, and that the deceased, having looked up and down the street and seen no car, had exercised reasonable care, judgment must be entered for the plaintiff, if there was evidence upon which reasonable men might find, as the jury did, that defendants were guilty of negligence and that the deceased had exercised reasonable care.

[*Cooper* v. *London Street R. Co.*, 9 D.L.R. 368, 15 Can. Ry. Cas. 24, 4 O.W.N. 623, applied; *Dublin, Wicklow & Wexford R. Co.* v. *Slattery*, 3 App. Cas. 1155, 1166, referred to.]

3. TRIAL (§ II D—170)—TAKING CASE FROM JURY—TWO EQUALLY POSSIBLE VIEWS ON THE FACTS.

If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more

consistent with the case for one party than for the other, it is the duty of the judge to let the jury decide between such conflicting views. [*Darcy* v. *London and Southwestern R. Co.*, 12 Q.B.D. 70, applied.]

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APPEAL in an action for damages for negligently causing death.

The action was tried before LENNOX, J., with a jury, at Toronto, and the action dismissed upon the following judgment now appealed from, the appeal from which is now allowed.

J. P. MacGregor, for the plaintiff.

D. L. McCarthy, K.C., *T. Herbert Lennox*, K.C., and *Keith Lennox*, for the defendants.

LENNOX, J.

LENNOX, J.:—The plaintiff sues as administrator of Jean Spence, who was killed on the evening of the 11th December, 1911, by coming in contact with one of the defendants' cars, as she and her sister, Lizzie Armstrong, were crossing Bathurst street, at a point between St. Patrick and Robinson streets, in the city of Toronto.

Lizzie Armstrong was the only witness called to testify as to what occurred immediately before and at the time of the casualty. The other testimony was, in the main, theoretic and speculative, and, more often than otherwise, was based upon assumed or unverified premises. Subject to one or two notable exceptions, the jury accepted the evidence of Lizzie Armstrong; and I can find no good reason why her account of what happened should not be entirely accurate and decide the issue between the plaintiff and defendants.

At the close of the evidence, the defendants' counsel moved for a nonsuit. I refused to withdraw the case from the jury, reserving leave to the defendants to renew the motion for a nonsuit. The defendants then decided not to call evidence, and a number of questions were submitted to the jury.

I am asked to direct that judgment be entered for the plaintiff for $920 upon the following questions and answers:—

1. Was the death of Jean Spence caused by the negligence of the defendants? A. Yes.

2. If you find that the defendants' negligence caused the death, in what did their negligence consist? A. We consider

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that the car was going at an excessive speed, from the fact of the distance the body was thrown, and also the distance the car travelled before it was stopped, and that the motorman gave no warning when approaching the girls.

3. Did Jean Spence, after stepping from the sidewalk, take any precautions for her safety? A. (as first brought in) We don't know.

The jury, having been instructed to retire and further consider this question and some other questions then unanswered, struck out the answer, "We don't know" and said:—

No. 3. From the fact that the witness was in advance of deceased, and the night was dark, we don't think that the witness was in a position to know whether the deceased took any precautions for her safety or not.

4. If she did, what precautions did she take? A. Answered by No. 3.

5. If Jean Spence, or her sister, had been on the alert or keeping a look-out for cars and vehicles as they crossed the street, would the accident, in your opinion, have occurred? A. It might have.

6. If, when the whistle was blown, Jean Spence had continued on her course south-westerly across the street, would the accident, in your opinion, have occurred? A. Yes.

7. At the time the whistle was blown, had Jean Spence and her sister crossed over the western track? A. Jean Spence was within the western rail of the western track. Lizzie Armstrong was just clear of the western track.

8. If not, where were they, specifying the position of each when the whistle was blown? A. Answered by No. 7.

9. Could Jean Spence, by the exercise of reasonable care, have avoided the accident? A. We consider that Jean Spence, by looking up and down the street before leaving the sidewalk and seeing no car, exercised reasonable care.

10. If your answer is "Yes," in what did her want of care consist? A. Answered by No. 9.

The damages were assessed at $920, and apportioned. It was with great difficulty and only after the jury had been sent

back twice, I think, that answers to some of the questions were obtained.

I have come to the conclusion that, upon these answers, I ought not to direct judgment to be entered either for the plaintiff or the defendants. I am not satisfied with the action of the jury; but, subject to the question of nonsuit later, this would not, of course, justify me in refusing to direct judgment, if the answers are sufficient to dispose of all issues raised. Equally of course, that, in my opinion, the jury have reached erroneous conclusions, is not a justification for refusing to give effect to their answers.

But the evidence, the Judge's charge, and perhaps even the argument of counsel, is of consequence in ascertaining what the answers of the jury really mean: *Rowan* v. *Toronto R.W. Co.* (1889), 29 S.C.R. 717, at pp. 731-4. I shall have occasion to define the issues, refer to the evidence, and consider what there was to be left to the jury when I come to deal with the motion for a nonsuit. This case is in some respects similar to the case just cited. There, however, the question of contributory negligence was submitted without asking the jury what constituted the contributory negligence, if any, they found to exist—and this was considered of importance in the Supreme Court; here, the two questions are submitted. There, the whole contest was as to the negligence of the defendants; here, the contest was chiefly as to whether the deceased acted with such a want of prudence or ordinary care as to disentitle the plaintiff to recover. There, there was a sharp conflict in the evidence upon all material questions; here, there was no conflict of evidence; and, of necessity, the question "Could the deceased, by the exercise of reasonable care, notwithstanding the negligence of the defendants, have avoided the accident?" and the other question as to the conduct of the deceased, are practically the only matters the jury had to consider and decide.

Leaving out of sight, then, other questions which have not been disposed of as explicitly as I think they ought to be, have the defendants a right to say that a full and fair trial of this action involves a direct, explicit, and non-argumentative answer to the question of contributory negligence. I think that

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they have a right to take this position, and, reading some others of the answers in the light of the evidence, I cannot help thinking that the jury were not so much unable as unwilling to answer this question. It is quite a different question from the one left unanswered in *Faulknor* v. *Clifford* (1897), 17 P.R. 363, but the principle is the same. An answer in the affirmative here, as an answer in the affirmative there, would render the other answers favourable to the plaintiff of no effect. In that case, Osler, J.A., delivering the judgment of the Court, said: "It appears to me very clear that my brother Street was right in refusing to direct judgment for the plaintiffs . . . A finding in favour of the defendants in answer to the first question would have been a complete answer to the action, notwithstanding the other findings in favour of the plaintiffs. There was evidence in support of such a finding, but the jury have disagreed and have not answered the question. The trial was therefore incomplete, and no judgment could be given."

For the effect of failure to answer material questions, see also *Blois* v. *Midland R.W. Co.* (1905), 39 N.S.R. 242.

But there still remains the question, have they implicitly answered, or eliminated the necessity for answering, this question, No. 9, by other answers, as was said to be the effect in *Rowan* v. *Toronto R.W. Co.*? I think not; but I cannot say that my mind is entirely free from doubt. It certainly was never intended, or thought of, that an affirmative answer to question No. 1 would be taken as obviating the necessity of answering No. 9—much less of being the equivalent of a negative to this question—yet part of the reasoning in the judgments in that case could, with some force, be applied here. The difference, however, in the issues presented, in the way the case was left to the jury, and in the questions themselves, lead me to think that to hold that question No. 9 is in effect answered or dispensed with, would be to go beyond the decision in the *Rowan* case; and that decision goes fully as far as I desire to go.

As to the effect of an affirmative answer to a general question of negligence, in *Dublin Wicklow and Wexford R.W. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, Lord Penzance says, at p. 1173: "In other words, the only finding upon the first issue,

under which the second issue could possibly arise, is a finding that the accident did happen by reason of the defendants' neglect, leaving open the further question whether other causes, and among them the negligent conduct of the deceased, contributed to it."

On the other hand, in *Moore* v. *Grand Trunk R.W. Co.* (1905), 5 O.W.R. 211, Mr. Justice Magee refused to enter judgment, although to the question "Was the death of the plaintiff's husband occasioned by the negligence of the defendants"? the jury answered "Yes."

I think, too, that the defendants had a right to an answer to the fifth question. See also *Carter* v. *Grasett* (1888), 14 A.R. 685. I will not direct judgment to be entered for the plaintiff.

The defendants renew their application for a nonsuit. I am now of opinion that I should not have allowed the case to go to the jury. Among other things, it was strenuously argued at the trial, and is now argued again, that there is no evidence of negligence upon the part of the defendants. I have not changed my mind upon this branch of the case. If there are any circumstances which could be counted for negligence against the defendants, and there is a *primâ facie* case in other respects, then these circumstances must be left for the consideration of the jury. I then thought and still think that there were circumstances deposed to and theories advanced by the experts from which, although falling far short of what would satisfy my mind, a jury might infer negligence; and, therefore, matters proper to be weighed and pronounced upon by the jury. But, in the circumstances of this case, it was not, necessarily, enough that the plaintiff should give evidence of the defendants' negligence; he must shew that the deceased was acting reasonably, or rather he must at least close his case without disclosing that the deceased was the author of her own disaster.

If, in any case, the only evidence for the plaintiff is that the person injured desired to be injured, or, recklessly indifferent as to whether he is injured or not, knowingly puts himself in the way of the danger, there can, of course, be no recovery, although the defendant is shewn to be negligent as well.

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As I said, Lizzie Armstrong is the only witness as to the facts, and she discloses not only that she and her sister knew of the danger, and that it was increased by the absence of street lighting at that place, but also such a careless and negligent use of the highway and such an absence of reasonable and ordinary care, or any care, that, in my opinion, they must be held to have brought this trouble upon themselves. Instead of crossing at a regular crossing or at right angles to the sidewalk, and so being in danger only while they crossed over two sections of street of the width of a car, and almost inevitably seeing a car going either north or south, they turn their backs upon the southern-bound cars, and, without ever looking after leaving the sidewalk, take a course diagonally from the park gate to Robinson street, shutting out the chance of even seeing the cars on the track where the injury occurred, and exposing themselves to contact with vehicles of all kinds for a distance of possibly 20 rods. If they had looked at all, they would have seen; if they had gone directly across the street, they probably would have seen even without looking; and if they had crossed in this way, they would have been upon the western sidewalk long before the car came along.

Lizzie Armstrong says:—

Q. And you were crossing the road in what direction? A. South, crossing angling.

Q. And you were going to Robinson street? A. Yes.

Q. And you did not walk down Bathurst street opposite to Robinson street and go across? A. No.

Q. So, after you left the sidewalk on Bathurst street, you would be going in a south-westerly direction? A. Yes.

Q. So your back would be pretty well towards? A. The north.

Q. The north? A. Yes.

Q. Now then you did not look to see if there was a car coming after you left the sidewalk? A. No.

Q. That is, you just walked in a diagonal direction—that is, in the direction right from the sidewalk to where the accident occurred—without looking up to see if there was a car coming? That is right, is not it? A. We looked before we started to cross the street.

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Q. You looked when you were on the sidewalk? A. Yes.

Q. But from the time that you left the sidewalk until the accident happened, you had not looked to see if there was a car coming? A. No.

Q. So that, if you had looked after you left the sidewalk until the time of the accident, you would have seen a car coming? A. I guess we would have seen it.

Q. And am I to understand that you walked across the track where the accident happened without ever looking to see if there was a car near you? A. Yes.

It is suggested that Lizzie might not know of all her sister did. It is enough to say that she is the witness upon whose evidence the plaintiff depends, and she professed to know. Further, if the deceased had looked, she would, as Lizzie says, have seen the car, and would, of course, have given the alarm.

In *Dublin Wicklow and Wexford R.W. Co.* v. *Slattery*, 3 App. Cas. 1155, Lord Blackburn (at pp. 1208-9) quotes this passage from *Ryder* v. *Wombwell* (1868), L.R. 4 Ex. 32, 38: "There is in every case . . . a preliminary question, which is one of law, viz., whether there is any evidence upon which the jury could properly find the questions for the party upon whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant." And Lord Hatherley (at p. 1168) quotes Chief Baron Palles as saying: "When there is proved, as part of the plaintiff's case, . . . an act of the plaintiff which *per se* amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury." Resuming, Lord Hatherley says (p. 1169): "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact." And this statement of the law by his Lordship is exceedingly pertinent in this case. "I cannot consider it a proper question," he says (p. 1171), "for a Judge to ask the jury whether

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a man's walking or running across a line of railway on which a train is expected, without looking to see whether a train is in sight, be an act of negligence. As Mr. Justice Montague Smith observed in *Siner* v. *Great Western R.W. Co.* (1869), L.R. 4 Ex. 117, at p. 123: 'Judges cannot denude themselves of that knowledge of the incidents of railway travelling which is common to us all.'" And again (p. 1172): "I do not think it would be reasonable to infer that a man exercised due caution in walking on a railway at night without looking about him." Lord Coleridge, at p. 1194, says: "Now it is admitted that in order to justify a case being submitted to the jury, there must be evidence of negligence on the part of the defendants, and also that the negligence in fact caused the injury complained of. . . . It is as necessary to make out the latter proposition as the former, and, therefore, in order to submit a case to the jury there must be evidence of both. It is also clear that if the undisputed evidence, or the admissions in the case, negative the latter proposition, the Judge must withdraw the case from the jury, because the plaintiff has not satisfied the onus which lies on him. . . . The plaintiff fails if he fails to shew that the defendants caused the wrong, and he does so fail, if he shews that he caused it, or that the deceased caused it himself."

See also *Skelton* v. *London and North Western R.W. Co.* (1867), L.R. 2 C.P. 631; *Rocke* v. *McKerrow* (1890), 24 Q.B.D. 463; and a case of *Myers* v. *Toronto R.W. Co.*, tried by Mr. Justice Middleton without a jury in April last: (1913), 4 O.W.N. 1120, 5 O.W.N. 587.

The defendants should not ask for costs; and, if they should not ask them, it is some reason why I should not give them.

I direct that a judgment of nonsuit be entered without costs to either party.

The plaintiff appealed from the judgment of LENNOX, J.

Argument

J. P. MacGregor, for the appellant. The deceased had a right to assume that the motorman would do his duty; *Tinsley* v. *Toronto R.W. Co.* (1908), 17 O.L.R. 74; *Toronto R.W. Co.* v. *King*, [1908] A.C. 260. The accident occurred on a compara-

tively deserted street, and the defendants did not take ordinary precautions, while the deceased was not required to be especially on her guard: *Canadian Pacific R.W. Co.* v. *Tapp* (1909), Q.R. 18 K.B. 552. On the question of the gong not being sounded, and the deceased being "lulled into a sense of security," see *Dublin Wicklow and Wexford R.W. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1193.

D. L. McCarthy, K.C., for the company. As to the duty to take care, see *Grand Trunk R.W. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838, 29 Times L.R. 679, where it was held "that to make the railway company liable it must be shewn that the omission to whistle or give the other warning, or both combined, and not the folly and recklessness of the person injured, caused the accident." *Davey* v. *London and South Western R.W. Co.* (1883), 12 Q.B.D. 70, and *Wright* v. *Grand Trunk R.W. Co.* (1906), 12 O.L.R. 114, may be distinguished. On the question of the defendant company's right to a nonsuit, see *Coyle* v. *Great Northern R.W. Co. of Ireland* (1887), 20 L.R. Ir. 409, at p. 418; *Allen* v. *North Metropolitan Tramways Co.* (1888), 4 Times L.R. 561, where the plaintiff "looked only in one direction, and not in the direction from which the car was coming." *Ibo Syndicate Limited* v. *Wyler* (1902), 87 L.T.R. 83, may be referred to on the question of weight of evidence and the power in the Court to set aside the verdict. *Preston* v. *Toronto R.W. Co.* (1905), 11 O.L.R. 56, *Toronto R.W. Co.* v. *King*, [1908] A.C. 260, *Milligan* v. *Toronto R.W. Co.* (1908), 17 O.L.R. 530, must be distinguished, as, owing to the peculiar facts involved in them, they are taken out of the usual rule. On the question of contributory negligence on the deceased's part in not looking up the street, see *Landrigan* v. *Brooklyn Heights R.R. Co.* (1897), 23 App. Div. (N.Y.) 43. The questions to the jury were unsatisfactory: *Elliott* v. *Chicago Milwaukee and St. Paul R.W. Co.* (1893), 150 U.S. 245.

MacGregor, in reply. *Landrigan* v. *Brooklyn Heights R.R. Co.*, *supra*, must be distinguished, as the facts in that case are quite different from this. There is a duty upon the driver of the car to use reasonable care: *Heath* v. *Hamilton Street R.W. Co.* (1906), 8 O.W.R. 937; *Toronto R.W. Co.* v. *Gosnell* (1895), 24

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S.C.R. 582, at p. 587; *Halifax Electric Tramway Co.* v. *Inglis* (1900), 30 S.C.R. 256, at p. 261. The question of sufficiency of negligence is for the jury: *Milligan* v. *Toronto R.W. Co.*, 17 O. L.R. 530, *per* Maclaren, J.A., at p. 542; *Sims* v. *Grand Trunk R.W. Co.* (1905), 10 O.L.R. 330; *Goodchild* v. *Sandwich Windsor and Amherstburg R. Co.* (1912), 4 D.L.R. 159; *Slingsby* v. *Toronto R. Co.* (1912), 3 D.L.R. 453. On the question of nonsuit, see *Cooper* v. *London Street R.W. Co.* (1913), 9 D.L.R. 368, 15 Can. Ry. Cas. 24, 4 O.W.N. 623, at p. 625; *Drewitt* v. *Hamilton Grimsby and Beamsville Electric R.W. Co.* (1907), 9 O.W. R. 427.

There was no proof of contributory negligence. *Clairmont* v. *Ottawa Electric R.W. Co.* (1910), 2 O.W.N. 108. The following American cases were decided on similar facts: *Handy* v. *Metropolitan Street R.W. Co.* (1902), 70 App. Div. (N.Y.) 26; *Denton* v. *Brooklyn Heights R.R. Co.* (1902), 75 App. Div. (N.Y.) 619; *Killen* v. *Brooklyn Heights R.R. Co.* (1900), 48 App. Div. (N.Y.) 557; *Gildea* v. *Metropolitan Street R.W. Co.* (1901), 58 App. Div. (N.Y.) 528; *Mauer* v. *Brooklyn Heights R.R. Co.* (1903), 87 App. Div. (N.Y.) 119. As to the questions to the jury, see *Rowan* v. *Toronto R.W Co.*, 29 S.C.R. 717; *Vallee* v. *Grand Trunk R.W. Co.* (1901), 1 O.L.R. 224, at p. 227.

MULOCK, C.J.

December 23. The judgment of the Court was delivered by MULOCK, C.J.Ex.:—This action is brought by James Ramsay, administrator of the estate of Jean Spence, deceased, against the Toronto Railway Company, for damages because of fatal injuries caused to her by the defendant company. The case was tried by Lennox, J., with a jury, and on their answers to questions submitted to them, the learned trial Judge ordered a nonsuit, and from his judgment the plaintiff appeals.

From the evidence it appears that the deceased Jean Spence and her sister, Lizzie Armstrong, at about six o'clock in the evening of the 11th December, 1911, were proceeding southerly along the east side of Bathurst street, in the city of Toronto, and when they had reached a point opposite the park gate desired to cross Bathurst street.

The defendant company have two railway tracks on this street, the easterly one being used for their north-bound and the westerly one for their south-bound cars.

Before attempting to cross, the two young women stopped on the sidewalk and looked northerly in order to discover whether any car was approaching from the north; and the witness Lizzie Armstrong says that she saw none; whereupon they both stepped off the sidewalk and proceeded to cross the street in a south-westerly direction, Lizzie Armstrong being slightly in advance of her sister. When Lizzie Armstrong had reached the westerly rail of the westerly track, she heard the whistle of a boy on a bicycle in front of her, whereupon, she says, "I kind of started back;" and she was hit on her right ankle and thrown on her hands and knees. When she got up, she saw her sister about a car and a half length from her, with her head lying on the kerb, whilst the car that had struck them was standing at a point a little distance to the south, the northerly end of the car being about two car lengths southerly from where her sister lay, and people were carrying her into a doctor's house. The car was about 30 feet long. Lizzie Armstrong says that her right foot was on the west rail when struck. The distance from the kerb on the east side of Bathurst street to the west rail is 27 feet, and from that rail to the west kerb is 13 feet.

The evidence does not shew with certainty how far the place where the accident happened was southerly of the point on the east side of the sidewalk from which the sisters began their diagonal crossing.

The defendants offered no evidence.

[The learned Chief Justice then set out the questions submitted to the jury and their answers as above.]

The jury assessed the damages at $920, and apportioned that sum between the father and mother of the deceased, giving the father $420 and the mother $500.

The case had been previously tried and a verdict rendered for the plaintiff for $1,000, but that was set aside and a new trial ordered.

The answer to question 5 affirms nothing, and may be disregarded: *Rowan* v. *Toronto R.W. Co.*, 29 S.C.R. 717; *Flan-*

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nery v. *Waterford and Limerick R.W. Co.* (1877), I.R. 11 C.L. 30.

The substance of the jury's findings is, that the death of the deceased was caused by the negligence of the defendant company in operating their car at an excessive rate of speed, and in failing to warn her of the approaching car, and that the deceased, having looked up and down the street and seen no car, had exercised reasonable care.

With respect, I am unable to agree with the learned trial Judge's disposition of the case in directing a nonsuit, on the ground, as I understand his judgment, of contributory negligence on the part of the deceased. There was ample evidence in support of the jury's finding that the car was being negligently operated; and, unless the deceased was guilty of contributory negligence, the defendant company are liable.

In view of the evidence, that issue could not properly have been withdrawn from the jury; and their finding, being justified by the evidence, is conclusive that the deceased exercised reasonable care. She and her sister looked before leaving the sidewalk, and, according to the sister, no car was in sight. The inference may be drawn that they assumed that no car operated at a reasonable speed could overtake them, and that it was unnecessary for them to look again while crossing the street. Persons crossing street railway tracks are entitled to assume that cars using those streets will be driven moderately and prudently. If a person crosses in front of an approaching car, which is so far off that, if driven moderately, it cannot overtake such person, even though he do not look again and is injured, he is not guilty of contributory negligence: *Toronto R.W. Co.* v. *Gosnell*, 24 S.C.R. 582.

In the present case, the deceased did look once, and, according to the jury's finding, circumstances excused her from looking again before actually stepping upon the track. Consideration of these circumstances was necessary before the jury were in a position to decide whether she had acted reasonably. Some of those circumstances were: that the sisters looked for a car; that nothing obstructed their view; that it is reasonable to suppose that they were able to see a considerable distance up the

track; and that neither of them was able to see a car; that, in consequence, they each assumed that no car could overtake them in their comparatively short trip across the street; and that they both acted on this belief in endeavouring to cross the track.

The jury were entitled to take into consideration these exculsatory circumstances in order to determine whether the deceased had been negligent: *Wright* v. *Grand Trunk R.W. Co.*, 12 O.L.R. 114. This was not a case where the accident was caused by the pure folly and recklessness of the deceased, which was the species of negligence commented upon by Lord Cairns in *Dublin Wicklow and Wexford R.W. Co.* v. *Slattery*, 3 App. Cas. at p. 1166.

From the facts proved it cannot be said that two reasonable views may not be taken of the conduct of the deceased. As said by Bowen, L.J., in *Davey* v. *London and South Western R.W. Co.*, 12 Q.B.D. 70, at p. 76: "If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the Judge to let the jury decide between such conflicting views."

In *Cooper* v. *London Street R. Co.*, 9 D.L.R. 368, 15 Can. Ry. Cas. 24, 4 O.W.N. 623, which was the case of the plaintiff alighting from a street car and walking around the rear and being struck by a car coming from the opposite direction, Meredith, J.A., says (p. 624): "There are just two questions raised whether there was any evidence adduced at the trial upon which reasonable men could find, as the jury did find, (1) that the defendants were guilty of negligence, and (2) that the plaintiff was not also so guilty. In my opinion, there was evidence, upon each point, which precluded a nonsuit; that is, that each finding is supported by reasonable evidence, or, as before put, evidence upon which reasonable men might find, as the jury did, in the plaintiff's favour on each of these questions."

It was contended before us on behalf of the defendant company that as a matter of law a person was bound to look before crossing a railway track, and that failure to do so was *per se* negligence; and *Grand Trunk R.W. Co.* v. *McAlpine*, 13

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D.L.R. 618, [1913] A.C. 838, 29 Times L.R. 679, was cited in support of that proposition. That case lays down no such doctrine. In his charge to the jury in that case the learned trial Judge had told them that "a party who crosses a railway is obliged to look, there is no doubt about that, but to what extent he is obliged to look is a question which is disputed. It seems to be considered now that it is sufficient if a party . . . looks both ways on approaching the track. He need not necessarily look again just before crossing. That is the English law." And in dealing with this passage, Lord Atkinson said: "That was an entirely erroneous view of the English law. Whether in a case of this character the plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence, were questions of fact to be decided in each case on the facts proved. There was no such rule of law in England as that if a person about to cross a line of railway looked both ways on approaching the track he need not necessarily look again just before crossing it."

Those observations do not affirm the proposition that a person about to cross a railway track is bound to look, and that failure to look is negligence. They were made merely in repudiation of the erroneous doctrine contained in the above-quoted extract from the charge of the learned trial Judge.

The duty of a person about to cross a railway track is not to be guilty of negligence, which is another way of saying that he must exercise reasonable care. In each case what is reasonable care is a question of fact to be decided by the jury, according to the facts of the case, and that is the only interpretation of which the above-quoted observations of Lord Atkinson admit.

On the facts here, the jury having found that the deceased exercised reasonable care, the learned trial Judge was not, in my opinion, entitled to disregard that finding.

I, therefore, think that this appeal should be allowed, and judgment should be entered for the amount of the verdict, with costs of action, including the costs of this appeal.

Appeal allowed.

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Saskatchewan Supreme Court, Lamont, Johnstone, Browne, and Elwood, JJ. March 16, 1914.

1. LIMITATION OF ACTIONS (§ II B—42)—MORTGAGE — VACANT LANDS — CONSTRUCTIVE POSSESSION—WHEN STATUTE BEGINS AGAINST MORTGAGEE.

Where a right of entry or to sue for possession has accrued to a mortgagee by the mortgagor's default in payment, and the mortgaged lands are left unfenced and without actual occupation by anyone, the Statute of Limitations does not run against the mortgagee so as to extinguish his title to the lands; the mortgagee may still foreclose although the remedy by action for the debt is barred, and the mortgagor similarly is not barred of his right to redeem.

[*Creamer* v. *Gooderham*, 9 D.L.R. 372, affirmed; *Buckham* v. *Stewart*, 11 Man. L.R. 625; *Delaney* v. *C.P.R.*, 21 O.R. 11, applied.]

Statement

APPEAL and cross-appeal from the judgment of Newlands, J., *Creamer* v. *Gooderham*, 9 D.L.R. 372, 23 W.L.R. 304.

Both appeals were dismissed.

E. B. Jonah, for the appellant.

Lamont, J.

LAMONT, J., concurred with BROWN, J.

Johnstone, J.

JOHNSTONE, J., concurred with ELWOOD, J.

Brown, J.

BROWN, J.:—This is an appeal from the decision of my brother Newlands, *Creamer* v. *Gooderham*, 9 D.L.R. 372, 23 W.L.R. 304, upon a stated case. The facts important to the issues involved are as follows:—

The plaintiff is the administratrix of the estate of James Charles Findlay, deceased, and the defendants are the executors of the last will and testament of George Gooderham, deceased. Findlay was, on October 21, 1885, the registered owner of the northeast quarter of section 36, township 18, range 21, west of the 2nd meridian, and on that date executed in favour of Gooderham a mortgage to secure the repayment of $250, with interest at 12 per cent. per annum. This mortgage was made under the Ordinance respecting Short Forms of Indentures, and contained provisions that, until default of payment, the mortgagor should have quiet possession of the land; that in default the mortgagee should have quiet possession of the land; and, further, that the mortgagee on default of payment for one

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month might, on giving ten days' notice enter on and lease or sell the said land. By the terms of the mortgage the interest was payable annually on each 21st day of October, the first payment of interest falling due on October 21, 1886, and the principal was payable on October 21, 1890. Nothing has ever been paid under the said mortgage. Findlay left the premises before October 21, 1886, and never afterwards returned to same, nor has anyone else been in actual occupation of the land since that time, and it has never been fenced. Findlay did not at any time, nor did anyone else with his authority, sign any writing acknowledging the right of Gooderham or his executors to payment of the mortgage moneys or to possession of the lands.

Upon these facts the following questions were submitted:—

(*a*) Have the defendants any legal right against the estate of the said James Charles Findlay under the said mortgage for payment of the whole or any portion of the moneys secured by the said mortgage?

(*b*) If the defendants have not any right to payment of any portion of the principal or interest secured by the said mortgage, have the rights of the defendants as executors of the last will and testament of the said mortgagee been extinguished and is the registration of the said mortgage against the said land a cloud upon the plaintiff's title to the said land which she is entitled to have cancelled and removed therefrom.

A mortgagee has two distinct remedies—one, against the mortgagor under the covenants, and the other, against the land. The Statute of Limitations constitutes a bar to the first remedy, although it does not extinguish the debt: see *Kibble* v. *Fairthorne*, 64 L.J. Ch. 184, [1895] 1 Ch. 219. This answers the first question submitted.

As to the second question, I am of opinion that it must be decided on the very simple proposition that as there has been no one in actual occupation of the land since the date of default under the mortgage, the statute does not apply. In *Smith* v. *Lloyd*, 9 Ex. 562, Parke, B., lays down the law at 572 as follows:—

We have not the slightest doubt that the title of the grantees of the mines is not barred in this case under 3 Wm. IV. ch. 27, secs. 2 & 3, for we are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be

both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburn, C.J., in *M'Donnell* v. *McKinty*, 10 Ir. L.R. 514, and the principle upon which it is founded.

The above decision is cited with approval by the Privy Council in the case of *Agency Co.* v. *Short*, 13 App. Cas. 793, 58 L.J.P.C. 4. In the case of *Delaney* v. *Canadian Pacific R. Co.*, 21 O.R. 11 at 19, Armour, C.J., is quoted as follows:—

In cases of vacant possession, as was pointed out in *Agency Co.* v. *Short*, there is no one against whom the mortgagee can bring an action, and he cannot make an entry upon himself, and in such cases trespass would be maintainable by the mortgagee.

In *Bucknam* v. *Stewart*, 11 Man. L.R. 625 at 628, Killam, J., is reported as follows:—

It appears to me that the case is settled by the judgment in *Smith* v. *Lloyd*, 9 Ex. 562. "There must," in the language of Parke, B., "be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute." That was a case of a claim to mining rights in land when the land itself was vested in another, but in *The Trustees, Executors and Agency Co.* v. *Short*, 13 App. Cas. 793, the Judicial Committee of the Privy Council, accepting the doctrine of Baron Parke, held that there was "no difference in principle as regards the application of the statute between the case of mines and the case of other land where the fact of possession is more open and notorious."

There having never been any person in actual possession of the property until June 30, 1896, the statute did not commence to run against the defendant until then, and his right of entry or to bring an action to recover possession still continues.

This is, undoubtedly, contrary to the view taken by the Court of Queen's Bench of Upper Canada in *Doe dem. McLean* v. *Fish*, 5 U.C.R. 295; but it agrees with the opinion of Armour, C.J., in *Delaney* v. *C.P.R. Co.*, 21 O.R. 11, which must now be taken to be the correct one.

In view of the above authorities, as neither the mortgagor nor the mortgagee in this case has been in actual possession since the date of default, the statute does not constitute a bar to the mortgagee's right to sell or foreclose, nor does it constitute a bar to the mortgagor's right to redeem. In answer to the second question submitted, it should, therefore, be stated that the rights of the defendants under the mortgage have not been extinguished, and the plaintiff is not entitled to have the same cancelled.

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In the result both the appeal and the cross-appeal should be dismissed, with costs.

ELWOOD, J.:—This is an appeal from the judgment of my brother Newlands, before whom the matter came by way of a stated case. The facts, according to the stated case, are as follows:—

The plaintiff, who claims to be the owner of the land hereinafter mentioned, is the administratrix of the estate of James Charles Findlay, deceased, who, on or about October 21, 1885, and while the registered owner of the northeast quarter of section thirty-six (36), in township eighteen (18), range twenty-one (21), west of the second meridian in the Province of Saskatchewan, or as it then was, the North West Territories, executed a mortgage on said land to George Gooderham, now deceased, to secure the repayment of the sum of two hundred and fifty ($250) dollars, on October 21, 1890, with interest at 12 per cent. per annum. Said mortgage purported to be in pursuance of the Ordinance respecting Short Forms of Indentures and, *inter alia*, provided that on default the mortgagee should have quiet possession of the said lands free from all encumbrances and that the mortgagee on default of payment for one month might, on giving ten days' notice, enter on and lease or sell the said lands and that until default of payment the mortgagor should have quiet possession of said lands. Nothing has ever been paid on account of the said mortgage. The mortgage was duly registered on October 22, 1885, and the title to the land is now registered in the name of the said Findlay, subject to said mortgage.

Since 1886, no person has been in occupation of the said land and the said land has never been fenced. The last heard of the said Findlay was in December, 1904. Administration to his estate was granted in March, 1912. The defendants are the administrators of the estate of the said George Gooderham who is deceased.

Neither the mortgagee nor the defendants ever gave to the said mortgagor or the plaintiff, 10 days or any notice of his or their intention to enter upon and take possession of said lands.

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No acknowledgment in writing was ever given of the right of the mortgagee or of the defendants to payment under said mortgage, or to said lands. There are other facts set out in the stated case but the above are all that to me seem material.

The questions submitted for the opinion of the Court are as follows:—

(*a*) Have the defendants any legal right against the estate of the said James Charles Findlay under the said mortgage for payment of the whole or any portion of the moneys secured by the said mortgage.

(*b*) If the defendants have not any right to payment of any portion of the principal or interest secured by the said mortgage have the rights of the defendants as executors of the last will and testament of the said mortgagee been extinguished and is the registration of the said mortgage against the said land a cloud upon the plaintiff's title to the said land which she is entitled to have cancelled and removed therefrom.

My brother Newlands held that the remedy against the mortgagor is barred by the Statute of Limitations but that the defendant's right of entry, or to bring an action for possession continues and that the defendants would be entitled to retain out of the moneys derived from a sale of said land interest at 12 per cent. to Oct. 21, 1890, and 5 per cent. thereafter.

From the above judgment the plaintiff appeals in so far as it holds that the defendant's right of entry or to bring an action for possession continues, and the defendants by way of cross-appeal claim to vary the said judgment in so far as the same determines that the defendants are entitled to the amount of the mortgage in question together with interest at 12 per cent. to Oct. 21, 1890, and 5 per cent. thereafter on the ground that the defendants are the owners of the land in question and are entitled to retain all moneys derived from the sale of the land and for a declaration that all of the rights of the plaintiff in reference to said land have been barred and that the defendants are now the absolute owners thereof.

The effect of 37 and 38 Vict. ch. 57, sec. 8, is to bar, but not extinguish, the rights of the defendants in so far as the covenant in the mortgage is concerned: *Kibble* v. *Fairthorn*, 64 L.J. Ch. 184, [1895] 1 Ch. 219. The rights of the defendants with respect to the land are, however, on quite a different footing.

On behalf of the plaintiff it was contended that the legal

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title was in the plaintiffs, that in the absence of actual occupation by the mortgagee possession will be attributed to the person who holds the legal title, that, by the mortgage the mortgagor retains possession until default, that before the mortgagee is entitled to possession he must give notice as provided by the mortgage, that never having given notice he was never entitled to possession, he never entered into actual possession and that his rights under the mortgage and to the land are extinguished.

In *Doe dem. McLean* v. *Fish*, 5 U.C.Q.B. 295, it was held that where a mortgagee has neither taken possession of the land mortgaged after default nor received interest upon the mortgage money within 20 years, the title is in the mortgagor and the mortgagee, if suing in ejectment a third party in possession, may be nonsuited. At page 296, Robinson, C.J., says as follows:—

> The mortgagee claims the land by reason of a forfeiture, and by the 17th section of our statute 4 Wm. IV. ch. 1, the time of limitation began to run from the time of forfeiture, or condition broken. If finding the land vacant, he had entered within the period, he would have been under no necessity of bringing an action, or if he chose to do so he might have proceeded as upon a vacant possession; but never having asserted his right till after some third party has entered, he now, for the first time, claims possession under his mortgage, on the ground of an alleged default of payment. He is in effect suing on his security, and the 43rd clause of the statute 4 Wm. IV. ch. 1, applies to him, which prevents his proceeding to enforce his mortgage after a lapse of twenty years.
>
> The mortgagee could not after what has occurred, dispossess the mortgagor if he were now in possession, and that being so, he can as little remove any other person enjoying peaceable possession.

In *Delaney* v. *Canadian Pacific R. Co.*, 21 O.R. 11, it was held that where a right of entry has accrued to a mortgagee without actual entry by him and the mortgaged lands are subsequently left vacant before a title by possession has been acquired by anyone, the constructive possession is in the mortgagee and the Statute of Limitations does not run against him so as to extinguish his title to the lands.

At page 19, Armour, C.J., says:—

> But whether the plaintiff's right of entry accrued upon the making of the mortgages or upon default being made therein, makes, in my opinion, no difference, for as soon as Daniel Hartnett abandoned the possession in 1877, and the lands became vacant, the constructive possession

thereof was in the plaintiff, and the statute did not run against him so as to extinguish his title to the land: *Agency Co.* v. *Short*, 13 App. Cas. 793.

In cases of vacant possession, as was pointed out in *Agency Co.* v. *Short*, there is no one against whom the mortgagee can bring an action, and he cannot make an entry upon himself, and in such cases trespass would be maintainable by the mortgagee.

In *Bucknam* v. *Stewart*, 11 Man. L.R. 625, it was held that the statute does not run against a mortgagee of land in a state of nature until actual possession is taken by some person not claiming under him.

At page 628, Killam, J., says:—

It appears to me that the case is settled by the judgment in *Smith* v. *Lloyd*, 9 Ex. 562. "There must," in the language of Parke, B., "be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute."

There having never been any person in actual possession of the property until June 30, 1896, the statute did not commence to run against the defendant until then, and his right of entry or to bring an action to recover possession still continues.

This is undoubtedly contrary to the view taken by the Court of Queen's Bench of Upper Canada in *Doe dem. McLean* v. *Fish*, 5 U.C.R. 295; but it agrees with the opinion of Armour, C.J., in *Delaney* v. *C.P.R. Co.*, 21 O.R. 11, which must now be taken to be the correct one.

The mortgage in question not being under the Land Titles Act had the effect of conveying the legal estate to the mortgagee. It was a conveyance of the land subject only to a condition that, if a certain amount be paid on a certain day, the land revested.

On default there was no one in actual possession and the mortgagee was in constructive possession: *Delaney* v. *C.P.R. Co.*, *ante*, p. 19.

At page 414, in *Mahar* v. *Fraser*, 17 U.C.C.P., Richards, C.J., says:—

Doe Roylance v. *Lightfoot*, 8 M. & W. 533, confirmed by *Rogers* v. *Grazebrook*, 8 Q.B. 895, and *Doe* v. *Davies*, 7 Ex. 89, shew that, under a mortgage in this form the mortgagee has an immediate right of entry, and under the general doctrine that, in the absence of possession by anyone else, the legal owner under a deed of bargain and sale is in possession, the mortgagees were in possession of the mortgaged premises, but the mortgage itself was subject to a defeasance on payment of the money,

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and at page 415, says:—

But, if the effect of the mortgage deed was to put the mortgagees into possession by operation of law, and it seems to us it was so, then it may be that the view contended for by the plaintiff fails, and the verdict should not be disturbed.

There was no necessity to make an actual entry and as was said in *Agency Co.* v. *Short*, 13 App. Cas. 798:—

There was no one against whom to bring an action. He cannot make an entry against himself.

It was objected though, that, under the mortgage in question, an entry could not be made without notice.

In *Sidey* v. *Hardcastle*, 11 U.C.Q.B. 162 at 166, Draper, J., says:—

But, since the argument my brother Burns has pointed out what escaped attention at the trial, that, according to the express terms of the proviso in the mortgage, the mortgagee would not be entitled to the possession on default of payment until demand in writing made and the agreement of the parties is clearly expressed that until three calendar months after this demand it was not intended that the mortgagee should enter. This right to enter, so limited, is coupled with a power of sale; but, as it is worded without proof of demand at all events the mortgagee cannot be said to have had a right of possession of the mortgaged premises. He should, therefore, as it now appears to me, have been allowed, and perhaps would have been, had the point been raised, to assert this right and to have tried the question of disputed boundary.

I am not sure, however, that I should have taken this view at the trial had the point been raised; for even now I have not adopted it without some degree of hesitation, arising from the difficulty I have felt in determining the true nature of the interest the mortgagor has under the deed after default, because of the uncertainty of the time when the three calendar months will begin to run; in other words, what sort of estate or tenancy, the proviso, covenant, and agreement create in the mortgagor after an admitted default.

It will be noticed that the above opinion is given with great hesitation and the question had not been raised or argued.

From a perusal, however, of the notes of *Keech* v. *Hall*, 1 Smith's Leading Cases, 11th ed., 530, and following, it appears settled that notice is not necessary before entry and, to quote from page 532, that such a proviso is "a covenant only and no lease."

The following quotation from page 532 seems instructive on the point:—

In *Doe* v. *Day*, 2 Q.B. 147, freeholds and leaseholds were conveyed in mortgage with a proviso that, upon payment on the next 5th October, the conveyance should be void, but in case of non-payment it was to be lawful for the mortgagee, after a month's notice in writing demanding payment, to enter into possession, and to make leases and sell, and the mortgage covenanted not to sell or lease until after such notice. The Court, following the authority of the passage in the Touchstone, referred to in *Doe* v. *Lightfoot*, and acceding to the doctrine of that case, came to the conclusion that, inasmuch as, after the day of payment, the time, if any, during which the mortgagor was to hold was not determinate, but altogether uncertain, and as there was no affirmative covenant whatever that he should hold at all, the covenant, therefore, that the mortgagee should not sell or lease, or, even if it be construed should not enter, until a month's notice, was a covenant only and no lease.

The author at page 533 says:—

It may, perhaps, be concluded on this review of the authorities that in order to make a redemise, there must be an affirmative covenant that the mortgagor shall hold for a determinate time; and that where either of those elements is wanting, there is no redemise.

See also Leith on Real Property Statutes, p. 389.

On the authority of the above it would appear that the redemise here at the most was only until default and that the proviso with regard to notice was too uncertain to create any estate or tenancy after default.

The mortgagee therefore being in possession could only have his rights to the land barred by some one in actual possession.

In *Smith* v. *Lloyd*, 9 Exch. 562 at 572, Parke, B., says:—

We are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburn, C.J., in *McDonnell* v. *McKinty*, 10 Ir. L.R. 514, and the principle upon which it is founded.

This is quoted with approval in *Agency Company* v. *Short*, 13 App. Cas. 793 at 799; *Delaney* v. *C.P.R.*, 21 O.R. 111; and *Bucknam* v. *Stewart*, 11 Man. L.R. 625. In fact it seems settled beyond any doubt that the party in possession, actual or constructive, can only have his rights barred by actual possession by another man. Here no person was in actual possession, and

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the statute did not run against the mortgagee so far as his rights against the land are concerned.

So far as the cross-appeal is concerned, the cases cited for the defendant are cases where the mortgagee was in actual possession, and I am of opinion that in order to bar the mortgagor's right to redeem there would have to be an actual possession by the mortgagee or some one claiming under him for the statutory period, and there being no such possession, the mortgagor has the right to redeem: *Smith* v. *Lloyd*, *Delaney* v. *C.P.R. Agency Company* v. *Short*, *Bucknam* v. *Stewart*, also *Campbell* v. *Imperial Loan*, 18 Man. L.R. 144.

I would, therefore, dismiss both the appeal and the cross-appeal.

Appeal dismissed.

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Manitoba King's Bench. Trial before Mathers, C.J. April 9, 1914.

1. CRIMINAL LAW (§ II B—44)—PRISONER MAKING UNSWORN STATEMENT IN DEFENCE BEFORE JURY.

The former right of a prisoner who is defended by counsel to make an unsworn statement from the dock is displaced by the Canada Evidence Act, under which he may offer his own sworn testimony as evidence on his own behalf.

[*R.* v. *Aho*, 8 Can. Cr. Cas. 453, considered.]

2. HOMICIDE (§ I—4)—INTENT — ACT CALCULATED TO CAUSE DEATH — SHOOTING.

If a person deliberately does an act which was calculated to cause the death of another, he will be presumed to have intended the death of that other, although he may have hoped that death would not result; and, where death results, he will be liable to be convicted of murder unless he proves extenuating circumstances which may reduce the act from murder to manslaughter or to justifiable or excusable homicide.

3. HOMICIDE (§ I—4)—SHOOTING—INTENT TO DO GRIEVOUS BODILY HARM.

If the firing of the fatal shot was done for the purpose of facilitating the commission of robbery or the flight of the robber, but not with the intention of doing grievous bodily harm, the offence is manslaughter and not murder.

[Cr. Code 1906, secs. 259 and 260, considered; see also *Gouree* v. *The King*, 9 D.L.R. 589, 21 Can. Cr. Cas. 44, 47 Can. S.C.R. 568.]

4. TRIAL (§ III D—229)—MURDER—REASONABLE DOUBT.

The evidence to convict on a charge of murder must be such as to convince the jury beyond all reasonable doubt that the accused is guilty; but a juror is not to create materials of doubt by resorting to trivial suppositions and remote conjecture as to possible states of fact different from that established by the evidence.

CRIMINAL trial on a charge of murder. Statement

The Crown adduced evidence to shew that on December 3, 1913, the accused, at mid-day, robbed the branch of the Bank of Montreal at Plum Coulee in the Province of Manitoba, of upwards of $5,300, while the manager, Mr. Arnold, was alone in the bank. When the accused left the bank Mr. Arnold pursued him, and, in order to facilitate his escape by means of an automobile awaiting on an adjoining street, he [the accused] fired a revolver at and instantly killed his pursuer.

Suffield, for the defence, at the conclusion of the Crown's case, called a number of witnesses for the purpose of shewing that the prisoner was not the robber and to establish an alibi. He then asked that the prisoner be permitted to make an unsworn statement from the dock instead of giving evidence on his own behalf. Argument

Hastings, for the Crown, opposed the application.

MATHERS, C.J.K.B., after taking time to consider, refused the request. He said he had consulted the Chief Justice of the Court of Appeal, and they both agreed that, since the Canada Evidence Act was passed, permitting an accused person to give evidence on his own behalf, the right to make an unsworn statement no longer existed. His Lordship continued:— Mathers, C.J.

Down until 1837, prisoners on trial in cases of felony were not allowed either to give evidence on their own behalf or (except in cases of treason) be defended by counsel, although they were allowed counsel to cross-examine witnesses. While the laws of evidence prevented the accused from giving evidence on his own behalf under oath, it was manifest that a great injustice might often be done unless the story of the accused was allowed to get before the jury in some form. To meet that difficulty, Judges adopted the practice of permitting the prisoner to make an unsworn statement from the dock and to address the jury on his own behalf.

In 1837, the Prisoner's Counsel Act was passed, conferring upon prisoners the right to make their full defence by counsel. Notwithstanding that, accused persons were still deprived of

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the privilege of giving evidence in their own defence, many Judges held that this Act, in effect, took away from prisoners who were defended by counsel the right hitherto accorded them of making a statement on their own account.

Acting upon this belief, Coleridge, J., in 1837, in *Regina* v. *Boucher*, 8 C. & P. 141, refused to allow a prisoner to make a statement after his counsel had addressed the jury, observing: "Prisoner, your counsel has spoken for you. I cannot hear both." The same Judge during the same year, in *Regina* v. *Beard*, 8 C. & P. 142, stopped the prisoner's counsel from telling the jury facts related to him by the prisoner. He there said:—

> I cannot permit a prisoner's counsel to tell the jury anything which he is not in a situation to prove. If the prisoner does not employ counsel he is at liberty to make a statement for himself and tell his own story; which is to have such weight with the jury as, all circumstances considered, it is entitled to; but if he employs counsel he must submit to the rules which have been established with respect to the conducting of cases by counsel.

In the following year, 1838, Alderson, B., allowed a prisoner to make a statement before his counsel addressed the jury in *Regina* v. *Malings*, 8 C. & P. 242. In that case the prisoner's counsel had commenced his address to the jury and had expressed regret that as the prisoner was defended by counsel he could not be allowed to make his own statement. Whereupon Baron Alderson said:—

> I see no objection in this case to his doing so. . . . I think it is right that a person should have an opportunity of stating such facts as he may think material and that his counsel should be allowed to comment on that statement as one of the circumstances of the case. On trials for high treason the prisoner is always allowed to make his own statement after his counsel has addressed the jury.

At the same assize Baron Gurney, in *Regina* v. *Walkling*, 8 C. & P. 243, permitted the same practice to be followed after conferring with Alderson, B., "but," he added, "I think that it ought not to be drawn into a precedent." In that case the prisoner was allowed to read a written statement.

In the same year, in *Reg.* v. *Burrows*, 2 M. & Rob. 124, Bosanquet, J., refused to allow a prisoner who was defended by counsel to make a statement. He was told of the decision

of Alderson, B., in the previous case, and also of a similar permission by Denman, C.J., but expressed the opinion that under the recent statute both the prisoner and his counsel could not make statements.

Later in that year, Patterson, J., refused, in a trial for murder, in the case of *Regina* v. *Rider*, 8 C. & P. 539, to allow the prisoner who was defended by counsel, to make a statement. He there said:—

> The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel and that rule should not be infringed on, except in very special cases indeed. If the prisoner were allowed to make a statement and stated as a fact anything which could not be proved by evidence the jury should dismiss that statement from their minds; but if what the prisoner states is merely a comment on what is already in evidence his counsel can do that much better than he can.

The question came up again before Mr. Baron Alderson in *The Queen* v. *Dyer*, 1 Cox C.C. 113, in 1844. Counsel for the prisoner remarked to the jury upon the hardship of the prisoner's position who could himself give no evidence to contradict the statement of the witnesses against him. The learned Baron interrupted him saying:—

> You have no right to make such an observation. The prisoner might make his own statement in explanation or contradiction of the evidence against him.

And later he added:—

> I would *never* prevent a prisoner from making a statement though he has counsel. He may make any statement he pleases before his counsel addresses the jury, and then his counsel may comment upon that statement as part of the case. If it were otherwise the most monstrous injustice might result to prisoners. If the statement of the prisoner fits in with the evidence it would be very material and we should have no right to shut it out.

In 1846, Mr. Baron Rolfe, in *Regina* v. *Williams*, 1 Cox C.C. 363, on being requested by the prisoner's counsel to allow the accused to make a statement to the jury before his counsel should address them, said: "That is quite a new request. I never heard of such a thing." He, however, upon the *Dyer* case being cited to him, approved of it and said it was a proper practice to follow.

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The point was next dealt with by Byles, J., in 1859, in *Regina* v. *Taylor*, 1 F. & F. 535. He was referred to the *Dyer* and *Malings* cases, the latter of which was erroneously attributed to Patterson, J., instead of to Baron Alderson; but he nevertheless refused to permit a defended prisoner to make a statement.

> I foresee (he said) to what it will lead: to prisoners being examined on their own behalf without the sanction of an oath, and then a speech commenting on their statements; but I will allow the prisoner to exercise the option of either speaking himself or having his counsel speak for him.

The prisoner then addressed the jury.

In 1860, Martin, B., after consulting Channell, B., allowed a prisoner to make a statement before his counsel's speech, on the authority of the *Malings* case (there called Martin), though he said he was entirely opposed to the practice of allowing prisoners to make any statement to the jury when the prisoner was defended by counsel, yet, as there was a precedent, he allowed it because of the importance of the case. He, however, considered it a bad practice.

In *Reg.* v. *Weston*, 14 Cox C.C. 346, tried before Cockburn, C.J., in 1879, counsel for the defence at 350, regretted that he could not give the prisoner's account of the matter whereupon Cockburn, C.J., said

> he might do so, as the prisoner's counsel were in place of the prisoner and entitled to say anything which he might say, for which he would be entitled to consideration and credence if consistent with the rest of the evidence.

In 1881, a resolution was come to by the English Judges as follows:—

> In the opinion of the Judges it is contrary to the administration and practice of the criminal law as hitherto allowed that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions on the authority of the prisoner but which they do not propose to prove in evidence.

In 1882 in *Reg.* v. *Shimmin*, 15 Cox C.C. 122, Cave, J., said, in effect, that:—

> Every prisoner was entitled to have an opportunity of making a statement and offering his explanation of the charges alleged against him, whether he is defended by counsel or not, at the conclusion of his counsel's

speech; subject to this, that what he said from the dock was subject to a reply as being new matter.

That was the rule he intended to follow and was concurred in by the other Judges.

In 1885, Lord Coleridge, C.J., in *Reg.* v. *Millhouse*, 15 Cox C.C. 622, refused to extend the rule to a case where a prisoner proposed to call witnesses. He said:—

By the resolution of the majority of the Judges, in which I did not agree, but by which I am bound, it appears to me that it is undoubtedly competent for the prisoner to make a statement of facts to the jury and the proper time is after his counsel has addressed the jury.

And he added:—

I cannot permit the prisoner to make a statement of fact to the jury, he having elected to call witnesses. To allow such a course would be to give him a most unfair advantage, especially if he were an intelligent man. If it were to be allowed, the result would be that, after counsel had made a defence and called witnesses to facts, that then the prisoner, who was not liable to be cross-examined, could supplement what had been said by his counsel and witnesses and supply facts by means of a statement made without the sanction of an oath which it would be impossible to test by the ordinary means of cross-examination. . . . It would be most mischievous and contrary to all precedent to allow the prisoner to call witnesses and then to volunteer his own statement and perhaps ingeniously supply what was omitted in the speech of his counsel or the evidence of the witnesses—a statement which, in the present state of the law, could not be contradicted, and upon which the prisoner could not be cross-examined.

In 1887, Stephen, J., in *Reg.* v. *Doherty*, 16 Cox C.C. 306, permitted a prisoner, who had not called witnesses to make a statement before his counsel's speech, observing that, although he cannot be questioned upon his statement his making it will give counsel for the prosecution a right of reply.

In 1898, the Imperial Criminal Evidence Act, [1898, ch. 36] was passed making all accused persons competent witnesses on their own behalf. By sec. 1, sub-sec. (*h*) of that Act it is provided that:—

Nothing in this Act . . . shall affect the right of the person charged to make a statement without being sworn.

This sub-section gives the right to make an unsworn statement a statutory consecration.

The first case in which the point arose after this Act was

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R. v. *Pope*, 18 Times L.R. 717. When the prisoner's counsel asked that the prisoner be allowed to make a statement from the dock before his counsel addressed the jury, Mr. Justice Phillimore, before whom the matter was pending, said:—

> Now that the prisoner is entitled to give evidence on his own behalf under the Criminal Evidence Act, 1898, is not his right to make a statement gone?

but on his attention being drawn to sub-sec. (*h*), he allowed it. The same course was followed by Darling, J., in *Rex* v. *Sheriff* (1903), 20 Cox C.C. 334.

The only Canadian case I can find on the subject is *R.* v. *Rogers* (1884), 1 B.C.R. pt. 2, 119, where Crease, J., permitted a prisoner to make a statement from the dock after his counsel had addressed the jury. That was before a prisoner was, in Canada, a competent witness on his own behalf.

The Canada Evidence Act, permitting prisoners to give evidence, was passed in 1893. It contains no equivalent to sub-sec. (*h*) of sec. 1 of the Imperial Act. I know of no reported Canadian case on the matter since this Act was passed, and the only reference I have seen to it by any Canadian Judge is some dicta in *R.* v. *Aho* (1904), 8 Can. Cr. Cas. 453. In that case Hunter, C.J., and Duff, and Irving, JJ., of the British Columbia Supreme Court are reported to have said *arguendo* that a prisoner in an undefended case might either make a statement or give evidence on oath. I should certainly feel myself bound by the considered judgment of these distinguished Judges; but, under the circumstances, what they said was manifestly *obiter dicta* and was not their considered opinion.

I think it extremely probable that had it not been for the saving clause in the Imperial Criminal Evidence Act, 1898, it would have been there held that the privilege of making an unsworn statement was abrogated by that Act.

The privilege was granted to prisoners because they were debarred from giving evidence on oath, and for that reason alone. When the law was changed and the right accorded to them to tell their story on oath as any other witness the reason for making an unsworn statement was removed. In my opinion a prisoner should not now be allowed to make an unsworn statement. I refuse the application.

The prisoner elected not to give evidence and his counsel addressed the jury, and was followed by counsel for the Crown.

The Chief Justice then charged the jury. He spoke in part as follows:—

It is now my duty to instruct you as to the law bearing upon the case to define for your information the crime charged and to point out the essentials to be proved on the one side and on the other, and to sum up the evidence for and against the accused on each essential point. It is your duty to accept as correct and act upon my direction as to what the law is. I shall endeavour not to overstate it; but if I should unwittingly err my error may be corrected in a higher Court. In the meantime you must assume that I am stating it correctly, and I assure you I will not knowingly do otherwise. Upon the facts of the case your judgment is supreme. It is perhaps inevitable that in arranging the events in the order of their happening and in their relation one to another, and in grouping and commenting upon the evidence bearing upon each essential point, my opinion as to the proper conclusion to be arrived at upon any particular fact may become apparent. While I am not obliged by law to conceal my opinion upon questions of fact from you and while I might fail in the full discharge of my duty if I did so, I am obliged by law to let you clearly understand that you are not bound to adopt my opinion upon any question of fact, but are at liberty to arrive at your own independent conclusion quite irrespective of what my opinion may be.

The charge against the accused is that on the third day of December last, at the village of Plum Coulee, in this Province, he murdered H. M. Arnold, at that time the manager of a branch of the Bank of Montreal located in that village. Now, murder, according to the old common law definition is unlawfully killing with malice aforethought, and manslaughter was defined as unlawful killing without malice aforethought. Malice aforethought was explained to mean not necessarily premeditation, but an intention which must necessarily precede the act intended. These definitions were misleading because the expression "malice aforethought" taken in its popular sense would be understood to mean that, in order that homicide might be

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murder, the act of killing must be premeditated, whereas murder might be committed without what is commonly called a premeditated design to kill. This element of doubt and fiction introduced into the common law by the use of the expression "malice aforethought" was removed by the Canadian Criminal Code, which became the law of Canada in 1892, and which codified, explained and simplified, and in some respects, modified the common law of homicide.

Homicide which consists in the killing of one human being by another is divided into two classes, namely, culpable homicide and not culpable homicide. That means killing which is unlawful and killing which is not unlawful, or excusable. Non-culpable homicide is again divided into two classes, justifiable and excusable. Justifiable homicide is when the act of killing is done pursuant to the orders of some higher lawful authority, as when the soldier in time of war shoots to kill the enemy by command of his officer. It is excusable homicide where a man being violently attacked is obliged to kill his assailant in order to save his own life, or where a man in doing a lawful act without negligence and with no intention to injure unfortunately kills another. Instances of such excusable homicide by misadventure occur almost every game shooting season by the accidental discharge of firearms. It is not necessary to dwell further on the incidents of justifiable or excusable or non-culpable homicide because this homicide was certainly not justifiable in the sense I have explained and I think you will agree with me that there is not a tittle of evidence to justify the conclusion that the shooting was either an accident or was done in self-defence.

If it is non-culpable homicide then it must in law be either murder or manslaughter, because all unlawful or culpable homicide amounts to either one or the other. Now, culpable homicide is, according to secs. 259 and 260 of the Code, murder in each of the following cases:—

1. If the offender means to cause the death of the person killed.

2. If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death and is reckless whether death ensues or not.

3. If the offender means to inflict grievous bodily injury for the purpose of facilitating the commission of robbery or the flight of the offender upon the commission or attempted commission of robbery and death ensues from such injury whether the offender means or not death to ensue or knows or not that death is likely to ensue.

Other circumstances might be given in which culpable homicide would in law amount to murder, but as there has been no evidence given that would be at all applicable to such other circumstances, I would not be aiding you by entering upon an explanation of them.

It will be seen that, under the first two instances I have given, an offender is equally guilty of murder where he intends to kill and does kill another, and where, without actually intending to kill he voluntarily inflicts any bodily injury known to be likely to cause death and which does result in death. In the one case he means to kill and in the other he means only to inflict bodily injury which he knows is likely to cause death; but they are both murder if death in fact does result. If the act which caused death, the firing of the revolver, was done with either of these intentions, the person who fired it is guilty of murder. It is difficult to see how a man can fire a loaded revolver at the body of another without at least intending to do him bodily harm likely to result in death, so that if you think the accused fired the revolver at Arnold's body intending to hit him, but taking his chance where he hit him, that would be murder though he did not intend to kill. If, on the other hand, you think he fired it vaguely without any special intent at all and by doing so caused his death that would be manslaughter. The general rule as to intention is that every sane man is presumed to have known and to have intended the natural and necessary consequences of his act. It is manifestly quite impossible to shew what was actually in a man's mind at any particular moment or what motive prompted any particular act or with what particular intent it was done. The law, however, does not impose that burden on the prosecution. If a man is aware that certain consequences will probably follow the act which he contemplates doing and yet deliberately proceeds to do that act he must be taken to have intended those conse-

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quences to follow even though he may have hoped that they would not.

One eminent judicial authority lays it down that if the result charged be the probable consequence of a man's act he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result he will be answerable for it. Another great English Judge lays it down as a universal principle that when a man is charged with doing an act of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing the act. So that you will see the law is that, if a person deliberately does an act which was calculated to cause the death of another, he will be presumed to have intended the death of that other and will be liable to be convicted of murder, unless he proves extenuating circumstances which may reduce the act from murder to manslaughter or to justifiable or excusable homicide. In other words, killing a human being is *prima facie* murder and the prosecution in such a case discharges the burden of proof which lies upon it in the first instance, by simply proving that the prisoner caused the death of the deceased; it is then in strict law for the prisoner to prove, if he can, facts which will reduce his act to one of manslaughter or justifiable or excusable homicide.

If a man presents a loaded revolver at the head or body of another and pulls the trigger, it is an almost irresistible inference that the intention was to kill, but it does not follow that the inference must necessarily be drawn in all cases. Take the case of a man who was insane, or so drunk as to be incapable of forming any intention, or was acting under coercion. In such a case the presumption of intention would be rebutted. It will not be rebutted, however, merely by proof that the accused never in fact intended the result to happen. If, therefore, gentlemen, you conclude that the accused took the life of Arnold by a pistol shot fired at him either with intent to kill him or with intent to do him a bodily injury which he knew was likely to cause death, he is guilty of murder.

In the latter case there must be not only the intent to inflict the bodily injury, but the knowledge that such injury is

likely to cause death and he is reckless whether death ensues or not. I have already pointed out that a person is presumed to know, and to intend, the natural consequences of his act. So that, if a man fired a loaded pistol at the body of another it would be presumed that he intended to inflict a bodily injury and that he knew such injury would likely cause death.

The third instance I have given you where culpable homicide is murder is where grievous bodily injury is inflicted to facilitate the commission of robbery or the flight of the robber thereafter. This is what the Crown alleges was done in this case. The theory of the Crown is that, for the purpose of facilitating the robbery of the bank or to facilitate his escape after the robbery he shot the manager, Mr. Arnold. If you find that the prisoner shot and killed Mr. Arnold for either purpose he is guilty of murder according to the law of Canada. It matters not under these circumstances that he did not mean to cause death or that he did not know that death was likely to ensue from his act. If he meant to inflict grievous bodily harm for either one of the purposes mentioned and death ensued, the crime is complete. In this connection you will please bear in mind what I have said about a person being presumed to intend the natural consequences of his act.

It will be observed that, under this classification of murder, it is an essential part of the Crown's case that a robbery should have been committed or attempted. In order to bring the case within the provision of the Code I have been discussing, the Crown must first establish that fact. When considering this part of the case you must first ask yourselves whether or not you are satisfied that a robbery was committed or attempted. If your answer to that inquiry is in the affirmative, you will then proceed to inquire whether Arnold was shot for the purpose of facilitating that robbery or the escape thereafter, and, if so, was it the accused who shot him.

In this connection I should explain that robbery is theft accompanied with violence or threat of violence used to either extort the property stolen or to prevent or overcome resistance to its being stolen. If, under the circumstances of this case Arnold was threatened with a revolver and his resistance to

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the theft of the bank's money was by that means prevented or overcome, a robbery was committed.

Now, gentlemen, I have told you that culpable homicide may be either murder or manslaughter, and I have pointed out under what circumstances culpable homicide will amount to murder. I now propose to tell you under what circumstances culpable homicide may be manslaughter. Broadly speaking, any unlawful killing not amounting to murder is manslaughter. If one man kills another in a sudden fit of passion caused by a sudden and sufficient provocation, he would be guilty of manslaughter only. So, if the bullet which caused the death of Mr. Arnold was fired without any intention of killing him or of doing him any bodily injury, or if it was fired with such latter intent that the person firing it did not know that such injury would likely result in death, then the offence would amount to manslaughter only, because the intent which is the essential ingredient in murder is absent. Again, if you believe the shot was fired for the purpose of facilitating the commission of robbery or the flight of the robber, but not with the intention of doing grievous bodily harm, or if with such intention, then not for the purpose stated, your verdict should be manslaughter and not murder. As to whether or not there is any evidence which would justify you in finding a verdict of manslaughter if you believe the fatal shot was fired by the prisoner, I shall have something to say presently.

I think now, gentlemen, you understand the principles of law by which you are to be guided in arriving at your verdict in this case; but to avoid the possibility of a misunderstanding, I propose, before proceeding to refer to the evidence, to briefly summarize what I have told you.

If you find that the accused fired the shot which killed Arnold, you will then consider whether it was fired either with an intent to kill, or with an intent to do Arnold a bodily injury which the accused knew was likely to cause his death. If your finding on these points is in the affirmative, your verdict should be murder. If, on the other hand, you find that it was fired without any such intent or if the intent to injure was present, that the knowledge of the probable consequences was ab-

sent, your verdict should be manslaughter only. That covers the first two instances I have given you in which culpable homicide may amount to murder.

Then, there is the third instance, where the shot was fired for the purpose of facilitating robbery or the robber's escape. In that case your verdict should only be murder if you find that the shot was fired with the intent to inflict grievous bodily injury for the purpose of facilitating the commission of the felony named. If you find that either the intent or the purpose was absent, your verdict should again be manslaughter and not murder. In this connection, I want to once more remind you that every sane man is presumed to have known and to have intended the natural consequences of his act.

Before proceeding to discuss the evidence in detail, I desire to make one more general observation. It is a presumption of English law that every accused person is innocent of the crime charged against him until the Crown has produced sufficient evidence to rebut that presumption and shew that he is guilty. We therefore commence the consideration of this case with the accused in the eyes of the law an innocent man. And if the Crown has not produced evidence sufficient to convince you beyond all reasonable doubt that he is guilty of the charge made, he is entitled to ask you by your verdict to declare him not guilty. There is no middle course in our system of criminal jurisprudence. The prisoner is innocent, and you are bound to so declare him, unless the Crown has, by the evidence adduced before you while you sat in that jury box, convinced you beyond all reasonable doubt that he is guilty. You will understand from that, as I have no doubt your own sense of justice and fair play have already told you, that the prisoner is not to be judged according to any preconceived notions you may have formed as to his guilt or innocence. The circumstances of the crime itself and subsequent events of a sensational character have been widely published in the newspapers. It may be that some of you have read these newspaper accounts and your minds may have received an impression from such reading. I need not tell you as intelligent and honourable men that all such pre-conceived impressions must be cast aside. From

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the unremitting attention you have given to the evidence throughout, and the lively interest you have exhibited in all its details, I feel warranted in believing that you are able to, and in fact do, approach the consideration of this case free from every taint of bias.

(His Lordship then reviewed the evidence for and against the prisoner in detail and proceeded):—

And now, gentlemen, in conclusion, let me in a few words summarize the essential points for your consideration, and I think it is best to take the events in the order of their happening.

The first question you will have to answer is: "Was the bank robbed on the occasion in question?" You have heard the evidence upon that point. None of it is contradicted or even seriously controverted. I have explained to you that robbery is simply stealing with violence or threat of violence to any person to extort the property stolen or to prevent or overcome resistance to its being stolen.

The next question you will ask yourselves is: Was grievous bodily injury inflicted upon Arnold, and did death ensue from that injury? In that point the evidence is equally convincing and conclusive. Then you will ask yourselves: With what intent was the shot fired? Was it or was it not with intent to do grievous bodily injury? Grievous bodily injury was inflicted and death did ensue, and I have explained to you the presumption which arises in such a case, that the natural consequences of the act were intended.

The fourth question will be, was the injury inflicted for the purpose of facilitating the robbery or the escape of the robber thereafter. If you believe the evidence of Weib, Thiesen, Jackman and the old couple Bergen, the robber was actually escaping with the plunder and Arnold was in close pursuit when the shot was fired. It is for you to infer what the offender's purpose was. It is difficult to see how he could have had any other purpose than to facilitate his escape, but it is for you to say.

The fifth question is: Was the shot which resulted in Arnold's death fired by the prisoner? The answer to this question

involves the only serious difficulty in this case. If you find that the shot was fired by the accused and you answer the four preceding questions also in the affirmative, then, gentlemen, your verdict must be murder. If, however, you have any reasonable doubt that he was the man, the prisoner is entitled to the benefit of that doubt, and in that case your verdict should be not guilty. The evidence for and against the accused on the question of his identity with the robber has been placed before you, and I will not now repeat it.

If by any chance you should be of opinion that the injury which resulted in Arnold's death, although inflicted intentionally by the accused, was not inflicted for the purpose of facilitating the robbery or the robber's escape you must in that case before you can find him guilty of murder ask yourselves the further question: Did he know that the bodily injury he was about to inflict would likely result in death. If he did your verdict should be murder. If he did not, manslaughter. I have already told you that a man is presumed to know and intend the consequences which result from his deliberate act, so that you would not be justified in concluding that he did not know unless you can discover something in the evidence or the circumstances which reasonably points to that conclusion.

I have explained to you what manslaughter means and what conclusions you must arrive at before you would be justified in finding that this homicide was, under the circumstances of this case, not murder but manslaughter only. Upon an indictment for murder a verdict of manslaughter may always be returned if the evidence proves manslaughter but does not prove murder. The right of a jury to find a verdict of manslaughter instead of murder is not to be exercised arbitrarily, but only if in their opinion that is the proper conclusion to be arrived at from the evidence. To justify a verdict of manslaughter in this case you must conclude that the shot was fired without any intention to either kill or to do bodily injury known to be likely to result in death. I must say that I can see nothing in either the sworn evidence or the circumstances that would reasonably support such a finding. In my view your verdict must be either murder or acquittal. The question, however, is one for you to

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decide. I do not withdraw the question of manslaughter from you. You may take a different view of the evidence from what I do and if you do it is not only your right but your duty to act upon your own opinion. If, therefore, notwithstanding what I have said, you think the evidence proves manslaughter and not murder you are at perfect liberty to so find.

Counsel for the prisoner has told you that if you should find him guilty of murder he must inevitably be sent to the gallows. His manifest purpose was to deter you from so finding because of the consequences which might follow your verdict. I need hardly tell you, gentlemen, that with the consequences which may follow a verdict of guilty neither you nor I have any responsibility. Your duty is to observe the oath which you took when you entered that box to render a true verdict according to the evidence, and in the event of that verdict being guilty my duty is to pronounce the sentence which the law prescribes. That is the beginning and the end of our responsibility.

But Mr. Suffield was hardly accurate in saying that the inevitable result of a verdict of guilty is the gallows. No sentence of execution can be carried out until all the evidence which you have heard and my charge to you has been submitted to the Governor-General-in-council and he has refused to stop the execution. Whether or not in the event of your finding him guilty the extreme penalty will be inflicted upon him or the sentence will be commuted to imprisonment or altogether set aside depends entirely upon the Minister of Justice by whom the Governor-General is advised. What his action would be I have no means of telling and no disposition to guess. I am merely pointing out that your verdict of guilty is not absolutely final as Mr. Suffield—I am sure with no desire to mislead—intimated to you.

Gentlemen, there is no room in the jury box any more than there is on the Judge's bench for weak sentimentality. The duty may be stern, it may be even repugnant to our natural feeling; but it is a duty which must nevertheless be honestly and fearlessly faced. The common jury has long been regarded as the palladium of British liberty, and it will hold

that high place in public confidence just so long as it can be depended upon, in the language of your oath, a true verdict to give according to the evidence. The security of life and property depends largely upon the integrity and fidelity of jurymen. For the law as it stands neither you nor I have any responsibility. It may be that some of you might like to see it changed. It may be that a better system of dealing with those found guilty of capital crimes might, in your opinion, be adopted. But for the time being it is the law of the land and you and I are bound to give it effect. I am not saying this to you because I suspect for a moment that any of you would be guilty of the weakness of refusing to return a true verdict because of the consequences to the accused which might follow. I believe you are one and all duly impressed with a sense of the great responsibility that rests upon you—a responsibility to the public, to yourselves and to your families—and if you think the prisoner guilty of the crime charged against him you will by your verdict say so, regardless of the consequences. The very horror and abomination of the crime is a reason for your taking the most extreme care not to impute to the prisoner anything which is not clearly proved. God forbid that I should, by what I say, produce in your minds even in the smallest degree any feeling against the prisoner. You must see, gentlemen, that the evidence leaves no reasonable doubt upon your minds; but you will fail in the performance of your duty if, being satisfied with the evidence, you do not convict of wilful murder. If, on the other hand, the evidence does not carry to your minds beyond a reasonable doubt a conviction of the prisoner's guilt, it is equally your imperative duty to find him not guilty.

I have told you that you should not convict if you have a reasonable doubt of the prisoner's guilt. By the term reasonable doubt, I do not mean a possible doubt, but an actual and substantial doubt. A juror may not create materials of doubt by resorting to trivial suppositions and remote conjecture as to a possible state of facts different from that established by the evidence. If after a fair and impartial consideration of all the evidence in the case both for the Crown and for the de-

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fence, you have an abiding conviction of the guilt of the defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond reasonable doubt; but if the evidence has left you in that condition of mind that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge then you have a reasonable doubt.

You will now retire and consider your verdict, in which you must be unanimous.

N.B.—A verdict of guilty was returned.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 20, 1914.

1. BILLS AND NOTES (§ I D—31)—SIGNING IN BLANK—DELIVERY FOR CUSTODY ONLY—FRAUDULENT FILLING IN OF BLANKS.

An action cannot be maintained, even by a subsequent holder without notice of the fraud, as against the person who signs a blank printed form of promissory note and delivers it to another as custodian only and without any authority to fill up the blank or to make himself payee or to get an advance or borrow money on the note, where the custodian held the same as promoter of a proposed company which when organized was to become the payee as consideration for the signer's stock subscription and where the promoter fraudulently filled up the note by making himself payee (the company not having been incorporated) and making the note payable in sixty days.

[*Hubbert* v. *Home Bank*, 20 O.L.R. 651; *Ray* v. *Willson*, 45 Can. S.C.R. 401; *Smith* v. *Prosser*, [1907] 2 K.B. 735, applied; *Lloyd's Bank* v. *Cook*, [1907] 1 K.B. 794; *Cox* v. *Canadian Bank of Commerce*, 21 Man. L.R. 1, distinguished; and see Falconbridge on Banking, 2nd ed., 506.]

Statement

APPEAL from the judgment of Dawson, County Judge, in favour of the defendants. The action was brought on an alleged promissory note made by Bourque in favour of J. H. Coward and indorsed by J. H. Coward and C. Coward to him.

The appeal was dismissed, PERDUE, J.A., dissenting.

A. B. Hudson, for the plaintiff.

R. D. Guy, for the respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—The evidence in this case shews that the defendant Bourque, the defendant James H. Coward and others were about to form a joint stock company, of which Coward was the chief promoter. The defendant Bourque, at the request of

Coward, signed a blank printed form of a promissory note, which he handed to Coward. The evidence shews that the note was signed and handed over to pay $200 for stock of the company when the company was incorporated and organized, and it further establishes that the note was to be filled up by putting in the name of the proposed company as payee. If this had been done, then when the company was organized the note would have been the property of the company only, and, if used, Bourque's stock would have been paid for. Coward fraudulently filled up the note by making himself payee and by making the note payable in sixty days. The company has not been incorporated. The plaintiff became the holder of the note without notice of the fraud.

The blank form was to be held until the company was formed, and then to be made a promissory note by putting in the name of the company as payee. Until that event might happen, it was no more a promissory note than the one referred to in *Hubbert* v. *Home Bank*, 20 O.L.R. 651. It was delivered to Coward as custodian only, as stated by Chief Justice Moss in *Ray* v. *Willson*, 24 O.L.R. 122, at 130, Coward was simply to hold this form until the happening of a certain event and was merely a custodian until then, as in *Smith* v. *Prosser*, [1907] 2 K.B. 735.

Coward was not authorized to fill up the blank and make himself payee, nor was he authorized to get an advance or to borrow money on the note, and so this case does not come within the principles of estoppel laid down in *Lloyd's Bank* v. *Cook*, [1907] 1 K.B. 794, and as in *Cox* v. *Canadian Bank of Commerce*, 21 Man. L.R. 1.

The appeal must be dismissed with costs.

RICHARDS, J.A.:—Though there is some slight difference between the facts in this case and those in *Smith* v. *Prosser*, [1907] 2 K.B. 735; *Hubbert* v. *Home Bank*, 20 O.L.R. 651; and *Ray* v. *Willson*, 24 O.L.R. 122, 45 Can. S.C.R. 401, I cannot so distinguish the present facts as to say that the decisions in those cases do not apply. If the matter were free from those authorities, I should unhesitatingly adopt the view of the law stated by

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Meredith, J.A., in his dissenting judgment in *Hubbert* v. *Home Bank*, 20 O.L.R. 651. Also, if it were open to me, I should, with great respect, dissent from the law as laid down broadly by Vaughan Williams, L.J., in *Smith* v. *Prosser*, [1907] 2 K.B. 735. But the decision of the Supreme Court of Canada in *Ray* v. *Willson*, 45 Can. S.C.R. 401, upholds the views of the learned Lord Justice, and we are, therefore, bound to follow them.

The result is that, as between the defendant Bourque, who has been guilty of gross negligence, and the plaintiff, who has been guilty of no negligence, the former escapes the loss and the latter must bear it. The effect of those decisions, and this, may seriously hamper banks in accepting for discount apparently valid and complete negotiable paper, offered them under circumstances which in no way, so far as they can see, call for suspicion, or inquiry, on their part.

With much regret I have come to the conclusion that for the reasons above given this appeal must be dismissed.

Perdue, J.A. (dissenting)

PERDUE, J.A. (dissenting):—This is an action on a promissory note purporting to be made by the defendant Bourque to one James H. Coward and indorsed by the payee and one Charles Coward. The defendant Bourque and certain other parties had decided to form a joint stock company to be known as the Obreto Product Co. James H. Coward appears to have been a promoter of the company. Bourque and others attended a meeting at which it was decided to form the company. The promissory note sued on was given in connection with this company. The following is the account given by the defendant Bourque as to how he came to sign the note:—

In the latter part of March Mr. Coward invited me to go to a certain meeting in the London block. I did not know exactly as to what the meeting was going to be at the time. I went to that meeting. I don't remember the date. When I got there it was the forming of a joint stock company for the manufacturing of a product, called Obreto Product Co. They were going to form a company for the manufacture of that product here. We had a meeting that night and I was supposed to be president. Mr. Love was supposed to be the treasurer and Mr. Andrews was the secretary and Mr. Coward was to be the manager, I think, together with Mr. Hunter. We were asked to take stock in the company so we agreed that we would have another meeting and the company would go ahead and be

formed and we would take $200 worth of stock and receive $1,000 worth of stock.

Q. Face value $1,000 for $200? A. Yes. We agreed that the company was going ahead and the charter was to be out and we would give $200. We never had a meeting afterwards. I was sick one day and Mr. Coward came in and he asked me for a note for that $200 and the note was made payable to Mr. Andrews, the secretary, and the next day he came in again and he told me that the note should be payable to the company, the Obreto Product Co. I understood it was to be made payable to the Obreto Product Co. I never heard any more of it until the notice of protest of the note. That is the first I heard of it. I went right down and told Mr. Morkill all about it. That is all that took place.

The document given to Coward by Bourque on that occasion was a printed form of promissory note signed by Bourque in blank. It was, no doubt, intended to be filled up so as to replace the note already made payable to Andrews, but the payee of the new note was to be the Obreto Product Co. Coward, however, filled up the note with his own name as payee, indorsed it, procured his brother to indorse it also and then negotiated it for value to the plaintiff, who became holder in due course.

An important part of Bourque's evidence is as follows:—

Q. Do I understand you correctly when you say that this note for $200 was given for and was to be used for the purpose of stock when the company was formed? A. When the company would be formed. When the company went along and was formed and they got a charter, it was to be used for stock.

Q. Was the company ever formed? A. It was not.

Q. Did you have any intention of paying the note if the company was not formed? A. No, indeed, I had not.

The first question in the above extract was put in objectionable form. The witness had not previously said the note was given for stock and the question suggested the answer. But the evidence as it is shews that the document was signed as a promissory note in blank to be filled up and used as a promissory note for a certain purpose, that it was filled up by the person to whom it was delivered (but with a different payee from the one intended by the maker), and that it was used for a purpose for which it was not intended to be used.

The plaintiff's case turns upon the application of secs. 31 and 32 of the Bills of Exchange Act. The defence relies upon *Smith* v. *Prosser*, [1907] 2 K.B. 735; *Hubbert* v. *Home Bank*,

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20 O.L.R. 651; and *Ray* v. *Willson*, 24 O.L.R. 122, affirmed 45 Can. S.C.R. 401.

It appears to me that the principles laid down in *Smith* v. *Prosser*, [1907] 2 K.B. 735, do not apply to the present case. In that case blank unstamped forms of promissory notes had been signed and handed to one of his two agents in South Africa by the maker on leaving for England. Express instructions were given to the agent that these were only to be filled up and used when the maker telegraphed or wrote instructions for their issue as promissory notes and stating the amounts for which they should be filled up. Vaughan Williams, L.J., said at 744, in giving judgment:—

> If that note, being in that condition (*i.e.*, incomplete), had been handed to Telfer (and I leave out of consideration for this purpose the fact that Telfer and Wilson were joint attorneys) for the purpose of his making use of it, and for the purpose of its being issued as a negotiable instrument, I am of opinion that *primâ facie* the defendant would have been responsible to a *bonâ fide* holder for value who had purchased the note from Telfer as the plaintiff did. In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such.

Fletcher Moulton, L.J., in the same case, at 752, said:—

> If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument. . . . The essential fact which is necessary to enable the plaintiff to establish his case is, therefore, absent. The defendant never issued the documents with the intention that they should become negotiable instruments.

In the present case there is no doubt in my mind that Bourque intended the blank form of note he signed and handed to Coward to be filled up as a promissory note for $200 payable to the Obreto Product Co., and that it was to be used as an ordinary promissory note, although the payee was a non-existing company the note might be treated as payable to bearer: Bills of Exchange Act, sec. 21, sub-sec. 5.

When he gave it to Coward there was no condition attached restricting the completion of the note or the delivery of it to the provisional secretary or treasurer or other proper person to

be held for or used on behalf of the company intended to be incorporated. A complete note for the same amount had been signed by Bourque, payable to Andrews, the secretary of the intended company and delivered to Coward. Andrews might at once have negotiated this to raise funds for the intended company. The present note was to replace the other. Bourque, it is true, says that the present note was to pay for stock in the company, but, the fact that it was used for a purpose not intended by the maker does not make it any the less a promissory note. It appears to me that the conditions prescribed by the learned Lord Justices in *Smith* v. *Prosser*, [1907] 2 K.B. 735, in order to give a *bonâ fide* holder for value the protection of the statute, have been fulfilled in this case.

In *Ray* v. *Willson*, 45 Can. S.C.R. 401, at 411, Davies, J., after referring to the extracts I have cited, goes on to say:—

> The true construction, therefore, of secs. 31 and 32 of the Bills of Exchange Act so far as the protection of third parties holders in due course is concerned, limits that protection to cases where the signer intended the instrument signed by him to become a bill or note, and authorized its issue for that purpose. Where that intention is proved it matters not whether his instructions to the person he delivered it to were exceeded or not. He is liable upon it.

The facts in the present case bring it completely within the rule above laid down as entitling the holder in due course to the protection afforded by the statute.

The same learned Judge goes on to say:—

> If on the contrary that intention is disproved and it is shewn the instrument signed was not intended to be issued or became a bill or note, but was left for safe custody in some agent's hands to await further instructions as to its issue, he is not liable if the bill or note is fraudulently issued by the agent or holder without such further instructions.

I would also refer to the judgments of Duff, J., and Anglin, J., and to their application of the principle enunciated in *Smith* v. *Prosser*, [1907] 2 K.B. 735.

In no part of his evidence does Bourque say that the note was to be held and not issued or was not to become a note until further instructions should be given. It was clearly intended to be issued as a note to the company then in process of being formed. There were no instructions given to Coward that the note was to

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be held and not used as a note until the company was formed or until the stock was issued.

The cases of *Ray* v. *Willson*, and *Hubbert* v. *Home Bank*, both turn upon findings of fact that the note sued upon in each case was not in fact issued or authorized to be made into and issued as a promissory note. In each case a signed blank form of note was left in the hands of another party with instructions that it was not to be used until some condition was performed or until further authority was given. In my view the point upon which these cases turned, the non-fulfilment of a condition precedent to the issue or use of the documents as notes, is absent in the present case.

Bills of exchange and promissory notes are absolutely essential in carrying on modern commercial business. Every person owes a duty to the mercantile community to use reasonable precautions to protect its members from being defrauded by the negotiation of bills or notes which had been signed in blank and left with an agent subject to secret instructions as to their use. When a party signs a blank form of promissory note and allows it to get into the hands of another person who transfers it to a *bonâ fide* holder for value, such party should justly be liable on the note, he by his negligence having enabled the other person to commit the fraud. It does not seem right that it should be open to the signer to say that the paper was issued as a note in breach of his instructions and that this should relieve him of liability. An unprincipled person may readily avail himself of such a condition of the law and fabricate a defence in accordance with it.

I think the application of the principles stated in *Smith* v. *Prosser* should not be extended, and that it would be in the interests of the whole commercial public that the provisions of the Act should be amended, if necessary, to cover cases like those dealt with in *Ray* v. *Willson*, and *Hubbert* v. *Home Bank*.

I think the appeal should be allowed and judgment entered for the plaintiff.

Cameron, J.A.

CAMERON, J.A.:—This is an action brought in the County Court of Winnipeg on a promissory note for $200 alleged to have been made by the defendant Bourque, payable to the order

of James H. Coward and by him endorsed to Charles Coward, who endorsed the same to the plaintiff, a purchaser for value without notice, who took the note in a complete state before its maturity.

The defendant stated that James H. Coward invited him to a meeting for the formation of a joint stock company for the manufacture of a certain product. The parties present at the meeting agreed to form the company and that each of them would pay $200 and receive $1,000 worth of stock in the company to be formed. A further meeting was to be held, but was not called. Afterwards Coward came to the defendant and asked him for a note for $200. This note was given and made payable to Mr. Andrews, the secretary of the company. The next day Coward came in again and said the note should be made payable to the company. The note in question was then signed by the defendant. When it was presented for signature it had on it no writing whatever except the printed words. The defendant says expressly that the note was given for the purpose of obtaining stock in the company when the company was formed, and it was never formed. Coward was not called and the defendant's version of the facts is uncontradicted.

The trial Judge entered a nonsuit as to this defendant and from this judgment the plaintiff appeals.

The provisions of secs. 31 and 32 of the Bills of Exchange Act apply only when the incomplete document has been delivered by the signer in order that it may be converted into a bill. Delivery is the transfer of possession from one person to another (sec. 2), and by sec. 39, every contract on a bill is incomplete and irrevocable until delivery of the instrument, in order to give effect thereto.

"Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder. Sec. 40 of the Act does not apply where the instrument is, when it leaves the hands of the signer, deficient in material particulars.

Baxendale v. *Bennett*, 3 Q.B.D. 525, was decided by Brett, L.J., on the ground that the acceptor, who there wrote his name across a document in the form of a bill of exchange, which was subsequently stolen and negotiated, never issued the bill and never authorized it to be filled up with the drawer's name.

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It seems to me that the defendant never authorized the bill to be filled in with the drawer's name and he cannot be sued on it. Whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used.

This last sentence is quoted with approval by Vaughan Williams, L.J., in *Smith* v. *Prosser*, [1907] 2 K.B. 735 at 748.

In *Smith* v. *Prosser*, [1907] 2 K.B. 735, amongst other cases, *Scholfield* v. *Londesborough*, [1896] A.C. 514; *Lloyd's Bank* v. *Cooke*, [1907] 1 K.B. 794; *Baxendale* v. *Bennett*, 3 Q.B.D. 525; *Young* v. *Grote*, 4 Bing. 253; and *London & Southwestern Bank* v. *Wentworth* 5 Ex. D. 96, were discussed and examined.

The facts in *Smith* v. *Prosser* were that the defendant, in South Africa, had left with his agents two blank unstamped promissory notes, on lithographed forms, signed by him and to be retained by them and to be used as such and for the amounts on instructions by him by letter or telegram from England. One of the agents fraudulently filled in the blanks and disposed of the notes to the plaintiff for value and without notice. It was held that as the defendant handed the notes to his agents as custodians only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and the plaintiff and that the action was not maintainable.

Under these circumstances the authorities seem to shew that, in the absence of a delivery of notes to an agent with the intention that they shall be negotiated, or at any rate that the agent shall have power to negotiate them, the signer is not responsible even to a *bonâ fide* holder for value: *per* Vaughan Williams, L.J., 745.

And all that the defendant did was to deliver

these notes to his attorney (agent), not as notes to be issued . . . but as custodian only, and intending that the notes should not be issued until he sent instructions to that effect: *Ib.*

What did the defendant do here? Did he not deliver the incomplete instrument to Coward, not as a note to be issued and negotiated, and which Coward from the first was to have authority to fill up and issue, but as custodian only, intending that it should not be issued until the stock certificate for which it was to be given was issued by the company? It seems to me that, on the evidence, the answer must be in the affirmative. The company

was never formed, the stock was never issued, and the sole and only occasion on which Coward had authority to issue the note never arose.

In *Hubbert* v. *Home Bank*, 20 O.L.R. 651, a document signed by the plaintiff in the form of a note, but wanting in material particulars was left by him with an insurance agent to be used in payment of the first premium on a life policy for which application had been made by the plaintiff, through the agent. The application was dropped. The agent filled up the note and negotiated it. It was held by Mr. Justice Britton, who tried the case, that the note was not given to the agent, that it might "be converted into a note" or that it might be used or negotiated as a note.

The plaintiff signed the paper intending it not as a note, but as a promise to pay premium for life insurance in case he submitted himself for, and passed, the necessary medical examination: p. 656.

Further he says:—

It seems to me clear that what the plaintiff did was not to give to Stirton a promissory note or a paper that could be converted into a promissory note, or that Stirton would have any right or authority to deal with in any way until he should get that authority after the plaintiff's application for insurance had been accepted. In a sense, Stirton was the plaintiff's agent, as well as agent for the insurance company. Acting for the plaintiff, an application, the plaintiff's application, was taken, and so acting, the plaintiff made him the custodian of the paper with the plaintiff's signature, not as a note or to be negotiated as a note, but as evidencing an amount that the plaintiff would pay should an examination be passed, which, of course, was necessary before his application would be accepted.

Following *Smith* v. *Prosser*, *supra* (which he considered as upsetting the opinions of Canadian bankers as to the meaning of the sections of the Act referred to) Mr. Justice Britton decided in favour of the plaintiff. His judgment was upheld by the Divisional Court, p. 659, and leave to appeal to the Court of Appeal was refused, p. 660. It seems to me that this case is closely in point.

In *Ray* v. *Willson*, 24 O.L.R. 122 (affirmed, 45 Can. S.C.R. 401), it was held that the defendant did not part with the document there in question with the intention that it should be converted into a promissory note by Thompson, the defendant's

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agent; it was delivered to him as custodian only, until the defendant should direct that it should be used as a promissory note to raise funds for the purposes contemplated by him. The judgment of Mr. Justice Clute at the trial was affirmed by the Court of Appeal. Chief Justice Moss says, at 130:—

> It is evident that the defendant did not part with the paper with the intention that it should then be converted into a promissory note by Thompson. It was delivered to him as custodian only, because of the defendant's confidence in him as an honest man, and they both understood that it was so delivered and was so to remain unless and until the defendant should change his intention and direct that it should, as said by Fletcher Moulton, L.J., in *Smith* v. *Prosser*, [1907] 2 K.B. at 752, "be used as the basis of a promissory note."

I refer also to the case of *McKenty* v. *Van Horenback*, 21 Man. L.R. 360; and to Falconbridge on Banking and Bills of Exchange, 2nd ed., at 506, *et seq.*, where the cases are collected and discussed.

In my opinion this case is governed by the decisions in *Smith* v. *Prosser*, *Hubbert* v. *Home Bank* and *Ray* v. *Willson*, referred to. Paraphrasing the words of Vaughan Williams, L.J., in *Smith* v. *Prosser*, at 748, the intention of the defendant at the time he signed was to hand the document over for the purpose of deposit, not that it might be used or negotiated; it was merely deposited or left with Coward with the understanding between them that it was to be made payable and given directly to the proposed company in payment of the defendant's allotment of stock therein if and when the company should be formed, and this stock issued, and for no other purpose, and, as I have stated, that occasion never happened.

I must add that were it not for these decisions, there is much to be said in favour of the view taken by Mr. Justice Meredith in his dissenting judgment in *Ray* v. *Willson*, and approved by the Chief Justice of the Supreme Court in the same case. There is no question that the plaintiff in *Smith* v. *Prosser* had notice of the incomplete state of the notes and that the agent was acting under a power of attorney. But the judgment of Vaughan Williams, L.J., was put expressly on the other ground, as stated, and we are bound by the authorities.

The judgment appealed from must be affirmed and the appeal dismissed with costs.

HAGGART, J.A.:—I agree with the reasons given by the Chief Justice and would dismiss the appeal.

The weight of judicial opinion is against the contention of the appellant. In most of the cases cited by the plaintiff the delinquent who filled up the blanks or altered the instrument had a certain authority to deal with the note or draft or cheque, and his wrongdoing was acting in excess of his powers. The common law doctrine of estoppel was also invoked under which the drawer or maker of the note or bill was prevented from giving evidence in support of his defence. In the case before us Coward never had any authority; he was simply the custodian of the paper, and he was to retain it until certain events happened, namely, the formation of the company and the issue of $1,000 stock; neither of which events ever took place.

The defendant had a right to assume that the promoter of the company was an honest man. I would dismiss the appeal.

Appeal dismissed.

REX v. BEAUDOIN.

Quebec Court of King's Bench (Crown Side), Carroll, J. June 27, 1913.

1. CRIMINAL LAW (§ II C—51)—SUFFICIENCY OF WARRANT OF COMMITMENT.

A warrant of commitment issued under sec. 690 of the Cr. Code 1906, remanding the accused to prison to stand his trial before the King's Bench, is not invalid merely on the ground that the elements of the offence are not recited in the warrant, if an indictable offence be disclosed in the depositions.

[*R.* v. *Phillips*, 11 Can. Cr. Cas. 89; and *R.* v. *Brown*, [1895] 1 Q.B. 119, followed.]

2. HABEAS CORPUS (§ I C—12*a*)—ARREST—COMMITMENT—GROUNDS.

A prisoner in custody under two warrants of commitment for trial for different offences cannot set up the irregularity of a remand under sec. 679 Cr. Code, because of an adjournment exceeding 8 days, during the preliminary inquiry on one of the charges, as a ground for a motion for his release on *habeas corpus*.

3. HABEAS CORPUS (§ I B—7)—WHO MAY DEMAND—WHEN PROPER REMEDY.

An objection that the prisoner is held on two warrants for conflicting offences (bigamy and refusal to maintain) cannot be raised on *habeas corpus;* if available at all, it is by a demurrer or analogous proceeding at the trial.

Statement

HABEAS corpus application as to two commitments for trial for alleged criminal offences.

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The discharge was refused.

A. Taschereau, for the prisoner.

A. Lachance, K.C., for the Crown.

CARROLL, J. (translation):— This is a *habeas corpus* application. Joseph Beaudoin, *alias* Jos. Morrison is held in the Quebec common gaol on two warrants, the one dated October 1, 1912, for refusal to maintain and the second dated February 27, 1913, for bigamy. Prisoner's counsel contends that the charge of refusal to maintain does not comprise the elements of a criminal offence, and, consequently, the magistrate had no jurisdiction to cause the warrant to be issued for the prisoner's arrest. The offence is described in the information as follows:—

> When he returned he told me to get his laundry ready that he would go to work elsewhere, that he would write and send the money to get it. Since then I have heard nothing of him. I have received nothing from him. At the end of last August I heard in Montreal that he was at Saint Henri. I had nothing to live on, I was entitled to rely on the support of my husband. I applied for a warrant for his arrest so that he might be made to provide for me.

There is no doubt that this information does not contain the elements of the offence, for the husband is only guilty according to the text of the statute when he refuses to provide for his wife without lawful excuse and that her health in consequence is likely to suffer. The warrant of arrest is legally drawn up, it contains all the elements of the offence and the *primâ facie* evidence was sufficient to cause the prisoner to be sent up for trial at the assizes.

Does the fact that the charge does not contain the elements of the offence withhold from the magistrate jurisdiction to go on with the preliminary investigation and commit for trial before the King's Bench?

I have carefully read all the authorities cited by counsel for the accused but they do not apply here. There are certain cases in which the offence is neither described in the information or in the warrant of arrest and it was held the magistrate had no jurisdiction.

The question came before the Queen's Bench in England in

1895 and at the hearing, Lord Russell, of Killowen, C.J., made a distinction not apparently noticed by the majority of the Judges in giving their judgments.

Lord Russell, in *Reg.* v. *Brown*, [1895] L.R. 1 Q.B. 119, at 126, says:—

> The contention on behalf of the defendant seems to be based upon some confusion between those proceedings before magistrates which are essentially summary proceedings upon which the magistrates will themselves adjudicate and cases where the magistrates are merely exercising their jurisdiction with a view to sending the case for trial before a different tribunal. . . . The difference between the two cases is obvious; in the one, the magistrates straightway exercise their jurisdiction over the offence; in the other the accused is sent for trial before a different tribunal and has full and ample notice before his trial of the character of the offence with which he is charged. When a case is sent for trial the real question to be considered is whether the evidence on the hearing of the summons covers and justifies the counts of the indictment.

This decision was followed by Boyd, C., in *R.* v. *Phillips*, 11 Can. Cr. Cas. 89. In his judgment at p. 94, he remarked that the decision of the Court of Appeal in *Reg.* v. *France*, 1 Can. Cr. Cas. 321, cited by counsel for the accused, did not make the distinction that I am pointing out.

Crankshaw's Practical Guide to Magistrates, 2nd ed., p. 148, says:—

> The possibility of taking technical objections either to the information or complaint or to the case, as made out in the evidence adduced at the preliminary investigation of an indictable offence, is thus done away with. The information or complaint, in the case of an indictable offence, is taken merely for the purpose of enabling the justice to judge whether or not he should interfere, and to guide his discretion as to the propriety of issuing a summons or a warrant; so that after the summons or warrant issues, the information or complaint ceases to be of any importance, and it necessarily follows that, if the evidence taken before the justice reveals an indictable offence as having been committed by the party summoned or apprehended though it may not be the same as the one charged in the information or complaint, he is bound to adjudicate upon the evidence and to discharge, bind over, or commit the accused, as directed by sections 579, 586, 587, 594, and 596 of the Criminal Code.

It follows from this that the argument for the prisoner on this point fails.

There still remains the other point. It is said that subsequently Beaudoin was accused and committed to the criminal

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assizes by the magistrate on a charge of bigamy after an irregular remand on his preliminary examination for a period of 21 days. This objection would hold were Beaudoin not already in custody under a valid warrant. It is argued that this second charge conflicts with the first. If, indeed, this argument is well based, his remedy is not by *habeas corpus* but by "inscription *en droit*" or demurrer.

In *habeas corpus* proceedings, the Judge considers the warrants, and if they are regular, he cannot interfere, at least where there is some evidence that the offence was committed. In the present case the sufficiency of the evidence is in question and I am not ready to say that *primâ facie* there was not sufficient evidence to have justified the magistrate.

For these reasons, I consider that the *habeas corpus* should be quashed.

Motion dismissed.

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CALUMET METALS, Ltd. v. ELDREDGE.

Court of King's Bench, Quebec (Appeal side), Sir Horace Archambeault, C.J., Trenholme, Cross, and Gervais, JJ. April 29, 1914.

1. CORPORATIONS AND COMPANIES (§ VI F—346)—WINDING-UP—TRANSFERRING ITS MAIN ASSETS—TAKING SHARES IN PAYMENT.

Where a company which is largely indebted and whose stock has been issued as fully paid has ceased active operations for lack of funds and is proceeding against the will of dissentient shareholders and creditors to make over its assets in exchange for the shares of another company, the court may, at the instance of a creditor, properly make a winding-up order under the Winding-up Act, R.S.C. 1906, ch. 144, because of the company being about to dispose of its property with intent to defraud or delay creditors (sec. 3 (*c*)) or because of its making a sale of such assets without the consent of its creditors and without satisfying their claims while it was unable to meet its liabilities in full.

2. CORPORATIONS AND COMPANIES (§ VII D—380)—WINDING-UP—COMPANY OF FOREIGN DOMICILE—DEBTS INCURRED IN CANADA.

Proceedings under the Winding-up Act, R.S.C. 1906, ch. 144, for the winding-up of an insolvent company are applicable to a foreign company as an effective recourse upon property in Canada or to enforce satisfaction of obligations created in Canada, and it is not necessary that similar insolvency proceedings should have been instituted in the foreign jurisdiction where the company's head office is situated.

Statement

APPEAL from a winding-up order made by the Superior Court in respect of the affairs of the appellant company under the Winding-up Act, R.S.C. 1906, ch. 144.

The appeal was dismissed.

The opinion of the Court was delivered by

CROSS, J.:—In the circumstances disclosed, the position of the appellant may be summed up as follows:—

The company was earning nothing and had come to a stop for want of money. It had a mine, a mill, certain equipment and 500 or 600 tons of "concentrates," all on Calumet Island. It owed about $146,000 including $15,000 and interest on a demand note, some trade debts and a large sum to its president, who could have put it into insolvency at any time, if she chose to do so. All its share capital had been issued as paid-up and there was, consequently, nothing to be had by calls on shareholders.

It was proceeding to make over its mine, its mill and its equipment—all that could be of use to earn anything—to some person unknown to the dissentient shareholders, not for money but in exchange for shares in a company, all of the shares of which were to be issued as paid-up.

In these circumstances, the Superior Court was right in holding that the appellant had been brought within sub-section (c) as being about to assign some of its property with intent to defraud and delay one of its creditors.

It is, in my opinion, equally clear that the appellant comes within the second branch of sub-section (*g*).

However commonplace the observation may be, it may be opportune to say that the capital of a joint-stock company is intended to be and should be provided by the subscribers to its stock. The operation of the appellant's promoter in making all of its shares appear on paper to be paid-up shares is, perhaps, a common mode of evading the requirement that shares should be taken and paid for to the company in money, and made it easier than it otherwise would be for it to vanish like a morning mist when it was found that no more money could be borrowed.

There are risks in doing that sort of thing. One of the risks is that a creditor may have a winding-up order made.

Without, however, attaching undue weight to that considera-

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tion, I conclude, for the other reasons above stated, that a winding-up order was appropriate in the circumstances of the appellant company.

Counsel for the appellant have called attention to the fact that the appellant company is a United States corporation, and I infer from their printed argument that their object in doing so was to meet a possible argument that, even if the proof of actual or "deemed" insolvency were inadequate, the Court should apply section 11 and hold, under sub-section (*c*) that it is just and equitable that the appellant company should be wound up. As the conclusion above indicated is arrived at, irrespective of sub-section (*c*) of section 11, it is unnecessary to consider the purport of that sub-section.

It was also suggested—rather than definitely argued—that the winding-up order should be set aside because action upon it would not bind the company appellant in the forum of its domicile and that a winding-up order in a jurisdiction other than that of the forum of the company should not be made unless a winding-up had already been ordered in the jurisdiction of the company's head office. I regard such a suggestion or argument as erroneous. The matter was considered in *Scott* v. *Hyde*, 18 Que. K.B. 138. The substance of the proceedings is to give effective recourse upon property in the country where the winding-up order is made or to enforce satisfaction of obligations created there.

The decision in *Merchants Bank of Halifax* v. *Gillespie*, 10 Can. S.C.R. 312, was referred to in the same connection, by counsel for the appellant, but I do not think that that case helps the appellant, because I take that decision to have proceeded upon the ground that the company there in question having been incorporated in Great Britain, there was an Imperial Act, the provisions of which were effective for the winding-up of the company, even in respect of its operations in Nova Scotia. The general extra-territorial operation of bankruptcy law does not obtain between Great Britain and the British Dominions, 46 *Law Journal* (Eng.) (1911), 117.

A few words may be added respecting the objection that the

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respondent is misusing the Act to coerce payment of a disputed claim. It is admitted that something is due to the appellant.

The part of his account which is specifically objected to is the claim for advances and outlay. It is said that the respondent was a mandatory and that he did not account. No doubt the money claim of a mandatory against his mandator for outlay becomes exigible only upon his having accounted. The respondent entered up the items of outlay in the cash book. He testified that his account is shewn in the ledger and that the ledger has been delivered to Mrs. Reader. At the trial the learned Judge asked if that book was to be submitted and the answer of counsel for appellant was: "We can produce it if necessary, my Lord." The matter does not appear to have been pressed farther.

There is no doubt that money was due to the respondent for salary. The claim for outlay was for a much smaller sum. This objection might have been serious if the appellant had not been shewn to have been a migratory and elusive body and to have been in the act of materially changing its position by disposing of its property. The respondent's interest as creditor and shareholder has been proved.

I would dismiss the appeal.

Appeal dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. ASSIGNMENT (§ III—32)—CONTRACT FOR SALE OF LAND—RECITAL IN VENDOR'S SUBSEQUENT DEED.

The recital of an agreement to purchase by instalments, contained in a conveyance of land, and to which agreement the conveyance was subject, does not, without notice in writing to the purchaser, constitute an assignment in writing, in conformity with sec. 2 of the Laws Declaratory Act, ch. 133, R.S.B.C. 1911, so as to enable the assignee to bring an action in his own name for the recovery from the purchaser of overdue instalments payable under the agreement to the original vendor.

Statement

APPEAL from the judgment of McInnes, County Judge, in favour of the plaintiff, the alleged assignee of an agreement for sale on instalments.

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The appeal was allowed, McPHILLIPS, J.A., dissenting.

H. R. Bray, for the defendant, appellant.

Sir C. H. Tupper, K.C., for the plaintiff, respondent.

MACDONALD, C.J.A.:—The facts of this case, briefly stated, are, that one Ruby Blackwell, being the owner, subject to a mortgage of lot 16, more particularly described in the pleadings, entered into a written agreement, dated November 23, 1912, to sell it to the defendant Mary E. Saunders. Some cash was paid down, Mrs. Saunders assumed the mortgage and agreed to pay it off, and the balance of the purchase money was made payable in four equal instalments of $525 each, the first payable in June, 1913. In February, 1913, Mrs. Blackwell conveyed the lot to the plaintiff, subject to the mortgage and to the Saunders agreement. There was no written assignment to the plaintiff of that agreement, or of the moneys payable by the defendant under it, but I think there is sufficient evidence of a parol assignment of it. In a document bearing even date with the above-mentioned conveyance, it is recited that the Saunders' agreement had been assigned to the plaintiff. I do not think that the recital can be regarded as an assignment in writing conforming to sub-sec. 25 of sec. 2 of the Laws Declaratory Act, being ch. 133, R.S.B.C. 1911, which is practically, if not identically, the same as sub-sec. 6 of sec. 25 of the English Judicature Act, 1873. There was admittedly no notice in writing to the defendant of any assignment to the plaintiff, the plaintiff is therefore not entitled to the benefit of said sub-sec. 25.

Default having been made by defendant in the payment of said first instalment, the plaintiff brought this action in his own name, and without joining the assignor, either as plaintiff or defendant, and obtained judgment in his favour, and from that judgment defendant appeals.

While it is clear that there was no assignment under the Act, I think it is equally clear that there was a good equitable assignment. The case is therefore narrowed down to the question, was the right assigned an *equitable chose in action* or was

it on the contrary a "debt or other legal chose in action." Either could be assigned in equity, or, to put it another way, there could be a good equitable assignment of a debt or legal chose in action as well as of an equitable chose in action. The said sub-section does not affect the matter except to this extent, that when the chose in action is a legal one, and is assigned in writing, and notice is given in the manner provided by the sub-section, the assignee obtains a remedy for its recovery by action in his own name, and is not obliged as formerly to sue in the name of his assignor. It is only when the right assigned is an equitable one, that is to say, one which, before the Judicature Act, could have been enforced only in the Court of Chancery, that the assignee can sue in his own name. The law in this regard has not been changed by the said Act. Legal choses in action could and have been recovered by suit in the name of the assignor. It is here that that law has been changed. The Act gives the assignee of a legal chose in action who complies with its provisions the right to sue in his own name, but when a legal chose in action is assigned otherwise than in conformity to the Act, he must still sue in the name of his assignor. It is necessary, therefore, to ascertain what the nature of the right in question in this appeal was. Was it an equitable right that was assigned or was it a legal one?

It was strongly urged by respondent's counsel that, because at the date of the assignment in question, the moneys were not due, but were merely accruing due, the right to recover them at maturity was an equitable right only. That contention is disposed of by the judgments in *Walker* v. *Bradford Bank*, 12 Q.B.D. 511 at 516; *Buck* v. *Robson*, 3 Q.B.D. 686; and *Brice* v. *Bannister*, 3 Q.B.D. 569, 575. The authority of the latter case has been questioned, but only because it was there held that an assignment of part of a debt or fund was within the section: *Durham Bros.* v. *Robertson*, [1898] 1 Q.B.D. 765; *Jones* v. *Humphreys*, [1902] 1 K.B. 10. It was not, however, doubted that, had the whole debt been assigned, the assignment would have been one of a debt or legal chose in action within the meaning of the sub-section.

Again, it was held by Lord Alverstone, C.J., Darling, and

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Channell, JJ., in *Torkington* v. *Magee*, [1902] 2 K.B. 427, that the assignment of a contract of sale of a reversionary interest in property was an assignment of a debt or legal chose in action. Channell, J., in delivering the judgment of the Court said, p. 431:—

> Now, the question we have to consider in the present case is whether an executory contract of purchase under which each party has rights and responsibilities, but of which there had been no breach at the date of the assignment, so that at that date no action could be brought upon the contract, but which, if occasion should ever arise to enforce it, must of necessity be enforced by action, is assignable by this sub-section as a legal chose in action.

He then proceeds to say that it unquestionably was a legal chose in action, and that it was also such within the meaning of the sub-section, and that a Court of equity would have enforced it in an action brought by the assignee in the name of the assignor. The case at bar is the converse of that case in this respect that there the purchaser assigned his contract, while here the vendor assigned hers. I see no distinction in principle between the two cases. I have examined a number of other authorities bearing on this question, and nowhere have I found anything to support the submission that rights of the kind here in question when assigned otherwise than in accordance with the sub-section can be recovered by the assignee in the absence of the assignor as nominal plaintiff or as a defendant.

One other question remains to be noticed although it was not strongly pressed. Sir Charles Tupper argued that there had been such a recognition of the assignment by the defendant, as to amount to an implied promise on her part to pay directly to the plaintiff. The facts bearing upon this point are that defendant, in February, about the time of the assignment, wrote a letter to plaintiff's agent, Honeyman, presumably at plaintiff's request, informing him that she accepted the house on said lot as being complete. I infer that it was part of Mrs. Blackwell's agreement with defendant to build a house on the lot and plaintiff wanted to be sure that the house had been completed. Manifestly, that letter, standing alone, is not evidence from which a promise to pay the moneys due under her agreement directly to the plaintiff can be implied. Honeyman was

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a witness on behalf of the plaintiff. He testified that defendant's husband had made promises to him to pay the instalment now sued for, and had told him that he was acting on behalf of his wife, the defendant.

Now, while it is true that a novation may be inferred from the acts and conduct of the parties, it must not be forgotten that the facts relied upon to shew a novation must be such as to establish a new contract, and are governed by the ordinary rules respecting contracts. There must be, for instance, consideration, and there is no suggestion of any consideration having passed between the parties here. The promises by the husband were made, as I understand the evidence, after the instalment sued on was due, and in arrear. Moreover, there is no suggestion that the assignor was released by the assignee. Apart from the objection that the husband's agency was not proven by Honeyman's evidence of his admission of it, and assuming that the defendant herself had promised the plaintiff that she would pay this instalment, that was a promise founded on no consideration. Besides, I am unable to find any legal evidence of the husband's actual authority, or of any holding out by the wife of him as having authority to make any contract of this sort with the plaintiff.

The action being defective for want of parties, there remains the question of whether or not we ought to allow an amendment if the respondent so desires. As was said in *Brandt* v. *Dunlop*, [1905] A.C. 454, 74 L.J.K.B. 898, actions are not now dismissed for want of parties. Hence, I think, subject to what counsel may say, that question not having been argued, that the plaintiff should have leave to add the assignor as a plaintiff, if she will consent, and if she refuse, then as a defendant.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal.

Plaintiff seeks to recover a debt due from the defendant to one Blackwell, at the date of the assignment, though not payable until a future time, but he has not obtained an assignment in writing of the debt. No particular form of assignment is necessary, but the plaintiff, in this case, has nothing but an

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equivocal recital in a deed. I do not think the recital is sufficient to enable plaintiff to maintain this action.

Martin, J.A.

MARTIN, J.A.:—I agree that the appeal should be allowed. The contention of the appellant that, as a matter of fact, there never was an assignment of any kind of the agreement for sale, is, I think, correct. The only evidence in support of it is the recital of such assignment in the conveyance of February 13, 1913, from Blackwell to the plaintiff of another lot, while in this conveyance of same date by Blackwell to the plaintiff of the lot in question, the conveyance is "subject to" the said agreement for sale. The present defendant is not precluded from denying the fact of the assignment, and the estoppel in said conveyance which was executed by Blackwell alone, does not extend to her. I can see nothing in the conduct of the defendant which disentitles her to rely on all the defences set up.

The case is not one where an amendment should be allowed by adding a party because, apart from other reasons, the respondent's counsel during the argument disclaimed any such application or desire when the point was taken against him.

Galliher, J.A.

GALLIHER, J.A., concurred in the judgment of MACDONALD, C.J.A.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A. (dissenting):—This is an appeal from the County Court of Vancouver and from the judgment of McInnes, County Judge.

The action, commenced on September 15, 1913, was one brought for the recovery of an instalment of purchase money, in amount $525, and interest due and payable on June 23, 1913, and due under an agreement for sale dated November 23, 1912, made between one Ruby Blackwell as vendor and the defendant (the appellant) as purchaser.

Under date of February 11, 1913, by a deed made in pursuance of the Real Property Conveyancing Act, Ruby Blackwell conveyed the land, the subject-matter of the agreement for sale of November 23, 1912, to the plaintiff, subject to a mortgage thereon for $2,300 to Francis W. and William H.

Underhill, and subject to the agreement for sale above referred to, namely of November 23, 1912, under which agreement the defendant was the purchaser of the land. A further deed of the same date, under the same statutory form was executed under the same date by Ruby Blackwell to the plaintiff, conveying certain other land, which contains a recital in these words:—

> Whereas the grantor (Ruby Blackwell is the named grantor) has assigned to the grantee (the plaintiff is the grantee) her interest in a certain agreement for sale wherein she was the vendor, and one Mary E. Saunders (the defendant in this action) the purchaser, and the grantor gives these presents to secure the first payment under the said agreement, namely, $525, due on June 23, 1913.

The payment for which security was given is the payment sued for in this action.

The learned trial Judge entered judgment for the plaintiff, and the amount of the instalment, interest, and costs, in the whole amounting to $697.20.

The counsel for the plaintiff at the trial, Mr. Bray, who also appeared in support of the appeal, introduced no evidence for the defence, but relied upon the contention as then advanced that the action should stand dismissed, in that no notice of the assignment or conveyance had been given that there was in fact not sufficient assignment as the conveyance in terms states that it is subject to the agreement for sale, and no assignment of the moneys due and payable under the agreement for sale. The conveyance as proved recites a valuable consideration, and it is under seal, the express consideration being $1,890, and grants the land covered by the agreement for sale to the plaintiff, and also

> the existing rights, title, interest, property claim and demand of her the said grantor (Ruby Blackwell) in to or upon the said premises.

At the time the conveyance was made the instalment sued for was not then due, but the effect of the conveyance was to absolutely transfer to the plaintiffs all title in the said land subject to the mortgage and the agreement for sale.

A letter was introduced in evidence from the defendant written to the agent of the plaintiff, under date of February

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21, 1913, before the instalment sued upon fell due reading as follows:—

I hereby accept the house purchased by me from Ruby Blackwell as complete, lot 16, block 70, D. L. 50.

It is affirmed that the defendant treated with the agent for the plaintiff on the basis of the plaintiff's being the owner of the land subject to the agreement for sale in her favour, and that it was to him she was to look for title, *i.e.*, that she was satisfied with the property and accepted the premises. To complete the assignment and to entitle the assignee to sue, notice to the person owing the debt, the defendant in the present case, was not necessary: *Ward* v. *Duncombe*, [1893] A.C. 369, *per* Lord Macnaghten, at 392.

Here we have the land conveyed to the plaintiff, and the assignment of the agreement for sale to the plaintiff. The entire estate and contract is vested in the plaintiff, and the plaintiff is unquestionably entitled to sue in his own name: *Forster* v. *Baker* (1910), 79 L.J.K.B. 664, [1910] 2 K.B. 636.

Further evidence was adduced that at the time of the conveyance, the husband of the defendant, acting as her agent, promised the agent of the plaintiff that the payments under the agreement for sale would be made when due.

The appeal is taken upon the following grounds:—

(1) That the judgment is against evidence and the weight of evidence.

(2) That the judgment is contrary to law.

It is to be observed, as previously remarked, that no evidence was adduced by the defence, and, apparently, no equities were set up or likely prejudice on the ground of non-joinder of the assignor, Ruby Blackwell.

Mr. Bray, in a very careful argument, endeavoured to shew that the action was not maintainable, being brought in the name of the grantee, the plaintiff only, and want of notice—under the Laws Declaratory Act (ch. 133, 2 Geo. V. R.S.B.C. 1911), sec. 2, sub-sec. 25—and further, that the conveyance and the recital in the other conveyance executed by Ruby Blackwell acknowledging the assignment of the agreement for sale

was insufficient to transfer to the plaintiff the right to sue for the moneys payable under the agreement for sale, that all that was granted or assigned was the land itself, not the moneys payable therefor, subject to the agreement for sale.

In my opinion, the land being granted to the plaintiff (the respondent), the right to the moneys payable under the agreement for sale passed by virtue of the conveyance and the recited assignment, and as well by operation of law. Assuredly the lien for the purchase money, for instance, passed to the plaintiff.

One further point of evidence is to be noted, and that is, that it was admitted at the trial that the defendant was in possession of the land and in receipt of the rents thereof.

In my opinion, the chose in action sued upon is equitable, and the plaintiff in this appeal being the owner of the land and the assignee, was and is entitled to sue thereon in his own name, and there was no requirement to join the assignor as a party to the action.

In *Fulham* v. *McCarthy* (1848), 1 H.L. Cas. 703, the Lord Chancellor, at 719, pointed out that, if the assignment was valid then the assignee was entitled, if invalid then the assignor was entitled to the moneys, and when valid, that there was no necessity to join the assignor in the action.

In the present case, the assignment, in my opinion is valid, therefore there was no necessity to join the assignor.

In *Cator* v. *Croydon Canal Co.* (1841), 4 Y. & C. (Ex.) 405, it was held that there was the equitable right to the money, it not being then due, which is the present case, the instalment sued upon was not due when assigned.

In *Bagshaw* v. *The Eastern Union Railway Co.* (1849), 7 Hare 114, 68 Eng. R. 46, it was held that the original subscriber of the sum represented by the script certificate as the vendor of the same to the plaintiff was not a necessary party to the suit, inasmuch as the contract between the original subscriber and the company gave the former the right to assign his interest and be discharged, and such interest was duly assigned by him to the plaintiff and the plaintiff was accepted by the company in his stead.

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In the present case we have evidence shewing that the defendant (the respondent) recognized the plaintiff as being the owner of the land subject to the agreement for sale.

In my opinion, the plaintiff, by virtue of the grant of the land, subject to the agreement for sale, and the declared assignment, became possessed by reason thereof of an equitable right, properly enforceable in a Court of equity, and the plaintiff was entitled to sue in his own name.

It might almost be said upon the facts that a novation was created, but I do not go so far as to hold that, nor do I think it necessary to do so.

The assignor having parted with the land, and the plaintiff having all the estate therein of the assignor, subject to the agreement for sale, the assignor has no further interest or estate in the land and there remains no need for his being a party to the action: *Brandt* v. *Dunlop Rubber Co.*, 74 L.J.K.B. 898, [1905] A.C. 454.

In *King* v. *Victoria Insurance Company* (1896), 65 L.J. P.C. 38, [1896] A.C. 250, the point was taken that the assignment by the bank did not confer upon the respondents any rights of action against the appellants, and the respondents were not entitled to sue the appellant in their own name; in fact, the stipulation was that the assignment should not authorize the use of the name of the insured. Notwithstanding this exception taken (and the statute law of Queensland is similar to that of British Columbia and the English Judicature Act) it was held affirming the decision of the Supreme Court that there had been a valid assignment of a legal chose in action.

In my opinion, however, the present case is not one of the assignment of a legal chose in action, it is in effect an equitable assignment for value, and it is clear that the defendant must look to the plaintiff for title when completion of payment is made under the terms of the agreement for sale, and her right of action would be the equitable right of compelling specific performance, and assuredly there must be mutuality in the exercise of the equitable rights.

Williams on Vendor and Purchaser, 2nd edition (1910), vol. 1, p. 527, under the title, "Of the Transfer pending completion of the rights and liabilities under the contract":—

We will now consider the effect of the transfer of the rights and liabilities created by the contract pending the completion thereof. This may take place either involuntarily, which is mainly by act of law, or voluntarily, that is by the act of the parties. The former case occurs upon the death, bankruptcy or personal incapacity supervening since the contract of either party thereto, and on the land sold being taken in execution of a judgment against the vendor; the latter upon the assignment *inter vivos* by either party of his rights under the contract.

It is clear to me that the plaintiff is in the position of having assigned to him the rights of the vendor (Ruby Blackwell) under the contract, *i.e.*, the agreement for sale.

Williams, at 528:—

The contract is also specifically enforceable against the vendor's assigns *inter vivos* of the land other than those who have taken the legal estate therein as purchasers in good faith for valuable consideration actually paid or executed without notice of the contract: *Daniels* v. *Davison*, 16 Ves. 249, 17 Ves. 433; *Potter* v. *Sanders*, 6 Hare 1, 2 Dart V. & P. 823, 824, 996, 5th ed., 927, 928, 1115, 6th ed., 836, 837, 1030, 7th ed.

Williams, at 564:—

With regard to the assignment by the vendor of the land sold, this land being in equity the property of the purchaser as from the date of the contract for sale, the vendor is not entitled to make any disposition thereof pending the completion of the contract to any other person or otherwise in derogation or to the prejudice of the purchaser's rights under the contract.

In the present case the assignment of the land sold, was expressly made, subject to the agreement for sale.

Williams, at 565:—

If, however, the vendor do make any such alienation of the land sold, either for a legal estate to a volunteer, with or without notice of the contract for sale, or to a purchaser with notice of the contract (*Dawson* v. *Ellis*, 1 J. & W. 524), or for an equitable estate only to any person, the alienee takes subject to the purchaser's equities under the contract, may be joined as a party to an action for its specific performance, and may be ordered to convey his interest in the land to the purchaser in order to complete the sale.

In *Daniels* v. *Davison* (1809), 16 Ves. Jun. 249, 256, 33 Eng. R. 978, 981, 17 Ves. Jun. 433, 34 Eng. R. 167, specific perform-

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ance was decreed of a contract to sell, against a person who had purchased the property from the vendor at an advanced price with notice of a prior contract. The subsequent purchaser being ordered to convey on payment to him of the price which the original purchaser contracted to pay. The Lord Chancellor (Lord Eldon), [at 16 Ves. Jun. 255, 33 Eng. R. 981]:—

The estate by the first contract becoming the property of the vendee the effect is that the vendor was seised as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seised in trust or should not be considered as selling it for the benefit of that person for whom, by the first agreement, he became trustee, and therefore liable to account.

Lord Eldon in the same case (17 Ves. Jun. 433, 34 Eng. R. 167), said:—

I have already expressed my opinion that the plaintiff is entitled to a specific performance of the agreement for the sale of these premises to him, and with regard to the subsequent sale by the defendant Davison to the other defendant Cole, my notion is that the plaintiff has an equity to have a conveyance of the premises from Cole upon the ground that Cole must be considered in equity as having notice of the plaintiff's equitable title under the agreement that Cole was bound to enquire, and therefore, without going into the circumstances, to ascertain whether he had or had not actual notice he is to be considered as a purchaser of the other defendant's title, subject to the equity of the plaintiff to have the premises conveyed to him at the price, which he had by the agreement stipulated to pay to that defendant; and that it is competent to the Court to make that arrangement as between co-defendants.

The plaintiff therefore deducting his costs out of the money he is to pay must have such conveyance from one or both the defendants, as the Master shall settle, if they differ; but I can go no farther than to regulate as between the defendants the payment of that money, which the plaintiff is to pay.

It is absolutely clear from the decision of Lord Eldon what the equitable rights are in this present case, and obviously they are these, that the plaintiff is entitled to the moneys under the agreement for sale and the defendant completing payment will be entitled to a conveyance from the plaintiff.

It seems to me that the language of Farwell, J., in *Manchester Brewing Co.* v. *Coombs* (1901), 70 L.J. Ch. 814 at 819, is particularly applicable:—

It is well settled that the assign of one of the parties to a contract can obtain specific performance of that contract against the other con-

tracting party; and although it is usually necessary in such an action to make the assignor a party, I do not think it is essential in a case like the present, where the sub-contract is no longer *in fieri*, and there are no equities between the parties to the original contract, and no suggestion of any reason for making the original contractor a party.

The line of reasoning of Farwell, J., although not upon similar facts is equally applicable to the present case where the plaintiff has the complete estate in the land subject to the agreement for sale held by the defendant—and the defendant has notice of the transfer of title in the land to the plaintiff subject to the defendant's right to complete the contract, and obtain title in ordinary course, not from the assignor (Ruby Blackwell) but admittedly the only person who could give title, namely, from the plaintiff.

In *Brandt* v. *Dunlop Rubber Co.*, [1905] A.C. 454, 74 L.J. K.B. 898, the question as to the non-necessity of joining the assignor where, as here, there has been a complete equitable assignment is, to my mind, finally settled, we find in the headnote this statement:—

> To constitute a good equitable assignment of a debt all that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person and if the debtor disregards such notice he does so at his peril.

The action was one brought by the appellants to recover certain moneys, due by the respondents in the first instance to the firm of Kramrisch & Co., the price of india rubber bought of this firm by the respondents. This debt the appellants contended was validly assigned to them by Kramrisch & Co., and notice given of the assignment to the respondents.

Lord Macnaghten, at 902, said:—

> With the utmost deference to the Court of Appeal I have great difficulty in following their reasoning. The plaintiffs' case was put in two ways. It was presented as a case within sub-sec. 6 of sec. 25 of the Judicature Act, 1873. It was also presented as a simple case of equitable assignment perfected by notice. Unfortunately the stress of the argument was laid on the Judicature Act.
>
> The Court of Appeal devoted almost the whole of their attention to it. The substantial question, the only question worth considering, was all but ignored. It was treated as subordinate to the question on the statute and bound up with it. The Lord Chief Justice, with whom the other members

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of the Court agree, came to the conclusion that this document—that is, Brandt's letter of January 7, and its inclosures—did not fulfil that which is necessary in order to entitle the plaintiffs to sue, whether suing as equitable or as legal assignees, on the ground that it was not an absolute assignment or an assignment at all within that section. Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree. Where the rules of equity and the rules of the common law conflict, the rules of equity are to prevail. Before the statute there was a conflict as regards assignments of debts and other choses in action. At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the rule in equity. It "is certainly not the doctrine of this Court," said Lord Eldon, sitting in Chancery, in *Re South, Ex parte Rowe* (1818), 3 Swanst. 392. In certain cases the Judicature Act places the assignee in a better position than he was in before. Whether the present case falls within the favoured class may, perhaps, be doubted. At any rate it is wholly immaterial for the plaintiffs' success in this action. But the Lord Chief Justice came to the conclusion that the document did not, on the face of it, purport to be an assignment, nor use the language of an assignment. An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor disregards such notice he does so at his peril. If the assignment be for valuable consideration and communicated to the third person it cannot be revoked by the creditor or safely disregarded by the debtor.

. . . . .

Strictly speaking, Kramrisch & Co., or their trustee in bankruptcy should have been brought before the Court. But no action is now dismissed for want of parties and the trustee in bankruptcy had really no interest in the matter.

In view of what Lord Macnaghten has said, it is, perhaps idle to say more, and it follows that the contentions put forward by counsel for the appellant are untenable.

Further, to give effect to the objection of non-joinder, and it goes to the real root of the defence, as assuredly if the assignor (Ruby Blackwell) had been joined in the action, the defence as set up would not be capable of even being argued, would offend against order 16, rule 2, marginal No. 224, of the County Court rules, which in part reads as follows:—

No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action or matter, be added.

The County Court rule is the same as that of the Supreme Court rule, order 16, rule 11, marginal No. 133.

In the Annual Practice, 1914, p. 237, it is pointed out that the rule is intended to do away with the plea in abatement, and we find it there stated:—

The Court may deal with the matter so far as regards the rights and interests of the parties actually before it. This course will be more readily adopted where an action has proceeded to trial without previous objection as to parties

which is the present case. The cases cited are the following: *Re Harrison*, [1891] 2 Ch. 349; *Hall* v. *Heward*, 32 Ch. Div. 430; *c.f.*, *Gort* v. *Rowney*, 17 Q.B.D. 625.

At page 238 of the Annual Practice, 1914, we find this stated:—

Misjoinder, Nonjoinder. Cannot now defeat a claim, see the rule. It is no defence: *Abouloff* v. *Oppenheimer*, 30 W.R. 430. The objection should be taken as soon as possible: *Sheehan* v. *G. F. R. Co.*, 16 C.D. 59; *Ruston* v. *Tobin*, 49 L.J. Ch. 262; *Roberts* v. *Evans*, 7 C.D. 830.

The learned trial Judge, in my opinion, upon the facts, was rightly entitled to enter judgment as he did for the plaintiff, instead of requiring the assignor (Ruby Blackwell) to be a party to the action, and it will be seen that there is ample authority to support the action in the name of the assignee alone, especially upon the specific facts of the present case.

It, therefore, follows that, in my opinion, the decision of the learned trial Judge was right and the judgment should be affirmed and the appeal dismissed.

Appeal allowed.

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REX v. ALLERTON.

British Columbia Supreme Court, Macdonald, J. March 3, 1914.

1. WITNESSES (§ I A—14)—COMPELLING ATTENDANCE—CRIMINAL LAW.

The magistrate, under sec. 671 of the Criminal Code 1906, is vested with some discretion in issuing subpœnas to witnesses, because of the words of that section "if it appears to the justice that any person is likely to give material evidence," and may refuse to issue a subpœna if the reasons advanced by the applicant do not shew that the witness sought to be examined is likely to give material evidence.

2. WITNESSES (§ I A—14)—CRIMINAL LAW—SUBPŒNA FOR ATTORNEY-GENERAL.

A magistrate is justified in refusing to issue a subpœna for the attendance of the Attorney-General before him as a witness if it appears that the Attorney-General could not give material evidence.

[*R. v. Baines*, [1909] 1 K.B. 258, 21 Cox C.C. 756, applied.]

Statement

MOTION for a mandamus to compel a magistrate to issue a subpœna to the Attorney-General.

The motion was refused.

J. A. Aikman, for the applicant.

H. A. Maclean, K.C., for the Crown.

C. L. Harrison, for the magistrate.

Macdonald, J.

MACDONALD, J.:—This is an application for a writ of mandamus to compel the police magistrate of the city of Victoria to issue a subpœna to the Honourable the Attorney-General of the province, to compel his attendance as a witness at a summary trial before such police magistrate. The applicant relies upon the provisions of sec. 671 of the Criminal Code, coupled with sec. 711 of the Code. During the course of the able argument presented by the counsel for the applicant he took the ground that the word "may" in sec. 671 should be construed as "shall," or to make the verbiage more applicable "must." It is not contended by the counsel for the Attorney-General or counsel for the magistrate that the section could not bear this construction. I do not find it necessary to express a decided opinion on that point. It will suffice for me to say that a power of this kind in the interests of justice should not depend upon the whim or feeling of the magistrate at the time. In my opinion, speaking generally, the magistrate is called upon under that section to issue a subpœna, or summons, as it is termed, to any

of His Majesty's subjects who he has reason to believe will be material witness and give relevant evidence in a matter then pending before him. The wording, however, seems to place some responsibility upon the magistrate and vest him with some discretion, because it speaks of the person to be subpœnaed as likely to give material evidence respecting the charge. If the affidavit on the part of the applicant had not been met by the affidavit of the magistrate, I would have thought it advisable in my present opinion of the matter, to grant the writ; but that affidavit is met by one on the part of the magistrate, in which he sets forth the reasons which were suggested by the solicitor for the applicant for obtaining such subpœna for the Attorney-General. To my mind, the statement of the magistrate uncontradicted shews that the witness so sought to be examined under the subpœna could not give material evidence in the matter then pending. In other words, he was not the witness that is contemplated by sec. 671, and the authority of *Rex* v. *Baines*, [1909] 1 K.B. 258, 21 Cox C.C. 756, seems to me to completely cover the situation.

In that case ministers of the Crown were sought to be examined as witnesses at a criminal trial, and a subpœna actually issued and served; an application was successfully made to the Court to set aside such subpœna, as being an abuse of the process of the Court, on the ground that such witnesses could not give any relevant evidence. It was mentioned in that case that a minister of the Crown had no special privilege from being summoned as a witness. They have no privilege or precedence over other subjects of the Crown; but if a subpœna is issued in a way that would be harassing, and not to aid in the administration of justice, but for an ulterior purpose, then the interference of a superior Court is upon application amply justified.

It has been suggested by counsel for the applicant in his reply, that the material might in some way be amended so as to meet the objections that have been taken; but I do not feel called upon to express any opinion in that connection. So far as this application is concerned, it is refused.

Application refused.

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WEST v. BROWNING.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. EVIDENCE (§ VI—I—566)—STATUTE OF FRAUDS—CONDITIONAL PURCHASE OF LANDS.

Where the receipt for the deposit on a proposed sale of land is not in itself a sufficient memorandum under the Statute of Frauds and no formal agreement has been signed, it is open to the proposed purchaser to shew by parol evidence that his promissory note given to the vendor, as well as the cash deposit made, was delivered subject to a condition of the bargain that he would buy only in the event of his being successful in his efforts to sell his own property so as to place him in funds with which to carry out the proposed purchase.

Statement

APPEAL by the plaintiff from the judgment of Grant, County Judge, dismissing his action to recover on a promissory note.

The appeal was dismissed on an equal division of the Court.

Joseph Martin, K.C., for the plaintiff, appellant.

J. E. Sears, for the defendant, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In this case there is a direct conflict of evidence. The situation of the parties, however, assists me in reviewing that evidence. Armishaw, the plaintiff's agent, in the beginning conducted the negotiations which led to the giving of the promissory note in question in this action. The defendants, husband and wife, were shop-keepers in South Vancouver.

Plaintiff owned a house in Whonnock. Armishaw suggested to the defendant, Sidney Browning, that he should purchase the house and convert it into a general store, and transfer defendants' business to Whonnock. Defendants were willing to do this, but could not make a cash payment unless they could sell their own property which they hoped to be able to do. It was, as I read the evidence, quite well understood between the parties that, in order to make the cash payment, and hence the purchase, it would be necessary that the defendants should sell their own property. That being the state of affairs defendant, Sidney Browning, paid $25 as a deposit, and received the following receipt:—

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Received from Sidney Browning, the sum of $25, as deposit on Mrs. West's property situate on the Whonnock road at Whonnock, B.C., containing three-quarters of an acre of land and all buildings on same, house, etc. Price $3,000, payable as follows: $450 down and note for $500, payable six months from date; balance to be arranged. J. E. ARMISHAW, Agent for Mrs. West.

This was, I think, regarded by both parties as an option to be converted into a sale when defendants succeeded in selling their property and thus procuring the cash necessary to enable them to make the cash payment.

It was undoubtedly intended that a formal agreement of sale should be drawn up when the transaction became a sale.

Three days after this defendants were induced to give two promissory notes for the sums mentioned in said receipt, on the representation, according to the evidence of defendant Sidney Browning, of the plaintiff and her agent, that the giving of such notes would shew his good faith in endeavouring to obtain the money due to complete the transaction. Defendant states most positively that the notes were handed over on the express condition that, if he failed to obtain the money for the first payment, the notes were to be returned or not used.

Now, in the circumstances above referred to there is nothing improbable in that story. The agreement for sale was not drawn up and executed as one would have expected had these notes been taken as part of the purchase money. The receipt does not satisfy the Statute of Frauds, therefore it is reasonable to suppose that defendants could not have intended to be bound by the notes, and yet have no agreement which they could enforce against the other party, and this, too, before they had assurance that they could raise the money to meet the payments. It seems to me that the plaintiff's own evidence bears this out to a certain extent. She declined to let them into possession until $250 in cash should be paid. I do not point that out as being unreasonable at all. Her position was well taken that she would not part with the possession of her property until she had got some cash. But that attitude, coupled with the absence of an enforceable agreement for sale, bears out the

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defendant's story that the purchase was conditional upon their raising the money by sale of their own property.

It was argued that defendant Sidney Browning's subsequent conduct indicates that the sale was concluded when the notes were given; that his conduct is consistent only with that of the purchaser, who had bound himself to pay the purchase money.

It seems to me that, while there is one inference that might fairly be drawn from his subsequent conduct, yet this other inference may be drawn from it; that he was very desirous of getting the property; he understood that he would get it whenever he could raise the money from the sale of his own property, which, admittedly, he was trying to sell, and which was the only way in which he could raise the money; and he was content to keep the matter *in statu quo* until it became apparent that he must fail to raise the money. I do not think that is an improbable inference to draw from his conduct. That being so I am thrown back on the conflicting testimony of the witnesses. Without reflecting at all upon the credibility of Armishaw, I recall the evidence in which he says that a formal agreement was actually drawn up at the time the notes were given. Now, it is quite apparent that he was quite mistaken with regard to that, and one can hardly credit him with a clear recollection of what took place at that time. Doubtless he was trying to tell the truth, but his testimony was evidently considered by the learned trial Judge to be very unreliable.

The learned Judge saw the demeanour of all the witnesses and appears to have been impressed with the truthfulness and sincerity of the defendant, Sidney Browning. That being so, I do not think I should be justified in interfering with his finding of fact. It does not appear that Mrs. Browning was present when the notes were given or heard any of the conversation between the parties with respect to the agreement. She was a witness, and was not asked by counsel on either side with respect to the matters in conflict, so that it is, I think, not open to me to infer that her husband's testimony is weakened because not corroborated by her. From the conduct of the case

I should assume that it was common ground that she did not know of her own personal knowledge anything about the arrangement that was made when the notes were given.

Being, therefore, unable to say that the learned trial Judge was clearly wrong in his conclusion, I think that conclusion should not be disturbed and that the appeal should be dismissed.

Irving, J.A. (dissenting)

IRVING, J.A. (dissenting):—At the hearing we determined all the points in dispute except one, that is, the plaintiff's contention that the purchase by him, and the payment of the note given by him, was conditional upon his ability to raise the money to pay the notes. The essence of a promissory note is that it is an unconditional promise to pay; even the addition of the words "as per agreement" does not make a note conditional: *Jerry* v. *Barker* (1858), El. Bl. & El. 459, 120 Eng. R. 580. The delivery of a note may be conditional, but that does not permit the maker to make it conditionally. The presumption being that promissory notes are for valuable consideration, the onus is on the defendant to upset that basis.

Oral evidence is not admissible to vary the instrument. That was decided over a hundred years ago in *Hoare* v. *Graham* (1811), 3 Camp. 57. A recent case is *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487. There, in an action by the drawers against the acceptors of a bill of exchange, evidence of a contemporaneous oral agreement to renew a bill was held inadmissible. That case is instructive.

In *Henderson* v. *Arthur*, [1907] 1 K.B. 10, the Court of Appeal pointed out that it would be contrary to the general principles of evidence to give effect to an antecedent parol agreement in order to give a different meaning to a document (a lease in that case) from that which the law would otherwise give it.

In *Heilbut Symons & Co.* v. *Buckleton*, [1913] A.C. 30 at 47, Lord Moulton said, speaking of a collateral contract:—

> The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and

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collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

It is true that there may be a delivery of a promissory note in escrow, but this is not the case suggested here, at least not by the defendant's evidence. He says, p. 20:—

> If we got the money, we would carry out the deal. If not, they (the notes) were to be returned, and they were not to be used.

At p. 21:—

> I signed the notes on the condition that if I got through with the money . . . I would come through with the deal, if not, there would be nothing in it.

At p. 22:—

> When I received Mrs. West's letter (ex. 4), of 31st March (in which she asks $250 cash before she will let the plaintiff into possession), I considered the thing off. I couldn't do anything; but I did not say anything to anybody except my wife.

And at p. 28:—

> Mr. Armishaw asked me if I would give him the notes, as he thought it would look better if he had the notes, and if we arranged the notes, and we could not come through with the money, there would be nothing in it.

This is clear; the witness wishes the Court to understand that the notes were only conditional. But if evidence of that kind were admissible, his own conduct shews that the statement is untrue. If it were true, then the whole thing would have been at end when the note became due, and was unpaid. His first act in that event would be to return the agreement of sale and ask for the return of his notes, but instead of doing that, we find that, on March 28, 1913, ten days after the first note became due, he wrote that he was packing and hoped to be in Whonnock next week (ex. 5, p. 11). This letter does not fit in with any theory. The deal was not off, and he had not yet found

the money: "*I will no doubt soon fix things up with you.*" His own conduct in June, 1913, when the plaintiff's solicitor interviewed him, shews that his testimony is not to be believed. He then said (p. 33) he still had hopes of raising the money, but was not sure, as things were dull—"things were getting so dull and there did not seem to be any chance of getting money." This was in June. The solicitor had demanded payment in April, and threatened action on the note. His answer is not that this was a conditional arrangement, or that the note was held as an escrow, but that he still had hopes, in June, of raising the money. Mrs. Browning was not asked to corroborate this part of the defendant's story. Mrs. West and Armishaw deny the statement that there was any condition about the note: see pp. 46-7, and p. 53. Their evidence is consistent in every way, that is to say, what each says is consistent with itself, and their testimonies agree and corroborate one another. The basis of it was that the defendant should not be allowed into possession until a substantial portion of the purchase money, viz., the amount of this note plus the $25 deposited, had been paid. The defendant acknowledges this in his letter of March 28, 1913. Moreover, their testimony is in conformity with law rights and with the teachings of experience. A vendor is not wise in letting a man of straw into possession, and although a vendor is a trustee of the lands for the purchaser, he has a paramount right to protect his interest as vendor.

The learned Judge seems to have been impressed by the defendant's evidence, but his belief in the truthfulness of the evidence is not absolutely conclusive.

The rule with its exception is stated very fully in *Khoo Sit Hoh* v. *Lim Thean Tong*, [1912] A.C. 323, at 325:—

> Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence

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to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony.

This case, in my opinion, falls within the class last referred to.

On the law and on the facts I would allow this appeal and enter judgment for the plaintiff.

Galliher, J.A.

GALLIHER, J.A., concurred in the judgment of IRVING, J.A.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I would sustain the judgment of the learned trial Judge (Grant, Co.J.). It would appear clear to me that the learned County Court Judge has arrived at the correct conclusion upon the facts as well as the law.

No complete agreement of sale was ever arrived at, it is plain that the plaintiff who sues upon the promissory note refused to accept it, and was always insisting upon a cash payment before any agreement would be entered into, and in that the promissory note is still held by the payee thereof (the plaintiff). All equities existing between the parties are available, and the promissory note must be held not to be enforceable, in any case no consideration therefor has been proved.

The learned trial Judge heard the evidence, saw the witnesses, and it is essentially a case of credibility, and there is no hesitancy upon the part of the learned trial Judge: he believed the witnesses for the defence and I cannot see how, upon the facts of this case, there can be any disagreement with his findings. The event never happened—well known to the plaintiff—which would admit of the defendant's entering upon a firm agreement with the plaintiff for the purchase of the land,

and the plaintiff upon her part was most insistent that there would be no agreement of sale until the substantial cash payment was made—her letter of March 31, 1913, makes this perfectly clear, and also makes clear that the promissory note was not accepted, and all subsequent dealings never changed matters. The letter was in the following terms:—

Exhibit 4.

Whonnock, March 31, 1913. Sir,—Your letter to hand. I am sorry my brother is not at home now and is therefore unable to do the work you require, he will not be back for two weeks at least. With regard to the cash payment, I cannot think of letting you take possession without at least $250 cash. Your note is simply useless. I must have the cash. M. M. WEST.

Unquestionably the plaintiff suing upon the promissory note was entitled to have it presumed at the outset that it was given for a valuable consideration, this is the case, even as between the immediate parties thereto, but the defendants amply shewed that it was given without consideration, and, further, was not accepted by the plaintiff, and the renewal of the promissory note—upon the facts—in no way changes matters, or rendered the promissory note valid: Halsbury, Laws of England, vol. 2, pp. 461-496; *Edwards* v. *Chancellor* (1888), 52 J.P. 454.

Lush, J., in *Currie et al.* v. *Misa* (1874), 44 L.J. Ex. 94 at 99, L.R. 10 Ex. 153 at 162, states what valuable consideration is in law:—

A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forfearance, detriment, loss or responsibility given, suffered or undertaken by the other: Com. Dig., Action on the Case Assumpsit, B. 1-15.

Lush, J., delivered the judgment of the majority of the Court (Exchequer Chamber, Keating, Lush, Quain, and Archibald, JJ.).

It is plain that no consideration such as is called for "in the sense of the law" was established in this case, it therefore follows that the plaintiff (the appellant) cannot recover upon the promissory note sued upon, and the appeal fails and must be dismissed.

Appeal dismissed on an equal division.

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REX v. MARTINUIK.

Saskatchewan Supreme Court, Elwood, J. March 5, 1914.

1. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL BY JUSTICES—ASSAULT WITH BODILY HARM.

Two justices in Saskatchewan have absolute summary jurisdiction under Cr. Code, sec. 776, to try the offence of assault occasioning actual bodily harm (Cr. Code 1906, sec. 295) without the consent of the accused to summary trial under Part 16 of the Code.

[*R.* v. *Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363; *R.* v. *Zyla*, 17 W.L.R. 258, followed; and see *R.* v. *Taylor*, 12 Can. Cr. Cas. 244.]

2. EVIDENCE (§ IV E — 412) — JUDICIAL RECORDS — CONVICTION WRONGLY DATED.

Oral testimony is admissible to prove that a conviction on a summary trial by two justices for assault occasioning bodily harm is erroneously dated, and that an appeal taken therefrom under Cr. Code, sec. 797 (amendment of 1913) was not, in fact, too late, as it would appear to be because of the error.

HABEAS corpus application.

H. Ward, for the applicant.

H. E. Sampson, for the Attorney-General.

Elwood, J.

ELWOOD, J.:—This is an application for a writ of *habeas corpus* and for an order that a writ of *certiorari* do issue in aid of such writ. A number of grounds were urged for issuing the writ, among them

(*a*) that the accused was convicted under sec. 295 of the Criminal Code of having assaulted Kost Martinuik, by striking him on the head with an iron bolt, causing bodily harm, and that the accused did not consent to be tried summarily by the justices on the charge, and that the justices had no jurisdiction without such consent to hear the charge; (*b*) that the accused was not tried or convicted at the time set in the conviction by reason of its being ante-dated by the said justices, deprived the applicant of his right to appeal therefrom; (*c*) that the said justices did not state to the accused as required by sec. 778 of the Criminal Code, that he had the option of being tried forthwith by the magistrate without the intervention of a jury, or to remain in custody or under bail to be tried in the ordinary way by a Court having criminal jurisdiction. And, in the alternative the said justices did not reduce the charge to writing and read the same over to the accused; (*d*) that, if the charge dealt with by the said justices was one of common assault, then the accused having been tried summarily the punishment was excessive.

Following the judgments of Wetmore, C.J., in *Rex* v. *Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363; *Rex* v. *Zyla*, 17 W.L.R. 258, the judgment (unreported) of Haultain, C.J., in

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Rex v. *Morton*, and the judgment (unreported) of Newlands, J., in *Rex* v. *Zachman*, I am of the opinion that the magistrates had jurisdiction to try the accused without his consent.

This, therefore, disposes of objections (*a*), (*c*) and (*d*).

So far as objection (*b*) is concerned, the conviction was apparently dated on the 12th of the month, whereas it actually took place on the 28th of the month. Apparently an appeal was taken, and the District Court Judge, before whom the appeal was taken, refused to hear the appeal on the ground that the notice of appeal was not served within ten days of the date of the conviction, he apparently being of the opinion that the conviction was on the 12th of the month, instead of the 28th. I take it from remarks that were let fall before me, that there was oral testimony given as to the date of the conviction, and apparently the oral testimony shewed that the conviction took place on the 12th of the month. However, it was quite open to the parties to shew the date on which the conviction did take place, and he, in my opinion, should have entertained the appeal if the notice of appeal was served within ten days from the date upon which the conviction actually took place.

The result will be that the application will be dismissed.

The only person who appeared on this application outside of the applicant was the representative of the Attorney-General, and there will be no order for costs against the applicant.

Application dismissed.

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Saskatchewan Supreme Court, Elwood, J. April 11, 1914.

1. CRIMINAL LAW (§ IV C—116) — IMPRISONMENT IN DEFAULT OF FINE — SUMMARY TRIAL.

Sub-section 2 of Cr. Code, sec. 781 (Amendment of 1913) applies to authorize a commitment in default of paying the fine imposed on a summary trial under Cr. Code 773 (*c*) for aggravated assault, where the sole penalty in the first instance was a fine, as well as to cases where both fine and imprisonment were imposed in the first instance; and this although the imprisonment on default of paying the fine is referred to in the sub-section as being for a "further term" not exceeding six months.

2. CRIMINAL LAW (§ IV B—111)—IMPRISONMENT AT HARD LABOUR—DEFAULT IN PAYING FINE.

Hard labour may be imposed although the imprisonment is only in the alternative of default being made in paying the fine imposed on a summary trial (*ex. gr.*, for aggravated assault).

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3. CERTIORARI (§ II—35)—RETURNING AMENDED CONVICTION — SUMMARY TRIAL PROCEDURE.

A magistrate making a conviction on a summary trial for an indictable offence may in answer to a *certiorari* motion attacking the same for irregularity, return an amended conviction conforming with the adjudication and setting out in a more formal manner the conviction which he had already drawn.

[And see *R.* v. *McAnn*, 3 Can. Cr. Cas. 110; *R.* v. *Whiffin*, 4 Can. Cr. Cas. 141; *R.* v. *Barre*, 11 Can. Cr. Cas. 1; *Ex parte Giberson* (No. 1), 16 Can. Cr. Cas. 66; *Ex parte Giberson* (No. 2), 16 Can. Cr. Cas. 71; *R.* v. *Smith*, 19 Can. Cr. Cas. 253, 45 N.S.R. 517.]

Statement

MOTION for a writ of *certiorari* to quash the conviction of C. H. Nelson made on a summary trial before a police magistrate for assault causing grievous bodily harm.

The motion was dismissed.

H. J. Schull, for the applicant.

H. Craig, for the informant.

H. E. Sampson, for the Attorney-General.

Elwood, J.

ELWOOD, J.:—In this matter the applicant was, on February 26, 1914, convicted by W. F. Dunn, police magistrate for the city of Moose Jaw, for that the applicant did assault and beat one A. A. Frost, thereby causing the said A. A. Frost grievous bodily harm; and the first conviction returned adjudged the said applicant for his said offence to forfeit and pay the sum of $100 and witness-fees forthwith, or in default to be imprisoned in the guard-room of the R.N.W.M.P. at Regina for the term of sixty days with hard labour. A subsequently amended conviction was returned adjudging the applicant for his said offence to forfeit and pay the sum of $100 to be paid and applied according to the law, and also to pay to the informant the sum of $2.25 for his costs in this behalf, being the amount allowed for witness fees for the witness called on behalf of the prosecution, and if the said further sums are not paid forthwith I adjudge the said C. H. Nelson to be imprisoned in the guard-room of the Royal North-West Mounted Police at Regina in the said province, and there to be kept at hard labour for the term of sixty days, unless the said sums and the costs and charges of the commitment and of the conveying of the said C. H. Nelson to the said guard-room are sooner paid.

This matter came before me by way of an application for a writ of *certiorari* to quash the conviction upon the following grounds, namely,

(1) that the magistrate had no jurisdiction to impose imprisonment to enforce payment of the fine because no imprisonment was adjudged in the

first instance; (2) that said magistrate had no jurisdiction to impose imprisonment either with or without hard labour as a means of enforcement of the fine imposed; (3) that the magistrate could not in any event impose hard labour; (4) that the conviction does not provide that the applicant is to be imprisoned for the term stated, "unless the fine is sooner paid."

The second objection was not contained in the original notice of motion, but on the application coming before me the solicitor for the applicant asked to amend the notice of motion by adding that objection, and I allowed the amendment. In support of the first and second contentions the following cases were cited: *The Queen* v. *Stafford*, 1 Can. Cr. Cas. 239; *The Queen* v. *Bougie*, 3 Can. Cr. Cas. 487; and *The King* v. *Hawes*, 6 Can. Cr. Cas. 238, and the note to Crankshaw, 3rd ed., 897.

I am of opinion, however, that those cases do not bear out the contention of the applicant. Those cases had reference to convictions under a section of the Act which did not specify any term of imprisonment unless the penalty were paid. The punishment awarded in the case at bar is under sec. 781 of the Code, and by sub-sec. (2) it is provided that the person convicted may be committed to the common gaol or other place of confinement for a further term not exceeding six months unless such fine is sooner paid.

I cannot find any case which sustains the contention that that sub-section is only meant to apply to a case where both fine and imprisonment are imposed in the first instance, and, in my opinion, that section applies to a case where a fine is imposed as the sole penalty as well as to a case where both fine and imprisonment are imposed.

So far as the third contention is concerned, sec. 739, sub-sec. (2), and sec. 1057 give power to impose hard labour, and I agree with the judgment of the Chief Justice of this Court in the unreported case of *Rex* v. *Morton* holding that hard labour may be imposed where the imprisonment is for the purpose of enforcing payment of a fine.

So far as the fourth objection is concerned, sec. 781 of the Code provides the means of levying the fine and provides that, in addition to any other imprisonment on the same conviction, the accused may be committed to the common gaol or other place

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of confinement for a further term not exceeding six months unless such fine is sooner paid. It will be observed that the original conviction did not contain the words, "unless such fine is sooner paid." It did, however, contain these words, "or in default to be imprisoned," and it seems to me that the clear and unmistakable intention of the conviction was that the imprisonment was made for the purpose of enforcing the fine, and was not a substantive punishment, and that, under the statute, the accused would automatically be entitled to be released from imprisonment as soon as he paid the fine. As a matter of fact, he did pay the fine and was released. It was very much in the same position as in the case of an appropriation of a penalty being fixed by statute, in which event the conviction need not contain any express award to that effect. See Paley on Convictions, 8th ed., 302. In any event, however, an amended conviction was returned providing that the imprisonment was to be unless the money and costs and charges of the commitment were sooner paid. The magistrate, in my opinion, had the right to return an amended conviction; the amended conviction appears to me to be only a more formal manner of setting forth the conviction which he had already drawn, and in such case he had the right to return an amended conviction: Paley on Convictions, 8th ed., 320. I may say that there was no objection to the adjudication in the amended conviction condemning the payment of costs, and costs and charges of commitment and conveyance to the guard-room.

The result will be that the application will be dismissed and the conviction affirmed. The counsel for the Attorney-General announced that he made no claim for his costs, but the counsel for the respondent did claim his costs of opposing the application. There will be an order that the applicant pay the costs of the informant of opposing this application.

Conviction affirmed.

STAATS v. CANADIAN PACIFIC R. CO.

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Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Brown, JJ. March 16, 1914.

1. TRIAL (§ V C—286)—SPECIAL FINDINGS—VERDICT—NEGLIGENCE.

The finding of a jury in a railway personal injury case that the defendant railway company was guilty of negligence in "non-observance of rules in going through a closed switch," does not necessarily refer to the company's printed book of rules, put in as evidence by the plaintiff, but may be supported as referring to a rule of operation to that effect proved by oral testimony as governing the conduct of employees, although not embodied in the printed rule-book.

2. PLEADING (§ II F—202) — ALLEGATIONS AS TO DAMAGES — GENERAL; SPECIAL—SUFFICIENCY.

General damage need not be specially pleaded, but special damage must be pleaded in order that the defendant may not be taken by surprise at the trial.

3. TRIAL (§ V C—280)—VERDICT—SUFFICIENCY AND CORRECTNESS—DAMAGES.

A jury cannot award as special damages an amount greater than the amount claimed, unless the pleadings are amended so as to cover the larger amount.

[*Chattell* v. *Daily Mail Publishing Co.*, 18 Times L.R. 165, applied.]

4. TRIAL (§ V C—280)—VERDICT—SUFFICIENCY AND CORRECTNESS—DAMAGES.

In a personal injury case where the jury's award of general damages at $15,000 is attacked as excessive and the evidence shews that the injuries sustained were unusually severe, the award will not be disturbed where it stands the test that twelve reasonable men might reasonably find the damages at that amount.

[*Tobin* v. *C.P.R.*, 2 D.L.R. 173; and *Gordon* v. *C.N.R.*, 2 D.L.R. 183, referred to.]

Statement

APPEAL from the judgment of Newlands, J., against the defendant company upon a verdict in $2,000 special damages and $15,000 general damages.

The appeal was dismissed, except that the special damages were reduced from $2,000 to $932.

J. A. Allan, K.C., for the appellant.

T. D. Brown, for the respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an appeal from the judgment of my brother Newlands entered against the defendants upon a verdict found by the jury. The action was for damages for personal injuries received by the plaintiff through being run over by an engine operated by the defendant company. The jury found

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that the accident was caused by the negligence of the defendants, and that such negligence consisted in "non-observance of rules in going through a closed switch." They also found that there was no contributory negligence on the part of the plaintiff, and they awarded him $2,000 special damages and $15,000 general damages. On this verdict judgment was entered against the defendant for $17,000. From this judgment the defendants now appeal.

The defendants seek the reversal of the judgment on the following grounds:—

1. Because there was no evidence on which the jury could find that it was against the company's rules to run through a closed switch.

2. Because the jury awarded $2,000 special damages, while the plaintiff, in his statement of claim, only asked for $705, or at most, $932.

3. Because the general damages awarded were excessive.

As to the first of the above grounds of appeal: it is true that the plaintiff as the trial put in evidence the book of rules governing the conduct of the defendants' employees in the operation of the defendants' engines and trains, and that this book does not contain any rule prohibiting an engineer from running through a closed switch. The defendants' superintendent, however, as well as the plaintiff, stated in evidence that it was improper to run an engine through a closed switch. It is, therefore, a rule of operation governing the conduct of the defendants' employees that an engine should not be run through a closed switch. That being so, there was evidence from which the jury could find the defendants guilty of negligence in the non-observance of this rule of operation, even although no section was found in the printed book of rules prohibiting the running of an engine through a closed switch.

Now, as to the second ground of appeal. In his statement of claim the plaintiff alleged:—

Par. 18. At the time of the said accident the plaintiff was 27 years old, and prior to the inflicting of said injuries the plaintiff was capable of earning wages as a railway man of $90 a month, and would have earned increased wages from year to year but for the inflicting of said injuries.

Par. 21. By reason of the said injuries the plaintiff has been since September 13, 1912, confined to the city hospital in the city of Saskatoon, and is still so confined, and will be so confined for some considerable time, and the plaintiff has been since the said date and is now and will be for some considerable time under medical care and attendance, and the plaintiff

has been thereby put to great expense, particulars of which are as follows:—

Particulars:

To Dr. Doran's bill for medical attendance, December 20, 1912	$505 00
To city hospital bill to December 31, 1912	200 00
	$705 00

The plaintiff, therefore, claims from the defendant:

(*a*) Damages in the amount of said doctor's and hospital bills incurred and to be incurred.

(*b*) $30,000 damages because of said injuries.

At the trial the plaintiff proved that his doctor's bill to that date was $505, and his hospital bill to December 31, 1912, was $194.50, and that the hospital authorities charged him a dollar and a half a day subsequent thereto, which, to the date of the trial, would make an additional sum of $232.50, or $932 in all. According to the evidence, therefore, this amount was all the plaintiff was entitled to under the first heading of his prayer for relief. For him it was argued that as he had testified that at the time of the accident he was getting $90 per month, and that in another month he would have been entitled to receive the average amount earned by brakesmen, which, he said, was $145 per month, and that as this was uncontradicted, the jury were entitled to award him as special damages, in addition to the doctor's bill and the hospital bill, the wages he might have earned from the time of the accident to the trial at the rate of $145 per month. For the appellants, Mr. Allan contended that if the statement of claim had disclosed that the plaintiff was going to ask for wages at $145 per month as special damages they would have brought evidence that he could not earn it, and that an advance from $90 to $145 per month is unusual, and would not have been made; and further, he contended that, to be entitled to wages as special damages such wages must be specifically claimed. The distinction between "general damage" and "special damage" is laid down by Lord Macnaghten in *Stroms Bruks Aktie Bolag* v. *Hutchison*, [1905] A.C. 515 at 525, where, after pointing out that this division was more appropriate in cases of tort than in cases of contract, his Lordship said:—

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"General damages," as I understand the term, are such as the law will presume to be the direct, natural and probable consequence of the act complained of. "Special damages," on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and therefore they must be claimed specially and proved strictly.

See also Bullen & Leake on Pleading, 6th ed., 54. The rule that anything claimed as special damages must be expressly pleaded is also laid down in Halsbury's Laws of England, vol. 10, 346, where the learned author says:—

General damage need not be specially pleaded, but special damage must be pleaded in order that the defendant may not be taken by surprise at the trial.

The diminution of the plaintiff's earning capacity, whether total or partial, is proper matter to be considered by a jury in awarding general damages, because it is the natural and probable result of the injury complained of. The actual loss of wages from the date of the accident to the time an action is brought may, in my opinion, if properly asked for, be made the subject of a claim for special damage: Odgers on Pleading, 7th ed., 428; Bullen & Leake, 6th ed., 443. But to entitle a plaintiff to such wages as special damages they must be expressly claimed in the statement of claim so as to give the defendants an opportunity of inquiring into them before trial, and so prevent them from being taken by surprise. In the present case no specific claim was made for the loss of these wages. The defendants had no notice that they would be claimed as special damages, nor that the plaintiff was going to ask wages at $145 per month. The jury, therefore, were not entitled to award loss of wages as special damages, if, indeed, they did so. A jury cannot award as damages an amount greater than the amount claimed, unless the pleadings are amended so as to cover the larger amount: Mayne on Damages, 8th ed. at 679; *Chattell* v. *"Daily Mail" Publishing Co.*, 18 Times L.R. 165. No amendment was here made, nor could one be made, after verdict, setting up a new cause of action for special damage. Had the plaintiff claimed a specific sum of $500 for medical attendance, and the evidence shewed that the doctor's bill was $600, an amendment could properly be allowed enabling him to claim the $600. But

an amendment setting up a new item of special damage of which the defendants had no notice cannot be allowed after verdict. I am, therefore, of opinion that the verdict of $2,000 special damages cannot stand.

A suggestion was made that as the jury had awarded a larger amount than the amount claimed, a new trial should be granted; but as counsel for the defendants did not press for a new trial, this phase of the question need not be considered. The special damages claimed in the statement of claim and proven at the trial amount only to $932, to which amount the verdict on this head must be reduced.

For the reasons given by this Court in *Tobin* v. *C. P. R.*, 2 D.L.R. 173, 20 W.L.R. 676, and *Gordon* v. *C. N. R.*, 2 D.L.R. 183, 20 W.L.R. 705, I am of opinion that no sufficient reasons have been shewn to entitle us to grant a new trial on the ground that the general damages awarded were excessive. The verdict is large, but the plaintiff's injuries were very severe. He lost his left leg, and also a part of his right foot, including the heel. His right hand was so badly crushed that it necessitated the amputation of the three middle fingers and the loss of the top of his thumb and other finger. His left arm was fractured and permanently injured. His head was fractured, and his shoulder dislocated. In view of the severity of his injuries, and the great pain he had to suffer, I cannot say that twelve reasonable men might not reasonably award the amount the jury allowed.

The appeal should, in my opinion, be allowed as to the amount awarded as special damages, and the judgment on this head varied by the insertion of "$932" in place of "$2,000."

In all other respects the appeal should be dismissed.

Judgment varied.

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ALBERT IMPROVEMENT CO. v. PEVERETT.

Saskatchewan Supreme Court, Newlands, J. April 1, 1914.

1. CORPORATIONS AND COMPANIES (§ V B 1—176) — STOCK — SUBSCRIPTION COMPLETE AND BINDING.

As soon as a proposed purchaser of company shares signs the memorandum and the articles of association, and these are registered as required by the Companies Act, R.S.S. 1909, ch. 72, he and his fellow subscribers become a body corporate, and his agreement to take shares becomes binding without further formality under sec. 13 of the Act.

Statement

ACTION for $2,000 as the price of company shares.

Judgment was given for the plaintiff company.

G. F. Blair, for the plaintiff.

J. F. Frame, K.C., and *E. Miller*, for the defendant.

Newlands, J.

NEWLANDS, J.:—The plaintiffs bring this action for $2,000, the amount due on twenty shares taken by the defendant in the capital stock of the plaintiff company. The principal defence raised by the defendant is to the effect that the defendant's name was never entered on the register of shareholders, and that there was no proper allotment of shares to him nor any notice thereof.

On this branch of the case, Mr. Frame, K.C., cited a number of cases going to shew that an applicant for shares could not be made liable to the company or as a contributor, unless the shares had been allotted to him and he had notice thereof and his name had been placed upon the register.

These cases are not, in my opinion, applicable to the present case, but the law which applies is that set out in Lindley on Companies, 6th ed., vol. 2, p. 1052:—

> Moreover, if a person has agreed to take shares, he will be a contributory, even although there may have been no allotment or he may have no notice of it. Allotment and notice are, in truth, only material where there is no agreement without them. In the ordinary case of an application for shares there is no agreement in the absence of allotment and notice of it, but there may well be a binding agreement without either of them.

In this case the defendant signed the memorandum of association required by sec. 7 of the Companies Act, R.S.S. 1909, ch. 72, and set after his name the number of shares he took, in this case twenty. He also signed the articles of association

as required by sec. 13 of the Companies Act. The memo. of association and the articles of association were registered as required by sec. 14 of the Act.

The effect of this registration is to make the subscribers to the memorandum of association a body corporate: see sec. 17.

The defendant is, therefore, a member of the plaintiff company, and his agreement to "take the number of shares in the capital stock of the company set opposite our respective names," as it is set out in the memorandum of association, became a binding agreement, and the price of those shares that he had agreed to take and pay for became a debt due from him to the company in the nature of a specialty debt: sec. 13.

The defendant admitted that he was one of the promoters of the company, but he contended that they had not kept to the agreement they made before incorporation as to payment for their shares. These were to be paid for by instalments spread over the summer of 1913, and it was shewn that the defendant was asked to sign notes for those amounts spread over the specified time, but he refused, and this action was not brought until after all the instalments would be due by the agreement. The defendant was, in my opinion, liable for the full amount when the action was brought.

It was further contended that the shares issued by the plaintiff company were not in accordance with the agreement and articles of association. This is not raised by the pleadings, and I do not consider it necessary to make any finding upon that question even if it was properly raised. It will be time enough for the defendant to object to the shares when he has paid up and become entitled to get same.

There will be judgment for the plaintiff company, with costs.

Judgment for plaintiff.

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O'CONNOR v. STURGEON LAKE LUMBER CO.

Saskatchewan Supreme Court, Brown, J. April 6, 1914.

1. SALE (§ III C—70)—RESCISSION—DEFICIENCY IN QUANTITY.

An action for rescission as distinct from an action for damages may be supported by proof of innocent representations as to quantity, where the deficiency between the actual quantity represented and that existing is so great that the buyer cannot be said to have received what he bargained for.

2. CONTRACTS (§ V C—397)—RESCISSION—RESTORING BENEFITS.

The general rule is that a rescission on account of the seller's innocent misrepresentations will be ordered in respect of a contract of sale only where the transaction can be rescinded *in toto* and where there can be *restitutio in integrum*.

Statement

TRIAL of action for the rescission of a contract for the sale of timber berths.

The action was dismissed.

C. E. Gregory, K.C., for the plaintiffs.

J. F. Frame, K.C., and *J. H. Lindsay*, K.C., for the defendants.

Brown, J.

BROWN, J.:—After the trial of this action application was made by Mr. Gregory, on behalf of one Charles E. Levey, that he (Levey) be made a party to the action. This was done because it was disclosed during the progress of the trial that Levey had an interest in the timber berths in question. I am of opinion that the application should have been made on behalf of the plaintiffs rather than on behalf of Levey himself, but, under the circumstances, I allow the amendment making Levey a party plaintiff. He, however, must pay the costs of the application.

With reference to the action itself: I find that it was represented to the plaintiffs that the timber berths in question contained substantially between forty and fifty million feet of merchantable timber; that such representations were made through Sibbald, Baker, and more especially Ballantyne's report, and that the plaintiffs were induced to buy the berths largely because of such representations. The witness Nagle, whose evidence I accept as giving an accurate statement of the amount of merchantable timber that was on the berths at the time of the sale, shews that there were only 9,185,695 feet. The witness Sharp says that the cut ought to go 25 per cent. better than a

good cruiser's report, and acting on that assumption the total amount of timber would, at the outside, be 11,482,118 feet, or about one-quarter of the amount represented. I do not, however, find that the representations which were made were made fraudulently. The evidence does not, in my opinion, justify any such conclusion, and, in fact, Mr. Gregory did not on behalf of the plaintiffs seriously argue to the contrary. As the action is one for rescission and not for damages, it is sufficient that the representations were made, even though made in innocence, and this, notwithstanding that the contract may be said to be a completed rather than an executory one. I say this because the difference between the represented and the actual quantity of timber is so marked that the plaintiffs cannot be said to have received what they bargained for: Kerr on Fraud and Mistake, 4th ed., 110; 20 Hals. 741, 742; and the cases: *Aberaman Ironworks* v. *Wickens*, L.R. 4 Ch. 101; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925; *Bingham* v. *Bingham* (1748), 1 Ves. 126, 27 E.R. 934.

Generally speaking, however, there can only be rescission where the transaction can be rescinded *in toto* and where there can be a *restitutio in integrum*. In this case the plaintiffs must shew ability to re-convey not simply part but all the property which the defendants parted with. The defendant Baker was a joint purchaser with the plaintiffs in these timber berths to the extent of a one-fifth interest, and he still has an interest in them. He states that he does not wish rescission of the contract, and I do not see how I can force him. He is made a party defendant, but simply as one of the purchasers, and as holding a present interest in the berths. There are no allegations whatever made against him in the statement of claim, and, by his counsel, he states that he does not want rescission. It also appears from the evidence that Dempster, Sibbald and Mahon have each an interest in the berths, and they also, in my opinion, would have to be added as parties before any order for rescission could be made. Further, as the Government of the Dominion of Canada are also interested in any transfer of timber berths, they should, it seems to me, either have been made parties or there should be some evidence to shew that they were willing to abide by the order of the Court. See *Morrison* v. *Earls*, 5 O.R. 434.

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In the result the plaintiffs' action must be dismissed with costs. There will, however, be no costs for the witnesses Allan, Montgomery, McDonald and Doak, who gave evidence on behalf of the defendants, as the defendants have entirely failed on the issue on which these witnesses gave evidence.

Action dismissed.

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ROYAL GUARDIANS v. CLARKE.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. February 3, 1914.

1. BENEVOLENT SOCIETIES (§ IV—19)—SUSPENSION FOR FAILURE TO PAY ASSESSMENT ON TIME—WAIVER BY ACCEPTANCE OF ASSESSMENT BY SUBORDINATE OFFICER—CUSTOM.

That portion of a rule of a benevolent association which provided that a member failing for thirty days after the same was due to pay an assessment which was by another part of the rule made payable on the first day of every month, should *ipso facto* be deemed suspended from all the privileges of the order and his benefit certificate thereby avoided, is waived by the association where it appears that to the actual though not "official" knowledge of the executive officer of the grand lodge, the officer of a subordinate lodge who was charged with the duty of preparing a statement of collection of assessments and the money collected and delivering the same to another officer of the lodge so that it could be sent to the grand lodge and reach it on or before the 15th of each month, had followed the custom for years of making the return himself to the grand lodge on the 15th of the month, and, before making it, of receiving from the members payment of their assessments shortly before the 15th so that it became the custom of the greater number of the members of the lodge to pay their assessments after the expiration of the thirty days, that is to say, in the first half of the month following that in which the assessments were payable.

[*Royal Guardians* v. *Clarke*, 6 D.L.R. 12, Q.R. 21 K.B. 541, affirmed.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, *Royal Guardians* v. *Clarke*, 6 D.L.R. 12, Q.R. 21 K.B. 541, affirming the judgment of Dunlop, J., in the Superior Court, District of Montreal, by which the plaintiffs' action was maintained with costs.

The appeal was dismissed, Duff, J., dissenting.

The action was brought by the beneficiaries named in a beneficiary certificate issued by the defendants, a mutual benevolent society, the late Joseph P. Clarke, deceased, a member of a subordinate lodge, constituted by the Grand Lodge of the defendants, which was formerly known as "The Ancient Order of United Workmen of Quebec and the Maritime Provinces," the certificate in question, together with the Constitution and by-laws

of the society, being, in effect, a contract of life insurance securing to the beneficiary an indemnity of $2,000 payable upon the death of the member provided he was in good standing in the order at the time of his death.

T. P. Butler, K.C., and *E. Lafleur*, K.C., for the appellants.

R. C. McMichael, K.C., and *R. O. McMurtry*, for the respondents.

FITZPATRICK, C.J.:—The contract here is to be found in the certificate and the application for membership, and both make it a condition that, if the assessments are not paid the policy lapses; the payment of the premium is made a condition precedent to the continuance of the liability, or, in other words, to be entitled to the benefits on the policy a member must be in good standing at the time of his death. FITZPATRICK, C.J.

Clarke, the beneficiary, died on the 7th of September, 1908, and the question is: What was his position at that time with respect to the society? It is admitted that the assessments for August, 1908, were not paid, and it was argued on behalf of the society, that, in consequence, he was not in good standing, and his heirs are not entitled to collect the benefits sued for. This is a good defence, unless, as found in the Courts below, Clarke was not in default, because it was usual and customary for the financier of the various lodges to receive from their members payment of their monthly dues and assessments after the expiration of the days of grace prescribed by the certificate. There are concurrent findings to that effect in both Courts below, and those findings are fully borne out by the evidence. Leroux, the financier, testifies that the larger proportion of the members' assessments were paid after the expiration of the thirty days and within the first fifteen days of the following month. It is admitted that the settled practice was not to send in the financier's report, as required by the conditions of the certificate, at the end of the month for which the assessments were due, but fifteen days later, and it is explained that this practice arose out of the fact that the members were usually in arrears in the payment of their assessments. Mr. Patterson, who describes himself as the "General Manager of the Society," admits the existence of this practice, and will not deny that it is attributable to the cause

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assigned by the financier, *i.e.*, to the prevailing custom of extending the days of grace within which members might pay their assessments. Patterson's letter to the financier, written after he heard of Clarke's death, is not to be explained on any other assumption. Clarke died within the extended period of grace.

There is this additional fact to be considered: there is no provision in the contract with respect to the place of payment of those assessments, in which case they should be collected from the beneficiary at his domicile under the law of Quebec where the contract was made, and the society carried on its operations under a charter or license obtained in the province. (Art. 1152 C.C.) It was proved beyond all doubt that the practice was to collect the assessments from the members, in which case the insured had the right to rely on that practice. It is also clear, on the evidence, that Patterson, the "Grand Recorder," received those assessments as they were paid, after the expiration of the delay with, I am satisfied, knowledge of all the circumstances. I do not think the society can now be heard to deny that the financier, the agent, whose special duty was to collect the assessments, had the authority to extend the delay: *Nicholson* v. *Piper*, 23 Times L.R. 620, at p. 621. In the course of business, as carried on with the knowledge of those in authority, Leroux had the power to do what he did. I am of opinion that, in this case, the society must be held to have adopted his act: *Wing* v. *Harvey*, 5 DeG. M. & G. 265, 43 Eng. Rep. 872. It is the law that when the practice of collecting the assessments in insurance matters is well established, the beneficiary is entitled to rely upon it, and there can be no default or forfeiture if a demand is not made on him: Planiol, vol. 2, No. 2159.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellants are a fraternal society carrying on a life insurance business. They were, as many of these societies, constituted by a constitution which vested the supreme authority in a Grand Lodge which was enabled thereby to charter subordinate lodges with definite powers.

The members of these subordinate lodges managed the details of their business by acting within the powers so granted. These members were in this instance enabled to obtain life insurance by

different plans, of which the one now in question provided for monthly payments of a fixed sum according to the age of the members; to be advanced, however, at the end of each successive period of five years during the life of the member. The payments were made to the officer of the local lodge called its "financier." No place of payment was fixed, though, according to the practice in many instances, they were made at the lodge-room. The monthly payments are spoken of as assessments and as having been levied. This seems to me rather an inapt way of expressing the substance of the transaction.

I rather think there are insurance societies or companies which proceed upon the basis of making good the losses sustained by a varying payment commensurate with the loss to be made up, and in such cases these terms might be apt ones to use.

But when the monthly payment was fixed and to be progressively increased by a mere mathematical rule, as here, other considerations are applicable to such a system than those carried on upon the basis I have just suggested as possible.

The Grand Lodge officers, each month, published in a paper called "The Protector," mailed to each member, a list of these monthly dues, by way of reminding the members of their respective amounts of dues. These monthly dues became payable on the first of each month, and, according to the term of the constitution, should have been paid within thirty days thereafter.

The Grand Recorder of the Grand Lodge was, to use his own language, "practically you might say the manager of the institution in the Province of Quebec and the Maritime Provinces."

This Grand Recorder tells us a practice grew up of his sending out, about the twentieth or twenty-fourth of the month, to each of the financiers of the local lodges, a form on which was entered the list of the members in each lodge with the amount payable by each for that month.

On this form the financier was expected to fill in the respective amounts paid him by each member, and such facts as the suspension or death or withdrawal of any member, and when so completed, to return it with the money collected to the Grand Recorder.

The system was simple, and, if acted upon promptly, brought under the eyes of this manager of the institution exactly how

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each member stood. In the local lodge now in question there were some thirty to forty members, no doubt slightly varying from time to time. The number ran up into the hundreds in some of the local lodges. But, in any case, there does not seem to have been any large amount of clerical work involved in completing the return after the payments were made. So far as I can see there was nothing involved in all this but a few hours' labour next day after the end of the month, yet, for some reason or other, as much as fifteen days was allowed for it, at other times ten days, and at the time of the trial of this case, eight days was fixed for such returns. At the time we are concerned with it was fifteen days. I will advert to the bearing of all this presently. The late Mr. Clarke had entered "Columbus Lodge, No. 26," on the 15th of December, 1896 and continued as a member till death, save one or two suspensions which are now out of the case or at least are not made part of the defence herein—and the alleged suspension of September, 1908.

He died, suddenly, on the 7th of that month, and a friend paid, next day, the sum due by him for the month of August to a person acting for the financier in his absence. The appellant, the Grand Lodge, refused to accept this money from the financier, or recognize payment, claiming that the insurance had ceased under and by virtue of the terms of article 98 of the constitution, which was as follows:—

> 98. Unless otherwise announced by the Grand Recorder, either in the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the financier of his lodge by each member of the Order on the first day of each month unless he be notified to the contrary, and any member making default for thirty days to pay the same shall *ipso facto* be deemed suspended from all privileges of the Order, and his beneficiary certificate shall thereby lapse and become void.

The learned trial Judge and the Court of Appeal have held that by virtue of a long course of dealing adopted by the parties this cannot furnish a bar to recovery.

It has been argued with great force before us that the language of this rule is so explicit and the limitation of the authority of the financier of the Columbus Lodge, No. 26, so clear that neither could this term of the constitution be varied nor the authority of the financier be so extended as to justify its variation.

I may observe that this constitution, of which we have heard so much, seems to me nothing more nor less than a contract which the association and those applying for membership therein each undertook to observe.

And I would further observe that the association, acting by and through its duly constituted officers, may by its course of conduct in its relations with its members as their insurer or with other persons in any of its dealings with them vary the terms of any contract not requiring by law to be written or may vary the mode of carrying same out; so long as not departing from the ordinary lines of conduct necessary to the success of its business as an insurer or not in absolute violation of the organic terms of the instrument under which it is operating.

Let us, therefore, see just what this article 98 says and implies. It expressly provides for the possible case of a "special notice" and the case of a member being "notified to the contrary" of the general rule that payments were to be made as specified in the rate table.

Surely if anything ever can be implied, it is implied in this very article, that the Grand Recorder may so notify and that if he did, even if in excess of authority I submit, those insuring and relying upon his express notice are entitled to have his notification observed. Nay, more, I submit it is implied thereby that in some such cases it is to be presupposed that he had authority for so acting.

I am not concerned with reconciling all the terms of this instrument. I am only concerned to know that it clearly never was intended that the hands of all the officers acting under it were so tied that they could not, for what seemed to them good and sufficient reasons, change the terms of the time of payment. Once we thus, by the manifest implication that some of the administrative officers had such powers, get rid of the need of all or a majority even of the members of the association sanctioning such proposals we have the very ordinary case of the conduct of the executive alone to consider.

That an executive so empowered can bind by their conduct those it represents in carrying out its contracts and its contractual relations with others, does not seem to me to need argument. Now let us see how little there was to do or be left undone herein as

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between appellants and those it insured. The two last lines sound very formidable to one who does not stop to consider. They admittedly mean that a man may become *ipso facto* suspended at midnight, and next morning pay a trifling sum and be *ipso facto* restored.

This is not the case of requiring to consult any one or ask his leave or be examined by a medical man, or, in short, anything but the awakened will of him most concerned. It is not the case which article 107 is evidently aimed at. Its whole purpose is evidently to hold the lash over the laggard—nothing more—unless he actually wishes to withdraw. To say that the waiver of such a term of this contract is something beyond the competence of the executive seems to me idle.

The grave question is whether or not the executive did in fact waive it and to the extent claimed, and in such deliberate fashion by their long course of conduct as to preclude them from setting up herein the contrary. Although Patterson, the Grand Recorder, was acting with and under the directions of an executive committee, we must not lose sight of the fact that he was "practically the manager of the institution." He, on the morning of Clarke's death being announced, telephoned to one Gilbert acting for Leroux, the financier of Columbus Lodge, No. 26, to know if Clarke had paid his dues of last month, and followed this up by the following letter:—

J. Leroux, Esq.,
Financier, Columbus Lodge, No. 26.

Dear Sir and Bro.—Be good enough to give the date of last payment made by the late Bro. J. P. Clarke and amount of same. Please be particular to give this exact, as you may be called upon to attest same under oath. I beg to warn you not to accept any money on his behalf for assessments. Kindly reply at once.

Yours fraternally,
(Signed) A. T. PATTERSON,
Grand Recorder.

It is not often honest men furnish such cogent evidence against themselves as this conduct of Grand Recorder Patterson does, in my judgment, against him relative to the knowledge of the course of dealing now in question, when read in light of all the previous history and surrounding facts and circumstances.

Why this feverish haste and urgency a week or more after the books had been forever closed if he honestly believed this clause

of the constitution had been observed—and did not know that it had been more honoured in the breach than in the observance?

As the evidence he gave is full of that sort of equivocation, and apparently mental reservation, regarding which we need the eyes and ears of the learned trial Judge to guide us in appeal, I accept that which his report indicates as being conclusive so far as it goes.

I shall, therefore, not deal at length with the details of the evidence bearing upon the question of the knowledge of the executive, by and through Patterson, of almost all, and in substance all, that Leroux, the financier, tells us. And assuming the Grand Recorder knew or had good reason to know the substance of what Leroux tells we need not doubt the conclusion to be reached. I must observe, however, that it seems impossible to me for any man of the alert mind of Mr. Patterson, as shewn in the course of his evidence, not to have appreciated the full meaning of the financial secretaries' need for more time to make their returns on any other hypothesis than that the moneys had not always come in just as quickly as the threatening rule required.

I have outlined the nature of these returns and the little to be done if money all in and ready to complete the business. Why was fifteen days needed? There is no explanation. Why was the period varied from time to time? Who took the side of the laggards in all the discussions leading to these changes? Who was afraid to cut them off? Who was to profit by their business? Who was to lose if they were cut off?

Is it not plain as if written that, while keeping in the constitution a plea for urgency, the executive was anxious to do business? Is it not equally plain that all this course of dealing was saying to the members, though the letter says thirty days we mean you have forty-five days if you cannot pay?

In doing so they were but conforming by acts and conduct to the actual language of the policy in the case of *Tattersall* v. *The People's Life Insurance Co.*, 9 O.L.R. 611, which I suppose is a usual provision. Even fraternal societies have to observe the trend of competitive exigencies in the insurance business and act accordingly. I think appellants' conduct in this instance, and so many others in the same matter of time, was tantamount to extending the time of payment, and should be treated accordingly.

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The remarkably clean slate that the reports for months produced do shew, regarding the lapses of the kind now in question, though shewing others more serious in import certainly, did not pass unnoticed unless it was just what this manager from his knowledge of the situation expected.

When we consider the frame of the Grand Recorder's approved form which has a column for "suspended, etc.," under heading "membership deceased" and another column for "arrears," and find, in practice, that it was under this latter and not under the former that such defaults as in question were put when the report was made to conform to what the Grand Recorder approved in this very instance, surely we must conclude there was a distinction in his mind between actual suspension and merely being in arrears with a "susp." added.

However that may be, it seems suggestive. As to the local law requiring the demand of payment from the debtor, I do not say more than that such doubt as created thereby lent aid to this way of looking at the business in hand.

The appeal should be dismissed with costs.

Duff, J. (dissenting)

DUFF, J. (dissenting):—I shall first state what appear to me to be the relevant facts, that is to say, the facts upon which, as it seems to me, the rights of the parties to this litigation must be determined. Other facts upon which the respondent largely rests her case, but which seem to me, for reasons I shall state, to be beside the point, may be considered later. On the 15th day of December, 1896, the deceased, Joseph P. Clarke, became a member of the Columbus Lodge of the Ancient Order of the United Workmen of Quebec and the Maritime Provinces, and received a beneficiary certificate, the material provisions of which are as follows:

THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC AND THE MARITIME PROVINCES, DOMINION OF CANADA.

This Certificate cannot be assigned or hypothecated.

This Certificate issued by the authority of the Grand Lodge of the Ancient Order of United Workmen of Quebec and the Maritime Provinces, witnesseth that Brother Joseph P. Clarke, a Workman Degree member of Columbus Lodge, No. 26, of said Order, located at Montreal, in this jurisdiction, is entitled to all the rights, benefits and privileges of membership in the Ancient Order of United Workmen of the Jurisdiction of Quebec and

the Maritime Provinces and to designate the beneficiary to whom the sum of Two Thousand Dollars, without use or interest of the Beneficiary Fund of the Order at his death, be paid.

This Certificate is issued upon the express condition that said Joseph P. Clarke shall in every particular while a member of said order comply with all the laws, rules and requirements thereof.

* * * * * *

ENDORSEMENT.—"ASSESSMENT SYSTEM."

Besides the terms and conditions appearing in the body hereof, this Certificate is issued upon the following further terms and conditions which are to be read as forming a part of this contract, viz.:—

(1) That the member to whom this Beneficiary Certificate is granted is bound not only by the Constitution, Laws and Amendments of the Order now in operation, but also by any Amendments that may subsequently be made thereto.

(2) That only persons entitled under such Constitution, Laws and Amendments to become beneficiaries can be named as such by the member to whom this Certificate is granted.

(3) *That this Grand Lodge shall not be liable to pay any sum under this Contract, if . . . he is not a Member of this Order in good standing.*

(Sig. of Member).....Attest.....Recorder .....Lodge, No.....

The Ancient Order of United Workmen appears to have been organized, in 1868, in Pennsylvania. The Order comprised a Supreme Lodge by which Grand Lodges of inferior jurisdiction were established, the Grand Lodge of Quebec and the Maritime Provinces being first constituted in 1894. In 1898, this Grand Lodge was registered under the Benevolent Associations Act of the Province of Quebec, and thereby became a body corporate.

In September, 1907, the Grand Lodge for Quebec and the Maritime Provinces seceded from the parent order and became an entirely independent body. In 1908, the name was changed by the authority of an order of the Lieutenant-Governor in Council of Quebec to "The Royal Guardians," and in May, 1910, after the commencement of this action, the Royal Guardians were incorporated by an Act of the Parliament of Canada. The constitution of the order and the laws governing the Grand Lodge and the members of the order subject to its jurisdiction, as adopted in 1906, are in evidence, and (with certain changes not material to any question on this appeal made necessary in consequence of the secession from the jurisdiction of the Supreme Lodge of the parent order) are admitted to have been the constitution governing the Grand Lodge in 1908, when Clarke died, and the

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suspension was alleged to have arisen which is the principal subject in controversy before us. The constitution provides, article 2:—

2. The following Constitution, as hereinafter set forth, subject to such changes as may be ordained by the Supreme Lodge, shall govern this Grand Lodge and the subordinate lodges and members of the Order in this jurisdiction, and no amendment or alteration shall be made in the said Constitution by this Grand Lodge except at a stated or special meeting of Grand Lodge, nor unless notice of such amendment shall have been given to the Grand Recorder sixty days prior to session of Grand Lodge and a copy thereof sent by him to each subordinate lodge thirty days previous to such meeting, and that a two-thirds majority of votes of the members of G.L. present at such meeting of Grand Lodge shall be cast in favour of such amendment or alteration.

By article 4, the Grand Lodge was to consist of certain officers and representatives from subordinate lodges within the jurisdiction.

By article 78:—

The following rules (arts. 78-118) are prescribed for the government of this Grand Lodge Beneficiary Jurisdiction in the collection, management and disbursement of the Beneficiary Fund.

By article 79: The Grand Lodge guarantees payment of the amount mentioned in the beneficiary certificate to the members named, provided:—

That said member shall fully comply with each and all requirements of the hereinafter specified conditions, with the Constitution, and the general laws governing the Order and shall at his death be a member of the Order in good standing.

The provisions as to the manner of assessment, the period of grace allowed for the payment of the sums levied and as to suspension for non-payment and re-instatement, are set out in articles 96-110 inclusive. The parts of these provisions which are immediately material are these.

Article 97 provides that (in certain circumstances mentioned in the article indicating that the beneficiary fund of the Grand Lodge needs replenishment in order to provide funds for the payment of benefits),

it shall be the duty of the Grand Recorder to call upon the subordinate lodges to forward the beneficiary funds in their respective treasuries and at the time of making such call to make an assessment upon each member of the Order who shall have received the Workmen Degree prior to the date of the last assessment.

Sections 98, 99 and 100 (pp. 51 and 52) are as follows:—

98. Unless otherwise announced by the Grand Recorder, either in the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the Financier of his Lodge by each member of the Order on the first day of each month unless he be notified to the contrary, and any member making default for thirty days to pay the same shall *ipso facto* be deemed suspended from all privileges of the Order, and his Beneficiary Certificate shall thereby lapse and become void.

99. Every call made upon subordinate lodges to forward Beneficiary Funds shall be made upon the first day of the month that is not Sunday or a legal holiday, shall contain a list of deaths officially reported to the Grand Recorder prior to the last day of the preceding month, and not included in the preceding call, and all necessary instructions relative to forwarding the funds called for. The notice of such call is given by the Grand Recorder having it printed in the official organ of Grand Lodge, or by mailing a special notice to the Recorder of each Lodge.

100. Any member not receiving the said official organ or official notice before the fifteenth day of any month shall write the Financier of his Lodge to ascertain whether an assessment has been made, and shall also by registered letter give notice to the Grand Recorder of the non-receipt of such official organ or notice; otherwise default to pay an assessment within the required delay shall not be excused on any plea of want of notice.

The two remaining sections which are material are secs. 106 and 107, which are in these terms:—

106. The Grand Recorder is hereby instructed, so soon as he receives the Subordinate Lodge's report, to give notice to any member reported as having failed to pay to the Financier of the Lodge of which he is a member, on or before the expiration of thirty days after an assessment has been made for the Beneficiary or other funds, and who, if under the Level Rate Plan, for a period of three years has not sufficient money to his credit in his reserve to cover the amount of such assessment, that his interest and benefit, and those of all claiming through him, from and after said date, and such member shall not be reinstated except as hereinafter provided. Such notice to be delivered or sent by mail (registered) to the last address of such member known in the Grand Recorder's office.

The above notice by the Grand Recorder is, however, only a matter of courtesy, and failure to give or to receive the same cannot be pleaded by a defaulting member, as in any way avoiding the suspension caused by his default.

Payment to the Financier of his Subordinate Lodge within thirty days from date of such suspension shall be for the purposes of this clause considered as payment to the Grand Lodge.

107. Any suspended member who has forfeited all his rights by reason of non-payment of assessments for the Beneficiary or other funds, may be reinstated, if he be living, at any time within a period of three months from the date of such suspension, upon the following conditions, and none other, that is to say: He shall pay all assessments that have been made during

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that time, including the one or more for the non-payment of which he had become suspended, together with his dues to date, and if thirty days have passed since such non-payment, he shall at the same time furnish a certificate by a duly qualified medical practitioner, that he is in good health. The Financier shall report the same to the Lodge at its next stated meeting, and the fact of the re-instatement shall be entered on the minutes; such report, however, is not to be a condition precedent to the re-instatement. But it is hereby expressly declared that the death of a member while so suspended, and during the said three months, shall debar him from being restored into good standing or from being re-instated, by payment of any assessments, either of the one or more for the non-payment of which he became suspended, or those that shall have been made against him during the said period; it being an absolute condition that all membership rights are forfeited by such non-payment, and the Beneficiary cannot claim any rights in case the member should die before complying with all the above conditions and before being re-instated as provided in this constitution, and payment or tender by his personal representative or representatives during such period shall in no case be held to restore the said member into good standing in the Order.

On the 1st of August, 1908, a call was made upon the subordinate lodges under the provisions of article 97, and, at the same time, an assessment was made and notice of it was given in the official organ of the Grand Lodge. The assessment and the notice are as follows:—

Official Notice of the Beneficiary Fund Assessment, No. 8, for August, 1908.

Office of the Grand Recorder,
Fraternal Chambers, A.O.U.W. Building,
Cor. Sherbrook St. and Park Ave.,
Montreal, Que., August 1st, 1908.

To the Members of the Ancient Order of United Workmen,
Jurisdiction Grand Lodge of Quebec and the Maritime Provinces.

You are hereby notified of the following deaths, necessitating the levy of one assessment:—

* * * * * *

In order to provide for payment of death losses, Assessment No. 8 is hereby levied upon each Workman Degree member who has taken the degree prior to the 1st of August, 1908, according to Tables of Rates in adjoining column.

The said assessment is now due, and must be paid to the Financier of your Lodge on or before the 31st instant. Failing to comply within the above stated dates you will forfeit all your rights, benefits and privileges, by becoming suspended.

Should you change your address notify your Financier, also the publisher of "The Protector," giving name and number of your Lodge.

* * * * * *

A. T. PATTERSON,
Grand Recorder.

Note (section 97, Grand Lodge Constitution, amended 1907).—Unless otherwise announced by the Grand Recorder, either by the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the Financier of his Lodge by each member of the Order on the first day of each month, and any member making default for thirty days to pay the same shall *ipso facto* be deemed suspended from all privileges of the Order, and his beneficiary certificate shall thereby lapse and become void.

Clarke died on the 7th of September, 1908, without having paid this assessment. After his death the amount was paid by some friends to the financier of his lodge, who accepted it, but the responsible officers of the Grand Lodge, taking the position that Clarke had incurred suspension by reason of the non-payment of his assessment on the 31st of August, refused to recognize this payment and declined to pay the benefits to which the respondents would have been entitled had Clarke been a member of the order in good standing.

The rights of the beneficiaries under Clarke's certificate rest upon the condition, which is an essential condition of them, that he shall have been a member of the order in good standing at the time of his death and that the beneficiary named shall be entitled to demand payment under the provisions of the constitution and laws of the order in force at the time of his death. Articles 97, 98, 100, 106 and 107, above quoted, provide in the most explicit terms that the failure to pay an assessment at the expiration of thirty days after it is made (and, by article 98, an assessment is deemed to have been made on the first of each month unless notice to the contrary is given) shall *ipso facto* involve the suspension of the delinquent member with the consequence of the lapsing of all rights under that member's beneficiary certificate; and sec. 107, moreover, contains a specific declaration to the effect that on the death of a member while under suspension the provisions of the constitution as to reinstatement cease to have any application and all potential rights under the beneficiary certificate irrevocably disappear.

I have been forced to the conclusion, very much indeed to my regret, that there is nothing in the circumstances of this case affording any way of escape from the operation of these provisions which I think have the construction and effect contended for by the appellants, and that the claim of the respondent fails. The grounds upon which the respondent rests her case are two: 1st,

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It is contended that, giving the articles referred to the legal effect assigned to them by the law of Quebec, the assessment was payable at the domicile of the member, that, consequently, it was the duty of the creditor to make demand at the member's domicile, and that its failure to do so had the effect, in law, of excusing non-payment. The second contention, I am obliged to say, I have some difficulty in stating with precision; the general effect of it is that the Grand Lodge is precluded, because of certain alleged practices connected with the collection and receipt of assessments, from setting up the articles of the constitution upon which it relies.

First, then, of the legal effect of these articles as touching the place where the payment of the assessments is exigible. A question suggests itself *in limine* which it may be worth while to indicate, although in my view it is unnecessary to pass any opinion upon it; and it is this: Is the legal effect of Clarke's contract necessarily ruled by the law of Quebec?

The Grand Lodge of Quebec and the Maritime Provinces was when first constituted an unincorporated association having members and subordinate lodges in the Maritime Provinces as well as in Quebec. The Grand Lodge was affiliated with other lodges all under the jurisdiction of the Supreme Lodge of the order, which had been organized in Pennsylvania.

The contract governing the rights of the members of the order in Quebec and the Maritime Provinces was expressed in the constitution of the Grand Lodge, subject, however, to the provisions of the constitution of the Supreme Lodge in case of conflict. It might, I think, be suggested with some shew of plausibility, that, in the matter—the vital matter—of the payment of assessments, the constitution itself affords conclusive internal evidence of an intention that the obligations of the members, whether in Quebec or in the three Maritime Provinces, should be governed by a single law, and, moreover, having regard to the origin of the order and of the constitutional provisions upon this subject and to the actual circumstances of this particular Grand Lodge itself, that these provisions contemplate in this respect the application of the common law rule according to which, reasonably, the debtor seeks his creditor rather than the rule of the French law.

In this matter of the law to be applied, the principle of the law

of Quebec seems to be the same as the principle of the law of England, *viz.*, that the actual or presumed intention of the parties as ascertained from the instrument and the circumstances must, in the last resort, govern.

I pass over this question because, according to the law of Quebec, I think the respondent's contention on this point fails.

The relevant provisions of the Civil Code do not seem to leave the rule of law in doubt.

Articles 1152 and 1164 are as follows:—

1152. Payment must be made in the place expressly or impliedly indicated by the obligation.

If no place be so indicated, the payment, when it is of a certain specific thing, must be made at the place where the thing was at the time of contracting the obligation.

In all other cases payment must be made at the domicile of the debtor; subject, nevertheless, to the rules provided under the titles relating to particular contracts.

1164. If, by the terms of the obligation or by law, payment is to be made at the domicile of the debtor, a notification in writing by him to the creditor that he is ready to make payment has the same effect as an actual tender, provided that in any action afterwards brought the debtor make proof that he had the money or thing due ready for the payment at the time and place when and where the same was payable.

The provisions of this constitution, above quoted, when read with the other provisions relating to the making and collection of assessments, seem to imply that the member shall seek out the financier *and not* the financier the member.

In articles 165, 166 and 167, which define the duties of the officers of the subordinate lodges, there is no provision for the taking of active steps by any of these officers for the purpose of collecting assessments. One sees further that no provision is made for the payment of these officers. The lodges are organized with a view to economical administration, and the constitution seems to contemplate that the offices shall be honorary and filled by persons who in the ordinary course are largely occupied with their own vocations.

That seems hardly consistent with the notion that the assessments are intended to be in point of law payable at the domicile of the member.

But the arguments advanced involve the proposition that the making of the demand at the domicile is a condition which must

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be complied with to put the member in default. Assuming for the moment that this view is consistent with article 1164, above quoted, it seems clear enough that you cannot give effect to this view without doing violence to the intentions of the framers of this instrument as expressed in secs. 97, 98, 99, 100, 102 and 106. Article 98, for example, says that an assessment is due and payable on the first of each month by each member unless he is notified to the contrary, and any member making default for thirty days shall suffer the consequences therein mentioned. According to the argument of the respondent, default would never take place until demand at the domicile of the member, from which time only the period of thirty days would begin to run. That would necessitate a demand at the domicile of each member on a given day, for which no sort of provision is made, and which cannot be supposed to have been in the contemplation of the constitution; or demands on successive days with the effect of giving different delays to different members in violation of the principle of equality which obviously pervades the constitution. The other articles are open to similar observations. The application of the rule suggested would throw the whole scheme into confusion. I think the proper conclusion is that, upon this point, the rule to be applied is that above indicated.

But, assuming the effect of article 1152 C.C. is to make the assessment payable at the member's domicile, the failure to demand payment there is not in itself sufficient to excuse the failure to pay. Article 1164 C.C. seems conclusive upon that point; and the evidence, unfortunately, does not bring the appellants within the protection of that article.

I come now to the second ground, which is that, for certain reasons, the appellants are precluded from alleging Clarke's non-performance of the conditions of his contract. Before stating the facts upon which the respondents rely in support of this contention it would be convenient first to refer to sec. 115 of the constitution. That section is as follows:—

> It shall be the duty of each Subordinate Lodge to make a monthly report to Grand Lodge, which report shall be closed on the last day of each month, signed by the Financier and Recorder, and at once sent to the Grand Recorder.
>
> This report shall be in the form provided by Grand Lodge, and contain the information thereby demanded.

Should said report fail to reach the Grand Recorder on the fifteenth day of any month, it shall be his duty to call upon the Recorder of each delinquent Lodge, by telegram or otherwise, to forward said report forthwith. In months in which no assessment is called, a report shall be made as if there were an assessment, except that the blank for current assessments shall not be filled.

This section was construed, not unnaturally—I think, indeed, it is probably the proper construction of it—as giving to the officials of the subordinate lodge a delay of fifteen days to make up and forward the report referred to. The forms provided for by the Grand Lodge referred to in the section called for a statement of the assessments paid for the month to which the report related, by the members of the lodge, and of the names of the members suspended for non-payment. By sec. 166 (*c*) it was the duty of the financier of the subordinate lodge to notify the Grand Recorder of all members who stand suspended on the last day of each month. The practice was to treat the report provided for by sec. 115 in which this information ought to be contained, as being a sufficient notification under sec. 116 (*c*). According to the strict letter of these provisions, therefore, members failing to pay an assessment due on the first of a given month within the thirty days of grace allowed by the rules should be marked suspended in the report under sec. 115. On the other hand, the effect of this would obviously be in some cases to give rise to what would very naturally appear to the officials of such an organization as this as quite useless trouble, not only to the officials themselves, but to the members, and at the same time involve the members in some, it is true, very slight expense. I am dwelling on this because it seems to be necessary to consider the practicable working of sec. 115 and sec. 166 (*c*) from the point of view of the member and the official of the subordinate lodge in order to appreciate the contention I am about to consider.

The constitution requires this report to be made up as of the last day of each month. But consider the case of a member having failed to pay during the given month his assessment for that month, but paying it a day or two after the end of the month to the financier. What is the position of that member? During the period which elapsed after the expiration of thirty days from the first day of the month when his assessment became due and the day on which the assessment was paid to the financier the member

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was, according to the provisions of secs. 98 and 107, suspended. If he died during that period (on this point sec. 107 is most explicit) no rights could arise under his beneficiary certificate. But, if living, on payment at any time within thirty days after the date on which the suspension accrued he became by virtue of the payment *ipso facto* restored to his status as a member. That is the construction and effect attributed to sec. 107 by the Grand Lodge, and that, in my view, is the proper construction of that section. The requirement that the member who has become suspended "shall pay all assessments that have been made during that time" has been construed, and, in my judgment, rightly construed, as requiring the payment of such assessments in accordance with the provisions of the constitution, *viz.*, within the period of grace allowed; and it follows that where the member pays prior to the expiration of the thirty days following the accrual of the suspension he is obliged to pay the assessment in respect of which he has made default and that assessment only, in order to obtain re-instatement. Section 107 requires that where the conditions of re-instatement have been satisfied, which in the case we are considering are limited to the payment of the overdue assessment, the fact of the re-instatement is to be reported to the next meeting of the lodge, but this declaration is added: "Such report, however, is not to be a condition precedent to the re-instatement."

Such, then, being the position of a member who, having failed to pay his assessment within the month for which it is levied, pays it within the first few days of the next month and, thereby, recovers his status as a member of the order in good standing and becomes re-invested with the rights under his beneficiary certificate which had suffered a temporary lapse during the period of suspension, one understands how the inutility of reporting such a member as suspended would impress itself upon the financier and recorder of his lodge. The reporting him as suspended would necessitate a formal notice by the Grand Recorder under sec. 106 and the entry of the suspension in the records of the Grand Lodge, the payment of a small fine by the defaulting member, and would involve, it may be, some discredit for the lodge itself.

The result was that a practice appears to have grown up, certainly in Columbus Lodge, and probably this practice was

general, of not reporting as suspended members who paid their assessments at any time before the report was sent forward under sec. 115; and this practice, while irregular and involving a violation of sec. 115, could not, in itself, prejudicially affect the rights of the Grand Lodge, *vis-à-vis* the holders of beneficiary certificates, provided the provisions of sec. 107 were observed and no assessment was received on behalf of a defaulting member who had died while under suspension.

It is this practice which is in the main relied upon as constituting the foundation of the respondents' contention that the appellants are precluded from setting up Clarke's default.

The contention is put in two ways: First, it is said that the provisions of the constitution quoted above became superseded by a practice or custom which extended the period of grace from thirty days to the date not later than the fifteenth of the month following the making of the assessment when it became necessary for the officers of the subordinate lodge to forward their report in time to reach the Grand Recorder by the fifteenth of that month. Secondly, it is said that, in effect, by this practice members were treated as being in good standing so long as their assessments were paid in time to be forwarded with the monthly report, and that the practice was known and acquiesced in by the Grand Lodge, and that this acquiescence precludes the Grand Lodge from asserting that Clarke was not in good standing at the time of his death.

Before analysing this contention I should summarize the features of the evidence bearing upon it which must be kept in view. There is no evidence that, except in Clarke's case, an assessment was ever accepted by any financier of a subordinate lodge on behalf of a member who had died while under suspension. Leroux, the financier of Columbus Lodge, says that he had never done so. And the effect of the evidence seems to be that if such a thing had occurred it had not come to the knowledge of the officials of the Grand Lodge. Then it is not denied that in each month in which an assessment was levied a notice was sent through the official organ of the Grand Lodge, the newspaper "Protector," in the form of a notice for August quoted above in full—a notice specially emphasizing the consequences of failing to pay within the month, and quoting verbatim the sec. 97 in which these

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consequences are declared. This notice was mailed to every member as required by the rules, and by the great majority of members, no doubt, was received. In the case of Columbus Lodge, it appears to have been a common thing for members to delay the payment of their assessments until after the expiration of the month, but it was by no means universal. Columbus Lodge seems to have been in a state of disorganization for a number of years; Leroux states that for four years there had not been a meeting of the Lodge. As to the other lodges, there is really no evidence to justify the inference that there was any general practice of delaying the payment of assessments beyond the time allowed by the rules. Patterson, the Grand Recorder, says that he had his suspicions that assessments were received after expiration of the days of grace, and forwarded without any report of the default. But he denies any knowledge of such cases, and according to his statement, at all events, his evident belief that such cases did exist was simply an inference founded upon the probabilities, and the fact that the reports were sometimes delayed beyond the fifteenth. Brady, the Grand Master Workman, denied any knowledge of any such practice, although he too had his suspicions.

There is, however, no evidence and there appear to be no facts upon which an inference could properly be based that delinquent members who allowed themselves the indulgence of falling into default were under any delusion as to the provisions of the constitution applicable to such a case, or as to the nature of the risk they were running. Larkin, who was called as a witness on behalf of the respondents, and says he considered himself in good standing if he paid before the forwarding of the monthly report, admits that he was acquainted with the provisions of the constitution, requiring payment before the thirtieth of the month. The members who indulged in this practice seem to have been aware of the importance of concealing the facts from the officials of the Grand Lodge. In Columbus Lodge the pass books of the members in which the financier receipted the payment of the assessments did not shew the date of payment, but only the month to which the assessment was attributed. In lodges in which the practice was to give the date of payment the receipts in such cases were antedated. The friends who paid Clarke's

assessment were evidently impressed with the necessity of doing so at the earliest moment; obviously they did not entertain the idea that Clarke was legally entitled to postpone payment until the report was forwarded. It is nowhere suggested that any act of the Grand Lodge or of any of its officials or any of its records or any communication made or published under its authority had justified or created in any way a belief amongst the members that secs. 98 and 107 were no longer in force or that the provisions of the constitution were in any respect other than those which are now produced in this litigation. On the contrary, the monthly notice, as I have already mentioned, pointedly called the attention of members to the terms of sec. 98 and the effect of non-compliance with them.

Now, it is a term of every beneficiary certificate that the member shall observe the conditions of the by-laws and constitution and amendments thereof. Among these are, of course, the rules prescribed (articles 78-116) for the collection, management and disbursement of the beneficiary fund, and in particular, the rules governing rights of the Grand Lodge in the levying of assessments and the consequences of non-payment.

While each member is bound by these rules himself, he is entitled to have them observed by others, that is to say, by the members in their dealings with the Grand Lodge and by the Grand Lodge in dealings with members.

Article 2. "The constitution" . . . shall govern this Grand Lodge and "the subordinate lodges and all members of the order"; and the rules just referred to "are prescribed" in the words of article 79 "for the government of this Grand Lodge beneficiary jurisdiction." These rules, in a word, constitute, in effect, a single contract to which the Grand Lodge and all beneficiary members are for the time being parties. It follows, of course, that they cannot be altered except in accordance with some provision of the constitution, *i.e.*, the contract itself or by the consent of all parties.

The constitution makes provision for amendment by the Grand Lodge by a two-thirds vote after certain notices have been given. The Grand Master Workman has power to grant dispensations *not inconsistent with the constitution*, and the Grand Lodge may

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adopt standing regulations *not inconsistent with the constitution* for the purpose of carrying the same into effect.

But it is clear enough that the Grand Lodge would have no authority, except by means of an amendment of the constitution, to change the provisions of articles 97, 98, 100, 106 and 107, already quoted, providing *ipso facto* suspension of members who fail to pay their assessments within the thirty days of grace provided for. An express resolution to that effect would, in itself, be inoperative.

And still less would the Grand Lodge have power to provide for the exemption of particular members or particular lodges from these provisions for giving, for example, to the members of some lodges forty-five days of grace instead of thirty days, the period allowed the other members. Equality is the fundamental principle of every such constitution as this.

There could, therefore, be no such thing as an amendment of these rules by the operation of "custom." It is conceivable that a practice might become established by the acquiescence of every member of the order the validity of which everybody would be estopped from disputing; but that would be a very difficult case to maintain where new members are constantly being added. No such case is suggested here.

Almost as difficult would it be to make out that the Grand Lodge is by reason of some practice precluded from setting up the provisions of these rules, for example, secs. 98 and 107.

Any such contention when analysed must come to this—that the Grand Lodge in permitting the practice relied upon had led the members to believe that these provisions would not be enforced and that the Courts would compel the Grand Lodge to give effect to this expectation in favour of members acting upon it in good faith. In the case of the specific provisions now under consideration, the contention being that in permitting the particular practice already described, the Grand Lodge encouraged the members of Columbus Lodge to act upon the assumption that these sections in so far as they provide for suspension or non-payment within the prescribed delay, would not be enforced provided the monthly assessments were paid in time to be forwarded to the Grand Lodge on the 15th of the month following that in which they became due. But the Grand Lodge having no authority to exempt lodges or

members by express declaration from compliance with these provisions of the constitution, it seems obvious that it could not so do by mere acquiescence in a course of conduct. Such a course of conduct, so long as there should be members entitled to insist upon the provisions of the constitution being observed, could not prevent the Grand Lodge insisting upon compliance with the provisions of the constitution.

Then a decisive answer to this argument on behalf of the respondent appears to be this, *viz.*, that no member or person seeking to enforce rights under a beneficiary certificate can be heard to say that he did not know the provisions of the constitution which are made part of his contract. I exclude, of course, cases in which a member has been misinformed as, for example, of some amendment of the constitution through some communication made by some official or agency under the proper authority of the Grand Lodge or by means of some error in the record of the Grand Lodge itself. Knowing the rules as to the payment of assessments and the consequences of non-payment as prescribed by the rules, and knowing that the Grand Lodge has no authority to exempt lodges and members from the observance of these rules or from the consequences of non-observance, it must be taken that when he, alone or in concert with others, departs from them he does so at the risk of having to suffer the consequences pointed out by the constitution.

Coming to the case at bar, in addition to the knowledge of the rules which must be imputed to Clarke there are the circumstances mentioned above—the monthly notice, in view of the terms of which it is impossible to suppose that there could have been anything like a general belief in the order that the provisions of secs. 98 and 107 would not be enforced, the fact that there is no evidence of a single instance in which a defaulting member, dying while in default within the meaning of secs. 98 and 107, was recognized as having died in good standing, the fact that the conclusive proof that no such case had occurred in the history of Columbus Lodge, at all events since the year 1903, that the practice, even such as it was, was obviously a clandestine practice—it seems impossible to conclude as a fact that members generally were really misled into a belief that they could fall into a default without suffering the consequences pointed out in secs. 98 and 107. What

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they did understand doubtless was this: That they would not be reported to the Grand Recorder as being in default, or as being suspended, if they paid their assessments in time to enable their financier to forward them with his monthly report; and that they would not suffer the inconveniences, whatever they might be, arising from being reported as defaulters. But there is no solid basis disclosed by the evidence upon which one can fairly found the conclusion that the members of Columbus Lodge, and still less the members of the order generally, did not understand that in failing to pay within the prescribed thirty days they were making default within the provisions of the constitution which remained in full force. Again, even assuming that there may have been members who in fact were ignorant of the constitution who never read the notices they received who having before their minds a sort of impression that in order to avoid obvious and immediate inconvenience an assessment must be paid by the fifteenth of each month at the latest and without thinking of ulterior and more serious consequences paid only at the last moment—is there anything in the circumstances of this case which can fairly be said, on legal principles, to cast upon the Grand Lodge the responsibility for such ignorance and neglect? The answer, it seems to me, must be in the negative if only for the simple reason that the whole pith of the complaint against the Grand Lodge rests upon the members' supposed ignorance of the provisions of the constitution. Take away this supposition of ignorance and there is nothing left. The Grand Lodge cannot be responsible for that, as I have already said, for the reason that a person who enters into a contract such as that expressed in these beneficiary certificates, and constitutional rules and by-laws, cannot excuse himself from non-performance of conditions on the ground that he does not know the provisions of his contract. It is his duty to know them. He must be held to know them. It is impossible to work out such a system as this upon any other principle. Then again, assuming ignorance in fact, on what ground is the Grand Lodge to be held responsible for it? There is nothing in the circumstances of this case to shew that the officials of the Grand Lodge had reason to suspect any general ignorance of the provisions in question. As I have already said, the evidence shews, on the contrary, that there was no such ignorance. Every-

thing that could reasonably be suggested was being done by the Grand Lodge to induce members to pay promptly by keeping before their eyes the consequences of default; and the officials had, apparently, every reason to believe, what I think was the fact, that these provisions were generally understood. Default, where there was default, they doubtless attributed to reasons other than ignorance. Clarke's case unfortunately illustrates my meaning. He was a persisent defaulter, being recorded again and again as suspended, making default no doubt with a full knowledge of the consequences. Indeed, there seems to be grave reason to doubt whether, strictly speaking, he was a member in good standing during the month of August. I mention this, of course, not for the purpose of insisting upon a point that the appellants have quite properly refused to take, but for the purpose of pointing out the difficulty of inferring that Clarke's default was due to a lack of appreciation of the consequences of default. Leroux's evidence, moreover, shews that, notwithstanding a reprimand administered to Columbus Lodge for the looseness of its methods, no change has since taken place, and, notwithstanding the position the Grand Lodge has taken in this litigation, the former practice is apparently continued.

Then the respondent says that the practice of the financier in sending for her husband's assessment on the fifteenth of every month established a course of business by which the Grand Lodge is bound. Now, first, it is perfectly clear that neither the financier nor Columbus Lodge had any authority to exempt Clarke from the operation of secs. 98 and 107, yet the contention must come to this, if it is to have any force, that the financier by his conduct had relieved Clarke from the operation of those provisions of the constitution. The contention appears to assume that the financier having no actual authority, had ostensible authority to bind the Grand Lodge by such a course of conduct. The argument seems to be that the Grand Lodge must have had notice through the financier of what was going on and receiving the assessment, with notice of the facts, ratified the acts of the financier. The contention, unfortunately, is compounded of fallacies, even leaving aside the fatal objections that the Grand Lodge itself had no authority under the constitution to exempt Clarke from these provisions except by amending the constitution.

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Clarke must be taken to have known the limits of the financier's authority, and the limits of the constitutional power of the Grand Lodge itself, with respect to these provisions of the constitution. Again, as Clarke was entitled to pay the financier when he did pay and to be treated thereafter as a member in good standing notwithstanding any pre-existing suspension, the acceptance of the assessment ratified nothing. The receipt by the financier must be presumed to be a rightful one, not a receipt in violation of the constitution. And, still again, the reasonable explanation of the financier's conduct, considered as a matter of fact, in sending his messenger to collect Clarke's assessment, is that he did it out of kindness for Clarke, who, unfortunately, seems to have had a very hard struggle to keep up his payments. It is not good policy to interpret such kindly acts of indulgence as establishing a course of business, in breach of the duty of the agents doing them, unless it is quite clear that such is the proper construction of them. It has been pointed out again and again that such extreme interpretations have a tendency to compel people to stand on their strict rights for their own protection rather than follow the more natural human kindly way, and for that reason they should be avoided except where there are really solid grounds for them. In this case the evidence utterly fails to begin to make a case shewing that Clarke was misled by the kindness of the financier.

What I have already said will make it clear that, apart from numerous other grounds of distinction which become obvious when one keeps the facts of this case in view, the cases cited, of which *Wing* v. *Harvey*, 5 DeG. M. & G. 265, 43 Eng. Rep. 872, is perhaps the type, can have no bearing upon any question before us on this appeal, for this short reason: That, as the member is conclusively presumed to know the limits of the authority of the Grand Lodge, the subordinate lodges and the officials of each (which are defined specifically and exhaustively by the constitution and by-laws), the ostensible authority of the officials cannot for any relevant purpose be of wider scope than the actual authority.

Anglin, J.

ANGLIN, J.:—I concur in the dismissal of this appeal. The evidence establishes that the financier of Columbus Lodge, to which the deceased Clarke belonged, was in the habit of collecting assessments from members, including Clarke, at their residences

after the period of thirty days during which, under the by-laws of the society, they might pay without incurring suspension, had expired, *i.e.*, he collected up to the 15th day of the month following that on the first of which the assessment became due. It was then that the financier was required to make his return to the Grand Lodge. His custom was, to return, on the 15th day of the following month, the moneys so collected after the expiry of the month in which they were payable as assessments paid in the ordinary course and not as moneys received from suspended members. This practice had continued for at least five years before Clarke's death. It appears to have prevailed also in other lodges. The learned trial Judge drew the inference from the evidence that the Grand Lodge officials were aware of what was going on. That inference has been accepted by the Court of Appeal and I am not prepared to hold that it is erroneous.

Upon this state of facts it has been held by the provincial Courts that the provision for forfeiture for non-payment of the assessments during the month in which they were levied was waived and that the time for payment was extended at least until the 15th day of the following month prior to which payment might be made without suspension being incurred.

The deceased died on the 7th of September leaving his August assessment unpaid. It was paid on the following day. I accept the conclusion reached in the provincial Courts that the practice above stated, known to the officials of the Grand Lodge and not repudiated by them, constituted a waiver of the provision for forfeiture which the defendants invoke. The assessment was not in default, and Clarke had not incurred suspension at the time of his death. At least the defendants are estopped from contending that he had. To the authorities cited in the judgments of Mr. Justice Dunlop and Mr. Justice Cross I would merely add a reference to *Buckbee* v. *The United States Insurance and Trust Co.*, 18 Barb. 541, at p. 544; *Insurance Co.* v. *Wolff*, 95 U.S.R. 326, at p. 333; and *Redmond* v. *Canadian Mutual Aid Association*, 18 Ont. App. R. 335, at pp. 341-342. The course of dealing by the society with Clarke was such, in my opinion, as to induce his failure to make payment within the thirty days prescribed by the by-laws and it would operate as a fraud upon his representatives if the society were now "allowed to disavow its conduct and enforce the condition."

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Neither can I see any distinction in principle, such as has been suggested, between mutual-benefit insurance societies and joint-stock insurance companies in regard to the effect of the conduct of high officials in creating a waiver or estoppel. In the management of its business these officials in the case of mutual benefit societies represent the members of the society, who are its owners and presumably have entrusted the management of its affairs to such officials because they repose confidence in them, quite as much as the directors and high office holders in the joint-stock company represent its owners, the shareholders. Shareholders and participating policy-holders in the latter are quite as much interested in the strict observance of provisions respecting forfeitures and lapses as the members of the former. The shareholders and participating policy-holders in the joint-stock company reap the benefit of forfeitures and lapses in the form of profits. Members of the mutual benefit society reap a like advantage in reduction of assessments either in number or amount. In either case the management of the business is entrusted to officials who are its representatives and agents. With them the insured must deal. I cannot see that it makes any difference whether the conditions of the risk are expressed in the contract of insurance itself or are contained in a constitution or by-laws incorporated with the contract. Conduct of officials which will render it inequitable for the insurer to set up a condition entailing forfeiture in the one case will be equally effective in the other.

Another answer made by the plaintiffs to the claim of forfeiture is that, according to the civil law of the Province of Quebec, where the contract in question was made and the insured lived, in the absence of a contrary stipulation—the policy contained none—the creditor must seek his debtor. The financier of Columbus Lodge had by his practice recognized this rule as applicable to the insurance contract sued upon. His custom was to go himself or to send some person to collect the assessments from the assured. He had not demanded the August assessment. Therefore, it is contended, the assured was not in default when he died. I do not wish to be understood as rejecting this answer of the respondents. Finding the ground first stated sufficient for the disposition of the appeal, it is unnecessary for me to deal with this further contention.

BRODEUR, J.:—I agree that this appeal should be dismissed for the reasons given by the Chief Justice.

Appeal dismissed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. February 3, 1914.

1. CONTRACTS (§ III C 5—264)—PRIVATE INTEREST OF PUBLIC OFFICER—CONTRACT FOR A MUNICIPAL WORK.

A contractor with a municipality who had entered into an arrangement with the mayor whereby the latter was to receive from him a bonus for financial assistance personally given by the mayor in carrying out the work contracted for, under circumstances which gave the mayor an interest in the contract incompatible with his official duty and in violation of the statute 58 Vict. (Que.) ch. 42, secs. 1 and 2, is not entitled to retain the illegal bonus money out of proceeds of the contract coming to his hands; the contractor may recover same either as money had and received to his use or under the statute 58 Vict. (Que.), ch. 42, sec. 11.

2. CONTRACTS (§ VI A—411)—PUBLIC POLICY—MUNICIPAL OFFICER—PRIVATE INTEREST.

Under article 989 of the Civil Code (Que.), which declares that a contract without consideration or with an unlawful consideration has no effect, money paid upon a contract which is merely illicit or contrary to public policy and not *in se* immoral or criminal, is recoverable.

[*Consumers' Cordage Co.* v. *Connolly*, 31 Can. S.C.R. 244, applied.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, by which the judgment of Bruneau, J., in the Superior Court for the District of Montreal was varied.

The appeal was allowed.

Sir Auguste Angers, K.C., and *A. E. deLorimier*, K.C., for the appellant.

E. C. Smith, K.C., and *R. Monty*, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an appeal from a judgment of the Court of King's Bench of Quebec varying a judgment of the Superior Court which had maintained the plaintiff's action.

That action was brought to recover from the defendant a sum of money alleged to be illegally retained by him out of a larger sum received from the plaintiff. The facts are susceptible of simple statement and the differences in the versions given by the parties of the circumstances out of which this suit arose are

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perhaps more apparent than real. Where they differ, the trial Judge says that he accepts in preference the plaintiff's story.

The undisputed facts are: In the year 1907, the defendant was mayor of the municipality of the village of DeLorimier, and in the month of September of that year the plaintiff was awarded a contract for the building of sewers in some of the main streets of the village. The terms of the contract are fully set out in notarial deeds executed on the 26th of the same month.

At that time the parties were apparently strangers to one another. On or about the 26th of October following, the plaintiff applied to the defendant for financial assistance to enable him to carry on his work, and it is admitted that without that assistance the contract could probably not have been executed. There is some dispute as to what occurred at the time and the trial Judge apparently believes the plaintiff, but, so far as the issue to be determined on this appeal is concerned, it is not material to say more than this. The parties after some negotiations agreed that the defendant would assist the plaintiff to obtain the advances he required in consideration of the payment of a bonus of $3,000 for which a promissory note was then given. The contract was proceeded with vigorously, the defendant made the necessary advances amounting in all to $12,201.30 and the work was completed in the summer of 1908, the defendant being still in office as mayor of the municipality. Notwithstanding the provision in the agreement that the contract price was to be paid in five equal annual instalments, the first falling due one year after the works were completed and accepted, on August 15, 1908, a promissory note, payable at six months, was given for the total value of the work done. The corporation gave the note to the contractor on his undertaking to renew at maturity, but he indorsed it over at once to Messier, the mayor. No importance seems to have been attached below to this serious departure from a term evidently inserted in the agreement for the protection of the municipality. It was quite in the interest of the mayor, creditor of the contractor, that the contract price should be paid at once, and evidently his interest prevailed against that of the ratepayers which he was supposed to protect.

There is some dispute as to what occurred at the time the note was given to the mayor. The plaintiff says that it was given as *collateral security* for his then existing indebtedness, the defendant is assumed below to have said that it was in *payment* of that indebtedness. What he really says is at page 26 of the case. The trial Judge believes the plaintiff.

Be this as it may, the defendant refused at the time, under one pretext or another, to account to the plaintiff for the note against which he, the defendant, had obtained an advance of $17,797.95 from the bank, *i.e.*, to the extent of his own claim for advances, commission and interest. There is some dispute here as to whether the note was discounted or merely given to the bank as collateral security for an advance then made. The defendant says in his examination on discovery:—

1. R. Monsieur Lapointe aurait voulu avoir la différence et je lui ai dit: Si je ne peux pas l'escompter je ne pourrai pas vous donner la différence maintenant.

. . . . . .

20. Q. Vous ne lui avez pas crédité ce billet à son compte?

R. Je l'ai crédité le montant de $17,597.95 par le billet de la Corporation, du moment que je l'eus escompté.

. . . . . .

40. R. Je ne pouvais pas lui créditer si je ne l'avais pas en mains.

Again, I do not think, in my view of the case, that the difference is important; the result was that the plaintiff took out of the advances made by the bank on the note of the municipality the amount of his claim against the plaintiff including the bonus of $3,000 which is in dispute here.

On these facts two questions arise: Was the promissory note for $3,000 given for an illegal consideration, and if so, is the defendant entitled to retain that sum out of the proceeds of the note given by the municipality in payment of the work done under contract?

I am quite satisfied that although there was no concert between the parties at the time the contract was awarded, the plaintiff's subsequent undertaking to pay a bonus of $3,000 for the advances which the defendant undertook to make was, in the circumstances, within the mischief of the Act hereafter cited and come within the words of the enactment, because it gave the

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mayor an interest in the contract which made him liable to the penalty prescribed by 58 Viet., ch. 42, sec. 2, which reads:—

> Any member of a municipal council who knowingly during the existence of his mandate has or had, directly or indirectly, through a partner or partners, or through the agency of any other person, any interest, commission or percentage (in a contract) with the municipal council of which he is a partner, or knowingly during the existence of his mandate has or had derived any pecuniary remuneration from any contract for work performed or to be performed, shall, upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

What is an interest sufficient to disqualify? See cases collected in 19 Halsbury, Laws of England, No. 627, p. 304, also *Miles* v. *McIlwraith* (1883), 8 App. Cas. 120; *Mayor of Salford* v. *Lever*, [1891] 1 Q.B. 168; *Norton* v. *Taylor*, 75 L.J.P.C. 79; *Re Campbell*, [1911] 2 K.B. 992, at p. 997; *Burgess* v. *Clark*, 14 Q.B.D. 735; *Hunnings* v. *Williamson*, 11 Q.B.D. 533.

I have looked at the case of *Le Feuvre* v. *Lankester*, 3 E. & B. 530, 118 Eng. R. 1241, much relied upon at the argument and, if still binding as an authority, it can be distinguished from this case. There the defendant sold the contractor certain ironwork which was used in carrying out the contract. No attempt was made to shew fraud or any interest which would affect the price of the goods or the manner in which they were to be paid for. Here the bonus of $3,000 was to be paid at the expiration of the contract out of the profits, which the contractor expected to make, and the defendant admits that if the contract was unprofitable, he stood a chance to lose not only his bonus, but also his advances. So that, if we take the view which is most favourable to the defendant, there is no doubt that by reason of that agreement he had a pecuniary interest in the result of the contract and he was, therefore, in a position where he had necessarily to choose between that interest and his duty towards the municipality. I entirely agree with what is said by Arnold, Law of Municipal Corporations, pp. 26, 27. The members of a council should have no interest to bias their judgments in deciding what is for the public good. Members of a town council should be advised to keep themselves absolutely free from the possibility of any imputation in this respect.

This case affords a striking illustration of the necessity of strictly interpreting the section above quoted. As evidence, I refer again to the way the interests of the municipality were, to say the least, put in jeopardy by the payment of the contract price before the time fixed to ascertain if the work had been satisfactorily executed.

As to the second question—the right to recover—it has been argued that the old Roman maxim *nemo auditur propriam turpitudinem allegans* applies, and much reliance is placed, and very properly so, upon the opinion of Pothier, Obligations, No. 45. But it must not be overlooked that the legislature had the opinion of Pothier brought to its notice when the Civil Code was enacted and that opinion was deliberately departed from. If the undertaking to pay a bonus gave the mayor an interest in the contract, then the statute makes that undertaking unlawful and the payment was without consideration. The right, therefore, to recover exists. There was no debt and the defendant received a sum that was not due him. (See arts. 1047-1048 and 1140 C.C..) Neither was there a natural obligation. (16 Laurent 164; Mareadé 4, p. 399.)

It is quite evident here that the defendant took an unfair advantage of the financial necessities of the plaintiff, and the latter cannot be said to have been a party to the illicit agreement. His promise to pay the bonus was not made to give the defendant an interest in the contract, although that was the effect of it, and as Planiol puts it, vol. 2, No. 846:—

> Il semble que cette action (en répétition) devrait toujours être accordée, car si l'obligation illicite ou immorale est condamnée par le droit, il importe que le créancier ne soit jamais autorisé a conserver ce qu'il a reçu, quand le débiteur s'est volontairement acquitté; lui laisser l'argent en privant le débiteur de son action en répétition, ce serait *donner effet à un acte illicite*, contrairement à l'article 1131 qui dit que ces obligations n'en doivent produire aucun.

It would be a curious result, if, under the statute, a briber could withhold from the bribee in a case like this the money paid when an innocent party would be obliged to suffer his loss.

It is said in the respondent's factum that *Consumers' Cordage Co.* v. *Connolly*, 31 Can. S.C.R. 244, decided in this Court, is based upon modern French jurisprudence, but that is not

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the case. As far back as 1839, the French Courts began to restrict the application of the Roman maxims *nemo auditur*, etc., and *quod nullum est nullum producit effectum*. (S.V. 33, 1, 668; S.V. 44, 1, 584; S.V. 90, 2, 97; Meynial's note and Marcadé, vol. 4, at page 399), and to-day it is universally admitted that they do not apply where the obligation is based on an illicit, as distinguished from an immoral, cause. (Vide Fuzier-Herman, vo. "Paiement," No. 451. All the cases on this subject are collected in "La Revue Trimestrielle," 1913, at page 553 *et seq.*)

The appeal should be allowed with costs.

Idington, J.

IDINGTON, J.:—Whilst respondent was mayor of DeLorimier, a municipal corporation, appellant tendered for the work of constructing some sewers and his tender was accepted and contract let accordingly.

It seems the appellant, who was not a man of much financial substance, then applied to respondent to finance him through the execution of these works.

There were proposals and counter proposals between these men, which ended by appellant giving respondent his promissory note for three thousand dollars, which is the note referred to in the following receipt given by respondent:—

Montréal, 26 Oct. 1907.

Reçu ce jour de M. M. Lapointe un billet à trois mois pour valeur reçu il est entendu que le dit billet sera renouvable jusqu'à la fin des travaux comprenant les canaux des rues Chabot, Simard et Gilford.

Ce billet est renouvable sans intérêt.

C. MESSIER.

Seeing that the total amount earned under said contract and owing by the corporation in respect of these works when finished was the sum of twenty-two thousand seven hundred and twenty dollars and fifty cents ($22,720.50), for which the corporation gave its promissory note, on July 18, 1908, and that the entire advances of the respondent to the appellant between the dates of his getting the remarkable document above quoted and the acquisition of this promissory note of the corporation was never more than nine thousand four hundred and fifty-nine dollars and twenty cents ($9,459.20), one is surprised at the audacity which can claim that the transaction truly repre-

sents interest or compensation of that sort for making such advances and means nothing else.

The appellant says that the respondent proferred a partnership in the contract on the basis of sharing equally in the profits, that he (appellant) did not assent, but, after several interviews that the respondent preferred it should be put in the shape of giving him the promise above set forth of three thousand dollars, and that when he discounted the corporation's note or renewal thereof (broken into four notes spread over a term of years) and wanted him to settle up, he claimed two thousand dollars in addition to this three thousand dollars, besides an item of three hundred and ninety-six dollars and sixty-five cents, for interest, which together would so closely represent the half of the actual profits admittedly made on this small contract, that I think it quite clear the respondent never let the proposal of partnership out of his mind. In truth, I infer, he was determined on the double advantage of securing at least three thousand dollars and, if the results should so turn out that he would find half the profits to be still better, to claim that as he did, in the mode he did.

The item of three hundred and ninety-six dollars and sixty-five cents ($396.65) for interest, the respondent says was interest computed up to May 22, 1908, at 7% or 8% on the actual advances made up to that date, and in the witness box claimed he ought to get interest on later advances, but indicates that was overlooked by reason of the disputes that followed.

If all this does not indicate that he had in mind the idea that he intended to be and was interested in the profits, I am puzzled to know what his process of reasoning was.

It is quite clear he claimed he intended he should get five thousand dollars over and above the usual bank interest.

If it could not be called anything else, it certainly was a lavish commission coming to him out of a transaction in which the corporation of which he was mayor was concerned, and, I think, unless the statute prohibiting such officers from taking commission or other interests on its contracts is to be frittered away or repealed by judicial interpretation and construction, it is a violation thereof.

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There are, besides the plain import of the transaction, several things in the respondents' evidence, such as his attempt to represent there were two contracts, when clearly only one, between the appellant and the corporation, and the erasure in the respondent's books, which, when taken with his evidence, shew or tend to shew a possibly false and fraudulent purpose on the part of the respondent and colour the whole story as against him.

The section 1 of 58 Vict., ch. 42 (Que.), relied upon is as follows:—

1. Any member of a municipal council who knowingly, during the existence of his mandate, *has* or *had*, directly or indirectly, *by himself or his partner any share or interest in any contract or employment* with, by or on behalf of the council, or who knowingly during the existence of his mandate, *has or had through himself or his partner or partners*, any commission or interest, directly or indirectly, or who *derives any interest in or from any contract with the corporation or council* of which he is a member, shall, upon a judgment obtained against him under the provisions of this Act, be declared disqualified from holding any public office in the said council or under the control thereof during the space of five years.

Section 2 puts the matter thus:—

2. Any member of a municipal council who knowingly, during the existence of his mandate, has or had, directly or indirectly, *through a partner or partners, or through the agency of any other person*, any interest, commission or percentage (in a contract), with the municipal council of which he is a member, or knowingly, during the existence of his mandate, has or had derived any pecuniary remuneration from any contract for work performed, or to be performed, shall upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

I have quoted these sections to shew how clear the purpose of the legislature was to prevent any member of the council from entering into any transaction which should place his personal interest in conflict with his duty to the corporation.

From the moment the respondent accepted the document I have quoted above from a man whose financial position was such as to induce him to give it, he (respondent) was no longer fit to sit in council and effectively discharge his duty. The restrictive interpretation pressed upon us of this statute is not in harmony with the rules laid down in *Heydon's* case, 3 Rep. 7*b*, as applicable to penal as well as other statutes.

The duty of the Judge relative to statutes and their interpretation can never be better defined than as expressed therein. And, if we are ever tempted by reason of a case presenting a want of "honour among thieves" or such like cause, to forget this, let us read the rule again.

Then it is argued that the three thousand dollars by discounting of the corporation's note or notes were paid and cannot be recovered back.

Had the parties so proceeded as to bring this about, an arguable question might have been raised. But the best evidence they did not is that the respondent held on to the document quoted above and was driven to a tender thereof in answer to the demand of the appellant to settle by paying the balance of the proceeds of the corporation's notes.

His rapacity was such that he insisted on retaining the whole five thousand dollars and the interest he claimed and shews how and what he thought of the question of payment. It was still an unsettled thing and so remained, has herein been in substance and effect claimed by him in his pleadings as his due, and asserting that as his right he has never so pleaded as to raise the question his counsel now seeks to raise as a matter of law.

The issue has been fought out on such contentions at the trial and the suggestion now made is the thought of the able and ingenious counsel, who was not at the trial. There is no room left for arguing that this is a suit to recover back that already paid. If there were I should have to consider the effect of 58 Viet. ch. 42, sec. 11, cited in the appellant's factum.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment of the learned trial Judge should be restored.

DUFF, J.:—In September, 1907, the appellant entered into a contract for the construction of certain municipal sewers. Finding himself unable to obtain the necessary advances from his bankers he applied to the defendant for assistance, who agreed to lend his credit in consideration of a bonus of $3,000. This term of the arrangement was evidenced by a promissory

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note for the sum of $3,000 and a contemporaneous acknowledgment in writing by the appellant of the receipt of the note which was declared to be renewable until the municipal works in question should be completed.

The respondent was the mayor of the municipality and, on behalf of the municipality, had executed the contract to which the appellant was a party. In August, 1908, the works in question having been finished, the appellant received from the municipality a promissory note for $22,720.50 (the sum due to him under his contract), payable in six months, the understanding being that the note was to be renewable at maturity. This promissory note, indorsed by the appellant, was delivered to the respondent; and one of the controversies at the trial related to the terms of the arrangement under which that was done. On this point it is sufficient for the present to observe that the appellant himself admits that the note of the municipality was transferred to the respondent "*en garantie* of the notes which I owed him."

The respondent discounted the municipality's note at the Merchants Bank. In September, the appellant offered to repay the respondent the sums actually advanced by the respondent to him, with interest, demanding at the same time the return of the promissory note just referred to. This the respondent refused, alleging that he was entitled to retain a sum of $17,500 out of the proceeds, offering at the same time to return the difference between that sum and those proceeds. The appellant then procured possession of the note by paying the amount due upon it at the Merchants Bank; and this action was brought to recover the difference between the amount so paid and the advances made by the respondent.

The dispute concerns the amount nominally payable in respect of the promissory note already referred to by way of bonus. The position taken by the appellant is this. He says that this note was the outcome of an arrangement which in effect gave to the respondent an interest in his contract with the municipality. And such an agreement he says is void as offending against public policy. The respondent meets this by denying that the

arrangement gave him any interest in the appellant's contract and by asserting that, in any event, the note was paid and that, consequently, the appellant is in the position of being obliged to rely upon an agreement which he alleges was unlawful to which he himself was a party.

The appellant's contention is based upon the provisions of sections 1 and 2 of 58 Vict., ch. 42 (Que.), which are as follows:—

1. Any member of a municipal council, who knowingly during the existence of his mandate has or had, directly or indirectly, by himself or his partner, any share or interest in any contract or employment, with, by or on behalf of the council, or who knowingly during the existence of his mandate, has or had through himself, or his partner or partners, any commission or interest, directly or indirectly, or who derives any interest, in or from any contract with the corporation or council of which he is a member, shall, upon a judgment obtained against him under the provisions of this Act, be declared disqualified from holding any public office in the said council or under the control thereof during the space of five years.

2. Any member of a municipal council, who knowingly during the existence of his mandate has or had, directly or indirectly, through a partner or partners, or through the agency of any other person, any interest, commission or percentage (in a contract) with the municipal council of which he is a member or knowingly during the existence of any mandate has or had derived any pecuniary remuneration from any contract for work performed or to be performed, shall, upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

There can be no doubt, I think, that it was understood between the appellant and the respondent in September, 1907, that the bonus of $3,000 should be paid out of the proceeds of the appellant's contract. Such being the understanding it appears to me that the respondent acquired an interest in the contract within the meaning of this statute, and that an agreement having that as its effect and one of its direct objects must, in view of the statute, be held to be an agreement contrary to public policy and void as such.

The substantial point in issue appears to be whether or not the appellant is precluded from recovering the amount of the note in question on the principle that the Court will not assist a party to an illegal contract to recover moneys paid or property delivered under it where, at all events, the illegal purpose of the contract has been completely performed.

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The appellant disputes the application of this principle, first, on the ground that, in the circumstances, there was no payment. This particular contention, I think, misses the mark. As I have already pointed out the note was delivered by the appellant's own admission to the respondent as collateral security for the promissory notes held by the respondent. It is not suggested that any exception of this note of $3,000 was made and, if the arrangement under which the note was given had not been tainted by illegality, it seems indisputable that the respondent would have been entitled to retain the note received from the municipality until the bonus note had been discharged. Assuming that the respondent committed a wrongful act in negotiating the municipality's note, the appellant would still only be entitled to recover, all question of illegality put aside, the damages suffered by him which would be measured by the difference between the value of the municipality's note and the amount for which the respondent was entitled to retain it as security. In either view the appellant must impeach the bonus note as given for an illegal consideration and could, therefore, succeed only through setting up the illegality of his own contract.

The question comes squarely to be decided whether, according to the law of Quebec, such an action can succeed on such grounds. The respondent's counsel largely rests upon the decisions of the English Courts, and, since the argument was mainly devoted to a discussion of these decisions, it is worth while, perhaps, going through them, although they do not appear to me to be strictly relevant to the point to be determined.

In applying the English law it may be observed the same principles apply as if the amount of the bonus note had been paid in money: *Taylor* v. *Chester*, 10 B. & S. 237.

The general rule of the English law is stated in the judgment of Lord Mansfield in *Holman* v. *Johnson*, Cowp. 341, at p. 343, 98 Eng. R. 1121:—

> The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non*

oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of the country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*

There are, however, apparent exceptions to this rule and the question is whether or not the present case comes within any of those exceptions. These exceptions have been stated in two text-books of high repute and in two comparatively recent judgments. And before considering the scope of them in their application to this case it will be convenient to reproduce the passages:—1st, Pollock on Contracts, pages 404, 405:—

Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral);

Or unless the agreement was made under such circumstances as between the parties that, if otherwise lawful, it would be voidable at the option of the party seeking relief.—Note *b.* This form of expression seems justified by *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K.B. 558.

Or in the case of an action to set aside the agreement, unless in the judgment of the Court the interests of the third persons require that it should be set aside.

Secondly, Anson on Contracts, p. 253-4:—

But there are exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. They fall into three classes: (1) The contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one; (2) the plaintiff may have been induced to enter into the contract by fraud or strong pressure; (3) no part of the illegal purpose may have been carried into effect, before it is sought to recover the money paid or goods delivered in furtherance of it.

The first of the judgments is in *Kearley* v. *Thomson*, 24 Q.B.D. 742, where Lord Justice Fry says (pp. 745-6):—

To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of these is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from

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the oppressor. In that class of cases the dictum is not par, and, therefore, the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract.

I do not think the transaction in question here could be brought within the exceptions as stated by Lord Justice Fry, Sir Frederick Pollock, or by Sir William Anson. Take first the judgment of Fry, L.J.

The transaction, as I view it, is not one prohibited by a statute passed for the "protection of a class of persons" of whom the appellant is one. It is a statute merely intended to disqualify from occupying certain positions of trust in relation to municipalities, persons who bring themselves within the provisions of the Act. The object is to protect the municipalities and the public generally against the evils of corruption in municipal office. I do not think there is any ground for saying that this statute was passed with the object of protecting the interests of persons who engage in contracts with municipalities. The statute has nothing material to the present purpose in common with the class of statutes to which Lord Justice Fry refers —to the Usury Acts and the statutes against lottery-keepers.

Then, is this a transaction between "oppressor and oppressed" as the phrase is used by Lord Justice Fry? It will be convenient to expand this phrase a little. Sir William Anson puts it in a slightly different way. He speaks of contracts procured "by strong pressure." And Sir Frederick Pollock sums up the exceptions as consisting of agreements made in "such circumstances as between the parties that, if otherwise lawful, they would be voidable at the option of the party seeking relief"; in other words, all cases in which illegal agreements completely executed may be set aside by a person who is a party to them and in the interests of such persons alone are cases in which on substantive grounds, independently altogether of illegality, the

transaction would be voidable by and for the benefit of such persons according to the general principles of law or according to the true intendment and effect of the statute which forbids it. The author cites in support to his proposition the following passage from the judgment of Collins, M.R., in *Harse* v. *Pearl Life Ass. Co.*, [1904] 1 K.B. 558, 563:—

> Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss.

Whether or not this view of the law on this point be open to criticism, it is clear enough, when one comes to consider the decisions referred to in the text-books mentioned illustrating the attitude of the Courts towards such plaintiffs, that one cannot bring the present transaction within the class of cases referred to by Fry, L.J., as being cases of "oppressor and oppressed" or by Sir William Anson as contracts procured "under strong pressure." In *Reynell* v. *Sprye*, 1 DeG. M. & G. 660, 42 Eng. R. 710, it was held that the champertous agreement was obtained by fraud and that alone was sufficient ground for setting it aside. In *Osborne* v. *Williams*, 18 Ves. 379, 32 Eng. R. 360, the Court had to consider a transaction between a father and son, the transaction itself being unfair and the son being at the time wholly within the father's control. In *Atkinson* v. *Denby*, 6 H. & N. 778, 7 H. & N. 934, the defendant had taken advantage of the plaintiff's situation to force him into an unfair bargain.

There is no evidence in this case of any such fraud or undue influence or unconscientious taking advantage of the appellant's situation. The appellant had a valuable contract; he approached the respondent, not as mayor, but as a person of capital in a position to assist him. The respondent was able to dictate terms quite independently of his position as mayor, and I think there is no adequate ground for holding that in fact the appellant was intimidated by the circumstance that the respondent held that office. The appellant had not entered upon the performance of his contract; if he were unable to get the necessary

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assistance to carry it out there is no reason to suppose that the municipality would not have permitted him to abandon it.

It was suggested that public policy would be better served by compelling the respondent to refund. That may be so; but I do not think the law of England on this subject leaves it to the Judge or the Court to determine in each particular case whether or not public policy will be best served by allowing moneys paid or property delivered under an executed contract void as against public policy to be recovered back by the party paying. On the contrary the general principle of the law is that stated by Lord Mansfield in the passage quoted above. The person seeking to recover must bring himself within one of the recognized exceptions to that principle or he must fail. I think in this case the appellant has not done so, and that if his right to recover were to be determined according to the law of England he could not succeed.

It remains to consider the question whether according to the law of the Province of Quebec the appellant is precluded from recovery because of the unlawful character of his agreement with Messier.

The present case, I think, is not a case of payment of money. The appellant affirms that the respondent had no authority to discount the note; and, in view of the conduct of the respondent in the litigation and the discredit cast upon him by the trial Judge, the appellant's story should, I think, be accepted. However, as I have already pointed out, the appellant can only make out his case by alleging the illegality of his contract and on principle he appears to be in the same position as if payment had been made; and, moreover, as I have already said, it was, no doubt, understood that the bonus was ultimately to be paid out of the proceeds of the contract. The general question is dealt with very elaborately in the judgment of the late Mr. Justice Girouard in *Consumers' Cordage Co.* v. *Connolly*, 31 Can. S.C.R. 244, with which Mr. Justice Sedgewick and Mr. Justice King concurred. The authorities cited appear to shew that according to the more modern view the effect of sec. 989 of the Civil Code, a plaintiff in the situation of the appellant is entitled to relief on the ground that the illegal contract being without effect the defend-

ant ought not to be permitted to retain that to which he never had any legal right.

Although it may be doubtful whether that decision is strictly binding upon us in view of the subsequent course of the litigation, yet I think I ought to give effect to the opinion of the majority of the Court which was not overruled by the Judicial Committee. [89 L.T. 347.]

ANGLIN, J.:—The evidence, in my opinion, clearly discloses that the defendant had a share or interest in the plaintiff's contract with the municipal corporation of the village of DeLorimier which falls under the penalizing provisions of articles 1 and 2 of the Quebec statute, 58 Vict. ch. 42. I am, with respect, unable to understand how the Court of King's Bench reached the conclusion that the agreement between the plaintiff and the defendant was not "illegal, prohibited or against good morals or public policy." But the case, in my opinion, is not within the purview of sec. 11 of the statute. There is no evidence that the defendant either performed or agreed to perform any service in his official capacity for the plaintiff in consideration of the $3,000 note given him.

If I could read the evidence as warranting a conclusion that the plaintiff had never authorized the defendant to retain out of the proceeds of the note of the municipal corporation, the amount of the $3,000 note now in question, the disposition of this case would be comparatively simple. The plaintiff would, in that event, be suing to recover money had and received to his use by the defendant, and the latter would be compelled to invoke the illicit contract as his only justification for retaining it. In such a defence he certainly could not succeed. I feel constrained, however, to take the view that in directing the defendant to retain out of the proceeds of the note of the municipal corporation the sums due him, the plaintiff intended that he should pay to himself the amount of the $3,000 note which represented his illicit share of the plaintiff's profits on the contract with the municipality, and that this should be deemed a payment of this sum of $3,000 by the plaintiff to the defendant. It is, I think, a fair inference from the evidence that "it was

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understood" that the defendant was to pay himself the amount of the $3,000 note out of the proceeds of the discount of the note of the municipality.

I agree with the view which has prevailed in the provincial Courts in regard to the $2,000 kept by the defendant on the pretext that he was entitled to it for financing a second contract—that he has neither right nor colour of right to retain it. There was no second contract.

Two objections are urged against the plaintiff's right to recover the sum of $3,000: 1st, that it was paid voluntarily, and, if in mistake, that the mistake was of law, not of fact; and 2ndly that in order to recover the plaintiff must invoke the illegality of the contract under which this money was paid. Notwithstanding these objections, under the Civil Code of the Province of Quebec, the right to recover appears to exist.

Article 1047 of the Civil Code provides that:—

> He who receives what is not due to him through error of law or of fact is bound to restore it.

Money voluntarily paid in mistake of law, is, therefore, recoverable, as has been held in many cases: *Leprohon* v. *Le Maire de Montréal*, 2 L.C.R. 180; *Leclerc* v. *Leclerc*, Q.R. 6 Q.B. 325; *Bain* v. *City of Montreal*, 8 Can. S.C.R. 252, at 265, 285.

There appears to be no doubt that under the system which prevailed before the adoption of the Civil Code full effect was given in French Courts to the maxim of the Roman law, *ex turpi causâ non oritur actio*, and the action *en répétition de l'indu* did not lie to recover moneys paid under illegal contracts, save in cases of the sale or cession of public offices, which were treated as exceptional. It suffices to cite Pothier in support of this statement. But, by article 989 C.C., it is declared that "a contract without consideration or with an unlawful consideration has no effect."

Modern commentators, as well as modern decisions, appear to agree that, by this article, it was intended to do away with the operation of the Roman rule in so far as it precludes actions to recover back moneys paid under illicit contracts. Otherwise, it is said, some effect would be given to the illicit contract in con-

travention of the article of the Code. And it is pointed out that while the Code was based largely upon the views of Pothier, in this particular his ideas were deliberately departed from. The right to recover moneys illegally paid is now the accepted rule, at all events where, as in the present case, the contract under which the payment has been made is merely illicit or contrary to public policy and not *in se* immoral or criminal. With this latter class of contract we are not now called upon to deal.

This subject was carefully reviewed by the late Mr. Justice Girouard in *Consumers' Cordage Co.* v. *Connolly*, 31 Can. S.C.R. 244, at pages 298 *et seq.* His conclusion was that, under the Civil Code, money paid upon such an illicit contract is recoverable. I regard this authority as binding and I follow it without hesitation both as to the principle sum of $3,000 and as to the interest, $396.65, which the provincial Courts disallowed.

In such a case as we have now before us, if the difficulty as to voluntary payment did not exist (*Wilson* v. *Ray*, 10 A. & E. 82, 113 Eng. R. 32), the money illegally paid to the defendant would be recoverable in an English Court. Although ordinarily money paid upon an illegal contract is not recoverable in a court administering English law, because *nemo allegans suam turpitudinam est audiendus*, and the maxim *potior est conditio defendentis* is applied

where the parties to a contract against public policy or illegal are not *in pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him as we know from various authorities of which *Osborne* v. *Williams*, 18 Ves. 379, 32 Eng. R. 360, is one. *Reynell* v. *Sprye*, 1 DeG. M. & G. 660, 42 Eng. R. 710.

As I have already said, the principle of the decisions in such cases as *Osborne* v. *Williams*, 18 Ves. 379, 32 Eng. R. 360, and *Morris* v. *M'Cullock*, Amb. 432, 27 Eng. R. 289, appears to have been accepted in France in regard to the sale of public offices even when it was held that the action *en répétition* did not lie to recover payments under illegal contracts.

Where, as here, there is a statutory prohibition of the contract under which the money has been paid and a penalty im-

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posed on only one of the parties, they may be regarded as not *in pari delicto;* and, where public policy requires it, the party who is not penalized may have relief. 15 Am. and Eng. Ency. (2nd ed.), 1005.

It is very material that the statute itself, by the distinction it makes, has marked the criminal. For the penalties are all on one side; upon the office keeper.

Browning v. *Morris*, 2 Cowp. 790, at page 793, 98 Eng. R. 1364, *per* Lord Mansfield; *Williams* v. *Hedley*, 8 East 378, 103 Eng. R. 388. Here the penalties are imposed only on the municipal office-holder. The purpose of the legislation is to ensure, for the protection of the public, whom the office-holder represents, that he shall not have interests which may conflict with his duty to them. Public policy requires that he shall not be allowed to retain profits made out of contracts which give or may give him such a conflicting interest. In such a case public policy demands the intervention of the Court. The guilty party to whom relief is granted is simply the instrument by which the public is served. 7 Cyc. 750.

It is upon grounds of public policy that similar relief is granted by English Courts of equity in marriage brokerage cases: *Hermann* v. *Charlesworth*, [1905] 2 K.B. 123; *Hall* v. *Potter*, Show. P.C. 76, 1 Eng. R. 52.

These references to English law are probably quite superfluous in the present case, since I dispose of it on the authority of *Consumers' Cordage Co.* v. *Connolly*, 31 Can. S.C.R. 244. I make them merely to indicate that, in Courts in which the maxim *ex turpi causâ non oritur actio* ordinarily precludes relief where the plaintiff is obliged to set up illegality in which he has participated, such a case as the present would, on grounds of public policy, be deemed an exception to the general rule and the public official would not be permitted to retain the fruits of his illicit bargain.

While the plaintiff's conduct may savour of ingratitude and may appear to be such as not to entitle him to assistance of a Court of justice, it must be borne in mind that he succeeds, notwithstanding his own demerit, solely because of the supreme importance, in the public interest, of frustrating attempts on

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the part of public officials to enrich themselves by forbidden means.

I am, with respect, of the opinion that the plaintiff's appeal should be allowed with costs in this Court and in the Court of King's Bench, and that the judgment of the Superior Court should be restored.

Anglin, J.

BRODEUR, J., concurred in allowing the appeal.

Brodeur, J.

Appeal allowed.

SPORLE v. GRAND TRUNK PACIFIC R. CO.

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Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ. April 25, 1914.

1. RAILWAYS (§ IV A—81)—ANIMALS ON TRACKS—ENGINEER'S DUTY.

Prima facie there is no duty on the engineer operating a railway train who discovers stray animals in danger on the right of way over which he is passing to stop his train for the purpose of driving such animals from the track so as to save them from injury.

2. RAILWAYS (§ II D 6—70)—INJURIES TO ANIMALS ON TRACKS BY TRAINS.

The evident purpose of Parliament to deal with the whole question of a railway company's liability for injury to animals at large by the provisions of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, as amended, constitutes such section 294 a specific code laying down a general statutory liability and providing a special defence, thereby precluding the plaintiff, in such cases, from resting liability upon a breach of sec. 254 read with the general provisions of sec. 427.

[*Clayton* v. *Canadian Northern R. Co.*, 7 Can. Ry. Cas. 355, applied.]

Statement

APPEAL by the defendant from the judgment of Crawford, District Court Judge, in the plaintiff's favour in damages for injury to animals at large.

The appeal was allowed and action dismissed.

John Cormack, for the plaintiff, respondent.

O. M. Biggar, K.C., for the defendant, appellant.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is an appeal by the defendants from a judgment of His Honour Judge Crawford giving the plaintiff $475 as damages for the killing of a mare and colt by a train of the defendant company upon their right of way. It appears that the animals had been on the highway at the railway crossing

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under no one's charge and had been frightened by a train so that they jumped the cattle-guard and went upon the right of way, and while there were injured, not by the train which frightened them, but apparently by another which subsequently passed.

In view of the terms of sec. 294, sub-sec. 4 of ch. 37, R.S.C. 1906, as amended by sec. 8, ch. 50 of 1910, and of the exception as to liability at the end thereof, it became of importance to ascertain whether or not the animals had got at large through the negligence or wilful act or omission of the owner. The burden of proving this was upon the railway company. The evidence bearing upon the point is as follows: First, the plaintiff swore in detail as follows: that the animals were being kept in a pasture just north of the track; that the pasture was all fenced "as far as he knew;" that there were gates in the pasture which were closed at the time; that he did not know how the horses got out; that he had seen them in the pasture that day; that he took no notice whether the gates were closed that day; that the horses had been in the pasture for some days; that he did not know exactly whether it was a quarter section or not; that the field was fenced "so far as he knew" when he put the horses in; that he did not examine the fence when he put the horses in, except the portions adjoining the highway and the railway track; that he had no knowledge of the fence to the rear; that the fence on the road was a two-wire fence with a rail top, the posts being about ten feet apart and the bottom wire about 18 inches from the ground; that he did not go carefully up and down the highway and examine the fence when he put the horses in; that he did not look at the fence particularly, but he had been there a good many times and had seen the fence and depended on his knowledge acquired by driving by; that there were two gates, one a pole gate a half-mile from the railway, which he never used, and the other a "western" or wire gate just near the railway, which was fastened by hooking over with a wire; that the fence was about four feet high, but that the gate might not be that high; that his horses had been out two or three times prior to the accident; that he did not know where they got out; that the mare and colt had been kept in

the pasture for six weeks, except sometimes when they were at home; that the home field was about a quarter of a mile from the pasture in question; that he had put his horses back in this pasture knowing they had got out before; that he had been putting horses in the pasture for four or five years "on and off;" that the pasture did not belong to him nor to his father; that his father had told him to put his horses in that pasture and he presumed his father had permission to do so; that he had never gone near the field to see how the horses had got out, and had not taken much notice of the fence since; that he "never bothered the fences," and did not look to see where his horses had got out previously when he put them back in; that they (he and his father) were not paying anything for the privilege of putting their horses in there and did not go to the bother of fixing the fences up or anything of that kind, and that he "took chances" on their getting out again.

Next, the plaintiff's father swore in detail as follows: that he had permission from one Reid, the agent of the owners of the property, which was subdivided property, to put the horses in there; that he had not seen the fence since the animals were killed; that he was out shooting on the property the day the horses were killed; that he did not take particular notice of the fence, but that it appeared to be all right; that he came out of the gate and fastened it himself, but he did not say that he saw the horses there; that he had not made a careful search of the fence on that day, but had on other days; that there was no fence at the rear of the pasture, but the side fence ran into a lake there.

Then, for the defence, on this point one Dagg swore that the fence was a pretty good fence all along the trail; that at times the gates were open and at times they were shut; that he had seen one or two of Sporle's horses out on the road; that in the fall after the hay was cut and stacked he had at times seen the gates open; that he had never had any reason to examine the fence closely. Next, one Donoghie swore that he had had the right of cutting hay in the field during the summer; that he had finished in September; that the fences surrounding the field were in poor condition, "all over, you might say;" that he

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repaired a little bit himself, but most of the time it was down; that he never fixed the fence at the back at all; that the fence in front (*i.e.*, on the trail) was broken in patches here and there, "you can see the patch"; that more than a panel was down; that he repaired the front fence when he cut hay, it was broken and he repaired it; but only at the gate, right at the gate, the cattle would get through; that after he had the hay cut he did not mend the fence at all; that after he had his hay cut the fence was down and the cattle would run in; that after he left the fence got worse because the survey went through in several places; that after he had corralled his hay he took no further interest in the fence; that while he was cutting hay it was "hard to keep cattle because they were going through in all directions. I tried to keep them away as much as I could, you know." Finally, one Gagnon was called, who was a neighbour, who stated that there was a good lot of the back fence down. This is the evidence as to negligence. There seems to have been a photograph of the gate taken, but it was not before us, and, in any case, it was taken some considerable time after the accident.

There may possibly be a little doubt, from the expressions used by the trial Judge, whether he did find as a fact that the animals got at large owing to the negligence of the plaintiff. If he did so find, there was ample evidence, in my opinion, to justify such a finding. If he did not, he certainly did not find to the contrary, and in that view we are at liberty to draw our own conclusions. There is only one conclusion possible, in my opinion, from the evidence I have set forth, viz., that the plaintiff was exceedingly negligent and that it was owing to his negligence that the animals got at large.

The learned trial Judge took the view that the case could be decided purely upon common law principles, without regard to the provisions of the Railway Act at all. He was of opinion that the evidence shewed that the engineer of the first train, which frightened the animals, had seen the animals getting upon the right of way and that it was the duty of the train crew to drive the animals back on to the highway again when they saw them on the right of way, that in not doing so they were negligent, and that it was this negligence which really caused the acci-

dent. This, he thought, relieved the plaintiff from any charge as to his own negligence.

In my opinion, it is unnecessary here to decide the broad question whether there could be any common law liability, aside from the provisions of the Railway Act. With much respect, I am unable to agree that, in any case, there was any negligence shewn on the part of the defendants' servants who were in charge of the trade. There is no direct evidence that any of them saw the animals. The inference is made from the frequent blowing of the whistle, testified to by an eye-witness who saw the animals being frightened, that the engineer of the train saw them. Assuming that he did, I cannot agree that it was the duty of the engineer to stop the train and turn all or any of the train crew from their ordinary duty of running and managing the train and drive the animals from the track. The management of a railway system would be impossible if such a duty were cast upon the train crews. The only remaining duty imaginable would be a duty to report to other servants, who should be supplied, and upon whom the duty should be imposed by the company of going at once to the scene and driving the animals away. Aside from the manifest difficulties of such a regulation, it is to be observed that no one saw the accident, and it does not appear whether or not there was time after the passing of the first train for any such a duty to be performed, even if it did exist, before the train came which did, in fact, injure the animals.

There remains only the question of defective cattle-guards to be considered. The evidence is, that the animals, having got at large through the negligence of the owner, were upon the highway very near the railway intersection without any one in charge of them, that they got upon the track at the point of intersection just as a freight train came up, and that they turned and went ahead of it over the cattle-guard on to the defendants' property, where they were subsequently injured by another train.

The case is upon all fours with *Clare* v. *Canadian Northern R. Co.*, 17 W.L.R. 536, except that here the defendants have succeeded in shewing negligence on the part of the owner, which was not established in the case cited.

The plaintiff's contention really amounts to an attempt to

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rest liability upon a breach of sec. 254, sub-sec. 3, read with the general provision of sec. 427, sub-sec. 2. But this seems to me fruitless in view of the evident purpose of Parliament to deal with the whole question of the company's liability for injury to animals at large by the provisions of sec. 294. I think the reasoning of Perdue, J.A., in *Clayton* v. *Canadian Northern R. Co.*, 7 Can. Ry. Cas. 355, 17 Man. L.R. 433, at p. 435, is sound and declares the proper principle. This is not the ordinary case of a plaintiff's contributory negligence at common law being overlooked on account of a defendant's direct breach of a statutory duty. We have to deal with a specific code laying down a general statutory liability and providing for a special defence. I think the whole case must be dealt with under the provisions of sec. 294.

In this view, the question of fact whether the cattle-guard was, in fact, defective, becomes immaterial.

I think the appeal should be allowed with costs, the judgment below set aside and the action dismissed with costs.

Appeal allowed.

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ROBINSON v. HOLMES.

British Columbia Supreme Court, Macdonald, J. January 20, 1914.

1. RECORDS AND REGISTRY LAWS (§ III D—31)—REGISTRATION; AS NOTICE TO SUBSEQUENT PURCHASERS.

The principle on which registry laws proceed is that an opportunity is afforded to examine the title, and a person acquiring land ought to see if there is anything registered against such land, and for that purpose he is assumed to make a complete search in the registry office.

[*Trust and Loan Co.* v. *Shaw*, 16 Gr. 446, applied.]

2. LIS PENDENS (§ I—3)—EFFECT OF NOTICE GENERALLY.

The registration of a certificate of *lis pendens* by the plaintiff is the means provided to protect his interests and give notice to other parties that he claims an interest in the property involved and is seeking to enforce his rights by action, and such registration operates as a notice to all who are or may become interested in the property.

3. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—NOTICE—CERTIFICATE OF LIS PENDENS.

The provision of the Land Registry Act, R.S.B.C. 1911, ch. 127, as to registration of a certificate of *lis pendens* operates for the benefit of intending purchasers who might, in its absence, innocently deal with the registered owner and be bound (without any notice) by judgment delivered in the action then pending.

[Armour on Titles, 3rd ed., 189, referred to.]

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4. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—LIS PENDENS AS CAVEAT.

The registration of a certificate of *lis pendens* against lands is similar in its effect to the registration of a caveat under the Land Registry Act, R.S.B.C. 1911, ch. 127, and its registration prevents any disposition by the registered owner in derogation of the claim of the party registering the certificate until that claim has been satisfied or disposed of.

[*Alexander* v. *McKillop*, 45 Can. S.C.R. 551, 1 D.L.R. 586, applied; *Stephens* v. *Bannan and Gray*, 14 D.L.R. 333, considered.]

5. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—REGISTRATION OF LIS PENDENS AS A CHARGE—WHETHER ASSIGNABLE.

The provision in the Land Registry Act, R.S.B.C. 1911, ch. 127, for the registration of a certificate of *lis pendens* as a charge does not imply that it shall constitute a "charge" as that term is interpreted by the Act, and the registration does not create any assignable interest in the lands.

Statement

ACTION to enforce an alleged agreement for the sale of land.

Judgment was given for the plaintiff.

C. M. Woodworth, for the plaintiff.

J. G. Gibson, for the defendant Holmes.

J. B. Pattullo, for the defendant Bevan, Gore & Elliott Ltd., transferees of one Beeks.

Macdonald, J.

MACDONALD, J.:—Beeks had compelled defendant Holmes to execute an agreement for sale of the property for $15,000. The agreement is dated March 4, 1912, and appears to be acknowledged on the same date: it provides for the payment of $7,500 on the execution thereof. This amount was paid by the defendant Bevan, Gore & Elliott Ltd., by cheque dated March 4, 1912. The cheque was sent to Fisher and Warton, solicitors, of Prince Rupert, with instructions to pay same over to Tupper & Griffin, as solicitors for defendant Holmes, upon title being satisfactory. This cheque was endorsed and remitted to Tupper & Griffin on March 7th, and appears to have been paid through the Vancouver clearing house in due course. I find that this payment was made *bonâ fide* and without any actual notice or knowledge on the part of Bevan, Gore & Elliott Ltd., of any claim of the plaintiff upon the land in question.

The question arises as to the position of the parties. Holmes, without regard to the first sale to the plaintiff, had made a second sale to Beeks, who had assigned his rights to the defendant Bevan, Gore & Elliott Ltd. They, in good faith and without knowledge, had paid over half the purchase-price of the

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property. Is plaintiff thus deprived of the benefit of his agreement of January 12, 1912?

As to tender, I doubt if under the circumstances it was necessary, but, in any event, I find that plaintiff made a proper tender to safeguard his position. He then after commencement of action took the only course possible to protect himself by registering a *lis pendens*. To my mind, the important or turning point in this action rests upon the effect of such registration. Plaintiff would, in my opinion, have succeeded in his action for specific performance against the defendant Holmes; then is he protected as against Bevan, Gore & Elliott Ltd., as *bonâ fide* purchasers, by registration of the *lis pendens?* It was admitted that, although the certificate of *lis pendens* by the plaintiff had not been entered in the books of the registry office, still it was properly registered.

Section 71, Land Registry Act [R.S.B.C. 1911, ch. 127], provides that:—

> Any person who shall have commenced an action in respect of any land may register a *lis pendens* against the same as a charge.

Then sec. 72 provides that:—

> The registration of a charge from and after the time of the application for the registration thereof, but not otherwise, shall give notice to every person dealing with the land against which such charge has been registered of the estate or interest in respect of which such charge has been registered, and of the contents of such instrument, so far as relates to the estate or interest in respect of which the same has been registered.

The registration was in the terms of the Act effected when the application therefor was received by the registrar on February 24, 1912.

The principle on which registry Acts proceed is that an opportunity is afforded to examine as to the title, and a person acquiring land ought to see if there is anything registered against such land, and for that purpose he is assumed to make a complete search in the registry office: see *Trust & Loan Co.* v. *Shaw*, 16 Gr. 446. Whether a search is made or not, the person so acquiring land is bound by the documents that may be registered. The registration of the *lis pendens* by the plaintiff is the means provided for the plaintiff to protect his interests and give

notice to other parties that he claimed an interest in the property and was seeking to enforce his rights by action. In my opinion, such registration operated as a notice to all parties who were or might become interested in the property. Beeks and the defendant Bevan, Gore & Elliott Ltd. as his assignees, could only purchase subject to whatever interest it might be declared the plaintiff was entitled to in the then pending action. Counsel for the defendant Bevan, Gore & Elliott Ltd., sought to obtain benefit for his clients from the registration of the *lis pendens* in the action of Beeks against Holmes. This *lis pendens* was withdrawn, but he contended that being registered as a "charge," and having been withdrawn in order to assist the registration of title, rights had accrued thereunder and had become vested in his clients, as assignees of the plaintiff in that action. It is true that the Registry Act provides that a *lis pendens* may be registered a "charge." Some strength is given to the contention by the fact that a "charge" is interpreted to mean and include

> any less estate than fee simple or any equitable interest whatever in real estate, and shall include any incumbrance, Crown debt, judgment, mortgage or claim to or upon any real estate.

I do not think the provision as to the registration of the *lis pendens* as a "charge" means that it is to have the same effect and constitute a "charge" as interpreted by the Act. Section 73 of the Act is relied upon as further supporting the contention, and it provides that "charges," as between themselves, have priority according to the dates at which the applications to register were made, and not according to the dates of the creation of the estates or interests. The wording of this section is not apt as applied to a *lis pendens*, as it does not create an "estate or interest," and is simply a notice that an estate or interest is claimed by the party bringing the action. I consider that the provision as to registration of a certificate of *lis pendens* was for the benefit of intending purchasers. If no such provision existed a purchaser might innocently deal with the registered owner and the rule is established that the purchaser would be bound by judgment delivered in the action then pending. See Armour on Titles, 3rd ed., p. 189:—

> The rule was sometimes said to depend on notice and to be based upon the fiction that every man was presumed to be attentive to what passed

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in the Courts of justice, but better authorities put it on the ground that the rule is not dependent upon notice, otherwise there would be no end to litigation.

Lord Cranworth, in *Bellamy* v. *Sabine*, 1 DeG. & J. 566, 578, 44 Eng. R. 842, 847, said:—

> Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence.

In the same case it was pointed out that:—

> The doctrine was not confined to Courts of equity, but was common to all Courts.

A *lis pendens* is similar to and is grouped with a caveat in the Registry Act. The effect of a caveat was considered by Mr. Justice Duff in *Alexander* v. *McKillop*, 45 Can. S.C.R. 551 at 556, 1 D.L.R. 586 at 595:—

> This machinery, however, was designed for the protection of rights, not for the creation of rights. A caveat prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of, but the caveator's claim must stand or fall on its own merits. If the caveator has no right enforceable against the registered owner which entitles him to restrain the alienation of the owner's title, then the caveat itself cannot and does not impose any burden on the registered title.

Stephens v. *Bannan and Gray*, 14 D.L.R. 333, was cited on the question of priority being obtained as between unregistered contracts for sale of land by filing a caveat, even though the party thus seeking to obtain priority had notice of the other's equitable interest. I do not consider this case is of assistance in deciding the question. The Supreme Court of Alberta was divided in its judgment, and the Registry Act of British Columbia does not contain a section similar to the one there being discussed. The essential reasoning in *Alexander* v. *McKillop*, 45 Can. S.C.R. 551, 1 D.L.R. 586, was not attempted to be disturbed. Beck, J., one of the majority Judges, while deciding

that Gray, having lodged his caveat first, was entitled to priority [14 D.L.R. 342], gives his opinion that a caveat is

> nothing more than a caution—as it is called in some similar Act—and an effective notice of a claim of title grounded upon something else and preventing any change in the rights of the caveator by dealings with the land subsequent to the lodging of the caveat.

In my opinion, whatever rights Beeks may have possessed in his action, the registration by him of a *lis pendens* did not create any interest in the land which was legally or equitably assignable to his assignees. I find that the defendant Bevan, Gore & Elliott Ltd., purchased the property subject to the rights of the plaintiff in this action, and that the plaintiff is entitled to specific performance in the terms of the agreement for sale of the land dated January 12, 1912. As to the payment of $900 made by defendant Bevan, Gore & Elliott Ltd. to Beeks, I find that this payment was made subsequent to the receipt of a telegram advising them of the registration of the *lis pendens* in the Beeks action. While this litigation has resulted from the failure of the defendant Holmes to complete his first sale, still I do not think that he is concerned in this payment. This amount was a portion of the profit that Beeks expected to reap through the assignment of his agreement for sale. He admitted that any further payment of profit that was dependent upon the result of this litigation, and as to the $900 defendant Bevan, Gore & Elliott Ltd. apparently assumed the risk of payment. It is a matter to be adjusted between them, and does not require to be dealt with in this action. Except as to any profit to be gained by Beeks, as all the parties interested are before the Court, the judgment should, if possible, cover all the interests.

I direct that the portion of the purchase-price already paid to defendant Holmes by defendant Bevan, Gore & Elliott Ltd., be repaid by the plaintiff to said defendant Bevan, Gore & Elliott Ltd., and that, upon such payment and the payment of the balance of the purchase-price, the plaintiff is entitled to a conveyance of the property. The agreement for sale from the defendant Holmes to Beeks, which was assigned to the defendant Bevan, Gore & Elliott Ltd., should be cancelled, as it forms a cloud on the title. Defendant Holmes was the cause of this litigation, and he should bear the costs of not only the plaintiff,

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but of his co-defendant Bevan, Gore & Elliott Ltd. The costs of adding such defendant should also be paid by the defendant Holmes.

Judgment for plaintiff.

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EVANGELINE FRUIT CO. v. PROVINCIAL FIRE INSURANCE CO. OF CANADA.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Meagher, Russell, and Longley, JJ. April 4, 1914.

1. INSURANCE (§ III D—65)—CONSTRUCTION—OF POLICIES ON PROPERTY.

Failure by an insurer to communicate the fact that he stored in dangerous proximity to the insured premises gasoline in greater bulk than allowed in the policy is an omission to communicate a material circumstance affecting the risk and will invalidate the policy, notwithstanding that the insurance company had the knowledge that a gasoline engine was operated in connection with the insurer's business.

[*Bates* v. *Hewett*, L.R. 2 Q.B. 595, referred to.]

Statement

APPEAL from the judgment of Drysdale, J., in favour of plaintiff in an action on a policy of insurance, whereby defendant company insured plaintiff against loss or damage by fire to stock, contained in the building occupied and used by plaintiff as a factory for the evaporation of apples.

The appeal was allowed.

The principal defence was omission on the part of plaintiff to communicate to defendant circumstances material to be known in connection with the effecting of the insurance, namely, that a gasoline engine was used in the building and that gasoline was stored or kept therein. The evidence shewed that a barrel, containing gasoline for use in connection with the engine, was kept under a platform outside the building and at a distance of sixteen or eighteen feet therefrom.

The learned trial Judge held, with some doubt, that this was not a storing or keeping of the gasoline in the building, in violation of the conditions of the policy, and that the failure of plaintiff to state the place where the gasoline was kept outside the building was not a material circumstance that avoided the policy in view of the circumstance, known to defendant, that a gasoline engine was used in the building. At the trial an amendment of the defence in connection with the keeping of the gasoline was moved for and allowed by inserting the words "and near thereto"

after the word "therein" and the words "and in dangerous proximity thereto" after the word "therein" in the first and ninth paragraphs of the defence.

H. Mellish, K.C., for the appellant.

W. E. Roscoe, K.C., and *W. M. Christie*, K.C., for the respondent.

TOWNSHEND, C.J., concurred with RUSSELL, J.

GRAHAM, E.J.:—The defence raised a breach of the following condition in a policy of fire insurance on goods in the plaintiff's building, i.e.: Nondisclosure.

Graham, E.J.

1. If any person or persons insures his or their buildings or goods, and causes the same to be described otherwise than as they really are, to the prejudice of the insurer, or misrepresents or omits to communicate any circumstance which is material to be made known to the insurer, in order to enable the insurer to judge of the risk undertaken, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

At the time of the fire there was a barrel of gasoline under the platform of the building and for a couple of months before the fire the gasoline had been kept there in a barrel and had been used from time to time for the gasoline engine in use on the premises for evaporating apples. This fact was not communicated to the Insurance Company.

There was another statutory condition, namely 11, by which, among other things, gasoline could not be stored or kept on the premises unless the gasoline did not exceed five gallons in quantity, that is to say, five gallons were permitted, and apparently previously to the barrel of that material being introduced, the plaintiffs limited their purchases to five gallons at one time.

This is not the condition the company relies on but the one first quoted.

The plaintiff relies upon notice to the agent of the defendant company that this barrel of oil was kept by the plaintiffs in compliance with condition one first quoted.

In connection with the application for this policy the applicant's agent referred the company's agent to the Nova Scotia Fire Insurance Company.

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Graham, E.J.

This is the evidence of the agent, Mr. Pryor:—

Q. What did you do? A. I went to their office and took a copy from the daily report in their office of the stock item and buildings which they had.

Q. What was the daily report in reference to which you say? A. Building, stock and machinery.

Q. Of what? A. Of the Evangeline Fruit Co.

Q. Made in respect to what? A. From inspection report.

Q. This daily report was in respect to what? Was it in respect to a policy issued by the Nova Scotia Fire? A. Yes, it was.

Q. You saw that? A. Yes.

Q. What information did you get from that with reference first to the building, if any, machinery, gasoline engine or gasoline? A. They were carrying $4,000 on the building and $1,000 on the stock. I took a note of the stock item and also of the building. I understood there was machinery and gasoline engine but there was a permit on the policy that no gasoline was to be kept in the building but as we were not interested in the machinery, why I thought it was not worth taking notice of.

Q. You got this information before issuing this policy? A. Yes.

Q. When you came over to your office what steps did you take? A. I simply handed the memorandum over to the stenographer and asked her to issue the policy.

Q. What one? A. The one I took from the Nova Scotia Fire office describing the stock and the building.

The learned trial Judge says in the judgment:—

As a matter of fact the practice of storing gasoline outside the main building and under the platform thereof had been adopted by plaintiffs prior to the effecting of the policy in question and was not communicated to the insurer. I held that this was not a material circumstance that voided the policy in view of the circumstance known to defendants, that a gasoline engine was used in the building.

With deference, I think there is a slip there. I think it would not be a necessary inference that because a gasoline engine was used in the building, therefore there was outside the building, dangerously near, gasoline exceeding the five gallons, excepted in the condition 11. That would not be a reasonable inference.

If the gasoline had been previously operated by quantities obtained in less than five gallons, it might then be the practice and the condition which the agent saw on the policy of the Nova Scotia Fire Company to which he was referred prohibiting quantities, unless under five gallons, would rather lead him to draw the inference that this was the practice in connection with the engine there. He would not infer that the plaintiffs would take such risks in connection with the Nova Scotia Fire Insurance Company's policy.

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The plaintiff did not give the information nor the means of information, and the company had not the information through the reference or from any other source to which it was incumbent on them to resort. There is no use to refer one to another company to find out about the use of the barrel of gasoline.

I refer to a Marine Insurance case, *Bates* v. *Hewett*, L.R. 2 Q.B. 595, and to the observation of Cockburn, L.C.J., at page 605. I also refer to Macgillivray on Insurance, page 317.

it is clear that keeping this gasoline where it was, was a material increase of the risk.

In my opinion, the appeal must be allowed and the action dismissed with costs.

Graham, E.J.

MEAGHER, J., concurred with RUSSELL, J.

Meagher, J.

RUSSELL, J.:—The plaintiff's building was insured by the defendant company under a policy of which the statutory conditions were terms. The defendants were aware that a gasoline engine was used in the building, but they were not aware that it was the practice of the plaintiffs to have a barrel of gasoline stored under the platform on the outside of the building and this fact was not communicated to the defendants.

Russell, J.

The questions raised on this appeal are, first, whether there was a breach of the 11th statutory condition, or rather whether the loss occurred under the conditions described in the 11th clause of the condition, which provides that the insurer is not liable for a loss or damage occurring while gasoline is stored or kept in the building insured; secondly, whether the policy was void because the plaintiff company omitted to communicate to the defendant the fact that gasoline was so stored.

The platform was 28 feet in width and was used for rolling barrels of apples into the building. It was not enclosed in such a manner as to form an outside cellar. It was open to the public and the gasoline was drawn off from time to time through a tap as required. There was no door or opening from the space under the platform to the building. It would seem arguable that a platform so used might be considered a part of the building, but I should prefer the negative side of the question, and if the issue depended on the 11th condition, I should incline to support the decision of the learned trial Judge in favor of the plaintiff.

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But I think the omission to communicate the fact that gasoline was stored under the platform was a breach of the first condition and that it avoids the policy. It seems to me that it is one of the kind of things that an insurer would deem material in accepting the risk and determining the amount of premium. I cannot accept the contention of the plaintiff that because gasoline is mentioned in the 11th condition, the fact that gasoline was stored outside the building cannot be made the ground of a complaint for omission to communicate under the first condition. If this contention were sound the plaintiff could surround his building with gasoline tanks and say nothing about it when applying for insurance.

I think the appeal should be allowed and the claim dismissed.

Longley, J.

LONGLEY, J., concurred with RUSSELL, J.

Appeal allowed.

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FARRELL v. NATIONAL TRUST CO.

Judicial Committee of the Privy Council. Present: The Lord Chancellor, Lord Dunedin, Lord Shaw, Lord Moulton, Lord Parker of Waddington. April 7, 1914.

1. WILLS (§ III L—194)—INTERPRETATION—REVOCATION CLAUSES.

Gifts by will given in plain and explicit language are not to be held revoked by uncertain language of a codicil, particularly where the same testamentary writings contained as to other bequests revocations clearly expressed.

[*Re Farrell*, 7 D.L.R. 419, 4 O.W.N. 335, affirmed on appeal.]

Statement

APPEAL by Edward D. Farrell from the judgment of the Ontario Court of Appeal, *Re Farrell*, 7 D.L.R. 419, 4 O.W.N. 335, affirming the judgment of Teetzel, J., 4 D.L.R. 760, 3 O.W.N. 1909, on the construction of a will and codicil.

The appeal was dismissed.

The judgment of the Board was delivered by the Lord Chancellor.

Viscount Haldane, L.C.

HALDANE, L.C.:—Their Lordships have considered the will and the various codicils made by the testator. The conclusion at which they have arrived is that it is impossible to attach to the

codicil of March 20, 1909, either of the meanings which are contended for by the appellant. If it is suggested that this codicil was intended to dispose of the whole of the residue which had already been exhaustively dealt with in the will itself, the answer is that the codicil provides that on failure of the issue of Dr. Edward Farrell, what is given by it is to go into the testator's residuary estate. This shews that he contemplated that the disposition of his residue by the will was intended by him to remain unrevoked. If it is, on the other hand, suggested that the testator intended to give Dr. Edward Farrell something by the codicil, and that effect must be given to the intention, the answer is that this something has not been sufficiently indicated by the testator to enable it to be ascertained by a Court of justice. He purports to dispose of:—

> Whatever balance may remain to the credit of my estate whenever the final settlement of the same is made by my trustees, the National Trust Company of Ontario, at Toronto.

There is no time defined at which this final settlement is to be made, and it can hardly be conceived that the testator meant to leave the amount given to depend on the discretion of the trustees. Nor, if this difficulty were got over, is it easy to think that he meant that the whole of the income of his residue, reaching a much larger amount than he was giving to other legatees in a similar position to Dr. Farrell, was to go, as has been suggested, to the original residuary legatees until the death of Dr. Farrell's mother, and was then to pass to Dr. Farrell in such a way as to give him the *corpus*, which in its turn was to come back to the original residuary legatees in the event of his death without issue. In whatever way the codicil is read the inference from the language used is that the testator had not clearly thought out what it was that he meant to dispose of by it.

Under these circumstances, their Lordships take the same view of the question of construction as was taken by the Court of Appeal for Ontario, [*Re Farrell*, 7 D.L.R. 419], that dispositions carefully made by the will cannot be treated as revoked by language used subsequently which is ambiguous and indefinite in its directions.

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Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs, those of the trustee respondents being paid out of the estate.

Appeal dismissed.

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CLAYTON v. HANBURY.

British Columbia Supreme Court, Murphy, J. February 27, 1914.

1. MASTER AND SERVANT (§ II D—205)—DISOBEDIENCE OF RULES BY SERVANT—CONTRIBUTORY NEGLIGENCE.

An application by a workman for compensation for personal injury under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, will be refused where the accident, basing the claim, is the result of the serious and wilful misconduct of the plaintiff, *e.g.*, his disobedience of repeated warnings not to do the work in question without first throwing back the lever of the machine which he was cleaning and turning off the power.

Statement

APPLICATION by a workman for compensation for personal injury under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, defended on the ground of the serious and wilful misconduct of the applicant.

The application was refused.

McLean, for the applicant.

McFarlane, for the defendant.

Murphy, J.

MURPHY, J.:—Assuming without deciding that the application for compensation under the Workmen's Compensation Act, [R.S.B.C. 1911, ch. 244] is made in time, I hold the plaintiff fails because I find the accident to have been the result of his serious and wilful misconduct. I find as a fact that he was forbidden to clean the machine in question until he had first done two things, *i.e.*, throw the lever back and turn off the power. I find as a fact that he disobeyed this order in the face of repeated warnings. I find as a fact that the foreman in no way countenanced his so doing, although I find the foreman himself did at times do the same thing as occasioned the accident, but that he was not aware that plaintiff was so acting either at the time of the accident or previous thereto.

I therefore dismiss the application.

Application dismissed.

BARRIE v. DIAMOND COAL CO.

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Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Simmons, JJ. April 8, 1914.

1. APPEAL (§ VII L 3—485)—WEIGHT OF EVIDENCE AS TO PREJUDICE FROM LACK OF NOTICE—WORKMEN'S COMPENSATION CLAIM.

While the question whether there was any evidence that the employed was not prejudiced by want of notice of the employee's injury under the Workmen's Compensation Act, Alta. stat. 1908, ch. 12, is a question of law upon which an appeal may be taken, no appeal lies as to the weight of such evidence where there was sufficient to base the Judge's finding that there was no prejudice, and that the notice might therefore be dispensed with under the statute.

[*Bruno* v. *International C. & C. Co.*, 12 D.L.R. 745, referred to.]

2. INFANTS (§ III—41)—ACTION BY—APPOINTMENT OF NEXT FRIEND—WORKMEN'S COMPENSATION CLAIMS.

In proceedings in a District Court under the Workmen's Compensation Act (Alta.) the practice of the District Court is applicable where not inconsistent with the Act; and, therefore, an amendment may be made during the trial so as to add a next friend in a proceeding thereunder to recover compensation for an employee under the age of twenty-one.

[*Bodner* v. *West Canadian Collieries*, 8 D.L.R. 462; and *Toll* v. *C.P.R.*, 1 A.L.R. 318, referred to.]

3. EVIDENCE (§ III—376)—ADMISSIBILITY—SECONDARY EVIDENCE NOT OBJECTED TO AT HEARING.

Secondary evidence is admissible where the primary evidence cannot be produced, or where the party against whom the evidence is tendered does not object.

4. APPEAL (§ IV J—155)—WORKMEN'S COMPENSATION CLAIMS—AWARD VARYING FROM THE DELIVERED REASONS FOR JUDGMENT—DISPOSAL AS TO COSTS.

It is not an objection available on an appeal that the disposition made by the District Judge of the costs in a proceeding under the Workmen's Compensation Act (Alta.) is different in his formal award from that in his written reasons for judgment; the award as finally signed is the only disposition to be dealt with on an appeal.

Statement

APPEAL from an award under the Workmen's Compensation Act, Alta. Stat. 1908, ch. 12.

The appeal was allowed and a reference back directed.

J. R. Palmer, for the plaintiff, respondent.

L. M. Johnston, K.C., for the defendant, appellant.

Beck, J.

The judgment of the Court was delivered by BECK, J.:—This is an appeal from the award of His Honour Judge Jackson, under the Workmen's Compensation Act (ch. 12 of 1908 Statutes), whereby he ordered the respondent company to pay the applicant, after deducting amounts already paid, the weekly sum of

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$7.50 as compensation for personal injuries, as well as arrears at that rate and costs.

A number of grounds of appeal are taken:—

1. No notice in writing of the accident was given.

The Judge found upon the facts and circumstances proved that the respondents were not thereby prejudiced in their defence. I think that these facts and circumstances constituted some evidence of there being no prejudice, and that, while the question whether there was any evidence is a question of law upon which an appeal is open, the question whether there being some evidence upon which the Judge could so find his finding is the more satisfying is one upon which no appeal is open.

The evidence in this respect is to this effect: The accident happened on December 21, 1911. The applicant was seriously and permanently injured in one arm. The respondents continued to pay his wages at the rate of $16.44 per month from the date of the accident to January 9, 1913. Then the respondents proposed in an indefinite way to pay him a lump sum in satisfaction of his claim. He refused it. The respondents then refused to pay him anything further. The applicant, immediately after the accident, was examined by two medical practitioners—Dr. D'Arc and Dr. Beaman, both of whom then lived at Diamond City, the village where the mine in which the accident occurred is situate, and both of whom are still there or in the same part of the province. Dr. D'Arc and a Dr. Rose, who also lives in Diamond City, performed an operation on the applicant, in relation to the injury occasioned by the accident, in February, 1913. A Dr. Taylor, of Lethbridge, had examined the applicant prior to this operation and had advised it. A Dr. Galbraith, also of Lethbridge, examined him before the hearing. The applicant has been living at Diamond City continuously ever since the accident.

To quote words which I used on a former occasion:—

> There is no room for the suggestion, under these circumstances, that the claim might be fraudulent or the applicant a maligner, or that a personal examination under the provisions of the schedule of the Act would have been of any additional advantage to the respondents: *Bruno* v. *International C. & C. Co.*, 12 D.L.R. 745, 24 W.L.R. 729.

I, therefore, think that there was evidence upon which the Judge could hold that the respondents were not prejudiced.

2. The applicant is an infant.

The proceedings were commenced without a next friend. The point was raised during and at the conclusion of the evidence. The Judge reserved his decision. He subsequently gave written reasons for judgment, in which, after finding on the merits in favour of the applicant, he expressed the opinion that, according to the proper practice, an infant applicant was bound, as soon as—but not before—the proceedings under the Act were ripe for hearing, to be represented by a next friend, and gave the applicant a stated time to enable him to file the consent of someone to act in that capacity, and directed that, upon this being done, the proceedings should be amended accordingly. This was done, and the Judge made an order for amendment accordingly, and subsequently made his award.

This Court has already held, in *Bodner* v. *West Canadian Collieries*, 8 D.L.R. 462, 22 W.L.R. 765, that, contrary to English decisions and by reason of differences between the English Act and that of Alberta, proceedings before a District Court Judge as arbitrator are proceedings in the District Court, and that the ordinary practice of that Court, so far as it can be applied and is not inconsistent with the provisions of the Act, is applicable to proceedings under the Act.

Again, in *Toll* v. *C.P.R. Co.*, 1 A.L.R. 318, this Court was of opinion that the suing by an infant without a next friend was a mere irregularity which might be amended at any stage. I think, therefore, the Judge quite rightly permitted the amendment and was fully authorized to do it as and when he did.

3. It is said that the Judge is clearly wrong in the amount of the weekly allowance—that there is no evidence to support a finding of the amount fixed—$7.50 a week.

The statutory provision which is to be applied is as follows:—

> The amount of compensation . . . shall be . . . where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50% of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed

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$10; provided that as respects the weekly payments during *total incapacity* of a workman who is *under 21 years of age* at the date of the injury, and whose average weekly earnings are *less than $10*, 100% shall be substituted for 50% of his average weekly earnings, but the weekly payment shall in no case exceed $7.50: Sch. A. (1) (*b*).

For the purposes of the provisions of this schedule relating to "earnings" and "average weekly earnings" of a workman, the following rules shall be observed:—

(*a*) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week *at which the workman was being remunerated*. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

What the Judge says on the question of the applicant's average weekly earnings is as follows:—

> The applicant had been working in an inferior position *until two days before the accident*, when he was given a better position. It was shewn in the evidence that the minimum wages received for the work he was doing at the time of the accident was $2.50 per day or at the rate of $15 per week, which is the amount arrived at as the "average weekly earnings": Sch. 1 8. 2 (*a*) . . . the award of the Court will be on the basis of $7.50 per week less the amount already paid.

The hearing took place on June 21, 1913. The applicant was examined by Dr. Galbraith a few days before. The doctor's evidence shews that the applicant's right arm is permanently and seriously injured, so that at the present time he cannot use it either for manual or clerical work, and the prospects of his ever being able to do so are very slight. The applicant said that he had, on account of the injury, been doing no work since the accident. He was living at his father's house, under the doctor's care, from the date of the accident (December 21, 1911) for nearly a year, visited by the doctor practically every day. Then, on February 20, 1913, another operation had to be performed upon the arm, which was found not to be healing properly, and a piece of bone was removed. From this and other less salient circumstances appearing in the evidence, I think the Judge could quite reasonably find that the applicant had from the date of the accident been and at the time of the hearing

was still under "*total* incapacity." This is, of course, subject to review in pursuance of the 1st schedule (13). Then the Judge has found as a fact that the minimum wage paid for the class of work the applicant was doing at the time of the accident was $2.50 per day—equal to $15 per week. If so, then, under the provisions I have quoted from the schedule to the Act, the weekly payment was properly fixed at $7.50.

Exception is taken by the respondents that the Judge partially based his finding of the weekly earnings on inadmissible or improperly received or insufficient evidence of an "agreement." Now, it is a matter of general knowledge that the common usage is that agreements exist between mineowners, on the one hand, and the body of their workmen, on the other, regulating, amongst other things, the rates of wages to be paid for the several classes of work, and this usage has become so well known and so nearly universally adopted that it is not only recognized but in effect assumed and taken for granted by the Parliament of Canada (the Conciliation and Labour Act, R.S.C. 1906, ch. 96).

Counsel on both sides quite well understood what agreement was referred to, no objection was taken at the time to the kind of the evidence being given with regard to it, and, assuming objection could have properly been taken—which I doubt—it could have been only on the ground that it was secondary evidence, and secondary evidence is perfectly good evidence if either it is shewn that the primary evidence cannot be produced or the party against whom the evidence is tendered does not object. The applicant was employed from the commencement of his employment—some two months before the accident—until within two or three days of the accident at $1.47 a day—equal to $8.82 a week. Then he was given a better position. But, even while taking into consideration the evidence regarding the agreement, I have come to the conclusion that there is no evidence upon which the Judge could fix any sum whatever as the applicant's average weekly earnings. Substantially the whole of the evidence upon this question is as follows:—

Joseph Paresi:

Q. Were you doing the same work as he was? A. Well, *not the same work*, but I used to have stronger horses; he used to pull out of the room; and I used to pull out of the entry.

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Q. What wages did you get from the company for the work? A. I used to have $3.03 for 8 hours.

Q. Is that the usual pay for that class of work? A. Yes.

The applicant:

(After saying that until two or three days before the accident he was getting $1.47 a day.)

Q. Do you know the usual pay that a man receives in this district for that class of work in the mine? A. Well, the agreement calls for from $1.75 to $2.50 or $2.75.

. . . . . .

Q. Do you know what the Diamond Coal Co. are in the habit of paying for that class of work? A. *No*, all I know is that the men get $3.03. *I don't know about the pony drivers.*

. . . . . .

Q. Having been shifted from the work of carrying plates to the work of driving a pony, how much *do you think you were entitled* to receive from the company? A. $2.50 to $2.75.

In view of this evidence, it seems to me impossible to say that "the minimum wages received for the work he was doing at the time of the accident was $2.50 per day, or at the rate of $15 per week." As the applicant was a boy of about 17, who had been receiving $1.47 a day, it seems more likely that he would in his better position receive $1.75, the minimum wage according to the agreement, than $2.50 or $2.75. $1.75 a day, amounting to $10.50 a week, and thus exceeding $10 a week, would entitle him to only 50% of this, or $5.25. In no view, as I see it, can the Judge's finding be sustained for $7.50 a week or for any fixed sum on the evidence produced.

There is another ground of appeal raised, namely, that the award makes a different disposition of the costs from that stated by the Judge in his written reasons for judgment. There is nothing in this ground. Any Judge is at liberty to alter his expressed opinion until—unless in exceptional cases—it is acted on to the extent of the formal judgment being entered. In such a case as the present, we can deal only with the award which he ultimately saw fit to sign.

In the result, the case should be referred back to the learned Judge of the District Court for the purpose only of his taking further evidence to enable him to fix the compensation and of his fixing it. In doing so, he should fix the exact amount due for arrears—that is, he should ascertain the exact amount already

paid by the company, deduct it from the arrears, and settle the balance.

As to the costs of the appeal, I would give them to the appellants, but fix them at $100. The costs of the further enquiry I think should be borne by the respondents.

Case referred back.

FORSTER v. CITY OF MEDICINE HAT.

Alberta Supreme Court, Walsh, J. April 7, 1914.

1. LATERAL SUPPORT (§ I—2)—EXCAVATIONS—CHANGING STREET GRADE.

The right to lateral support of land is not infringed until actual damages are suffered by reason of the withdrawal of the support, and a falling in of an insignificant quantity of the soil without any consequent special damage will not sustain an action based in damages only and not for an injunction.

[*Backhouse* v. *Bonomi*, 9 H.L.C. 503, applied.]

2. HIGHWAYS (§ II B—52)—VOLUNTARY LICENSE TO ABUTTING OWNER TO PUT STEPS ON HIGHWAY—REVOCATION.

Where a city municipality, by way of mere license and voluntary concession, permits a property owner to put steps on the highway as an approach to his property, the city has the right at will to withdraw such license without the owner's consent or concurrence.

[*Forster* v. *Medicine Hat*, 9 D.L.R. 555, 5 A.L.R. 36, doubted.]

Statement

ACTION by a private owner against a municipality in damages for alleged withdrawal of lateral support from his property.

The action was dismissed.

G. H. Ross, K.C., and *J. T. Shaw*, for the plaintiff.

Rand, for the defendant.

Walsh, J.

WALSH, J.:—This action is brought to recover from the defendant the damages which he claims to have suffered by reason of the cutting down of the street in front of property owned by him and the removal from it of earth along the entire frontage of his lots. It is brought as a result of my refusal to appoint an arbitrator to fix the amount of the loss claimed to have been thus sustained by him. See *Forster* v. *Medicine Hat*, 9 D.L.R. 555, 5 A.L.R. 36. That decision was reached practically without argument upon the ground on which I placed it and I must frankly confess that a reading of the authorities cited to me by Mr. Rand on the argument of this case has raised some doubt in my mind

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as to the correctness of the conclusion which I then reached. That question is, however, now *res judicata* as between these parties. If, however, the same point is ever raised before me again I will approach its consideration with an open mind in spite of the view of it which I expressed on the occasion above referred to.

The facts of the case, as disclosed at the trial of this action, are vastly different from my understanding of them when the application for the appointment of an arbitrator was before me. The cutting down of the highway was done in 1905 under a resolution of the city council at a time when the plaintiff was the mayor of the city and at a meeting over which he presided and it was done with his full consent. In the same year he applied for permission to build steps from the grade of the highway, as thus established, to the property in question. This permission was given him and he put the steps up, which were thereafter used by him and his family until 1912, and they afforded the only means of access to his property from the front. The cut was a deep one, being from nine to twelve feet in depth across the entire frontage of the lot, but the plaintiff was entirely satisfied with that arrangement and if nothing further had happened, this litigation would not have arisen. In making this cut, the entire width of the street was not excavated. The top of the cut was about two feet from the line of the plaintiff's lots with a gradual slope from there to the roadbed. In 1912, under the authority of certain by-laws properly passed and never since questioned, the cut was widened on the plaintiff's side of the street to permit of the laying of a curb, gutter and sidewalk, and in the carrying out of this work the top of the cut was brought very close to the plaintiff's line and the slope of the side of it was made much steeper than before and the steps, until then used by the plaintiff, were removed. The grade of the highway as it was left in 1905 was not further lowered in this process. It was, if anything, raised a little. All of this work was done on the highway, but the plaintiff complains that as a result of it, the soil of his lot is falling into the highway and that the removal of the steps has taken away his only way of getting into and out of his property from the front, and it is only of this work done in 1912 that he complains. In my opinion, the defendant is not now liable on the score of the cutting off of the plaintiff's means of access to his property,

Any claim that he ever had in this respect was because of the work done in 1905 for that was the effective cause of the isolation of his property and of that he makes no complaint. Even if he did, he could not succeed in it quite apart from any defence under any statute of limitations which the city might have to a claim for an act done so many years ago. He was an active and a consenting party to this very thing being done. He knew that it was in contemplation and he approved of it. He knew that it was being done and encouraged it. He certainly could not be heard to say now that the city had no right to do it even if he put forward that contention which he does not. The removal of the steps in 1912, when the excavation was widened constitutes, as I understood him at the trial, his present real grievance on this branch of his claim. I am unable to see, however, how their removal gives him any right of action. He was a mere licensee in the placing of them on the highway. The right which the city gave him to so place them was not given in recognition of any legal obligation on its part or of any legal right in him, but was a voluntary concession made solely for his convenience which I think it had the right to withdraw when and as it liked.

His claim arising out of his contention that the soil of his lot is falling into the highway as a result of what was done in 1912 is founded upon the argument that he had a right to the support which the neighbouring land, in its natural state, afforded to his land and that the withdrawal of this support, occasioning damage to his land, gives him a cause of action against the city. The evidence at the trial rather points to the conclusion that the construction of a retaining wall is or will some day become necessary to prevent the falling of at least some portion of the plaintiff's land into the street. The contest upon this point seemed to be over the question as to which of the parties should be at the expense of building it. The plaintiff practically asked me to award him as damages the sum which it would cost to build this wall, which sum he in effect, if not in so many words, promised to expend in its construction.

The city advanced the proposition that he should build it himself because, when built, his property would, by the opening

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up of this street, be enhanced in value by an amount considerably exceeding the cost of the retaining wall.

I do not see what I have to do with either of these submissions. The only claim which the plaintiff makes is for damages. The work has been done so that an injunction to stop it, even if it were asked, would be futile. No claim is made by the pleading or was even hinted at during the trial, that the defendant should be compelled to restore matters to their former condition. It is a claim for damages and damages only that is presented by the plaintiff. If the principle of lateral support which prevails as between adjoining proprietors applies as between a private owner and the municipal corporation owning or having the control over the highway upon which his land abuts (and his claim can certainly be placed upon no higher ground than this) his right is to damages when and not before damages are suffered by reason of the withdrawal of that support.

It is, I think, conclusively settled by the decision in this House in *Backhouse* v. *Bonomi*, 9 H.L.C. 503, that the owner of land has a right to support from the adjoining soil, not a right to have the adjoining soil remain in its natural state (which right if it existed would be infringed as soon as any excavation was made in it) but a right to have the benefit of support which is infringed as soon as, and not till damage is sustained in consequence of the withdrawal of that support: (*per* Lord Blackburn in the House of Lords, *Dalton* v. *Angus*, 6 App. Cas. 740 at 808).

Upon the evidence I think that the plaintiff has as yet sustained no damage under this head. There is some evidence that an insignificant quantity of the soil of the plaintiff's land has fallen into the street. I am not satisfied that this is so, but even if it is, the damage thereby occasioned is so small as to be unworthy of notice. The plaintiff would probably not care in any event to have that damage assessed to him now, for it may be that there can be but one assessment of such damage, and should it be made now, he might find himself remediless if something more serious in this respect should occur in the future. The plaintiff's action is dismissed with costs.

Action dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 29, 1914.

1. PLEADING (§ II—165)—STATEMENT OF CLAIM—AVERMENTS—AMENDED STATEMENT—EFFECT.

The right of one party to read the pleading of another as evidence against the latter is confined to the pleading as it stands, so that if the pleading has been amended, the original pleading cannot be read as such evidence.

[*O'Kelly* v. *Downie*, 15 D.L.R. 158, reversed.]

2. SOLICITORS (§ II B—25)—RELATION TO CLIENT—INSTRUCTIONS—ERROR IN PLEADING.

A misstatement of certain allegations of fact, made by a solicitor in drawing the plaintiff's pleading, owing to wrong or misleading instructions having been given, is merely a statement of fact made improperly by an agent, and cannot be read as evidence against his client after the pleading has been corrected by amendment.

[*O'Kelly* v. *Downie*, 15 D.L.R. 158, reversed.]

Statement

APPEAL from the decision of Curran, J., *O'Kelly* v. *Downie*, 15 D.L.R. 158, 26 W.L.R. 413, in defendant's favour on a counterclaim for specific performance of a rescinded contract alleged to have been revived by the plaintiff's pleadings.

The appeal was allowed, Haggart, J.A., dissenting.

W. H. Trueman, for the plaintiff.

A. B. Hudson, and *E. A. Conde*, for the defendant.

Howell, C.J.M.

HOWELL, C.J.M.:—The facts in this case are almost identical with those in *Handel* v. *O'Kelly*, 8 D.L.R. 44, 22 Man. L.R. 562. At the date of entering into this agreement the property had only a speculative value and in harmony with *Sanderson* v. *Burdett*, 16 Gr. 119, Courts consider in such cases that time is of the essence of the contract even if it had not so been made by the very terms of this agreement.

I think the learned Judge properly held that the defendant before this suit began had abandoned the contract which abandonment had been acquiesced in and acted upon by the plaintiff. While matters were in this state the plaintiff filed the statement of claim in this cause and the record when the defendant filed his statement of defence and at the trial and now, so far as the statement of claim is concerned, is merely a statement of the above and a claim asking to have it declared that because of the abandonment

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the contract should be declared to be at an end and void and that a caveat registered pursuant to the contract should be vacated. It appears that through some misunderstanding of the solicitor, due to want of full instructions, the original statement of claim alleged that the contract was still on foot and in force and asked for specific performance by the defendant, and in default, cancellation. On being served with this the defendant tendered payment and demanded conveyance. The solicitor notified the plaintiff and he was then, for the first time, told of the abandonment and of the sale of the land by the defendant. Thereupon the statement of claim was amended, and made as the record now is. The defendant in his answer to the amended statement of claim, set up the original, and claims that it is the record in this cause, or, at all events, that the plaintiff is bound by it.

In Daniell, Chancery Practice, 7th ed., 490, the following is stated:—

> The right of one party to read the pleading of another party as evidence against the latter is confined to the pleading as it stands, so that if the pleading has been amended, the original pleading cannot be read as such evidence.

This principle is stated to be the law in Annual Practice, 1914, at 531. That is also my memory of the practice in the past.

It seems to me the utmost use that the defendant can make of the original statement of claim is that the plaintiff by his solicitor, at the institution of this suit, claimed that the contract was still in force and did not assert or claim that it had been abandoned. The plaintiff, to meet this, gives evidence of the imperfect instructions to his solicitor and of his want of knowledge at the institution of the suit of the abandonment and of the sale of the land by the plaintiff.

It seems to me clear: (1) that the defendant abandoned the contract and the plaintiff acquiesced in this; (2) that they merely instructed their solicitor to clear the title; (3) that the solicitor made a mistake in certain allegations of fact in the original statement of claim which he corrected by amendment. It is merely a statement of fact made improperly by an agent. The defendant has not been induced to change his position because of this misstatement. He had lost his right to the property before the pleading and I cannot see how this misstatement of fact could give it back to him. There was no new agreement. If because of this

misstatement the defendant has been put to costs, his wrongs can be remedied by an order as to costs. If the pleadings in the action had originally been in proper form, perhaps the defendant would not have contested the action.

The judgment entered must be set aside and a judgment entered for the plaintiff declaring that the contract in question was abandoned and declare it void, and the caveat must be vacated.

There will be no costs in the Court below and this appeal will be allowed with costs to the plaintiff.

Howell, C.J.M.

RICHARDS, J.A., PERDUE, J.A., and CAMERON, J.A., concurred in the judgment of HOWELL, C.J.M.

Richards, J.A.
Perdue, J.A.
Cameron, J.A.

HAGGART, J.A. (dissenting):—I would affirm the judgment of the trial Judge, and I accept his statement of the facts.

Haggart, J.A. (dissenting)

In the exercise of its discretion the Court will refuse to give relief by way of specific performance or making a declaration in favour of a party to the contract when by his actions or conduct the plaintiff has become disentitled to that relief or remedy which he asks for.

Here it has not been shewn when or how or by what process the defendant became divested of the rights he acquired under the agreement of purchase or of his interest in the land.

The plaintiff urges that the defendant abandoned his rights and his interest. The evidence shews that the defendant wanted to get his money back and that he would like to get out of his obligation to make further payments. The contract of abandonment to be effectual must have all the formalities and requirements of an original contract. The plaintiff claims that the "abandonment" was accepted by them by their re-selling the land to Chapman, and by their striking out of their books their charges in respect of the unpaid purchase money; but I cannot find that either of these circumstances were communicated to the defendant before the commencement of this action.

Fry on Specific Performance, 5th ed., 504:—

> The Court must be satisfied of this total abandonment by both parties of the contract.

"The Court," said Lord St. Leonards,

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requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less.

and in another case His Lordship said that

unless a party has by his conduct forfeited his right, abandonment of a contract, according to the law of this Court, is a contract in itself.

citing *Carolan* v. *Brabazon*, 3 Jon. & L. 200, and *Moore* v. *Crofton*, 3 Jon. & L. 438.

It has been also urged that the amount actually paid by the defendant was very small in proportion to the total purchase money. In the recent case of *Kilmer* v. *British Columbia Orchards Co.*, [1913] A.C. 319, 10 D.L.R. 172, it was contended that it was a speculative purchase and that only $2,000 out of a total purchase price of $75,000 had been paid, and that the forfeiture clause should be given full effect to; but the Court there relieved against the penalty, following the law as laid down in *Re Dagenham Dock Co.*, L.R. 8 Ch. 1022.

I would dismiss the appeal.

Appeal allowed.

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BENNEFIELD v. KNOX.

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. April 20, 1914.

1. APPEAL (§ I B—15)—FINAL DECISION.

The refusal of a District Court Judge to confirm a referee's report under an order of reference is not a "final decision" within the purview of sec. 48 of the Alberta District Courts Act, 1907, ch. 4, where the decision from which the appeal is taken does not in fact determine the rights of the parties.

[*Baby* v. *Ross* (1892), 14 P.R. (Ont.) 440; and *Ward* v. *Serrell*, 3 A.L.R. 138, applied.]

Statement

MOTION for extension of time to perfect an appeal from a District Court Judge's decision, involving the question as to whether the order from which appeal was sought was appealable.

The application was refused.

A. Stewart Watt, for the plaintiff, appellant.

The defendant Knox in person.

Harvey, C.J.

The judgment of the Court was delivered by HARVEY, C.J.:—This is an application for an extension of time to perfect the appeal, of which notice has been given. The appeal is from the

decision of a District Court Judge, and one of the objections is that there is no right of appeal by reason of sec. 48 of the District Courts Act, 1907, ch. 4. See *Herman* v. *McConnell*, 3 A.L.R. 136.

This section is taken in exact words from an Ontario Act. It was held by the Court of Appeal of that province, in *Baby* v. *Ross* (1892), 14 P.R. (Ont.) 440, that the proviso as to final and interlocutory orders and decisions applied to the whole section, and not merely to the last paragraph. This judicial interpretation ought to be accepted for our Act. See *Ward* v. *Serrell*, 3 A.L.R. 138.

The only question, then, is whether the decision appealed from is final or interlocutory. The plaintiff gave two mortgages to the defendant Knox, which were transferred to his co-defendant, the Trusts and Guarantee Co., who are now the registered owners. The plaintiff alleges that he only received a portion of the amount of the mortgages and claims:—

(*a*) An accounting from defendant Knox;

(*b*) A declaration of the interest of either of the defendants;

(*c*) A discharge on payment to Knox of the amount due him;

(*d*) An injunction restraining the transfer of the mortgages.

The defendants the Trusts and Guarantee Co. disclaim any beneficial interest in the mortgages, and the defendant Knox alleges that the full amount is due on the mortgages, and that for valuable consideration he had agreed to cause the mortgages to be transferred to certain named persons.

On May 21, 1913, the District Court Judge, in whose Court the action was, ordered a reference to the clerk of the Court to ascertain and report what amount, if any, was due on the mortgages. The clerk reported, on October 29, 1913, that there was $341.05 due. On January 12, 1914, the plaintiff applied by summons for an order confirming the report, and for an order that, upon payment into Court of the amount found due, the registrar should cancel the mortgages. This application was dismissed on February 2, 1914, and it is from this decision dismissing the application that the plaintiff desires to appeal. It does not appear from the material how the order of reference came to be made. The reasons given by the learned District Judge for his refusal to grant the order were that the reference was not

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one for trial nor one covering all the issues in the action, and that he knew of no rule requiring confirmation. Apparently he had been asked to treat the application as a motion for judgment, but this he declined to do, one reason being because the proper procedure was not taken. It is hard to see how a refusal to make an order asked for which does not determine the rights of the parties can be deemed to be final, and, therefore, the subject of appeal within the section. The decision in the present case did not settle any question in dispute between the parties except the bare question of the plaintiff's right to have the particular order he asked for, nor does it stand in the way of his pursuing all his rights in the action.

I think it is clearly not final and that there is no appeal. The application should, therefore, be dismissed with costs.

Application refused.

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SMITH v. ULEN.

Alberta Supreme Court, Beck, J. April 16, 1914.

1. MASTER AND SERVANT (§ III B 2—302)—JOINT LIABILITY OF PROPRIETOR AND OF INDEPENDENT CONTRACTOR—INJURY TO SERVANT OF CONTRACTOR.

A municipality's reservation by its contract with an independent contractor of control over the way in which the contractor's work shall be done and the kind of material that should be used and its stipulation for the right under certain circumstances to dismiss workmen engaged thereat, does not render such municipality jointly liable with the contractor to a servant of the contractor for injuries sustained as the result of mere collateral negligence of the contractor in the performance of the contract, such as the latter's failure to provide an efficient method of marking the location of unexploded dynamite charges or giving notice thereof to his workmen engaged in excavating at places where dynamiting had been done.

[*Reedie* v. *London and N.W.R. Co.*, 4 Ex. 244, 20 L.J. Ex. 65, applied; *Dallontania* v. *McCormick*, 14 D.L.R. 613, considered.]

Statement

ACTION against one Ulen, the contractor with the city of Edmonton and against the city municipality, for damages for negligence, involving the question of joint liability by the city on the ground of assuming control.

The action was dismissed as against the city.

H. H. Parlee, K.C., for the plaintiff.

Frank Ford, K.C., for the defendant Ulen.

J. C. F. Bown, K.C., for the defendant Edmonton (city).

BECK, J.:—This action was tried before me with a jury. It was an action for damages for negligence. I put certain questions to the jury which they answered, fixing the damages at $10,000. On the findings of the jury I directed judgment for $10,000 and costs against the defendant Ulen but reserved the question of the liability of the city of Edmonton for further consideration. This question has now been argued. The decision involves the consideration of the much discussed questions which arise from the intervention of an *independent contractor* between the party sought to be made liable and the party injured. I have been referred to many decisions and text-books. The authorities seem to me to establish the following propositions:—

1. Where an independent contractor is employed to do an act unlawful in itself, the principal is liable for the direct consequences of such act and is also liable for the consequences of the negligence of the servants of the contractor: *Ellis* v. *Sheffield Gas Consumers Co.*, 23 L.J. Q.B. 42.

2. Where an independent contractor is employed to do a particular thing, which the principal is authorized to do, whether by statute or otherwise, and the contractor does the thing in an improper or imperfect manner, so that the impropriety or imperfection is the cause of damage, the principal is liable: *Hole* v. *Sittingbourne and Sheerness R. Co.*, 6 H. & N. 488, 30 L.J. Ex. 81.

3. Where the thing done is a nuisance the principal is liable: *Ib.*

4. It being the law that when one invites another to use his premises or chattels the person giving the invitation must use reasonable care to ensure that the condition of the premises or chattels does not subject the person invited to danger; this applies to the case of a principal who has employed an independent contractor so as to render the principal liable to an employee of the contractor if injury results to the employee by reason of the premises or chattels being—at all events at the time they are placed in charge of the contractor—in a condition which is dangerous but can be guarded against: *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; *LeLievre* v. *Gould*, [1893] 1 Q.B. 491; *Earl* v. *Lubbock*, [1905] 1 K.B. 253.

5. Where an independent contractor is employed to do a particular thing and in the ordinary course of events the omission to take proper precautions with regard to the manner in which the work is to be done, is the occasion of a person being injured, the principal is liable, if he fail to see that proper precautions are taken: *Hughes* v. *Percival*, 8 App. Cas. 443; *Pickard* v. *Smith*, 10 C.B. N.S. 470; *Bower* v. *Peate*, 1 Q.B.D. 321; *Dalton* v. *Angus*, 6 App. Cas. 740; *Penny* v. *Wimbledon Council*, [1899] 2 Q.B. 72.

An instance of the converse case is *The Cockshutt Plow Co. Ltd.* v. *Macdonald*, 5 D.L.R. 365, 8 D.L.R. 112, 22 W.L.R. 798.

6. But the principal is not liable for a negligent act or omission occurring collaterally or casually or incidentally in the course of the performance

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of the work: *Reedie* v. *London & N.W.R. Co.*, 4 Ex. 244, 20 L.J. Ex. 65; *Pearson* v. *Cox*, 2 C.P.D. 369; *Pickard* v. *Smith*, 10 C.B. N.S. 470.

7. If the principal is not liable on any of the above stated principles he may, nevertheless, be liable by reason of the principal retaining a right to such control and interference with the contractor's employees as to create the relationship of master and servant between the principal and the contractor's employees and thus render the principal responsible for the negligence of the contractor's employees: *Donovan* v. *Laing*, [1893] 1 Q.B. 629; *Stephen* v. *Thurso Police Commissioners* (Court of Sessions) Scotland 1876, 3 Rettie 535, quoted 19 Rul. Cas. pp. 183 *et seq.*; MacDonnell's Master & Servant, 2nd ed., 257.

The defendant, Ulen, was a contractor employed by the city of Edmonton under a special contract in writing to make a large sewer extending a very considerable distance under one of the streets of the city. Its depth was so great that the method of making it was to make vertical shafts at long intervals to the depth required for the sewer, and then to make a tunnel in and along which a concrete sewer was constructed. For the purpose of making the tunnel, charges of dynamite were embedded on the face of the work and exploded so as to loosen the material. The dynamite was exploded by means of fuses. After igniting the fuses the gang of men would retire. In this instance they were followed by another gang of men, of whom the plaintiff was one. While engaged in excavating the earth he evidently struck with his pick an unexploded stick of dynamite. The jury found that the negligence consisted in not having a proper method of marking holes for unexploded shots and also in the inefficient method adopted of gang foremen notifying those on the next shift of unexploded shots.

In my opinion, the negligence which resulted in the injury to the plaintiff was collateral, casual and incidental to the performance of the contract and therefore the city of Edmonton is not liable unless by reason of the terms of the contract the city reserved such control over and right of interference with the contractor's workmen as to make the latter the servants of the city. The only provisions of the contract upon which, to my mind, an argument can be based that this relationship was created are two: (1) a provision that inspectors appointed by the city are required to see that the provisions of the plans and specifications are faithfully adhered to, especially as to the quality of the *workmanship* and materials and shall have power *to suspend any workman*

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for incompetency, drunkenness or negligence or disregard of orders; and (2) that the assistant engineers of the city shall have full power to decide as to the manner of conducting and executing the work in every particular and the contractor shall follow the instructions or orders of any person designated by the city.

I think these provisions do nothing more than give the city control over the way in which the work shall be done and the kind of material that should be used and the right, under certain circumstances, to dismiss workmen. In Beven on Negligence, 3rd ed., 604, it is said:—

> A subsidiary point decided by *Reedie* v. *L. & N.W.R. Co.*, 4 Ex. 244, should be noticed. By the contract for the construction of the works the railway company had the power of removing workmen appointed by the contractor, who was yet not considered under their control. We must conclude from the case that a provision of this description does not make the owner of the property responsible for the workmen's negligence.

I have, in considering the various points involved, considered with some care the recent decision in Ontario of *Dallontania* v. *McCormick*, 14 D.L.R. 613, 29 O.L.R. 319.

The conclusion I have come to is that the city of Edmonton is not liable to the plaintiff in respect of the negligence found by the jury. I think the action should be dismissed against the city of Edmonton with costs.

Action as against city dismissed.

STANDARD FASHION CO. v. McLEOD.

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Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Simmons, JJ. April 25, 1914.

1. CORPORATIONS AND COMPANIES (§ VII C—376)—FOREIGN COMPANY'S RIGHT TO SUE.

An unregistered foreign company is not deemed to be carrying on business in Alberta within sec. 3 of the Foreign Companies Act, N.W.T. 1903, 1st session ch. 14, as amended by statutes of 1903, 2nd sess., ch. 19, merely because it enters into an agreement with a person in Alberta purporting to appoint the latter as its "agent," if in fact the agreement is made by the company outside of the province for the sale of its goods f.o.b. at a point outside of the province to the so-called agent with certain privileges of return or exchange, and no power is thereby conferred to act on the company's behalf.

[*Semi-Ready* v. *Hawthorne*, 2 A.L.R. 201, distinguished.]

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APPEAL by the plaintiff from the judgment of Carpenter, District Court Judge, in the defendant's favour, involving the right of an unregistered foreign company to sue.

The appeal was allowed.

McArdle, for the appellant.

Sellar, for the respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the judgment of His Honour Judge Carpenter.

The only question involved is whether the plaintiff company, a "foreign" trading company, is prevented from recovering by reason of its not being registered under the Foreign Companies Ordinance, ch. 14, N.W.T., of 1903, 1st sess., amended by ch. 19 of 1903, 2nd sess., vol. 1.

Section 3, sub-sec. 1, of the Ordinance, says that

> unless otherwise provided no foreign company having gain for its object, or a part of its object, shall carry on any part of its business in the (Province) unless it is duly registered under this Ordinance,

and sec. 10 that

> any foreign company required by this Ordinance to become registered shall not, while unregistered, be capable of maintaining any action or other proceeding in any Court in respect of any contract made in whole or in part in the (Province) in the course of or in connection with business carried on without registration contrary to the provisions of sec. 3 hereof.

A restriction, but at the same time an interpretation of the meaning of sub-sec. 1 of sec. 3 is placed upon it by sub-sec. 3 of the same section, which is as follows:—

> The taking orders by travellers for goods, wares or merchandise to be subsequently imported into the (Province) to fill such orders or the buying or selling of such goods, wares or merchandise by correspondence, if the company has no resident agent or representative and no warehouse, office or place of business in the (Province) . . . shall not be deemed to be carrying on business under the meaning of this Ordinance.

In this case it is true that the agreement, which is in writing, between the plaintiff company and the defendants, purports to be an appointment by the company of the defendants as the company's agents. But there is no magic in a word, and we must see the sense of the agreement as a whole. In substance and effect the agreement, as I interpret it, is as follows: The company

are to *sell* and deliver f.o.b. Toronto to the defendants "Standard patterns" at a discount of 50% from retail prices, and advertising matter at certain prices and on certain conditions, and also such other publications as may be issued by the company at regular agents' rates; the defendants to be at liberty to return discarded patterns semi-annually between January 15 and February 15 and July 15 and August 15, *in exchange at nine-tenth cost for other patterns*. The defendants are to purchase from the company for free distribution "Standard fashion sheets" to a number not less than 12,000 per annum, and "Handy catalogues" to a number not less than 200 per annum; to pay transportation charges on all goods ordered or returned; to keep on hand (except during the period of exchange) $250 worth of "Standard patterns" at net invoice price, and to pay for a pattern stock of that amount. There is a provision for the termination of the agreement by either party by three months' notice. In that event if the defendants promptly return in good order all Standard patterns on hand at the expiration of the three months the company is to "redeem" them or pay for them at three-quarter cost. The agreement covered only patterns and certain publications to be sold by the defendants and certain advertising matter. The patterns and publications were, I think, clearly under the agreement *sold* by the company to the defendants; the provision for the return on certain conditions of those which the defendants failed to sell to their customers gave the right to the defendants to have the company "redeem" them—that is, *buy* them back.

I cannot quite make out from the evidence what the advertisements said, but I understand that they were notices to the public that "Standard patterns" and certain publications of the plaintiff company could be obtained at the defendants' place of business. In any case, I do not think that the words of a mere advertisement could change the effect of the actual agreement between the parties.

On the ground that the defendants were not agents for, but purchasers from, the plaintiff company, I think the learned Judge of the District Court was wrong in holding that the company was prevented from succeeding by reason of the Foreign Companies Ordinance.

This case is quite distinguishable from that of *Semi-Ready*

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v. *Hawthorne*, 2 A.L.R. 201, decided by the Chief Justice. No other defence or objection to the plaintiff company was established.

The appeal should be allowed with costs and judgment entered for the plaintiff company for $338.47 with interest from November 25, 1912, with costs.

Appeal allowed.

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DAVIS v. WINNIPEG.

Manitoba King's Bench, Macdonald, J., April 9, 1914.

1. MUNICIPAL CORPORATIONS (§ III—287)—EXPENSE OF RECEPTIONS TENDERED GUESTS OF CITY.

Prior to the amendment to the Winnipeg charter (sec. 584 B) the city of Winnipeg had not the power to expend municipal funds for the reception and entertainment of distinguished guests.

Statement

ACTION by the plaintiff suing on behalf of himself and all other electors and ratepayers of the city of Winnipeg against the city municipality to restrain the latter from using municipal funds in paying the expenses of a reception and banquet tendered the members of the Legislature.

Judgment for defendant, dissolving injunction.

H. P. Blackwood, for the plaintiff.

J. Preudhomme, for the defendant.

Macdonald, J.

MACDONALD, J.:—On December 29, 1913, the council of the city of Winnipeg passed a resolution,—

> That the city council tender to the Manitoba Legislature a banquet at an early date and that the reception committee be requested to make the proper arrangements,

and on January 28, 1914, the defendant did tender, give to and, in fact, did entertain the members of the Legislature of the Province of Manitoba at a banquet at "The Fort Garry," an hotel in the said city.

The plaintiff alleges that the resolution was and is beyond the powers and authority of the defendant to pass and that the giving and tendering said banquet and entertainment is and was illegal and beyond the powers and authority of the defendant, and this action is brought to restrain the defendant from appropriating and applying any funds of the defendant, the property of the electors and ratepayers, for the purpose of paying and dis-

charging the cost and expense incurred in giving the said banquet and entertainment and for a declaration that paying and discharging such cost and expense out of the funds of the defendant, the property of the electors and ratepayers, is illegal and beyond the powers and authority of the defendant.

Objection is taken by counsel for the city that the action should be brought in the name of the Attorney-General.

The law seems settled that in cases where payment of any moneys is beyond the powers of a city council any ratepayer may intervene to prevent such payment: *MacIlreith* v. *Hart*, 39 Can. S.C.R. 657; *Smith* v. *Raleigh*, 3 Ont. R. 405; *Wallace* v. *Orangeville*, 5 O.R. 37; *Shrimpton* v. *Winnipeg*, 13 Man. L.R. 211; *Selkirk* v. *Selkirk*, 20 Man. L.R. 461; Joyce on Injunctions (1909), par. 1300.

The defendant contends that it has been the custom for many years on the part of the city of Winnipeg to expend moneys in entertainment. Mr. Brown, the city clerk, has filled that position for the past thirty years, and has been a resident of the city since 1872. In his affidavit filed herein he says that there has always, since his connection with the city, been a custom within the city of Winnipeg for the entertainment of various persons and organizations which custom he asserts still exists. He further states that the city has always had power by and through the council thereof to make contracts in the management of the affairs of the city and that such power has always been construed to enable the council to contract for and to pay the costs and expenses of entertainment to and of various persons and organizations, and that the word "affairs" contained in the charter has always been extended to include such entertainment and that such entertainment has always been regarded as part of the municipal affairs of the city and treated as such. Because of the custom which it is alleged has existed as stated by Mr. Brown, it is contended by counsel on behalf of the city that this alone is sufficient legal justification for the incurring of the expense objected to.

Every custom must have been in existence from a time preceding the memory of man, a date which has long since been fixed at the year 1189, the commencement of the reign of Richard I. Where, however, it is impossible to shew such a continued existence the Courts will support the custom if circumstances be proved which raise a presumption that the custom in fact existed at that remote date. Evidence shewing continuous user as

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of right as far back as living testimony can go is regarded as raising this presumption: 10 Halsbury 222.

If such a custom has existed in Winnipeg for the past forty years, it has been more by way of indulgence than of legal right, and if such indulgence becomes unreasonable, it is the right of any ratepayer to interfere. I do not wish it to be inferred that there has been, to my mind, any unreasonable conduct on the part of the council in this matter. I am dealing only with the legal aspect. The members of the council are the representatives of the ratepayers and to the latter they owe allegiance and the ratepayers are in many instances the proper source to pronounce upon their conduct of municipal affairs.

If the defendant is relying upon custom, I do not think they can succeed, nor yet by interpreting the word "affairs" in the power of the city by the council thereof, to make contracts in the management of the affairs of the city to embrace a contract for giving a banquet to distinguished guests, the extending of such hospitality not being a part of the municipal affairs of the city.

In the case of *The Queen* v. *The Mayor and Town Council of Warwick*, (1846) 15 L.J.Q.B. 306 at 308, it was held that

> the sums claimed can only be allowed under the general words "expenses necessarily incurred in carrying into effect the provisions of the Act."

I do not see how it can be argued here that the giving of a banquet was in any way carrying out any of the provisions of the charter, nor included in the affairs of the city.

To entitle the city to maintain its position it must rely upon the power vested in it under its charter.

There is nothing in the charter with reference to the entertainment of guests or expenditures of that character and the passing of a by-law providing for such an expenditure would not be a good and valid by-law, unless the power for passing the same was conferred by the charter.

At the time of the bringing of this action I find that the defendant had not the power to expend moneys for the reception and entertainment of important guests; but, subsequent to the incurring of expenses for that purpose the Legislature by amendment to the city charter, provided as follows:—

> 584 B. The council of the city may pay for the reception and entertainment to important guests and expenses incurred in matters pertaining

to the interests of the corporation a sum not exceeding $10,000 in any one year, and the expenditures of the moneys heretofore voted or paid for any such purposes are hereby validated and confirmed. The city shall be deemed to have always had the powers contained in this section.

In my opinion this amendment covers the point in issue and validates the action of the council in providing the entertainment referred to.

This legislation, however, was not in force at the time of bringing this action and the plaintiff was within his rights up to the time of the passing of this amendment, and is entitled to his costs of action up to the time that such amendment became law, and for any costs incurred since that date the plaintiff must be held liable.

The injunction must be dissolved with costs.

Judgment accordingly.

MEIGHEN v. KNAPPEN.

British Columbia Supreme Court, Murphy, J. January 28, 1914.

1. JUDGMENT (§ V—251)—SATISFACTION—RESCISSION AFTER JUDGMENT OF THE CONTRACT SUED ON—COSTS.

That part of a judgment recovered by a vendor against the purchaser which represents purchase money is to be deemed satisfied by the vendor's exercise of a power of rescission of the contract and his resale of the lands; but the vendor may still enforce payment of the costs awarded him by the judgment.

[*Jackson* v. *Scott*, 1 O.L.R. 488, applied; *Cameron* v. *Bradbury*, 9 Gr. (Ont.) 67; *Fraser* v. *Ryan*, 24 A.R. (Ont.) 441; *Gibbons* v. *Cozens*, 29 O.R. 356, referred to.]

ACTION upon several judgments, one being for purchase money, under a contract, which had been rescinded by the vendor after its recovery. Statement

Judgment for plaintiff in part.

W. B. A. Ritchie, K.C., for the plaintiff.

D. A. McDonald, for the defendant.

MURPHY, J.:—In this action it seems clear on the authorities that any portion of the judgment sued upon which represents purchase money cannot be recovered, the plaintiff having obtained a foreclosure decree and, in fact, resold the land: *Cameron* Murphy, J.

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v. *Bradbury*, 9 Gr. 67; *Fraser* v. *Ryan*, 24 A. R. (Ont.) 441; *Gibbons* v. *Cozens*, 29 O.R. 356; *Jackson* v. *Scott*, 1 O.L.R. 488.

In my opinion, the whole of the first of plaintiff's judgments sued upon, except that portion directing payment of costs, represents purchase money. It is true that the agreement calls for the full amount represented in part by this judgment to be paid down, but it was not, in fact, so paid. Instead, a promissory note was taken, and, some months after it matured, a part payment was accepted, and no action was taken for the balance for some nine months thereafter. Further, the cash payment called for by the agreement is so large a part of the total purchase price as to indicate, not a deposit, but a payment on account of purchase money. Moreover, nowhere in the agreement is the first payment called "a deposit," as was the case in *Howe* v. *Smith*, 27 Ch.D. 89, 53 L.J.Ch. 1055, and, although that is not conclusive, it is, I think, a fact to be taken into consideration. There is, indeed, a right to retain the money on default as liquidated damages, but it is to be noted that this applies not only to the first but to all subsequent payments, and it cannot be argued that these are anything but purchase money.

But whatever this payment down was intended to be originally, I think the course of conduct in reference to it made it purchase money rather than a deposit at the time the proceedings were instituted on which the judgment was obtained, and the fact that judgment has been obtained does not alter its character: *Cameron* v. *Bradbury*, 9 Gr. 67.

The subsequent rescission does not, however, entitle the defendant to have the judgment set aside. "It would be deemed satisfied except as to costs": *Jackson* v. *Scott*, 1 O.L.R. 488.

There is on the first judgment a sum of $49.91 due for costs, and this, I think, the plaintiff entitled to recover, together with legal interest thereon. The other two judgments expressly order the sum of $212.07 costs to be forthwith paid to the plaintiff by the defendants, and, as these are valid judgments, both now owned by the plaintiff, I think he is likewise entitled to recover these amounts with legal interest.

Judgment accordingly.

WADDELL v. CALDWELL.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Drysdale, Russell, and Longley, JJ. April 4, 1914.

1. LIMITATION OF ACTIONS (§ IV C—167)—INTERRUPTION OF STATUTE—PROMISE OR ACKNOWLEDGMENT.

Where an alleged debtor on a liquidated money claim, in answer to the creditor's notice of intended action writes a letter to him acknowledging the debt without superadding any mere conditional promise to pay, such letter is sufficient to take the case out of the Statute of Limitations; the acknowledgment is not qualified even if accompanied by a request for time, by a statement that the debtor will not be able to pay until a future time.

[*Waddell* v. *Caldwell*, 15 D.L.R. 678, affirmed; *Chasemore* v. *Turner*, L.R. 10 Q.B. 500, referred to.]

Statement

APPEAL from the judgment of Graham, E.J., *Waddell* v. *Caldwell*, 15 D.L.R. 678, in favour of plaintiff. The question to be determined was whether the debt sought to be recovered was taken out of the Statute of Limitations by a letter written by defendant to plaintiff's solicitors admitting the indebtedness and asking for further time to make payment.

The principal portions of the letter in question are set out in the judgment of the Court as delivered by Sir Charles Townshend, C.J.

The appeal was dismissed.

J. Terrell, for the appellant.

A. W. Jones, for the respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an appeal from the decision of Graham, E.J., in favour of plaintiff. The debt is admitted, and the only defence set up is the Statute of Limitations. In reply to this plaintiff puts in evidence a letter from defendant in which he acknowledges the debt and expresses his intention to pay the same. The only question before us is whether or not the defendant's letter is a conditional promise to pay. The argument for the defence is that it is nothing more. Reading the letter in the light of the numerous cases before the Court on that subject, I come to the same conclusion as the learned trial Judge that there is no condition.

Defendant says:—

I would be very much obliged to you for a statement of your account with payments. I am anxious and hope very soon to be in a position to pay

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your account in full, but cannot see the advantage paying legal fees and increasing my debt to you and prolonging my chances of making money to pay you.

He had, in a previous sentence, referred to the threat of legal proceedings, which, if taken, would ruin his prospects, and that he would be compelled to allow a judgment to be entered against him "which I could not settle until I put a deal through."

I refer to the authorities cited in the decision below, and especially to the case of *Chasemore* v. *Turner*, L.R. 10 Q.B. 500, where the whole subject is discussed at great length in the Court of Appeal. Of course such a case must depend on the particular language of the letter, and if we can gather from that an unconditional promise to pay the debt barred, it is enough. In this case I think it would be difficult to come to any other conclusion.

In my opinion this appeal should be dismissed with costs.

Drysdale, J.
Russell, J.

DRYSDALE, and RUSSELL, JJ., concurred with TOWNSHEND, C.J.

Longley, J.

LONGLEY, J.:—The case cited of *Tanner* v. *Sweet*, 6 B. & E. 603, was the only one which could form any likeness to the present case, and is only after all a decision in the Court of King's Bench, and not a *pronunciamento* from the highest Court.

That case is very different from this case. The letter submitted in this case is the clearest possible. It could not have been better if the defendant had said:—

> I owe you $173 and I wish you would not take steps to collect it just now as it would embarrass me.

I think that was sufficient, and I think in the present case the defendant's promise is sufficient.

I would refuse the appeal with costs.

Appeal dismissed.

SIMPSON v. DAVIS.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. March 16, 1914.

1. BROKERS (§ II A—7)—REAL ESTATE AGENT'S PURCHASE IN OWN NAME—LIABILITY TO ACCOUNT FOR PROFITS.

A real estate agent cannot make a secret profit for himself at the expense of his principal, and where he secretly purchases the land himself and afterward makes a profit on the re-sale, he must account to his principal for the amount of such profit.

[See also *Miller* v. *Hand*, 10 D.L.R. 186, and *Re Blaylock*, 16 D.L.R. 487.]

Statement

APPEAL by the defendants (Davis and Armitage) from the judgment at the trial in favour of the plaintiff in an action by a principal to recover alleged secret profits received by his agents in a real estate transaction.

The appeal was dismissed.

J. A. Allan, K.C., for the appellants.

H. V. Bigelow, K.C., for the respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an action brought by the plaintiff to recover his share of the profits made by the defendants in the sale of two pieces of land. There are two defendants, both of whom were the agents of the plaintiff, and the claim against one of them, Davis, is on the ground that he became a purchaser without the knowledge or consent of his principal, and against the other, Armitage, on the ground that he did not make a full disclosure of the facts and thereby made a secret profit.

Simpson and Davis purchased certain lands together under an agreement of sale, paying down $150, of which sum Simpson put up two-thirds and took an interest to that extent. Davis acted as agent for Simpson in the purchase. This land was afterwards put in the hands of Armitage for sale. Simpson, who had never seen the land, relied upon the judgment of Davis. Shortly before the second payment became due, both Davis and Armitage gave the plaintiff to understand that the land was a poor proposition, and Davis also gave him to understand that he was going to get out of the deal also, and under these circumstances, Simpson and Davis agreed to sell their interest in this land to Armitage for $500. The assignment from Simpson and Davis to Armitage is dated January 29, 1912, and on the 30th

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Davis drew on Armitage for $500. Armitage's cheque for this amount is dated February 1, and was deposited in the Quebec Bank at Saskatoon, where Simpson and Davis resided, on February 5, and was paid at Prince Albert, where Armitage resided, on February 9. On February 3, Davis bought back from Armitage a half interest in this property for $250. On February 8, Armitage entered into negotiations with a Rosthern syndicate for the sale of this property, and on the 10th of that month he sold half of this land to them for the sum of $25,000, being a profit of about $9,000. The agreement of sale was executed on February 13. He subsequently sold the balance of the property at about the same profit. Upon these facts the learned trial Judge held:—

> As a matter of fact, I am satisfied that, at that very time, the land in question was in demand, or, to use the words of the defendant Armitage on a previous trial, it was active, there was good money in it, and I am satisfied that both defendants knew that it was active and that it was a good proposition. I cannot interpret the evidence of Armitage given in that previous case otherwise than as an admission on his part that there was good prospect of selling this land at that time, and the fact that a sale went through almost immediately afterwards at an enormous profit goes to shew that his evidence was in harmony with the actual conditions. I am also forced to the conclusion that Davis, when he executed the assignment, had no intention of dropping out, but he took this method of dropping the plaintiff out so that he, Davis, might get further in. It is clear that in this case there has not been that complete disclosure to the principal that is required of the agent, and, in consequence, the transaction cannot be allowed to stand.

Mr. Allan, who acted for the defendants on the argument, practically abandoned the appeal on behalf of Davis, but contended that Armitage made full disclosure and acted *bonâ fide* all through. The facts, however, are against putting this interpretation on Armitage's conduct. The making of such a large profit on the sale of this land immediately after getting rid of Simpson raises such a strong presumption against his having acted in a *bonâ fide* manner towards Simpson that it is impossible for this Court to say that the learned trial Judge put a wrong construction upon the evidence. In my opinion, the facts as proved, and which are not disputed, are open to no other construction; and the appeal should therefore be dismissed with costs.

Appeal dismissed.

MERRICK v. CAMPBELL.

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Manitoba King's Bench, before Patterson, K.C. (Master and Referee). April 7, 1914.

1. MECHANICS' LIENS (§ VI—46)—SUB-CONTRACTOR—TIME FOR FILING LIEN.

Under a mechanics' lien statute enabling claims for liens by contractors or sub-contractors to be registered within thirty days after the completion of "the contract," a sub-contractor is to register his lien within thirty days after the completion of his contract with the principal or superior contractor.

2. MECHANICS' LIENS (§ II—5)—WHEN EFFECTIVE AGAINST OWNER—MANITOBA MECHANICS' LIEN ACT.

Under the Manitoba Mechanics' Lien Act, the lien arises and takes effect against the owner from the commencement of the work or service.

3. MECHANICS' LIENS (§ VI—47)—SUB-CONTRACTOR—NOTICE OF CLAIM TO OWNER—SUBSEQUENT PAYMENTS BY OWNER TO PRINCIPAL CONTRACTOR—PERCENTAGE.

Notice in writing to the owner by the sub-contractor giving the particulars of the sub-contract and stating that the owner will be held liable therefor is sufficient under the Manitoba Mechanics' Lien Act as a notice in writing of the lien, and payments thereafter made by the owner the principal contractor even within the 80 per cent. mentioned in R.S.M. 1902, ch. 110, sec. (8) c, are not protected as against the sub-contractor's lien.

[*Robock* v. *Peters*, 13 Man. L.R. 124; *Craig* v. *Cromwell*, 27 A.R. (Ont.) 585, and *McCauley* v. *Powell*, 7 W.L.R. 443, referred to.]

4. MECHANICS' LIENS (§ VI—51)—PROGRESS PAYMENTS TO CONTRACTOR—ABANDONMENT OF WORK—PERCENTAGE FUND.

The value of the work upon which, to the extent of eighty per cent., the owner may pay the contractor under the Mechanics' Lien Act (Man.) prior to receiving written notice of a sub-contractor's lien claim, is, in case of abandonment of the work while uncompleted by the principal contractor, the value of the work actually done and material furnished up to the date of abandonment, but such value is to be calculated on the basis of the price to be paid for the whole contract.

5. MECHANICS' LIENS (§ VI—47)— PERCENTAGE FUND— RETENTION OF 20 PER CENT. FOR THIRTY DAYS.

The period of thirty days during which the owner is to retain twenty per cent. of the value from his contractor for the protection of other lien holders is to be computed from the completion or abandonment of the contract by the principal contractor, but the expiry of such period does not relieve the owner from his obligation to protect the interests of a sub-contractor of whose right to register a lien the owner has notice; and such obligation is enforceable by a sub-contractor who was enabled to file his lien more than thirty days after the abandonment of the work by the principal contractor by having been permitted by the owner thereafter to go on and complete the sub-contract and who had filed his lien within thirty days of completing his own work.

[See Annotations on Mechanics' liens, 9 D.L.R. 105, 16 D.L.R. 121.]

Statement

TRIAL of a mechanics' lien proceeding under the Mechanics' Lien Act (Man.).

S. R. Laidlaw, for the plaintiff.

S. R. Flanders, for the defendant.

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PATTERSON, K.C. (referee):—This action was commenced by Merrick, Anderson & Co., against Ann Robina Campbell, the owner of the property in question, and J. W. Henderson, who was employed by her to erect a dwelling thereon under a contract for the sum of $6,685, to which should be added the sum of $50 for extras.

The plaintiff's claim was settled before trial and the conduct of the action given to Robert Jamieson, upon whom the notice of trial had been served, as he had, on September 30, 1911, registered a lien against the property for the sum of $1,230.45, being the balance due to him as a sub-contractor under Henderson for work done under a number of sub-contracts.

It appeared that on or before August 19, 1911, Henderson had practically abandoned the contract, and that on that day the owner had posted up a notice in several places on the building, addressed to Henderson, and informing him that as he had failed to carry out the works according to his contract, she would, at the expiration of one week, cancel the same and employ other persons to complete the contract and charge up against the contract price all moneys that she would have to pay to get the building completed.

After this, the owner did employ workmen and contractors to complete the building, and paid out therefor sums of money which, in addition to the amount previously paid to the contractor Henderson, exceeded the total contract price.

Jamieson at that date had practically completed all his sub-contracts except a portion of the work on the basement floor, and except also the work which he claims to have done on September 17, in completion of his agreement with Henderson to do the stone-work and the brick veneering. This work was comparatively trifling, consisting of the following:—the taking out of some stones, part of the foundation of the verandah posts, which had been wrongly placed, not being in accordance with the specifications, and replacing them properly, and cleaning off some mortar stains from the brick veneering. No complaint had been made to him by either Henderson or Campbell, the husband of the defendant Ann Robina Campbell, in respect of these matters; but the plaintiff stated that he considered he had not properly carried out his contract with Henderson until he had attended to these matters,

and Campbell stated in the witness box that he had drawn the attention of Jamieson to the condition of the bricks and had asked him to have them cleaned off, although he stated that he had at the same time promised to pay Jamieson for this work.

On May 26, 1911, Jamieson wrote the following letter to the defendant Campbell's husband, who acted as her agent throughout all the transactions in question and to whom, for brevity, I shall hereafter refer as Campbell:—

> Winnipeg, May 26, 1911. Mr. J. C. Campbell,
>
> Having been awarded the contract for the following work on your residence in course of construction on the corner of Home and Buell Sts., viz.:
>
> Cement Footings, Stone Wall for basement,
> Weeping Drains, Brick Work for chimneys,
> Brick Veneering not including cut stone,
>
> We hereby notify you that we are sub-constractors for the above-mentioned work. The amount of this contract which we hold from Mr. J. W. Henderson is One Thousand Six Hundred and Forty-seven Dollars ($1,647.00). Also contract for Lathing and Plastering at the rate of thirty-five cents (.35) per yard, for which amounts you will be held liable by us as sub-contractors on said building.—Jamieson and Holmes, *per* Robt. Jamieson.

By the contract between Campbell and Henderson the latter was to be paid 80% of the amounts of the estimates certified by the architects from time to time, and he received in this way, up to June 12, 1911, the total sum of $3,100. On July 28, 1911, Jamieson notified Campbell that Henderson was indebted to him on the sub-contracts, and requested that he would accept an order from Henderson for payment on account; but Campbell, in a letter dated July 29, 1911, refused to accept any more orders from Henderson until he should have completed his contract, adding:—

> I believe we have lots of money left, but we feel that if we paid him any more money that possibly the other sub-contractors would not get it. The house should be finished in about a month when he will have close on to $4,000 coming to him. I think that should be sufficient to cover everything.

Jamieson's solicitors also, on September 25, 1911, sent Campbell the following letter:—

> Winnipeg, September 25th, 1911. Re Robert Jamieson. $500. J. C. Campbell, Esq.
>
> Dear Sir:—We enclose you herewith a statement of the balance due Mr. Robert Jamieson in connection with the work done by him for you on the erection of a house on the corner of Home and Westminster Sts. in the City of Winnipeg, and would be pleased if you would kindly let us know when

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Jamieson may expect payment of this amount. We beg to advise you that Mr. Jamieson is entitled to file a lien for this amount. We also understand that the original contractor, Mr. Henderson, was dismissed from the job by you but that you had sufficient moneys on hand to cover the amount of his contracts. We would be pleased to receive a cheque to cover Mr. Jamieson's account.—Laidlaw & Earl.

There are several questions of more or less difficulty to be determined. First, as to whether Jamieson's lien was filed in time. The statute in force at the time, being the Mechanics' and Wage Earners' Lien Act, ch. 110, R.S.M. 1902, provides in section 20 that

> a claim for lien by a contractor or sub-contractor may, in cases not otherwise provided for, be registered before or during the performance of the contract or within thirty days after the completion thereof.

I interpret this as meaning that a sub-contractor may register his lien within thirty days after the completion of his contract with his contractor. The matter is not free from doubt; but I accept Jamieson's evidence on this point, and there being no evidence to contradict it, I find that Jamieson did the last work on his contracts at the time he states, namely, on September 17, 1911, and therefore that his lien was filed in time.

In *Day* v. *Crown Grain Co.*, 39 Can. S.C.R. 258, the principle is laid down that the time for filing the lien should only run from the date when the lien claimant finally completed his contract in such a manner that he could sue upon it.

In *Swanson* v. *Mollison*, 6 W.L.R. 678, the architects notified the contractor on November 19, that the mason and brick work (the subject matter of the plaintiffs' work as sub-contractors) was quite satisfactory to them and, with the exception of one or two minor items, was complete. The plaintiffs did no further work on the building till December 19, when they spent about half a day in doing some "beam filling" in the stone work, some "pointing" on the outside and filling up some joints with red mortar, work very similar to that relied on by Jamieson in this case, and it was held by Stuart, J., that they were not too late in filing their lien on January 14 following.

One or two of the jobs undertaken by Jamieson for Henderson had been completed more than 30 days before the filing of the lien, but, under *Carroll* v. *McVicar*, 15 Man. L.R. 379, the lien for all

was good if filed within 30 days from the completion of the last of such jobs.

A more difficult question follows: At what time did Jamieson's lien arise, and was it a subsisting lien at the time of the abandonment of the contract by Henderson? To determine this it will be necessary to review the course of the legislation to some extent. By the Mechanics' Lien Act in the Revised Statutes of Manitoba, 1891, ch. 97, it was provided by section 6 that *no lien should exist* unless and *until* a statement of claim is registered, etc. That statute was superseded in 1898 by ch. 29 of 61 Viet., sec. 21 of which provided that

> every lien which is not duly registered under the provisions of this Act shall absolutely *cease to exist* on the expiration of the time hereinbefore limited for the registration thereof.

Reading that provision along with the provision of section 4 that

> any person who performs any work or service upon or in respect of . . . any erection, building, etc., for any owner, contractor or sub-contractor, shall, *by virtue thereof*, have a lien for the price of such work, service or materials upon the erection, building, etc.,

I would infer that it was intended that the lien should arise and be in existence from the date of the commencement of such work or service notwithstanding sub-sec. 2 of sec. 4 of that Act, which appears as sub-sec. (*a*) of sec. 4 of the Act, ch. 110, in the R.S.M. 1902, namely:—

> (*a*) Such lien upon registration as hereinafter provided, shall arise and take effect from the date of the commencement of such work or service or from the placing of such materials *as against purchasers, chargees, or mortgagees*, under instruments registered or unregistered.

All the provisions of the Act must be read together and considered in connection with the provisions in former Acts for which they were substituted; and I think that sub-sec. (*a*) should not be interpreted so as to prevent the lien arising and taking effect from the commencement of the work or service, even against the owner of the property. If this view is correct, then Jamieson's lien arose and existed long before the abandonment of the contract by Henderson.

It is hard to see why the Legislature should speak of a lien, which never arose or existed, "ceasing" to exist at the expiration of a certain time. There is an absence of authority on the precise

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point now under consideration; but, in interpreting the statute of Alberta, both Stuart, J., in *Swanson* v. *Mollison*, 6 W.L.R. 678, at 686, and Taylor, Dist. Co. J., in *McCauley* v. *Powell*, 7 W.L.R. 443, hold that the lien arises from the commencement of the work, although that statute did not contain any provision similar to sub-sec. (*a*) of sec. 4 of our statute.

If, however, I am wrong in so holding, then Jamieson is without remedy, since the provisions of sec. 9 of the Act, [R.S.M. 1902, ch. 110,] are only for the benefit of those having liens before the expiration of the period of 30 days mentioned in that section.

Section 8 of the Act provides that where the lien is claimed by any other person than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor, save as otherwise provided in the Act. That exception clearly refers to the following sec. 9, by which the owner is required to deduct from any payments to be made by him in respect of the contract and retain for a period of thirty days after the completion or abandonment of the contract, 20% of the value of the work, services and materials actually done, placed or furnished, which value shall be calculated on the basis of the price to be paid for the whole contract.

Sub-section (*b*) provides that the liens created by the Act shall be a charge upon the amounts directed to be retained by sec. 9 in favour of sub-contractors, and sub-sec. (*c*) provides that all payments up to 80% of such value (which, I take it, means the value of the work, services and materials actually done, placed or furnished up to the date of the completion or abandonment of the contract, calculated on the basis aforesaid) made *in good faith* by an owner to a contractor before *notice in writing of such lien* given by the person claiming the lien to the owner, shall operate as a discharge *pro tanto* of the lien created by this Act.

In *Robock* v. *Peters*, 13 Man. L.R. 124, it was held by Killam, C.J., interpreting sec. 11, that if a mortgagee has notice in writing of the fact that there is an indebtedness for which a lien may be claimed, that is *primâ facie* notice of the lien itself and he cannot claim priority for moneys advanced after such notice. See also *Craig* v. *Cromwell*, 27 A.R. (Ont.) 585, as to what is a sufficient notice in writing of a lien under the Mechanics' Lien Act of Ontario.

As to when payments should be held to have been made "with notice" or not in "good faith," see also remarks of Taylor, Dist. Co. J., in *McCauley* v. *Powell*, 7 W.L.R. 443 at 445.

I therefore think that, as Campbell had ample notice of the indebtedness of Henderson to Jamieson, and that Jamieson would have a right to file a lien, Jamieson's lien is a charge upon the 20% of the value referred to in sec. 9.

But, in my opinion, sub-sec. (*c*) of sec. 9 goes farther and the owner is not entitled to pay up to 80% of the amounts earned by a contractor from time to time to such contractor unless he makes such payments both in good faith and before notice in writing of the lien.

In *Smith Co.* v. *Sissiboo Pulp & Paper Co.*, 36 N.S.R. 348, (affirmed in the Supreme Court of Canada in 35 Can. S.C.R. 93,) Graham, E.J., at 358, makes use of this expression:—

> It is quite clear that except where the owner has made payments contrary to the provisions of sec. 8, that is, either exceeding the 85% before the time limit, or *within that amount after notice in writing of the lien*, or which are not *bona fide*, a sub-contractor is not entitled to enforce his lien against the property for a greater amount than the amount due from the owner to the contractor.

I infer from this that, if the owner has made payments even within the 80% after notice in writing of the lien or which are not *bonâ fide*, he would be liable to the sub-contractor to the extent of the latter's claim.

It appears that after Jamieson's letter of May 26, Campbell made a payment on June 12 of $1,600 to Henderson, and, after the abandonment of the contract by Henderson, Campbell paid out considerable sums of money to wage earners, contractors and material men for the purpose of getting the building completed.

It is true that the period of thirty days during which the owner, under sec. 9, is to retain the 20% is to be reckoned from the "completion or abandonment of the contract," which I think means the completion or abandonment by the contractor, and I think that period of thirty days expired not later than September 26, 1911, but this, to my mind, does not relieve the owner from his obligation to protect the interests of persons having liens or the right to register liens of which he is aware.

If I am right in my interpretation of sub-sec. (*c*) of sec. 9, the

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payments made by Campbell to Henderson in June and those subsequently to a considerable extent for work done and materials provided prior to the abandonment by Henderson of his contract are not protected and are available for the satisfaction of Jamieson's lien.

I therefore conclude that Jamieson has a lien for the amount of his claim, $1,230.45, less the amount paid into Court, with interest thereon from the time of the commencement of this action therefor in the King's Bench, namely December 12, 1911, at 5% per annum and his costs of the action.

In case it should be held that Jamieson's lien is limited to 20% of the value mentioned in sec. 9, I find such value to be, as nearly as I can estimate it from the evidence, the sum of $4,400 and Jamieson should have judgment for $880, less the amount paid into Court, as his is the only lien on the property.

Judgment accordingly.

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LAMOUREUX v. CRAIG.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. February 3, 1914.

1. WILLS (§ I D—38)—VALIDITY—WILL DRAWN AT INSTANCE OF BENEFICIARY.

A person who is instrumental in the framing of a will and who obtains a bounty thereby is placed in a different position from ordinary legatees and has cast upon him the onus of shewing the righteousness of the transaction.

[*Lamoureux* v. *Craig*, 2 D.L.R. 148, Q.R. 42 S.C. 385, restored on different grounds; *Craig* v. *Lamoureux*, 14 D.L.R. 399, 22 Que. K.B. 252, reversed; *Fulton* v. *Andrew*, L.R. 7 H.L. 448; and *Barry* v. *Butlin*, 2 Moo. P.C. 480, 12 Eng. R. 1089, followed.]

2. EVIDENCE (§ II E 5—172)—ONUS—WILL PROCURED BY SOLE BENEFICIARY.

In an action to set aside a will of which probate in common form has been granted, the burden of proof is shifted when the plaintiff shews that the will had been prepared and its signature procured at the instance of the defendant who was the sole beneficiary: (*Per* Anglin, J.)

[*Tyrell* v. *Painton*, [1894] P. 151; *Brown* v. *Fisher*, 63 L.T. 465; *Fulton* v. *Andrew*, L.R. 7 H.L. 448; *St. George's Society* v. *Nichols*, Q.R. 5 S.C. 273, followed; and see *Mayrand* v. *Dussault*, 38 Can. S.C.R. 460.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, *sub nom Craig* v. *Lamoureux*, 14 D.L.R. 399, Q.R.

22 K.B. 252, reversing the judgment in the Superior Court, District of Montreal, *Lamoureux* v. *Craig*, 2 D.L.R. 148, Q.R. 42 S.C. 385, and dismissing the plaintiff's action with costs.

The appeal was allowed, FITZPATRICK, C.J., dissenting.

Surveyer, K.C., and *Hurteau*, for the appellant.

A. Cinq-Mars, for the respondent.

FITZPATRICK, C.J. (dissenting):—The will in this case is attacked on several grounds.

[The learned Chief Justice here quoted from the plaintiff's pleading.]

That the will was duly executed was found by both Courts below. The trial Judge found against the will on the ground that the husband of the deceased induced her to sign it on the false representation that the previous will was invalid because the signature was illegible. Whether it was or not, I submit respectfully, is not in issue here, but that the husband was so informed by his brother, a professional man, cannot be doubted. I understand that the majority here is of opinion that the will in question was properly executed and that the testatrix was of sound and disposing mind, but that it does not truly express her last intentions and that she was in error as to its provisions when she signed it.

What are the facts? The parties married in Quebec, under what is known there as a "régime de séparation de biens." The husband, therefore, would not, in case of intestacy, inherit anything from his wife. They apparently lived together for twenty-seven years. During all that time the wife was under the impression that the last survivor would inherit everything. When the attention of her husband was drawn to the true situation, his observation was "in my wife's present condition, I am not to trouble her about such things." This is not evidence of rapacity on his part. The respondent's father saw the priest who was about to attend on the deceased and he was asked to speak to her about her temporal affairs, and it was only as a result of that interview that the husband came to interfere in the matter at all. For what occurred when the wife gave her instructions to draw the will we must rely entirely upon his evidence. He

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says that her suggestion was that he should have the property, but that, when he came finally to dispose of it, he should bear in mind her promise to her father to give what she had received back to her family. I read the husband's evidence to mean that the deceased was prepared to execute the will leaving everything to him on his personal undertaking to comply with her request. He thought, however, that it would be more satisfactory to have the wife's wish expressed in the will itself. Hence the change.

If anything is clear in this unfortunate controversy, it is that the wife's wish was to give her husband her estate, relying upon him to carry out her verbal request with respect to her family, and the effect of this judgment is to defeat that intention. For that reason, I think the appeal should be dismissed. As the evidence was carefully and ably analyzed by the Chief Justice of the Court of King's Bench, I do not think it necessary to do more than to say that I adopt his conclusions as well as his reasons.

Idington, J.

IDINGTON, J.:—The respondent's late wife, whose health had not been very satisfactory for some time, fell rather suddenly very ill. She was nervous and suffered such pain that her physician, in order to alleviate her sufferings, administered morphine. He intimated to her husband that her condition was such that her spiritual adviser should be called in, and the reverend Father Charbonneau was accordingly sent for. On his reaching the house, he was interviewed by the father of the respondent, domiciled with him, and asked to bring under the notice of the sick woman the fact that her worldly affairs were not settled and to advise her to consider same.

Something is sought to be made of the different versions given on the trial hereof, by respondent's father and the priest, both as to what transpired at this interview and what the priest reported to him after leaving the sick-room of the dying woman. I attach little importance to any such discrepancy, though accepting the priest's version of what was said. The eagerness of respondent's father is, of course, the subject of fair criticism. But the important thing to be observed is that it was not until after the priest had discharged his duties as required,

by administering the last rites of the church to the sick woman, that the subject of making a will had ever been considered by her.

Immediately after the departure of the priest, respondent tells that he was called into her room, and, when the nurse had retired and no one else present, he was spoken to by her on the subject of her worldly affairs which, up to then, she had seemed to think settled.

The result of what seems to have been a very brief interview was that the brother of the respondent, also living in the same house and an advocate by profession, was asked to draw a last will and testament for his wife according to instructions given by him.

The brother, accordingly, without any interview with her, drew up the following very short will:—

Par mesure de prudence, et sans me croire nullement dangereusement malade, je prends, à tout événement, les présentes dispositions: Je donne et lègue, sans restriction, à mon époux, Isaïe Craig, tous mes biens, tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches comme souvenirs. Et je déclare ne pouvoir signer.

When this was read to her by respondent, she, as he testifies, said:—

Si tu pouvais faire quelque chose pour ma famille; mon père m'a toujours demandé de penser à eux autres en autant que la chose serait de mon goût, j'aimerais que tu ferais la même chose si tu peux.

He says that, thereupon, he withdrew and instructed his brother accordingly. The brother drew then a will which reads as follows:—

Outremont, Montréal, 5 Juillet, 1911.

Par mesure de prudence et sans me croire dangereusement malade, je prends à tout événement les présentes dispositions: Je donne et lègue à mon époux, Isaïe Craig, tous mes biens tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches, comme souvenirs. Suivant les recommendations de mon défunt père, je lui recommande de même de ne donner ou lèguer ces dits biens à nuls autres qu'aux membres de ma famille, et je signe.

FLORE LAMOUREUX.

I omit in each case the attesting clause signed by the witnesses. I desire only to present the actual operative form of each of these wills. All this took place about half-past ten or

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eleven o'clock in the morning of the 5th of December. Why she was not asked to sign this latter will till five o'clock in the afternoon is not, to my mind, at all clearly established beyond suspicion. It is said, by and on behalf of the respondent, that she slept and only awoke about five o'clock. It appears, however, that her sister, the appellant, had called about eleven o'clock in the forenoon and stayed until five p.m. Nothing was said to her of these wills or of the purpose that existed relative thereto. It may be but a coincidence that she slept whilst the sister remained, but I cannot rid my mind of the suspicion that her sister's presence was equally a barrier in the way.

However that may be, the sands of life were meantime ebbing fast, for in forty hours she was dead. The stock of vitality which was able in the morning to discuss the difference between the will first read to her and what it omitted and she would have preferred to have it provide for, had become so low at five o'clock that she could not write her name so as to be legible when she attempted to subscribe the second will and, obviously, could not see the material difference between them, and treated the one as the equivalent of the other.

We are asked to believe as conclusive of her capacity to understand that she asked if this one to which she set her mark was the same as read in the morning, and to have her spectacles handed to her.

There is a marked difference between these two wills. And the fact that she did not observe it, seems conclusive that she did not apprehend clearly what she was doing or saying. I am not concerned with any difference in their legal effect. I cannot assume that she was possessed of that legal knowledge and acumen that would have enabled her to decide that they were (if they were) in law the same.

To the ordinary mind they were as widely different as can be on the point she had called attention to in the morning and requested consideration of. She had forgotten. She had been drugged. She, when aroused from the slumber that induced, clearly had not that grasp of thought to enable her to discover this vast difference in language. That difference ought, but for the condition of mind thus induced, to at least have revived

her memory relative to what she had requested. Nay, more, her request, veiled in the language of affection and politeness as quoted above, ought, to my mind, to have been treated by her husband as that of a command, or have, at least, driven him to the straight course of bringing to his wife the adequate assistance in the way of the independent skill of some one to whom she might have given instructions freed from the embarrassment of his presence.

The dying are entitled to such consideration at the hands of those they have loved and cared for. Or if he had even taken the appellant into his confidence and left the sisters to settle the matter and the dying woman had then, as the result of such consideration, persisted in leaving it entirely in his discretion whether she should leave him absolute owner or not, he would have possibly been relieved from the suspicion he must now forever rest under.

He has not removed it so as to comply with the law as laid down in the leading cases of *Barry* v. *Butlin*, 2 Moo. P.C. 480, 12 Eng. R. 1089; and *Fulton* v. *Andrew*, L. R. 7 H.L. 448.

In the latter case, at foot of page 471 and top of page 472, Lord Hatherly uses language to be borne in mind in such cases as this. It is as follows:—

> There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.

"Now," again adopting the language of Lord Hatherly, "how did the respondent discharge this onus in the present case"?

What I have related and suggested, answer that he failed. But, when we find that she left no children, that her property came from her father, that her sister had children surviving,

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that her father had extracted from her a solemn promise that the property should return ultimately to his family, the hopes and wishes she had expressed to her husband, so illuminated by such facts and read in light of the law applicable to one directing all and so directing it as to make the result enure entirely to his benefit, seem to have been so disregarded that this instrument cannot be called her will.

I think we must find that he undoubtedly failed to discharge the onus resting upon him. There is much that might be said relative to the details of the execution and attestation of this pretended will but, in view of the answer which these broad features of the case present, it seems needless to dwell on such details.

The appeal should be allowed with costs throughout and the judgment of the learned trial Judge be restored.

Duff, J.

DUFF, J., concurred in allowing the appeal.

Anglin, J.

ANGLIN, J.:—This case has given me not a little trouble and anxiety. Three questions arise: First: Had the testatrix mental capacity? Second: Was the will propounded by the defendant duly executed? Third: Does the evidence sufficiently remove the suspicion created by the facts that the instrument in question was prepared under the instructions of the husband of the testatrix, the defendant, who is the sole beneficiary, and its execution was procured by him—a suspicion which is augmented by the peculiar circumstances of this case—and establish that it expresses the true last will of the testatrix and that she knew and approved of its contents? *Tyrell* v. *Painton*, [1894] P. 151.

The evidence has satisfied me that the testatrix had testamentary capacity at certain times on the day in question: *McLaughlin* v. *McLellan*, 26 Can. S.C.R. 646; *Martin* v. *Martin*, 15 Gr. 586; *Kaulbach* v. *Archbold*, 31 Can. S.C.R. 387. From about noon until after four o'clock she slept most of the time under the effect of a dose of a quarter of a grain of morphine administered about eleven o'clock. She appears to have been awake and fully conscious from about half-past four until

after five o'clock, when the nurse gave her another dose of one-eighth grain of morphine to allay her pain. Whether the effect of this latter dose had not so much benumbed her faculties by six o'clock, or shortly after, when the will now propounded was executed, that she was unable to fully appreciate the differences between it and the paper she had attempted to sign a short time before, is, I think, extremely doubtful. Yet it is essential to the validity of the will propounded by the defendant that he should establish that, at this time, the testatrix was capable of thus discriminating between the two wills and of understanding and approving the contents and effect of that to which she finally put her mark.

It is not satisfactorily proven that the formalities prescribed for the execution of a will in the English form were observed. The evidence of nurse Laporte, although in some parts uncertain, in the end seems clear enough that the three witnesses signed this will in the room of the testatrix and in her presence and that it was another will, to which the testatrix had previously put an illegible signature, which, although then believed to be of no value, was subsequently signed by the same witnesses in another room—a peculiar circumstance, if it be the fact, of which there is no real explanation in the evidence. The witness, Marie-Louise Craig, is most unsatisfactory; and the evidence of the third witness, Dorila Amyot Lessard, while by no means clear, rather goes to shew that it was the signatures to the document now propounded which were affixed by the witnesses in another room and out of the presence of the testatrix. On the whole evidence, perhaps the balance of probability is in favour of the due execution of the will propounded. But it is not satisfactorily proven.

It is upon the third question, however, that the chief difficulty arises. The suspicion created by the facts that the defendant is the sole and absolute beneficiary under this will, that it was he who gave the instructions for its preparation to his brother, Fernand Craig, who is a lawyer, and that he was present at and procured its execution is greatly increased by the following circumstances, deposed to by himself. The testatrix, when the defendant read this instrument to her on the morn-

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ing of the 5th of July (possibly in the presence of nurse Laporte, as was found by the trial Judge upon evidence which is very slender, to say the least), expressed a desire that he should do something for her family in conformity with a wish of, if not in fulfilment of a promise made by her to, her father from whom she had received her property. The trial Judge finds that she then refused to sign the will as drawn. As pointed out by the learned Chief Justice of the Court of King's Bench, there is no direct proof of such a refusal. The evidence, however, warrants the inference that the testatrix took exception to the will in the form in which it was read to her. In order to comply with the wish thus expressed by his wife, the defendant had his brother draft another will in which, after bequeathing her property to her husband, she recommends him not to give or bequeath it to any persons other than members of her family. This will was drawn about noon, but was not presented to the testatrix until after five o'clock in the afternoon, either because she was drowsy from the effect of the dose of morphine given to her about eleven o'clock, or because of the presence of visitors in her room, including her sister, the plaintiff, who remained from about eleven o'clock to five o'clock. The testatrix signed this will, apparently with much difficulty, and at the cost of considerable effort. It was subsequently attested, but, probably, not in her presence. This opinion is expressed by Archambeault ,C.J., in rendering the judgment of the Court of King's Bench. The signature of the testatrix is said to have been illegible. The brother of the defendant, who had drawn the wills, was not present at the execution of either and was not called as a witness in this case. On seeing the defective signature, he expressed the opinion that it was worthless and that the will which bore it was invalid. The good faith of this professional opinion may be open to serious doubt. But I proceed on the assumption that fraud was not intended. On being told that her signature was insufficient, the testatrix, according to the testimony of the defendant, asked that the first writing of the morning should be brought to her. The defendant and the three witnesses say that he offered to read to her the document which he brought, but that she said it

was unnecessary, that he had read it to her and that she knew its contents. She asked for a pen and her spectacles and signed it by making a cross. The witnesses then signed, probably in the room of the testatrix and in her presence. This took place about or shortly after six o'clock in the evening. The testatrix died on the morning of July 7. The will now in question was admitted to probate in common form on August 3.

In his preliminary examination, although asked generally to tell the circumstances surrounding the preparation and execution of this will, which he propounds, the defendant made no allusion to the preparation or attempted execution of the other will. At the trial, during the early part of his evidence, occupying fourteen pages of the appeal case, he entirely suppressed the fact that another will had been drawn. He gives a manifestly false explanation of the delay in the execution of the will now propounded, which was read to the testatrix in the morning but not signed until the evening. It is only when pointedly asked whether there were two wills made that, after first pretending to be surprised and not to understand the question, (je ne saisis pas la chose,") when pressed he discloses the circumstances which led to the preparation of the second instrument and the facts concerning it. He was undoubtedly trying to conceal those facts. In a number of particulars—some important, some not—his evidence at the trial differs from the testimony which he gave on preliminary examination. He is not a frank or candid witness and his conduct in the litigation adds to the very grave suspicion which already surrounded this case.

The will to which the testatrix attempted to place her signature undoubtedly expressed with approximate accuracy her real testamentary wishes. It was only because she was told that the illegibility of her signature to that document rendered it worthless that she assented to signing another. The defendant sought to make it appear that it was the testatrix herself who asked that the document first prepared should be brought to her for signature. The other witnesses, Laporte, Marie-Louise Craig and Lessard, do not corroborate him on this point.

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His father, speaking of the time when the testatrix had endeavoured to sign the second instrument, says:—

Elle a essayé de le signer, elle a voulu faire des lettres et elle n'a pas eu la force de mettre sa signature comme il faut. Fernand était absent, il est arrivé sur ces entrefaites-là, immédiatement après, il a dit: "cela ne vaut rien, celui qui a été fait ce matin vaudra mieux; faites-lui donc signer celui-la;" ç'a été fait, ç'a été signé.

Moreover, although the witnesses agree that, when the defendant brought in the will now in question, he offered to read it to his wife and she declined to hear it read upon being told that it was the will which had been read to her in the morning, in the evidence of nurse Laporte we find this passage:—

Q. Qu'est-ce qui s'est passé, qu'est-ce qui s'est dit?

R. On a rapporté ce papier, vingt minutes, une demi-heure après, peut-être pas tout à fait autant, on est arrivé avec celui-là et elle a demandé si c'était bien le même; on lui a dit—"Oui, je te l'ai lu" et elle a mis sa croix.

There is, no doubt, evidence from which an inference might be drawn that the testatrix knew that she was signing the document which had been read to her in the morning; but it is far from being absolutely clear that she was not confused or that she fully appreciated that it was not to a copy of the second will, which had been read to her shortly before and which she had attempted to sign, that she was asked to make her mark. The execution of this instrument took place about or shortly after six o'clock—nurse Laporte says about twenty minutes—Dorila Amyot Lessard, some few minutes—after she had endeavoured to sign the other document. She had an injection of one-eighth grain of morphine about five o'clock. Did she appreciate the difference between the two instruments when asked to make her mark to that now propounded because her attempted signature to the other was illegible? Did she, consciously and fully realizing what she was doing, abandon the wish she had expressed in the morning and the will giving effect to that wish, with which she had announced her satisfaction when it had been read to her some fifteen or twenty minutes before? Whether benumbed faculties afford the true explanation of her signing at six o'clock a will to which she had taken exception at noon, or whether she accepted the docu-

ment presented to her because she was fatigued and tired of the whole affair and anxious to be done with it, as her repeated expression "dépêchez vous" would indicate, or, perhaps, feared that she might not continue in a fit state to make a will long enough to have another prepared more exactly in accord with her wishes, is by no means clear. Whatever the explanation, she put her mark to an instrument which did not fully express her wishes—not of her own initiative, but upon this document being presented to her for signature by her husband at the suggestion of his brother, Fernand Craig, who undoubtedly could have given evidence that would be very valuable upon material points in this case. He was not called. The defendant, on whom lay the burden of proof, must bear the consequences of failure to call him.

Whatever the true facts may be, no adequate reason is given for the testatrix relinquishing her desire to have her father's wish carried out—and the evidence is by no means convincing that she did consciously and deliberately abandon her intention to give effect to that wish and decide of her own volition to make the will in which it is ignored.

The learned trial Judge found against the will propounded on the ground that its execution was invalid because procured by a mistaken representation of law, viz., that the imperfection of the signature to the other will rendered it valueless. The Court of Appeal held that this mistake did not avoid the later will. Apparently proceeding on the footing that the burden of proof was on the plaintiff and that she had failed to prove the allegations of her declaration, the appellant Court held that the will attacked contained the last wishes of the testatrix; that she was of sound mind at the time of its execution; and that this will was made in conformity with the formalities prescribed by law. The judgment of the Superior Court was reversed and the action dismissed. With great respect, I think there was error in charging the plaintiff with the burden of proving that the formalities of execution were not observed and, more especially, that the will propounded by the defendant did not really express the last wishes of the testatrix. Pro-

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bate in common form of this will having been granted, the plaintiff was, no doubt, obliged to begin. But, so soon as it appeared that the will had been procured by the defendant who was the sole beneficiary, the burden of proof shifted: *Tyrell* v. *Painton*, [1894] P. 151; *Brown* v. *Fisher*, 63 L.T. 465; *Fulton* v. *Andrew*, L.R. 7 H.L. 448; *St. George's Society of Montreal* v. *Nichols*, Q.R. 5 S.C. 273, art. 858 C.C.

Something has been said of alleged intrinsic evidence afforded by the documents themselves that the will to which the testatrix finally affixed her mark was not the document read to her in the morning. But, as this aspect of the case does not appear to have been gone into at the trial, I pass no opinion and rest nothing upon it.

On the whole case, though not without some hesitation, due chiefly to the contrary view unanimously taken by the learned Judges of the Court of Appeal, I have reached the conclusion that the burden which rested upon the defendant, particularly in regard to establishing that the will propounded expresses the true last testamentary wishes of the testatrix and that when executing it she knew and approved of its contents, has not been satisfactorily discharged. The principle of the decision in *Harwood* v. *Baker*, 3 Moo. P.C. 282, at p. 313, 13 Eng. R. 117 at 129, cited by counsel for the appellant, applies to this case. See also *Tribe* v. *Tribe*, 13 Jur. 793.

The appeal should be allowed with costs in this Court and in the Court of Appeal, and the judgment of the Superior Court should be restored.

Brodeur, J.

BRODEUR, J., concurred in allowing the appeal.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. PRINCIPAL AND AGENT (§ III—34)—LIABILITY OF AGENT TO PRINCIPAL FOR FRAUD.

One employed to ascertain the lowest price for which property may be purchased, who deceives his principal and induces him to pay more than the owner of the property was willing to accept, is answerable to his principal for the difference.

[*Fry* v. *Yates*, 12 D.L.R. 418, affirmed; *Hutchinson* v. *Fleming*, 40 Can. S.C.R. 134, followed.]

Statement

APPEAL from the decision of Clement, J., in *Fry* v. *Yates*, 12 D.L.R. 418, in favour of the plaintiff in an action by a principal against an agent to recover for fraud in inducing him to pay more than the owner of the property was willing to accept.

The appeal was dismissed, MACDONALD, C.J.A., and MARTIN, J.A., dissenting.

W. S. Deacon, for the defendant, appellant.

W. B. A. Ritchie, K.C., for the plaintiff, respondent.

Macdonald, C.J.A. (dissenting)

MACDONALD, C.J.A. (dissenting):—All the parties concerned in this transaction were real estate brokers and speculators. On the date of the transaction, which was a highly speculative one, there was a lively demand for water frontage in the locality of these lots. The lots were owned by Charles Bienemann, residing near Vancouver, and Edgar Bienemann, his brother, residing in England. The defendant Yates was an acquaintance of Charles Bienemann, and was by him given some sort of verbal authority to offer the lots for sale. On March 18, 1913, the defendant "listed" the lots with another agent, named Henderson. "Listing," as I understand the term in this connection, means that defendant informed Henderson that he (Henderson) might offer the lots for sale. Henderson the same afternoon offered the lots to one Harrison, who was on the look-out for lots of this description for his customer, the plaintiff Laselle. I might add that the plaintiff Fry afterwards joined with Laselle in the purchase so that there is no distinction to be drawn between Fry's position in the case and that of Laselle. For the purposes of this statement of facts, I accept the evidence of Harrison, the

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plaintiff's agent and witness, whenever it conflicts with that of defendant or Henderson. I do this because I think the learned trial Judge did not accept the evidence given by and on behalf of the defendant as reliable, and as I am, with great respect, unable to accept the conclusions of the learned trial Judge, I desire to base my own upon evidence which does not depend for its weight upon the impression made by the demeanour of witnesses.

When Henderson met Harrison, as above stated, and offered him the lots, Harrison asked him to cable to his customers for the lowest price they would sell at. Henderson replied that he would not care to do this unless a deposit was made. Thereupon a cheque for $25 was given by Harrison to Henderson. The defendant was informed by Henderson of what had taken place, and was given the cheque which however he did not cash. He saw Charles Bienemann that night, and got him to sign a cablegram to his brother that he was offered $75 per foot for the lots and advise acceptance. This cablegram was sent by defendant on the same night, the 18th, and a reply was received on the following day from Edgar Bienemann that he would accept $75 per foot. I think there is no doubt the defendant's scheme was to enter into an agreement with the two brothers to purchase from them at $75 per foot, and then re-sell to the person or persons who would give a higher price. It is clear he had not sufficient money of his own to carry out a purchase. His scheme was to finance the purchase from the moneys which he would receive on the re-sale. Charles Bienemann was aware of and acquiesced in this, and there is nothing to shew that Edgar Bienemann had been taken advantage of in any way. The next day the defendant was introduced to Harrison and told him he had received a cablegram, and that the owners wanted $90 per foot. Harrison then drew up a form of receipt for the deposit and by way of evidencing the transaction. That receipt drawn by Harrison and addressed to himself, *inter alia*, said:—

> Re your deposit of $25 on lots, etc., I have cabled owners who will accept $90 per foot. Papers will be from F. B. Yates to buyer.

This receipt the defendant refused to sign, but drew up one himself which says:—

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Re your deposit of $25 on lots . . . I have received a letter and cable regarding same and am able to sell for $90 per foot, etc. Papers will be from Fred B. Yates to buyer. It is understood your cheque (for the deposit of $25) is accepted on these conditions, and is forfeited if money is not placed in bank by time mentioned. Mr. Harrison is to have two-thirds of the usual commission of 5% on first $5,000, and 2½% on balance of purchase price.

I do not give the exact words of the latter part of the receipt but I have fairly stated all that is necessary to state here. In a note at the foot of this receipt signed by defendant, it is stated that Harrison will get his commission when the deal goes through on whatever terms may be finally agreed upon.

I have stated these matters somewhat fully because the judgment is for the profit made by Yates, namely the difference between $75 and $90 per foot. The learned Judge held th t Yates was the agent for the plaintiffs in the transaction and could not retain the secret profit as against them. I am unable to adopt that view. One would be obliged to find, and in truth that is the only suggestion upon which the view rests, that because Harrison asked Henderson to send a cablegram to the owner in England, asking his lowest price, a contract was thereby made by which defendant became agent for the proposed buyers, or that because the defendant thereafter sent a cablegram in the name of Charles Bienemann, advising acceptance of an offer at $75 per foot, he became the agent of Harrison and Harrison's clients (the plaintiffs) to procure the lots for them at the owner's lowest price, although it is very clear that he himself was to be the purchaser as between him and the Bienemanns. I think that view is wholly opposed not only to the evidence on both sides, but quite inconsistent with the conduct of the plaintiffs and their agents, both before and after the cablegram was sent.

An effort was made in the examination of one Lamonde, a partner of Harrison's, to shew that the $25 cheque was not given to Henderson as Harrison says, but to Yates, to pay for Yates' cablegram to Edgar Bienemann, for the purpose of supporting an argument that Harrison, having paid for the cablegram, Yates was his agent to send it, and thereby became his agent to obtain the property for plaintiff at the owner's price. La-

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monde's evidence in this regard is not, I think, quite reliable. It is opposed to that of Harrison, it is opposed to Harrison's draft receipt, and to the one which was drawn up and signed in substitution therefor by defendant. I think, therefore, it is quite fair to the plaintiff to accept the evidence of Harrison, their own witness, as more accurate and satisfactory than that of Lamonde.

Now when the cablegram was received, Harrison arranged a meeting between himself, the defendant, and the plaintiffs. That meeting took place at the Commercial Club on March 20th. Defendant had been asked by Harrison to bring the cablegram to the meeting. When he arrived he was asked for it and said that if they wanted to see it they could see it at the office of his solicitors, and the matter was allowed to drop at that. That answer was not consistent with the idea that defendant was the plaintiff's agent, but rather that he was acting in another capacity and at arm's length. The defendant, however, then asserted as he had to Harrison that the owner's price was $90 per foot. Plaintiffs agreed to take the property at that price, and to deposit $5,000 in a bank to the joint order of one of the plaintiffs' and of the defendants' solicitor, by way of forfeit if on the return of the necessary documents from England the plaintiffs declined to carry out the transaction on their part. Again, this in my opinion tends to negative the alleged relationship of principal and agent. On the return of the papers from England the plaintiffs discovered the difference between the owner's price and the price at which they had agreed to buy from Yates. They protested, but nevertheless elected to complete the transaction. They did not say, "You are our agent and could not therefore have honestly made the profit." Their complaint was, "You have deceived us about the owners' price."

In my opinion that was what took place. The defendant I think undoubtedly led the plaintiffs to believe that the owners' price was $90 per foot, and that they were to get the property at that price. The plaintiffs did make a claim in the pleadings for damages for deceit, and it is manifest that they cannot succeed on that ground now. They did not repudiate when they discovered the alleged fraud, and in any case they have proven

no damages, in fact I think that that branch of the case was not pressed at the trial nor was it before us.

The case is, therefore, narrowed down to one of secret profits made by Yates while standing in an alleged fiduciary relationship to the plaintiffs—moneys had and received to their use. What position must the plaintiffs take in order to succeed on this issue. There is no doubt that Harrison understood that Henderson and Yates represented the vendors. A contract of agency like any other contract must be based upon consideration. If Harrison employed Henderson as his (Harrison's) agent to procure the property and paid the $25 as consideration for doing it, then Harrison was doing an improper thing; he was engaging the seller's agent as agent for the buyer to deal with the seller. If, on the other hand, as I think, Harrison asked Henderson as seller's agent to find out his clients' lowest price, that was a legitimate and honest request. But the matter must be carried a step further. Harrison did not employ Yates to send the cablegram, according to his own evidence. Therefore, are we to infer that because Yates sent the cablegram which was not the cablegram Harrison wanted sent, and got a reply and deceived Harrison with respect to it, that he thereby made himself the agent of Harrison, and that he also thereby made himself the agent of the plaintiffs, who, up to that time, had had nothing to do with the transaction, except that Harrison was looking for lots for one of them.

I assume for the purpose of this judgment that the defendant was guilty of fraud; I do not find that he was so guilty because it is unnecessary to do so. His liability for fraud, if he has been guilty of it, is one thing. It is grounded on tort. His liability to pay over secret profits is another, it is based upon contract, express or implied. There must first be established a contract of agency because it cannot be suggested that any other fiduciary relationship existed between the parties.

The question therefore is contract or no contract. If there was a contract of agency whereby defendant undertook to procure this property for the plaintiff at $90 per foot, then undoubtedly the judgment below was right. But it is only confusing the issue to mix up the alleged deceitful conduct of the

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defendant with the question which we have to decide in this action. All the documentary evidence is against the plaintiff's contention. The evidence of Harrison is against it; the evidence of Lamonde is practically against it, the evidence of Laselle is against it. Fry in his evidence at the trial says that at the meeting of the Commercial Club defendant stated that the "best price" he could get the "property for us was for $90 a front foot." The words "for us" are relied upon as indicating that defendant was acting for the plaintiffs. However, the evidence of the other witnesses contains no such words, and the evidence of Fry himself on discovery omits them. He said, "Defendant said that the best price he could get the property for was $90 a foot, and wanted to know if we would take it at that." And this answer is repeated on the next page in identical words. Throughout all the evidence the plaintiffs and their agents refer to and treated with the defendant as the agent of the vendor or as the vendor.

It may be useful here to draw attention to the confusing way these real estate agents speak of their commission. Harrison and Lamonde speak as if they were dividing their commission with Henderson or with defendant. The plaintiffs were to pay no commission to their agents. The local usage would appear to be that the vendor always pays the commission to his agent, and that agent sometimes divides it with the agent for the purchaser, and that was the arrangement in this case, to which defendant assented. The fact appears to be that Henderson got one-third of the commission, and Harrison and his partner Lamonde, the balance.

It follows that, in my opinion, the appeal should be allowed.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal, for the reasons given by the learned trial Judge.

Martin, J.A. (dissenting)

MARTIN, J.A. (dissenting) would allow the appeal.

Galliher, J.A.

GALLIHER, J.A. would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The appeal is from the judgment of Clement, J., *Fry* v. *Yates*, 12 D.L.R. 418, in this action, being

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one brought by the plaintiffs (the respondents) against the defendant (the appellant) for the recovery of a secret profit or commission which the defendant, being the agent for the plaintiffs, made in respect of the purchase by the defendant and sale to the plaintiffs, his principals, of a certain parcel of land in Vancouver district.

The judgment of the learned trial Judge is in the following language:—

> I find as a fact that the defendant agreed to act as agent for the plaintiffs in ascertaining the lowest price at which the property in question could be bought from the then owners and agreed in effect to afford them an opportunity to buy at such lowest price. I further find that he deceived the plaintiffs in this respect and upon the representation (false in fact) that $90 per foot was such lowest price induced them to pay that price instead of $75 per foot which was in fact the price the then owners were willing to accept.
>
> On these facts it seems to me that *Hutchinson* v. *Fleming* (1908), 40 Can. S.C.R. 134, is authority for the proposition that the plaintiffs' claim to recover the extra $15 per ft. from the defendant is well founded "either on the ground of agency or of deceit:" *per* Idington, J., at 136.
>
> There will be judgment therefore for the plaintiffs for $7,211.25 with costs.

It will be observed that the learned trial Judge has made the express finding of fact that that defendant was the agent of the plaintiffs in the transaction which was ultimately carried out by the plaintiffs acquiring the land, the title to which was, at the time of the negotiations, vested in Edgar Bienemann, of Croydon, England, and Charles Bienemann of the city of Vancouver, British Columbia, the defendant obtaining from the Bienemanns agreements for sale of the land to himself under date of March 21, 1912, and entered into an agreement for sale with the plaintiffs under the same date of the same land, the purchase price the defendant bought at being $36,556.25 and the price at which the defendant sold being $43,267.50, the difference, $7,211.25, being the amount for which the learned trial Judge entered judgment in favour of the plaintiffs and against the defendant.

Upon the evidence as adduced at the trial it cannot be said that it is clear beyond all contradiction that the defendant was the agent of the plaintiffs, yet with all deference to the very

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forcible argument of Mr. Deacon, counsel for the appellant, I cannot come to the conclusion that the learned trial Judge had not evidence before him upon which he could reasonably hold that the relationship of principal and agent existed, and when I weigh matters, and consider that the learned trial Judge had the opportunity we have not of seeing the demeanour of the witnesses, and further in view of the fact that it cannot be successfully contended that the defendant was a witness who could be said to be candid or frank, but at the trial exhibited himself, as he did throughout the negotiations, as one who was unwilling to make a full and complete disclosure of all that took place, I am the more convinced that the learned trial Judge arrived at the correct conclusion upon the facts. We find it stated in Bowstead on Agency, 5th ed., 3, that,

> An agent is a person having express or implied authority to represent or act on behalf of another person who is called his principal.
>
> (*b*) to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal; e.g., where a solicitor, factor or broker is employed as such.

Custom and usage no doubt has a great deal to do with the establishment of the relationship of the parties in transactions relating to the buying and selling of real estate, especially where the market is active and the land is being everywhere sought after. In the present case the defendant was undoubtedly endeavouring to purchase for re-sale the land, but was operating on a "shoe-string" which in effect meant that he was without the money to carry it through, except that he was enabled beforehand to have a purchaser ready, willing and able to buy. The defendant under cross-examination, at p. 162 of the Appeal Book, states that it was a common practice. Now to accomplish his ends, the defendant was not content to earn money on commission upon the transaction, but was desirous of increasing his profits by the receipt of an increased price, and his energies were devoted to procuring a purchaser for himself at a greatly increased price, and to do this so conducted himself towards the plaintiffs as to lead them to believe that he, acting in their behalf, would ensure the acquirement of the land at the price as stated by the plaintiff Laselle at p. 100 of the Appeal Book:—

Of course we were buying it at what we supposed was the bottom price, that is what Mr. Yates told us was the lowest price.

This "bottom price" was, as the evidence shews, the lowest price that the owners would sell for, and communication was had by cable with the one owner living in England to arrive at the price, and unquestionably the defendant represented to the plaintiffs that the lowest price was $90 per foot, when in truth and in fact it was $75 per foot.

That the agreement for sale was to be from the defendant to the plaintiffs in my opinion does not affect the situation of matters, as undoubtedly it was assumed that it would be the most convenient way to carry out the transaction, the defendant Yates was to be a mere conduit pipe in this regard—although unquestionably it was a part of the design of the defendant, Yates, whereby he expected to reap the advantage of the increased price, but this proceeding cannot be countenanced by the Court to establish as a real transaction that which was unreal, and effected by the fraudulent misrepresentation of the defendant.

The defendant apparently was not satisfied to earn a reasonable commission, but was willing to so comport himself as to lead the plaintiffs into the belief that acting for them he would procure the land at the lowest possible figure from the owners, yet regardless of the duty he owed to the plaintiffs his attempt is to justify himself by claiming that the plaintiffs are purchasers from him and that he owed them no duty, although without the plaintiffs the transaction, even to the extent of giving to the defendant a reasonable commission, would have been impossible of being carried out.

What was the defendant's position with regard to the owners of the land as to what would be coming to him, the transaction being completed? This is best evidenced by the letter of March 21, 1912, C. H. Bienemann to the defendant Yates—it is in the following terms—

Exhibit No. 5.

Vancouver, B.C., March 21, 1912. F. B. Yates, Esq., City. On behalf of myself and my co-owner, Edgar Bienemann, I beg to say that we will allow you the usual agent's commission in the form of a discount on the

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amount of purchase price to be paid by you for lots 68 and 69, subdivision D.L. 258 and 329, New Westminster district. In addition to such commission, you are to be entitled to retain any profit you may make on the sale you are making of the said property. C. H. BIENEMANN.

It is apparent that in this case the owners were paying the commission, and custom and usage has now to a great extent established this, that is that the person getting the purchase price pays the commission, the agent very often really acting for both parties, and this may be allowable where there is no conflict of duty. In *Robinson* v. *Mollett* (1874), L.R. 7 H.L. 802 at p. 816, Mr. Justice Mellor, said:—

> It is said by Willes, J., in his judgment in the Court of Common Pleas (Law Rep. 5 C.P. 655), that "it is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller without distinct notice to the principal so that the latter may object if he think proper, a different rule would give the broker an interest against his duty." I agree with this and think that although a custom of trade may control the mode of performance of a contract it cannot change its intrinsic character.

The Lord Chancellor (Lord Cairns), Lord Hatherley, and Lord O'Hagan, agreed with the opinion of Mr. Justice Mellor, p. 838.

It is apparent in the present case that the owners were willing that the defendant should have the usual agent's commission in the form of a discount on the purchase price, and any profit on a re-sale.

It cannot be contended that the defendant owed no duty to the plaintiffs because of the fact that he was not receiving any commission from the plaintiffs, that would be a question of law. Apparently there was no agreement upon the matter in this connection, though I would quote the language of my brother Irving in delivering the judgment of this Court in *Canadian Financiers, Ltd.* v. *Hong Wo* (1912), 1 D.L.R. 38 at 40, 17 B.C.R. 8 at 10:—

> In *Andrews* v. *Ramsey & Co.*, [1903] 2 K.B. 635, Lord Alverstone hits the nail on the head at p. 638: "A principal is entitled to an honest agent and it is only the honest agent who is entitled to any commission."

The offer cabled by Chas. Bienemann to his brother Edgar was at the instance of the defendant, and the only purchasers in

view at the time for the land were the plaintiffs, and what was the defendant's duty at this time? —It was most certaintly the acquirement of the land at the lowest obtainable price, the plaintiffs to become the purchasers thereof, and the defendant was wholly disentitled to become the real purchaser of the land against the duty he had undertaken, as in becoming the *de facto* purchaser he really became such purchaser as trustee for the plaintiffs, and in my opinion upon the facts the Court would be so entitled to decree.

Williams on Vendors and Purchasers, 2nd ed. (1911), vol. 2, p. 991:—

> The rules governing the case of a trustee for sale or purchase are equally applicable in every instance in which a person exercising an authority to sell or purchase stands in a fiduciary relation to the person by or on whose behalf the authority was conferred although the former may not be a trustee under a formally constituted trust. Thus an agent employed to sell or purchase land such as an auctioneer, an estate agent, or a solicitor, cannot buy the principal's land from himself for his own use or purchase his own land from himself for the principal.

In *Oliver* v. *Court* (1820), 8 Price 127, 173, 22 R.R. 720, the Lord Chief Baron at p. 161 said:—

> I am clearly of opinion that an auctioneer while his employment continues cannot purchase the estate which he is engaged to sell; and that opinion is founded on the well-known and established rule of equity that persons who are in any way invested with a trust or an employment to be performed by them, to the advantage of their *cestui que trust* or principal are *primâ facie* virtually disqualified from placing themselves in a situation incompatible with the honest discharge of their duty.

Applying the rule to the present case the defendant was to get the land from the owners for the plaintiffs at the lowest price, could he in the honest discharge of his duty proceed to purchase the land for himself and thereafter claim and retain an increased price, a price not paid to the owners, but an increased price payable to and received by him on his own account?

It would seem to me that the contention of the defendant is absolutely untenable. Pursuing the law upon the subject with the attendant facts the defendant's duty was plain, he was to obtain the land for the plaintiffs at the best possible price, and in this case it was understood that the agreement for sale would be from the defendant to the plaintiffs, but this was understood

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to be a mere matter of convenient procedure, it would not admit of the defendant buying the land for himself and by reason thereof achieving a position unaffected by the relationship existing between the plaintiffs and defendant, the defendant could not in this way honestly discharge his duty. It must, therefore, be said that the purchase made by the defendant of the land was a purchase by and on behalf of the plaintiffs and that the defendant only became the purchaser thereof as trustee for the plaintiffs. To admit of the contention of the defendant succeeding would in fact offend against the rule quoted by Mr. Justice Mellor in *Robinson* v. *Mollett* (1874), L.R. 7 E. & Ir. App. 802 from the judgment of Willes, J.:—

> Nor can a broker employed to buy become himself the seller without distinct notice to the principal so that the latter may object if he think proper. A different rule would give the broker an interest against his duty.

In the present case there was nothing to apprise the plaintiffs of any breach of duty of the defendant in getting title in himself, as that was understood, but only as a matter of convenience in conveyancing or some reason of the owners or the defendant which the plaintiffs evidently did not seem to consider they were bound to enquire into, but this did not admit of the defendant expanding a title affected with a trust into a title denuded of that trust, there is no such magic in the document. As a matter of law the purchase of the defendant is the plaintiffs' purchase, to hold otherwise would be to admit of the broker employed to buy becoming himself the seller, and at an increased price, and to admit of his purchasing his own land from himself for his principals.

It is apparent that when the facts were known that the owners had in fact sold at $75 per foot not at $90 the plaintiffs objected and objected strenuously, and subsequent payments were made under protest, and this action was brought within two months of notification being received that the documents of title were open to inspection, namely within two months from Messrs. Deacon, Deacon & Wilson's letter, the solicitors for the defendant, to Messrs. Ellis, Brown & Creagh, the solicitors for the plaintiffs, being so advised under date of April 24, 1912, as

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it was only after the inspection of the documents that the true facts became known to the plaintiffs, and the evidence discloses that the defendant was at once apprised of the position taken by the plaintiffs,—that they would not consent to the defendant retaining the increased price. I cannot consider upon the fact that the plaintiffs on account of anything that they have done are in any way precluded from bringing this action or that there has been any unwarranted delay.

Now as to the rights of the plaintiffs in this action—in my opinion, the plaintiffs are entitled to have the judgment of the learned trial Judge affirmed upon the rules obtaining both at law and in equity. Williams on Vendor and Purchaser, 2nd ed., vol. 1, p. 806, treats of the question of the two alternatives at common law, where there has been fraudulent representation or deceit, that is the party misled may avoid the contract or

He might affirm the contract and bring an action of deceit to recover any damages caused by the fraudulent misstatement: *Deposit and General Life Assurance Co.* v. *Ayscough*, 6 E. & B. 761; *Oakes* v. *Turquand*, L.R. 2 H.L. 325; *Clough* v. *London and North Western R. Co.*, L.R. 7 Ex. 26; Benjamin on Sale, 2nd ed., 336, 342, 359.

Williams, at 812, treating of the equity rule has this to say:—

A person induced by fraud to make a contract for the sale of land had therefore the like election in equity as he had at law: that is he might either rescind the contract, or he might affirm it and claim to have the representation made good: *Rawlins* v. *Wickham*, 3 De G. & J. 304, 314, 315, 321, 322.

The learned trial Judge has relied upon *Hutchinson* v. *Fleming* (1908), 40 Can. S.C.R. 134, as being an authority to suggest the judgment given by him, and particularly calls attention to what was said by the Honourable Mr. Justice Idington at p. 136. The effect of that decision is undoubtedly that an agent cannot make any secret profits out of any transaction in which he is acting as agent.

In my opinion what was said by the Honourable Mr. Justice Duff at pp. 137, 138, is peculiarly apposite to the present case:—

I think this appeal should be dismissed. In the transaction relating to lot 739 the defendant appears in fact to have made the purchase after he had accepted employment as the plaintiff's agent for the purchase of that property. Under his arrangement with the plaintiff the defendant

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was unquestionably entitled to bargain with the vendors for and to receive from them a commission on any sale effected through his agency; and, had he in this case made such a bargain, it may be assumed that the price demanded by the vendors would have been correspondingly increased. Instead, however, of taking this straightforward course the defendant—as the learned Judge appears with quite sufficient warrant from the evidence to have found—resorted to the subterfuge of a clandestine purchase in the name of another in order to procure a profit out of the plaintiff; a profit ostensibly paid to the sham purchaser, but really passing into the defendant's own pocket. By this tortuous course the defendant made himself as the plaintiff's agent accountable for the whole of the excess of the purchase money paid by the plaintiff over that actually received by the vendors; and clearly, I think, without the right to make any deduction as for commission—for under the terms of his agency he was to look for his commission to the vendor.

In the present case the purchase was not made in the name of another, but deception was practised on the plaintiffs and the plaintiffs were led to believe that the owners would sell for nothing less than $90 per foot, and that it was the unalterable decision of the owners, when in truth and in fact the owners were only getting $75 per foot, the excess, $15 per foot, not being paid to the owners "but merely passing into the defendant's own pocket."

In my opinion nothing more can be reasonably said, it follows that the appeal should be dismissed.

Appeal dismissed

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Manitoba King's Bench, Mathers, C.J.K.B. April 20, 1914.

1. VENUE (§ II A—16)—CHANGE—CONDITIONS ON GRANTING—MANITOBA PRACTICE.

Where the plaintiff has sued in the judicial district in which the cause of action arose, a sufficient preponderance of convenience is not made out to change the venue to another district by shewing five witnesses to which the latter venue would be more convenient as against the plaintiff's three witnesses located at the city where the venue was originally placed.

Statement

APPEAL from the referee's order changing the venue from Winnipeg to Brandon.

The appeal was allowed, and the original venue restored.

A. G. Kemp, for the plaintiff.

H. E. Swift, for the defendant.

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MATHERS, C.J.K.B.:—Appeal from order of the referee changing venue to Brandon.

Apparently the referee was satisfied that the cause of action arose in the Eastern Judicial District, notwithstanding the affidavit of the defendant's manager that he was advised and believed that it arose in the Western Judicial District. He made the order appealed from under the rule permitting a change of venue and not because the plaintiff should have commenced his action in the Western Judicial District. The material shews five possible witnesses at Brandon and three possible witnesses at Winnipeg. That does not shew such a preponderance of convenience in favour of Brandon as to override the plaintiff's *primâ facie* right to sue where the cause of action arose, and particularly in view of the fact that there are daily sittings of the Court at Winnipeg and only quarterly sittings at Brandon.

The appeal is allowed, the order of the referee rescinded, and the motion to change the place of trial dismissed with costs in the cause to the plaintiff in any event.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. MASTER AND SERVANT (§ II A—46)—DUTY TO ADOPT PROPER RULES—COMMON LAW LIABILITY—"DEFECTIVE SYSTEM"; ITS TESTS.

In the erection of a concrete construction where the forms or skeleton walls have continually to be heightened as the work progresses and a gangway of boards and scantling is laid across the skeleton walls to permit the concrete to be wheeled to the forms and dumped, the work so performed is not part of a "system," but is something that of necessity must be left to the care of a foreman and workmen, and the master's common law liability is satisfied on supplying the necessary materials, resources, and competent workmen to do it.

[*Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326 applied; *Waugh-Milburn Construction Co.* v. *Slater*, 15 D.L.R. 484, 16 D.L.R. 225, 48 Can. S.C.R. 609, distinguished.]

Statement

APPEAL from the decision of Macdonald, J., in favour of the plaintiff in a common law action for damages for injuries.

The appeal was allowed, IRVING and MCPHILLIPS, JJ.A., dissenting.

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S. S. Taylor, K.C., for the defendant, appellant.
E. A. Lucas, for the plaintiff, respondent.

MACDONALD, C.J.A.:—There is no dispute concerning the facts of this case, and it is conceded that it cannot be decided by reference either to the Employers' Liability Act or to the Workmen's Compensation Act, for the reason that it is out of time in respect to these Acts. The defendant's common law liability only is in question now.

The defendants were erecting a mill, including a circular refuse burner, the walls of which were being constructed of concrete. The burner had a diameter of 25 feet and the walls a thickness of 6 feet. Forms or skeleton walls of planks were erected and between these the concrete was dumped so that on removal of the planks the solid concrete wall would remain. These forms had to be heightened from time to time as the work progressed. Across the forms or skeleton walls were placed 2 x 4 scantling, and on these planks were laid, making a gangway of about 2 feet in width in the centre between the skeleton walls. The concrete was wheeled in barrows up an incline bridge and along this gangway, and their contents dumped into the cavity beneath. At the time of the injuries for which the plaintiff claims damages, the skeleton walls had reached a height of 6 feet from the ground. They had been raised at least once or twice before the day in question. The work on the burner had been in progress for about three days at that time. The plaintiff was employed on this gangway cleaning out the wheelbarrows and adjusting the concrete in the form with a pole or tamping stick. The negligence complained of was in not nailing the planks to the cross-pieces; one of the planks had been forced out of position by the wheelbarrows, and had lost its hold upon the cross-piece, and the plaintiff inadvertently stepping upon it, was thrown down and injured. In the construction of similar concrete work in other parts of the mill the scaffolding which corresponded to the gangway in question had been properly nailed. The construction and raising of the forms from time to time was entrusted to a competent foreman and competent workmen. This, I think, is the result of the admis-

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sions of plaintiff's counsel at the conclusion of the evidence at the trial.

I think it may also be inferred from the whole case that these men were supplied by defendants with suitable materials and appliances with which to do the work properly. The gangway was a temporary structure which, I take it, had to be removed each time the walls were raised in height and then replaced. This apparently would occur within short intervals, if not from day to day.

Unless the employers (an incorporated company) were in duty bound to do more than put the work in competent hands and supply the necessary materials and resources to do it, so that if carefully done the gangway should be a safe place for the plaintiff and other employees to work upon, then the judgment for the plaintiff cannot be sustained. The contention of respondents' counsel is that the gangway was part of a system. In fact, he grounded his case entirely upon that. In my opinion it was not part of a system. It was something that appellants must of necessity have left to the care of their foreman and workmen. I think it was even less a part of a system than was the platform in *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326. The case I think is distinguishable from *Ainslie* v. *McDougall* (1909), 42 Can. S.C.R. 420; *Brooks* v. *Fakkema* (1911), 44 Can. S.C.R. 412, and other cases of that character? It is more akin to *Hosking* v. *Le Roi* (1903), 34 Can. S.C.R. 244. In any case it seems to be so completely covered by *Wilson* v. *Merry*, supra, that I am impelled to the conclusion that the appeal must be allowed and the action dismissed with costs.

In the result it becomes unnecessary to deal with the question of plaintiff's voluntary assumption of the risk, which also was raised in the appeal.

Irving, J.A. (dissenting)

IRVING, J.A. (dissenting):—I would dismiss this appeal on the authority of the *Fakkema case*, [*Brooks* v. *Fakkema*, 44 Can. S.C.R. 412]. There is evidence here from which it may be inferred that there was neglect of duty to properly adjust the boards along which the plaintiff was expected to wheel his wheelbarrow. This is neglect which to my mind would be the

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fault of a fellow-servant, and therefore a defence in a common law action (as this is), and can, according to the *Fakkema case*, be regarded as a faulty system. As to the contention that the plaintiff was *volens*, I certainly would have drawn the inference that he was, but the Judge thought he was not, and it is not advisable for a Judge in appeal to upset an inference drawn by a trial Judge, when there is evidence to support his finding. Besides, the doctrine of *volens* has almost reached the vanishing point.

Martin, J.A.

MARTIN, J.A.:—This appeal I think should be allowed, the judgment on the facts can only be supported on the ground that the defendant had not provided a safe place for the plaintiff to work in. It is not a case of system. But the authorities cited in favour of the respondent, ending with *Waugh-Milburn Co.*, v. *Slater*, 15 D.L.R. 484, 48 Can. S.C.R. 609, do not apply to the facts of this case which is one of the alteration in a runway or staging at frequent intervals, as the wall rose day by day it may be safe to-day and unsafe to-morrow. As a matter of fact when the work of constructing the wall was begun it was reasonably safe, for the runway would be upon or close to the ground, but as the wall rose and the staging with it, it gradually became so high that the precaution of nailing the planks should have been taken by the foreman in charge, and an action could have been maintained under the Employers' Liability Act if it had been brought in time.

Galliher, J.A.

GALLIHER, J.A.:—The work in which the plaintiff was engaged at the time of the accident was in connection with the erection of a cement burner some 20 feet in diameter and which at that time had reached a height of about 14 feet from the ground. His duty on the day in question was levelling the cement after it was poured into the forms from wheelbarrows, and in order to do this was obliged to stand on planks laid on 2 x 4 pieces on top of the forms. The burner was circular in shape, and the planks instead of being cut on the bias, so as to come together and conform to this shape, were crossed one on top of the other and were not nailed, and one of these planks

upon which the plaintiff stepped having been shifted by the wheeling of the heavy barrows full of cement tipped, and the plaintiff fell and was injured.

No testimony was given one way or the other as to the competence of the foreman in charge of the work or the erection of these runways, but counsel for the plaintiff said he did not question the competence of the foreman except in so far as the nature of the structure shewed.

The method adopted was in my view grossly negligent, so much so that had the general competence of the foreman been questioned, I would have been inclined to hold that it argued incompetence; however, the admissions of plaintiff's counsel do not warrant me in going beyond classing it as negligence.

In this view with some reluctance I am unable to distinguish it from *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326.

The appeal must be allowed.

McPHILLIPS, J.A. (dissenting):—This appeal is one brought by the defendant company from the judgment of the Honourable Mr. Justice Macdonald in a common law action for negligence, tried by the learned Judge without a jury, judgment being entered for $2,500 in favour of the plaintiff, respondent.

McPhillips, J.A. (dissenting)

The plaintiff was seriously and permanently injured (breaking his right leg, an impacted fracture of the neck of the femur, and leaving it permanently shorter by an inch and a half) by falling from a staging consisting of loose planks placed upon the top of the form or false work used in the construction of a large burner, to be used at the saw mills of the defendant company, the burner was being constructed of concrete and the plaintiff was at times wheeling barrows of the mixed concrete up the runway, and along the planks, to the top and dumping it between the false work where required and at other times emptying or scraping out the barrows and smoothing or levelling the mixed concrete down, after it was dumped by other employees. At the time of the accident the plaintiff was, pursuant to instructions given him, scraping out the barrows and smoothing and levelling down the concrete, and about the last of the concrete had been deposited to complete the final course

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which could go on with the false work already constructed. It would appear that up the slanting runway the planks were nailed, but those upon the top of the false work were not, and the planks were overlapped over which the barrows had to be wheeled, and the workmen were standing and working on these planks which, not being nailed, under the influence of the weight brought upon them by the wheeling and other strain from time to time, were liable to get out of position, which event did happen, precipitating the plaintiff to the ground below. The form or false work, the slanting runway and the loose planks on top were built to a height of about six feet from the ground about a week before the accident, and the plaintiff had been working about a week before the accident took place. A superintendent and foreman were in charge and were about the place and saw the work going on and were at times upon the staging during the progress of the work. An excavation had been made inside the form or false work, i.e., the interior of the circular form or false work and the depth to the inside from the top was fourteen feet to the outside six feet.

Previous to the form or false work being contructed for the burner a machine house had been constructed of concrete at the same place, and the planks were during its construction nailed down. The planks in the form or false work were of course nailed and the planks upon the runway slanting up to the top of the form or false work for the burner were nailed, but the others which circled round were not nailed. The plaintiff in doing the work he was engaged upon had to stand upon and pass over these planks which were left unnailed and stepping upon one of the planks it tipped up, as he explains it, and he fell to the ground. It is perhaps somewhat explanatory of matters to quote some of the questions put to the plaintiff by counsel for the defendant company and the answers made thereto by the plaintiff, it is to be noted that the plaintiff is a Scandinavian and was examined through an interpreter.

Olav Liset (the plaintiff), cross-examination at pp. 45, 46, Appeal Book.

Mr. Stockton of counsel for the defendant company.

Q. You knew that the planks would tip, they would be apt to tip if you stepped on them? A. No, he says if he had known that he would

have watched himself better; but it happened sometimes that the fellow-workers would fall down with the wheelbarrow.

Mr. Stockton:—We will see what he says on discovery on that as well.

Q. You knew you had to be careful when you were on those planks, didn't you? A. Yes, he was always careful he says.

Q. You knew that if you were not careful you were apt to tip the planks and you were apt to go over, isn't that right? A. Yes, he says one had to watch them and see that they laid in their original positions or else they would be liable to tip or slip off.

Q. And you knew that you had to watch them and had to be careful isn't that right? A. It was not his job he says to watch these planks.

Q. Did you know that you had to be careful when you were walking on those planks? A. Yes, he knew he had to be careful.

Q. You knew that it was dangerous work, working up there with those planks that way didn't you, Mr. Liset. What does he say? A. Yes, he says, but he was very busy emptying out, scraping out the wheelbarrows as they came along with him and it was not his job, so he would forget it, it was not his job to do it.

Q. You knew it was dangerous working up there on the scaffold though? A. Yes, I saw it was not very safe and I tried to look out for it.

Q. You knew it was not——

THE COURT:—Finish your answer. You saw it was not very safe and what. A. He saw it was not very safe and tried to look out for himself as best he could.

Mr. Stockton:—Q. You recognized it was a dangerous place to work when you started to work on that, didn't you? A. He thought it was not very dangerous because it was not very high.

Q. But you knew there was a chance of those boards tipping, isn't that right? A. He says he didn't think anything about that. He thought it was the foreman's business to watch out for the scaffold and none of his.

The learned trial Judge, in his findings of fact, held that the defendant company was guilty of negligence, and that the negligence was not that of a fellow-servant, but negligence imputable to the defendant company, being a case of defective installation and construction without proper precautions to provide a fit and proper place for the plaintiff to work, that the plaintiff had not consented to undertake the risk, and a defective system.

I suppose it may well be said that negligence in law receives more careful attention and is oftener up for consideration by the Courts than perhaps any other branch of the law, yet with all the investigation we have had, great uncertainty exists, and it must be said, always will exist, consequent upon the varying

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conditions and situations in which persons may be placed, and in the relationship of masters and servants, the relative duties and responsibilities which the law imposes are sometimes most difficult of ascertainment. For a short and terse statement, and an accepted one of what constitutes "negligence" Willes, J., said in *Vaughan* v. *The Taff Vale R. Co.* (1860), 29 L.J. Ex. 247 at 248:—

> The definition of "negligence" is the absence of care more or less according to the circumstances.

In the present case, no doubt, the plaintiff was aware that the planks were loose, and that there was danger, but does that preclude his right of recovery? I think not. Lord Watson in *Smith* v. *Baker*, [1891] A.C. 325 at 355 said:—

> The maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that if the injury should befall him the risk was to be his and not his master's. When as is commonly the case his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at work with such knowledge and appreciation will in every case necessarily imply his acceptance. Whether it will have effect or not depends in my opinion to a considerable extent upon the nature of the risk, and the workman's connection with it as well as upon other considerations which must vary according to the circumstances of each case.

In *Waugh-Milburn Construction Co.* v. *Slater* (1914), 15 D.L.R. 484, 48 Can. S.C.R. 609, it was held that the defence that the accident occurred through the fault of a fellow-servant was not available, and the default to take measures to ensure the safety of the employee was personal negligence on the part of the company.

The Chief Justice (Rt. Hon. Sir Charles Fitzpatrick), at 615, said:—

> The failure on the part of the appellants to provide a hole of sufficient depth, as found by the jury, to plant the poles firmly and safely is negligence for the consequences of which the employers are as clearly

responsible as if they had supplied their servants with defective posts or defective apparatus of any kind.

In the present case at the inception of things when the first work on the construction of the burner is entered upon the planks are laid and left unnailed, it is not a case of the staging being at first properly constructed with materials at hand and competent servants charged with the duty to see to its being kept in proper condition.

Idington, J., in the *Slater* case, *supra*, at 617, said:—

The undertaking of a dangerous work without adequate means of averting the consequences of such dangers as attendant upon its execution, and protecting therefrom those engaged therein, is negligence.

Duff, J., at 621, said:—

The jury found the defendants guilty of negligence in two respects: in failing to set the poles sufficiently deep, and in failing to fill the post holes with sufficiently rigid material. I think this involves a finding that there was negligence in these respects and that negligence is imputable to the defendants personally.

Anglin, J., at 623, said:—

The defendants owed to the plaintiff's husband the duty of furnishing him with a reasonably safe place in which to work, of seeing that the pole which he was required to ascend was securely placed. Notwithstanding the shallowness of the hole, it is claimed that the pole would not have fallen if sufficiently rigid filling had been used. The jury has found that the defendants were at fault in regard to the filling. The circumstances disclose a case of dangerous employment imposing upon the defendants, as masters, the duty to see that proper precautions were taken to ensure their employee's safety.

In *Brooks-Scanlon O'Brien Co.* v. *Fakkema* (1911), 44 Can. S.C.R. 412, at 417, Duff, J., said:—

As to the first point, the employer is responsible according to the view of the majority of the Judges in *Ainslie Mining & Railway Co.* v. *McDougall*, 42 Can. S.C.R. 420, for the installation of a system of work which needlessly exposes his workmen to risk of injury.

In the present case in my opinion there is the clearest evidence that there was a defective system which renders the defendant company liable. In *Webster* v. *Foley* (1894), 21 Can. S.C.R. 580, it was held that a master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in

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the machinery itself and that at common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery or a defective system of using the same by reason of his failure to give notice to the employer of such defect.

Sir Henry Strong, C.J., then Strong, J., said, at 586, referring to the judgment of Lord Watson in *Smith* v. *Baker*, *supra*:—

> And at page 355, Lord Watson pointed out that at common law notice to the employer of the unsafe state or the unsafe working of appliances or apparatus was not required, and that he was bound at his peril to make proper provision in these respects, but that the Employers' Liability Act had in this respect altered the law in favour of the employer by requiring that the workmen should give information of the dangerous or defective state of the appliances.

The learned trial Judge has relied upon *Ainslie Mining & R. Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420, and, rightly, it was in that case held that an employer is under an obligation to provide safe and proper places in which his employees can do their work, and cannot relieve himself of such obligation by delegating the duty to another, and that if an employee is injured through failure of the employer to fulfil such obligation the employer cannot in an action against him for damages invoke the doctrine of common employment.

In *Ainslie Mining & R. Co.* v. *McDougall*, *supra*, Davies, J., said at 427:—

> That case, referring to *Hall* v. *Johnson*, 3 H. & C. 589, does not involve any question as to the primary duty of the master to provide in the first instance places in and materials with which workmen may safely work or systems under which they may so work, or whether with respect to cases where such duty is not fulfilled, and an accident happens to a workman in consequence, the master can invoke the doctrine of common employment and escape liability by shewing merely that a fellow workman's negligence was the cause of his duty being unfulfilled. My holding is that in such cases he cannot and that he is bound to shew that reasonable and proper skill and diligence were not wanting on his part or on the part of those to whom he delegated the performance of his duty in those regards.
>
> In view of the disuse of the mine for a period of 18 months, I deem the position on the resumption of work as regards the mine-owners' duties to their employees to be the same as if they were then for the first time placing their men at work in the mine. Their duty to their workmen in

this situation was to provide them with a reasonably safe place in which to work. When that duty has been delegated, any negligence of an employee to whom it has been confided must be imputed to the employer whether an individual or a body corporate.

In *Weppler* v. *Canadian Northern Railway Company* (1913), 14 D.L.R. 729, 25 W.L.R. 858, it was held that to support the defence of "*volenti non fit injuria*" the defendant must set up and prove affirmatively first that the plaintiff well knew the danger and the risk, second that the plaintiff contracted or consented to run the risk. Mere proof that the plaintiff knew the danger and continued in his employment is not conclusive evidence to prove the second point.

It is plain in the present case that the defendant company had carpenters to put up the form or false work, and there was a superintendent and foreman about, and the construction of the burner was a new work and of different shape no doubt to the machine house, being circular, and the duty of the defendant company was to see to it that in the carrying on of the work a safe system was adopted, and in my opinion a most unsafe system, as it was proved, was adopted, resulting in this very serious and permanent injury to the plaintiff.

I cannot accede to the very forceful argument of Mr. Taylor, counsel for the defence, that this is not a case of liability because of the fact that the defendant company had competent servants, and that in the construction of the machine house, carried out shortly before work on the burner was undertaken, the planks upon the top of the form or false work were nailed, to the plaintiff's knowledge, and that the negligence was the negligence of fellow-servants, i.e., the carpenters. At first sight this would seem to be very convincing, but when analyzed it is far from convincing, as it really fails to establish compliance with that duty which at common law is imposed on the master, and that is to at all times provide the workmen with a reasonably safe place to work. The building of the burner was a new work and the form and false work no doubt greatly differed in construction, and was it incumbent upon the plaintiff to point out to the employer that in this new work the system was a different one and to apprehend danger and point out the

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danger to the employer and at his peril continue the work? I cannot think that this can be the situation in law.

Now upon the facts of the present case it is clearly demonstrated that there has been negligence and negligence imputable to the defendant company. Lord Watson in *Smith* v. *Baker*, [1891] A.C. 325, at 353, said:—

> The judgment of Lord Wensleydale in *Weems* v. *Mathieson*, 4 Macq. 226, clearly shews that the noble and learned Lord was also of opinion *that a master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.*

In the present case there was failure to see that the supplied materials were properly placed, and properly secured, i.e., an absence of proper precautions—a defective system is proved, and in my opinion it is impossible for the defendant company to shelter themselves behind other servants to whom they delegated a duty which is inseparably fastened upon themselves, in the language of Davies, J., in *Ainslie Mining & R. Co.* v. *McDougall*, 42 Can. S.C.R. 420:—

> Their duty to their workmen in this situation was to provide them with a reasonably safe place in which to work.

Upon the facts of the present case was it a reasonably safe place to work? The obvious and only answer, in my opinion is, that it was not, and that happened which proper precautions and a proper system would have prevented.

It therefore follows, that in my opinion, the decision of the learned trial Judge is right and the appeal should be dismissed.

Appeal allowed.

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British Columbia Supreme Court, Hunter, C.J.B.C. April 2, 1914.

1. BROKERS (§ II A—5)—REAL ESTATE AGENT—RE-SALE—ALTERNATIVE PROMISE TO TAKE PROPERTY HIMSELF.

Where a real estate agent, in order to induce a proposed purchaser to buy certain land, orally promises the proposed purchaser that he would make a profit of a stated sum within 60 days on the deal *or* take the property himself, such promise is to be construed as indivisible, but it cannot be enforced because of its uncertainty where it does not appear whether or not the latter alternative of "taking the property" was to include the suggested profit, nor was any time fixed for carrying it out, nor specification made as to the liabilities or encumbrances which the purchaser had assumed with the property.

Statement

ACTION against a real estate agent to enforce the agent's oral promise made in the alternative that if the plaintiff would buy, the agent would make him a profit of $30,000 by resale or the agent would "take the property" himself.

The action was dismissed.

Bodwell, K.C., for the plaintiffs.

S. S. Taylor, K.C., for the defendant.

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HUNTER, C.J.B.C.:—I am quite satisfied that the facts are, in the main, as stated by the plaintiffs Fletcher and Shatford. I am quite clear that the promise alleged by them and sworn to half a dozen times in their evidence, namely, that Holden was to make them a profit of $30,000 within 60 days, or take the property himself, was made. And, in coming to that conclusion of fact, I do not intend to impute any wilful misstatements to either party. It must be clear enough that a transaction of this kind, involving, as it did, possibly a very large liability, would be likely to be more acutely recollected by Fletcher and Shatford than it would be by Holden, whose only interest in the matter was the securing of a commission. And I can quite readily understand how it is possible that Mr. Holden may not have had any particular recollection of making this promise, as he is a man engaged in a very extensive way in real estate and, no doubt, has had transactions amounting to several millions a year; on the other hand, the plaintiffs were obligating themselves to a very large amount, or considering the obligating of themselves to a very large amount, and naturally would have a

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very much more acute recollection of the transaction which affected them in a very much more serious way, than it did the defendant Holden. However that may be, I have no difficulty in coming to the conclusion that the promise as repeatedly sworn to by the plaintiffs was, as a matter of fact made, and that that promise was that the defendant Holden would make them a profit of $30,000 within 60 days, or that he would take the property himself.

Now, the first defence suggested by the statement of defence was that there was no consideration for this promise. I am of the opinion that there is nothing in that point. It is elementary law, as I take it, that where the promisee is to expose himself to some possible liability or detriment, that that of itself affords sufficient consideration in English law for the promise. And, not only that, but it is common ground that the object of the transaction, so far as Holden himself was concerned, was in order to enable him, Holden, to make a commission out of the sale to the plaintiffs, from the then owner, O'Toole. And not only that, but it was also plainly enough apparent that Holden was intending to make a profit out of the re-sale when the property became acquired by the plaintiffs. So that there is no difficulty, so far as I can see, upon the score of consideration.

The next point stated by Mr. Taylor, for the defence, was that this promise, so-called, amounted to a mere expression of belief, and that it was to be treated as a mere puffing by a real estate agent who is exercising his ingenuity in working up a sale. I am unable to put that estimate upon it. I think it is clear from the evidence of the two plaintiffs that, while originally they may have hesitated about accepting this statement as a statement on which they could rely, that there is no doubt they did finally change their position upon the faith of that statement; and that that promise amounted to an enforceable contract, if no other consideration will prevent that, which I will deal with further on.

The next point raised in connection with the defence is, that this contract, if it is a contract, is within the Statute of Frauds.

Now, ordinarily speaking, of course, contracts concerning land or interests in land, are within the Statute of Frauds; but I take it that such contracts are contracts whereby it is intended that some interest in the land should pass from one party to the other. If that is a true test as to whether or not a contract is within the Statute of Frauds, then I should take it that this contract is not really within the Statute of Frauds, although within the letter of it, because it is not intended, by virtue of the promise itself, that any interest shall pass from one party to the other; neither of the parties at the time of the making of this promise had any interest in the land itself; the bargain related to a possible interest to be acquired in future by one of them.

However that may be, assuming that the Statute of Frauds is not fatal to the action, I have come to the point which, to my mind, is fatal to the success of the plaintiff. The promise, as declared on—at least as proved in the evidence—was a promise in the alternative; that is to say, it was a promise to do one or other of two things. Mr. Bodwell has, in the course of his argument, suggested that it was quite within the right of the plaintiff to sue on one branch of the promise, and refers to the case of *Wood* v. *Benson*, 1 L.J.Ex. 18. *Wood* v. *Benson*, however, was a case where a man promised to do two things, and one of the two things which he promised to do was held to be bad, because it was not in writing. I fail to see what application that case has to this, because here the promise was to do one of two things, and not to do two things. I therefore think that the promise has to be taken as a whole, and if it is enforceable at all, must be enforceable as a whole. As a matter of fact, the action was brought upon one branch of the promise, that is to say, relating to the $30,000 profit. I am willing, however, to assume that the pleadings can be reformed, and have been reformed so as to make the action stand on the promise taken as a whole. I think, even if that were to be allowed to the plaintiffs, that it is impossible to enforce the promise as it was proved on the ground that it is too vague to enforce—or as it is sometimes put, is void for uncertainty. If we take the first branch

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of the promise, that is to say, "make you $30,000 profit within 60 days," that of itself might be susceptible of two different constructions; it may be that the $30,000 profit was to be realized in cash within the 60 days, or it may be that the defendant had bound himself to bring into existence a contract by which, at some future time, the $30,000 was to be realized, but that only the contract itself was to be produced within the 60 days. However, that is, if that difficulty can be got over, then I think undoubtedly the latter branch of the promise, that is to say, "take the property myself" or "take it myself" is clearly open to two or three different constructions. It may mean, and in fact it was stated by Mr. Shatford that he so understood it, that the defendant Holden was obligating himself to take over the property, and in addition to give the $30,000 profit. It may, of course, mean that he was obligating himself only to take an assignment of the plaintiffs' interest without paying any profit—$30,000 or other profit. Then, again, it may mean that they had a naked promise simply to take an assignment, without necessarily covenanting to indemnify the plaintiffs against the liability which they had assumed. I think that that is a very different phase of the matter to come to a conclusion about. "Take it myself" does not necessarily mean taking an assignment from you and indemnify you—although a great many persons might think that that is what it did mean, that the instrument by which the title was to pass was also to contain a covenant against the liabilities assumed by the plaintiffs. Then again, "take it myself" may mean, I will indemnify you if you are held or caught on this liability, but not otherwise; or, I will agree to indemnify you afterwards, if by any chance the liability becomes a judgment against you. I will agree to indemnify you then. There is nothing stipulated as to the time when the property is to be taken over. It may mean, I will take it myself when I am in a position to take it over, or take it myself immediately, or take it myself within a reasonable time, and either with or without protection to you in the meantime. I think that all these constructions are open to be put upon the expression. With these various constructions open, can anyone say that the parties were ever *ad idem*?

Then, I think, moreover, that the action should have been, as I said, brought upon the promise as it stands with the two alternatives, and as I say, being willing to assume that it was brought that way, and that the pleadings are not now open to any objection on that score, I think there is another difficulty standing in the way of the plaintiffs, that, before commencing the action there should have been an agreement or assignment drawn and this agreement tendered to the defendant for execution. That, of course, would have at once brought up the question whether or not the covenant that I have been speaking of should have been inserted in it, or whether Holden could say I did not undertake to give you any covenant at all. But, however that may be, the action being in itself one for specific performance, the ordinary rule of course must prevail, and the instrument which it is alleged that Holden had obligated himself to sign, should have been presented to him for signature before the action was brought. Of course, I am quite well aware that a man may shew by his conduct that it is not necessary to present him with such document. At any rate, I think it quite clear that before the plaintiffs are in a proper position to sue, they must make it clear to the court that they did put the option to Holden in some form or other, that he should either pay the money, the $30,000, or take an assignment of the property.

Mr. Shatford in his evidence says, that they finally decided to keep the property. Well, I do not propose to hold Mr. Shatford literally to that language, because it might very well mean that what he was endeavouring to say then was that, so far as other people were concerned, the real estate market having depreciated, he intended to keep the property as against others, but not necessarily as against Holden. And I think that possibly that is the proper construction to put upon his language, that what he meant by that was that he did not intend to say that he intended to hold the property as against Holden.

The short conclusion of the matter is that I do not think this promise as proved by the evidence is divisible, and I think,

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not being divisible that it is too vague for the Court to enforce; in other words, that it is void for uncertainty; and on that ground, if upon no other, I think that the action fails.

Action dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 20, 1914.

1. APPEAL (§ I B—21)—SURROGATE ORDER—PASSING EXECUTOR'S ACCOUNTS—EXECUTOR'S COMPENSATION.

An appeal lies to the King's Bench in Manitoba from that part of an order made in the Surrogate Court fixing and allowing the executor's compensation on the passing of his accounts.

[*Re Alexander*, 31 O.R. 167, referred to.]

2. EXECUTORS AND ADMINISTRATORS (§ IV C 2—110)—EXECUTOR'S COMPENSATION—ADVANCE ALLOWANCES.

A Surrogate Court on the passing of an executor's accounts should not, under ordinary circumstances, fix in advance the compensation of an executor-trustee for the future work to be performed in getting in and distributing the unrealized part of the estate. (*Per* Howell, C.J.M.)

3. TRUSTS (§ II B—57)—COMPENSATION—MAKING MORTGAGE INVESTMENTS.

Where the will limits the executor's investments to be made from sales of land to real estate mortgages, an allowance for procuring and passing the loans may be made to the executor on passing his accounts, in addition to the agent's commission where the loan is brought in through an agent; and where the agent's commission was one per cent. on five year loans, an additional one per cent. may properly be allowed the executor-trustee in addition to all proper disbursements, for examining and passing each loan, excluding, however, mortgages taken back for balance of purchase money of properties bought from the estate.

4. TRUSTS (§ II B—57)—COMPENSATION—COLLECTING MORTGAGE INTEREST.

Compensation to an executor-trustee for collecting and paying over the income on mortgage investments in Manitoba to the life beneficiary and for looking after the investment may properly be allowed at seven and one-half per cent. of such income on farm loans and five per cent. on city loans.

Statement

APPEAL from the order made by the Surrogate Court Judge fixing the amount to be allowed the executors on passing their accounts.

The appeal was allowed and the order below varied.

E. F. Haffner, and *A. B. McAllister*, for the beneficiaries, appellants.

J. S. Hough, K.C., and *A. E. Dilts*, for the executors, respondents.

HOWELL, C.J.M.:—The deceased left an estate of the value of more than $300,000 consisting largely of unproductive, unoccupied real estate. He directed his executors to call in and convert the whole of his estate, to pay a few thousand dollars in legacies, and to invest the balance in mortgages and to pay the income to his daughter during her lifetime.

There is a further provision that if at the death of his daughter she leaves children, the income is to go to them until the youngest is twenty-one years old, after which the estate is to be divided amongst these children. In default of her leaving children the estate at the death of the daughter is to be divided amongst certain nephews and nieces. The daughter, although married, is a young woman and has no children.

More than one-half in value of the real estate consisted of a tract of suburban real estate upon which the deceased had given an option of purchase during his lifetime. The remaining real estate consisted chiefly of vacant farm lands. In January, 1910, soon after the death, the executors sold this suburban property, and since then a large part of the farm lands have also been sold.

The executors on passing their accounts to date in the Surrogate Court applied to the Judge of that Court to fix their allowance as provided for under sec. 52 of ch. 170, R.S.M. 1902, which section is in identical language with sec. 52 of ch. 200, R.S.M. 1913. The executors in their account had charged an "administration fee" of $10,221.81 against the whole estate, that is, against the principal, and this, I gather from counsel for the executors, was the whole fee intended to be charged for getting in and paying out the whole estate. In their accounts against revenue they have charged a sum fixed at one per cent. per annum of the principal for all investments on farm mortgages and one-half per cent. per annum on city mortgages.

Upon the sale of the suburban property, above referred to, a large portion of the purchase price was provided for by taking from the purchaser a mortgage for well over $100,000, the principal of which is payable by instalments and upon this mort-

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gage the executors have retained out of revenue a sum equal to one-half of one per cent. of the outstanding principal and upon the sales of the farm lands they charged a sum equal to one per cent. of the principal, treating all as investments on the basis above set forth.

Except one city lot, as I gather from the evidence, every sale of real estate was made through agents to whom the executors have paid large sums by way of commission, all of which has been charged to the estate. There are also many items in the accounts charged against the estate for inspection, and from the evidence I gather that this is charged chiefly as a portion of the time of their inspectors, who are paid by a salary and who examined the property before sale.

The order in this matter was made under sec. 71 of the Surrogate Court Act and under sec. 52 of the Trustee Act above referred to, it passed the accounts and fixed the compensation to be allowed the executors. By sec. 49 of the Trustee Act this compensation may be fixed by a Judge of the King's Bench and in that event there would be an appeal to this Court. There is an appeal from this order so far as it applies to the passing of accounts under section 92 of the Surrogate Court Act, and sec. 52, above referred to, provides that the sum fixed for compensation shall be allowed the executor in passing his accounts.

In *Boston* v. *Lelièvre*, 6 Moore's P.C.N.S. 427 at 434, Lord Westbury uses the following language:—

> The consolidated statutes may be treated as one great Act, and their Lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively, and with reference to one another, just as if they had been sections of one statute, instead of being separate Acts.

In Ontario similar statutory provisions in separate Acts were construed as giving a right of appeal: see *Re Alexander*, 31 O.R. 167. It is true in that case the Chancellor in giving judgment commented on the fact that before consolidation all the sections were in one Act, which was not the case in this province, but the Acts he was called upon to consider as they then stood were separate chapters in the Revised Statutes of Ontario, just as here. I think there is also a right of appeal to this Court from the portion of the order fixing the compensation.

To find the rules of law to be applied in fixing the compensation for executors and administrators, for obvious reasons, reference can only be made to Canadian and American cases. The Canadian cases on this subject are well reviewed in Weir on Probate, beginning at 387, and the American law is collected in 18 Cyc., beginning at 1141. Executors must be allowed a reasonable compensation. If the estate consisted of a business to be carried on for a time by the executors, or if it consisted of unproductive or only partially productive property to be held for a considerable time or other peculiar estates, it might well be that a gross sum or something akin to an annual salary might be allowed. If the estate was partly productive and partly unproductive there might well be an annual sum allowed and a commission on the receipts.

This estate is one simply of getting in and converting into cash certain real estate, of paying a small proportion for legacies and of investing the balance on mortgages which all parties assume to be mortgages of real estate. There seems to be a unanimity of thought in the Canadian and American cases that the compensation to the executors in such cases as this should be by way of commission upon the amount received and paid and in some cases an additional salary or yearly sum for management of the estate, and upon this principle the Surrogate Judge acted in fixing the allowance.

In endeavouring to fix the compensation to be allowed in this matter it seems to me the work and responsibility might well be divided into three heads: (1) the conversion of the estate either into money or partly into money and partly into mortgages, the latter to be continued as investments and the paying over of the legacies, $8,000 in all; (2) the investment and re-investment of the money in mortgages and the paying over of the income as directed by the will; and (3) the final distribution of the estate under the will.

Now, as to the first branch of this matter: the order appealed against is a double one, it passes the accounts and also is an order fixing the compensation under the statute above referred to. As above mentioned the executors charged as disbursements many items for inspection of these lands chiefly made by their

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employees and they also charged as disbursements large sums for agents' commissions on all of the sales except city property of small amount. The work they are to be paid for then is for the sale of this land, the purchasers of which have been found by agents (paid for by the estate to the extent of over $12,000), the inspection of which lands the executors having been already allowed for.

For this work and responsibility the executors charged and claimed the sum of $10,221.81, and they in their accounts charged it against the capital account. The beneficiaries objected to this item and the Judge considered it, and on this branch of the case found that the executors had got in, sold and converted the estate to the amount of $280,546.82, and that there remained in their hands unsold real estate of the value of $38,490. He fixed the compensation to be allowed to the executors up to the 1st of April, 1913, the sum of $8,513.65, and although the language of the early part of the third paragraph of the order is not clear, I think it means that the executors are from time to time hereafter, as these lands are converted, to be allowed 2½ per cent. on the amount of the purchase price, and the order contains this clause,

> and also an annual allowance of five hundred ($500) dollars from December 24, 1912, so long as the said estate or any portion thereof shall remain in their hands, such fees and annual allowance to be charged up to revenue account and deducted on the first day of January in each year.

This quoted clause may only refer to the second branch of this matter. On any calculation of my own I cannot arrive at the principle upon which the Judge acted in fixing the gross sum to be allowed and why he apparently reduced the fee fixed and claimed by the executors in their accounts. They were apparently satisfied with the amount so charged. The annual charge of $500 referred to in the quoted part of the order was perhaps put in really to supplement this charge. I shall refer to this charge again in considering the second part of this matter. From the order I cannot find whether or not the Judge has allowed the various charges made for inspection. I think the total sums charged by the executors for getting in the whole estate (together with the inspection charges above referred to and which

amount in all to about $100) are reasonable, and I agree with the Judge that these sums should only be credited as earned. He seems to think that 2½ per cent. is enough to allow for getting in the balance of the estate and this on his valuation of the residue amounts to $962.25.

I would, therefore, fix the compensation for converting the estate into productive property and for paying the legacies and the other work incidental to taking over the estate at the sum claimed by the executors in their accounts filed, namely, $10,221.81, less the sum of $962.25, being 2½ per cent. of the assumed value of the unsold portion of the estate. The difference between these two amounts the executors are now to be allowed for and from time to time hereafter they are to be allowed 2½ per cent. on the amounts for which the balance of the estate is sold. If the executors have not on the passing of their accounts been credited for the sums charged therein for inspection then to the total of these items must also be added the above sum. It is not usual and I should think not good practice to fix in advance what executors are to get for work subsequently to be performed, but as this estate is largely converted and it is well to settle the compensation now, I have fallen in with the view of the Judge.

The executors charged this sum to capital account and for some reason the Judge reversed this and directed it to be charged to revenue, thus loading the tenant for life with all this expense. I suppose the reason for this change was because of paragraphs 4 and 5 of the will, which are as follows:—

> 4. The rest and residue of my personal estate, I direct my executors to reduce to money and to invest the same in mortgages, and after paying taxes and other necessary charges in and about the management of my estate to pay over to my daughter Cora during her lifetime the balance of such interest or income.
>
> 5. That portion of my estate comprising real estate or any interest in real estate, I direct my executors from time to time to dispose of and to add the proceeds to the investment of the preceding paragraph mentioned, my intention being to increase my daughter's income as my real estate can be advantageously disposed of.

Looking at the whole scope of the will, I cannot think that the testator intended that the income of his daughter should be

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deferred until revenue on the sale of real estate should produce enough to pay this charge. The personal property produced only about enough to pay probate charges and succession duties and other necessary disbursements, leaving out of consideration the legacies. If these charges should be made against the revenue accounts it follows that the sums paid to agents as commission on the sale of the real estate should also be so charged. I think the testator did not intend to so load up his only child's income in favour of the more remote beneficiaries. The compensation mentioned under this branch of the matter must be charged against the capital account.

The executors under the second branch of this matter entered into their accounts and charged and claimed before the Judge by way of compensation for investing on mortgages and for collecting and paying to the parties entitled to the income therefrom one per cent. per annum of the principal on all mortgages of farm lands and one-half per cent. per annum of the principal on mortgages of city property.

The Judge for some reason by his order allowed for this the sum of one per cent. of the principal for each investment and a sum equal to one per cent. per annum of the principal to be retained out of the income for collecting and paying the same over. In addition he allowed them a yearly sum of $500, "so long as the said estate or any portion thereof shall remain in their hands." The Judge thus allowed the executors a much larger compensation than they asked for, charged or claimed.

The authorities enunciate the common sense principle that in considering compensation the benefit or advantage given to the estate is to be considered and there should also be kept in view the principle that the trustee should not, if it can be avoided, be placed in such a position that his interests are not in harmony with those of the beneficiary.

By the order made, the trustees receive the same compensation whether the income secured by their investments is large or small. They can earn the same money by lending in large sums at a low rate of interest and thereby get the same compensation with less trouble to themselves, but with less income to the beneficiaries. I think the principle should be followed of giving com-

pensation in proportion to results; in other words, a commission on the amount of the revenue. As the will, however, limits the investments to mortgages, there should be some allowance for procuring and passing the loans. It appears from the evidence and accounts that loans are always brought to the executors by agents to whom a commission of one per cent. of the principal is paid, and no doubt with each is a description and valuation of the property offered. I think the executors should be allowed a sum equal to one per cent. over and above all proper disbursements for examining and passing each loan, and I assume these loans will average about five years each. This one per cent. must not be allowed, however, where on sales mortgages are taken back for balance of purchase money.

For collecting and paying over the income and for looking after the investment the Judge allowed twelve and one-half per cent. on the income of an eight per cent. mortgage and twenty per cent. on a five per cent. mortgage. I think this amount excessive. I would allow seven and one-half per cent. on all farm loans and five per cent. on city loans. I would not allow any annual fee whatever, and the order should be varied to be in harmony with the above.

The trend of legislation in this western country at present as to mortgage securities is uncertain, values are shifting rapidly and the labour and care required in such investments may change materially in future years and it seems to me unwise to fix now the compensation for the long term that this trust will probably continue. As to this branch of the matter, I think this order fixing this part of the compensation should continue only for five years from the 1st day of January, 1915. The parties can then apply for a new order.

As to the third branch of this matter: Many long years may elapse before compensation can be asked for under this head. The property may have to be divided amongst many beneficiaries, and I think this branch of the case should be left open and the executors should be reserved the right to apply for this compensation when the time for final distribution has arrived.

The costs of all parties shall be paid by the executors out of the corpus of the estate.

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RE PATERSON ESTATE.

Perdue, J.A.

RICHARDS, CAMERON and HAGGART, JJ.A., concurred.

PERDUE, J.A.:—The corpus of the estate, after paying debts, legacies, succession duties, etc., is to be invested by the trustees, as the will directs, in mortgages, and the net income is to be paid to Mrs. Cora Jackson, the daughter of the testator, during her lifetime. After her death the income of the estate is to be applied in the maintenance and education of her children until the youngest is twenty-one years of age, when the estate is to be divided amongst them. Should Mrs. Jackson die without issue, the estate is to be divided between certain nephews and nieces. The trustees are, therefore, involved in a trust that is likely to last for many years and the investment of the funds is to be made in one class of security, mortgages, no discretion being given as to selecting other kinds of investment.

Two main considerations must influence the trustees in making investments: (1) the conservation of the principal money, and (2) the earning of as good an income for the beneficiary or beneficiaries as, in the exercise of their judgment and discretion, can reasonably be earned, consistently with the safety of the principal money. Investments in mortgages upon farm lands yield, no doubt, the best returns in the matter of interest, but the loans on that class of security in western Canada are usually of moderate amounts, averaging, it is said, about $1,000 each. The property offered as security on each application for a loan is inspected and valued by one of the inspectors of the Royal Trust Co. before the loan is made. This is done at the company's expense. The application is then considered by the company's advisory board and, if it is deemed a desirable investment, the loan is passed and made. During the existence of the loan the company sees that the taxes are paid, the buildings kept insured and the investment guarded against liens and charges which may, by law, rank ahead of the mortgage, although subsequent in point of time. Then, the interest has to be collected and paid over. If default is made, an inspection of the premises may become necessary. All this takes place at the company's expense. In the case of city mortgages a lower rate of interest is obtained, but the trouble and expense to the trustee in connection with

these is much less. The evidence shews that the charge proposed for looking after the investment and collecting the interest, namely, one per cent. upon the capital, is considered reasonable. But I agree that it is desirable that the trustees should be remunerated by receiving a percentage on the income realized, rather than a percentage on the capital which would remain the same whether the rate of interest now obtained declined or not. Trust companies of high standing must receive such remuneration for the responsibility assumed, and the care and skill exercised that it will be reasonably profitable to them to undertake and carry out the trust. A trust company does not undertake a trust by reason of any friendship towards the testator or the beneficiaries. It does so purely as a matter of business and with an expectation of profit. In all cases, unless the undertaking and performance of the trust will be attended with profit to the trust company it will decline to act, and the estate may be driven into the hands of a trustee or trustees who are less competent and less desirable in all respects. I am of opinion that it is in the interests of beneficiaries in cases of long continued trusts, that such reasonable compensation should be paid as will secure the services of competent and responsible corporations authorized to perform that class of business.

For the above reasons, I was disposed to allow a higher remuneration in respect of farm loans, for looking after and protecting the investments and collecting and paying over the interest, but in all other respects to agree with the judgment of the Chief Justice. I do not, however, desire to dissent from the majority of the Court. I would add that in fixing the amount of remuneration to trustees in each case that may arise, the nature of the trust and all the circumstances attending it must be taken into consideration, so that what is fixed in one case is not to be taken as binding the Court or a Judge in settling the amount to be awarded in another case.

Appeal allowed.

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VOYER v. LePAGE.

Alberta Supreme Court, Stuart, J. May 11, 1914.

1. EVIDENCE (§ IV I—434)—MORTGAGES—PAROL EVIDENCE TO SHEW DIFFERENT ADVANCE FROM THAT RECITED AS PAID.

Where a mortgage is given for a specific sum stated to be then advanced, the receipt of which is acknowledged in the mortgage, the mortgagor may still shew by parol evidence that the sum named was not in fact advanced.

Statement

ACTION to establish the plaintiff's rights as next of kin and heirs at law jointly with the defendant and for an accounting.

Judgment was given for an accounting as to a part of the demand.

E. B. Edwards, K.C., for the plaintiff.
John Cormack, for the defendants.

Stuart, J.

STUART, J.:—Louis LePage, late of Edmonton, died September 11, 1910, intestate, leaving him surviving the plaintiff and the defendants, who are all brothers and sisters, as his only next of kin. On October 5, 1910, letters of administration of the estate of the deceased were issued to the defendant, Victoria LePage. In the inventory made of the estate, its value was placed at $50, and the administratrix furnished a bond in the sum of $100.

At his death the deceased was the registered owner of (1) the north east quarter of section thirty-six, in township fifty-five, in range twenty-two, west of the fourth meridian, subject to a mortgage dated January 28, 1904, for $4,500 and interest at 8 per cent. per annum, executed in favour of Victoria LePage. (2) An undivided one-half interest in lots numbered one to five inclusive in block nine, according to a plan registered in the North Alberta Land Titles office as plan LXXI. (3) Lots one to ten inclusive and lots fifteen to twenty inclusive in block twenty-two according to plan XLVI. (4) There was also at the time of his death an outstanding unregistered transfer dated October 29, 1909, from the Hudson's Bay Company to himself of lots 137 and 138 in block 11 according to plan B4 (apparently generally spoken of as the Hudson's Bay Reserve). This transfer was registered after his death on December 2, 1910.

Having secured letters of administration of the estate of the deceased, the defendant, Victoria LePage, filed transmissions of these various properties whereby they became registered in her name as administratrix, and subsequently executed transfers from herself as administratrix to herself personally and secured certificates of title in her own name. Most, if not all, of the properties have subsequently been transferred by her to other parties.

The plaintiff, who is nearly eighty years of age, has brought this action against the administratrix adding the other next of kin as parties defendants.

With respect to the first mentioned parcel, the plaintiff alleges that there was never any such sum as $4,500 advanced to the deceased by the defendant, Victoria LePage. The defendant (by which term I shall hereafter refer to Victoria LePage only) having secured administration and a transmission of the title into her own name did not need to take any foreclosure proceedings. The mortgage was evidently considered as merged and she simply transferred the property first to herself personally and then to a purchaser, a nephew, subject to a mortgage which she had given to the Great West Life Assurance Company for $1,600.

The price received was, as I remember, not stated in evidence, but the affidavit of value places a value of $3,000 upon it. With respect to the other property, the plaintiff claims that the deceased and the defendant had been in partnership in Edmonton in the business of buying and selling real estate and that, as to a half interest in the said lands, the defendant should be declared a trustee for the estate of the deceased. The plaintiff also alleged that this partnership covered other properties in Edmonton, the title to which stood in the name of the defendant at the time of the death of Louis LePage, and, therefore also asks that she be similarly declared a trustee with respect to a half interest in these properties, that she be ordered to account and that the estate of the deceased be administered by the Court. The plaintiff was practically supported in her action by the defendants, Fortunat LePage and Napoleon LePage, the former of whom is eighty-one years of age, and had

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come from Quebec to attend the trial, and the latter between seventy and eighty.

The family came from Quebec, where their parents lived on a farm. The sons had, some of them, come west in the early eighties, and had worked on the C.P.R. construction. The defendant, Victoria, had taught school for a number of years in Quebec. Napoleon, Louis and a brother Charles, now deceased, had come to the neighbourhood of Fort Saskatchewan. In 1891 the defendant came up to join them, and shortly after her arrival Louis made a homestead entry on the land first above mentioned. The plaintiff attempted to prove that the defendant had gone into partnership with Louis in farming on this homestead. The defendant asserted that she had never done so, but had merely lent her brother money to help him along. At any rate she began to teach school at a salary of $600 a year within a few weeks of her arrival, and continued to do so at various places around Edmonton until 1904. She stated that she had repeatedly loaned her brother substantial sums of money for the purpose of buying stock and implements for the farm. On April 22, 1895, the deceased executed a mortgage in her favour for $5,000 covering his homestead, which mortgage states that that sum had been lent to him by her. The mortgage was made repayable in 1900, but the clauses regarding interest were struck out.

A chattel mortgage for the same sum was also given by the deceased at the same time covering the stock and chattels on the farm. On June 18, 1895, the deceased entered into a written agreement with the defendant, which, after reciting that the deceased was indebted to the defendant in the sum of $5,000 and had given the real estate and chattel mortgages to secure the same, went on to state that the defendant had taken possession and control of both the farm and the chattels, but was desirous of employing the deceased,

> as her servant in working and using the land and property, so as to make the same remunerative and so as by the profits to pay off said chattel and real estate mortgage,

and then witnessed that the deceased, in consideration of the sum of $35 a month, agreed to work for the defendant in the

management of the farm, but "at all times under the direction of the defendant," and not in any manner to assume the ownership of the same "or contend that he is in possession in any capacity other than that of servant." The defendant agreed to pay all expenses of running the farm including the wages of $35 a month, and to apply all profits upon the amount of the mortgage, and when this was paid to release everything again to the deceased. Mr. Harry Robertson, now a solicitor of Edmonton, was then a law student in the office of S. S. Taylor and prepared this agreement, acting, as he said, for both parties. He said there was a big row between them and that the interview was at times dramatic. This arrangement does not seem to have worked very well. The farm was rented and the deceased went to live with the defendant at Morinville where she was teaching. Eventually, in 1904, they both came to Edmonton where the defendant's real estate operations began.

For some purpose or other the defendant apparently needed $800. In order to raise this she discharged the mortgage on the farm, got her brother to give a first mortgage for that sum to a loan company, and then he again signed a mortgage to her for $4,500. This was in January, 1904. By this, the fourth document, the deceased again acknowledged an indebtedness of $4,500, and this time agreed to pay interest at 8 per cent. per annum, and to repay the principal on February 1, 1909.

This is possibly a case for the application of sec. 12 of the Evidence Act, ch. 3 Alberta Statutes, 1910, 2nd sess., which says that,

> in an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person unless such evidence is corroborated by some other material evidence.

In so far as the mortgage is concerned, I think the defendant, Victoria LePage, should be treated as the party seeking a judgment. She never took any judicial proceeding to enforce her mortgage. Assuming on her part a consciousness of the justness of her claim and of the rectitude of her course, one cannot perhaps very severely criticize the summary method by which she obtained a foreclosure of the deceased's interest in the home-

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stead, although the course was, for reasons I shall mention, certainly open to criticism. Now, that her actions are questioned, I think, with respect to this land she should be treated as now seeking to establish her claim under her mortgage. In this view she has produced, of course, the strongest possible testimony, namely, the four different documents executed by the deceased to which I have referred. The hints and suggestions, made on behalf of the plaintiff, of the existence of a partnership in the farming operations were of the vaguest kind. It was, moreover, urged very strongly by the plaintiff that the deceased was an intelligent, good business man, and I have no doubt that, had it not been for certain very serious moral defects, he should have been so considered. At any rate, he was clearly a man of intelligence and education. On three different occasions, and by four separate solemn deeds he acknowledged the existence of a debt from himself to the defendant amounting to $4,500 or $5,000. The defendant swears positively to the existence of the debt. In my opinion, in such circumstances, especially when there is other evidence of verbal acknowledgments made by the deceased to other persons of his great obligations to his sister, the Court ought not to insist upon the defendant setting forth every particular of amount and date in order to shew how the indebtedness was made up. I can well understand how, in the intimate relations of a brother and sister a strict record or account would not be kept of every advance made. The evidence furnished by the deceased's own agreement consenting to become his sister's servant at $35 a month, to manage what had been his own homestead, points clearly to a complete financial, if not moral, collapse on his part, and the whole weight of the other evidence corroborates this. In Halsbury, vol. 21, at page 223, the question of burden of proof in mortgage cases is dealt with. It is there said

> where a mortgage is given for a specific sum stated to be then advanced, the receipt of which is acknowledged by the mortgagor, the mortgage deed is *primâ facie* evidence of the amount of the advance, and accordingly the principal debt is proved by production of the deed with the receipt contained in the deed or endorsed on it; but the receipt is not conclusive and the mortgagor is entitled to shew by parol evidence that the sum named was not in fact advanced; and the burden of proving the advance strictly

is on the mortgagee in certain cases, namely, where the mortgagee was at the time the mortgagor's solicitor or where there is evidence of pressure or fraud.

The burden of proving that there had been no advance or indebtedness amounting to $4,500 in 1904, was therefore upon the plaintiff and in this I think she failed entirely. Owing, however, to the summary method of foreclosure, I think the defendant is formally liable to furnish an account of the proceeds of the sale effected by her and the burden of proving a sale at the full value which could have been realized by a sale under proper judicial proceedings lies upon her.

With respect to the amount due upon the mortgage there was, of course, no strict calculation made before me. Although the defendant obtained $800 in cash as a result of the mortgage to the Great West Life Assurance Company, I think the mortgage which had been originally $5,000 without interest, should be treated as being still for the sum of $4,500 and interest. That was the sum acknowledged by the deceased as being his debt, and it may very well be that the balance unaccounted for of $300, out of the Great West Loan was applied on some other account. Unless this were so, and if the defendant were really getting $300 for her own use, or the half of it for her own use as a mere loan, or repayment by Louis, it is difficult to see why the mortgage was not reduced to $4,200. Inasmuch as there was no means of tracing what was done with the $800 by the defendant, because she stated that she did not know what she had done with it, I think the very most that the plaintiff could ask against her, would be that the $300 should be credited forthwith upon the mortgage, thus in effect reducing it to $4,200. But, I think, the weight of evidence justifies the inference that this $300 was treated by the parties in some other way, perhaps, as a voluntary payment of interest on the mortgage of $5,000 which had been running for nine years.

Turning now to the other property which stood in the name of the deceased at the time of his death, I think section 12 of the Evidence Act may, in one view, apply with especial force, although the nature of the pleadings may alter the situation. The accident of the defendant securing administration

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enabled her without any judicial proceeding to secure title in her own name to this property, upon the theory or assumption that he held it as trustee for her. In this action when once these facts appeared, I think the whole matter should, except for the state of the pleadings, be treated as if she were now seeking from the Court a declaration in her favour that the deceased had been such a trustee.

I will assume, therefore, for the moment, that the Evidence Act applies. Taking first then, lots one to five in block nine, known as the Dorval lots, it appears that an old gentleman named Drapeau had been induced to purchase these five lots at $1,000 and had paid $500 on them, that when the second payment came due he was unable to meet it, and, being pressed for the money went to the LePages for assistance. At that time the deceased was living, along with his sister, at a Mrs. LeClaire's in Edmonton. Mrs. LeClaire testified that she heard Drapeau ask the defendant, in the presence of the deceased for a loan of $500, that she at first refused, when the old man began to cry, that then the defendant handed the deceased $500 and said to him to take it and go and settle it with Drapeau. This corroborates the defendant's account of what occurred and is sufficient, I think, to comply with the terms of the statute, although, of course, notwithstanding the statute it is still open to the Court to take what view it thinks proper as to the credibility of the whole evidence. I prefer to deal with this latter question as a whole and in connection with the other properties as well. Next, we have lots one to ten, and lots fifteen to twenty in block twenty-two, known as the Inglewood lots. There are just twenty lots in all in this block and the whole twenty lots were sold by Messrs. Crofts and Lee by an agreement in writing dated April 6, 1905, wherein Louis LePage, the deceased, is named as purchaser. The price was $1,000, payable one-third in cash and the balance in two equal annual instalments with interest at 6 per cent. per annum. Three receipts are attached to the agreement each for an instalment of principal and interest. They all acknowledge receipt of the money from Louis LePage. A transfer was executed by the vendors on April 11, 1911 to Louis LePage. The affidavit of value made for purposes of re-

gistration is sworn by Victoria LePage, the defendant, on May 23, 1907, and the transfer was registered on that day. On May 13, 1907, Louis LePage signed a transfer of the lots 11 to 14 both inclusive to one Cormier, the consideration being $410 and this was registered on May 30, 1907, so that these lots no longer concern us particularly. The remaining lots in block twenty-two stood in the deceased's name at the time of his death.

Mr. Robert Lee, of Crafts & Lee, testified that he had made the original sale to the deceased and that he had no recollection of dealing with any other person than the purchaser. The defendant swore that she paid all the purchase money herself. Her explanation of the circumstances that the papers were drawn in the name of the deceased was that he could talk English better than she, which was a reason also for his going with her to Crafts & Lee to make the purchase, and that it would be more convenient, if it became necessary to make a quick sale, that is, to accept an offer quickly, to have the deceased in a position to deal with the matter. She said that all the time from 1904 until his death, the deceased depended entirely upon her for money, that she personally paid his board at LeClaire's and allowed him wages at $35 a month. The inference I made from her evidence was that his board was charged up against the $35, but that she continually gave him additional sums for clothing and for drink, of which, so she said, he was unfortunately very fond. I think the great mass of testimony adduced by the defendant corroborates her general account of the relations between herself and her brother. To this it is not necessary for me to refer in detail. It is sufficient to say that the evidence convinced me that the defendant was giving what was substantially a correct account of the position of the deceased. The evidence of Mr. Mackie, who said that he frequently lent the deceased small sums of money, that he was often drunk, that the defendant always paid the bills for any legal expenses incurred by the deceased, the evidence of the LeClaires as well as of Grace Dalphond, Tancred Gibeault, and Celestine LePage, and of several others, all bears out the defendant's story, and there is very little, if anything, to contradict them. While, however, I think I must accept the defendant's testimony in

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the main as correct, in view of this general corroboration of it, I am not sure that this general corroborative testimony, no part of which refers specifically to the matter of the Inglewood lots, is sufficient to satisfy the provisions of the statute.

There is, of course, this to be noticed (and this is the point as to pleading, to which I have referred) that the plaintiff does not claim that the deceased owned these properties in his own right, but that they were partnership property; in other words, the plaintiff admits that the defendant had an interest in them, that is, that the documentary evidence is not correct and does not represent the true state of affairs. I am somewhat inclined to the view that this throws the whole matter at large in any case, and that in such circumstances the statute ought not really to be applied. In any case I think that, having found corroborative testimony in regard to one parcel of property, namely, the half interest in the Dorval lots and having found that, in that case the whole interest was in the defendant although the registered title was in the deceased's name, this may itself be treated as corroborative testimony in respect to other property. It shews that some property, at least, did stand in his name which belonged to the defendant.

I think also, that the complete absence of any suggested source of income in the deceased in 1905; the fact that evidently all he had in the world was a homestead of 160 acres near Fort Saskatchewan with a mortgage of $4,500 on it, the interest on which would more than absorb the rent, the fact that, just prior to that he had even lived at Morinville with the defendant doing nothing and supported by her as was testified by Mrs. Gibeault, is all very strongly corroborative of the testimony of the defendant in swearing that it was her money which paid for the Inglewood lots. Mr. Lee said no more than that he had no memory of dealing with anyone but the purchaser, and the receipts his firm gave are, of course, consistent with the defendant's account of the relations between her and her brother. I am quite unable to imagine if the deceased was a real partner in all the transactions, and was equally interested with the defendant, why he should have been so dependent upon her for payment of his board bills at LeClaires, and for spending money.

Why was he not standing on his own feet? To that question no answer whatever is furnished by the evidence except the answer given by the defendant. I do not think, if her story were really untrue, so many persons could have been found to corroborate it.

Finally, with regard to lots 137 and 138 in block 11, I think the same general considerations must apply. This is all the property which stood in the deceased's name at his death. With regard to property standing in the defendant's name at the death, the case is, of course, much stronger in the defendant's favour. The allegation of the existence of a partnership was not proven, and nothing more needs to be said.

In the result, I think the only thing the plaintiff was entitled to was to demand an account in respect of the mortgage on the homestead.

The defendant secured letters of administration and as administratrix stood in a position in which her interest and her duty conflicted. I think, however confident she was that everything belonged to her, it is impossible for the Court to approve of the course she took. It would be entirely too dangerous a precedent to establish, if the Court were to say that an administrator may transfer property to his own name which stood in the name of the intestate at his death without notice to the next of kin and without the approval of the Court, merely because he is, in his own mind, satisfied that the property is his. He is practically making himself judge in his own cause. I think the defendant should be ordered to account in respect to the mortgage and the proceeds of the sale of the homestead and the burden, as I have said, should be upon her of proving that full value was obtained in the sale, or that, in any case, the property could not have brought more than the amount of the mortgage.

With regard to the sum of $484.75, which stood to the deceased's credit in a bank at his death, this seems to have originated in a deposit of $650 made on October 4, 1909. The defendant made no explanation of this except such as was quite consistent with a gift by her to the deceased of this amount. Her real explanation was that the deceased had forged her name to a cheque and that in order to stop this she had allowed him

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to deposit some money in his own name. But it is apparent that he was quite at liberty to draw cheques against this account as he pleased. Indeed, this seems to have been the purpose of the deposit. I cannot see what more was necessary to constitute a gift and I do not think the gift was revocable upon the death of the deceased. There is, of course, no special reference to this sum in the statement of claim but I think the claim for an account is wide enough to justify a declaration that it belonged to the estate. The defendant will, therefore, be declared to hold this sum in her capacity as administratrix and as assets of the estate.

With respect to costs, the plaintiff has failed upon the main ground of contention. Had the claim been merely one to force an accounting respecting the mortgage and the proceeds of the sale of the homestead, the defendant's attitude might have been very different. She would probably have acceded to this at once. In regard to the property standing in the deceased's name at his death, I do not think the defendant can complain, owing to her very summary method of procedure, if she is made to pay her own costs of proving that the property belonged to her. Had she been a little more careful and frank at the first and notified the District Court Judge that this property stood in his name but that she claimed it as her own and then notified the next of kin that she proposed to prove that it was her own property, they might never at that time have decided to contest her claim.

There will be no costs to either party. The costs of the accounting on the mortgage, if it goes on, are reserved.

Judgment accordingly.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. April 23, 1914.

1. VENDOR AND PURCHASER (§ I C—10) — MAKING TITLE — TRANSFER OF TITLE TO UNREGISTERED LANDS.

Title to land in British Columbia which has never been registered under the Land Registry Act (B.C.) may be transferred by conveyance, registration under that Act not being obligatory; and a purchaser of such unregistered land cannot insist upon the vendor placing it under the Land Registry Act if the agreement does not so stipulate. (*Per* Irving, and McPhillips, JJ.A.).

Statement

APPEAL in a vendor and purchaser action.

The appeal was dismissed.

Hart-McHarg, for the appellant.

C. B. Macneill, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. It appears from an affidavit which Mr. Macneill asked us to look at that, since this appeal was launched, the disputes between these parties have practically ceased. That is to say, the vendors have performed their contract by shewing and conveying a good title, and the purchaser has performed his contract by paying the judgment against him for the balance of the purchase money. Under circumstances like those, I must confess I cannot understand why this appeal should have been brought to a hearing. It has, however, been brought to a hearing and insisted upon by counsel. A course, I think, which might very well have been followed in this case would have been to have struck the appeal off the list and refused to hear it as being merely the hearing of a dispute for the purpose of disposing of the costs. It is the only matter left to be disposed of between the parties. We have, however, consented to hear the appeal and have heard it on the merits, and after a very able argument by Mr. Hart-McHarg, he has failed to convince me that the appeal ought to succeed.

On the question of costs I think that they should follow the event. I think the appellant has been more at fault than the respondents all the way through, in this litigation. In fact I am not sure that the appellants have not been entirely at

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fault. There is, therefore, no reason for departing from the usual rule that costs should follow the event.

Irving, J.A.

IRVING, J.A.:—The purchaser under sec. 104, [Land Registry Act, R.S.B.C. 1911, ch. 127] insists that the vendor must, before he is entitled to be paid, have his title registered in his own name. I think if he wants that he should have stipulated that in the agreement for sale. This was an open contract in which the place and manner of completion of the contract were not mentioned. Under these circumstances, all the vendor had to do was to shew a good title. It was then the purchaser's business to prepare the conveyances, pay over the money, get the conveyances executed and comply with the usual covenants, and in the absence of any express stipulation the purchaser must rely upon those covenants.

Martin, J.A.

MARTIN, J.A.:—In my opinion of the facts in this case, when the vendors produced the registered title to themselves, it released all of the substitute encumbrances, and that was all that was necessary to be done on their part. The appeal should be dismissed.

McPhillips, J.A.

MCPHILLIPS, J.A. (oral):—In my opinion, the appeal should be dismissed. I do not hesitate to say that the appeal is highly unreasonable. The agreement of sale under which the appellants are contending that the moneys sued for should not be required to be paid—and for which judgment and payment has gone—has been given effect to; and payment has been made by the appellants and title accepted, yet the appeal is pressed. If parties entering into agreements of sale of land want to import all the controlling provisions of the Land Registry Act, R.S.B.C. 1911, ch. 127, into them, there is an easy way of doing it, and that is to incorporate them in the agreements. It is a well-known fact that there are conveyances of land good and sufficient quite apart from registered titles. It is well known that in this province valuable lands are held by good and sufficient title, not as yet brought under the provisions of the Land Registry Act, the root of title being from the Crown or the Hudson's Bay

Company. The Land Registry Act never was intended to sweep away all real property law, nor is registration under the Land Registry Act obligatory; unregistered titles are not declared to be null and void; on the contrary, as I have stated, many titles exist to-day not appearing upon the books of the land registry office. In my opinion, reverting again to the express point for consideration upon this appeal, within the four corners of the agreement of sale we should find those terms which are insisted upon by the appellants, and if not found, it is a mere money demand, due and payable under the agreement of sale, and I see nothing in the agreement of sale which calls for a registered title. The money was in the terms of the agreement of sale to be paid into the Bank of Commerce, to be paid out on a conveyance being delivered, not a registered title. In conclusion, it may be said that the action was one on a covenant to pay the consideration money due under an agreement of sale of land, and the appellants had a well-known course to pursue and, if the respondent could not give title, remedies were open to the appellants which were apparently not invoked, obviously because, as it has been proved, title could be and was given. The appeal is without merit and must be dismissed with the attendant result, that is, that the appellants do pay the costs thereof.

Appeal dismissed.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Russell, Longley, and Drysdale, JJ. April 4, 1914.

1. AFFIDAVITS (§ I A—5)—SUFFICIENCY OF.

The description of the Commissioner subscribing the jurat to an affidavit being incomplete, or even incorrect as to the territory over which his commission extends, does not vitiate the document, his commissionership being actually *in esse* and the court having power to satisfy itself on this point.

[*Ex parte Johnson, Re Chapman*, 26 Ch.D. 338, 50 L.T. 214, followed.]

Statement

APPEAL from the judgment of Finlayson, County Court Judge, for District No. 7, setting aside an order for substituted service of a petition under the Municipal and Town Contro-

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verted Elections and Corrupt Practices Act, against the return of the respondent Roderick H. McLeod, as a municipal councillor for the Municipal District No. 13, in the county of Victoria.

The order was attacked upon several grounds, but chiefly on the ground that the affidavit on which it was granted was a nullity and an affidavit which could not be filed or read, as it purported to have been sworn at Baddeck in the county of Victoria, before "K. J. McKay, a commissioner of the Supreme and County Courts in and for the county of Cape Breton."

The learned County Court Judge sustained the objection and set aside the order, from which petitioner appealed.

The appeal was allowed, DRYSDALE, J., dissenting.

J. S. Roper, for petitioner, appellant.
V. J. Paton, K.C., for respondent McLeod.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—With some doubt I come to the same conclusion as my brother Graham.

Graham, E.J.

GRAHAM, E.J.:—There was obtained in this case, from the Judge of the County Court, District No. 7, an order to effect constructive service of an election petition under the Municipal and Town Controverted Elections and Corrupt Practices Act, ch. 72 R.S.N. 1900, the respondent being out of the jurisdiction.

That order, with all proceedings, including the petition, on application by the respondent has been set aside, on the ground that the affidavit on which the order was obtained was defective.

The defect occurred in the description appended to the name of the commissioner who administered the oath to the deponent. The jurat was in the usual form, viz.:—

> Sworn to at Baddeck in the county of Victoria, this 6th day of December, A.D. 1913, before me,

But some one, I suppose, applied the wrong rubber stamp and the description is

> K. J. McKay, a commissioner of the Supreme and County Court, in and for the county of *Cape Breton*.

The learned County Court Judge says: "I must confess that this is a case of true hardship if there is no remedy for the petitioner." And I infer that he thought he could not take judicial notice of the fact that McKay was a commissioner for Victoria county, although an officer of his own Court and district, which included both of those counties, not that he would not exercise his judicial knowledge.

It is quite clear (1) that perjury could be assigned on this affidavit, I shall cite authority presently. (2) That the Judge could take judicial notice that the officer was a commissioner of the Court for Victoria county, although the affidavit does not shew that fact on the face of it. An affidavit is, I think, different from a conviction of a magistrate in which judicial functions are exercised, and, looking at the latter, one says it is bad on the face of it.

I will cite a decision of the Court of Appeal in England in 1884, *Ex parte Johnson, Re Chapman*, 26 Ch. D. 338, 50 L.T. 214, because previously the decisions were not apparently consistent with each other in their views. There, the affidavit filed with a bill of sale was sworn to before a person about whom nothing was known but his name and his place of business and contained no statement that he was a commissioner for administering affidavits. Cotton, L.J., 50 L.T. at 216, says:—

In *Burdekin* v. *Potter*, 9 M. & W. 13, one case I refer to, Lord Abinger, on a somewhat similar objection being taken, said: "I think this objection cannot prevail. If you go upon any principle it would seem that if the party be named at all the Court may examine to see whether he is one of its commissioners, I doubt whether anything at all need be added to his name." That was not a case under the Bills of Sale Act.

Here I interpose, it was an affidavit of the execution of a warrant of attorney and the jurat stated it to have been "sworn before, etc., a commissioner, etc.," without stating that he was a commissioner for taking affidavits in this Court, the Exchequer Court. The affidavit was intituled in the cause in that Court.

Baron Parke, [In *Burdekin* v. *Potter*, 9 M. & W. 13], said:—

And it was expressly held in *Kennet* v. *Jones*, 7 T.R. 451 (which was the case of an affidavit to hold to bail), that it was no objection to an

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affidavit to hold to bail that it was not entitled in the King's Bench or that it appeared to have been taken before a commissioner who was not stated to be a commissioner of that Court.

And in that early case, Lord Kenyon was then Chief Justice, the Court said:—

An indictment for perjury might be framed on it if the contents were not true.

To return to the opinion of Cotton, L.J., he continues:—

But there is a case *Cheney* v. *Courtois*, 13 C.B.N.S. 634, with which Bowen, L.J., has furnished me, actually under the Bills of Sale Act where this very point was decided. The affidavit was filed in the Queen's Bench but the person *before whom the affidavit was taken* was stated to be *a commissioner of the Exchequer* and the objection was taken that it must be bad because it was not stated that he was a commissioner of the Queen's Bench. The Court was composed of Erle, C.J., and Williams, Willes, and Keating, JJ., and they overruled that objection. The question was put: Can the person who swore this affidavit be convicted of perjury if it is false? And the Court said that he could if it was shewn that the man before whom the oath was made was one competent to administer an oath in the proceedings. That objection was therefore a highly technical one and it was overruled. In the absence of authority I should have come to the same conclusion, but there being authority to support such a conclusion I think the objection in the present case is overruled by the decision which I have mentioned.

Bowen, L.J., on p. 218, said:—

Then, is it void because the affidavit does not state it was sworn before a commissioner? As to that I have really nothing to add to what Cotton, L.J., has said, except that I should think it was a very gloomy day for English law if the Court of Appeal were to go back and hold an affidavit under the Bills of Sale Act to be void because, although the name of the commissioner before whom it was sworn was stated, it did not go on to describe him as a commissioner.

Fry, L.J., agreed with the other members of the Court of Appeal.

In *Cheney* v. *Courtois*, 13 C.B.N.S. 634, at 639, which was then approved of, Erle, C.J., said:—

According to Mr. Kemplay's argument, the rights of the parties under the bill of sale are to be lost because we are to presume that the person who administered the oath is only a commissioner for taking affidavits in the Court of Exchequer and not in the Queen's Bench. I am of opinion that the statute intended to require the formality and sanction of an oath and unless it were shewn to my satisfaction that the person be-

fore whom the affidavit was sworn had no power to administer an oath, I should feel bound to presume *omnia rite esse acta* . . . If this deponent were indicted for perjury it would be idle for him to contend that because the person who took the affidavit described himself *as a commissioner of the Court of Exchequer he could not be shewn to be a commissioner of the Court of Queen's Bench also.* In the event of an indictment, the commissioner would be called and if he proved that he had authority to administer the oath, the description which he gave of himself at the time would be perfectly immaterial.

If the Court could not take judicial notice of the commissioner being an officer of the Court, when it was not shewn on the face of it, the Common Pleas presided over by Tindal, C.J., went through a very useless form in *Sharpe* v. *Johnson*, 4 Dowl. 324 at 326. Tindal, C.J.:—

> The only question here is, whether Mr. Gaynor before whom this affidavit is sworn is a commissioner appointed under the provisions of 3 & 4 Wm. IV. ch. 42, sec. 42. I have obtained from my clerk his list of the persons appointed and I do not find the name of Gaynor among them.

The case of *Frost* v. *Hayward*, 2 Dowl. N.S. 267, was cited in the case of *Cheney* v. *Courtois*, and was before the Court for consideration. In Chitty's Archbold 463 (1885, 14th edition) when it and some other cases like it are cited, there is this note:—

> But probably it would now be held that it was sufficient if the party before whom the affidavit was sworn was a commissioner though the jurat does not state this.

And he refers to the case in the Court of Appeal, *Ex parte Johnson, Re Chapman*, 26 Ch. D. 338, just cited.

In Ontario, as far back as 1846, in *Henderson* v. *Harper*, 2 U.C.R. 97, objection having been taken to an affidavit simply signed with the name of the commissioner without the addition of any words shewing him to be a commissioner, Jones, J., said:—

> The person before whom the affidavit was sworn is known to this Court as a commissioner for taking affidavits in the midland district. Kingston is known to be in the midland district and therefore the signature of the commissioner is sufficient without prefixing the word commissioner or any other word.

And this is still the law of Ontario; I refer to the case of *Canada Permanent Loan Company* v. *Todd*, 22 A.R. (Ont.)

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515, where an affidavit of *bonâ fides* to a bill of sale had only the words "a commissioner, etc.," and Burton, J.A., to an objection to it said: "The present objection is frivolous."

I think there is uniformity among the American cases as to a Court taking judicial notice of the authority of an officer of its own to administer an oath in such circumstances where the document does not on the face of it shew that fact. I refer to a few: *Brooster* v. *State*, 15 Ind. 190; *Hopes* v. *State*, 73 Ind. 39; *Homman* v. *Mink*, 99 Ind. 280; *Thalman* v. *Bing*, 73 Ill. 294; *Buell* v. *State*, 72 Ind. 523; *Jackson* v. *City of Gloucester*, 143 Mass. 380; *Hunter* v. *Leconte*, 6 Cowen 278.

The appointments of commissioners for taking affidavits are gazetted in the *Royal Gazette* in Nova Scotia.

In 1 Taylor on Evidence, 10th ed., sec. 21, it is said:—

> Where matters ought to be judicially noticed but the memory of the Judge is at fault he resorts to such means of reference as may be at hand and he may deem worthy of confidence.

That he may resort to the Official Gazette, I refer to *The King* v. *Holt*, 5 Term Reports 443. And by the Revised Statutes of Nova Scotia, 1900, ch. 153, sec. 10:—

> All copies of official and other notices, advertisements and documents printed in the *Royal Gazette* shall be *primâ facie* evidence of the originals and of the contents thereof.

Besides, in this same case there were other papers, the recognizances, for instance, taken before the same commissioner McKay, and as a commissioner for the county of Victoria. It is strange if the learned Judge would take judicial notice of the proper ones as one always does of such instruments and affidavits, and not the impeached affidavit. A simpler thing would be to ask the commissioner to send his commission.

I have now shewn by authority that upon an indictment for perjury upon this affidavit, the commissioner could prove that he was a commissioner for Victoria county where it was sworn as stated in the jurat, although the description appended stated he was a commissioner for the county of Cape Breton. That would be "immaterial."

Also that this Court or the Judge of the County Court for

district No. 7 could inform itself or himself that McKay was a commissioner for Victoria county in which the affidavit was stated to be sworn. If you can take judicial notice of a fact one does not require an affidavit to prove it. In my opinion, the affidavit was sufficient.

With authorities so completely in point I feel it unnecessary to point out the presumption that McKay would not be likely to violate the law by taking an affidavit without authority in Victoria county if he was not a commissioner for that county.

The appeal must be allowed with costs and the order for constructive service and proceedings restored.

RUSSELL, J., concurred with GRAHAM, E.J. Russell, J.

LONGLEY, J., concurred with GRAHAM, E.J. Longley, J.

DRYSDALE, J. (dissenting):—An *ex parte* order was obtained in this case for substituted services of the petition herein. Such order was based on an affidavit of William D. McLeod on its face purporting to have been sworn to at Baddeck in the county of Victoria, before one K. J. McKay, a commissioner of the Supreme and County Courts in and for the county of Cape Breton. This *ex parte* order was attacked by motion before the learned County Court Judge, who granted it mainly on the ground that the said affidavit on its face is a nullity. A commissioner for the county of Cape Breton having no authority to administer oaths in Victoria county, the motion so made prevailed and the said Judge set aside the order and the service of the petition made therein. No attempt was made to establish that the K. J McKay, who certifies himself a commissioner for Cape Breton county, was in fact a commissioner for Victoria county. Commissioners in this province are appointed for counties and commissioners of the Supreme Court are, by virtue of the County Courts Act, ch. 156, sec. 21, made commissioners of the County Court. Said section reads as follows:— Drysdale, J. (dissenting)

Every commissioner of the Supreme Court, shall within the county for which he is appointed, exercise in proceedings in every County Court

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the same powers as are exercised by him in proceedings in the Supreme Court.

It is stated by counsel before us that K. J. McKay, whose name is to the jurat on said affidavit is in fact a commissioner for Victoria county. No attempt was made to shew this and it is argued that we are obliged to take judicial notice of such a fact. The learned County Court Judge in whose district both the counties of Victoria and Cape Breton lie, did not take judicial notice of such a fact and I am unable to see how we can do so. If he is a commissioner for Victoria county, it must be by virtue of an order in council appointing him. No proof of any such order was attempted, although proof of an order in council is made simple by our Evidence Act. Judicial knowledge is not reached by the use of evidence, it is a matter pertaining to the judicial function and its existence dispenses with evidence. This is the general rule stated in a treatise on judicial notice, and I fail to see how we can be asked to overrule the judgment below by taking notice of an order in council that is not in the case or before us, and for aught I know that does not exist.

Certain it is, that the only thing before the County Court Judge was an affidavit purporting to be taken by a commissioner for Cape Breton county in Victoria county, a thing not warranted or justified either by statute or commission. In England, in the case cited, the Courts could verify its officers by an examination of their own rolls. This cannot be done here, and, outside of the commissioner's certificate which we take at its face, I know of no method of ascertaining a commissioner's jurisdiction, except by the order in council appointing him.

I must, and I think I ought, to decline to tell the learned County Judge that he is obliged to take judicial notice of an order in council not proved. I am of opinion that the said learned Judge was correct in rescinding the *ex parte* order based on the affidavit, which, in my view, on its face is clearly bad.

Appeal allowed.

ALBERTA ENGINEERING CO. v. BLOW.

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Alberta Supreme Court, Walsh, J. May 9, 1914.

1. CONTRACTS (§ IV B 3—335)—PERFORMANCE—EXCUSE FOR FAILURE—PREVENTION OR HINDRANCE BY OTHER PARTY.

The *primâ facie* liability of a builder, for failure to complete the construction of a building for the owner until some months after the time stipulated, resulting in damages to the owner, is subject to abatement if it be shewn that part of the delay was due to the default of the owner himself.

2. CONTRACTS (§ IV C 1—345)—RIGHT OF RECOVERY ON PART PERFORMANCE—SUBSTANTIAL COMPLIANCE.

The liability of a builder, for failure in certain respects to complete the construction of a building for the owner pursuant to agreement, is properly met by a fair allowance for the expenditures made and to be made by the owner, in remedying the defects, it appearing that there was a substantial compliance resulting in a practically first class job by the builder.

Statement

ACTION by a builder for the contract price of constructing a building for the defendant, with a counterclaim for expenditure in remedying alleged defects due to the plaintiff's non-compliance with the contract.

Judgment was given for the plaintiff, with certain abatements as counterclaimed.

A. H. Clarke, K.C., and *F. S. Albright*, for the plaintiff.

T. M. Tweedie, K.C., and *W. H. McLaws*, for the defendant.

Walsh, J.

WALSH, J.:—I find that the contract price for the work in question was 4c. per pound for all of the material and $12 per ton for the erection.

I find that the total weight of the material used in construction exclusive of the cast iron columns and rivets is 367,337 pounds, the value of which figures out at $14,693.48, and the cost of construction amounts to $2,222.56. I think the plaintiff's charges of $200 for the cast iron columns and of $47.50, $7.10 and $56 for the last three items in exhibit 6 are proper. These six sums aggregate $17,226.54, which is the amount for which the plaintiff, if otherwise entitled to succeed and if its account is not subject to abatement, would be entitled to judgment.

I find that the date finally agreed upon for the completion of the building was September 15, 1912, and that it was not com-

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pleted by the plaintiff until January 24, 1913. I find that the defendant was partly responsible for this delay by reason of his own delays in the completion of the concrete work, in the final approval and acceptance of the plans and otherwise. I find that the defendant could have followed the plaintiff's workmen with the other work of construction a good deal more closely than was actually the case. I do not see how the plaintiff can be held liable for the delay occasioned by the defendant's difficulty in financing owing to the changed conditions in the money market when he really set about the performance of his own part of the work. I place the entire delay attributable to the plaintiff at three months. This takes into account the fact that some of the defendant's delay was occasioned by his inability to carry on his part of the work throughout the entire winter. I think that he could have done some work during that season if he had followed up the plaintiff's men promptly, but I do not think he was justified in delaying his own work not only until the plaintiff was done, but for several months later. The defendant is entitled to a fair and reasonable compensation for his loss of rents traceable to the plaintiff's delays. Evidence was given of offers for various parts of the building, but there was nothing binding upon either the defendant or any of his would-be tenants, and it may have been that none of these offers would have ripened into a tenancy even if the building had been finished on time. I am satisfied that $4,200 would be a fair and reasonable allowance to make to the defendant on this account, being at the rate of $1,400 per month for three months.

I find that there was a substantial compliance by the plaintiff with the terms of its contract. A great many complaints are made by the defendant. Some of them have been remedied, such as the placing of the stringers securely in the party wall. Some of them are unimportant; the majority of them went in under the eye of the defendant's inspector without protest, and for some of them, such as those resulting from the fact that the building is not rectangular (as I find the fact to be), I do not think the plaintiff is to blame. I accept the opinion of Mr. Fyshe that whilst, theoretically, this may not be a first-class job, practically it is. The defendant should have a fair and

proper allowance for the expenditure made and to be made by him in remedying the defects which can fairly be laid at the plaintiff's door. He is entitled to the following items forming parts of exhibit 28:—

Wages	$265.96
T. R. Stuart & Co.	45.08
Union Iron Works	124.40
Weaver & Keen	6.30
	$441.74

The plaintiff should get from him, if it wants them, the tools included in the above accounts. I do not think the plaintiff is chargeable with the salary of either W. R. Blow or E. H. Nichols. No other claim is made for money actually expended by the defendant.

The question as to the amount which should be expended to remedy other defects which can be remedied is a more difficult one. Some of those complained of have been covered up by the closing in of the building. Some of them were more offensive to the eye than detrimental to the building. I think that an allowance of $1,000 on this account will be ample. I am satisfied that any error in the fixing of this amount is as it should be, in the defendant's favour.

I am by no means satisfied that the building as it now stands is not capable of carrying four additional storeys. My opinion is to the contrary of this. Even if the building as left by the plaintiff was deficient in some of the essentials of strength looked for in the substructure of a six-storey block, I am satisfied that with the meeting of one of the building inspector's objections by the placing of the stringers more securely in the east wall, which the defendant has already accomplished, and the expenditure of a sum easily within the $1,000 allowance which I am making, no doubt as to the sufficiency of the structure to support the additional storeys could reasonably be felt.

There will be judgment for the plaintiff for $17,226.54 on its claim, and judgment for the defendant on his counterclaim for $5,641.74, which will be deducted from the amount of the plaintiff's judgment, leaving a balance of $11,584.80 due to the

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plaintiff, which will bear interest at 5% per annum from February 1, 1913. The plaintiff will have the costs of the action and the defendant the costs of the counterclaim, and the plaintiff will have the usual mechanics' lien judgment.

The plaintiff may amend by adding the Standard Bank as a co-plaintiff if it so desires.

Judgment for plaintiff; counterclaim allowed in part.

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BARTLET v. DELANEY.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 3, 1913.

1. PUBLIC LANDS (§ II—21)—GRANT OR PATENT—AMBIGUITY.

A Crown grant of a named island may include surrounding marsh land by a reference therein to a plan and survey, and to documents indicating the nature and extent of the prior use and occupation of the land making it possible to determine its boundaries.

[*Bartlet* v. *Delaney*, 11 D.L.R. 584, 27 O.L.R. 594, 4 O.W.N. 577, reversed; *Booth* v. *Rattè*, 15 App. Cas. 188; and *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A.C. 92, referred to.]

2. WATERS (§ II A—65)—RIPARIAN RIGHTS—LAND BOUNDED BY "SIDE OF CHANNEL" OF STREAM.

Land bounded on and described as following the windings of the "side of the channel" of a navigable river, ordinarily extends only to the bank or shore line of the stream past which the body of water flows, and not to the margin of the deeper channel used for navigation.

[*Bartlet* v. *Delaney*, 11 D.L.R. 584, 27 O.L.R. 594, 4 O.W.N. 577, reversed; *Alabama* v. *Georgia*, 23 How. (U.S.) 505, followed.]

Statement

APPEALS by the defendants from the judgment of LATCHFORD, J., *Bartlet* v. *Delaney*, 11 D.L.R. 584, 27 O.L.R. 594.

The appeals were allowed.

Argument

McGregor Young, K.C., for the defendant Gauthier, appellant, argued that the question in this case was with regard to the description in the patent, and, consequently, the meaning of the word "channel:" see *Collins Bay Rafting and Forwarding Co.* v. *New York and Ottawa R.W. Co.* (1902), 32 S.C.R. 216; the definition of "channel" in Murray's Oxford Dictionary and in Black's Law Dictionary; Farnham on Waters, sec. 417; *Dunlieth and Dubuque Bridge Co.* v. *Dubuque County* (1881), 55 Iowa 558; *Iowa* v. *Illinois* (1892), 147 U.S. 1, at p. 12. The

meaning of the word "channel" in international law and in private law should be noticed. If the instrument is not clear, the plan will control: *O'Donnell* v. *Tiernan* (1874), 35 U.C.R. 181; *Grascit* v. *Carter* (1884), 10 S.C.R. 105; *Herrick* v. *Sixby* (1867), L.R. 1 P.C. 436, at pp. 451, 452; *Llewellyn* v. *Earl of Jersey* (1843), 11 M. & W. 183; Williams on Vendor and Purchaser, 2nd ed., p. 634.

I. F. Hellmuth, K.C., for the original defendants, appellants, argued upon the facts that the defendants were entitled to possession, pointing out that the learned trial Judge, while declaring in his judgment that the plaintiff was entitled to possession, gave no reasons for his conclusion.

E. D. Armour, K.C., and *A. R. Bartlet*, for the plaintiff, argued that the description in the patent was good, and that the plan did not identify the land: *Attrill* v. *Platt* (1884), 10 S.C.R. 425, at p. 470. [MEREDITH, C.J.O., referred to *Dominion Loan Society* v. *Darling* (1880), 5 A.R. 576, on the question of a rectification of the description of the property]. *In re Provincial Fisheries* (1896), 26 S.C.R. 444, *per* Strong, C.J., at p. 521, may be referred to on the question of the boundaries of the river. The channel-bank and each side of the channel is one boundary. The plaintiff had rights of user from 1827-1907: *Van Diemen's Land Co.* v. *Marine Board of Table Cape*, [1906] A.C. 92, *per* Lord Halsbury, L.C., at pp. 97, 98; *Zacklynski* v. *Polushie*, [1908] A.C. 65; Halsbury's Laws of England, vol. 14, pp. 583-588. The right of the Crown is proprietary, not prerogative. The plaintiff got a grant of land of which he had been in possession for the purpose of fisheries; the defendant Gauthier held the land on leases for thirty continuous years. This was where the fraud came in. Such possession has been held by the Privy Council to identify land: *Booth* v. *Ratté* (1890), 15 App. Cas. 188, at p. 192. As to the effect of the plan, see *Horne* v. *Struben*, [1902] A.C. 454, where it is said that in a grant of land with certain specified boundaries, as a matter of construction, where the diagram is repugnant to the terms of the grant, the latter will prevail. In *Mellor* v. *Walmsley*, [1905] 2 Ch. 164, the word "seashore" was held to mean the "foreshore" in its strict legal sense, i.e.,

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the land situate between medium high and low water-marks. The judgment is right because: (1) the description in the instrument is particular and accurate, being shewn by metes and bounds, and hence the plan must give way; (2) the difference between the old plan and the present plan is very small; (3) if the plan and the description do not agree, the occupation and evidence of identity are sufficient.

Young, in reply.

Hodgins, J.A.

HODGINS, J.A. (delivering the judgment of the Court):—I am unable to see that the description in the patent presents any difficulty which cannot be readily solved by looking at the plan, the words of the grant, and any evidence to identify the subject-matter which can be properly considered. I refer to the evidence identifying the mainland points, the measurements of the firm and marsh land, the location of the piers and fishery establishments, and the documents and facts indicating the nature and extent of its prior title, use, and occupation, and its being part of an Indian reservation: *Booth* v. *Bath*, 15 App. Cas. 188; *Van Diemen's Land Co.* v. *Marine Board of Table Cape*, [1906] A.C. 92.

The construction which I would place upon the grant would give the grantee the firm and marsh land shewn upon the Bartley plan. That supplies both a visible outline (see Rolliter, pp. 30-34, and Lambe, who circumnavigated the marsh land in a boat, pp. 44, 45, 50) and visible and proper beginning and ending points, and treats the word "channel," in its ordinary significance, as meaning "stretching from margin to margin;" and the expressions "side of the channel" and "following the windings thereof" as indicating a course bounded partly by firm land and partly by marshy land as shewn on the plan. In the view I take, it would not militate against this view even if the line between the marsh and the channel were in the water at places.

The principle may well be applied which was followed in 23 How. (U.S.) 505, *State of Alabama* v. *State of Georgia*, where the expression "along the western bank" was treated as allowing, where the bank was not defined, a continuance of the bound-

ary along the line of the bed, as that is made by the average and mean stage of the water.

I disregard, if necessary, the bearings in relation to the mainland, as being too indefinite to interfere with the clearer expression of the plan and the other words of the patent. The area thus covered is 1,339 acres, which approximates more nearly to the original 1,200 acres than to the 2,602 acres now given.

The plaintiff does not allege fraud, error, or improvidence, and does not, therefore, bring himself within the case just referred to. The defendant Gauthier may or may not be entitled to compensation, but the right of the Crown to be heard or to be an active plaintiff, if it so desires, seems to me to be an important one and one that would have to be carefully considered if the facts of this case did not warrant the finding that the plaintiff had established no title to the lands for which Gauthier obtained his license, and consequently had no status to attack him. In a case where possession is claimed, and it is sought to oust the licensee of the Crown, it would seem to be reasonable that the Crown should be entitled to be heard and to defend that possession, if the title to the property is brought in question. Here a notice of some sort was served on the Attorney-General, but I am unable to find any authority for a summary notice to the Attorney-General except in the Judicature Act, 1913, 3 & 4 Geo. V. ch. 19, sec. 33, upon a constitutional question being raised.

But, apart from that, the point here is, that there has been no charge of fraud, no investigation of fraud, and no notice to the defendant Gauthier that he was to defend himself against such an attack. It is as much contrary to natural justice to pronounce a person guilty of fraud or perjury, if in the proceedings taken he had no knowledge that such a charge was made or was being inquired into, and had no thought of meeting it, as it is to proceed against him in his absence; and the principle stated in *Nicholls* v. *Cumming* (1877), 1 S.C.R. 395, is carried to that extent. See also Maxwell on Statutes, 4th ed., p. 546.

In this case no charge of fraud, misrepresentation, or suppression is made against the defendant Gauthier. The pleadings disclose a case of overlapping boundaries only. The sole item of actual misrepresentation mentioned in the reasons for

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judgment is, that his lease did not cover the water front or the fisheries in any way, but only the shore, and that, instead of one lease, there were several, which should have been mentioned. On looking at the lease of 1907, to which, it is evident, reference was made, the statement that it did not cover the water front or the fisheries in any way, but only the shore, is an accurate statement; while the other and earlier leases proved, *i.e.*, of 1877 and 1881, cover pier fisheries, which are out from the shore of the island 280 feet, 360 feet, 940 feet, and 2,220 feet respectively.

The suppressions charged, summarised, are of facts which would go to shew that the Paxtons had exercised rights over the water lots in question, and therefore had a title or claim. In the reasons for judgment, it is stated that the defendant Gauthier could, as the leases to him had expired, question these rights, and that the Crown had knowledge of an adverse claim. It had knowledge of more than that; for on its file (exhibit 30) there is, as I have mentioned, an express statement on behalf of the Palms estate, through Clarke, Cowan, & Bartlet, their Windsor solicitors, in 1904, that the water lots surrounding the island had not been granted to them, and asking for a patent. The lease of January, 1907, was made by the Palms estate four years after the defendant Gauthier had been openly operating the fisheries.

The express disclaimer of the Palms estate was repeated in November, 1909, by the Detroit attorneys of the estate, to Behan (exhibit 38); and that position was maintained in this action until after the defendant Gauthier was added; the original defendants pleading (paragraph 3) that they bought out to the channel-bank, and the plaintiff joining issue on that statement. The Ontario Government were not likely to be ignorant of the fact, if it be a fact, that the Dominion Government operated these fisheries from 1892 to 1903.

No witness from the Department of the Ontario Government concerned was called—and naturally so, where the only allegation was that the Crown grants overlapped; so that there is nothing to shew their state of knowledge at the time—a reasonable step to take if the fraud was said to be perpetrated on

them. This is the more necessary, as the Minister's letter refers to evidence being before the Department when the license was granted. This may and probably was Gauthier's evidence; but that should not be left to surmise. It is not enough that a judgment may be right; it must be founded on evidence of the facts on which it rests.

Under these circumstances, and apart from the principle I have alluded to, I think that there is no such proof as is required from a party alleging fraud in another, and that that must be the test where a finding of fraud is made, although not asked for in the pleadings or adopted by any of the parties.

The judgment should be reversed, and the proper declaration made as indicated as to what passed under the patent to Paxton. As to the original defendants, so much of the judgment as orders them to give up possession to the plaintiff should be set aside, and judgment entered dismissing the claim for possession and mesne profits, and also dismissing the counterclaim of these defendants for specific performance, with a declaration that the dismissal of these claims is not to be a bar to any subsequent action arising out of or by reason of the alleged contract or contracts. There should also be a declaration that the rights of the plaintiff, if any there be, arising out of any practice of the Department of Crown Lands in dealing with owners of the shore or arising because of their ownership thereof, are not interfered with by this judgment.

There should be no costs of the action or counterclaim between the plaintiff and the original defendants. The judgment annulling Gauthier's license of occupation should be set aside, and the action as to him dismissed with costs.

Appeal allowed.

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DEISLER v. SPRUCE CREEK POWER CO.

British Columbia Supreme Court, Macdonald, J. April 30, 1914.

1. MINES AND MINERALS (§ I A—7b)—PLACER MINING (B.C.)—LEGAL POSTS ON STAKING.

Strict compliance with statutory requirements is essential on staking a claim under the "placer mining" law of British Columbia, R.S. B.C. 1911, ch. 165, and, if legal posts were not used in locating the claim it is invalid.

[*Pellent* v. *Atmoure*, 1 Martin's Mining Cases, 134, referred to.]

2. MINES AND MINERALS (§ I C—15)—MINING LEASE WITH INSUFFICIENT DESCRIPTION—SUBSEQUENT LOCATOR OF PLACER CLAIM WITHIN INDICATED AREA—AMENDMENT OF CROWN LEASE—RESERVATION OF RIGHTS OF FREE MINERS.

If, through a faulty description in a lease from the Crown of a mining claim in British Columbia, the lessee did not get the land intended, a subsequent *bonâ fide* locator of a placer claim is not affected by the fact that the greater portion of his claim may be within the boundaries of an area created by four corner posts but for which no lease has been granted; nor is the validity of the placer claim destroyed by any subsequent amendment in the description authorized by the Crown subject only to free miners' rights.

Statement

TRIAL of action involving the validity of certain mining claims.

Judgment was given for the plaintiff.

S. S. Taylor, K.C., and *W. P. Grant*, for the plaintiff.

E. V. Bodwell, for the defendant.

Macdonald, J.

MACDONALD, J.:—Plaintiff on July 13, 1906, by purchase from one P. C. Callaghan became the owner of the Sunflower placer claim, situate on Spruce creek, Atlin district, British Columbia. This claim was located by one Walter Rennison in 1902 and the statutory enactments relating to placer claims have been complied with, so that whatever title Rennison possessed to the ground situate within the limits of the claim became vested in the plaintiff.

The working of the claim was interfered with by the defendant company through its workmen on September 16, 1906, and its co-defendants entered into a "lay" agreement with the company, at the same time annulling a previous agreement with said Callaghan under which they had been working the claim. Defendant company claimed that it was entitled to adopt this course either through being the owner of the property under a

placer mining lease, known as the Vernon lease, granted by the Crown on May 10, 1901, or as being the owner of the Speculator mineral claim, embracing the same area as the Sunflower, the Speculator having been purchased from one R. H. Thomas on September 1, 1906.

Defendant company attacked the staking of the Sunflower mineral claim and its location as not being in accordance with the provisions of the Placer Mining Act [R.S.B.C. 1911, ch. 165].

Aside from the question of the ground being already occupied by the Vernon lease, the invalidity contended for narrowed itself to two points: first, that the location posts were not of the proper size; and, secondly, that, in any event, the location was premature, having taken place before the ground had become open for location. As to the staking there was considerable contradictory evidence. William C. Hall, manager of the defendant company, stated that he had measured the stakes and produced a memorandum alleged to be made at the time. The difficulty, in giving effect to his evidence, arises from the fact that Edward S. Wilkinson, P.L.S., called to corroborate him, and who would, on this point, have been of great assistance as being an independent witness present at the time, did not make or keep a memorandum of such measurement. There were some very emphatic statements made as to the shrinkage that would occur in location stakes exposed to the weather in the Atlin district. At one time James A. Fraser, gold commissioner for the district, made a measurement of the stakes in question, but the book in which the result was noted was not forthcoming at the trial and could not be found by him. There is no section in the Placer Act, [R.S.B.C. 1911, ch. 165] similar to sub-sec. (*d*) of sec. 16 of the Mineral Act, [R.S.B.C.] 1897, ch. 135; R.S.B.C. 1911, ch. 157], so if legal posts were not used in locating the claim it is invalid. Strict compliance is required. See *Pellett* v. *Almoure*, and other cases referred to in vol. I. Martin's Mining Cases (B.C.) 134, decided before the saving clause to the Mineral Act was passed. After due consideration of the evidence pertaining to the size of these stakes, I cannot find that the staking of the Sunflower mineral claim was invalid through

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legal posts not being used for that purpose. In coming to this conclusion, I am impressed with the fact that the stakes were located on ground claimed by the defendant company and the manager of such company doubtless knew the necessity of properly staking a placer claim. With his knowledge and means of attack, if certain of his ground, he allowed the plaintiff's predecessor in title to work the claim and dispose of a large quantity of gold extracted therefrom. There is also the presumption in favour of the plaintiff that the staking, especially under the circumstances, was carefully and properly carried out by Rennison. As to the question of whether the claim was a premature location, I am satisfied the claim was located after the period of "lay over" had expired, namely, on July 5, 1901, being the date referred to in a sworn application for record of the claim. The physical location of the Sunflower thus having been found valid and as far as other placer claims are concerned, to have taken place upon ground which was open for location, disposes of the Speculator mineral claim. It was located on ground then occupied by the Sunflower mineral claim, and, as far as such claim is concerned, is invalid. It would also be invalid if the ground thus sought to be located was within the limits of an existing placer mining lease. I find that the location of the Speculator was at the instigation and for the benefit of the defendant company, and that Thomas was simply utilized in the matter. His affidavit stating that the land sought to be located was unoccupied for placer mining purposes does not accord with the position taken by his employer, that the Vernon placer mining lease was then effective for mining purposes.

The more important question then remains to be decided, whether the land occupied by the Sunflower placer claim, or any valuable portion thereof, was located on ground then lawfully occupied by the Vernon lease. J. F. Murton made application in May, 1900, pursuant to sec. 90 of the Placer Mining Act (R.S.B.C. 1897, ch. 136), *inter alia*, for a lease of bench ground for placer mining purposes according to a description contained in said application. His application was for a lease

of the land, containing an area of twenty acres, for twenty years, and the claim was to be known as the Vernon placer mining claim. The gold commissioner for the district on June 2, 1900, pursuant to the statute, recommended such application, with five others, for the favourable consideration of the Lieutenant-Governor-in-council, explaining that the ground sought to be obtained could only be worked on a large scale, by reason of depth of gravel and the cost of obtaining water. He stated that sec. 92 of the Act had been complied with and recommended that the rentals be fixed at $50 yearly. An order-in-council was passed on June 15, authorizing the issuance of the lease for the ground for the period and at the rental recommended by the gold commissioner. A hydraulic bench lease (number 189) was in due course, under date June 15, 1900, granted to Murton and contains the usual conditions and stipulations, including proviso for re-entry.

This lease was issued before a survey of the land was completed, and, according to a recital contained in a memorandum of the gold commissioner attached to the lease (exhibit No. 30) the metes and bounds referred to in the original description were incorrect and had been derived from assumed, instead of actual measurements, with courses and directions. When the survey subsequently took place, it was found that such survey did not correspond with the description in the lease, or even with the description in the application therefor. It appeared to overlap and encroach upon placer claims or prior locations. Authority was then obtained for a new survey and an order-in-council was passed with a view to rectifying the discrepancies. An amended description to correspond with such new survey, with an accompanying plan, was substituted for the original description in the lease and the original plans were detached therefrom. The defendant company, as successors in title to Murton, seek to uphold this lease with such amended description and plan. I do not consider that the original boundary of the leased property as marked on the plan (exhibit 32) made by J. H. Brownlee, P.L.S., was correct. He stated that there was a custom in the district of surveying placer claims in the manner indicated, but, even if there were a local custom to that

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effect, it would not entitle the owner of land held under lease from the Government to include additional land in the manner indicated. There was also what is termed a first amended boundary of the Vernon lease, arising out of a survey, which is referred to in the different plans, but I do not find any authority for this survey and consider that the boundaries thus created should be ignored. There remains to consider whether the second amended boundary already referred to in the amendments to the lease, and which was made by E. S. Wilkinson, P.L.S., is the proper boundary of the land comprised within the Vernon lease. The first point to determine is the location of No. 1 post of the Vernon lease. There was considerable evidence adduced and lengthy argument as to whether or not this post was at the point shewn in the plan attached to the lease as amended. Mr. Wilkinson was admitted by both parties at the trial to be an impartial witness and his credibility was not in any way attacked. I accept his evidence and in referring to the running of the amended boundary he stated he intended to start from the posts as he saw them on the ground: " . . . I intended to start from the original location posts as I found them." In further reference to the starting point of his survey in cross-examination he stated as follows:—

Q. What was the post you started from? A. That was the Vernon lease post. It had a whole lot of writing referring to the lease.

Q. Was it the corner post of the lease? A. Yes.

Q. Did it seem to be in its original location? A. As far as I could tell, yes.

Q. Who pointed it out to you? A. Probably Mr. Hall, I should think.

The suggestion was made that even if the post were at the point where it was found by the surveyor, that it had been moved to that point preparatory to his making the survey. I find no evidence to support such a fraudulent act, and I assume that the post was at the point of its original location, so that whatever course was taken in the survey, was from the proper starting-point. If the ground to be obtained under a lease is governed by the location of the posts placed at each corner of the claim and not by the description in the lease subsequently granted, the company became entitled to the ground

within the limits of the second survey made by Wilkinson. This shews, according to exhibit 32, a substantial portion of the Sunflower placer claim within the boundaries of the land occupied by the Vernon lease. It is contended, however, that the amendment to the Vernon lease, which was authorized by order-in-council, dated September 22, 1904, was subject to the proviso that such description as amended did not conflict with the rights of any free miner. The effect of this proviso requires to be considered. Does it limit the relief, so that the lessee from the Crown only obtained the land included within such limits, subject to the rights that might have been acquired by any free miner who had located mineral or placer claims in the meantime? Some weight is given to this contention by the fact that the order-in-council provides that the leases are to be re-executed and should be considered as only effective from the time of such execution. It is contended on the contrary that the fact that re-execution is provided for instead of a new lease implies that the old lease stands and the description is simply to be rectified and that its operation relates back to its date. The lease was not as a matter of fact re-executed, but no point was taken on this ground at the trial, and the Crown received rent and recognized the defendant company as its tenant. This direction in the order-in-council thus only becomes important in determining the construction to be given to the authority under which the gold commissioner acted in amending the description. The plaintiff submitted that it was intended that the rights of free miners, which had arisen in the meantime, should, by this proviso, be preserved and that they should not suffer through rectification of an error with respect to the description, either in the application or in the original lease. It was also contended that the location of the Sunflower was a re-location of a placer claim, which had expired, and that the ground had thus become open for re-location. No evidence was adduced as to the extent of the prior placer claim. As advantage was taken in locating the Sunflower of the law that had just been changed, extending the area that could be located, the ground thus previously occupied may not have been within the limits of the Vernon lease as indicated upon the ground by

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its four corner posts. The form of lease in use by the Department of Mines provided that the land demised to Murton was subject to the reservation of:—

> All such mining claims (if any) situate in whole or in part within the tract hereby secured as are legally held and represented by free miners on the day of the date of these presents,

so that within the limits of the large area thus leased by the Crown there might exist a valid placer mining claim which would not be affected by the lease. This is important in considering whether the lease was to become effective from the time of its amendment or was to relate back to the date of its execution in June, 1900. With this reservation in the lease why was the proviso in the order-in-council also inserted? Was it to place beyond doubt the intention of the Crown that such mistake was not to be rectified to the prejudice of any free miner who had located a placer claim within the limits of the land which would thus be included within the amended description. It must be borne in mind that this order-in-council was apparently passed at the instigation of the defendant company after the location of the Sunflower claim and without the owner of such claim having an opportunity of being heard. Beyond question such owner obtained some interest in the land, and it would be contrary to justice that he should be deprived of his rights in this manner. Consequently, the more reasonable interpretation would be that it was not intended to affect the position of the Sunflower or any other claim.

The contention of the defendant company is that the Crown was simply rectifying an error that had taken place and that the plaintiff was not in a position to obtain any advantage from the mistake. This position would be tenable if the land comprised within the limits of the area bounded by the corner posts became, simply by the location of such posts, alienated from the Crown and leased to Murton. Shortly, I take the contention of the company to be that, after proper staking, it then complied with all the other provisions of the Act entitling it to a lease of the ground within the area thus sought to be obtained but that in the description in the application, and more especially in the lease, there was a serious mistake—that such description did

not correctly describe the land thus applied for and the Crown as the landlord was simply performing an act of justice in correcting the error. I do not think the staking alone conferred any rights upon Murton. It was only an initial step and would not even have enabled him to redress an act of trespass. He did not obtain any such interest as the locator of a mineral claim acquires between time of location and recording his claim. Until his application for a lease was sanctioned and the lease executed, Murton had no right to the land.

In my opinion, if, through faulty description, he did not become lessee of the land intended, then a subsequent *bonâ fide* locator of a placer claim is not affected by the fact that the greater portion of his claim may be within the boundaries of an area created by four corner posts, but for which no lease has been granted. This was the position with respect to the Sunflower placer claim, and I do not think the validity of the claim was destroyed by any subsequent amendment of the description in the lease to Murton. Plaintiff is entitled to all the land lying within the boundaries of the Sunflower claim and defendants are liable in damages for trespass and removal of gold therefrom. I do not consider that there is sufficient evidence before me to fix the amount of damages so there will be a reference to the registrar and any evidence already taken may be used in addition to further evidence. Counsel may speak to the form of the reference. Plaintiff is entitled to the costs of action and the costs of reference are reserved.

Judgment for plaintiff.

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JOHANSEN v. ANDERSON.

British Columbia Supreme Court, Murphy, J. January 23, 1914.

1. MASTER AND SERVANT (§ II A 3—50)—LIABILITY OF MASTER—DUTY TO WARN AND INSTRUCT.

In an action by a workman for personal injury, due to an accident resulting from the negligence of the defendant employer's foreman in giving an order to the workman without warning him against the danger which was the effective cause of the accident and which was known or should have been known to the foreman, the defendant is liable under the Employers' Liability Act, R.S.B.C. 1911, ch. 74, although it may appear that the workman's ordinary calling, in which he had been hired, *primâ facie* imported a right on defendant's behalf to assume that the workman knew his business and would not place himself in danger.

Statement

ACTION by a workman in damages for personal injury, on the ground of the negligent giving of an order to him by the defendant employer's foreman, without warning against the danger known, or presumed to be known, to such foreman.

Judgment was given for the plaintiff in $1,000 damages.

Lucas, for the plaintiff.

Craig, for the defendant.

Murphy, J.

MURPHY, J.:—I have carefully read the evidence since the trial and with considerable hesitation have concluded the plaintiff is entitled to recover. Hernstrom had authority to give the order to the plaintiff to cut off the projecting stick and did give such order. When he gave it he knew that the log being drawn had jammed against the stick and had pushed it forward a foot. It then, as appears from Macdonald's evidence, came in contact with a rock, and, as appears from the accident happening, was subjected to such a strain by reason of the pull of the log against one end and the resistance of the rock along its length that it was sprung.

I think this spring was clearly the cause of the accident and not the fall of the stick as contended by the defence—for the fall of a stick—an eight-inch stick—a few feet would hardly break a clean section out of a man's leg. I think Hernstrom ought to have known, if he did not know, that the stick was probably sprung, not only because he saw what had happened but also because, as appears again from Macdonald's evidence,

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when the jam occurred it was decided to attach the line of another engine to the log for additional power. Inasmuch as the practice was to pull right through any obstruction, if possible, I think it is a fair inference that that had been attempted in this case with the one line and the attempt failed but did result in a considerable spring being put in the stick. Under these circumstances, I think Hernstrom was negligent in giving the order he did without warning the plaintiff of conditions which, if he did not know, I hold he should have known, and therefore the defendant is liable under the Employers' Liability Act, R.S.B.C. 1911, ch. 74.

My hesitation arises from the fact that plaintiff admits he was hired as a "chunk bucker" and there is evidence that the cutting off of such a stick as the one that caused the accident was the ordinary business of a chunk bucker. It is urged, therefore, that plaintiff having hired as a chunk bucker, defendant and his servants had a right to assume that he knew his business and would not place himself in danger. In this connection I must state that some of the plaintiff's evidence, if taken as it appears on the notes would, I think, put him out of Court. He is a foreigner, not very conversant with the English language, and it was clear to me on the trial that he did not fully understand all the questions put to him, particularly those where he apparently makes admissions injurious to his case. On the whole, I think, there were special circumstances which ought to have been known to Hernstrom if they were not, and which he ought to have communicated to plaintiff when giving the order. I assess damages at $1,000.

Judgment for plaintiff.

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SIMONSON v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. April 29, 1914.

1. MASTER AND SERVANT (§ II E 4—225)—NEGLIGENCE OF FELLOW-SERVANT—STATUTORY LIABILITY—LIMITATION TO INJURIES WITHIN PROVINCE—EMPLOYERS' LIABILITY ACT (MAN.).

The Employers' Liability Act, R.S.M. 1913, ch. 61, giving an employee a right of action which did not exist at common law in respect of the negligence of a fellow-servant, does not apply to injuries suffered by the employee outside of Manitoba.

[*Simonson* v. *C.N.R. Co.*, 15 D.L.R. 24, affirmed; *Johnston* v. *C.N.R. Co.*, 19 Man. L.R. 179, discussed.]

2. MASTER AND SERVANT (§ II E 4—225)—NEGLIGENCE OF FELLOW-SERVANT—CHANGE OF RULE BY STATUTE IN PROVINCE WHERE INJURY SUSTAINED—ACTION IN ANOTHER PROVINCE.

The Saskatchewan statute, R.S.S. 1909, ch. 52, sec. 31, sub-sec. 14, which declares in effect that the defence of common employment shall no longer obtain in an action against an employer for injuries resulting to the employee from the negligence of another employee engaged in the same service, applies only to actions in Saskatchewan, and will not sustain an action by the employee in Manitoba for injuries sustained in Saskatchewan in the course of his employment, to which action there was in Manitoba as regards injuries sustained outside of the province, a defence at common law on the ground that the injury was received from the act or default of a fellow-servant constituting an ordinary risk incident to the service. (*Per* Perdue, J.A.)

3. CONFLICT OF LAWS (§ I E 1—106)—EMPLOYERS' LIABILITY—INJURIES SUSTAINED IN ANOTHER PROVINCE—ACTION BY EMPLOYEE AT PLACE OF HIRING—LEX FORI—LEX LOCI.

Where an action is commenced in Manitoba by a servant against his employer respecting an alleged wrong which took place in Saskatchewan in the course of his employment extending to that province, he must prove that a wrong has been committed which is actionable according to the law of Manitoba and also that the act was wrongful in Saskatchewan. (*Per* Perdue, J.A., and Cameron, J.A.)

[*Simonson* v. *C.N.R. Co.*, 15 D.L.R. 24, affirmed; *Tomalin* v. *Pearson*, [1909] 2 K.B. 61; and *Schwartz* v. *India Rubber Co.*, [1912] 2 K.B. 299, referred to.]

Statement

APPEAL by plaintiff who sued to recover damages for injury while working for the defendant railway, from the dismissal of the action at the trial before Metcalfe, J., *Simonson* v. *C.N.R.*, 15 D.L.R. 24.

The appeal was dismissed, HOWELL, C.J.M., dissenting.

D. A. Stacpoole, for the plaintiff.

O. H. Clark, K.C., and *C. W. Jackson*, for the defendant.

Howell, C.J.M. (dissenting)

HOWELL, C.J.M. (dissenting):—As I differ from the majority of the Court in this matter, I shall briefly give my reasons.

The law applicable to this case is fully discussed by Mr. Justice Metcalfe in giving his reasons for directing judgment for the defendant, holding as I think he does, that the Manitoba statute under which the plaintiff hoped to succeed was local and limited.

The case of *Davidsson* v. *Hill*, [1901] 2 K.B. 609, decided that a foreigner could, under the English Fatal Accidents Act, recover for the death of another in a foreign country in an English Court, the defendant being within the jurisdiction. In *The Halley*, 5 Moo. N.S. 262, 16 Eng. R. 514, it was held that where by English statute the owner was not liable when the ship was in charge of a pilot, although the contrary was the law at the place of the accident, which was in foreign waters, the plaintiff could not recover.

The principles laid down in *Machado* v. *Fontes*, [1897] 2 Q.B. 231, apply then as well where the rights are secured by statute as by common law. I have carefully read the criticisms of this last mentioned case in Piggott's Foreign Judgments and Jurisdiction, 3rd ed., beginning at p. 177. The part of that case criticised has no bearing upon this case. That case merely reiterated in the main the clear law that where by the *lex loci* there is a cause of action by the plaintiff against the defendant of a transitory nature, and where by the *lex fori* there is also a cause of action under similar facts the defendant being subject to that forum an action will lie. See Dicey's Conflict of Laws, 2nd ed., p. 645. In other words, English Courts give redress for personal wrongs which have arisen abroad because they are transitory, if such wrongs are redressible by English law. Personal injuries are transitory and follow the person.

In *Brereton* v. *C.P.R.*, 29 O.R. 57, Sir John Boyd held that the destruction of furniture burned in a house in Manitoba where the fire which destroyed the house was caused by the negligence of the defendant in Manitoba created a transitory cause of action which could be tried in Ontario.

In Saskatchewan, where this accident happened, by the statute law, the defendant was liable although the accident happened because of the negligence of a fellow-servant. It was a personal injury and, therefore, transitory.

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Howell, C.J.M. (dissenting)

It has been already stated that by the common law personal actions being transitory may be brought in any place where the party defendant can be found: Story, quoted with approval by Lord Herschell, in *British S.A. Co.* v. *Companhia de Mocambique*, [1893] A.C. 623.

As I understand the Saskatchewan statute it has the same legal effect as sec. 3, ch. 178, R.S.M. 1902. There is then the same statutory liability at the place of the accident and in this Province, and why should the plaintiff not recover? It is argued that the Manitoba Act is so local in its application within its very terms that there is evident a legislative intention to exclude this statute from the great principles of English law above discussed. The case of *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, is relied on. In that case a man was employed in England to work in Malta and was injured there. That case merely decides that the new statutory duty to pay in case of death of a workman regardless of negligence under the English Act of 1906 created no duty to a workman of an English employer who works out of the United Kingdom. It decides nothing as to liability in England if there had been liability by the law of Malta, and to me it has no bearing on this case. The Manitoba statute limits the liability in amount and, of course, no larger sum could be given here, but up to that amount the Court has power. There are references in our statute to regulations by orders-in-council and, of course, the Court here is bound by such; but I see no reason why this should take away the jurisdiction.

I think this action could be tried here; but the plaintiff not having shewn what the earnings would have been in Manitoba as required by sec. 6, the damages may be for too great an amount, and for this reason there should be a new trial.

Richards, J.A.

RICHARDS, J.A.:—The plaintiff, a brakeman in the service of the defendants was, while in the Province of Saskatchewan, and acting in the course of his employment, seriously injured, owing to the negligence of a fellow-servant. He sued the defendants in the Court of King's Bench for Manitoba. The trial was had before Mr. Justice Metcalfe with a jury [*Simonson* v. *C.N.R.*, 15 D.L.R. 24]. The jury found a verdict for the plaintiff for $4,500, which, it is claimed, the evidence shews to be the amount

of three years' earnings of a person in like employment to that of the plaintiff when injured.

The learned trial Judge entered judgment for the defendants, holding that the fact that the injury was caused by the fellow-servant prevented the plaintiff recovering at common law, and that the Employers' Liability Act of Manitoba did not apply to injuries suffered outside of this Province.

In appeal the plaintiff's counsel contended that by statute of Saskatchewan there was in that province a right of action whether the injury did or did not occur from the negligence of a fellow-servant. He further urged that the case came within sub-sec. (*e*) of sec. 3 of our Employers' Liability Act [R.S.M. 1902, ch. 178; 1913, ch. 61], in which case the question of common employment would not apply.

He relied on the rule of law stated in Dicey's Conflict of Laws, 2nd ed., 645, as follows:—

> Rule 178. An act done in a foreign country is a tort, and actionable as such in England, if it is both
>
> (1) Wrongful, *i.e.*, not justifiable, according to the law of the foreign country where it was done, and
>
> (2) Wrongful, *i.e.*, actionable as a tort, according to the English law, *i.e.*, is an act which, if done in England, would be a tort.

The question of common law liability may be disposed of at once. The injury having been caused by the negligence of a fellow-servant, it was not an act that, if done in Manitoba, would, as against the common employer (which the defendants here are) be a tort or actionable. Then, as to the Employers' Liability Act: Assuming the law in Saskatchewan to be as stated, the plaintiff probably brings his case within sub-sec. (1) of the above rule. My first impression was that he brought it also within sub-sec. (2). On consideration, I am, with much regret, unable to hold that opinion. It was an act which, if done in Manitoba, would be within the scope of sub-sec. (*e*) of sec. 3 of the Employers' Liability Act. So that, taking the rule in its widest sense, it would seem, at first sight, that there might be a cause of action here. But it seems to me that our Act, giving only a statutory remedy where, but for it, there was none, the right of action given by it is special, created only by statute, and what is sued for under it

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is not a tort in the ordinary common law meaning as contemplated by sub-sec. (2) of the above rule.

The powers of our Legislature to enact it are got by sec. 92 sub-sec. (13) of the B.N.A. Act, 1867, which empowers it to make laws in relation to "(13) property and civil rights *in the Province.*"

Then, the Act itself seems to me on its face to be restricted to injuries occurring in Manitoba. Sub-sec. (*d*) of sec. 3 gives a right of action where personal injury is caused,

> by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer.

Then sec. 5 says:—

> A workman shall not be entitled under this Act to any right of compensation or remedy against the employer . . . under para. (*d*) of sec. 3 unless the injury resulted from some impropriety or defect in the rules, by-laws . . provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law . . . by the Lieutenant-Governor-in-council, or under or pursuant to any provision in that behalf of any Act of the Legislature of Manitoba, it shall not be deemed . . . to be an improper or defective rule or by-law.

The sanction of the Lieutenant-Governor-in-council or of an Act of the Legislature could only affect the by-law or rule in so far as it applied in Manitoba. Then, what would be its effect if an action were brought under sub-sec. (*d*) in respect of an injury suffered outside of the Province?

By sec. 6 the compensation recoverable shall not exceed the estimated earnings during three years preceding the injury of a person in like employment *in this Province.*

Section 8 provides for the deduction, from the compensation awarded, of any penalty, or damages, which may, in pursuance of any other Act either of Parliament, or of the Legislature, have been paid to the plaintiff in respect of the same cause of action. It also provides that where an action has been brought in a case where there has been no payment of penalty, or damages, under such other Act, in respect of the same cause of action, the plaintiff shall not thereafter be entitled to receive such penalty or damages under such other Act.

If the Act extends to injuries suffered outside of Manitoba,

then the compensation awarded in our Court, would not in such case be liable to deduction in respect of any penalty or damages paid the plaintiff under any Act of the Province where the injury occurred. Further, the plaintiff, in spite of suing here, would not be debarred from afterwards claiming in such other Province in respect of any such last named penalty or damages.

To hold that the Manitoba Act applies to injuries occurring outside of the Province would result in this, that the plaintiff might have wider rights than are given by the Act to parties, injured within Manitoba, inasmuch as, for the reasons above given, sec. 8 of the Act would be inapplicable.

Where several actions are brought in respect of the same negligence, etc., sec. 10 enables a Judge to consolidate them or to stay all but one till that one shall be tried. It is obvious that, if such negligence happened in another Province, the Judge could not exercise such powers as to actions brought in that other Province.

English legislation—and the same rule applies to Manitoba legislation—is *primâ facie* territorial. See Beal's Cardinal Rules of Interpretation, 2nd ed., 232, and cases cited, pp. 232 to 238.

In *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, and *Schwartz* v. *India, etc.*, [1912] 2 K.B. 299, it was held that where, on the construction of an Act providing for compensation to workmen for injuries, the intent appeared to limit the remedy to the case of injuries happening in the United Kingdom, workmen, even though hired as such in England, could not recover in respect of injuries incurred outside of the United Kingdom.

I am not prepared to say that the provision of sec. 92, sub-sec. (13), of the B.N.A. Act makes it *ultra vires* of our Legislature to pass an Act giving our Courts power to grant compensation, at least as against parties within Manitoba, in respect of injuries occurring outside of the Province. But I think its wording confirms the view that in the absence of a clear intent being shewn to the contrary, we should presume that the Acts of the Legislature are not to be taken to have that effect. I have not overlooked the restrictive wording of the first part of sec. 4 of the Act, as compared with the unrestricted language of the first part of sec. 3. But I do not think that we should imply from that

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an assumption by the Legislature of such an unusual extension of its authority. But, apart from that, it seems to me that the provisions above cited, of the Act in question, shew an intention to restrict its operation to cases of injuries arising within the Province.

I have not referred to *Couture* v. *Dominion Fish Co.*, 19 Man. L.R. 65, or to *Johnson* v. *C.N.R. Co.*, 19 Man. L.R. 179, as I do not think they affect this case. In each of them an administrator, appointed by the Manitoba Courts, sued in respect of injuries caused outside of the Province, and resulting in the death of the intestate. In neither case had administration been got in the Province, or territory, where the injury occurred. In each case a right to bring an action would have accrued in that Province, or Territory, to the plaintiff on taking out such last-named administration. But, until it should be so taken out, the plaintiff was not, as Manitoba administrator, entitled to say, for the purposes of suit, either there or here, that an act had occurred in the foreign jurisdiction from which, according to its laws, he had suffered any injury or wrong. Until the foreign administration should be got, the law applied, as far as concerns a plaintiff suing here as administrator, that the right of action in such Province or Territory died with the injured person.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff sues for an injury caused to him in the Province of Saskatchewan while acting as a brakeman in the defendant's employ. He was on the rear end of a train which was backing up during a switching operation. At the time of the accident he was signalling, his signals being passed by another brakeman to the engineer on the locomotive. For some reason the engineer brought the train to a sudden stop and the plaintiff was precipitated over the end of the car upon which he was standing and sustained injury. The trial Judge allowed the case to go to the jury, reserving the question whether the plaintiff could legally recover. The jury entered a verdict for $4,500. Upon a consideration of the legal aspect of the case, judgment was entered for the defendants.

By the Revised Statutes of Saskatchewan, 1909, ch. 52, sec. 31, sub-sec. 14, it is enacted as follows:—

It shall not be a good defence in law to any action against an employer or the successor or legal representative of an employer for damages for the injury or death of an employee of such employer that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee any contract or agreement to the contrary notwithstanding.

At common law, the general rule is that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service: *Priestly* v. *Fowler*, 3 M. & W. 1; *Farwell* v. *Boston & Worcester R. Corp.*, 4 Met. (Mass.) 49; *Wilson* v. *Merry*, 19 L.T.N.S. 30. That was the law in force in Saskatchewan when the above enactment was passed. The enactment does not expressly abolish the common law rule above stated; it only declares that it shall no longer be a good defence, in law. It does not say that the employer shall be liable where the injury complained of has been caused by a fellow employee. The statutory provision above referred to only applies to actions in Saskatchewan. Where an action is commenced in Manitoba by a servant against his employer respecting an alleged wrong which took place in Saskatchewan he must prove that a wrong has been committed which is actionable according to the law of Manitoba, as well as shew that the act was wrongful in Saskatchewan: Dicey, Con. of Laws, 2nd ed., 645. There is nothing to prevent the employer in such a case from succeeding in the action in Manitoba, if he sets up and establishes the defence that the injury was caused by a fellow servant engaged at the time in the same employment.

The present action is, however, framed in such a way as to attempt to bring it also within the Employers' Liability Act, R.S.M. 1913, ch. 61. It has already been held in this Court that this Act does not apply to an injury which took place in another province: *Johnson* v. *C.N.R. Co.*, 19 Man. L.R. 179. A perusal of the Act shews that the intention was to confine it to wrongs that take place in Manitoba. I would refer to secs. 3, 4, 5, 8, and specially to sec. 6, where the measure of compensation is based on the estimated earnings of a person in the same grade engaged in similar employment in Manitoba. The Act is essentially a local one. It gives to a servant engaged in certain employments

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in Manitoba a limited right of action against his employer for injury sustained under certain conditions set out in the Act. The Act was intended for the protection of a class of its own citizens and was plainly not intended to apply to injuries which took place outside Manitoba. A distinction must be drawn between a tort created or made actionable by statute and a tort which is in itself a wrong and contains an element of moral misconduct. *Primâ facie* the first has validity only where the statute runs, the second may be actionable although it took place in another country.

In *Cope* v. *Doherty*, 4 K. & J. 367, 70 Eng. R. 154, Sir W. Page Wood, V.-C., after discussing the authorities, held that

> *primâ facie*, and unless the contrary be expressed, or be implied from the absolute necessity of the case, every legislature must be presumed to have intended by its enactments to regulate the rights which should subsist between its own subjects and not to affect the rights of foreigners, whether by restricting or augmenting their natural rights.

This case was affirmed in appeal: 2 DeG. & J. 614, 44 Eng. R. 1126. The principle there laid down was followed in *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, and *Schwartz* v. *India Rubber Co.*, [1912] 2 K.B. 299.

It may be mentioned that at the trial of this case no evidence was given under which the damages could be measured in accordance with sec. 6.

I think the appeal must be dismissed.

Cameron, J.A.

CAMERON, J.A.:—There may be a remedy in an English Court for an act in the nature of a tort committed outside the Court's territorial jurisdiction.

> The act may be such that, although it may be wrongful by the local law, it would not be a wrong if done in England. In this case no action lies in an English Court: Pollock on Torts 205.
>
> It is . . . alike contrary to principle and authority to hold that an English Court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed: *Per* Selwyn, L.J., in *The Halley*, L.R. 2 P.C. 204, 16 Eng. R. at 519.

The circumstances in this case [*The Halley*, L.R. 2 P.C. 204] were most instructive and seem to me to make it very much in

point in the consideration of that before us. On this branch of the case, I refer to the passage from Dicey on Conflict of Laws, cited by Mr. Justice Metcalfe, also to *The M. Moxham*, L.R. 1 P.D. 107, at 111, where the law is stated by Mellish, L.J.

I think that on the evidence, the negligent act in question being that of a fellow-servant of the plaintiff, there is disclosed no actionable wrong as against the defendant company according to the principles of law in force in this Province.

The Saskatchewan Act can be given no effect in this Province where, except in actions brought under the Employers' Liability Act, the common law rule as to common employment prevails.

It is true that a different rule has been adopted in the United States, and that an action may be maintained in one State, if not contrary to its own policy, for a wrong done in another and actionable there, even if it were not actionable by the *lex fori*: Pollock on Torts, 205.

If the *lex delicti* is not opposed to the settled policy of the forum, it will be enforced there, provided the Court has jurisdiction of the defendant: Minor, Conflict of Laws, 485.

But this rule has never been laid down in England.

As I read our Employers' Liability Act (formerly the Workmen's Compensation Act), it must be taken as applying to personal injuries caused to workmen in this Province and not elsewhere. The rule is that the operation of a statute passed by the English Legislature is confined to the territorial limits of the United Kingdom, unless it can be gathered from the terms or obvious intent that it was meant to apply elsewhere: Ruegg, Employers' Liability, 305. I refer also to the discussion on the territorial effect of statutes to be found in Craie's Hardcastle, ed. 1911, 393 *et seq.* Moreover, there occur in this statute expressions indicating the intention to restrict its operation to this Province. See secs. 3(*e*), 5(*b*), and 6 and 8.

The Fatal Accidents Act (Imp.), 1846 and 1864, apply as well for the benefit of the representatives of a deceased foreigner killed on the high seas, as for the benefit of a British subject: *Davidsson* v. *Hill*, [1901] 2 K.B. 606. Kennedy, J., at p. 614, held that

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under all the circumstances, and looking at the subject-matter, . . . Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects.

The Workmen's Compensation Act (Imp.), 1906, has, however, been held to have no application outside the territorial limits of the United Kingdom, except in the cases of seamen provided for by sec. 7. The rule laid down in Maxwell on the Interpretation of Statutes, p. 13:—

> In the absence of an intention clearly expressed, or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom

was applied by the Master of the Rolls in *Tomalin* v. *Pearson*, [1909] 2 K.B. 61.

> The accident must be one happening in the United Kingdom to a person who has the status of a workman to some employer who . . . is made liable to the jurisdiction of the Act: *Per* Fletcher Moulton, L.J., p. 65.

Farwell, L.J., says:—

> The words (of sub-sec. 1, of sec. 1 of the Act) are: "If, in any employment personal injury by accident arising out of and in the course of the employment is caused to any workman," and so on. To my mind the words "any employment" there must be restricted to employment within the ambit of the United Kingdom, or on the high seas as provided by sec. 7.

This decision was followed in *Schwartz* v. *India Rubber Co.*, [1912] 2 K.B. 299, where it was held that the Act did not apply to British ships on the high seas, except in the case of seamen within sec. 7.

Now, under the British North America Act our Legislature derives its powers to enact the Employers' Liability Act from sec. 92, sub-sec. 15. —

> In each province, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say, (13) property and civil rights in the province.

The words "property and civil rights" are to be used in their largest sense; but, nevertheless, they are subject to limitations as set forth by the Privy Council in *The Royal Bank of Canada* v. *The King*, [1913] A.C. 283, 9 D.L.R. 337.

Whatever may be the effect of this decision, the words in the

section "in each Province" and in the sub-section "in the Province" it seems to me tend to increase the presumption that the provincial legislature in dealing with property and civil rights does not intend its statutes to operate beyond the territorial limits of the Province. It may be that the legislature can by clearly expressed enactment, subject a company or a person within the Province to liability for damages for injuries sustained by a workman or other person outside the province. Assuming that such power is given by the B.N.A. Act the presumption would still be that the intention to exercise that power is to be inferred only from the use of express and unequivocal language.

The English Act of 1906 referred to above is more akin to our present Workmen's Compensation Act than to our Employers' Liability Act, which was modelled on the English Act of 1880. But under the one Act as under the other there was an extension of the rights of recovery beyond the limits known to the common law. The English Act of 1880 did away with the defence of common employment in certain cases where the action was founded in negligence. The Act of 1906 extended the liability of the employer beyond the region of negligence and made him liable to persons suffering injuries by accident in the course of the employment.

I think this branch of the case is governed by the decisions in *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, and *Schwartz* v. *India Rubber Co.*, [1912] 2 K.B. 299. Independently of those decisions the point was passed upon by this Court in *Johnston* v. *C.N.R. Co.*, 19 Man. L.R. 179. The conclusion that must be drawn is, therefore, that no action is maintainable under our Employers' Liability Act in respect of injuries sustained outside the Province.

It was argued that this action was contractual, arising out of the relation of master and servant, rather than tortious. Such cases have, however, been in general regarded as tortious in their character and are so treated by the authorities. The principle underlying the Employers' Liability Act is that of placing the workman, when seeking the benefit of its provisions, in respect of injuries suffered in the course of the employment, in

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the position of a stranger, so far as his employer is concerned. It is to be regretted that this plaintiff has to be deprived of his remedy; but, in my opinion, we have no option, and the judgment of Mr. Justice Metcalfe must be affirmed.

Appeal dismissed.

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Manitoba King's Bench, Galt, J. February 13, 1914.

1. CONTRACTS (§ I E 3—78)—STATUTE OF FRAUDS—PAROL PARTNERSHIP FOR MORE THAN A YEAR.

A parol partnership agreement for more than one year is not enforceable under the Statute of Frauds unless there has been part performance taking it out of the statute.

[*Caddick* v. *Skidmore* (1857), 2 DeG. & J. 52, 44 Eng. R. 907; *Dowes* v. *Collins*, 6 Hare 418, 67 Eng. R. 1228; *Johannson* v. *Gudmundson*, 19 Man. L.R. 83 at 96, referred to; see *Baxter* v. *West*, 1 Drew & Sm. 173; and *Crowley* v. *O'Sullivan*, [1900] 2 Ir. R. 478; and see Annotation on part performance excluding the Statute of Frauds at end of this case.]

Statement

ACTION to establish a partnership agreement for three years made by parol.

The action was dismissed.

W. J. Finkelstein, and *E. R. Levinson*, for plaintiff.

H. Phillipps, and *W. D. Lawrence*, for defendant.

Galt, J.

GALT, J.:—In this action the plaintiff claims to have entered into partnership with the defendant for a term of three years from the 1st day of June, 1910, and that he was forcibly prevented by the defendant, on or about July 3, 1911, from continuing in the said partnership.

The partnership, if any, was arranged verbally. The terms of it are alleged by the plaintiff as follows:—

4. During the month of May, 1910, and at the request of the defendant, the plaintiff and the defendant agreed to become partners in the trade or business of general merchants at Oak Point aforesaid, for the term of three years from June 1, 1910. It was agreed that the partnership so formed would take over the assets and liabilities of the business theretofore carried on by the said defendant, same to be taken over at face value, and the surplus of such business would be considered as capital brought in by the said defendant into the said partnership so formed as aforesaid. It was

further agreed that the plaintiff would not bring in any cash capital into the business, but that he would devote his whole time and attention to the partnership business. It was also agreed that the profits and losses of the business would be divided in the following proportions, namely: the said plaintiff to receive one-third of all profits and be liable for one-third of all losses and the said defendant would receive two-thirds of all profits and would be liable for two-thirds of all losses. It was further agreed that at the expiration of every year during the term of partnership, a statement of the assets and liabilities of the firm would be made out. It was further agreed that in case a dissolution should take place at any time, the defendant would take over the assets and liabilities of the partnership business at face value, and would pay out to the plaintiff in cash, the share and interest of the plaintiff, in the said business.

The plaintiff then alleges that in pursuance of the said agreement the plaintiff and defendant entered into partnership, opened a new set of books and carried on the business of the partnership down to July 3, 1911, on which latter day the defendant by improper conduct and threats of physical violence took possession of the assets of the partnership and drove the plaintiff from the premises.

The plaintiff claims a declaration that the partnership was dissolved on July 3, 1911, and payment by the defendant to the plaintiff of $1,549.65, by way of profits, etc.

The defendant denies the partnership and pleads the Statute of Frauds in that the alleged partnership was for three years and is not in writing.

In the alternative the defendant alleges if he had any dealings with the plaintiff in respect to the said business, that during the month of May, 1910, the defendant offered to sell to the plaintiff a one-third interest in the defendant's said business for the sum of $1,400 in cash, and after the payment of the said $1,400 by the plaintiff to the defendant the said business was to be carried on by the plaintiff and defendant as partners in the following shares, namely, the plaintiff one-third, and the defendant two-thirds; but the plaintiff has never paid or offered to pay the said sum of $1,400, etc.

Prior to the alleged partnership the plaintiff had been working as a clerk for the Lake Manitoba Trading Co., and when he left their employment in December, 1909, a sum of $1,400 or thereabouts was due to him from the company. About April,

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1910, the plaintiff having returned from a visit to the coast, interviewed the defendant and an arrangement was made between them in Winnipeg in accordance with which the plaintiff went out to Oak Point and commenced working in the defendant's general store. The principal work performed by the plaintiff was as bookkeeper. The first thing that was done was to take an inventory of the defendant's business, which was concluded about May 31, 1910. New books were opened, but the business was carried on in the name of the defendant only.

The general details of the business are equally consistent with their being a partnership or no partnership; but in some particulars the facts seem more consistent with the existence of a partnership—for instance, the taking of stock by the defendant in May, whereas the previous stock-taking had been in February, 1909. One or two clerks in the store were paid regular monthly wages, whereas the plaintiff was allowed to draw for his expenses as and when he pleased, but the total sums so drawn only amounted to about $60 per month on the average. During the period between June 1, 1910, and July, 1911, two small lawsuits were started, in which the names of both Cohen and Hoffman were used as plaintiffs. Then, again, when it became necessary to have certain buildings moved, which had been the property of the defendant alone, the contract was made in the names of both parties with the contractor and the document was executed by all three.

Evidence was given by Jacob Udow, a brother-in-law of Cohen's, to the effect that it was understood that Hoffman was to become a partner of Cohen's when he went out to Oak Point. Alexander De Lorande, a notary public at Oak Point, who appeared to me to be a truthful and reliable witness, stated that shortly after Hoffman joined Cohen at Oak Point, he, De Laronde, called at the store one day and made some remark to Cohen as to what Hoffman was doing there, when Cohen said he had taken him in as a partner, thinking it better to take him as a partner than as a clerk.

Cohen absolutely denies having ever admitted that Hoffman was a partner and he endeavours to explain the joining of Hoff-

man in the two lawsuits and in the contract aforesaid as having occurred without his knowledge or consent.

The plaintiff and the defendant appear to me to be unreliable witnesses. Each of them appeared to be ready to say almost anything which at the moment appeared to be favourable to his own interest or detrimental to his opponent. I would not accept the evidence of either of them without corroboration; but they have both come to Court armed with considerable corroborative evidence in support of their conflicting contentions.

The plaintiff's case is that sufficient part performance of the partnership which he alleges has taken place to take the case out of the Statute of Frauds.

In Fry on Specific Performance, 5th ed., the law applicable is laid down as follows:—

Sec. 578. The part performance of a contract by one of the parties to it may, in the contemplation of equity, preclude the other party from setting up the Statute of Frauds, and thus render it, although merely resting in parol, capable of being enforced by way of specific performance, though not by way of damages, even since the Judicature Acts.

Sec. 580. In order thus to withdraw a contract from the operation of the Statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2nd, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; 3rd, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4th, there must be proper parol evidence of the contract which is let in by the acts of part performance.

The plaintiff at the trial stated that his own ability and popularity in the neighbourhood was the consideration for the defendant admitting him as a partner with a one-third interest.

The defendant, on the other hand, states, in conformity with his defence, that it was only to be on payment of $1,400 by the plaintiff that the partnership was to commence.

Considering that the defendant already had an established business and was making a substantial profit out of it, the probabilities are in favour of the defendant's contention.

If the arrangement really was as the defendant contends and that the defendant did not insist on an immediate payment of the $1,400, but expected it within a reasonable time and in the

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meantime allowed the plaintiff his ordinary expenses all the circumstances relied upon by the plaintiff would have a satisfactory explanation, that is to say, the defendant would regard the plaintiff as an inchoate partner and might even speak of him and treat him as a partner in the expectation that in the near future the plaintiff would pay the $1,400 and actually become a partner. But as between the parties themselves, they would not be partners.

The plaintiff, of course, in accordance with the stand he had taken throughout, stoutly denied that he was under any obligation to furnish any moneys at all. Yet, here and there throughout his evidence he has made one or two admissions which seem to be only consistent with the defendant's contention. For instance, he says, "I was not to put in any money, only my popularity. Cohen said, 'I don't need your money just now.' I said, 'I will put it in as soon as I get it.'" In another portion of his evidence the plaintiff says, "I don't remember telling Mrs. Cohen I was going to Winnipeg to try and raise money. I was trying to get $950 coming to me from Lake Manitoba Trading Co. to put into the business."

Then, Richard M. Pierce, a friend of both parties, was called by the defendant and stated that he had an interview with the plaintiff in February last, and during the course of conversation the plaintiff said he was having trouble with Cohen. Pierce said to him, "Were you not supposed to put money in with Mr. Cohen?" and the plaintiff replied, "Oh, yes, but you know the Lake Manitoba is hard up and I didn't get it."

I am, therefore, of opinion that the defendant's contention in this respect is correct, and that it was a term of the verbal agreement that the plaintiff should put $1,400 into the business or purchase a one-third interest in the business with $1,400. The exact date of payment was not fixed so that the payment would have to be made within a reasonable time. A year and more having elapsed without payment, I think the defendant was under no obligation to wait any longer.

This is not the only difficulty in the plaintiff's way, because in his evidence at the trial he stated certain other terms of the

alleged partnership which are not alleged in his statement of claim; for instance, that it was agreed the business should be carried on in the name of "S. Cohen" alone and that all profits were to be capitalized for three years.

Prior to the Judicature Act the rule was much more strict than it is now in holding a plaintiff bound by the exact contract which he alleged.

The case of *Caddick* v. *Skidmore* (1857), 2 DeG. & J. 52, 44 Eng. R. 907 at 908, shews very clearly what would have become of the plaintiff's case under the earlier authorities. Lord Chancellor Cranworth in dismissing an appeal from a decision of Vice-Chancellor Kindersley, explains the facts and his decision upon them as follows, p. 55:—

> The plaintiff states the intention to have been that the partners were to be jointly interested without more; on the other hand, the defendant insists that although a joint interest may have been agreed upon, yet that before any division the plaintiff was to contribute to some large previous outlay of the defendant, who was also to have a large charge upon the royalties.
>
> The parties, therefore, are distinctly at issue as to what the contract was, and the very object of the Statute of Frauds was to prevent parol evidence being gone into to elucidate that which the parties have failed to make distinct by reducing it into writing. In my opinion that affords a conclusive answer to the claim of this plaintiff.
>
> The grounds upon which I proceed are, that the agreement was one for the purchase of an interest in land, which was not reduced into writing so that its terms can be ascertained; that there was no part performance; and that the defendant sets up a totally different contract from that which is insisted upon by the plaintiff, and claims the benefit of the Statute of Frauds.
>
> I am, therefore, of opinion that the bill ought to be dismissed, and was properly dismissed by the Vice-Chancellor, and, consequently, that this appeal must be dismissed with costs.

See also *Downs* v. *Collins*, 6 Hare 418, 67 Eng. R. 1228.

The present practice is expressed in Fry on Specific Performance, 5th ed., as follows, sec. 638:—

> The authorities upon the point now under discussion, to which reference has been made, were all under the old practice, and were greatly influenced by the incapacity of the Court of Chancery, except under very unusual circumstances, to permit an amendment of the record at the hearing. The High Court may be expected to feel itself freed from some of the difficulties which arose under the old practice in dealing with cases where one contract was alleged and another proved; it will probably, for the most part, feel it possible to deal with the matter once for all, and not to post-

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pone the real discussion till a further proceeding shall have been taken; it is probable that the main question will always appear to be, Was there really and in truth a contract or not? That if there was, the Court will generally allow the needful amendment to put that contract in issue; that if there was not, it will generally give judgment for the defendant, without reserving any right to the plaintiff to institute fresh proceedings. But the circumstances will govern the discretion of the Court in each case which may arise.

See also *Johannson* v. *Gudmundson*, 19 Man. L.R. 83 at 96.

Where the Statute of Frauds is inapplicable the Court has a much wider discretion in endeavouring to ascertain the terms of the contract. See, for instance, *McNeil* v. *Reid*, 9 Bing. 68.

If in the present case the plaintiff had been willing to accept the terms set up by the defendant in respect of the $1,400 payment and had either paid the amount into Court or asked to have it taken into account on a distribution of the assets, it might well be that needful amendments might have been made and relief given. But the stand taken by the plaintiff in absolutely repudiating any liability to pay any money whatever precludes such a course. I am of opinion, therefore, that the defence in respect of the Statute of Frauds must prevail as the plaintiff has failed to establish the agreement he alleges. The action, therefore, will be dismissed with costs.

Action dismissed.

Annotation

Part performance and Statute of Frauds.

Annotation—Contracts (§ I E 6—110)—Part performance excluding the Statute of Frauds.

The part performance necessary to take a case out of the operation of the statute must be by the person seeking to enforce the parol agreement: *Caton* v. *Caton*, 1 Ch. App. 137, 148; *Dickinson* v. *Barrow*, [1904] 2 Ch. 339.

In *Crowley* v. *O'Sullivan*, [1900] 2 Ir. R. 478, Palles, C.B., discussed at length the question of part performance as affecting the Statute of Frauds. In the English Courts there is a seeming conflict of authority as to whether the equitable doctrine of part performance of a parol agreement which enables proof of it to be given notwithstanding the provisions of the statute, is confined to contracts relating to land or applies to all cases in which a Court of equity would entertain a suit for specific performance if the alleged contract had been in writing: *McManus* v. *Cooke*, 35 Ch.D. 681; *Hammersley* v. *De Biel*, 12 Cl. & F. 45; *Britain* v. *Rossiter*, 11 Q.B.D. 123; *Maddison* v. *Alderson*, 8 A.C. 467, Palles, C.B., with whom Andrews, and Johnston, JJ., concurred, in delivering the judgment of the Irish Queen's Bench Division, *Crowley* v. *O'Sullivan*, [1900] 2 Ir. R. 478 at 490, referred to the de-

Annotation (*continued*)—Contracts (§ I E 6—110)—Part performance excluding the Statute of Frauds.

Annotation

Part performance and Statute of Frauds.

cision in *Maddison* v. *Alderson*, 8 A.C. 467, and said that he could not find that Lord Selborne there laid down that part performance is confined to cases of land. Continuing, the Chief Baron said:—

"The matter came later on for consideration before Mr. Justice Kay, afterwards Lord Justice Kay, in *McManus* v. *Cooke*, 35 Ch.D. 681; and that which is, in my view, the true rule was there laid down, that the doctrine of part performance is applicable to every case in which a Court of equity would before the statute, have sustained a suit for specific performance, were the contract in writing. There, of course, the statement in *Britain* v. *Rossiter*, 11 Q.B.D. 123, was much pressed upon Mr. Justice Kay, and he says:—

"In *Morphett* v. *Jones*, 1 Swans. 181, 5 Vin. Abr. 323, pl. 41, Sir T. Plumer states the equitable [491] doctrine thus: 'In order to amount to part performance an act must be unequivocably referable to the agreement; and the ground on which Courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referable to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession, having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and is sufficient to authorize an inquiry into the terms; the Court regarding what has been done as a consequence of contract or tenure.' In the speech of Earl Selborne in *Maddison* v. *Alderson*, 8 A.C. 467, which contains an elaborate examination of this doctrine of part performance, the latter portion of the quotation which I have just cited is mentioned with approval, and also these words of the late Vice-Chancellor Wigram from *Dale* v. *Hamilton*, 5 Hare 369, 381: 'It is, in general, of the essence of such an act that the Court shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract' . . . Earl Selborne's conclusion is: 'The acts of part performance, exemplified in the long series of decided cases, in which parol contracts concerning lands have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of land. The law of equitable mortgage by deposit of title deeds depends upon the same principles.'"

Treating that judgment of Lord Selborne as not limited in the way that is relied upon here (continues Palles, C.B. in the *Crowley* case), Lord Selborne disapproves of the rule laid down in *Britain* v. *Rossiter*, 11 Q.B.D. 123, and he holds that the doctrine of part performance is applicable to

Annotation

Part performance and Statute of Frauds.

Annotation (*continued*)—**Contracts** (§ I E 6—110)—**Part performance excluding the Statute of Frauds.**

any case in which a Court of equity would, before the statute, have decreed specific performance.

The facts in the *O'Sullivan* case were as follows: An agreement was entered into between Crowley and O'Sullivan, whereby O'Sullivan was to acquire certain premises, with stock-in-trade and book debts, in Bantry, wherein business was to be carried on in partnership between them for a period of not less than three years. In pursuance of this agreement the purchase was effected by O'Sullivan, with his own money, and thereupon Crowley and O'Sullivan entered into possession under the style of "O'Brien & Co." They opened a bank account in that name, and carried on business as partners for a period of seven months. The heads of the agreement were drawn up, but were never signed, and a draft deed of co-partnership passed from one to the other during the seven months, undergoing revision of its details. Finally, O'Sullivan refused to execute this deed when called upon by Crowley to do so, whereupon Crowley instituted an action at common law for damages and recovered a verdict for £700. It was held that the agreement being one of which a Court of equity would have had jurisdiction to enforce specific performance, the doctrine of part performance applied to take the case out of the Statute of Frauds, the parol evidence upon which the verdict was founded was properly admitted, and the verdict should be upheld: *Crowley* v. *O'Sullivan*, [1900] 2 Ir. R. 478.

As to contracts for the sale of goods, the statute itself specifies what acts of part performance may be admitted as proof in lieu of a writing.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Meagher, Longley, and Ritchie, JJ. April 4, 1914.

1. BOUNDARIES (§ II B—10)—STREET OR HIGHWAY—REFERENCE TO PLAN.

When a highway or street is referred to in a grant or other conveyance, the way, as opened and actually used, rather than as platted, is construed to be the boundary intended by the parties, but when the grant or conveyance refers to a map, the line of the way as actually surveyed is held to determine the boundary of the line.

[5 Cyc. 907, referred to.]

2. BOUNDARIES (§ II A—9)—COURSES AND DISTANCES—REVERSING CALLS.

If there is difficulty about fixing the beginning boundary in a conveyance of land, the calls may be reversed and the lines traced the other way.

[*Ayers* v. *Watson*, 137 U.S. 584, applied.]

3. DEEDS (§ II C—31)—DESCRIPTION OF PROPERTY CONVEYED—INACCURACY IN PLAN.

An inaccuracy in a plan does not control the dimensions of the parcels as set out in a conveyance of land.

[*Horne* v. *Struben*, [1902] A.C. 454; *Lyle* v. *Richards*, L.R. 1 H.L. 222; *Chelmsford* v. *Bender*, 3 U.C.O.S. 220, referred to.]

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Statement

APPEAL from the judgment of Russell, J., in favour of defendant in an action of ejectment to recover possession of land, and land covered with water, which it was alleged defendant wrongfully, and without the consent of plaintiff, entered and took possession of, and since retained, and of which he refused to give up possession to the plaintiff.

Plaintiff claimed possession, damages, and a declaration, with respect to the removal of a boathouse, and other fixtures, erected by defendant.

The cause was tried before Russell, J., who dismissed the action, on the ground that, in order to recover, it was necessary for plaintiff to locate the southeast corner of a lot of land, known as the "Boggs lot," and that he had failed to satisfy the burden resting upon him.

The appeal was allowed, LONGLEY, J., dissenting.

H. Mellish, K.C., and *W. C. Macdonald*, for the plaintiff, appellant.

C. J. Burchell, and *V. J. Paton*, K.C., for the defendant, respondent.

GRAHAM, E.J.:—This case involves a dispute as to the boundary line between the parties. The plaintiff claims that a boathouse built by the defendant encroaches upon him. Graham, E.J.

The common title to the area in dispute was formerly in Alexander McKay, who, by divers conveyances became the owner of a lot of land in the Dartmouth cove 150 feet long by 87 feet wide. The lot had been acquired as a water lot by the Honourable Enos Collins, first by deed dated August 17, 1830, and then by a confirmation grant from the Crown. It is common ground that the grant really covers the same area as that deed, that is 87 feet in width, the 60 feet therein inserted is a mistake.

McKay, on August 15, conveyed to John P. Mott thirty-two feet off the northern side of this lot, and this afterwards, by divers conveyances became vested in the plaintiff. Later McKay conveyed to the Diocesan Church Society, with other land to the south, the balance of the lot, bounding it on the north by

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the Mott lot, and this became vested in the defendant, that would be fifty-five feet off the Enos Collins lot on a street now called King street.

The learned Judge who tried the case thought there was not sufficient evidence on which to determine the location of the plaintiff's lot, and he also thought that if the positions were reversed, the defendant would have the same difficulty in respect to his lot. That is rather an unusual circumstance in litigation. However, by deciding there was no evidence, the facts are open in the Court of Appeal.

It is necessary to go back a little in order to get the point of commencement for the Collins lot. The Collins lot, in the deed, is described as follows, and there is a plan annexed to the grant, both also in evidence:—

All that certain water lot and land covered with water situate and being in the Dartmouth Cove in Dartmouth in the Province aforesaid described as follows, that is to say, beginning at the southwest angle of a water lot granted to Thomas Boggs, Esquire, in the Dartmouth Cove aforesaid, thence running north fifty-five degrees east one hundred and fifty feet, thence south forty-five degrees east eighty-seven feet more or less, thence south fifty-five degrees west one hundred and fifty feet, thence north forty-five degrees west to the place of beginning, being bounded on the north by a water lot granted to the said Thomas Boggs, and on the south by the water lot granted to the said Enos Collins and Joseph Allison and being the same lot formerly owned by Samuel Starbuck and Timothy Folger and purchased from them by the said Lawrence Hartshorne, deceased, and Jonathan Tremain, deceased.

It will be noticed that the southwest angle of the water lot granted Thomas Boggs is called for. The Thomas Boggs water lot is No. 2 in the grant of July 13, 1811, which, with the plan annexed is in evidence. No. 2 lot is on a public street, now King street, and this is the description of lots one and two:—

Two pieces of land in part covered with water, situate, lying and being in front of the dwelling-house and premises of said Boggs in the town of Dartmouth and county of Halifax, and abutted and bounded as follows, viz.: The piece of land marked number one on the annexed plan, beginning at the south-east angle of said Boggs' land on the margin or line of the public street, from thence to run southerly in a right line with the western side of line of said street, one hundred feet or until it comes in a right line with a store or building, the property of J. Tremain, Esquire, thence westerly in a right line along the northern side of said

building sixty-two feet or until it comes to the northwest angle thereof then at right angles southerly along the western side line of said building, thirty feet, thence at right angles westerly four hundred and seventy-eight feet thence at right angles northerly ninety feet, thence at right angles easterly three hundred feet or until it meets the shore at the common high water mark, then at right angles forty feet or until it meets the southwest angle of said Boggs' land, thence along the front line of the said Boggs' land two hundred and forty feet or until it meets the place of beginning. And the piece of land marked on said plan number 2 begins on the east side of the public street at the distance of sixty feet measuring in a right line easterly from the commencing point of the above described piece of land, from thence measuring easterly at right angles with the line of said street one hundred and fifty feet, thence at right angles southerly one hundred feet, thence at right angles westerly one hundred and fifty feet or until it comes to the eastern side line of said street, thence northerly along the line of said street one hundred feet or until it meets the place of beginning, containing in the whole of both pieces of land one acre and twenty-seven rods.

The plan annexed is of importance.

Lot 1 calls for another lot of Thomas Boggs, the house and garden lot acquired from the committee of a lunatic, Hart, by deed dated July 26, 1810. The description is as follows:—

All that lot piece and parcel of land situate lying and being in the town of Dartmouth being an oblong square lying between division letter Q and a small pond and measuring on the streets of the said town from the east to the westward *two hundred and forty feet* and from the north to the southward *three hundred and twenty feet* containing one acre and three-quarters.

The boundaries are three streets; a street now called Boggs street on the north, the public street now called King street on the east, and the street now called Prince Edward street on the west.

The defendants put in evidence the title before that date back to the Crown. It commenced Sept. 10, 1750. Survey to Benjamin Green of this whole point surrounded by water on all sides and on the north by stakes, which, of course, are of no service now. But, in the next conveyance, May 7, 1763, Green to Bernard & Rutt, there is the following description of this point:—

All that certain tract of land situate lying and being on the east shore of the harbour of Halifax, aforesaid, commonly called and known by the name of Green's Point, bounded on the east, south and west by

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the harbour and cove of Halifax, alias Dartmouth, and on the north by the front street of said town containing by estimation 10 acres, more or less.

This description is cited in some of the later conveyances, viz., that to Brook Watson and that from Abbot to Cochran, October 7, 1784, and that from Cochran to Wallace of February 7, 1805.

The next description is only of part of the point, Wallace to Hart, June 25, 1807, and is the same description as that contained in the deed from Hart's committee to Boggs.

Now, Front street mentioned in those early descriptions is Boggs street, and the defendant's witness, the surveyor McKenzie, in his examination-in-chief proves that Boggs street was called Front street; he says, p. 16:—

Q. The grant to Benjamin Green included the whole of the point? A. Yes, extended from about Boggs street south, including the whole point. At the time of that grant the Boggs street was not named at all. Front street was not named until about 1763. Boggs street was called Front street.

The importance of this is, that it shews that this street, now Boggs street, had an existence in 1763, before there was any map of the town in existence. Therefore, that the descriptions referred to an actual street and, as I shall endeavour to shew, not to a street on a plan on which the defendants have built up their theory.

The Crown land plan of Dartmouth is not earlier than 1800. The recital in that ancient deed of the existence of Front street is evidence: *Morris* v. *Callanan*, 105 Mass. 129. It is a deed really in the chain necessary to fix the boundary of the common title, and, moreover, was put in by the defendant. Mackenzie, the defendant's surveyor, on his plan puts Boggs street where he thinks it ought to be according to the Crown land map of Dartmouth made afterwards, and on that map, all neatly laid off in rectangular figures, Boggs street runs parallel with Portland street and other streets. But a Boggs street in actual use never was there and never could have been there. There is original rock there with an elevation about 15 or 20 feet above the actual street in use.

The defendant's surveyor says:—

Q. Between what you have marked as the north original line of Boggs street and what you have marked as the south original line, there is this big embankment? A. A high hill, yes.

Q. The street could not go through that without tremendous expense? A. Not without deep cutting.

And his cross-examination shews what would happen if this theory of his was carried out:—

Q. So, to put Boggs street where it should be according to the Crown land plan, you would have to shift it back 17 feet further? A. Yes.

Q. You would also have to change the line from Water street to the dock? A. You would not change the direction.

Q. You would also have to move the public dock 17 feet further to the north? A. Yes.

Q. To make it conform exactly to the given distance? A. Yes.

Q. To give the lots there, their proper width, you would have to move the public dock and the line 17 feet further north? A. Yes.

Q. In practice usually these grants over-run? A. As a general thing.

Q. This point "B" that you located as the northwest corner of the Boggs water grant, where will that come on the ground in relation to the building that is there, would it come north of the building? A. I think it would come, speaking from memory, pretty well toward the north end of that building.

Q. *You put that building in the Boggs' water grant?* A. *Partly, if not all. I should think very nearly the whole building.*

Q. How many feet would that be? A. About thirty, more than thirty.

Q. What frontage do you give Mr. Evans on King street? A. 55 feet.

Q. According to your scale, your survey? A. I give him 55 feet.

Q. You place our line at the point "B.B." Do you know that his deed bounds on the grant from McKay to Mott? A. Yes.

Q. You located that at the point "B.B."; tell us the frontage you gave him on King street according to your survey? A. 85 feet.

Q. His deed calls for 55 more or less? A. Yes.

Q. At the south end of King street there is a very old building marked "Z" on your plan? A. Yes, I would take it to be very old, quite old, perhaps 40 years old.

Q. Measuring from that building "Z," taking that to be the south side of Main street, what frontage then would you have for Mr. Evans? A. 4½ feet more, that would be about 90 feet.

Q. The grant to Enos Collins, according to your plan would be about 120 feet wide? A. Somewhere about that.

Q. The grant itself calls for 60 feet? A. Yes, but it is bounded north and south by the older grants.

Q. According to this plan, the north side of the boathouse, produced west in a straight line would come north of the main street as shewn on your plan? A. It would come north of the fence and building, through the building and north of the fence.

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Q. In other words, the north line here of Main street is not at right angles to King street? A. No.

Q. I understand that on the ground east of Prince Edward street the north line of Boggs street as it exists on the ground is indicated by the remains of an old fence? A. For a short distance, perhaps 50 feet.

Q. Further along towards King street? A. The top of the cutting is about in line with the remains of the old fence, and also roughly in line with the terrace near King street.

Q. The street line as on the ground is indicated on your plan? A. Yes.

Q. It shews the north line of Boggs street, at the point "H"? A. Yes.

Q. The northern line of Boggs street on King street would be at "H" on your plan? A. Yes.

Q. And that is 55 feet south of where you say it should be? A. No, 39.8 feet.

Q. That accounts for the whole difference between you and the other surveyor? A. Yes, just about.

Q. You make the Evans property 120 feet as against 87? A. Something near that.

I think that the deed of July 26, 1810, when it referred to the street now Boggs street, referred to a street then in actual use, and not to a street on a plan.

In 5 Cyc. 907, it is said:—

> When a highway or street is referred to in a grant or other conveyance, the way, as opened and actually used, rather than as plotted is construed to be the boundary intended by the parties, but when the grant or conveyance refers to a map, the line of the way as actually surveyed is held to determine the boundary of the line.

I refer to *Barrows* v. *Webster*, 144 N.Y. 422; *Sproule* v. *Foye*, 55 Maine 162; *O'Brien* v. *King*, 49 N.J. 84.

But to shew that the defendant's surveyor's plan and his theory are untenable, and it lends great assistance to the plaintiff's case, I return to the Crown grant of Thomas Boggs of 1811 and the plan annexed. The distance between Boggs street and the street now Main street to the south, that is the depth of the house and garden lot, and the lot No. 1 together from north to south, is given at 430 feet; while on the plan compiled by Mackenzie, that distance is at least 30 feet more. Besides Main street, or the south side of it, is, as I shall presently endeavour to shew, well fixed on the ground, and taking the distance from Main street we ought to have the locality of Boggs street, whether the actual street or a street on a plan. In pass-

ing, I think that though the house and garden lot is spoken of as "an oblong square" in the first deed, the conveyance was laying hold of a mere likeness, and not necessarily one exact enough to lead to the conclusion that the lot itself was rectangular at every corner.

The width of Boggs street is shewn to be 55 feet, by a conveyance put in by the defendant, and it is shewn to be 55 feet by scaling the Boggs grant. The surveyor for the plaintiff, in order to get a starting point on Boggs street, commenced at the northwest corner of Prince Edward street (the next street parallel to King street) and Boggs street at which corner there was a fence, and measured across, south 55 feet, which brought him to the south side of the concrete sidewalk on the south side of Boggs street, placed there by the town, and buildings on the street. Then he took a line at right angles to Prince Edward street (which, as I said, is parallel to King street) and King street, and this continued line gave him the corner of King and Boggs street,

This point was north of the stone wall and picket fence on the north side of the Boggs house and garden lot, which he would have been justified in taking for the corner, but if he had taken that, it would have been so much further to the south and that much worse for the defendant. But, of course, he had to reckon with Main street. There is on the northwest corner of the house and garden lot, a house, and a fence running south on Prince Edward street, and the distance across Prince street between the houses is 55 feet. From the northern line of Boggs street he measured 320 feet, the depth of the house and garden lot. That point corresponded with the boundary line on the east side of King street, between the plaintiff's land and his neighbour Webber's to the north. The iron pin which marks the boundary between them is recent, of course, but the line of occupation between them is always evidence in a case of this kind.

Measuring the distance south from the iron pin or the termination of the 430 feet, it shewed that the boathouse encroached to the extent of four feet five inches upon the plain-

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tiff. The distance between the side lines of the house and garden lot corresponds with the dimension given in the deed.

The defendant's surveyor seeks to displace this survey by going to the north as far as Portland street and evolving a different street line by taking the general course and a different right angle. I think that this is not more likely to be correct than Knight's mode of taking the opposite corner. There is, in my opinion, evidence sufficient to carry this case to a jury and as between the two theories the plaintiff's survey is in the result, I think, more correct.

Then there is the description in the defendant's deed of September 22, 1884. The last return call of this description, in my opinion, greatly strengthens the plaintiff's case.

It has been long established that if there is difficulty about fixing the beginning boundary, you may reverse the calls and trace the lines the other way. In *Ayers* v. *Watson*, 137 U.S. 584 at 604, the Court said:—

> As already intimated, the Judge was right in holding as he did . . . that the beginning corner of a survey does not control more than any other corner actually well ascertained and that we are not constrained to follow the calls of the grant in the order said calls stand in the field notes, but are permitted to reverse the calls and trace the lines the other way, and should do so, whenever by so doing, the land embraced would most nearly harmonize all the calls and the objects of the grant.

This is the description:—

> All that piece and parcel of land and land covered with water, situate lying and being on McKay's Point, so called, in Dartmouth, more particularly described as follows, that is to say, beginning on the east side of King street at the southwest angle of land conveyed by the said Adam McKay to John P. Mott; thence running easterly along the south side line of said Mott's land one hundred and fifty feet into the Dartmouth cove (so called) thence southerly and westerly along the line of the water grants six hundred and forty-one feet until it comes to a point distant three hundred and eighty feet from the south side line of a street running along the north side of the land now under description; thence northerly three hundred and eighty feet to the said last mentioned street; thence easterly along said street one hundred and eight-three feet seven inches until it meets the eastern side of King street aforesaid and thence northerly along King street fifty-five feet more or less to the place of beginning being all the lands and premises owned by the said Adam McKay on said McKay's Point at the time of said mortgage according to a plan of the same annexed to said mortgage.

This fixes the place of beginning, viz., northwest angle of the lot previously conveyed by McKay to John P. Mott, and puts the defendant's land to the south of that point.

The south street line of Main street is well fixed on the ground by an old building of the defendants, which, with the wall of another building of his on King street, forms a right angle shewn in photograph G. 10. There are two other buildings of the plaintiff and one of the defendant's and fences between, which fix the street line for this distance of 183 feet, 7 inches. From this angle the defendant is entitled to go north only 55 feet. Now the boathouse extends north of it fifty-nine feet five inches. True, the words "more or less occur," but in a survey in which inches are taken into consideration, the words "more or less" are not very elastic.

Then to return to the description of the Enos Collins water lot, it purports to be bounded on the south by the water lot granted to the said Enos Collins and Joseph Allison, dated April 8, 1826. A water lot around the whole shore of the point and the description and the plan of it are in evidence. The description refers to a street crossing Dartmouth Point and that street is delineated on the plan annexed to the grant. It is clearly Main street, so that one looks on the south side of Main street prolonged for the southern boundary of the Enos Collins lot.

At the hearing before us, the defendant put in the plan which is referred to in the description in his deed. It really illustrates the point I have been making from the description; but having got it in evidence, the defendant now seeks to make use of it for another purpose in his favour. On this plan there is shewn among a good many other things a "breast-work, stone and wood," and he contends that he is entitled to go as far north as the north side of that breast-work as it is on the ground. Inasmuch as the north side of that breast-work is fifty-nine feet five inches north from the Main street corner on the ground (see evidence of Jost: "Q. From the north corner of the boathouse to the line of Main street, was what? A. That is fifty-nine feet five"), and the plan shews it is to be 55 feet only, the plan

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is in its delineation of the locality of the breast-work inaccurate. It is delineated too far to the north. There is no reference to the breast-work in the description in the deed, it is not incorporated and the reference to the plan is only for the purpose of shewing the lines under description, not other things outside of that in respect to which surveyors are not likely to be particular when they make plans. The description mentions (Main) street, it does not mention this breast-work.

An inaccuracy in a plan would not control the dimensions in the deed: *Horne* v. *Struben*, [1902] A.C. 454 at 458; *Lyle* v. *Richards*, L.R. 1 H.L. 222 at 237; *Lord Chelmsford and Badgely* v. *Bender*, 3 U.C. O.S. 220 at 229, Robinson, C.J.

The distance from the Main street corner to the Mott lot, 55 feet being the width of Main street, at the end of which it is measured, could hardly be inaccurate. Under these circumstances, I think the boathouse is an encroachment on the plaintiff's land.

Then it is contended that the defendant has acquired a title to this breast-work and the land that far north by possession under the Statute of Limitations. It is not shewn when the breast-work, or rather the site of it, was first constructed. Whether when the two parts of the Collins lot were all one property under McKay, when it would not mean anything, or after Mott's lot had been sold to him, when there might be a presumption that it was partly on both properties. But, at any rate, Mackenzie says (I don't know how he estimates it) that, "the bottom logs were fifty or sixty years old, at least, probably a great deal older." One witness says he remembers it or the foundation of it 40 years before the trial. No one is shewn to have effected any repairs upon it or to have exercised any acts of ownership in respect to it until 19 years before the trial. The public had been in the habit of dumping rubbish there. It was under water except at low tide. It is shewn that the defendant placed repairs on it 19 years before the trial, not earlier. This period is too short for our statute. And I think that there was no exclusive, continuous or notorious possession proved. Indeed, the defendant himself, regarded the question as doubtful, and until recently, did not assert his right. I think the Statute

of Limitations does not bar the plaintiff's remedy. The negotiations as to a settlement on a compromise line never came to a conclusion. The alleged terms of reference were not carried out and anything Mr. Brookfield said about being satisfied, if said, would not bind the incorporated company.

For these reasons, I think, the appeal should be allowed and the plaintiffs should have judgment to recover the possession of the disputed area, the defendant having liberty to remove his boathouse. All with costs.

Graham, E.J.

TOWNSHEND, C.J., MEAGHER, and RITCHIE, JJ., concurred with GRAHAM, E.J.

Townshend, C.J.
Meagher, J.
Ritchie, J.

LONGLEY, J. (dissenting):—This is a case in which the plaintiff is seeking to trace his boundaries five feet over the boundaries now held by the defendant. In the case of land, this would require strict and conclusive proof, and in land covered by water, as most of this is, it would require very clear and sufficient proof. I do not find in this case that there is any evidence that justifies me in finding for the plaintiff. The defendant has had a wharf on the property, and these five feet which are now applied for by the plaintiffs would take five feet off the side of the wharf. This wharf has been in existence for fifty or sixty years, and has been recently renewed. The plaintiffs, by their agent, S. M. Brookfield, agreed to leave the matter to the determination of one man, W. A. Hendry. Mr. Hendry went over the place and viewed it and made his calculations, and awarded all the land now occupied by Evans to Evans, and gave the company the remainder. Mr. Brookfield was satisfied with this, but, upon placing it before the company, the directors of which are in England, they would not agree to it, and six years have been allowed to go by, and the company have at last taken action. Five feet of land, under ordinary circumstances, is a very trifling matter, one way or the other, and a person would rather avoid a lawsuit to obtain this, but, in order to obtain this, it is necessary for him to prove conclusively that he is entitled to it, and in this case the plaintiff has failed to do so.

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If you take measurements at a point beginning north, no proper measurements will bring the defendants into possession of as much land as they claim from the plaintiff. At last another plan was brought in containing the measurements from Main street, and it is assumed that the street is a certain distance wide. The street is no street at all near this place and does not maintain any width and such measurements are to be treated with lightness when you consider that there is a wharf at stake, which constitutes the natural boundary of the defendant. Under all the circumstances, I am inclined to the view that the plaintiff has not conclusively proved his case. That was the judgment of the learned Judge who tried the cause, had all the witnesses before him, and that is the opinion in which I coincide. The appeal should be dismissed.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. MORTGAGE (§ I B—8)—CONVEYANCE ABSOLUTE IN FORM—CONTEMPORANEOUS AGREEMENT—DEFEASIBLE PURCHASE OR MORTGAGE.

In determining whether a deed absolute in form was in fact a mortgage under the form of a sale or represented a *bonâ fide* sale with a contract to re-purchase, it is a fair test to ascertain if the remedies are mutual and reciprocal; and a collateral agreement which refers to the debt and interest for which the property is held and which stipulates for the transferee having full power to dispose of same, is evidence of the transaction being a mortgage rather than a defeasible sale with right of re-purchase.

Statement

APPEAL from the judgment of Morrison, J., in favour of the plaintiff in an action to have a conveyance, absolute on its face but qualified by a contemporaneous agreement, declared a mortgage transaction only.

The appeal was dismissed.

Sir C. H. Tupper, K.C., for the defendant, appellant.

W. J. Whiteside, K.C., and *W. F. Hansford*, for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss this appeal.

No useful purpose would be served by my referring to the

evidence in detail, suffice it to say that I have read it all and find it amply sufficient to sustain the judgment appealed from.

Irving, J.A.

IRVING, J.A.:—I agree with the conclusion reached by the learned trial Judge. The two documents (exhibits 5 and 3) of September 24, 1907, and Cleary's acceptance of the thirty-day proposition, satisfy me that the transaction was in the nature of a mortgage to secure the repayment of the sum of $500. The omission to register ex. 5 with the mining recorder supports that view.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A., concurred in dismissing the appeal.

Galliher, J.A.

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

Upon the evidence, and upon the face of the documents themselves, taking exhibits 5 and 3 together, there can be no question as to what the intention of the parties was, and that exhibit 5, though absolute on its face, was merely a security for a debt. The whole transaction shews that.

I have gone carefully through the authorities cited by Sir Charles Tupper, but when you start to apply them to the facts in this case they are easily distinguishable. In nearly all of them upon the documents themselves and the facts in evidence it was held that the transaction was an absolute sale with the right to re-purchase within a given time. Here, neither upon the documents themselves, nor upon the evidence, could any such conclusion be arrived at.

On the question of costs I see no reason for altering the judgment of the learned trial Judge. The sale of the property was not carried out by the defendant, but by the trustees for the different interest holders. The defendant's contention is, and was before action brought, that he was not a mortgagee, but an absolute owner, under exhibits 5 and 3, of all the interests of the deceased Cleary. He had in his hands at the time action brought, moneys paid him on account of that interest largely in excess of what he could claim as mortgagee, and un-

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der such circumstances, the plaintiffs in their statement of claim offering to redeem, no tender was necessary.

McPHILLIPS, J.A.:—This is an action brought to establish the interest of the plaintiffs in certain mineral claims known as the South Valley properties, the plaintiffs being respectively the son and widow (also administratrix) of the estate of the late Francis Joseph Cleary, and to have it decided that a certain instrument dated September 24, 1907, and a certain other instrument dated September 24, 1907, both made between Francis Joseph Cleary and the defendant Robert Aitkin were in fact documents by way of security and given by way of mortgage to the defendant Aitkin, and not constituting an absolute transfer to the defendant Aitkin, and for an account from the defendant Aitkin of all moneys received from the sale of the properties. The properties were held in trust by one William M. Humphreys, of the city of Los Angeles, State of California, one of the United States of America, to the extent of ten forty-eighths interest therein for the late Francis Joseph Cleary and one George C. L. Miller.

On or about October 9, 1912, Humphreys sold under agreement, the properties at the price or sum of $25,000, and when action brought, the sum of $14,000 was alleged to have been received by the defendant Aitkin and the said George C. L. Miller. The defendant Aitkin contended at the trial that the sale to him was an absolute one and relied upon the following documents to support his contention:—

Exhibit 5.

I, Francis J. Cleary, hereby assign and transfer to Robert Aitkin all my interest in the South Valley properties held under an agreement by John F. Humphreys and W. M. Humphreys in trust for George C. L. Miller and F. J. Cleary and dated November 1, 1904, and I hereby authorize Robert Aitkin to sign any documents that may be required to transfer same. Value received for one dollar.

Witness: John J. Banfield, F. J. CLEARY (Seal).
24 Sept. '07.

Exhibit 3.

Memorandum.

Customs, Canada, Sept 24, 1907.

To F. J. Cleary, Esq., Vancouver, B.C.

In reference to the ($500) five hundred dollars due me and interest

therein, for which I hold an assignment of your South Valley property, it is agreed between us that if the (8500) five hundred dollars is not paid within (30) thirty days from this date I have full power to dispose of same.

R. AITKIN.

Witness: Geo. Miller. I hereby agree to this agreement.

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The learned trial Judge, Morrison, J., found upon the facts as adduced before him that the sale was not an absolute one, but was in its nature a mortgage transaction, and granted a decree in the terms of the prayer of the statement of claim.

The defendants appeal, the defendant company, by its counsel stating that it would abide by any order the Court might make, the defendant Aitkin still contending before this Court that he became the absolute owner of the interest in the properties assigned and transferred to him by the late Francis Joseph Cleary under the instrument of transfer of September 24, 1907.

In my opinion, it is quite unnecessary to specifically set forth or remark upon the evidence upon which the learned trial Judge proceeded, it is quite sufficient to say that it is ample to support the finding of fact of the learned trial Judge, and it is idle to attempt to canvass it as it, in my opinion, wholly fails to support the contention as advanced by the defendant Aitkin, that he should be held to be the absolute owner of the properties and be under no obligation to render an account in regard thereof. I might pause to remark that the documents relied upon as hereinbefore set forth, taken in connection with the attendant facts fully support the plaintiffs' case as made out at the trial.

It is only necessary, perhaps, to remark that exhibit 3 indicates in itself the true motive of the transaction, *i.e.*, at most it was a power of sale but never exercised, as Humphreys, the trustee, effected the sale, and if the defendant Aitkin had effected a sale, he would have been compelled to account for the moneys received to the same extent as a mortgagee would be required to do when exercising a power of sale.

The lapse of time here has not been great when the facts are looked at and the sale as made by the trustee was only made in 1912 about five years after the transfer to Aitkin, the late

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Francis Joseph Cleary dying in the same year and having been ill and unable to attend to any business for some three years before his death.

There was no entry into possession of the properties or any exercise of ownership or interest in the properties by the defendant Aitkin, and there is no evidence to shew that the defendant Aitkin disbursed any money in relation to the properties, in fact it was conceded that he did not and that all necessary outlays were made by the trustee.

In *Waters* v. *Mynn* (1850), 14 Jurist 341, 342, 89 R.R. 717, it was held, where an absolute assignment of a reversion was made, with a memorandum for reconveyance or repayment with interest in six months, and nothing done for eighteen years—that the transaction was a mortgage. The Vice-Chancellor said:—

> My opinion is, that it is impossible to attend to the circumstances without coming to the conclusion that it was a mortgage transaction.

It is likewise clear in the case as presented to this Court, in my opinion.

The learned counsel for the appellants, Sir Charles Hibbert Tupper, very ably argued the appeal from the point of view that the case must be looked at as one within the principle of *Williams* v. *Owen* (1840), 5 My. & Cr. 303, 41 Eng. R. 386, also referring to *Gossip* v. *Wright* (1863), 32 L.J. Ch. 648, at 652-653; *Lisle* v. *Reeve* (C.A.), affirmed *sub nom. Reeve* v. *Lisle* (1902), 71 L.J. Ch. 768, [1902] A.C. 461, and other cases, that the transaction was in effect a conveyance by way of absolute sale, accompanied as in *Williams* v. *Owen, supra*, by a contemporaneous agreement for reconveyance upon payment upon a day certain.

With all deference to the argument advanced, the transaction was not one of that nature, here there was no agreement for reconveyance as in *Williams* v. *Owen, supra*, and no independent transaction not part of the mortgage transaction as in *Lisle* v. *Reeve, supra*. Upon the surrounding facts and circumstances this amounted to only a mortgage transaction.

The Lord Chancellor (Lord Cottenham) in *Williams* v. *Owen*, 5 My. & Cr. 303 at 307, [41 Eng. R. 386], said:—

The question always is, was the original transaction a *bonâ fide* sale with a contract for repurchase or was it a mortgage under the form of a sale?

In *Mellon* v. *Lees*, 2 Atk. 494, Lord Hardwicke puts the case thus:—

As to the contract whether it is a transaction that is in its nature a mortgage or a defeasible purchase and subject to a repurchase?

In *Goodwin* v. *Grierson*, 2 B. & B. (Ir. Chy.) 274, 12 R.R. 82, Lord Manners puts the case upon the same ground and says:—

The fair criterion by which the Court is to decide whether this deed be a mortgage or not I apprehend to be this, are the remedies mutual and reciprocal? has the defendant all the remedies a mortgagee is entitled to?

The Lord Chancellor proceeded and said:—

Tried by this test there would be no doubt that in this case the transaction was not a mortgage.

In my opinion, however, if this test is obligatory, we have that which was wanting in *Williams* v. *Owen*, 5 My. & Cr. 303, 41 Eng. R. 386, the debt is set forth and there is a power of sale, and the document, ex. 3, refers to that debt in this way . . "for which I (the defendant Aitkin) hold an assignment of your South Valley property . . ." this clearly imports the holding of the property as security or by way of mortgage.

The Lord Chancellor, at 308, further said:—

In *Sevier* v. *Greenway*, 19 Ves. 413, Sir W. Grant said that if the case had rested upon the conveyance of November, 1799, possession being taken, he did not see why it should be considered otherwise than as a sale. The transaction of November, 1799, was an absolute conveyance as to a purchaser with a proviso for reconveyance to the apparent vendor upon payment of the purchase money within two years. Subsequent instruments between the parties described the premises as "standing upon mortgage" and upon that Sir W. Grant decreed a redemption.

Trying this case by the principle so long established and settled upon such high authority, what is there to shew that this transaction was in its origin a mortgage and not a sale, with a provision, under certain conditions, for a repurchase.

If the transaction was a mortgage, there must have been a debt; but how could Owen have compelled payment?

In the case we have before us, everything, to my mind, is answered to shew that "*in its origin*" the transaction was one

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of mortgage, the contemporaneous agreement gives the amount of the debt, that it carried interest, that after thirty days, if there was default in payment, a power of sale could be exercised, the remedies would be cumulative—as in all mortgage transactions—and nothing prevented the debt being sued for.

Now, the present case is not one of subsequent agreement, all that was done took place on the same date, and the most that can be said upon the facts in favour of the defendant Aitkin is, that he had assigned and transferred to him the interest of the late Francis Joseph Cleary in the properties with a contemporaneous agreement, evidencing that the assignment and transfer in the form of an absolute sale was in fact a mortgage or security for the payment of $500 and interest, the money to be paid in thirty days from September 24, 1907, and at most, the position is that the defendant Aitkin still has his security, the money being long overdue, but he has not on his part taken any proceedings by way of foreclosure or sale, nor has he sued for the amount of the debt due to him; is his position any better than that of any other mortgagee upon an overdue mortgage, and is not the position one that entitles the mortgagor, his heirs or legal representatives to come in and redeem? In my opinion, that is clear.

The case of *Gossip* v. *Wright* (1863), 32 L.J. Ch. 648, was referred to by Cozens-Hardy, L.J., at 52, in the report of the decision of the Court of Appeal in *Lisle* v. *Reece* (1902), 71 L.J. Ch. 42, and he there said, "I agree, I desire to adopt the language of Vice-Chancellor Kindersley in the case of *Gossip* v. *Wright*, where he says at 653:—

> In that which it is to be a mortgage transaction, that is a security the Court will not allow the right of redemption to be crippled and hampered by any arrangement between the parties at the time. That is well established as a general rule, I need not say like any other general rule that even that broad rule is liable to some exceptions. For example, there are one or two cases of this sort, one where the object of the transaction was not merely a loan of money, but one party meant to benefit the other. It was a sort of settlement between relations, and then the Court although it did cripple the right of redemption upheld the transaction. However, there is no doubt that the broad rule is this: the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intend to be a security either by any contempor-

aneous instrument with the deed in question, or by anything which this Court would regard as a simultaneous arrangement on part of the same transaction. That the Court will allow the parties by a subsequent arrangement to enter into a transaction by which the mortgagor sells or releases or conveys or gives up (call it what you will) his equity of redemption and makes the estate out and out the estate of the mortgagee is clear.

Cozens-Hardy, L.J., then proceeds discussing the facts of the case then before him:—

Now, applying that principle, and, in the absence of a particle of either allegation or evidence to shew that the two deeds of June and July, 1898, were part of the same transaction, it seems to me to come simply to an arrangement made after a mortgage security between a mortgagor and mortgagees.

Now, upon the facts of the present case we have the one transaction at one and the same time, and *Gossip* v. *Wright*, *supra*, is clear authority that, in view of the facts, this is a case where the broad rule as stated applies.

The case of *Alderson* v. *White* (1858), 2 DeG. & J. 97, 44 Eng. R. 924, was a very different case, and upon the facts was not held to be a mortgage transaction, further, that the party went into possession and it was not until after the lapse of thirty years that the bill to redeem was filed. The Lord Chancellor (Lord Cranworth) there said at 106, [44 Eng. R. 928]:—

The rule of law on this subject is one dictated by common sense, that *prima facie* an absolute conveyance, containing nothing to shew the relation of debtor and creditor is to exist between parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have the right to repurchase. In every such case the question is, what upon a fair construction is the meaning of the instruments?

In the present case we have "the relation of debtor and creditor" and all the earmarks which demonstrate that the transaction was one in the nature of security, *i.e.*, a mortgage transaction.

In the *Manchester, Sheffield and Lincolnshire R. Co.* v. *North Central Wagon Co.* (1888), 58 L.J. Ch. 219 (H.L.), it was held that the transaction was not a security for the payment of money. Lord Macnaghten, at p. 225, refers with approval to

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the language of Lord Cranworth in *Alderson* v. *White*, *supra*, above quoted, and said:—

> In all these cases the question is, what was the real intention of the parties?

In the present case, can there be any doubt about the real intention? Unquestionably, if there was default in payment there was the power of sale, but could the defendant Aitkin have sold to himself? Obviously no—but then it may be said that that was unnecessary as the sale was absolutely complete—then why the power to sell? It is incontrovertible that the transaction was one of security for the payment of money and not an out-and-out sale with a right of repurchase not exercised, as contended by the appellant Aitkin.

With regard to *McMicken* v. *Ontario Bank* (1892), 20 Can. S.C.R. 548, where it was held that

> to induce a Court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only, the evidence of such intention must be of the clearest, most conclusive and unquestionable character,

the present case has this strong feature, that here we have contemporaneous documentary evidence establishing the transaction as one of mortgage and security for the payment of money, whilst, in the case before the Supreme Court there was merely parol evidence of the interested parties. Taschereau, J. (afterwards the Rt. Honourable Sir Henry Elzear Taschereau, Chief Justice of Canada), at 550, said:—

> The case turns mainly upon the questions of fact, and we cannot, in my opinion, interfere with the finding of the learned Judge at the trial, concurred in as it was by the Court *in banco*.

In the present case we have the finding of the learned trial Judge in the converse way to that—in *McMicken* v. *Ontario Bank*, *supra*, here the finding is that it was a mortgage transaction, there it was held that the deed absolute in form was intended to so operate and was not intended to operate as a mortgage.

In *Samuel* v. *Jarrah Timber and Wood Paving Corporation*, (1904), 73 L.J. Ch. 526 (H.L.), [1904] A.C. 323, it was held that a mortgagee is not allowed at the time of the loan to enter

into a contract for the purchase of the mortgaged property. Lord Lindley, at 528, said:—

In *Lisle* v. *Reeve* (1901), 71 L.J. Ch. 42, [1902] 1 Ch. 53, Mr. Justice Buckley suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption, but although his decision was affirmed first by the Court of Appeal and afterwards by this House (*Reeve* v. *Lisle*, 71 L.J. Ch. 768, [1902] A.C. 461) the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. The Irish case, *Re Edwards' Estate* (1861), 11 Ir. Ch. R. 367, is to the same effect.

In the present case, the assignment, together with the memorandum shewing that the assignment was by way of security for a debt, was all one transaction, and may be said to be the original mortgage transaction, and there was no subsequent and entirely separate transaction, which the law requires to negative the continuance of the original condition of things.

Lord Lindley, continuing in *Samuel* v. *Jarrah*, *supra*, at 529, said:—

Lord Hardwicke said in *Toomes* v. *Conset*, 3 Atk. 261: ("This Court will not suffer in a deed of mortgage any agreement in it to prevail that the estate become an absolute purchase in the mortgagee upon any event whatsoever." But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine "once a mortgage always a mortgage" means that no contract between a mortgagor and a mortgagee, made at the time of the mortgage and as part of the mortgage transaction, or in other words as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage. The principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is.

In *Fairclough* v. *The Swan Brewing Company, Ltd.* (1912), 28 Times L.R. (P.C.), 450, being an appeal from the Supreme Court of Australia, Lord Macnaghten, at 450, 451, said:—

The arguments of counsel ranged over a very wide field. But the real point was a narrow one. It depended upon a doctrine of equity which

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was not open to question. "There is," as Vice-Chancellor Kindersley said in *Gossip* v. *Wright*, 32 L.J. Ch. 653, "no doubt that the broad rule is this; that the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security, either by any contemporaneous instrument with the deed in question or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction." The rule in comparatively recent times was unsettled by certain decisions in the Court of Chancery in England, which seemed to have misled the Judges in the full Court. But it was now firmly established by the House of Lords that the old rule still prevailed and that equity would not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. Counsel on behalf of the respondents admitted, as he was bound to admit, that a mortgage could not be made irredeemable. That was plainly forbidden.

The rule which is to guide the Court is firmly established by the Judicial Committee, in *Fairclough* v. *The Swan Brewing Company Ltd.*, *supra*, and that rule is the doctrine of equity as set forth in *Gossip* v. *Wright*, *supra*, by Vice-Chancellor Kindersley, and applying that rule to the present case, can it be at all successfully contended that the facts admit of it being said that it was not a mortgage transaction or assignment by way of security, although, in the one instrument in the form of an absolute sale? In my opinion, to hold otherwise would be to ignore the plain and unmistakable doctrine of equity which has had this very recent approval by the Judicial Committee of the Privy Council.

In the present case, the contention is that it was an absolute sale, although the memorandum shews that the assignment was intended to be a security, and as all was done contemporaneously and simultaneously, and all formed part of the same transaction, applying the rule, the Court must not allow the right of redemption to be in any way defeated.

Now, with regard to the question of costs, this is not a case where the mortgagee was in possession, disbursed moneys, made repairs and lasting improvements, nothing of that kind occurred; nevertheless, had the appellant, the defendant Aitkin, not raised an untenable defence: *Heath* v. *Chinn* (1908), 98 L.T. 858, in my opinion, he would have been entitled to his costs: *Sevier* v. *Greenway*, 19 Ves. 413; his proper course was to

have submitted to be redeemed: *Bell* v. *Cochrane* (1897), 5 B.C. R. 211 at 214, and there is authority for his being deprived, upon the facts of the case, of the ordinary right to the costs of suit in a redemption action: *National Bank of Australasia* v. *Hand in Hand and Band of Hope Co.* (1879), 4 App. Cas. 391, having set up and failed to prove an absolute title to the mortgaged property, and not only not to be allowed his costs of suit, but may have costs given against him.

In *Rourke* v. *Robinson* (1911), 80 L.J. Ch. 295 at 298, [1911] 1 Ch. 480 at 487, a redemption action, Warrington, J., said:—

> With regard to the costs of the action it was laid down by Selborne, L.C., in *Cotterell* v. *Stratton* (1872), 42 L.J. Ch. 417, 419, L.R. 8 Ch. 295, 302, which is cited in *Kinnaird* v. *Trollope*, 58 L.J. Ch. 556, 569, 42 Ch. D. 610, 619, that the rights of a mortgagee to costs "resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract."

In my opinion, the contention of the defendant Aitkin, the appellant, that the transaction was one of absolute sale not by way of security, *i.e.*, a mortgage transaction constitutes inequitable conduct which disentitles him to costs.

Further, under order 65, r. 1, marginal No. 976, the costs of the trial follow the event unless it is for a good cause otherwise ordered, save that a mortgagee who has not reasonably resisted any proceedings shall be entitled to costs—but, in my opinion, in the present case the defendant Aitkin the appellant did unreasonably resist this redemption claim.

Then, as to the costs of appeal to this Court, order 58, r. 4, marginal No. 868, reads as to costs of appeal as follows:—

> The costs of the appeal and cross-appeal (if any), shall follow the event unless the Court shall otherwise order.

This is not a case, in my opinion, when any departure from the rule should be adopted.

With regard to the other defendant, the Brittania Land Co. Ltd., it would not appear to have appealed, and it is to be observed that no pleadings were filed on its behalf; it is to be further observed that Mr. Armour, who appeared as counsel for the defendant Aitkin, also appeared for the defendant com-

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pany, and made the statement that it would abide by the order of the Court. I cannot see, under the circumstances, how any costs can be given to the defendant company nor upon what authority they could be given, although I must admit that it does seem reasonable that it should be allowed any costs reasonably put to; possibly the plaintiffs, the successful appellants will see that all proper allowances will be made in this regard, having made the defendant company a defendant in the action.

It, therefore, in my opinion, follows that the decision of the learned trial Judge was right, and that the judgment appealed from should be affirmed, and that the appeal should be dismissed.

Appeal dismissed.

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STEEVES v. MONCTON.

New Brunswick Supreme Court (Chancery Division), McLeod, C.J. April 3, 1914.

1. PARTIES (§ I A 4—46)—RATEPAYER'S ACTION—ATTORNEY-GENERAL.

A ratepayer has the right on behalf of himself and the other ratepayers, without joining the Attorney-General as a party *ex relatione*, to maintain an action against a municipal corporation to restrain acts which are *ultra vires*, where the Crown is not directly interested.

[*Brogdin* v. *Bank of Upper Canada*, 13 Gr. 544; and *Hoole* v. *G.W.R. Co.*, L.R. 3 Ch. 262, applied; *Rogers* v. *Bathurst School District*, 1 N.B. Eq. 266, distinguished; see also, as to restriction of right to sue, *Verner* v. *Toronto*, 1 D.L.R. 530.]

2. MUNICIPAL CORPORATIONS (§ II F 3—192)—PURCHASE OF LAND—MARKET BUILDING.

The fact that a municipal corporation's statutory authority was in terms to continue the market theretofore established and to establish and regulate "other markets" will not debar the municipality in case of destruction by fire of the market building so continued, from building a new market in another and more fitting location within the municipality to the exclusion of the former site, or from using the former site for other purposes.

Statement

MOTION to continue an injunction restraining the defendant municipality from erecting a market building on a new site.

The motion was refused.

Argument

M. G. Teed, K.C., for plaintiffs:—The town of Moncton was incorporated by 38 Viet. ch. 40, Acts of 1875. By sec. 47 of this Act, it was provided that the council of the town should

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regulate and manage the market or markets and establish and regulate market days and fairs. By 43 Vict. ch. 43, Acts of 1880, power was given the town council to borrow $12,000 for the construction, among other things, of a market building, and to lease grounds for the same. 46 Vict. ch. 17, Acts of 1883, sec. 20, is a consolidation of the powers previously given. The town council was authorized to establish one or more markets and purchase lands and erect buildings for that purpose. No market building was erected under this Act. By 47 Vict. ch. 28, Acts of 1884, sec. 1, authority was given the town council to borrow $20,000 for the erection of a building for a market and for other purposes. After the passing of this Act, land was purchased and a building erected and used in part for market purposes. 53 Vict. ch. 60, Acts of 1890, is a consolidation or re-enactment of the previous legislation. Sec. 84 of this Act, gives authority to continue the established market and to establish and regulate such other markets in the said city as may from time to time be necessary. The city having purchased land, erected a building and established a market therein, by virtue of this Act, has exhausted the authority given it, save that, by sec. 84 of ch. 60, Acts of 1890, it has the right of erecting other markets; but it has not the right to abandon the existing market and use the land for other purposes. Sec. 20 of the Act of 1883, shews that the word "other" in sec. 84, ch. 60, Acts of 1890, means addition, in addition to the one already in existence.

The powers of a municipal corporation are more restricted than those of a trading corporation. The limitations are well pointed out in *Ashbury Railway Carriage and Iron Company* v. *Riche*, L.R. 7 H.L. 653, 44 L.J. Ex. 185; *Wenlock (Baroness)* v. *River Dee Co.*, 38 Ch.D. 534, 57 L.J. Ch. 946. The city of Moncton has no general power to buy land. It has no authority to abandon this market and buy land for the purpose of establishing a market elsewhere.

J. B. M. Baxter, K.C., and *A. A. Allen*, for the defendant:—A municipal corporation has incidental and implied powers; such incidental powers would enable the city of Moncton to ex-

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tend its present market: *Jamieson* v. *The City of Fredericton*, 2 Allen, N.B.R. 128; read judgment of Carter, C.J., at p. 136. Sec. 84 of 53 Viet. ch. 60, gives the town council authority to continue the present market, but does not compel it to do so. The city of Moncton is not restricted from building a city hall or borrowing money, it can borrow money by sec. 53, Viet. ch. 60, Acts of 1890. A governing body like the city of Moncton must be allowed some latitude. Whether the present market is kept or a new one built, is a question for the citizens to decide. It would be restrictive of the powers of the city to say a market could not be built elsewhere: *Atty-Gen.* v. *Newcastle-upon-Tyne Corporation*, [1892] A.C. 568. The erection of this new market may be considered as an extension of the original market: *Atty.-Gen.* v. *Cambridge Corporation*, L.R. 6 H.L. 303. The power to buy the land and establish the market exists by sec. 84 of ch. 60, Acts of 1890. If the power exists, the question as to borrowing money is immaterial; but, under sec. 55 of ch. 60 of Acts of 1890, provision is made for a temporary loan: the objects are not restricted, only the amount. Chapter 84 of the Consolidated Statutes of N.B. (1903), gives general power to a corporation to acquire real estate. As to borrowing powers of a corporation, American authorities are divided. There is an implied authority here to borrow money: Dillon on Corporations, 5th ed., secs. 278-293.

(THE COURT:—Is the building of a market one of the incidental powers of a corporation?) No, but if power has been given to build a market, it would be an incidental power to extend the market. This suit should be brought in the name of the Attorney-General *ex relatione*. The ratepayers have no right to maintain the action without the Attorney-General: *Rogers* v. *Trustees of School District No. 2, of Bathurst*, 1 Eq. N.B.R. 266; *Evan* v. *The Corporation of Avon*, 29 Beav. 144.

Teed, K.C., in reply:—As to the right of a ratepayer to maintain action without the Attorney-General, it is submitted that on this continent at least, the practice is that a ratepayer, on behalf of himself and other ratepayers, may maintain an

action against the corporation to restrain acts that are *ultra vires*.

Any municipal ratepayer whose pecuniary or proprietary interests would be affected by any unlawful act on the part of the council, may maintain such an action which (strictly speaking) should be brought on behalf of himself and of all the other ratepayers similarly affected.

Biggar's Municipal Manual, 11th ed. (Ont.), p. 46, citing, *inter alia*, *Brogdin* v. *Bank of U.C.*, 13 Grant 544; *Wilkie* v. *Village of Clinton*, 18 Grant 557; *Helm* v. *Town of Port Hope*, 22 Grant 273; *Wallace* v. *Town of Orangeville*, 5 O.R. 37. Also in Manitoba, see *Shrimpton* v. *City of Winnipeg*, 13 Man. L.R. 211. In this case, Killam, C.J., refers to English, Canadian and American authorities and decided the ratepayer should maintain the action. In many of the above cases, the objection was distinctly taken and overruled. It is submitted *Rogers* v. *Trustees of Schools, Bathurst*, 1 Eq. N.B.R. 266, is clearly distinguishable. In that case the Crown was directly interested, as part of the school moneys was contributed by the province and that the Attorney-General should clearly be before the Court. Even if the Court should be of opinion that the Attorney-General should be a party or that the proceedings should be by information, it is respectfully submitted time should be given to amend as was done by Barker, J., in the *Bathurst* case, and as was done in *Caldwell* v. *Pagham Harbour Reclamation Co.*, L.R. 2 Ch.D. 221, referred to in the *Bathurst* case.

McLeod, C.J.

McLEOD, C.J.:—This is an application made by the plaintiffs for an order to continue an injunction granted by me on March 14, 1914, to prevent the defendant from purchasing land in the city of Moncton on which to erect a market building, it being contended by the plaintiffs that the defendant has no power to acquire the said lands. By 38 Vict. ch. 40 (Acts of 1875), a part of the parish of Moncton (in the county of Westmorland) was incorporated by the name of the town of Moncton, provision was made for the election of a town council, and other provisions as to the government of the town were made. By sec. 47 of the Act, it was provided that, in addition to the general powers of making by-laws for the good government of the town,

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and other powers incident thereto, especially conferred by the Act, that the council of the town should have sole power, etc., among other things, "to regulate and manage the market or markets, and to establish and regulate market days and fairs." By 43 Vict. ch. 43 (Acts of 1880), power was given to the town council of the town of Moncton to borrow money not exceeding $12,000, to be applied in the construction and erection of a building or buildings for a Courtroom, council chamber, lockup, engine and hose cart rooms, and market buildings, and to purchase or lease grounds for the same. By 46 Vict. ch. 17 (Acts of 1883), sec. 20, the town council is authorized to establish and regulate one or more markets in said town, and to purchase land and erect such buildings as might be necessary for that purpose.

It appears that, under these Acts the town council did not erect any market buildings. By 47 Vict. ch. 23 (Acts of 1884), sec. 1, the town council of the town of Moncton was authorized to borrow such sums of money not exceeding the whole sum of $20,000, to be used and applied in the construction and equipment of a building or buildings in the town of Moncton to be used for the purpose of a market, and for such other purposes as the town council might from time to time appoint and determine. Under this Act, the town council purchased land in the city of Moncton on what is known as West Market street, and erected a building on it, which was used for a city hall and for market purposes. By 53 Vict. ch. 60 (Acts of 1890), the different Acts relating to the town of Moncton were consolidated, and the corporate name of the town of Moncton was changed to the city of Moncton. Section 84 of the Act provided as follows:—

> The city council are hereby authorized to continue the market heretofore established in the town of Moncton, and to regulate the same, and to establish and regulate such other markets in said city as may from time to time be deemed necessary, and to purchase land and erect such buildings as may be necessary for that purpose, and to establish and regulate market days and fairs in said city.

It is the construction to be given to this section on which depends the question now before me. The building erected on

West Market street was destroyed by fire on February 25, last past, and the city council of Moncton has arranged to purchase land situate on East Market street on which to erect a new market building, proposing to use the land on West Market street on which the market originally was, for other city purposes. It is claimed by the plaintiffs that the city council has no power to make this purchase; that the market must be rebuilt on the land on which the market formerly stood. The first objection—or one of the objections made by the defendant—is that the action is improperly brought. It is contended that it should have been in the name of the Attorney-General *ex relatione*, and *Rogers* v. *The Trustees of the School District of Bathurst*, 1 N.B. Eq. 266, was cited in support of that contention. That case, however, differs from this in that in that case the Crown was directly interested in the matter, as part of the school moneys were contributed by the province, and, therefore, it would seem reasonable that the Attorney-General should be before the Court. In this case it is simply a question affecting the city of Moncton itself, and every ratepayer is in a sense one of the corporators of that city, and, in my opinion, the plaintiffs, in taking proceedings in this matter on behalf of themselves and all ratepayers of the city of Moncton, have a right to prevent the city from doing that which they claim is *ultra vires* its powers. That is, they claim that what the defendant is attempting to do is an absolutely illegal act: *Brogdin* v. *Bank of Upper Canada*, 13 Grant 544, was a case in which a municipal corporation after raising money on the credit of a municipal loan fund for a purpose specified in a by-law, passed another by-law diverting the debentures to another purpose, and, under this second by-law, the debentures passed into the hands of the Bank of Upper Canada, and it was held that a bill would lie by a ratepayer on behalf of himself and all other ratepayers of the municipality against the bank and the municipal corporation for the restoration of the debentures to the corporation, and a demurrer on the ground that the Attorney-General was not a defendant was overruled. The principle in this case seems to be the same as that involved in that case. The

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plaintiffs contend here that the defendant is attempting to do an illegal act, an act which they have no power to do, and therefore any ratepayer acting on behalf of himself and all other ratepayers, may take proceedings to prevent the illegal act. In *Hoole* v. *Great Western R. Co.*, L.R. 3 Ch. 262, it was held that an individual member of a corporation might maintain a bill in his own name without suing on behalf of other persons as well as himself to restrain the corporation from doing an act which is *ultra vires*. At page 277, Sir John Rolt says:—

> If the act complained of is illegal, as I think it is, I do not at present see why any single shareholder should not be at liberty to file a bill to restrain the company from exceeding their powers,

and in *Shrimpton* v. *City of Winnipeg*, 13 Man. L.R. 211, Killam, C.J., following *Hoole* v. *Great Western Railway Co.*, held that it was not necessary that the suit should be brought in the name of the Attorney-General. I will therefore overrule that objection.

Coming then, to the main question. It is claimed on behalf of the defendant, that, outside of the Act of 1890, or any other Acts referred to, the city has power as an incident to its corporate existence to establish a market or markets, and if so, can place the market where it deems best. In 1 Dillon on Corporation, 5th ed., sec. 301, it is stated that municipalities may suppress nuisances, preserve health, prevent fires, regulate the use and storing of dangerous articles, and establish and control markets and the like. It is not necessary, however, for me to determine whether or not the city of Moncton could establish a market without express legislative authority, because it has express legislative authority to establish a market or markets. The real question is, that having erected a building and established the market on it and that building having been destroyed by fire, is the city obliged to rebuild on the same place, or can it purchase other land for the purpose of re-building the market? In using the words, "authorized to continue the present market" does the Legislature mean anything more than that the city is authorized to continue a market, that is, a place where goods may be publicly bought and sold, without reference to the locality

where that market shall be continued? It would seem to be a strange construction to give the Act that if one market was sufficient for the town of Moncton that the city could not change it and put it in another place more convenient to the city than the place where it was first established. The object of the legislation is that the city shall have a market for the convenience of its inhabitants. Assume for the purpose of argument, that after a building has been erected and the market established in it the trade carried the population to another part of the city at a distance from where the market was first established, it could scarcely be successfully contended that the city could not remove the market to a more convenient place. In other words it seems to me that the Legislature in providing or authorizing the city to continue the market had no reference to the locality in which it was situate, it simply gave it authority to continue the market, and if one market was not sufficient, it gave authority to purchase land and build another or others. To sustain the contention put forward by the plaintiffs it would be necessary to hold that, if the market building had not been burned down the market would have always had to have been continued there by the city, although the circumstances were such that it was much more in the interests of the whole city that it should be moved to some more convenient and better place, and the only way the city could get relief would be by building another one. It is admitted on behalf of the plaintiffs that the city could build other markets, but it is contended that they cannot build a building for a market in any other place than the place where the market originally stood, except as an additional market to that market. I cannot think that that contention can prevail. It seems to me the construction claimed on behalf of the plaintiffs is too narrow a construction to give the Act. The Legislature authorizes the city council to continue the market, and, in my opinion, it could continue in any part of the city it was deemed best in the interests of the city and can purchase land for that purpose.

Questions have been raised as to the advisability of the change in the location and as to the price paid for the land; with that I have nothing to do; the only thing is as to the power

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of the city council of Moncton to purchase this land, and I think they have that power. The injunction, therefore, will not be continued. The plaintiffs must pay the costs of this application.

Application refused.

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GREAT WEST LIQUOR CO. v. COLQUHOUN.

Alberta Supreme Court, Stuart, J. May 5, 1914.

1. CHATTEL MORTGAGE (§ II D—25)—SECOND CHATTEL MORTGAGE—SEIZURE IN DEFAULT.

A second chattel mortgagee may have a right of seizure under an express stipulation in the mortgage subject to the rights of the first mortgagee, notwithstanding that the legal estate in the chattels passed to the first mortgagee and that the latter's mortgage stipulated that the mortgagor should hold them as bailee in trust exclusively for him.

[*Rugg* v. *Barnes*, 56 Mass. 591, distinguished.]

2. CHATTEL MORTGAGE (§ II C—16) — FUTURE ACQUIRED GOODS — MORTGAGOR'S TRANSFEREE.

The general inclusion in a chattel mortgage of future-acquired goods brought upon the premises by the mortgagor will not cover future-acquired goods separable from the others and brought in by the mortgagor's transferee who had purchased the business subject to the chattel mortgage.

Statement

TRIAL of action for goods sold and delivered and counterclaim for illegal seizure under a chattel mortgage.

Judgment was given sustaining both demands and directing a reference as to damages on the latter.

Reilley & Lunney, for the plaintiff.
Aitken, for the defendants.

Stuart, J.

STUART, J.:—The plaintiffs sue for the sum of $338.80 for goods sold and delivered. The defendants deny the indebtedness and bring a counterclaim for damages for the illegal seizure of certain goods and chattels.

The plaintiffs are wholesale liquor dealers. Prior to June 1, 1913, one Alexander Douglas, who had previously bought out his partner Lett, was the lessee of certain hotel premises in Calgary known as the Lincoln Lodge. On that date he sold

out his business including the chattels in the hotel to the defendants by an agreement in writing, the terms of which are not material. One William Graham, who had been tenant of the premises prior to Douglas and Lett and had sold out to them, had given a chattel mortgage to the plaintiffs for $4,000 on July 11, 1911. Douglas had, on January 20, 1912, given a mortgage to the plaintiffs and to the Ranchmen's Trust Co. for $3,000, and Douglas and Lett had on November 2, 1911, given a chattel mortgage to the Ranchman's Trust Co. for $2,000. These mortgages covered the chattels on the premises at their respective dates as well as "leasehold interests, license to sell liquors" and also

> all and singular all goods, chattels and personal effects used by the mortgagor in connection with the said business which shall hereafter be brought in upon, around or about the said premises . . . whether in addition to, substitution for, or in renewal of any of the goods, chattels and personal effects hereinbefore mentioned.

A mortgage had been given by Graham to one McAllister and one Thomson on April 5, 1911, for $18,900 on the chattels in the hotel. Thomson was a son of Mrs. Ingram, who was the owner of the hotel itself, that is, the real estate.

After going into possession on June 1, 1913, the defendants purchased goods, that is liquors, from the plaintiffs, and it is for a balance due on the purchase price of these that the plaintiffs sue.

On June 18, one Stahle, acting as bailiff of the plaintiffs and the Ranchmen's Trust Co. Ltd., whose mortgages were in default, under three separate distress warrants referring to the three mortgages before mentioned, entered into the hotel and seized everything that was visible including $75 cash in the hotel cash register and including liquors brought on the premises by the defendants themselves after taking possession from Douglas and not either by Graham or Douglas. The chattel mortgages contained a clause to the effect that in the event of the mortgagees taking possession of the goods and chattels under the mortgages, they should have

> the right to have, hold, use, occupy, possess and enjoy the premises on which the said goods, chattels, and effects were situate in so far as the

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interest of the mortgagor therein might extend and to carry on the business carried on thereon by the mortgagor until the whole amount unpaid on the mortgages was satisfied.

This right, if it was a right at all, the plaintiffs proceeded to exercise. The defendants were ousted from the premises entirely and the plaintiffs carried on the business until June 27, when their proceedings were brought to a sudden end by the intervention of the prior mortgagee Thomson, who, under the authority of his mortgage took possession of everything. The defendants were unable to adduce any evidence to shew that the action of Thomson was caused by the action of the plaintiffs. For all that appears, Thomson might have closed down on the defendants on June 27, in any case. It is therefore evident, and it was indeed admitted on the trial by their counsel that the defendants would recover only such damages as had been suffered between June 18 and June 27, and which were caused by any illegal act of the plaintiffs.

It was contended by the defendants that a second chattel mortgagee has no right to make a seizure at all, that the legal estate in the chattels having passed by the first chattel mortgage to the first mortgagee, any right of seizure was enjoyed by the first mortgagee only and by no one else. The first mortgage contained the following clause:—

> And the mortgagor doth put the mortgagee in full possession of said goods and chattels by delivering to him these presents in the name of all the said goods and chattels at the sealing and delivery thereof: Provided always, and it is hereby expressly agreed that the mortgagor will, during such period or periods, during the currency of these presents or any renewal . . . thereof that the mortgagee shall permit him to have possession of said goods and chattels, hold the same as *bailee* in trust exclusively for the benefit of the mortgagee.

A previous clause had given an express power of distress in certain events, one of which was in case the mortgagee should for any reason deem himself unsafe, of which he should be the sole judge. Notwithstanding these provisions, however, I think *as between the mortgagor and the second mortgagee*, the second mortgagee did give a right to take possession always subject, of course, to the rights of the first mortgagee. It is true

that the mortgagor might be virtually only a "bailee" for the first mortgage, but it cannot lie in his mouth to deny that the second mortgagee had a right to do that which he, the mortgagor, has expressly agreed that as between themselves, the second mortgagee could do. The case of *Rugg* v. *Barnes*, 56 Mass. 591, to which I was referred, does not help. There the second mortgagee was a plaintiff in trover. When he made his demand on the defendant, who was a sheriff seizing under execution against the mortgagor, it is true the first mortgagees had made no demand, but they made their demands next day and long before the plaintiff brought this action. When the claim began, the first mortgagees were claiming possession and the Court said:—

> The removal of this property by the defendant could not give the plaintiff a right of possession, the first mortgage remaining in full force and the mortgagees insisting on their rights under it.

But here the first mortgagees did not intervene for nine days. In the interval I think the second mortgagees were entitled to take possession under the agreement which the mortgagor, the prior owner had made, of all goods which were really covered by the mortgage.

It does not appear that the plaintiffs seized any goods and chattels not brought upon the premises by the defendants' vendor, the mortgagor, except a certain stock of liquor and cigars, the cash in the cash register amounting to about $75, and possibly, some eatables. I think the seizure of these latter was illegal. The mortgage refers only to the goods afterwards brought upon the premises by the mortgagor himself, not to those brought there by his assignees.

There is the further question whether, under a chattel mortgage, a "leasehold interest" may be mortgaged. A leasehold interest is an interest in land. The defendants were tenants of the property and were in possession lawfully as such tenants. It did not specifically appear in the evidence what was the nature of the tenancy enjoyed by the defendants or whether there had been a written lease to Douglas or Graham or not. There, at any rate, does not appear to have been any assign-

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ment of a lease from Douglas to the defendants. The agreement between them of May 27, makes no reference to a lease being assigned at all. The defendants said they paid their June rent to Mrs. Ingram, the owner. For all that appears, Mrs. Ingram accepted the defendants under a new tenancy. In the absence of any evidence pointing to the contrary, I think that is the proper inference to make and therefore, whatever effect a chattel mortgage purporting to mortgage a leasehold interest may have (and I think it very doubtful in view of the provisions of the Land Titles Act, [ch. 24, 1906] if it could have any), certainly the only leasehold interest mortgaged was that of Graham. This interest, I think, was not in existence when the seizure was made. The consequence is that while the seizure of the chattels was quite legal except those I have referred to, there is no doubt the entrance into possession, or at any rate the continuance in possession of the realty was illegal.

The counterclaim is, however, only a claim for an illegal seizure of chattels and not for wrongful ejectment from the premises. I have, therefore, had some doubt whether I could properly allow the defendants damages for this wrongful ejectment. There was not much said in the evidence or upon the argument about the specific question of the continuance in possession of the realty. The case seemed to be vested mainly upon an alleged wrongful seizure of all the chattels and for damages for the interruption of business caused by the wrongful seizure, not by a wrongful ejectment. I think, however, inasmuch as I have held the seizure of most of the chattels to have been lawful and inasmuch as such a seizure, if it had been followed, as it no doubt lawfully might have been by a complete removal of these chattels from the premises, or a refusal to allow the use of them to the defendants, would, in itself, have had the effect of interrupting the defendants' enjoyment and use of the premises for hotel purposes for, at least, the short period of nine days, or, at any rate, a good part of that time, it is not necessary to be much concerned about the damages resulting from the wrongful ejectment. But, I think it is only fair, notwithstanding the defect in the pleadings to take notice of the

wrongful ejectment, at least, so far as to allow the defendants to recover a proportionate part of the rent they had paid. The rental paid for June was $500. The plaintiffs were wrongfully in possession for nine days. The proportion of the rent which may be allocated to that period would be $150, and this amount, I think, the defendants should recover from the plaintiffs. But, with regard to the remaining three days of the month, I presume the defendants must settle that with the first mortgagee, who is also in effect the landlord, but who is not a party to this suit. There remains, therefore, to be considered only the amount of damages to be awarded for the illegal seizure of the liquors, etc., brought upon the premises by the defendants. The measure of damages on this account should, of course, be the actual value of the goods seized. There is no claim for treble value, but as is usual in such cases the evidence left the real position rather obscure. The defendants say they had bought goods to the value of $712.60 and there was $75 in the till. But it did not appear how much of these goods had been used by themselves between June 1 and June 18. Then the plaintiffs' accountant swore that, while their man was in possession, he had taken in the sum of $739.61 and had turned over to the plaintiffs the sum of $188.24. He said that they had "paid it all out" for accounts during the time they were in possession. Whether the $188.24 was also paid out in that way was not made clear, and, in any case, it was not made clear whether some of the payments were not for debts incurred by the plaintiffs themselves while they were in possession.

In the result I find it impossible to make a satisfactory calculation of the value of the goods illegally seized. I, therefore, propose to leave the matter in this shape. The plaintiffs are, admittedly, entitled to judgment for the sum of $338.80 sued for. The defendants are entitled to damages for the illegal seizure, but, I think, if the parties cannot agree upon the proper amount upon the basis I indicate, that there will have to be a reference to ascertain the value of the goods illegally seized and the defendants should have judgment for this sum, adding the $75 cash and the $150 for proportion of rent. But

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the plaintiffs should have credit as against this for accounts paid by them for which the defendants were liable. This should include an apportionment of any salaries paid, charging the plaintiffs with the salaries for nine days. On completion of the reference either party may move for judgment when I will dispose of the question of costs.

If the parties prefer I will take the reference myself as practically a continuance of the evidence, but it must be understood that nothing upon which I have already given judgment can be reopened.

Judgment accordingly.

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COLONIAL INVESTMENT CO v. SMITH.

Manitoba King's Bench, Macdonald, J. May 19, 1914.

1. DISCOVERY AND INSPECTION (§ I—2)—PRODUCTION—AFFIDAVIT—DEFAULT THROUGH ILLNESS—MOTION TO STRIKE OUT DEFENCE.

The default of a party defendant to make and file his affidavit on production is excused upon a shewing of incapacity through illness, and where the plaintiff, moving to strike out the statement of defence on the ground of such default, suggests no person other than the defendant himself capable of giving the discovery, the motion fails on proof of such incapacitating illness.

Statement

APPEAL from an order of the Referee in Chambers refusing to strike out the defence for failure to comply with an order for production of documents.

The appeal was dismissed.

W. L. McLaws, for the plaintiff.

H. A. Bergman, for the defendant Smith.

Macdonald, J.

MACDONALD, J.:—Appeal from the Referee refusing to strike out statement of defence because of default on part of defendant Smith to make and file affidavit on production. The learned Referee found that this defendant was incapacitated through illness from making this affidavit and the evidence amply justifies his conclusion.

A statement of defence was entered on the same day that an order for production was made, but this statement of defence is a general denial of all allegations contained in the statement of

claim and could be made out without any consultation or advising with the defendant.

Provision is made that a party incapacitated from giving discovery on oath may be got over by making an order not directly against a person not a party, but against the party that some other person shall give the discovery on his behalf. There is nothing here suggesting any one who could make such discovery and the fact that there are two other defendants so mixed up with this defendant in the matters calling for investigation and who are called upon to make discovery leads me to the conclusion that they are the most likely to make the discovery sought. Should the plaintiff find, however, that such other defendants cannot make such discovery and they can ascertain who, other than the defendant Smith, can make such discovery a further application can be made by them.

The appeal must be dismissed with costs in the cause to the defendant Smith.

Appeal dismissed.

VANCOUVER MACHINERY CO. v. VANCOUVER TIMBER AND TRADING CO.

British Columbia Supreme Court, Murphy, J. January 28, 1914.

1. DAMAGES (§ III J—202)—DETENTION OF PERSONAL PROPERTY—RENTAL VALUE.

In fixing damages for the mere detention or non-delivery to the owner of an engine which the defendant did not use, the full rental value which the owner could have obtained for its use may properly be reduced by an allowance for wear and tear.

Statement

ACTION for the rental of certain engines.

Judgment was given for the plaintiff.

Burns & Walkem, for the plaintiffs.

Hart-McHarg, for the defendants.

Murphy, J.

MURPHY, J.:—In face of the correspondence filed herein I do not see how the defence can succeed. Plaintiffs put their understanding of what their agent had done into writing forthwith after the deal was made, and sent such written memorandum to defendants. Both Buck, defendants' agent, and Hazwell, their manager, knew what the agreement with plaintiffs' agent was, if made as alleged. Yet no exception was taken to

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the memorandum, although attention was called to it within a few days. Then plaintiffs' agent died about three months after the bargain was made and that fact was communicated to defendants. Beginning with January, 1912, monthly statements charging rent for the engines were rendered to defendants every month up to and including June, when the engines were finally delivered. No exception was taken to these accounts except some general message over the telephone (the date of which is uncertain) to the effect that plaintiffs should call and see Mr. Alvensleben, until the letter of May 15, 1912. Mr. Walkem, plaintiffs' manager, did call several times but failed to obtain an interview. Letters insisting on the claim were sent in September, October, November, and December, and it is not until January 8, 1913, that the contention now set up was communicated to the plaintiffs. To give effect to it would work manifest injustice to the plaintiffs, for even if their agent made the alleged bargain, it is clear, I think, they had no knowledge that he had done so, and defendants, by ignoring all their letters and accounts, although aware from such communications that plaintiffs were under a misapprehension as to the real contract—assuming their version of it is correct—took no steps to enlighten them but retained the engines and used one of them for their own benefit for many months.

Again, I think the agent had no authority to finally conclude such a bargain, if he did make it. I think the plaintiffs are entitled to the sum claimed for the use of the engine utilized by defendants. The smaller engine was, however, not used at all and all plaintiffs would be entitled to would be damages for detention or non-delivery. It was kept for about nine months and apparently plaintiffs could have rented it for $50 per month if it were in their possession. At any rate, they did rent it shortly after delivery to them. Such renting, however, would involve wear and tear so that I think the $50 per month charged for it as damages is excessive. I would reduce this by one half and give judgment for that amount, together with the amount claimed for use of the large engine.

Judgment for plaintiffs.

ELGIN CITY BANKING CO. v. MAWHINNEY.

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Alberta Supreme Court, Stuart, J. April 26, 1914.

1. SALE (§ II C—37)—STALLION—FITNESS AS FOAL-GETTER.

Where an agreement for the sale of a stallion stipulates that in the event of its deficiency within a fixed period as a foal-getter, a substitute stallion will be furnished in exchange by the seller, provided certain stated particulars (customary and reasonable) shall be recorded and furnished by the buyer, such particulars will be construed strictly as a condition precedent to the special remedy so stipulated, and the seller's omission to furnish the usual printed tally sheet for the record does not impair his right to insist upon the condition.

[*First National Bank* v. *Matson*, 2 A.L.R. 249, distinguished.]

2. EVIDENCE (§ IV G—422)—FOREIGN COMMISSION—USE AT TRIAL "SAVING ALL JUST EXCEPTIONS."

An order to take the plaintiff's evidence on commission and directing that it may be used at the trial "saving all just exceptions," excludes only ordinary exceptions as to admissibility, and does not apply so as to leave it open for the trial judge to exercise a judicial discretion by insisting that the plaintiff's evidence shall be given *viva voce* at the trial, unless the order so provides.

[*Park* v. *Schneider*, 6 D.L.R. 451, 5 A.L.R. 423, referred to; compare Ont. C.R. (1913), rule 287.]

Statement

ACTION on certain promissory notes given for the purchase price of a stallion and endorsed over to the plaintiff.

Judgment was given for the plaintiff.

A preliminary motion in the same case is reported: *Elgin City Banking Co.* v. *Mawhinney*, 16 D.L.R. 74, 27 W.L.R. 54.

H. P. O. Savary, and *M. B. Peacock*, for the plaintiffs.

F. E. Eaton, for the defendants.

Stuart, J.

STUART, J. (oral):—I do not think I need to call upon counsel for the plaintiff. I think there will have to be judgment for the plaintiff in this case. This is a case distinguishable in many respects from the *First National Bank* v. *Matson*, 2 A.L.R. 249, which has been cited. In that case there seems to have been in the first instance an arrangement between the bank and the original vendors that they were practically all joint vendors, including the bank. There is no suggestion of that in this case. The defence which the defendants have attempted to make out is, in the first place, one of fraud on the part of the vendor of the horse, Mr. Devine.

Of course, it is obvious to any one who has listened to the evi-

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dence that they have not succeeded in making out such a case at all, but that there was no fraud on Mr. Devine's part. If they had proved that he had asserted, at the time of the bargain, that he knew the horse was a 50% foal getter, and had also proven that in so saying, he knew it was something that was not true, that he knew when he contracted that it was not a 50% foal getter when he told them that, I think then that they would have established fraud against him, but the evidence does not go anything like that far. It practically is admitted that the only statement made was that he would abide by this contract which the Dunhams had made, which was there in writing for these gentlemen to read, and in this respect this case is different from the *National Bank* v. *Matson*, 2 A.L.R. 249. The facts in that case apparently were that the purchasers were illiterate people, not very well acquainted with the English language. These purchasers here, so far as I have been able to observe them, are not unintelligent people and not illiterate people, particularly Mr. Boch, and Mr. Gruel, and I would say Mr. Reidt. Surely they must have known themselves that this was an agreement, and it is admitted that every representation or agreement Mr. Devine made is contained in this written document. Now that document reads as follows:—

> It is hereby expressly understood and agreed by and between the parties hereto, that in case said stallion, in good health and with proper usage, does not get with foal fifty per cent. (50%) of the mares regularly tried and bred to him between the first day of May and the first day of July, 1910, and provided if said purchaser shall have accurately filled out a tally sheet of the same form as the form of tally sheet hereto attached, giving the date of each service and trial, to enable identification of all mares bred, and after said tally sheet is so filled out shall have sent the same to the vendors at Wayne, DuPage County, Illinois, by registered mail, not later than July 15, 1910, then, upon the return of said stallion, during the first week in April next following, sound and in good health and condition, to said vendors at Wayne, Illinois, by said purchaser, the vendors shall, without further charge, in exchange for said stallion so returned, furnish the purchaser at Wayne, Illinois, with another imported or pure-bred stallion of equal quality as the stallion hereby sold; and it is expressly understood between the parties hereto that the vendors shall not be responsible or accountable to said purchaser in any other way for the stallion hereby sold failing to get the mares bred to him with foal.

Now, leaving aside for the moment all questions of the plaintiffs being purchasers for value of these notes, I am unable to see

what remedy the defendants can have in the face of that agreement, which is said to be the only agreement, and in the face of the facts which have been proved. I assume, for argument's sake, in behalf of the defendants, or in favour of the defendants that they have proven, and I think they have proven fairly well, that the horse was not, in that year at any rate, a 50% foal getter. But what was their duty under this contract? Being intelligent men, and not illiterate men, I would have thought, when they were making a bargain, that they would have seen to it that the tally sheet was attached. They were not bound to enter into this bargain unless the tally sheet was there, about which they were talking. Of course, Mr. Devine asserts that it was there. Assuming that he is wrong about that, assuming that I believe the defendant's evidence and that there was no tally sheet, why did they not see there was a tally sheet? That is what the bargain was about.

In the *Matson* case [*First National Bank* v. *Matson*, 2 A.L.R. 249], the defendants being illiterate foreigners, Mr. Justice Beck seems to have thought there was a greater duty upon the vendors than upon the purchasers to see that the forms of the contract were there.

I am inclined to think that there was as much obligation upon the purchasers here to see that the condition of their contract, under which the contract was made, was satisfied by the attaching of the tally sheet to the contract before they made their bargain. As a matter of fact no tally sheet was attached, or rather that is the assumption I have just made in their favour, and it is hard to see what intelligent meaning could be given to the contract if there was not one there. But assuming that there was some fault on Mr. Devine, rather than upon the purchaser's part, in not having the tally sheet there, and assuming Mr. Boch is correct when he said he wrote to Mr. Devine for a tally sheet—I will assume that in their favour—surely being intelligent men they ought to know that the meaning of that contract was that, if they wanted to have the right to give that animal back if he did not get 50% of the foals, they had to send down to either Devine or Dunham a statement of the names of the persons whose mares had been served, and the date of service and trial. They could

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easily have got up something if they had a blank sheet themselves. Surely they must have understood that that was the condition upon which they would have the right to return the horse, that they should send the information either to Devine or the Dunhams, it makes no difference which, as to the persons whose mares had been served, and when they were served, and where they lived. If they had done that then they would have had a right, before the 1st of April following, if the horse was sound and in good health to have returned the horse and to have gotten another one. I do not think that it is possible to say that they were relieved from that obligation by the fact that a tally sheet was not attached in the first instance, as I presume it was not. Or by the fact that they wrote, if I assume that they did write, to Mr. Devine, and he did not send it to them. Surely they could have done the best they could, and what any intelligent person would understand was required, so that they could claim their rights under the contract, of returning the horse, and yet there is no suggestion that they wrote to Mr. Devine, that they sent any information as to whose mares had been served, or the date of trial or anything. They could easily have got that out of the book and sent it down before July 15, the book was there with all the information in it, and yet there is no suggestion that they did anything of the kind and I do not think they are excused from not doing so merely because some blank sheet was not attached, which I think they ought to have seen was attached in the first instance. There is nothing particularly mysterious about the blank sheet, and the information it was to contain was all expressly set forth in the contract. They could have easily taken a blank sheet and done so themselves and the situation would have been very different indeed, but they did not make any attempt to do it. That is the only remedy given them under this contract. There is no remedy by way of damages for breach of warranty because there was no warranty here that that animal, that is, a warranty in the sense that if it was broken you could get damages for the breach of it, there was no warranty that the animal was a 50% foal getter. There was an agreement that if it was not then if they did certain things the vendor would take

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the animal back, but there was no warranty in the sense that if there was a breach of it damages could be got. A special remedy was given under certain conditions which they might have in substance fulfilled, which they did not fulfill, therefore, it seems to me their remedy, under the contract, does not exist. This is all on the assumption, of course, that the one year extension was allowed, was authorized by the Dunhams, and Mr. Devine admits it was, and I read the dates in this contract as one year forward. Of course, this is all aside from the question of plaintiffs being holders in due course, purchasers for value before the notes became due.

It seems, from the view I have taken, it makes very little difference whether the plaintiffs, the Elgin City Banking Co., ever gave any money for the notes or not. It is not alleged in the defence that they did not. The view I take of it is, that even Dunhams could have recovered upon the note if they had been the plaintiffs, even Devine if it comes to that. I think the other questions are questions which I need not consider very much. Of course, there is only one side to the evidence in the commission, that the plaintiffs were the holders for value in due course. I am inclined to think, as I did during the argument, that I was bound to admit that commission pursuant to the order of the Master. The portion which, it was contended, would exclude it, is that portion saving all just exceptions. I think that phrase only meant ordinary exceptions as to admissibility. I do not think that, when that order was finally made in that form, and not appealed from, it was then open to the defendants to say that the evidence should not go in at all, on the principle of *Park* v. *Schneider*, 6 D.L.R. 451, 5 A.L.R. 423, 22 W.L.R. 70. I think I was bound to admit that evidence in view of the manner in which the order was made. The result will be that there will be judgment for plaintiffs against the defendants for $1,000 with interest at 6% per annum from November 14, 1910. That judgment will be against all the defendants, the non-appearing ones as well.

Judgment for plaintiff.

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REAMAN v. WINNIPEG.

Manitoba King's Bench, Macdonald, J. April 3, 1914.

1. MUNICIPAL CORPORATIONS (§ II C 3—60)—MOTION TO QUASH BY-LAW—PROCEDURE—WINNIPEG CHARTER.

Sec. 526 of the Winnipeg charter, Manitoba Statutes 1902, ch. 77, as to the procedure on moving to quash a by-law is controlled by the later provisions of the King's Bench Act, R.S.M. 1913, ch. 46, sec. 85, and the proceeding may be begun by notice of motion.

[*Re Peck and Ameliasburgh*, 12 P.R. (Ont.) 664; *Re Colcraft and Colchester North*, 13 P.R. (Ont.) 253, applied.]

2. MUNICIPAL CORPORATIONS (§ II C 2—55)—BY-LAWS — STATUTORY RESTRICTION AS TO THREE READINGS.

When the statutory provision that municipal by-laws or ordinances shall be read on three different days permits the municipal council to dispense with the rule upon a specified vote, the rule can be dispensed with only by a strict compliance with the statutory authority; and, after the rejection of a motion to suspend the rule, it is not competent for the municipal council at the same session to re-consider it, and pass the by-law, where the statute further provided that "no question once decided shall be reversed without notice from at least one meeting to another."

Statement

APPLICATION to quash a municipal by-law prohibiting the erection of an apartment block or tenement houses in a certain district.

The by-law was quashed.

E. Anderson, for the applicant.

J. Preudhomme, for Winnipeg city.

Macdonald, J.

MACDONALD, J.:—The applicant, Mrs. Reaman, purchased certain property within the area covered by the above by-law for the purpose of erecting thereon an apartment block and had plans of the proposed block prepared and submitted to the buildings inspection department of the city for approval.

Within a few days after the submission of the plans for such approval a petition was presented to the city council by at least three-fifths of the owners of property on both sides of Grosvenor avenue between Wellington crescent and Lilac street and on July 28, 1913, the municipal council of the city passed the by-law now moved against.

Section 526 of the Winnipeg charter, [Statutes Manitoba 1902, ch. 77] provides for the quashing of by-laws and the pro-

cedure to be followed which, under this section, is to be by summons or rule *nisi*. The objection is taken that here the applicant proceeded by way of notice of motion instead of by summons or rule *nisi*.

Section 85 of the King's Bench Act, R.S.M. 1913, ch. 46, provides as follows:—

> The procedure provided by this Act shall in all cases prevail over and be adopted in lieu of procedure provided by the practice of the Court in use before the coming into force of the Queen's Bench Act, 1895, and by statutes of this province theretofore in force where the procedure provided by this Act can be reasonably and conveniently applied.

Rule 442 provides that

> Where any application is authorized to be made to the Court or a Judge in an action or proceeding, such application shall be by motion.

And rule 443 provides that

> no summons, rule or order to shew cause shall be granted in any action or matter; but when any person other than the applicant is entitled to be heard thereon he shall be served with a notice of the motion.

In *Re Peck and Township of Ameliasburgh*, 12 P.R. (Ont.) 664, it was held that, although the Act required the application to be by a rule *nisi*, yet the practice must be governed by rule 526 (similar to our rule 443) that the proceeding by rule to shew cause to quash a by-law is no longer a practice which is in force and that the proceeding by motion is substituted for it.

This case was followed in *Re Colenutt and Township of Colchester North*, 13 P.R. (Ont.) 253: "It is not now proper to proceed by order *nisi*."

The applicant has, therefore, in my opinion, followed the proper procedure.

Now, as to the legality of the by-law.

Sec. 1 of the by-law reads as follows:—

> No apartment or tenement houses and no garages to be used for hire or gain shall be erected on any lot fronting or abutting on both sides of Grosvenor avenue between Wellington crescent and Lilac street in the city of Winnipeg, and that said Grosvenor avenue be and the same is hereby declared to be a residential street.

Between Wellington crescent and Lilac street there are at present at least two apartment houses and the neighbouring

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district, from the plan produced upon the argument, seems a veritable hive of apartment buildings, and a purchaser of property anywhere thereabouts would be justified in assuming that there could not reasonably be a restriction such as the by-law in question would create.

The applicant purchased lots 11 and 12 in block 48, plan 208, parish of St. Boniface, for the purpose of erecting thereon an apartment building. Five lots west of lot 12 is erected an apartment and, in the same block, on lots four and five, is erected another apartment building, and this within the area affected by the by-law.

Plans of the proposed apartment building were prepared and submitted to the buildings inspection department of the city of Winnipeg for approval on or about July 25, 1913, and on July 28, 1913, and without the approval having been given, the council of the city of Winnipeg purported to pass the by-law referred to.

In view of these facts, the applicant has, to my mind, much merit in her application, and, as the effect of the by-law is in derogation of private rights, it must, in order to stand, be put to the most severe test as to its legality.

In the first place, the by-law reads as applying to lots abutting on both sides of Grosvenor avenue. The lots in question do not so abut nor indeed can I, from the map produced, find any lot within the restricted area abutting on both sides of this avenue. It is possible that a lot may abut on both sides of a street, but I cannot see how it is possible here, as Grosvenor avenue is open at both ends and leads into other thoroughfares of equal importance.

It is possible the word "both" is an error and should read "either"; but am I to construe the by-law in the manner in which I think it was intended rather than interpret it strictly as it reads? In my opinion, the latter course is the proper one. It might be urged that the by-law does not affect the property of the applicant, and therefore should not be disturbed; but it is evident that the civic authorities treat it as restricting the rights of the applicant and because of that fact it should be considered in the light of affecting her property.

The principal ground for applying to quash the by-law is, that the by-law received its three readings at one session, whereas, according to rules of procedure, before this can be done, it is necessary to suspend the rules, and this requires a majority vote of at least two-thirds of the members of the council present.

Provided that no question once decided shall be reversed without notice from at least one meeting to another and without a majority of the whole council voting in favour of such reversal: sec. 251, city charter.

The minutes of the meeting of July 28, 1913, when the by-law in question was passed, shew that a motion for suspension of the rule governing the passing of by-laws was put and lost.

Afterwards, and in the same evening, this motion was re-considered and carried, and the by-law was then read a third time and was passed and ordered to be signed and sealed.

This proceeding was followed contrary to, and directly in the face of rule 251.

It may be laid down as a general rule that all charter or statutory requirements as to the method in which an ordinance shall be introduced and the manner in which it shall be considered are when reasonably calculated to induce deliberation, mandatory in their nature, and must be complied with. Among statutory requirements of this nature are provisions that all ordinances shall be read three times before their final passage and that no ordinance shall pass at the same meeting at which it is introduced. These provisions are mandatory and an ordinance which is passed without complying with them is void: Dillon on Municipal Corporations, 5th ed., 905.

When the statutory provision that ordinances shall be read on three different days permits the members of the council to dispense with the rule upon a specified vote, the rule can only be dispensed with by a strict compliance with the statutory authority: Dillon, on Municipal Corporations, 5th ed., 907.

When the council voted against the suspension of the rule it was with the object of giving this by-law its third reading and finally passing it, and by their rejection of that resolution the fate of the by-law was in abeyance for that meeting and, no doubt, the object of so rejecting was for further deliberation, and in re-considering the resolution they were acting beyond their powers under the charter.

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In my opinion, the by-law has been irregularly passed, and must be quashed, with costs to the appellant.

By-law quashed.

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CAMPBELL v. HEINKA.

Saskatchewan Supreme Court, Lamont, J. April 29, 1914.

1. BILLS AND NOTES (§ VI B—158)—TAKING MORTGAGE SECURITY—MERGER—DIFFERENT MATURITY DATES.

The acceptance of a mortgage security maturing after the due date of promissory notes for the same debt does not of itself and apart from any express agreement impair or suspend the right of action upon the notes.

2. SALE (§ I C—15)—CONDITIONAL SALE — TAKING COLLATERAL CHATTEL MORTGAGE BESIDES LIEN NOTES.

The acceptance of a chattel mortgage by the conditional vendors covering all the conditional vendee's interest in the goods sold will not necessarily abrogate their rights reserved under the conditional sale agreement.

Statement

TRIAL of an action upon two lien notes.

Judgment was given for the plaintiff.

P. E. Mackenzie, K.C., for the plaintiffs.

T. Lynd, for the defendants.

Lamont, J.

LAMONT, J.:—The defendants [Heinka and Bailey] are the makers of the two lien notes sued on in this action, which they jointly agreed to pay. The notes were given for a second-hand engine and separator purchased by them from the plaintiffs in April, 1910. The notes were not paid. On April 1, 1913, the defendant Heinka gave to the plaintiffs a mortgage on his farm for $1,511.05, which included the amount of the notes and interest thereon. The amount secured by the mortgage was made payable in two equal instalments, the first on October 1, 1913, the second on October 1, 1914. On September 9, 1913, the defendant Bailey gave to his co-defendant Heinka a bill of sale of all his interest in the said engine and separator, and, on the same day, Heinka gave to the plaintiffs a chattel mortgage on the outfit for the same amount as that set out in the land mortgage already mentioned, and payable on the same dates. When

this was given, the defendant Bailey asked if he would be released from his liability upon the notes, and was told by the plaintiffs that he would not. On August 1, 1913, before either of the mortgages had become due, the plaintiffs brought this action upon the notes. The defendant Heinka does not dispute his liability. For the defendant Bailey, two contentions are made: (1) that, by taking the mortgages the plaintiffs extended the time for payment of the indebtedness until the maturity of the mortgages; and (2) that, by taking a chattel mortgage on the outfit from Heinka, the plaintiffs must be held to have transferred to him the property in the machine reserved to them by the notes, and had therefore put it out of their power to give Bailey any interest therein should he be compelled to pay the notes.

As to the first of these defences, it seems clear that there can be no merger of the notes in the mortgage, because, in order to effect a merger, the superior security must be co-extensive with the inferior security and between the same parties. The notes not being merged, the defendants' obligation to pay them according to their tenor remained the same. The taking of security from the defendant Heinka cannot affect that obligation. There was no agreement to extend the time for the payment of the notes, and the acceptance of security maturing after the due date of the notes does not of itself impair or suspend the right of action upon the notes. To suspend that right of action, there must be a definite and valid agreement that the time shall be extended: Jones on Collateral Security, 2nd ed., p. 638. The plaintiffs cannot, it is true, proceed to realize on their mortgage security before its due date, but that cannot affect the defendants' liability upon the notes.

As to the other ground of defence, I am of opinion it also fails. There is no evidence beyond the chattel mortgage itself that the plaintiffs transferred or released to Heinka the property in the outfit reserved to them by the lien notes. The mortgage binds all the interest which Heinka had in the outfit at the time the mortgage was given, but nowhere does it purport

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to convey to him any interest which, prior to that time, he did not have.

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

Judgment for plaintiffs.

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RICHARDS v. PRODUCERS ROCK AND GRAVEL CO.

British Columbia Supreme Court, Murphy, J. February 27, 1914.

1. SHERIFF (§ I A—3)—RIGHT TO COLLECT FEES AND CHARGES.

The onus is on a sheriff claiming poundage, to satisfy the court that a compromise payment is the direct consequence of the seizure and not of an agreement entered into previously between the parties.

[*Mortimore* v. *Cragg*, L.R. 3 C.P.D. 216, referred to.]

2. SHERIFF (§ I A—3)—RIGHT TO COLLECT FEES AND CHARGES.

A sheriff is not entitled to poundage or possession money under an execution, levied subsequently to a winding-up order under sec. 23 of the Winding-up Act, R.S.C. 1906, ch. 144, as the seizure is illegal.

[*Shaver* v. *Cotton*, 23 A.R. (Ont.) 426; *Keating* v. *Graham*, 26 O.R. 361, applied.]

3. CORPORATIONS AND COMPANIES (§ VI C—330)—WINDING-UP—EFFECT ON PROPERTY RIGHTS.

A payment out of a company's funds either to avoid, or in consequence of, a seizure under execution after a winding-up order has been made must be deemed to be illegal and subject to reclamation by the liquidator.

[*Shaver* v. *Cotton*, 23 A.R. (Ont.) 426; *Keating* v. *Graham*, 26 O.R. 361, followed.]

Statement

ACTION by a sheriff to recover poundage fees.

The action was dismissed.

Higgins, for the plaintiff.

White, for the defendant.

Murphy, J.

MURPHY, J.:—Action by the sheriff for the county of Victoria to recover poundage fees and expenses consequent on an execution levied by him under writ of *fi. fa.* at the suit of defendants against the Canadian Mineral Rubber Co., Ltd.

Dealing first with the question of poundage, defendants had a judgment for some $8,000 against the Rubber Co., and had been pressing for payment, but were put off from time to time.

Finally, on September 24, 1913, Mr. Lucas, local manager for the Rubber Co., made an arrangement with defendants' solicitors to pay $3,000 on account. He explained that the cheque had to go to Vancouver for an additional signature. The understanding was that this cheque would be forwarded from Vancouver on September 25, and if this were done it would arrive in Victoria in due course of post on the morning of September 26. It did not arrive, and, in the afternoon of that day, defendants' solicitor placed a writ of *fi. fa.* in the sheriff's hands. The cheque arrived on the next day, Saturday, the 27th inst., and, on the 29th inst. defendants' solicitor wrote a letter requesting the sheriff to withdraw from possession. There is a dispute as to what then occurred, but such dispute does not affect the question of poundage.

Under the common law the sheriff was not entitled to poundage as he was executing the King's writ: *Graham* v. *Grill*, 2 M. & S. 294 at 297, 105 Eng. R. 391, 392. He acquired the right thereto under 29 Eliz. ch. 4. The process of execution is explained by Brett, L.J., in *Mortimore* v. *Cragg*, L.R. 3 C.P.D. 216 at 219, as follows:—

> Where an execution issues the transaction may be divided into four parts: (1) the delivery of the writ to the sheriff; (2) seizure; (3) the possible payment of money after seizure; (4) if no payment, sale. The first step does not entitle the sheriff to poundage. And if he does not seize, *Nash* v. *Dickinson*, L.R. 2 C.P. 252, is an authority that he is not entitled to poundage. Although he seizes, nothing may be realized because the seizure may be wrongful; it may be withdrawn by direction of law, then the sheriff would receive no poundage. Then comes the case after seizure. The money may be paid by the execution debtor either directly or indirectly; directly by virtue of the seizure to the sheriff; indirectly where payment is made by means of a compromise which is the consequence of the seizure; in either of these cases the sheriff is entitled to poundage. If a sale takes place, again the sheriff is entitled to poundage.

This being the law it is doubtful on the facts that the sheriff is entitled to poundage in this case. Assuming for the moment a legal seizure, the only head under which he would be, is "payment" by means of a compromise which is the consequence of a "seizure."

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At the trial I thought that the dates were so significant that the inference could well be drawn that the fact of seizure had been communicated to Vancouver and that the cheque was forwarded in consequence of the seizure and not in pursuance of the original arrangement.

Further consideration causes me to doubt. The onus is on the sheriff to make out his case, and the above citation shews that such compromise payment must be a consequence of the seizure. No evidence beyond the fact of payment was given, and although I think this, in connection with the dates, is some evidence, it does not, I think, satisfy the onus when the evidence of McDermot is taken into account.

Further, I ordered in the discovery of Hall, from line 10 on p. 2, to make intelligible the extract Mr. Higgins proposed to read, which began at line 3 on p. 3. Hall there swears the cheque was mailed according to agreement. I think, on the whole, that I cannot find it to be proven as a fact that this payment was the result of the seizure and not of the previous arrangement. But, if I am in error as to this, the claim for poundage, in my opinion, still fails. The fact was, though none of the parties seem to have been aware of it, that an order to wind up the Rubber Co. had been made on September 19, 1913, by order of the Supreme Court of Ontario, so that, when the sheriff seized, the company was in liquidation by virtue of such order. By sec. 23 of the Winding-up Act, R.S.C. 1906, ch. 144, every execution against the estate or effects of the company after the making of the winding-up order shall be void. By sec. 84, as amended 7 & 8 Edw. VII. ch. 75, sec. 1, no lien or privilege upon the real or personal property of the company for the amount of any judgment debt by levy or seizure is acquired if, before actual payment over to the plaintiff, the winding-up has commenced. The effect of these sections and others contained in the Act has been held to

> conclusively shew that the power of dealing with and collecting the assets after the making of the winding-up order is vested in the liquidator alone: *per* Osler, J.A., in *Sharer* v. *Cotton*, 23 A.R. (Ont.) 426 at 434.

If this be so, the first step set out above to entitle the sheriff to poundage, viz., seizure (which, I think, must mean a legal

seizure) is wanting. In *Keating* v. *Graham*, 26 O.R. 361, it was held that a judgment obtained after winding-up order had been made was wholly void and nugatory.

Further, it follows, I think, from these cases that the $3,000 payment out of the company's funds was an illegal payment, and that such sum can be demanded back by the liquidator. The defendants, therefore, have derived no fructuary benefit from the execution, and are not liable to poundage: *Re Thomas*, [1899] 1 Q.B. 460. As, in my opinion, the seizure was void from its inception, the claim for possession money fails with the claim for poundage.

Then remains the question of the costs paid by the sheriff incurred in resisting the application for an injunction to restrain him and defendants from proceeding further under the writ of *fi. fa.* It is alleged that he opposed this application by request of Mr. McDiarmid. Here I have a direct conflict of evidence; the sheriff asserts and Mr. McDiarmid denies the giving of such instructions. I am unable to say that the onus resting on the plaintiff to prove affirmatively this part of his case has been satisfied.

In the result the action must be dismissed.

Action dismissed.

ADAMS POWELL RIVER CO. v. CANADIAN PUGET SOUND CO.

British Columbia Supreme Court, Murphy, J. April 7, 1914.

1. EVIDENCE (§ IV R—483)—SURVEY OF TIMBER LIMIT.

Surveys made by the plaintiffs and which were accepted by the Government of British Columbia and declared by government regulations to be the true boundaries of plaintiff's timber limits granted by the government, are sufficient evidence of title to maintain an action for trespass against persons who are clearly shewn to be trespassers in cutting timber within the marked boundaries of the limit.

2. DAMAGES (§ III K 2—216)—CUTTING TIMBER—TRESPASS OVER MARKED BOUNDARY.

The quantum of damages for trespass in cutting and removing timber from the plaintiff's limits where the boundary line was clearly marked and deliberately crossed, will be the value of the cut timber less only the cost of felling the trees and fitting them for removal, and without any reduction in respect of the cost of moving the logs.

[*Last Chance* v. *American Boy*, 2 Martin's Mining Cases (B.C.) 151, applied.]

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ADAMS POWELL RIVER CO. v. CANADIAN PUGET SOUND CO.

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ACTION to recover damages for alleged trespass and timber cutting on timber limits in British Columbia.

Judgment was given for the plaintiffs.

S. S. Taylor, K.C., for the plaintiff.

A. H. MacNeill, K.C., for the defendant.

MURPHY, J.:—On the first point I think the plaintiffs have made out a sufficient title against the defendants, who are admittedly trespassers.

The disputed timber is embraced in surveys by plaintiffs accepted by the government and by government regulations declared to be the true boundaries of the plaintiffs' limits. Plaintiffs have been paying license fees on the limits so determined. Acts of ownership, such as discharge of burdens, are evidence of title: Phipson, 5th ed., 96. I should think causing surveys under the statutes, which surveys are accepted by the government, would, on the same principle, be also so regarded.

As to the quantum of damages, in view of the admission of Lutz that the line was clearly marked and was deliberately crossed, I think the more severe rule set out in *Last Chance* v. *American Boy*, 2 Martin's Mining Cases (B.C.) 151, must be applied.

The suggestion that some arrangement was made with the government agent cannot, I think, be accepted as true in view of Lutz letter to plaintiffs that the trespass was the result of the line not being clearly marked. Even if taken, however, in my opinion, the more severe rule would still have to be applied, for defendants must be taken to have known that, under the law, no government agent had the shadow of authority to make such an arrangement. At best the defendants were guilty of negligence which the case cited shews to be the same thing as wilful trespass so far as the rule *re* damages is concerned.

Under the more severe rule I consider defendants only entitled to be credited with the cost of severance. By that I mean the cost of felling the trees and fitting them for removal, but not to include any cost of moving. To be on the safe side, I fix this at $2.50 per M.

I accept Clark's classification of the timber other than cedar removed, viz., 20% first class; 65% second class; and 15% third class. I think the fair market price was $12 for first class; $9 for second class; and $7 for third class; and $8 for cedar; but, if so desired, counsel may speak again to this question. As it is practically admitted that the timber remaining on the trespassed area, which I find to be one-third of what was removed under the northerly trespass, will now cost $5 per M. more to log than it would have had the trespass not taken place, the plaintiffs are entitled to recover this sum also. Any question arising on calculation of damages may be spoken to.

Judgment for plaintiff.

NORTHERN CROWN BANK v. GREAT WEST LUMBER CO.

Alberta Supreme Court, Scott, Stuart, Beck, and Simmons, JJ. April 8, 1914.

1. BANKS (§ I—2)—ENGAGING IN TRADE—COMPANY CONTROL—BANK ACT (CAN.), SEC. 76.

A bank does not engage in a trade or business in contravention of sub-sec. 2, sec. 76, of the Bank Act, R.S.C. 1906, ch. 29 [3-4 Geo. V. (Can.) ch. 9], where its operations are through the medium and intervention of the company chartered to carry on such trade or business and having a distinct and separate legal existence, although the bank holds a controlling interest and is thus enabled and in reality does direct the affairs of such company, if the bank does not share in the profits nor is the business of the company owned by the bank.

[*Northern Crown Bank* v. *Great West Lumber Co.*, 11 D.L.R. 395, reversed; and see Falconbridge on Banking, 2nd ed., 196.]

2. BANKS (§ I—2)—ENGAGING IN TRADE—BANK ACT (CAN.)—VOTING POWER ON COMPANY SHARES HELD AS COLLATERAL.

The two essential rights of a shareholder in a company embrace (*a*) the profits, and (*b*) the voting power, and the inhibition of sub-sec. 2, sec. 76, of the Bank Act, R.S.C. 1906, ch. 29 (the gist of whose intent is merely that a bank shall not create an alias carrying on business for the bank with its money and giving it the profits), cannot ordinarily be invoked against a bank which did not have the right nor the intention to share in the profits although it did in substance have the voting power.

[*Northern Crown Bank* v. *Great West Lumber Co.*, 11 D.L.R. 395, reversed.]

Statement

APPEAL by the plaintiff from the judgment of Harvey, C.J., *Northern Crown Bank* v. *Great West Lumber Co.*, 11 D.L.R. 395, 24 W.L.R. 477.

The appeal was allowed, and it was held that the plaintiff bank did not carry on a trade or business contrary to the Bank

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Act, by reason of the control exercised over the defendant company's affairs through holding as collateral a majority of the shares and consequently controlling the voting power.

Wallace Nesbitt, K.C. (of the Ontario Bar) and *A. H. Clarke*, K.C., for the plaintiff, appellant.

E. P. Davis, K.C. (of the British Columbia Bar), *C. C. McCaul*, K.C., and *H. P. O. Savary*, for the defendant, respondent.

Scott, J.

SCOTT, J., concurred with BECK, J.

Stuart, J.

STUART, J.:—I agree with the general result arrived at by Mr. Justice Beck and Mr. Justice Simmons and have very little to add. I think it is impossible, without destroying the essential nature of a joint-stock company as a separate legal entity created by our statute law, to say that a bank which legally acquires control of a majority of the shares in a joint stock company organized to engage in trade or business and, by observing the formal procedure necessary to exercise control of the company, does so exercise control, is thereby indirectly carrying on that trade or business. I think it would be possible for a bank to make an agreement with a company in which it held no shares similar to the one suggested by my brother Beck in the case of an individual and thereby carry on business "indirectly" within the prohibitory clause of the Bank Act. But where the control is exercised merely by acquiring shares in the company and by taking advantage of the legal machinery created by the companies' ordinance, then, to deny that it is the company, and the company only, which is carrying on business is in my opinion tantamount to destroying the whole effect and intended result of the legislation with respect to joint-stock companies. It is true that Menzies did in many cases seek instructions directly from the manager of the bank but I cannot see that that amounted to anything more than the case of a company manager going past his directors and seeking instructions from the holder of a majority of the shares whom he knew to be able in any case by some wholly unnecessary trouble to control him through the directors.

The logical result of this view is that whatever extravagances of borrowing and management were indulged in, were the acts

done by the company itself, and as long as all was done legally I cannot see that in the absence of fraud a minority shareholder has a right to complain. I have had grave doubt as to the legality of the borrowing owing to the absence of a previous resolution but in view of the fact that no new obligations were created this becomes immaterial: *Reversion Fund* v. *Maison Cosway*, [1913] 1 K.B. 364. With regard to the particular form of the judgment and upon the question of interest I concur in the view of Mr. Justice Beck.

BECK, J.:—This is an appeal from the judgment of the Chief Justice [*Northern Crown Bank* v. *Great West Lumber Co.*, 11 D.L.R. 395]. The action is one by the bank on a number of promissory notes aggregating a large amount and on certain mortgages and liens under the Bank Act given as collateral securities. Before the time for defence one J. W. Robinson a shareholder in the defendant company made an application in Chambers upon which an order was made permitting him to defend the action on behalf of himself and all other shareholders. Some such order was, it seems to me, an eminently proper one to make, though I find no express rule authorizing such an order, but I think it was justified under the general rules adopted and applied by the Court as to parties for the protection of shareholders (10 Cyc. tit. "Corporations" 964, 968, 1000. Annual Prac. 1914, at 207, (Note to 16, rule 1) "intervention by persons not parties"; and see order 12, rules 23, 24, 27).

Robinson pursuant to this leave filed a defence and a counterclaim on behalf of himself and all other shareholders of the defendant company. No defence was filed in the name of the company. Perhaps the order should have been one permitting Robinson to use the name of the company and to defend in its name. I think, however, that is of no consequence now and that the defence can if necessary be treated as being in fact in the name of the company. The most important defence set up is that the bank had so dealt with the defendant company, its capital stock and shares and its property, as to have contravened the provisions of the Bank Act R.S.C. ch. 29, sec. 76, sub-sec. 2, which reads:—

> Except as authorized by this Act, the bank shall not, either directly or indirectly, (*a*) deal in the buying or selling or bartering of goods, wares

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and merchandise, or engage or be engaged in any trade or business whatsoever

and that the alleged indebtedness was incurred in the course of such dealings and therefore is not recoverable.

The learned Chief Justice says [11 D.L.R. at 406]:—

I find it impossible to come to any other conclusion than that the bank was carrying on the company's business if not in form certainly in substance; if not directly at least indirectly,

and on this ground held that the bank could recover no more than $54,000 secured by land and chattel mortgages dated April 8, 1907 and the additional sum of $25,000, of which $20,000 was placed to the credit of the company on April 23, 1907, and $5,000 on May 14, 1907, and such subsequent advances as were actually used in the payment of debts existing at the time of the advances but excluding all debts arising after December 2, 1907; this latter date being the date of an agreement for what is called the reorganization of the company; the effect of which and the subsequent conduct of affairs being in the learned Judge's opinion that thenceforward the bank was carrying on the company's business.

The company was incorporated on February 9, 1906, the subscribers to the memorandum of association were James W. Robinson, William McKenzie, James A. Steele, W. E. Payne, and George W. Greene, all of whom became directors of the company. Shortly after incorporation the company commenced business at Red Deer, acquiring on February 15, 1906, from George E. Bawtinheimer an assignment of his lease of the sawmill property at Red Deer and his interest in what are known as the McMillan estate timber limits 252 and 253. The company, on the same date, also acquired from James W. Robinson, William McKenzie and James A. Steele, their interest in what are known as the McEwen and Carter timber limits. These interests in these timber limits —interests which were created by license from the Crown—and the lease of the sawmill property at Red Deer constituted the assets of the company.

It is necessary to explain the nature of the interests acquired by the company in and especially the obligations undertaken by it in respect of these timber limits:

(1) *The McMillan Estate Timber Limits 252 and 253.*

Under agreement between Donald McMillan and others exe-

cutors of Duncan McMillan and Hon. Peter McLaren, of the first part, and Pennefather, Grant & Bawtinheimer, of the second part (ex. 13) the parties of the second part were obliged to cut one and a half million feet per year from these limits and to pay to the parties of the first part $1.50 per thousand feet log measure on or before April 30 each year and also to pay to the Dominion Government the ground rent and a royalty of fifty cents per thousand, and it was provided that upon any default for sixty days the parties of the second part should forfeit their rights. By agreement, dated March 21, 1904 (ex. 14), Pennefather and Grant granted to Bawtinheimer their rights in these timber limits and leased to him the sawmill property at Red Deer for 10 years from January 1, 1904, and the lessee agreed to make all the payments called for by the agreement, ex. 13, and to pay Pennefather and Grant an additional sum of $1.50 per thousand feet of timber taken from the limits on September 1, in each year. The lessee covenanted not to assign or sublet, except to a joint stock company; to carry out the provisions of the lease; and to keep the buildings fully insured. There was also a provision for forfeiture if work should stop for three months. By agreement dated February 15, 1906 (ex. 15), the defendant company became the assignee from Bawtinheimer of his rights and undertook all his obligations thereunder.

(2) *McEwen and Carter Limits.*

By agreement, dated December 21, 1905 (ex. 11), McEwen and Carter agreed to sell to Robinson, McKenzie and Steele all the timber owned by them on timber berths 105, 106, 185, and 186 on the Red Deer river, and 199, 200, 203, 204, 242 and 625 on the Clearwater river, afterwards known as berths 1100 and 1168, at $2 per thousand feet, board measure, according to Doyle's rule, and the purchasers agreed to pay $10,000 on or before May 1, 1906; $20,000 on or before May 1, 1907, and $20,000 on or before May 1, in each succeeding year, for which they were entitled to cut sufficient timber at $2 per thousand feet to amount to the said sums, with the right to cut further timber upon payment therefor at $2 per thousand feet on May 1, in each year. The purchasers further agreed to pay all ground rents and royalties payable to the Dominion Government and to keep the mill insured. There was provision for forfeiture for breach of covenants or non-

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payment of money. There was provision against sale or lease without consent except to a company being formed for carrying out the agreement.

The obligations imposed upon the company by the government requirements in respect of all these limits were:—

(1) To pay ground rent of $5 per square mile. The McMillan limits contained 24.17 square miles; the McEwen and Carter limits 333.46 square miles.

(2) To keep in operation 6 months of the year a saw mill capable of cutting 1000 feet each 24 hours for every 2½ square miles of the area licensed.

(3) Not to assign without consent of Minister.

The cash capital of the company seems to have been extremely small. The assets were subject to very onerous and dangerous conditions. I pass over the details of the history of the company and its relation to the bank up to the so-called reorganization of the company which indicated a crisis in its affairs. The documents immediately relating to this crisis in the company's affairs themselves give one I think a sufficiently definite idea of the position which the company had then reached. The proposition for reorganization came from the general manager of the plaintiff bank. I set it out below, italicizing what appears to me to be of special importance, and observing that in my opinion the statements of fact contained in this proposal are substantiated by the evidence. The proposal was as follows:—

Memo for the Great West Lumber Co. Outline for proposed reorganization of the company. *The company is at present indebted to the bank for a large sum of money, and also has a number of outside creditors. The assets* of the company, *apart from their interests in the timber berths*, which they have, contracts *to operate*, are not *sufficient to meet their obligations. If the company is liquidated*, there will not only be *no residue for stockholders*, but there will be *an unsettled liability. The holders of the leases for which the company has contracts both threatening to cancel their contracts.* Messrs. Graydon & Graydon, representing heirs of the McMillan estate, state they are about to take immediate action to terminate the contract entered into with them. Messrs. Carter & McEwen state it is their intention to give notice on September 25 that their contract is terminated. *The only possible way* that appears to be open *to save anything whatever for the shareholders* of the present company is to effect a reorganization of the company and *by introducing new interests* secure either new arrangements with the holders of the leases or their consent to a continuance of the leases now in force. The following proposal is submitted as a basis upon which this may possibly be accomplished.

The present capital stock of the company *issued* amounts to $26,500 (the amount intended to be stated was $25,500). Of this amount there shall be transferred to such party or parties as the bank may indicate to be held

by them *for account of the new interests to be introduced*, $16,500 (which should be $15,600). There shall be transferred *to a trustee* to be chosen by the present shareholders, and to be approved of by the bank, *the balance of the issued stock, amounting to* $10,000. It is claimed that the total amount of capital stock *which should be issued is* $116,500. If this amount of stock is issued, then by the respective proportions to be allotted to the parties named by the bank and to the trustee selected by the present stockholders shall bear the same relative proportions to the present issue as $15,600 does to $10,000 (no issue was made under this clause). The bank will release the stock of the Robinson, McKenzie Lumber Co., which has been assigned to them as security for the debt of the Great West Lumber Co. The reorganized company will make such new arrangements with the heirs of the McMillan Estate—and with Messrs. Carter & McEwen for the operation of the respective limits leased by these parties as may be possible to effect in the best interests of the company. The reorganized company will protect the outstanding obligations of the Great West Lumber Co. *It shall be understood that there is no obligation on the reorganized company to continue the business indefinitely, but it shall be definitely understood that the company is to be at liberty to dispose of the business and plant as a going concern if a favourable opportunity to do so presents itself, and the price to be obtained is satisfactory to the majority shareholders.* It is to be understood that there will not be any distribution of profits from the results of the business while the company is indebted to the bank or to outside creditors. Salaries of all employees engaged by the company are to be reasonable and such as shall be satisfactory to all parties interested. It is understood that the rate of interest to be paid by the company to the bank shall be sufficient to compensate the bank for extra risk, anxiety and care, and that such rate of interest will be higher than the ordinary rate of interest charged to first-class customers.

In reply to this proposal the defendant Robinson wrote on October 3, 1907, the plaintiff's general manager a letter in the course of which he said:—

> In view of the large asset we now have in hand, leaving out of the question any equity in the timber limits, we think we should get a more favourable distribution of the shares.

By letter of October 8, 1907, the general manager replied to Robinson:—

> I cannot understand why you should think that you should get any more favourable distribution of the shares than what I have proposed. Any appreciation of the assets have been made entirely by us and through us, and I do not anticipate that I will be able to interest those whom I expect to interest in the matter on any less favourable a basis than what I have suggested to you. It will not be of any use to even suggest a modification of the terms I have proposed.

At a meeting of the directors of the company held on October 11, 1907, it was resolved to accept the proposed outline for reorganization to take effect on November 1, provided the company

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should be unable before that date to pay the bank or otherwise satisfy its indebtedness. On the same date, George W. Greene, the secretary of the company, by letter, advised the plaintiff's local manager at Red Deer of the last mentioned resolution and stated that the acceptance was upon the understanding that the shareholders represented by the stock proposed to be held by a trustee should have the privilege of paying to the new interests to be introduced or to whom the bank may direct, the par value of the stock to be transferred to the parties representing such new interests and obtain a retransfer. This proposition was declined by the general manager of the bank. At a special meeting of the company held on October 14, 1907, it was decided to accept unconditionally the terms of the proposed memo. for reorganization.

Transfers of stock to carry out the arrangement were approved at a directors' meeting on December 2, 1907. The declaration of trust by W. E. Payne of shares retained by the shareholders dated December 2, 1907. A declaration of trust dated August 2, 1909, was given by the Western Trust Co. in respect of 156 shares transferred to it to be held "in trust for the Northern Crown Bank."

Pursuant to the memo. of reorganization it was agreed in writing, dated December 2, 1907 (ex. 129), that of a proposed further issue to W. J. Robinson and Wm. McKenzie under the terms of agreement of November 28, 1907 (ex. 128), 62.66 per cent. should be transferred absolutely to the Western Trust Co. and the remainder to W. E. Payne in trust. This stock was never issued. After the reorganization James W. Robinson continued to act as a director and vice-president of the company until January 16, 1911. Thenceforward the external carrying on of the business was continued as before. Nothing in the history of the affairs leads me to conclude that at any stage was the bank either directly or indirectly dealing in the buying or selling or bartering of goods, wares or merchandise or was engaging or engaged in any trade or business whatsoever. Unquestionably it was not doing so directly. If it was doing so at all it was doing so through the medium and intervention of the company. The company was a distinct legal entity. The mere fact that the bank had acquired a controlling interest and thus was enabled to and did in reality direct the affairs of the company could not destroy the fact of the separate legal existence of the bank and the company.

I think that there can be no doubt that under some circumstances a bank could carry on a trading business indirectly through the medium of an incorporated company so as to contravene the provisions of the Bank Act by just such methods as it could do so through the medium of an individual; for that it can carry on a trading business indirectly so as to contravene the provisions of the Bank Act is a thing contemplated by the Act as possible and one cannot conceive how this can be done except through an intermediary who is either a person or a corporation. The word "indirectly" means through the intervention of another. It is contended that if what was done in this case was not an indirect trading by the bank it is difficult to see to what state of circumstances the word indirectly can be supposed to have been intended to apply. I suggest such a case as the following. The bank places $50,000 to the credit of John Smith, Smith is to engage in the grocery business in his own name. The lease of business premises is to be in him. The business is to be advertised as his. He is to account regularly to the bank for all profits. The bank is to indemnify him against loss, is to take all the profits and to pay him a fixed monthly salary. It is possible that such an arrangement might be held to be trading directly, but if it was intended to be prohibited it would be a wise precaution to cover it by the use of the word "indirectly." Under such a scheme as I have supposed the business would in reality be the business of the bank and only nominally that of the company. In my opinion the relationship between the bank and the company did not constitute the business of the company that of the bank. In other words, in my opinion, the bank was not acting in contravention of the provisions of the Bank Act prohibiting trading.

This brings me to the question raised upon the Companies Ordinance (N.W.T. 1901, ch. 20) sec. 98:—

> All companies under this Ordinance shall have power, subject to the conditions of and in addition to all other powers conferred by this Ordinance, to borrow money for the purpose of carrying out the objects of their respective incorporations; and to hypothecate, pledge or mortgage their real and personal property; to issue debentures secured by mortgages or otherwise; to sign bills, notes, contracts and other evidences of or securities for money borrowed or to be borrowed by them for the purposes aforesaid, and to pledge debentures as security for temporary loans.
>
> (2) These powers shall not be exercised except with the sanction of a special resolution of the company previously given in general meeting.

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The word "special" was struck out by ch. 5, sec. 13, sub-sec. 4, of 1907. This is of more than usual importance, as a special resolution is required by the Ordinance N.W.T. 1901, ch. 20, (sec. 122), to be recorded with the registrar of joint stock companies.

In Lindley on Companies, 6th ed., 230, it is said:—

> As regards borrowing money, (1) statutes limiting the *amount* which may be borrowed are always regarded as imperative . . . ; (2) but a statute authorizing money to be borrowed with the consent of a general meeting was as to this held directory only. (*a*) A similar construction was put on a statute which gave the company power to borrow in certain events, but "not without" the authority of a general meeting.

We are not here concerned with the proposition which I have numbered (1). The case of *Landowners West of England and South Wales Land Drainage and Inclosure Company* v. *Ashford* (1880), 16 C.D. 411, a decision of Fry, J., is cited for proposition (2). The statutory provision in question provided that it should be lawful for the company to borrow on mortgage or bonds such sums of money as should from time to time be authorized to be borrowed by an order of a general meeting of the company, not exceeding in the whole the amount of one-third of the subscribed capital of the company then paid up. Money was borrowed by the issue of debentures to an amount within the restriction as to amount provided by the statute (p. 434). Then the company gave a mortgage to a bank for a large sum, the total of a number of amounts borrowed from the bank. No general meeting sanctioned the borrowing from the bank (p. 435). Fry, J., says (p. 438):—

> Then the debenture holders raise several objections to the bank's claim. They say, in the first place, that the 46th section (of the Companies Clauses Consolidation Act, 1845) requires that the amount to be borrowed shall be specified in an order of the general meeting of the company, and that no such order was given. I think the cases which have been referred to shew that that is a *directory* portion of the statute, and not one which it is obligatory on the lender to shew has been performed as against the company, but that the company borrowing money must be taken to have done all that was necessary to give themselves that power. Then is it a provision which the creditors of the company—I mean the debenture holders of the company—can insist upon? The case I was referred to, before Lord Hatherley, of *Fountaine* v. *Carmarthen Railway Company*, L.R. 5 Eq. 316, does shew that the provision with regard to the general meeting is inserted in the Act of Parliament for the benefit of the *shareholders*, and not of the creditors. They (the creditors) could not stop the company exercising that power, and therefore it does not interest them.

Re Hampshire Land Co., [1896] 2 Ch. 743, was a decision of Vaughan Williams, J. The clause in the articles of association under consideration was as follows:—

> 82. The directors may borrow, in the name or otherwise, on behalf of the company, such sums of money as they may from time to time think expedient. . . . Provided, nevertheless, that the aggregate of the principal money so borrowed shall not at any time exceed the amount of the paid-up capital, *unless the borrowing of a larger amount* shall have been *previously* authorized by a general meeting, in which case the directors may borrow to such an extent as is authorized.

The paid-up capital of the company was only about £10,000. Vaughan Williams, J., at 747, says:—

> It must be taken that in fact a resolution was passed by the shareholders of the company authorizing the borrowing of the £30,000, and it must be also taken that no notice was given to them that this special business was intended to be proposed to the meeting which passed the resolution (a clause in the articles required this), and that therefore the authority of the directors of the company to borrow this money was not perfected. *They had no authority in the absence of a properly passed resolution to borrow this money.* But in that state of things, the money having been lent by the society and received by the company, the question which I have stated arises. It is not disputed that the authority of the *Royal British Bank* v. *Turquand*, 6 E. & B. 327, is such that the society had a right to assume in a case like this that all these essentials of internal management had been carried out by the borrowing company, and that it is only in case the law imputes to the society knowledge of these irregularities that the society is not to rank upon the estate of the Hampshire Land Co. as a creditor for the amount lent.
>
> The question, therefore, is this: Is it right to impute this knowledge to the society? It is said that it is right, because Mr. Wills was the common officer of both the society and the company and was aware of these irregularities; and I think it must be taken that he was aware of them. Then it is said that his knowledge as the officer of the company is equally his knowledge as the officer of the society, and that therefore I ought to impute this knowledge to the society. I do not agree.

He then proceeds to give his reasons, with reference to cases, for this opinion.

I think that no different construction is to be put upon the words of our Ordinance in which it is explicitly said that the sanction of the company shall be given previously from that of similar provisions where (as in *Landowners etc.* v. *Ashford* (1880), 16 C.D. 411, the implicit meaning is the same.

A general meeting of the company held on April 2, 1907 (pp. 356-7), authorized the directors to borrow from the Northern Bank a sum not exceeding the sum of $25,000 to apply *in reduc-*

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tion of the liabilities of the company and to bring down to the mill at Red Deer the logs now cut, at a rate not exceeding 7 per cent. per annum, and *as security* for the repayment *thereof* and of the interest thereon *and of the existing liability of the company to the bank* to pledge or mortgage, etc.

The proposal for reorganization submitted to J. W. Robinson and forwarded to the manager of the bank at Red Deer under cover of a letter of September 21, 1907 (No. 38), contains the statement that *the company is at present indebted to the bank for a large sum of money.* This proposal was laid before a meeting of the company held on October 14, 1907, and accepted unconditionally. The amount of the indebtedness to the bank at this time appears to have been $108,804.87 (see p. 230 referring to ex. 168). The circumstances and especially the correspondence about this time make it altogether probable that the members of the company were aware of the amount of this indebtedness when they accepted the proposal and thereby accepted the fact that this indebtedness existed. Then there was the general annual meeting held on December 2, 1907; adjourned to December 17, 1907 (p. 367), and the adjourned meeting (pp. 369, 370), at which the auditor's report was considered and adopted. This report ought to have and no doubt did contain a true statement of the company's indebtedness to the bank. The annual general meeting of the company on December 19, 1908 (p. 372), adopted the auditors' report and balance sheet presented to that meeting. The same thing took place at the annual general meeting 1909 (p. 376-7), 1910, 1912 and 1913. In this way the shareholders confirmed the action of the directors in borrowing from the bank and thereby waived the irregularity in the internal management of the company which arose by reason of the authority from the shareholders not being previously given.

I think for the reasons indicated that the plaintiffs are entitled to judgment for the amount of their claim with the exceptions (1) that the sum of $6,950, secured by mortgage of September 27, 1911 (ex. 7), is to bear interest at 5 per cent. only, the stipulation for interest at 8 per cent. being void under the Bank Act, and (2) that it be left to a reference to be determined whether in making up the amounts of any of the notes or securities the company has been improperly charged with a larger amount than was actually

and legally owing by reason of an excessive rate of interest on earlier indebtedness having been charged which the company is not estopped from taking exception to on the principle laid down by the Privy Council in *McHugh* v. *Union Bank*, 10 D.L.R. 562, [1913] A.C. 299, 23 W.L.R. 409.

None of the other instruments upon which the bank claims seem on their face to offend against this statutory provision. The bank is entitled to enforce its several securities to the extent of the amounts owing upon them respectively. There should be a reference to the clerk to calculate and certify these several amounts having regard to the two exceptions above stated. The order should go in the usual form for payment, and in default, sale with the approbation of a Judge.

I add a word with regard to the shares transferred to the nominee of the bank "for the purpose of introducing new interests" and to be held "for account of the new interests to be introduced." These shares were the shares of individual shareholders—not treasury shares. It is a common thing for vendors to a company to place some of their vendors' shares received as part of the purchase price of what they conveyed to the company at the disposition of the company, either for the absolute benefit of the company or for temporary purposes. With which object the transfer of these shares was made it is not necessary in the present action to discover. So far as the bank is concerned the bank received them undoubtedly on the terms that if the shares were sold the proceeds would go to the credit of the company. They may still be sold. The bank holds them as security only and in the event of a sale must account in respect of them to the company. As to the rights between the company and the individual shareholders, whose shares they were, that can be left to be settled between the company and the shareholders when, if ever, the question arises, I think there should be a declaration in respect of these shares that the bank holds them as security only.

I would give the costs in the Court below and the costs of the appeal to the plaintiff bank.

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SIMMONS, J.:—This is an appeal from the judgment of the Chief Justice dismissing the claim of the plaintiff bank against the defendant company for all moneys advanced by the plaintiff bank

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subsequent to December 2, 1907, on the ground that the bank had been carrying on the business of the company contrary to section 76, sub-sec. 2, of the Bank Act and also declaring that the securities taken by the bank for their indebtedness subsequent to that date were invalid upon the same ground. The judgment also declares that the bank held 156 shares of the defendant company as trustee for the remaining shareholders, and ordering the transfer of same to the remaining shareholders.

The main facts out of which the action arose are set out in the judgment appealed from and I need not repeat them. The effect of the acceptance by the company of the terms of the memorandum, ex. 39, and the acts of the company subsequent to its acceptance of the same, are the real subject matter of this action. The memorandum is as follows:—

> The company is at present indebted to the bank for a large sum of money, and also has a number of outside creditors.
>
> The assets of the company apart from their interests in the timber berths which they have contracts to operate are not sufficient to meet their obligations.
>
> If the company is liquidated, there will not only be no residue for stockholders, but there will be an unsettled liability.
>
> The holders of the leases for which the company has contracts both threatening to cancel their contracts. Messrs. Graydon & Graydon, representing heirs of the McMillan estate, state they are about to take immediate action to terminate the contract entered into with them. Messrs. Carter & McEwen state it is their intention to give notice on September 25 that their contract is terminated.
>
> The only possible way that appears to be open to save anything whatever for the shareholders of the present company is to effect a reorganization of the company and by introducing new interests secure either new arrangements with the holders of the leases or their consent to a continuance of the leases now in force.
>
> The following proposal is submitted as a basis upon which this may possibly be accomplished. The present capital stock of the company issued amounts to $26,500. Of this amount there shall be transferred to such party or parties as the bank may indicate, to be held by them for account of the new interests to be introduced, $16,500. There shall be transferred to a trustee to be chosen by the present stockholders, and to be approved of by the bank, the balance of the issued stock amounting to $10,000. It is claimed that the total amount of capital stock which should be issued is $116,500. If this amount of stock is issued then by the respective proportions to be allotted to the parties named by the bank and to the trustee selected by the present stockholders shall bear the same relative proportions to the present issue as $16,500 does to $10,000. The bank will release the stock of the Robinson, McKenzie Lumber Co., which has been assigned to them as security for the debt of the Great West Lumber Co.

The reorganized company will make such new arrangements with the heirs of the McMillan estate, and with Messrs. Carter & McEwen, for the operation of the respective limits leased by these parties as may be possible to effect in the best interests of the company. The reorganized company will protect the outstanding obligations of the Great West Lumber Co. It shall be understood that there is no obligation on the reorganized company to continue the business indefinitely, but it shall be definitely understood that the company is to be at liberty to dispose of the business and plant as a going concern if a favourable opportunity to do so presents itself, and the price to be obtained is satisfactory to the majority shareholders. It is to be understood that there will not be any distribution of profits from the results of the business while the company is indebted to the bank or to outside creditors. Salaries of all employees engaged by the company are to be reasonable, and such as shall be satisfactory to all parties interested. It is understood that the rate of interest to be paid by the company to the bank shall be sufficient to compensate the bank for extra risk, anxiety and care, and that such rate of interest will be higher than the ordinary rate of interest charged to first-class customers.

It was not a formal contract but was a memorandum submitted to the company by the general manager of the bank as the basis on which the bank was willing to assist the company by further advances. A consideration of the circumstances existing then between the parties is necessary to appreciate the intention of the parties. The company's indebtedness to the bank had increased in the preceding eight months from $54,000 to $115,000. The arrangement for an advance of $25,000 in April, 1907, when securities for this sum and for $54,000 indebtedness then existing were given, had not enabled the company to finance its undertakings. It had an overdraft with the bank which kept increasing. Creditors of the company in Calgary were threatening to bring action in August, 1907. The owners of the leases of the timber berths were threatening cancellation on account of the company's default. The efforts of the directors to make a sale or obtain new capital had been unsuccessful. The bank was ready and willing to accept payment of their advances but the company could not make the payment. A crisis had been reached in the affairs of the company. If moneys were not forthcoming to protect the leases of timber-berths the company's main asset would be lost. Practically all the money that had been put in the business had been advanced by the bank. Even in the preceding April the bank made it a condition of their advance of $25,000 that the bank should have the right to nominate an acting manager to control the management of the company's business

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and this was accepted by the company. The minutes of the company are a fair indication of affairs at this period. On October 2, 1907, the directors request the bank to pay the D. McMillan estate $9,750, less $2,250 already paid, being dues for lumber cut in 1906 and 1907. Minutes of October 11, that the company accept the terms of the memorandum to take effect November 1st next, provided the company is not able on or before that date to pay the bank or otherwise satisfy the bank of its indebtedness and on the same date

> that whereas the executors of the estate of D. McMillan have demanded payment of dues on one million feet of lumber which they allege was cut during the season of 1905 and 1906 . . . over and above the actual cut taken, and whereas they have threatened to cancel the licenses or agreements to cut unless the demand is satisfied, therefore be it resolved that the Northern Bank be requested under strenuous protest to pay the amount demanded, being dues on 1,000,000 feet at $1.50 per thousand feet, in order to avoid further bother and trouble and the risk of cancellation proceedings being taken.

On the following October 14, the company accepted unconditionally the terms of the proposed memo. for re-organization of the company. Carter & McEwen were threatening cancellation proceedings of the contracts held by the company from them. If money was not forthcoming to protect the licenses the main asset of the company would disappear and only the mill property and land, some 111 acres at Red Deer, and the mill would be left and the bank stood to lose a large sum of money. The bank was willing to keep alive the company if it obtained control of the majority of the shares issued by the company. The company transferred 156 shares to the Western Trust Co., the nominee of the bank, and the bank, armed with the voting power of these 156 shares and additional shares afterwards purchased by them, controlled and directed the operations of the company subsequent to December 2, 1907.

In regard to the proviso that "the re-organized company will protect the outstanding obligations of the Great West Lumber Co.," I can conceive of no other meaning to attach to this term than that the bank should at once advance the money to protect outstanding obligations of the company. The memorandum is divisible, the first part consisting of a recital of the present conditions of the company and a suggestion that the one possible way

to "save anything whatever for the stockholders of the present company is to effect a re-organization of the company and by introducing new interest, etc." There follows a proposal for carrying this out. The company is to make transfers of stock to the nominees of the bank to be held by them for account of the new interest, and the balance to a trustee nominated by the shareholders and approved by the bank.

The draftsman's work is no doubt clumsily carried out, but it is quite clear that all parties understood the real effect of the acceptance was to give the bank control of the policy of the company, until its indebtedness was paid. The minutes of the company clearly indicate this. The minutes of the company between October 14, 1907, and December 20, 1907, are instructive in this regard.

The company proceeded to amend the articles of association by reducing the number of directors from five to three and making two directors a quorum, and then elected the three directors, Menzies, Kennedy and Robinson, with Kennedy as president; J. W. Robinson, vice-president, and Menzies, secretary-treasurer. There was to be no distribution of profits till the bank was repaid its advances. This indicates clearly the intention of the parties that the bank, while exercising through its own nominee a control of the majority of the shares of the company, yet was not to receive dividends or profits.

As early as April, 1907, the bank officials were convinced that the management of the company was incompetent. It was a condition of the advances subsequent to December, 1907, that the bank should have complete protection against incompetent management and that the manner of accomplishing this was to place a majority of the shares in the name of a trustee for the bank. In the result it did give the bank control of the administration of the company. The learned Chief Justice has held that consequently the bank was carrying on the business of the company "if not in form certainly in substance, if not directly at least indirectly." The Canadian case cited by the Chief Justice, namely: *Ontario Bank* v. *McAllister*, 43 Can. S.C.R. 338, is not of much assistance in the present case, notwithstanding the able and exhaustive discussion of the Judges of that Court and of the Courts below as to the construction of the prohibitive sub-section of the

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Bank Act. In the first place, the Ontario Bank was dealing with private individuals and, in the second place, the Ontario Bank arranged with the McAllisters that the business should remain in the name of one of them but should be carried on by the bank, the McAllisters retaining no further interest in the business. Now, a company is not possessed of a personal individuality enabling it to act and speak but must, of necessity, carry on its business through its agents (its directors or manager) who are given powers by statute and under by-laws of the company.

In the present case the memorandum did not contemplate that the bank should derive profits and therefore did not contemplate that the bank should have any of the rights of a shareholder except the right of nominating a representative who should be empowered with voting a majority of shares at all meetings of the company. If the shareholders had resolved to give the bank's nominee irrevocable proxies during the period of the bank's indebtedness the same result would have been obtained.

Now, the right to participate in profits and the right to exercise a voting power are the two essential rights of a shareholder. The bank did not have the first but did, in substance, have the second. How, then, can it be said the bank was either directly or indirectly carrying on the business of the company? I apprehend that the Legislature had in mind when inserting the word "indirectly" a purpose, namely, that the bank should not create an alias who should carry on business for the bank with the bank's money and who should account to the bank for the profits of the business. Sub-sec. 2 of sec. 76, R.S.C. 1906, ch. 29, enacts that the bank "shall not either directly or indirectly deal in the buying or selling or bartering of goods, wares and merchandise or be engaged in any trade or business whatsoever." Any one dealing in the buying or selling of goods, etc., does so primarily for the profits that can be got out of such transactions. It is contended, however, by the respondents that the section prohibits the bank from engaging in any trade or business even though the purpose is solely to enable the bank to recover advances previously made to the business or concern and *Ontario Bank* v. *McAllister*, 43 Can. S.C.R. 338, is cited in support of this contention.

This contention arises from a confusion of thought and upon an incorrect hypothesis. It assumes that the bank was in sub-

stance, if not in form, the owner of the business of the company. The bank did not become the owner of the shares transferred to the trustee. The trustee was bound to transfer these shares to a *bonâ fide* purchaser if the company or those associated with the direction of the company succeeded in getting such a purchaser. The trustee was bound to put no obstacle in the way of a sale of "the business and plant as a going concern if a favorable opportunity to do so presents itself," etc. The evidence does not warrant a conclusion that there was a breach of trust by the trustee nominated by the bank in regard to any of these duties.

Section 76, sub-sec. (1) (*a*) of the Bank Act authorizes the bank to "deal in, discount and lend money and make advance on the security of . . . stocks, bonds, debentures and obligations of municipal and other corporations." These powers when exercised must of necessity carry with them the exercise of all the powers of a stockholder, including the right to vote and the right to participate in dividends and profits. It is true the shares of the defendant company had not been converted into stock, but since they were paid up they were subject to such conversion by the majority of the shareholders at any time. The statute has given the bank unqualified rights as a stockholder and it can not then be said that the following prohibitive subsection had the effect of taking away these rights. If the exercise of the complete rights exists it can not be maintained that the lesser or qualified rights do not exist by reason of the prohibitive subsection.

The Great West Lumber Co. and its business as a separate entity still existed and carried on business, and if a majority of its shareholders authorized its directors to pursue a business policy suggested by the officials of the bank in the absence of actual fraud and collusion, that was a matter concerning the internal economy of the company with which the Court have no right to interfere.

Lord Halsbury in *Salomon* v. *Salomon*, [1897] A.C. 22 at 30, very clearly enunciates the principle applicable.

> I must here pause to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven (shareholders) or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. . . . Still less is it possible to contend that the *motive of becoming shareholders or of making them shareholders is a field of inquiry which the statute itself recognizes as legitimate.*

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It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and, in fact, has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, or to recover moneys or damages alleged to be due to the company, the action should, *primâ facie*, be brought by the company itself. . . . But an exception is made to the second rule where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of a majority of the shareholders *or are capable of being confirmed by the majority*. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.

Per Lord Davey in *Burland* v. *Earle*, [1912] A.C. 83 at 93, and in the same case:—

Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his voting power having a particular interest in the subject matter of the vote:

See also *MacDougall* v. *Gardner*, (1875) 1 Ch. D. 25; and *North West Transportation Co. Ltd.* v. *Beatty*, (1887), 12 A.C. 589.

It is said there has been a breach of trust committed by the bank because new interests were not introduced. That argument arises from a failure of recognition of the fact that the bank was not bound to sell or cause to be sold the 156 shares to new interests, although both the company and the bank were only too willing, as shewn by the evidence, to get new interests into the business by way of a purchaser for the whole business. The introduction or non-introduction of new interests was a part of the internal economy of the company. By new interests was obviously meant by all parties additional capital to enable the company to carry on business and preserve its main assets which were peculiarly liable to disappear if the new capital did not materialize. The bank by way of advances did furnish the money to effect this purpose and the claim of a breach of trust in this regard seems to have no foundation in fact.

It is necessary still to deal with the important question of the

borrowing powers of the company. Although not resting his judgment on this ground, the learned Chief Justice indicates that the borrowing subsequent to December 2, 1907, was *ultra vires*, not having received the assent of the shareholders. Sec. 98 of the Companies Ordinance, ch. 20, 1901, provides, sub-sec. 2, that the borrowing powers shall not be exercised except with the sanction of a resolution of the company "previously given in general meeting." The judgment appealed from has indicated that the effect of the sub-section is to abolish the principle of ratification unless, perhaps, by a concurrence of every shareholder. I cannot concur in this conclusion. I am of the opinion that the statute is directory only and not mandatory and as relating to the conduct of the internal affairs of the company is subject to ratification and was ratified by resolution of January 28, 1913.

I am of the opinion, however, that the question of authority to borrow is not material to the main issue, of the indebtedness of the company to the bank, in view of the evidence that all moneys advanced by the bank were applied in retiring debts of the company (Menzies, p. 40), and admission of J. W. Robinson that this was so up to December 1, 1907, and that he cannot say after that date. Menzies says the cheques of the company were issued in payment of its debts and the bank honored the cheques and this is not contradicted or disputed, so far as the evidence before us discloses. I, therefore, apply the principle enunciated in *Reversion Fund* v. *Maison Cosway*, [1913] 1 K.B. 364, namely, that the question of authority to borrow is not material because the company's liability remained unchanged and in equity—that there had been no real transgression of the principle on which the company is prohibited from borrowing.

There remains only the question of the validity of the securities and the matter of interest. I concur in the judgment appealed from as to the invalidity of the chattel mortgage for $25,000 given on April 8, 1907, and with the finding that the real property mortgage of $54,000 of April 8, 1907, and the chattel mortgage of August 27, 1907, are valid. I am not satisfied that either of these mortgages was paid in full, especially in view of the date of the last chattel mortgage, August 27, 1907, and if the plaintiffs apply they should have a reference to determine the amount, if any, due, after deducting the costs and expenses incurred in connection with the sale and manufacture, including stumpage.

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Simmons, J.

On October 24, 1911, there was an assignment of book debts amounting to $23,123.35 and also of the lease of "Grant Pennefather to the company" pursuant to sec. 88 of the Bank Act and the same was ratified in the general meeting of January 28, 1913, and the plaintiffs are entitled to enforcement of the same.

On the question of interest the evidence is very incomplete but Menzies admitted (p. 64) that the bank charged as high as 8 per cent. in 1907, and notes bearing interest at 8 per cent. were taken by the bank and that the rate varied with the money market. The interest was apparently computed by the bank and the amount added to the overdrafts of the company and notes taken for these amounts. In view of the methods of computation and the fact that the bank did not inform the company of the rate of interest that was charged, I conclude that the charges of interest in excess of 7 per cent. were invalid, as the company cannot be said "to have voluntarily assented to that which was equivalent to payment of interest at that rate" (*McHugh* v. *Union Bank*, [1913] A.C. 299, 10 D.L.R. 562).

The same rule should apply to the mortgage of September 27, 1911, for $6,950, as it provided for interest at 8 per cent. per annum. There should be a reference as to interest and in all cases where the bank has charged a rate in excess of 7 per cent. per annum the rate should be calculated at 5 per cent. per annum.

The judgment appealed from should be set aside and judgment entered for the plaintiffs for the amounts of the notes sued upon and interest as therein claimed subject to a reference as to the proper amounts of these notes where any principle of the same is arrived at by computing interest at a rate in excess of 7 per cent.

The counterclaim of the defendants for the return to them of 165 shares transferred to the trustee of the bank should be dismissed, as the bank has not been paid the moneys due from the company for advances pursuant to the memorandum of December, 1907, under which these shares were transferred to the trustee. The plaintiffs are to have enforcement of the securities above mentioned for the amounts found due on the same at a reference, and judgment for the amount of the notes sued upon and interest subject to the reference above referred to where interest in excess of 7 per cent. per annum has been computed in arriving at the principal sum of said notes, and also to have the costs of the appeal and trial below.

Appeal allowed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. February 3, 1914.

1. FISHERIES (§ IA—3)—THREE-MILE LIMIT—FOREIGN SHIP—EVIDENCE REQUIRED TO ESTABLISH JURISDICTION.

To justify the condemnation of a foreign ship seized for alleged infraction of the Customs and Fisheries Protection Act (Can.) R.S.C. 1906, Ch. 47, it must be established with accuracy and complete certainty that the boat was within the three-mile limit of the coast, at the time of the alleged offence, as such finding is essential to jurisdiction over the offence.

["*The Kitty D.*" v. *The King*, 22 Times L.R. 191, referred to.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia affirming the judgment of Morrison, J., at the trial, by which action, on the information of the Attorney-General for Canada, was maintained, and the launch "Thelma" was condemned to forfeiture for unlawfully fishing within the three-mile limit off the coast of British Columbia.

The appeal was allowed, Idington and Brodeur, JJ., dissenting.

Lafleur, K.C., and *R. M. Macdonald*, for the appellant.

W. B. A. Ritchie, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree, for the reasons given by Mr. Justice Anglin, that this appeal should be allowed with costs.

Davies, J.

DAVIES, J.:—This is an action brought in the name of the King, on the information of the Attorney-General, against the defendant, as owner of the gasoline launch "Thelma," for the condemnation of the launch, a foreign vessel, her tackle and apparel, for fishing within the three-mile limit off the coast of British Columbia, in contravention of the Customs and Fisheries Act of Canada.

It is unnecessary, in the view I take of the case, to deal with the question whether, even if within the limits, the launch, when seized, was engaged in fishing; the substantial question on which I rest my judgment and which gives rise to so much doubt and difficulty is whether the "Thelma," when so seized, was or was not within the prohibited limits.

The weather on the day and at the time of the seizure was, by common consent, thick and foggy, and the shore or land was

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not visible until the vessels were brought in quite close to it—say about a quarter of a mile.

Fishery Officer Ledwell, who made the seizure, described the weather as "very inclement, very dirty. You could not call it a fog—a heavy, misty rain."

He also says that, when he boarded the "Thelma" and charged Captain Carlson with being within the three-mile limit, the latter replied that he was not aware of it. Mr. Ledwell frankly admits that land was not in sight and that you could not form a true estimate of the location of the "Thelma" by the courses and distances followed by the cruiser "Newington" from the time she left port till the seizure took place. What he and the captain of the "Newington" relied upon to fix the true location of the "Thelma," when seized, was the course and distance run towards the shore after the cruiser took the launch in tow and the time and speed of the vessel while so running. These, I agree, are the determining factors, and the chief one is the time.

The location of the launch, when seized, was not buoyed for further testing, and whether or not it was within the three-mile limits depends entirely upon the distance traversed by the cruiser "Newington" after taking the launch in tow and while she ran at full speed towards the shore.

The contention on the part of the Crown was that the steamer ran straight towards the shore from the time she took the launch in tow for a period of sixteen minutes, running at the speed of about eight miles an hour, and that when the captain stopped at the end of the sixteen minutes he sounded with the lead, and found he was in fifteen fathoms of water, and was then about a quarter of a mile from the shore.

Under the weather conditions there were no other means of judging how far the "Thelma" was from the shore when she was seized than the test made by running the cruiser at full speed towards the shore, determining at what speed she was running, and ascertaining, as nearly as possible, the time taken to make the run.

The whole question depends upon the correctness of this time. If, as the Crown contends, it was sixteen minutes only, and the rate the steamer was running at was eight miles an hour and there were no distances run towards the shore after the cruiser

started with the launch in tow and before the log was thrown over and also after it was read and taken in before the fifteen fathoms were sounded when the vessel was judged to be within a quarter of a mile of the shore, then it would be tolerably certain that the Crown's contention was correct, and the launch, at the time she was seized, was, at any rate, not more than about two and a quarter or two and a half miles, at the outside, from the shore.

But, if the time during which the cruiser ran at full speed, judged to be at the rate of eight miles an hour, was twenty minutes, and not sixteen, then, making reasonable allowance for the distance the cruiser ran with the launch in tow before the log was thrown over and also after it was taken in and the vessel slowed down and the fifteen fathoms sounding was made, at which moment Captain Halgreen judged himself to be a quarter of a mile from shore, I think the conclusion must be that, when seized, the "Thelma" was not within the three-mile limit.

In determining whether the cruiser ran with the "Thelma" in tow for sixteen minutes or twenty minutes at full speed towards the land, we are not left altogether to the conflicting judgment or memories of the witnesses.

Captain Ledwell, the fishery officer, who was, however, aboard the launch, and not in the cruiser "Newington," states that he took the time with his watch in hand, and that they ran in sixteen minutes at the rate of eight miles an hour, as he judges, and, at the close of his examination, says:—

> I might say that, when we started to tow the boat in, I took my watch out like that; just as the "Newington" started her propeller, started to go ahead, I took my watch out and I held it in my hand until we got close in to shore then and the captain (Carlson) was standing alongside. I don't know whether he saw it or not, but I told him the time and distance.

Captain Carlson's account differs somewhat. He says that after the tow line was made fast to his launch the cruiser went ahead and got them under a little head-way, and then went ahead "a few hundred yards any way," then stopped, and then got the log ready, started again and threw the log overboard. He says, at page 95, that he was at the wheel with Captain Ledwell holding his watch in his hand alongside of him, and

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he (Carlson) looking at the clock in the pilot-house from the second time they started. He goes on to say:—

That was just exactly half-past eleven. And, when we were going in the neighbourhood of fourteen or fifteen minutes, well, I had pretty near fifteen minutes at the time, somebody asked Mr. Ledwell how long we had been going. He said, "fourteen minutes," and I looked at the pilot-house clock and I had pretty near fifteen minutes. Well, after then it seemed as though the speed of the "Newington" became slackened up, she commenced to go slower, and at the end of seventeen minutes she was going, I should judge, under half-speed, or something like that, and I says to Mr. Ledwell, I says, "It ought to be three miles now; we have been going nearly twenty minutes." So he simply looked at his watch; he didn't say how many minutes it was, and he kind of smiled, and he went across the deck and he says, "Work under slow bell," and the like, and "We are inside the headland and it would not make any difference whether you are five miles off shore, as we measure a line from headland to headland, and you have got to be three miles outside that line." I said, "I never heard of that before," and he said, "That is the way we are taking measurements."

He then goes on to speak of the lowering of speed and the throwing out of the lead two or three times, and then the turning of the ship towards the eastward parallel with the shore, and that, up to that time when the ship turned eastwards, they had been towing altogether twenty minutes.

Captain Halgreen professes to speak of the time run from a memorandum made at the time. At first I gathered that this memorandum was made by himself, but later on he explains that it was put down by the wheelsman, who was in the wheel-house, while the captain was outside on the bridge, in his oilskins, telling him what to put down, and that the man made a mistake in his entry of the hour the steamer stopped, which he (the captain) afterwards corrected.

Exhibit "E" reads as follows:—

Extract from daily journal, 1912, of "Newington."

Wednesday, 24.

Morning, thick fog and rain.

Left 7.7 a.m. and proceeded west under half speed; 9.46 spoke launch "Vera" of U.S.; sighted launch "Emma," U.S., and warned her to keep outside 3-mile limit. Sighted gasoline str. "Thelma" with her seine out, 10.41; was alongside of her from 10.55 to 11.26, then took her in tow towards shore, stopped 11.$\frac{3}{4}$ about $\frac{1}{4}$ of a mile from shore, at that time the log shewed 2 miles. Tsusiat Village 11.54, log 2$\frac{1}{4}$ Natinat Village 12.04, Owen Point, 1.54 p.m., Gas Buoys 2.00. Dropped anchor in San Juan Hr. 2.31 p.m.

Distance, 44½ miles.
Coal consumed, 2 tons.
Coal on board, 28½ tons.

The original sheet was not produced. The copy produced was, as the captain explains, taken from the original sheet, as he says:—

I wrote it down on account of it was so wet and the sheet I would write it on got so soiled I took it from that copy that day. You can see it was so dirty.

The captain put in the figures "42" below the figures "39," which had been entered by the man in the wheelhouse, because the entry was wrong, but what time of the day he did this is not explained.

I dwell upon this as shewing that the captain was not relying upon any contemporaneous memorandum or entry made at the time, but upon a corrected entry made some time later in the day, no doubt honestly made, but, possibly, after conference with Captain Ledwell and others. He made the entry conform to what, in his honest belief, it should have been. Captain Halgreen states that he went by his judgment and the log; that, of course, he could not say how the engines were going; that he looked afterwards at the log, and it read the ship had run just two miles; that he stopped the engines at the end of sixteen minutes, took soundings, found fifteen fathoms, and then judged himself to be within a quarter of a mile of the coast.

He says, at page 57: "When I stopped her I stopped her from full speed ahead to stop—see."

He says that when the lead was hove and shewed fifteen fathoms he turned the ship E.S.E. for a quarter of a mile. He does not say how far the ship ran after he gave the order to stop her before the soundings were successfully taken, remarking, however, that the quarter-mile run, after he turned her, was run while the ship was from full speed to stop, and that "you can't stop a ship dead still like you stop a waggon."

It is quite plain, however, that, after the ship was stopped from "full speed ahead" to "stop," or as the chief engineer put it, to "half-speed," she continued running on her course towards the shore until the soundings had been successfully taken. James McKay, the seaman who took the soundings, explains that, at

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the time he took the fifteen fathoms soundings, the vessel had stopped or slowed down, and that the shore was in sight then and, he judged, about a quarter of a mile away. Later he explains that you could not take soundings while the vessel was going full speed, and that he had taken four soundings *before he got bottom*. How far the vessel ran towards the shore between the order which stopped her engines, or put her at half-speed, and the first successful soundings, after three unsuccessful attempts, is not stated, but it obviously must have been some considerable distance.

Apart, however, from the evidence of the chief engineer, to which I will refer later, and which seems to have been entirely overlooked by the trial Judge in his oral judgment, I confess that, while entertaining much doubt, I would not have felt justified in interfering with his finding, confirmed as it was on appeal, as to the launch having been captured within the three miles from the shore.

But, unless this evidence of the chief engineer is to be entirely disbelieved, and there has not been a word said to throw discredit upon this officer, I cannot see how we can affirm such a finding.

Chief Engineer Wilson was in the discharge of his duty in the boiler-room all the morning of the day of the seizure, and up to 12 o'clock. It was his watch. It was his duty to make correct entries in his log kept there of the speed at which the engines were, from time to time, running, and of the moments when any changes were made in that speed, pursuant to orders from the captain. He swears he never left the engine-room at all during the whole of his watch and that he had made the entries in his log as produced by him. The custom was to make the entries on a slip kept for the purpose and copy them into the official log-book each evening. He says he did so with respect to these entries on the day in question. He knows, of course, nothing of what is taking place on deck, or can be seen from the deck, but whether his vessel is going at "full speed," or "half-speed" or "slow," or his engines are "stopped" altogether, it is his duty not only to know, but to record.

I make the following extract from his evidence. After asking permission to refer to his log and saying that "all the move-

ments in the engine-room were placed on this paper by myself," he says, in response to the question:—

Q. Give us your movements that morning?

A. Then I can give you the whole thing. We ran full speed until five minutes past ten o'clock. At 40 past 10 we stopped to speak to the launch "Emma."

Q. What does that mean?

A. I am referring to this because it will have some bearing upon the pressure of steam I was carrying at the time of the seizure. At 10.44 we were running at half-speed; at 11 we were running at full speed, and to orders. The orders came so quickly between 11 and five minutes past 11 it was almost impossible to give the variation of time, there were so many orders. At five minutes past 11 we were running at full speed and stopped at 11.20. At 11.25 we were running at full speed again, and at 11.45 at half-speed. We ran at half-speed until 1.45.

Later, replying to the vital question, "Q. Then, tell us how your engines were from 11.25 to 11.45?" he answered: "We were moving at full speed. Q. And from 11.45 to 1.45? A. Half speed."

In reply to Mr. Ritchie, he further said that he had more than 185 head of steam on between 11.25 and 11.45, and that his highest was 195.

Now, the entry in the captain's log is that at 11.26 he took the vessel in tow and stopped at 11.42. But it is somewhat indefinite as to the precise moment he meant when he "took her in tow." The captain's starting time in taking her in tow is one minute later than the engineer's time when the engines were started at full speed, while the time when he says he "stopped"—11.42—is three minutes before the chief engineer says he stopped the engines at full speed. One or the other has made a grave mistake. The chief engineer is speaking of the actual movements of the engine and the screw and the moments of each and every change as recorded by him in his engine-room at the time. The captain speaks from a memorandum entered by the wheelsman and, some time afterwards, corrected by himself.

Full speed for twenty minutes, from 11.25 to 11.45, would mean, at the rate the officers estimated the steamer's speed, two and a half miles. Making reasonable allowance for the distance the cruiser, with the launch in tow, sailed before the patent log was thrown out and began to record, and also for the distance she sailed after the "stop" order was given, and while the three

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unsuccessful attempts in throwing the lead to get bottom were being made, and the fourth successful one was made and announced, after which only the course of the vessel was changed, and adding to these distances the estimated distance of one-third of a mile from the shore, I would conclude that the "Thelma" was, at least, three miles from the shore when she was taken, or, at least, so very near to the three miles that it would be unsafe and unjust to condemn her.

For these reasons, I would allow the appeal and dismiss the information with costs.

Idington, J. (dissenting)

IDINGTON, J. (dissenting):—I think the officer directing the seizure in question was acting in good faith and took the proper attitude to be taken in all such cases; that, if there should be found a doubt as to the distance of the fishing-vessel from the shore, the owner thereof should get the benefit of the doubt.

All parties concerned knew what was involved in starting for the shore to measure the distance, and, if the appellant did not take more care than he seems to have done to guard against mistakes in doing so, it must be because he assumed due and proper methods were, before his eyes, being adopted.

Loose expressions are used which might, if standing alone, cast a doubt on the accuracy of the test applied, but the officer directing the proceedings, if in good faith, could hardly be mistaken with watch in hand, and experienced in the use of the appliances, in the result.

The questions involved are merely of fact, and I do not see how, if even I had great doubt, to reverse such findings.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—In such a case as this, where condemnation involves the forfeiture of the property of an alien friend and the fundamental question, though a question of fact, is that upon the answer to which depends not only the conclusion as to the acts alleged to constitute the offence charged, but the jurisdiction of the Court to award the condemnation and of the legislature over the locus of the defendant's acts, I think the judgment against the defendant ought to rest upon something more solid than a measure of probability barely sufficient to sustain

a verdict in an ordinary civil action in which none of these exceptional elements of controversy are present. I think, with respect, that this principle has not been kept in view; and I am constrained to the conclusion, after an examination of the evidence, that the allegations of the Crown have not been satisfactorily established.

I agree with the judgment of my brother Davies.

Anglin, J.

ANGLIN, J.:—Although I entertained little doubt at the close of the argument that if I had been presiding at the trial of this action I should have felt obliged to hold that the Crown had not sufficiently established its case, I was not then satisfied that the conclusion of the trial Judge, affirmed by the British Columbia Court of Appeal, should be reversed here. But, on further reflection and study of the evidence, I have become convinced that the judgment of condemnation should not be sustained.

The provincial courts held that the defendant had incurred the penalty of confiscation of his 15-ton gasoline fishing-boat, the "Thelma," his nets, etc., on the ground that, when the boat was arrested, he was illegally engaged in fishing within three miles of the Canadian shore. That the defendant was engaged in fishing, was, I think, a proper conclusion from the evidence under the authorities: "*The Frederick Gerring, Jr.*" v. *The Queen*, 27 Can. S.C.R. 271. But that the boat was, when seized, within the three-mile limit has not, in my opinion, been established with that accuracy "and complete certainty" which is properly required in cases where such a penalty as confiscation is the result of an adverse judgment: "*The Kitty D.*" v. *The King*, 22 Times L.R. 191.

To discharge the burden of establishing the location of the defendant's boat at the time of the seizure, counsel for the Crown adduced evidence on three distinct lines. First, he sought to trace the route of the Government boat, the "Newington," which made the seizure, from her departure from the harbour of San Juan to the point of seizure; secondly, he endeavoured to prove the distance of the point of seizure from the coast by shewing the time taken to tow the "Thelma" in to a point which the Crown witnesses estimate to have been a quarter of a mile from the shore and the speed at which the run towards the shore

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was made; thirdly, he relied upon the record made by the patent log used on the "Newington" while towing the "Thelma" in.

At the outset of the trial, counsel for the Crown, in his examination of the first witness, fishery officer Ledwell, endeavoured to establish the course which the Government vessel had taken in reaching the point of seizure. He must have very soon realized that in that effort he would not succeed. But, as a result of his examination of this witness and of the cross-examination both of this witness and of the next witness, Captain Halgreen of the "Newington," we have laid down upon a chart what purport to be approximately the courses taken by the "Newington" and the point of seizure. According to what is thus laid down, the Government vessel would, at the time of the seizure, have been more than three miles distant from the shore. For the Crown it is now said that the laying down of these courses is quite unreliable. Although the trial Judge states that Captain Halgreen figured them out deliberately, there is no doubt that both the witnesses spoke of them as being only approximate at best, and stated their inability to locate on the chart the precise position of the Government vessel either at the time when they sighted the "Thelma" or when they came up with her and arrested her. I would regard this evidence as of little value in itself and something to which no attention should be paid were it not for the fact that the point of seizure thus shewn on the chart agrees with what the defendant's witnesses maintain to have been the location of the point of seizure and also, approximately, with what the log of the engineer of the "Newington" and other evidence in the record indicate to have been the distance of that point from the shore as will be presently explained.

The weather at the time of the seizure and during the shoreward run which followed was foggy or misty. The "Thelma" was sighted when about half a mile from the "Newington." Fishery officer Ledwell says that on that morning "you could not distinguish anything more than about half a mile." Captain Halgreen says, "Just about three-quarters of a mile, that is about all you could see ahead." Of course, neither the shore nor any landmark was visible from the place at which the seizure was made. There could be nothing in the nature of cross-bearings to assist in locating it. The spot was not buoyed as was done

in the case of the "*Kitty D*," 22 Times L.R. 191. Perhaps it was not practicable to do so in this case. But that is not shewn: and, since the failure to buoy the spot precludes all possibility of subsequently ascertaining it, the necessity for absolute accuracy and precision in making the test to determine the distance by running in to the shore was all the greater.

When confronted with the difficulty that the point of seizure, as marked by him, is over $3\frac{1}{2}$ miles from the shore, Captain Halgreen endeavoured to meet it by stating that the "Newington," when the "Thelma" was sighted, in order to come up with her, had run in towards the shore about three-quarters of a mile. He evidently forgot that both he and officer Ledwell had already said that, when sighted, the "Thelma" was only *half a mile off the "Newington's" starboard bow*, and that she had not moved while the "Newington" was bearing down on her. The course of the "Newington" until the "Thelma" was sighted had been about parallel to the shore-line. This discrepancy rather shakes one's faith either in the reliability of Captain Halgreen's estimates of distances, on which so much depends in this case, or in his trustworthiness as a witness. Then, again, in the particulars delivered on behalf of the Crown the point of seizure is stated to have been "about $2\frac{1}{4}$ miles off shore from the mouth of the Nattinat River and about seven miles in shore from the Swift Shore light ship." The point of seizure, as marked by officer Ledwell on the chart, is $4\frac{1}{2}$ miles from the mouth of the Nattinat. At the trial Ledwell thought the Swift Shore light ship was about seven miles from the shore. He said he had often measured it. It is shewn by the chart, however, to be $8\frac{1}{2}$ miles from the shore. Yet the Crown case largely depends on the testimony of these witnesses as to distances measured by the eye.

According to the log of the captain of the "Newington," after she came up to the "Thelma" both boats lay to for 31 minutes (10.55 to 11.26) before the "Newington" started to tow the "Thelma" in towards the shore. During the first part of this period the net or seine of the "Thelma" was at least partly out and the current would affect the boat more on that account. The oral testimony also establishes that the boats lay to for about 30 minutes while the crew of the "Newington" were

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making preparations for the towing. Captain Halgreen makes this period 36 minutes or possibly 41 minutes. While the tide was slack at this time, according to the evidence of Captain Churchill (which is uncontradicted), there was a current at the place of seizure of which the general tendency was towards the shore, and Captain Carlson says that about the time of the seizure the wind was also blowing towards the shore, though not strongly or steadily. This evidence is also uncontradicted, although both officer Ledwell and Captain Halgreen were called in rebuttal. The "Thelma" was drifting shoreward during all this time. The defendants claim that there should be an allowance of three-quarters of a mile for this drifting. In the calculations of the Crown no allowance whatever is made for it. Upon the whole evidence I should be disposed to think that an allowance for drifting, during this 31 minutes, of one-third of a mile would not be excessive.

The "Newington" started in towards the shore with her tow-line slack. She tightened it and ran, the defendants' witnesses say, for a few minutes, and then stopped to adjust the line—all this before the real start for the shore was made—before the 16 minutes run in at full speed of which the Crown witnesses speak, had begun, and, of course, also before the patent log had been put out. The defendants' witnesses estimate the distance covered during this preparatory movement variously—Captain Carlson at several hundred yards, Torrisdal at one-quarter of a mile, and Tideman at from 1,500 to 2,000 feet. The two latter witnesses probably include in their estimate the distance covered after the second or true start for the shore was made and before the patent log was thrown out. The Crown witnesses do not dispute that the "Newington" stopped to adjust the tow-line, but they maintain that no appreciable headway was made as a result of the first start. On the whole evidence the Crown cannot, I think, complain of an allowance being made for the distance covered in this way of about 120 yards—say, one-fifteenth or .066 of a mile. Indeed, that is probably considerably under-estimating it.

After the tow-line had been adjusted, the "Newington" made her real start for the run towards shore. The Crown's evidence is that, after this second start, she ran in towards shore under full

speed for 16 minutes and then stopped. There is some question, however, whether the 16 minutes was not counted from the moment when the patent log was thrown into the water, which was not until the vessel was well under way. It is noteworthy that on this crucial point as to the length of time occupied in the full speed run in, on which the oral evidence is conflicting, the wheelhouse log of the "Newington" is unreliable. The original entry is not produced. In explanation Captain Halgreen says that it was wet and soiled. What is produced purports to be a copy of the log made by the captain from notes, he says at a later hour on the day of the seizure. It shews that the towing in began at 11.26 and ended at 11.4?. The original entry made by the man in the wheel-house was 11.39. The captain, in his evidence, says that he did not write the notes himself because he was out on the bridge, that the man in the wheel-house made a mistake in putting down 11.39 instead of 11.42, which he (the captain) told him to enter. It is a little difficult to understand how such a mistake could be made. The captain adds that he himself afterwards corrected the entry by putting the 42 below the 39. He also states that the figures "11.26," as they now appear in the log, were written "11.36": "This is a little mistake here, I think that is 36. It should be 26, though." This evidence requires no comment. Asked by counsel for the Crown as to the rate of speed maintained during the run in at full speed, fishery officer Ledwell says "about 8 miles an hour, *I guess*," and Captain Halgreen, "Well, I should judge about 8 miles an hour." Assistant-engineer Morrison, in answer to a question by counsel for the Crown, "Well, give us a minimum?" says: "Well, I should say she ought to make 8 knots on that run." According to the evidence of Inspector Ledwell, during a run on the following day, while towing the "Thelma" to Victoria, they made a test to determine the rate of speed which the "Newington" would make with the "Thelma" in tow. But the head of steam during the test is not given nor is there any evidence that the conditions of tide, wind and current were the same. Captain Halgreen bases his estimate of the speed, while towing the "Thelma," on his experience in towing scows; Tideman, a seaman for twenty-nine years, and Torrisdal, who had been seventeen years fishing, think the "Newington" made 10 miles

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an hour while towing the "Thelma." The evidence of Wilson, the chief engineer of the "Newington," who was called as a Crown witness, and gave his statement after making a careful scientific estimate, is that, allowing for a slightly reduced head of steam and for the drag of the tow, the "Newington" went towards the shore during the full speed run at the rate of 9 miles per hour. On all this evidence it would not seem to be unfair to fix the rate of speed at 8½ miles per hour. At 9 miles per hour the vessel would cover 2.4 miles in 16 minutes; at 8 miles per hour, 2.133 miles; and at 8½ miles per hour, 2.266 miles. McKay, a Crown witness, says, in his direct examination, that the towing in of the "Thelma" lasted "about half an hour, as near as I can say." The engine-room log, produced and vouched for by chief engineer Wilson, who made the entries himself, contains this item: "At 11.25 we were running full speed again, and at 11.45 half-speed," and the word "Thelma" is written under the figures 11.25, which Wilson says means "we have taken the 'Thelma' in tow," as was reported to him by a man whom he had sent on deck to ascertain that fact, which indicates that he was aware of the necessity for accurate and careful observation. He also says that from 11.25 to 11.45 the engines were running at full speed. This evidence is given in direct examination by counsel for the Crown. If the chief engineer's entry and testimony are reliable and if his estimate of the rate of speed should be taken, the "Newington" towed the "Thelma" three miles in towards the shore before she changed from full speed to half-speed. It should be observed, however, that, according to the engine-room log, there was no stop of 31 minutes (10.55 to 11.26), during which, according to the captain's log and the oral testimony, the "Newington" lay to beside the "Thelma." The engine-room log says "full speed, and to orders 11.05 stopped 11.20." But the defendant has a right to expect, where so much depends upon it, that the Crown case shall be borne out by the engine-room log as well as by the captain's log, and shall not rest merely upon unrecorded statements of witnesses' recollection of events and periods of time as to which there is a conflict of evidence. Both logs are in this case unreliable. One of them confirms the defendant's version of the time occupied in the run in. Captain Carlson, of the "Thelma,"

says his boat was towed in towards shore for 20 minutes; and he adds that he said so to fishery officer Ledwell at the time. Earlier in his evidence he had stated that the "Newington" had slackened speed, after 15 minutes, and, at 17 minutes, was running at half-speed. Peter Tideman, cook on the "Thelma," says that he kept watch during the run in by the clock in the pilot-house; that they went at full speed for 16 minutes and then at slackened speed for between five and six minutes, at the expiration of which they could see the shore, and he adds that the 16 minutes at full speed elapsed after the patent log was thrown out. The log was not thrown out, he says, until four or five minutes after the "Newington" had started, when she was from 1,500 to 2,000 feet from her starting point. Torrisdal, a seaman, corroborating Captain Carlson, says that when the "Newington" stopped towing the "Thelma" in towards the shore, Captain Carlson remarked to Inspector Ledwell, who was standing beside him, "We have been towing 20 minutes now." Upon all this evidence it is, I think, not possible to say that the time occupied in towing the "Thelma" in to shore at full speed was established with the precision and accuracy requisite in penal proceedings at the 16 minutes claimed by the Crown. There is the further uncertainty whether the 16 minutes, if accepted, should be computed from the moment when the "Newington" started shorewards the second time, or from the time when the patent log was thrown overboard. The Crown certainly cannot complain if the distance covered under full speed is calculated on the basis of a 16 minutes' run at 8½ miles per hour—2.266 miles. Making a deduction for loss in getting up speed, and no addition for the interval which elapsed between the start and the throwing out of the patent log, if the 16 minutes should be computed from the latter moment, it would seem that the distance covered in the full speed run may be fairly fixed at 2.15 miles.

It is also reasonably clear that, after the run in at full speed, whether it occupied 16 minutes, as sworn by Carlson and stated by Ledwell and Halgreen, or 20 minutes, as shewn by the engineer's log, the "Newington" continued to move towards the shore for several minutes at slower speed. If she ran in for from four to six minutes at half speed, as Tideman says, she would cover in that time about one-third of a mile. He says she went

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"about close to half a mile." Officer Ledwell says that, after running under full speed for the 16 minutes, the "Newington" stopped and the lead was then cast. McKay, the man who cast the lead, called by the Crown, says he cast it four times before he got bottom, and that on the fourth cast he got it at 15 fathoms. Of course, the vessel was moving in towards shore while these soundings were being taken, though at a reduced rate of speed. Up to the time of the soundings McKay says she had been going at full speed. Captain Halgreen says that in slowing down from "full speed" to "stop," the vessel would cover a quarter of a mile. McKay, who cast the lead, says that when he got 15 fathoms on the fourth sounding the "Newington" had stopped. Ledwell says that after the soundings were taken, the "Newington" again started to go ahead, and that he then told the captain to stop, because he thought it dangerous to take the "Thelma" any further towards shore. This was clearly after the 16 minutes had elapsed. Ledwell and Tideman both say so, and Captain Halgreen also says the lead was cast after the 16 minutes had expired. Taking into account what McKay says as to the four soundings made after the full speed run had been completed and while the vessel was proceeding under slow speed, what Captain Carlson says on the same point, and what officer Ledwell says as to the start to go ahead towards the shore after the soundings had been made, a movement which continued until he called out to go in no further, I would be disposed to make an allowance of one-quarter of a mile for the distance thus covered at reduced speed after the 16 minutes, or whatever longer period the full speed run occupied, had expired.

How far was the "Newington" from shore when, in obedience to officer Ledwell's order, she ceased towing the "Thelma" in and turned east? This point was not buoyed and no cross-bearings were taken to fix it. Nor was the distance measured accurately, as might have been done by sending a small boat in to the shore. No reason is given why these measures were not taken. No suggestion is made that it was not practicable to have thus ascertained with certainty and precision at what distance from the shore the towing in of the "Thelma" ceased. On this very important point the Crown case depends on eye measurements made in a fog by Captains Ledwell and Halgreen.

assistant-engineer Morrison and sailors Kraemer and McKay, who all agree (*mirabile dictu*) in stating that the distance was "about a quarter of a mile"—modifying that statement, however, by such expressions as "as nearly as I can judge." Tideman says that at the end of the full speed run he could "see the high land" on the shore. Kraemer, a Crown witness, says that when the "Newington" "stopped," when they "read the log, the two miles" they "could just make out the shore line"; and he adds that they could only see a quarter of a mile that day. Now, the evidence of other Crown witnesses is that they could see half a mile. They saw the "Thelma" at that distance. Captain Halgreen says he could see three-quarters of a mile ahead. This evidence casts grave doubt on the reliability of the estimate of a quarter of a mile as the distance from the shore—made by "optic observation," to quote officer Ledwell. Captain Halgreen says that, after running in, the "Newington" turned along the coast at 11.42 and ran easterly for 12 minutes, during which, he maintains, she covered only one-quarter of a mile! His story is that the "Newington" turned east immediately upon the expiry of the 16 minutes. He excludes from consideration the four or five minutes that Tideman and Carlson say the course shoreward continued at slow speed. He ignores, if he does not contradict, Ledwell's statement that, after taking the soundings, they again started towards the shore and turned east only when he, Ledwell, called out an order not to go further in. The log shews that the "Newington" stopped abreast of Tsusiat Village at 11.54. Twelve minutes—from 11.42, when the 16 minutes expired, to 11.54—are, therefore, to be accounted for as well as the admitted registration of $2\frac{1}{4}$ miles on the patent log when it was taken in, the captain says abreast of Tsusiat Village. He maintains that during that 12 minutes his boat made this quarter of a mile at a speed of $1\frac{1}{4}$ miles an hour, and suggests that the additional quarter of a mile shewn by the patent log was registered during this eastward run, although his own evidence shews that the patent log will probably not *register* when the speed is under $2\frac{1}{2}$ miles an hour. In explanation of thus moving along the coast only at the rate of $1\frac{1}{4}$ miles per hour Captain Halgreen says: "This quarter of a mile run (was) while the ship was from 'full speed' to 'stop.' You

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can't stop a ship dead like a waggon." That is quite inconsistent with officer Ledwell's evidence, confirmed by Tideman, and it scarcely accords with Kraemer's evidence. The four soundings were taken after the "stop" order was given and while the speed was lessening. Captain Halgreen himself says that it was after the taking of these soundings that he turned the "Newington" east. To take these soundings must have required several minutes—no doubt the four or five minutes to which Tideman deposes—the three or four minutes of which Carlson speaks—during which the vessel made headway towards the shore. Then there was the third start of which Ledwell tells. All this occupied part of the 12 minutes period from 11.42 to 11.54—probably nearly half of it—leaving about seven minutes for the quarter of a mile run down the shore to Tsusiat. Much the greater part, if not the whole, of the last quarter of a mile of the 2¼ miles shewn by the patent log when it was taken in would appear to have been recorded before the "Newington" turned eastward.

Speaking of the position of the "Newington" when, after going this quarter of a mile, she had reached a point abreast of the village of Tsusiat, Captain Halgreen says: "That is the nearest we got to the coast . . . just about a quarter of a mile, I should judge, from shore." How much farther out had the "Newington" been when she turned east? Pressed by Crown counsel, on re-examination, Captain Halgreen says they were as close to the shore at the beginning of the quarter-mile run to the east as they were at the end of it. He thus seeks to avoid the effect of the statement that "the nearest point we got to the coast" was at the end of that quarter of a mile. Captain Carlson estimates the distance from the shore when the towing in ceased at one-third of a mile. He says the shore line was visible only for a half mile, but the woods up high on the mountain in the rear could be seen a mile off. Torrisdal and Tideman say that when the "Newington" stopped her shoreward course they were still three-quarters of a mile from the shore. Tideman had seen the high land at the end of the full speed run. It was at the end of the run of four or five minutes at reduced speed that these witnesses say the shore was still three-quarters of a mile off. It was then that the captain said

they were close enough in. It was then they turned down the coast to the east. On all this evidence it can scarcely be said to have been satisfactorily established that the "Thelma" was towed on a course at right angles to the coast to within a quarter of a mile from the shore. On the story of Kraemer that they could just make out the shore line, taken with Captain Halgreen's statement that they could see three-quarters of a mile and the statement of Halgreen and Ledwell that they saw the "Thelma" when half a mile away, and on Captain Halgreen's admission that they were nearest the shore after making the quarter of a mile easterly run, the defendants would seem to be entitled to claim that half a mile, or, at all events, the one-third of a mile which Captain Carlson estimates, should be fixed as the distance from the "Newington" to the shore when the run in at right angles to the coast ended. But for the purpose of estimating the distance of the "Thelma" from the shore at the time of seizure, I place this distance at the quarter of a mile claimed by the Crown.

To sum up the result of all the evidence in a manner of which, I think, the Crown cannot reasonably complain, we have, as the outcome of the time and speed test, the following:—

	Miles.
Drifting allowance while boats lay to for 31 minutes	.333
Preliminary movement adjusting the towing line, etc.	.066
Full speed run—16 minutes at 8½ miles per hour, 2.266, less allowance for loss in getting up speed	2.150
Run at slow speed during soundings, etc.	.250
Distance from shore at stop	.250
Distance from shore of point of seizure	3.049

Indeed, the defendant may have reason to complain that none of these allowances is made on a sufficiently liberal scale. For instance, he may well claim that the distance from the shore when the "Newington" turned east should be placed at one-third of a mile at least; that engineer Wilson's estimate of the rate of speed during the tow should be taken; and that the allowance for distance covered in preliminary movements before the 16 minutes' run began should have been at least one-eighth of a mile instead of one-fifteenth.

The learned trial Judge did not base his judgment on the

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time and speed test, but he held himself bound to accept as conclusive the record of the patent log. He could "see no evidence to offset it." As already stated, the patent log was put out only after the "Newington" had made her second start towards the shore. The allowances for drifting during the 31 minutes that the vessels lay to and for the distance covered as a result of the first start and during the adjusting movements must, of course, be made in considering the result of the patent log records as in the case of the time and speed test. To these must be added something for the distance covered from the moment of the second start until the log was thrown over. Crown counsel speaks of this as "a short distance on"; Captain Halgreen as an interval which "*might have* been the time of 45 seconds"; Torrisdal "about a quarter of a mile"; and Tideman four or five minutes—1,500 to 2,000 feet. (These two latter witnesses may be including the distance covered as the result of the first start.) Tideman, however, adds: "They did not throw out the log until after we got a good speed."

The learned trial Judge says that he does not discredit the evidence of the defence witnesses as untruthful, but deems it unsatisfactory because they had not the necessary skill and information to give reliable testimony. The latter part of that observation is scarcely applicable on this point. Then Captain Halgreen says: "You cannot count on the patent log registering when the speed is under 2½ to 3 miles an hour. . . . At four miles it will register true, but under three miles I would not be very positive of it." Kraemer, the man in charge of the patent log, says that "when the vessel is going under five or six miles, you cannot say it is registering accurately." The log evidently cannot be relied upon to register fairly either while the vessel is getting up speed in starting or while it is slowing down in stopping. It would seem to be proper, therefore, to make an allowance, either for distance covered during the interval between the second start and the moment when the log was cast over, or for distance covered before a registering speed was obtained, or partly for one and partly for the other; and one-tenth of a mile would seem to be reasonable.

The Crown evidence is that at the end of the 16 minutes' full-speed run the patent log registered two miles. The accuracy

of this registration is challenged. The line of the log appears to have been long enough to bring the fan or rotator at times under the "Thelma" and at times alongside her. There is evidence that this would make the registration slower. But I shall assume that, while the vessel was running at full speed, the log recorded accurately. When it was taken in it registered $2\frac{1}{4}$ miles. Captain Halgreen says that this was after he had run one-quarter of a mile along the coast, but he also says that to run that quarter of a mile took twelve minutes—that is, at the rate of $1\frac{1}{4}$ miles an hour, and at that speed, according to his own evidence and that of Kraemar, the log cannot be relied on and probably would not register at all. Kraemer says that the reading of $2\frac{1}{4}$ miles was "very shortly after the reading at two miles." Captain Carlson says that only ten seconds elapsed between the announcement of the reading of two miles and that of $2\frac{1}{4}$ miles. Kraemer says that the log was taken in after the "Newington" turned east, but he does not say that it was when she had stopped opposite Tsusiat. Upon all the evidence there is not the slightest doubt that, after the order to slow down or stop had been given at the expiration of the 16 minutes, when the log was read and shewed two miles, the "Newington" continued to move shoreward slowing down. During this time the soundings were taken. During at least part of it the log was recording. This fact goes far to substantiate the defendant's claim that an addition must be made to the distance covered during the 16 minutes and recorded on the patent log at 2 miles, for the further run in at slow speed. The same allowance should be made as in the previous test, viz., one-quarter of a mile. On the patent log test, therefore, we have the following result:—

	Miles.
Allowance for 31 minutes drifting	.333
Preliminary movement	.066
While log not in water, or not registering	.100
Log record during full speed run	2.000
Run in at slow speed during sounding and start after before Ledwell called far enough in	.250
Distance from shore at stop, or turn	.250
	2.999

In regard to these allowances, the defendant, as already pointed out, may well claim that some of them are not made on a sufficiently liberal scale.

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I do not wish to be understood as expressing the opinion that the evidence clearly establishes that the "Thelma" when seized was outside the three-mile limit. That is not proved, although the balance of probability seems to be in favour of that view. On the other hand, I think it is satisfactorily demonstrated that the evidence does not establish that the "Thelma" was clearly within the three-mile limit when seized, certainly that it fails to do so with that precision and conclusiveness which are properly demanded in a penal proceeding such as this. It may be said that the various allowances which I suggest are mere guesses. As to the quantum of each allowance that is, no doubt, the case. But that some such allowances should be made seems to be quite clear, and the Crown has left matters in such uncertainty that I do not think it possible to say that those which I suggest are excessive. For these reasons, I think, judgment of condemnation should not have been pronounced. I would allow this appeal with costs in this Court and in the British Columbia Court of Appeal, and would direct the entry of judgment dismissing the action with costs.

Brodeur, J. (dissenting)

BRODEUR, J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for British Columbia confirming the decision of the trial Judge.

The questions at issue are questions of fact on which we have the unanimous findings of the Courts below.

The contention of the respondent is that the appellant, who is a United States citizen, was fishing, contrary to law, within the three-mile limit of Vancouver Island.

The appellant claims that his vessel was outside of territorial waters. The evidence shews that, in order to ascertain which of those claims were right, the Canadian Government vessel towed the fishing launch straight to a point as close to the nearest shore as it could safely get, and measured the distance by a patent log. The evidence is somewhat conflicting as to what then occurred. The learned trial Judge's finding was that the "Thelma," the seized vessel, was within the three-mile limit at the time she was apprehended.

That finding having been concurred in unanimously by the Court of Appeal, I feel that, relying on the constant jurisprudence

of this Court, those decisions of two Courts below on a question of fact should not be disturbed.

Appeal allowed with costs.

GARDNER v. EATON.

Manitoba King's Bench, before the Referee. April 13, 1914.

1. WRIT AND PROCESS (§ II A—16)—SERVICE OUT OF THE JURISDICTION—ASSETS WITHIN THE JURISDICTION—KING'S BENCH ACT (MAN.) RULE 291.

Service out of the jurisdiction of a statement of claim should not be allowed, under rule 291 of the King's Bench Act (Man.) upon a mere affidavit by the plaintiff stating that the defendant has assets in Manitoba of the value of at least $200 which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action, without shewing what the assets are, because the rule requires that the possession of such assets must be shewn to the satisfaction of the Court or Judge, and this implies that the Court or Judge should have some information furnished from which to be so satisfied.

Statement

MOTION by the plaintiff for an order allowing service out of the jurisdiction of a statement of claim in an action upon promissory notes signed by the defendant and made payable in British Columbia, where the defendant resides.

The motion was refused.

J. L. McManus, for plaintiff.

Patterson Referee

PATTERSON, Referee:—The plaintiff filed affidavits in support of the application making a *primâ facie* case of liability on the part of the defendant upon the notes, but, in support of his application to be allowed to serve the statement of claim on the defendant out of the jurisdiction under rule 291 of the King's Bench Act, R.S.M. 1913, ch. 46, the plaintiff's affidavit merely said:—

> The defendant has assets in Manitoba of the value of $200 at least, which may be rendered liable to the judgment in case the plaintiff should recover judgment in this action.

The rule, however, requires that this must be made to appear to the satisfaction of the Court or a Judge before such an order should be made, and no information has been furnished to me as to what the assets are to which the plaintiff refers from which I might be able to decide for myself whether the defendant really has any such assets, or what their value may be, and I do not think I should be satisfied on these points without such information.

I therefore think that the application must be refused.

Motion refused.

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SCHEUERMAN v. SCHEUERMAN.

Alberta Supreme Court, Scott, J., July 17, 1914.

1. EXEMPTIONS (§ I A—4)—ASSIGNMENT TO EVADE—EFFECT—RIGHT TO RECOVER BACK.

Where a debtor owning property exempt by law from execution assigns such property to a third party merely for the purpose of defeating his creditors and solely without consideration, although it may appear that the debtor's intention was to do an act which would be a violation of the law, yet since his act could not have the effect of defeating or delaying his creditors, he is not by such assignment deprived of the right to recover back the property from the assignee who has given no consideration for it.

[*Symes* v. *Hughes*, L.R. 9 Eq. 476, and *Mulligan* v. *Hubbard*, 5 Man. L.R. 225, referred to as supporting the principle on basis not so strong: *Mandel* v. *Tinkis*, 6 O.R. 625, distinguished.]

2. FRAUDULENT CONVEYANCES (§ II A—8)—VOLUNTARY TRANSFER OF EXEMPT PROPERTY—TO EVADE AN EXECUTION—EFFECT.

A voluntary conveyance of property made by a debtor for the purpose of evading an execution although made with fraudulent intent has not the effect of defeating, defrauding, or delaying creditors where such conveyance merely covers property already exempt by law from execution.

Statement

ACTION by a husband against his wife, registered owner of certain lands in Edmonton, for a declaration that she held the lands in trust for the plaintiff and for an injunction restraining the defendant from receiving the unpaid portion of purchase money on a sale of such lands already effected by her. The action involves the right of a debtor owning property exempt by law to voluntarily assign it for the purpose of evading an execution.

Judgment was given for the plaintiff.

Short, Cross, Biggar, Sherry & Field, solicitors for plaintiff.

Emery, Newell, Ford, Bolton & Mount, solicitors for defendant.

Scott, J.

SCOTT, J.:—The plaintiff claims that the defendant, who is his wife, was the registered owner of certain lands in Edmonton, that they were held by her in trust for him and that, in breach of the trust, she sold them to one Bucholz for $3,500 of which she had received $2,000, the balance of $1,500 and interest being still unpaid. He claims (1st) a declaration that she held the land in trust for him, (2nd) judgment against her for $2,000 and interest, (3rd) an order vesting the lands in him, and (4th) an injunction restraining her from receiving the balance of the purchase money and interest.

The defendant, besides denying the trust, the breach thereof and the receipt of any of the purchase money, sets up the Statute of Frauds as a bar.

The plaintiff entered for a homestead near Bruderheim in 1900 and resided thereon with his wife and family until 1905, when they removed to Edmonton. Upon coming here he purchased the lands in question for $700 and erected thereon a house at a cost of $600, the conveyance of the property being taken by him in the name of the defendant.

While residing on his homestead he purchased some land from the Canadian Pacific Railway Company, and he also, about that time, purchased jointly with the defendant's father and brother a threshing outfit from the J. I. Case Company for $2,700, and gave a mortgage on his homestead to secure the payment thereof. He was unable to pay his indebtedness to that company and he transferred the railway lands to the defendant for the purpose, as he admits, of protecting them from that company. He also admits that it was for that purpose that he caused the transfer of the Edmonton lands to be made by his vendor to her.

Plaintiff sold the railway lands in 1907 for $1,200, which he deposited in a bank for the defendant's credit. Shortly before coming to Edmonton he sold his cattle for $1,200. He states that he applied the proceeds of the sale of the cattle in payment of the Edmonton lands and the house thereon. The defendant denies that they were so applied and also states that the cattle were her property. I hold, upon the evidence, that the proceeds were so applied and that the cattle were his property. Plaintiff's homestead was sold by the Case Company under its mortgage and its claim has been satisfied. It is also shewn that he is not otherwise indebted.

Plaintiff lived with the defendant and his family upon the lands in question until February, 1912, when, as the result of a quarrel between them, she drove him from the house and he went to visit some relatives in the State of Washington. Upon his return some months later he found that she had sold the property and had disappeared. He afterwards learned that she had gone to Portland, Oregon. He followed her there and demanded a transfer of the property which she refused to give. She admits that she sold it for $3,500 and had received $2,000 on account of the purchase money.

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The plaintiff and the defendant both state that the transfer of the Edmonton lands was made to the latter for the purpose of protecting them against the Case Co.'s claim and, such being the case, it cannot be presumed that it was made to her by way of advancement. It therefore follows that the transfer to her created a resulting trust in favor of the plaintiff. Sec. 8 of the Statute of Frauds provides that such a trust is not within the statute. The statute is therefore not a bar to the plaintiff's right to recover. It is true the plaintiff states that the defendant at some time, it does not clearly appear when, promised to reconvey the property to him but I cannot find upon the evidence that there was a valid agreement between them to that effect at the time the property was transferred to her.

I come now to the question whether, in view of the admitted intent of the plaintiff in causing the Edmonton property to be conveyed to the defendant, this Court should assist him in recovering it or the proceeds arising from its sale. That the plaintiff's intent was fraudulent clearly appears. It is apparent, however, that it was unnecessary for him to take that course at that time in order to protect the lands in question from the Case Company or other creditors. The lands were purchased with the proceeds of the sale of property which was exempt from seizure or sale under execution and the lands, being occupied by the plaintiff and his family and under the value of $1,500, were also exempt from such seizure or sale. It follows, therefore, that, notwithstanding the intent of the plaintiff, the effect of the transfer was not such as to defeat, defraud or delay his creditors.

In *Symes* v. *Hughes*, L.R. 9 Eq. 476, the Master of the Rolls in his judgment says:—

> Where the purpose for which the assignment was given is not carried into execution and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it.

This doctrine is quoted with approval by Lord Coleridge in *Taylor* v. *Bowers*, 1 Q.B.D. at 296, and by Taylor, C.J., in *Mulligan* v. *Hubbard*, 5 Man. L.R. 225, but in *Mundel* v. *Tinkiss*, 6 O.R. 625, Boyd, C., expresses the view that it is too broad in its terms. He says at p. 629:—

If it is meant that the illegal purpose is not carried out unless it is proved that some creditor has actually been defeated or delayed, this is imposing an unsatisfactory test because the act and conduct of the grantor are not affected by the subsequent course of third parties. So far as he is concerned the illegal purpose is complete, he has violated the law and should not be allowed to resort to the law for protection.

This plaintiff is in a better position than those seeking relief in the cases I have referred to in that, although his intention was to do an act which would be a violation of the law, his act had not that effect, as it could not defeat or delay his creditors.

I hold that the plaintiff is entitled to a declaration that the defendant held the lands in question in trust for him, and to an order vesting them in him subject to the claim of Bucholz, the purchaser, under his agreement to purchase. The plaintiff is also entitled to an injunction restraining the defendant from receiving the balance of the purchase money and to judgment against her for $2,200 with costs of suit.

Judgment for plaintiff.

LIGHTNING CREEK v. HOPP.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. April 14, 1914.

1. WATERS (§ II J—162)—GRANT OF PLACER MINING CLAIM — WATER RIGHTS.

In construing special privileges, under private statutes and grants from the Crown, the rule is, that nothing passes except what is included by necessary and unavoidable construction of the terms used, and a placer mining lease, silent as to the right to the water necessary to work the lease, does not carry with it such right. (*Per* Irving, J.A.).

[B.C. Consolidated Statutes, 1888, ch. 82, referred to.]

2. STATUTES (§ I G—75)—LOCAL OR SPECIAL LEGISLATION—STRICT OR LIBERAL CONSTRUCTION.

The requirement of sec. 16 of the Placer Mining Act, 1896, that every extension of a grant of water for mining grounds leased must be recorded in the Record of Water Grants, imports, when read with sec. 14, that no such extension can be effected except by express words. (*Per* Irving, J.A.).

3. PLEADING (§ I J—71)—PLEADING LAWS—ACTS.

The provision in favour of free miners, embraced in sec. 53 of the B.C. Mineral Act 1896, ch. 34, exempting such class from suffering from any acts of omission or commission or delays on the part of any Government official, must be specially pleaded before evidence in respect thereto can be received. (*Per* Irving, J.A.).

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LIGHTNING CREEK v. HOPP.

Statement

APPEAL from the judgment of Hunter, C.J.B.C., of October 16, 1913, dismissing the plaintiff's action for an injunction to restrain the defendants from interfering with the enjoyment of a certain water right for 1,000 inches of water to be diverted from Lightning Creek in Cariboo District, B.C., alleged as appurtenant to a placer mining lease.

The appeal was dismissed, MCPHILLIPS, J.A., dissenting.

W. J. Taylor, K.C., for the appellant.

Maclean, K.C., for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred in dismissing the appeal.

Irving, J.A.

IRVING, J.A.:—We are dealing with the question of the right to water claimed by both parties under the Placer Mining Acts.

The plaintiffs are the holders of a lease which was acquired by their predecessors in 1890, and which has been renewed from time to time, and they were also at one time the holders of a grant of water issued in April, 1897. This grant on its face was to continue in force for five years.

The defendant claims the water in priority to the plaintiffs, by virtue of a water grant obtained by him subsequent to the water grant of 1897.

In 1912, the plaintiffs brought this action for an injunction to restrain the defendant from interfering with the plaintiffs' lease and water record, and for damages for the unlawful appropriation of the water. There is no suggestion of trespass on the lands included in the lease, the case turns on the right to the water. The learned Chief Justice of British Columbia, before whom the trial was had, dismissed the plaintiffs' action on the ground that the plaintiffs had not made out their case.

There are certain things which are not disputed, namely:—

(*a*) That the plaintiffs obtained a five years' lease in 1890, and that it has been renewed in 1895 and 1900, and again in 1905, on the last occasion for twenty years. The regularity of the renewal of 1900 is questioned by the defendants, but assuming that all renewals were regular, or if the renewal of 1900 is irregular, that such irregularity has been cured by the renewal of 1905, the lease is alive and will remain in force until 1925.

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(*b*) That the only express grant of water ever held by the plaintiffs was obtained in April, 1897, and that on its face was limited to five years, that is to say, that unless kept alive by virtue of its being "appurtenant" to the lease, or resuscitated by virtue of a statutory provision to be hereafter mentioned, it expired on April 27, 1902, the end of the five years' term.

The plaintiffs' lease (p. 91), is dated October 3, 1890, and recites (what has led to the practice of granting leases, viz.), that there was a large extent of abandoned mining ground at Lightning Creek, and that such ground could not be worked effectually (that is to say, with advantage) without a very large expenditure of money. This means in effect that if the ground were to be taken up in small areas of 100 feet, in the usual way, nothing could be done, therefore it was desirable that the lessee should be permitted to take up the larger area which the part of the Mining Act dealing with leases contemplates being granted in such cases.

It then proceeds to grant them the parcel therein described, and represented on a roughly drawn map a rectangular area half a mile long by 500 feet wide, some 30 acres, spanning Lightning Creek and embracing a portion of ground below the turn of that creek to the south—no doubt the staking was intended to include the old river bed of Lightning Creek. A likely looking piece of ground, particularly that part to the west of the Elbow.

The Mineral Act set out in the Consolidated Statutes of 1888, ch. 82, was then in force. That Act dealt with both placer mining and mineral claims; the first attempt to separate the two classes of claims was made in 1889 (ch. 16); the work of separation was finally carried out in 1891, when the Mineral Act, ch. 25, 1891, and the Placer Mining Act, ch. 26, 1891, were passed.

The Act of 1888 was divided into eleven parts, the fourth part dealt with the size of claims, *i.e.*, ordinary claims. The 9th part with leases, *i.e.*, leases of land which would not be considered available for being worked by free miners as holders of individual claims: see sec. 137. The 10th part dealt with water and water grants (ditches).

In the 9th part, "leases," no mention is made of water.

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In 1890 (ch. 31, sec. 3), an amendment was passed under which the plaintiffs' assignors were able to secure a lease of the lands in question, viz., a lease of *bench* lands adjoining unworked or abandoned rivers or creeks, an area for hydraulic working not exceeding 160 acres.

The map shews that this lease falls within this description, and the gold commissioner's reference to sec. 124 of Placer Mining Act, 1891, ch. 26, confirms this opinion.

Mr. Taylor claims that the lease carried with it the right to the water necessary to work the lease. If it did, why did the lease not say so? The applicants are very much in the same position as people obtaining a private act. They for their own benefit and profit were obtaining special privileges, and the rule adopted in construing private statutes and grants from the Crown is to hold that nothing passes except what is included by necessary and unavoidable construction of the terms used.

Neither the lease nor Part 9, Consol. Stats. 1888, ch. 82, dealing with the granting of leases mentions the right to use water. On the other hand Part 10 relates to the acquisition of water. The language used in Part 10 indicates that the water is to be granted for an ascertained piece of ground already acquired by the applicant, and the water, when granted, is to be recorded annually. In this Part 10, sec. 139, there occurs the expression so much relied upon by Mr. Taylor that

> the water shall be deemed as appurtenant to the mining claim in respect of which it has been obtained.

One other section of the Act should be referred to, sec. 56, but that can only refer to a creek claim, for it is only with reference to a creek claim that the words "naturally flowing through or past" could be used.

I think on these grounds that it is clear that the lease in itself did not carry the right to water, nor was there any special provision in the statute for water grants for use on leased bench claims. The draftsman of the Placer Mining Act, 1891, seems to have conceived the same opinion, for in that Act appears a new enactment in Part 7, dealing with leases—authorizing the grant of water for working "leased bench lands adjoining un-

worked or abandoned rivers or creeks;" such grants were to be for the same term for which the bench land was leased.

These different numbers are somewhat confusing, but as I see no way of simplifying the reference to them, I must therefore set them out with this explanation.

In the Placer Mining Act of 1891, Part 7 deals with leases, renewals thereof, grants of water for use on leased lands and renewals of such grants. The leases, if over five years, are to be with the sanction of the Lieutenant-Governor-in-council, but the water grants are wholly in the discretion of the gold commissioner.

Part 4 deals with water rights in respect of placer claims or placer mines held as real estate. The expression "appurtenant to such claim" appears in this part (sec. 65) but that word does not appear in connection with the leased lands.

This Part 4 remained unaltered until June 1, 1897, when the Water Clauses Consolidation Act, ch. 45, 1897, came into force, notwithstanding that amendments were made as hereinafter mentioned to Part 7, dealing with water for use on leased lands.

In 1894 (by ch. 33, sec. 8), sec. 124 of the Placer Mining Act, ch. 26 of 1891 was amended by striking out "bench lands" and extending the operation of the section to

any mining lands on or adjoining unworked or abandoned rivers or creeks held under lease.

In 1897, by ch. 29, the power to grant water *for leases* under this section, and to renew such grants was taken away from the gold commissioner on May 8, 1897. Thereafter applications for water had to be made under the Water Clauses Consolidation Act, 1897, ch. 45, Part 2.

From the use of the word "appurtenant" in connection with water grants under Part 4 in respect of placer claims and placer mines held as real estate, and from its omission from Part 7, I infer that the argument resting on the use of the expression,

such water grants shall be appurtenant to the claims in respect of which they are granted

can have no force when we are considering grants of water acquired for use on *leased* bench lands under Part 7.

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If I am wrong in that opinion, I think the plaintiffs' counsel is pressing his argument too far. "Appurtenant" does not necessarily mean that you own the adjunct as long as you own the principal. The word has a narrower meaning, and in the mining acts was intended to convey that when there ceased to be an "agreement of quality" between the water and the claim, so that appropriate use of the water could not be made by or on the claim in respect whereof the water had been granted, then the right to the water was to cease, although the full term of years mentioned in the grant had not expired. It cut the grant down from the period named in the record to only so long as the two could suitably be enjoyed together.

It never could be intended to extend the grant beyond the period named in the record.

For the plaintiff it was contended that the renewals of the lease carried on the right to the water, but the renewals do not on their face purport to do so, and the statutes authorizing the renewals, say that such renewals shall be on the same terms as the original lease.

The grant of water obtained by the plaintiffs in 1897 was made under the authority of the Act of 1896, ch. 35, sec. 14, which authorized the gold commissioner to make a grant of water to be used on any leased mining ground "for the same period for which the ground is leased."

The section also authorized the extension both of the grant of water and the lease of the land for a further period, but this extension had to be approved of by the Lieutenant-Governor-in-council who would direct the gold commissioner to endorse the necessary memorandum on the lease.

Sec. 16 required that every grant of water under that section and every extension should be recorded, but the annual re-record was not necessary.

The right to the water, according to the terms used in the grant would expire on April 27, 1902, for some reason or other the gold commissioner did not make the water grant terminate with the expiration of the plaintiffs' lease, viz., on October 3, 1900. I think that is what he should have done. No application to renew was made in 1902. Mr. Taylor's contention is that as

the lease was extended in 1900, the water grant was by implication also extended.

The provision in sec. 16, that

> every extension of a grant of a water right for mining grounds leased shall be recorded in the record of water grants,

shews conclusively that there could be no extension except by express words: these words would constitute the memorandum which should be endorsed on the lease: sec. 14.

This brings me to the question raised as to benevolent provision that no free miner shall suffer by reason of any mistake made by any Government official.

The point comes up in this way: Jones says (p. 34) that when he applied for a renewal of his lease in 1900 he asked the gold commissioner to renew the water grant also, but the gold commissioner said it was unnecessary.

Mr. Taylor draws attention to sec. 14 of ch. 26, 1891, which declares that a free miner taking a certificate out under the Placer Mining Act shall have all rights and privileges granted to free miners by the Mineral Act, 1896. This section, he contends, entitles the plaintiff to the benefit of sec. 53 of the Act, ch. 34, 1896, which enacts that no free miners shall suffer from any acts of omission or commission or delays on the part of any Government official if such can be proven.

How this section can be worked out in practice—or what it includes—is difficult to say; and whether the advantage it was supposed to give was a "right or privilege" applicable to placer claims—at any rate prior to 1901—when sec. 19, ch. 38, 1901, was passed, is doubtful.

But in 1900 the plaintiffs' water grant was, by its express words, in force, and the gold commissioner could not renew it as the Act of 1897, ch. 29, secs. 3 and 4, had deprived him on and after May 8, 1897, of the power to extend the water grant.

If the gold commissioner told Mr. Jones in 1900 or at any time after May 8, 1897, that he had no longer power to extend the water grant, I think he was right, as ch. 29 of 1897 left him power to extend leases only.

The plaintiffs could only obtain a renewal by making ap-

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plication under the Water Clauses Act, 1897. I do not think the failure of the gold commissioner to direct them how to proceed can be regarded as a mistake within the meaning of sec. 53, ch. 34 of 1896—if that section is applicable at all.

But, in any event, the plaintiffs have got to raise this matter in their pleadings. When evidence was submitted by the plaintiffs, the defendant objected, and no amendment was made.

The question of jurisdiction which appears to have been argued in the Court below, was not raised in the argument before us. We therefore do not deal with it.

The plaintiffs have failed to establish their right to the water, and their action fails.

The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the learned trial Judge.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A. (dissenting):—This is an appeal by the plaintiff (appellant) from the judgment of the Honourable the Chief Justice of British Columbia (Hunter, C.J.), dismissing the action. The action was one brought for an injunction restraining the defendant from in any way interfering with the enjoyment of a certain grant of water right for 1,000 inches of water, to be diverted from Lightning Creek in the district of Cariboo, being appurtenant to a lease of certain placer mining ground held from the Crown by the plaintiff. The grant of water right as originally issued, and which it is contended by the plaintiff is still existent by reason of the renewal of the lease recording same, and subsequent conduct and representations of officers of the Crown reads as follows:—

Exhibit E.

Placer Mining Act (Form H.).

PLACER MINING ACT, 1896.

Grant of Water Right.

Granted this twenty-seventh day of April, 1897, to THE SOUTH WALES COMPANY.

One thousand inches of water out of Lightning Creek for the term of five years from the date hereof.

Such water is to be used for hydraulic mining on South Wales lease and is to be diverted from its source at a point at or near the Milk Ranche.

Fee $2.50.

Receipt 94943.

Certified a true and correct copy,

Sgd. JNO. BOWRON,
Gold Commissioner.

C. W. GRAIN,
Gold Commissioner.

The above grant of water right was held in connection with the leases of the New South Wales group situated in Lightning Creek, Cariboo, and entered in the Cariboo register of leases as Nos. 11, 936 and 1244.

The leases above referred to and the placer mining group covered thereby would appear to have been demised to predecessors in title of the plaintiff, viz., Harry Jones, W. C. Prince, George Cowan, Fred. J. Treyillus, and Gowen Johns, of Cariboo. The lease which specifically covered the placer mining ground upon which the grant of water right above set forth had relation is one of date October 3, 1890, from the Crown to Jones *et al.*, whose names are above set forth, being predecessors in title of the plaintiff. The term of demise from the Crown of the lease above referred to was five years and, in 1895, it was renewed for a further term of five years and in 1900 again renewed for five years, and finally, by order-in-council of October 2, 1905, the lease was extended for a term of twenty years from October 3, 1905. On June 13, 1910, the leases above referred to were assigned and transferred together with all appurtenances to Leicester A. Bonner of Cariboo and the consent to the transfer by the proper officer of the Crown was duly given and recorded. Later, all of these placer mining properties covered by the said leases and water rights appurtenant thereto, were transferred by Bonner to Francis William Darch, of 20 Eastcheap, London, E.C., England. Finally, on February 8, 1911, Darch duly transferred all of the leases above referred to, together with all the water rights appurtenant thereto, to the plaintiff, and this transfer was duly consented to and recorded by the proper officer of the Crown.

The plaintiff is a company duly incorporated in England under the Companies Act (Imperial) and duly authorized and

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licensed to carry on business in British Columbia, having its head office in England at 13 Saint Helen's place, London, England, with its head office in British Columbia in Barkerville.

The real subject-matter of the contest and litigation herein is the right to the water from and out of Lightning Creek, the plaintiff insisting upon its right thereto originating under the grant of water right above set forth under date April 27, 1897, issued under the Placer Mining Act, the defendant on his part insisting that this water right has expired and that he is entitled to the water as against the plaintiff under that certain water record No. 18, originating in a grant of water right for mining purposes under the Water Clauses Consolidation Act, 1897, of September 22, 1898, of which the following is a copy:—

Exhibit K:—Water Clauses Consolidated Act, 1897.
Grant of water right for mining purposes.
Granted this day, 22nd September, 1898, to Ernest Brenner.
Free Miner's Certificate No. 14669A.
Five hundred inches of water out of Lightning Creek.

Such water is to be used for hydraulic mining on the following mine or lands, viz., the Pinkerton Claim on Lowhee Creek, or such ground as may be acquired to work in connection with that property and is to be diverted from its source at a point or near the "Niggers" and is to be returned at a point into Ella or Blue Lake, thence by ditch and flume to the Pinkerton Claim, Lowhee Creek.

The difference in altitude between the point of diversion and the point where it is returned is about 200 feet. It is intended to store or divert the water by means of a ditch.

The annaul rental, payable on or before the 30th June in each year is $7.00.

Dated the 22nd day of September, 1898.

Sgd. JNO. BOWRON,
Commissioner.

Certified a true copy.—C. W. GRAIN,
G. C.

It would appear that the grants of water right were numbered as denoting priority, and the grant of water right under which the plaintiff is claiming is No. 2 and that of the defendant No. 18.

It would not appear that either the plaintiff or the defendant or their predecessors in title expended any very large sums

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of money in constructing ditches, flumes and other works to utilize the water in question until the year 1910, but from that time on to the commencement of the litigation very large sums of money have been expended.

The evidence plainly discloses that the defendant was aware of the previous grant of water right under which the plaintiff is claiming, but contends that it has expired, and claims under the water right above set forth, viz.: No. 18, and also under No. 255—a grant of water right for 300 inches, issued on November 27, 1905, and No. 256, a grant of water right for 300 inches, issued on November 27, 1905. Both of these latter records being issued to one W. C. Fry.

The water in question is vital in the carrying on of the respective mining operations of the plaintiff and the defendant, and in that the point of diversion of the water from Lightning Creek covered by No. 12 (the grant of water right of the plaintiff) is below that of No. 18 (the grant of water right of the defendant) the user of the water by the defendant would, as the evidence shews, absolutely deprive the plaintiff of the water claimed under No. 12, *i.e.*, one thousand inches out of Lightning Creek.

As already stated, it is clear upon the evidence that the defendant was fully aware of the leases and water right under which the plaintiff claims and that they were prior in point of time, but the whole contention is that the leases and the water right have expired, not having been properly renewed, further that the water by non-user became forfeited and became unrecorded water within the meaning of secs. 4 and 5 of the Water Clauses Consolidation Act, ch. 45, 1897.

The plaintiff at great expense constructed a ditch line and pipe for the utilization of the water covered by grant of water right No. 12, and the defendant actively interfered with the plaintiff's use of this water in the seasons 1912 and 1913 by diverting the water higher up the stream to the serious damage and detriment of the plaintiffs in their mining operations, the plaintiffs not being enabled to clean up, and a loss is mentioned of some $12,000.

The evidence shews that the grant of water right No. 12 (al-

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though erroneously it would seem to me at p. 33 of the Appeal Book referred to as No. 27, 1897) was obtained by Harry Jones one of the predecessors in title of the plaintiff and his evidence is that there was no renewal of the grant of water right as at the time of the renewal of the lease on October 1, 1900, for five years, John Bowron, the gold commissioner, said it was unnecessary. To quote:—

> He (meaning John Bowron, the gold commissioner) said it was not necessary to pay for the water record any more as long as the lease was in good standing the water went with it.

Then in 1905, the renewal is by order-in-council.

In my opinion, John Bowron, the gold commissioner, when granting the extension of the lease of October 3, 1890, then held by Harry Jones, W. C. Prince, George Cowan, Fred. J. Treyillus, and Gower Johns, now held by the plaintiffs, being duly transferred, had authority under sec. 124 of the Placer Mining Act, ch. 26, 1891, to not only grant an extension of the lease, but make a grant as well of the necessary water to work the same. However, at this time, the grant of water right upon which the plaintiff is relying was not then existent, but was issued on April 27, 1897, and was expressed to be for the term of five years.

Had the grant of water right existed when the extension of the lease was made in 1895, unquestionably the extension, in my opinion, considering sec. 124, would have covered the water as well—did the issuance of the grant of water right at a later date, but appurtenant to the lease, render the situation of matters at all different?

In my opinion, it did not; once the grant of water right was made in 1897, it was appurtenant to and was attached to the lease which had been renewed in 1895, expiring on October 3, 1900, and when the lease was later renewed on October 1, 1900, to October 3, 1905, in my opinion the then existing grant of water right which, according to the expressed term on the face thereof, had still two years to run, was likewise renewed and extended to October 3, 1905.

At the time of the grant of water right No. 12 in 1897, sec.

55, as amended by sec. 2 of the Placer Mining Amendment Act (1894) was in force, and the gold commissioner was empowered to make a grant of a water right in any unappropriated water for any term not exceeding ten years and the free miner was not to be charged any money rental for any such water for mining purposes on his own mining claim. Further, in 1900, sec. 124 of the Placer Mining Act, 1891, as amended sec. 3 of the Placer Mining Act, 1891, Amendment Act, 1897 (not as amended by sec. 14 of the Placer Mining Act Amendment Act, 1896, as erroneously assumed by the learned trial Judge), was in force and it is there provided that where placer mining ground is held under lease, the gold commissioner might grant an extension of the lease upon the same conditions as the original lease for a reasonable time and the gold commissioner may, with the sanction of the Lieutenant-Governor-in-council, grant such extension by memorandum endorsed on the lease, but there would not appear to be the requirement as contained in sec. 14 of the Placer Mining Act Amendment Act, 1896, that any extension of the water right should be endorsed upon the lease or should have the sanction of the Lieutenant-Governor-in-council.

The lease was renewed in 1900. It is true in the memorandum endorsed no mention is made of the sanction of the Lieutenant-Governor-in-council, but might this not be presumed as there is no evidence to the contrary? However, I can see no requirement that the extension of the lease should specifically state that it was with the sanction of the Lieutenant-Governor-in-council, and that, as endorsed, "further renewed till October 3, 1905," it was sufficient.

Sec. 125 of the Placer Mining Act, 1891, was by sec. 16 of the Placer Mining Amendment Act, 1896, repealed and the following inserted in lieu thereof:—

> 125. Every grant and every extension of a grant of water right for mining ground leased shall be recorded in the "Record of water grants" but it shall not be necessary to re-record such grants of extension annually.

It is apparently not disputed that the grant of water right as claimed by the plaintiff is of record in the "Record of water grants."

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No question of the forfeiture of the lease or forfeiture of the water right which is an appurtenant to the lease can be successfully advanced as no forfeiture ever took place. The procedure to accomplish this is set forth in sec. 122 of the Placer Mining Act, 1891, as amended by the Placer Mining Act Amendment Act, 1896, sec. 13, which reads:—

> 122. On the non-performance or non-observance of any covenant or condition in any lease, such lease shall be declared forfeited by the gold commissioner, subject to the approval of the Minister of Mines, unless good cause be shewn to the contrary. After any such declaration of forfeiture the mining ground shall be open for location by any free miner. No lease, whether made before or after the passage of this Act, shall hereafter be declared forfeited, except in accordance with this section.

It is to be observed that in the Placer Mining Act, 1891, Amendment Act, 1897, which became law on May 8, 1897, the powers of the gold commissioner with regard to the granting of unappropriated water were withdrawn, but the record in question in the present case, No. 12, was granted on April 27, 1897.

Further, sec. 16 of the Placer Mining Act Amendment Act, 1896, referred to by the learned trial Judge, was repealed by sec. 6 of the Placer Mining Act, 1891, Amendment Act, 1897, ch. 29, sec. 6.

The question that is most important for consideration now is,—What were the powers of the gold commissioner on October 1, 1900, when the renewal of that date took place? It is clear that at that date the Placer Mining Act, ch. 136, R.S.B.C. 1897, had the force of law, the Revised Statutes becoming law on March 4, 1898.

Turning to Part 7 of the last-mentioned Act under the title "Leases," sec. 101 provides that the gold commissioner may, with the sanction of the Lieutenant-Governor-in-council, grant an extension of a lease of placer mining ground by memorandum endorsed on the lease, but it makes no mention of granting any extension of water rights.

In Part 9 under the title "gold commissioner's powers," sec. 128, sub-sec. (*e*) it is enacted:—

> 128. It shall be lawful for the gold commissioner to perform the following acts in accordance with the provisions of this Act:—

(e) He may grant leases of placer mining ground and he may grant renewals of such leases and exercise all such powers as are specified in Part 7 of this Act.

It will be noted that, under sec. 128, sub-sec. (e), it would not appear that the sanction of the Lieutenant-Governor-in-council as to granting renewals of leases is required, and, possibly, that is only necessary where the facts are as set forth in section 101, *i.e.*, part of the ground only still remains to be worked, what the facts in the present case were, the evidence does not disclose.

It would seem to be an admitted fact, in truth one that the Court may well take judicial notice of, that in the working of placer mining ground water is essential, and the extension of time of the lease without an extension of the grant of the water appurtenant to it, would be an illusory extension, therefore, in my opinion, the Court should lean most strongly in favour of the support of the view that the renewal of the lease carries an extension of the water right appurtenant thereto.

The defendant claims under a water record, No. 18, granted under the Water Clauses Consolidation Act, 1897, under date September 22, 1898, and it is urged that from and after the coming into force of that Act, which was June 1, 1897, all unappropriated water was taken to the Crown and that at that date the grant of water right, No. 12, really was ineffective, as the water had never been appropriated or used, or, failing that, the contention is that on April 27, 1902, the grant of water right No. 12 expired, and the water then became unrecorded water vested in the Crown.

Before further proceeding with the examination of what (if any) the rights of the plaintiff may be under the grant of water right No. 12, it is well to now note that by order-in-council, approved by His Honour the Lieutenant-Governor on October 2, 1905, the lease of October 3, 1890, which had previously been extended on two occasions, was extended for a term of twenty years from October 3, 1905, on the same terms and conditions as the existing lease, *i.e.*, the lease upon which this memorandum, in compliance with the statute, was endorsed of date October 3, 1890. Therefore, it is plain that the plaintiffs who

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are the successors in title of this lease, and the duly recorded assignees thereof, have a good and subsisting lease extending to the year 1925, and, upon the faith of this, the evidence shews the plaintiffs have expended very large sums of money and executed very considerable works.

The Water Clauses Consolidation Act, 1897, in my opinion, only impressed itself upon and took to the Crown unrecorded water, and that the water in question in the present action cannot be so called and the plaintiffs are, in my opinion, in the exercise of legal rights in respect to the water in question, being legal rights supported under the provisions of the Placer Mining Act, ch. 136, R.S.B.C. 1897, and ch. 165, R.S.B.C. 1911. Further, in my opinion, after the passing of the order-in-council of October 2, 1905, the lease and the water grant appurtenant thereto must be deemed to be valid and to be extended for the further period of twenty years.

The defendant, in the assertion of his title to the water in question in the present action, is confronted with what seems clear to me is a prior and superior right as, at the time his predecessors in title obtained the water right of September 22, 1898, under which he claims the plaintiff's predecessors in title held one thousand inches of water out of Lightning Creek, under a grant made on April 27, 1897, good for the term of five years therefrom, therefore, for five years at least unless disturbed in title by the Crown, there was the absolute right to the water and certainly the grant of water right to the defendant's predecessor in title made on September 22, 1898, could not be one that would entitle an invasion of that prior right. That the continuity of right has been preserved and is vested in the plaintiff as against the defendant would appear to me to be the true interpretation and construction of all the statute law. In my opinion, the plaintiff should not be held to have suffered by the statement of the gold commissioner in 1900, that it was unnecessary to specifically renew the water grant. Sec. 14 of the Placer Mining Act, ch. 136, R.S.B.C. 1897, then in force, reads as follows:—

14. A free miner shall have all the rights and privileges granted to free miners by the Mineral Act, 1896.

Turning to the Mineral Act, 1896, ch. 135, R.S.B.C. 1897, it reads as follows:—

53. No free miner shall suffer from any acts of omission or commission or delays on the part of any Government official, if such can be proven.

In determining the meaning to be attributed to the words "rights and privileges" these words are considered by Duff, J., in *B.C. Electric R. Co.* v. *Crompton* (1910), 43 Can. S.C.R. 1 at 22, 23, 24 and 25.

In my opinion, therefore, giving effect to the preservation of right, the Crown would not be entitled to claim that the water grant had expired, and the Court, it would seem to me, is called upon to protect the miner and not give effect to the contention of the defendant that the water right has lapsed or expired. In my opinion, apart from applying the enactment set forth, the water right was extended for the life of the lease by operation of law.

I cannot say upon the evidence that the defendant has established any equitable position. He was well aware of the lease and the plaintiff being assignee thereof and well knew of the prior record, but has relied solely upon the claimed invalidity of the water right of the plaintiff. When it is considered that the gold commissioner assured the predecessors in title of the plaintiff that the water grant would continue throughout the life of the lease, and the lease being extended for twenty years by order-in-council in 1905, and the water enjoyed for a very considerable time, in my mind, it cannot be successfully contended that water which would otherwise be the property of the Crown is not the property of the plaintiff as against the defendant: *Carson* v. *Martley* (1899), 1 B.C.R. Pt. 11, 189-281, 20 Can. S.C.R. 634; *sub nom. Carson* v. *Martley*, Martin's Mining Cases and Statutes of British Columbia, 1902-7, vol. 2, Pts. 1 and 11, Appendix lv., lvi., in my opinion supports this view.

Admittedly, in the present case the predecessors in title of the plaintiff had a good and sufficient grant of water right before the Water Clauses Consolidation Act, 1897, took effect, which would not expire if not duly extended until 1902, and in 1900, the gold commissioner assures the predecessors in title of

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the plaintiff that this water right will continue during the life of the lease. Then, later, this same lease is further extended in 1905 for twenty years. The gold commissioner was the statutory officer with full authority in the district to deal with all records of waters in 1900 and 1905 under the Water Clauses Consolidation Act, 1897. I would refer to *Covert* v. *Pettijohn* (1902), 9 B.C.R. 118 at 122, where Hunter, C.J., said:—

> The defendants are not without a remedy if their case is that the water is going to waste or is being taken for unauthorized purposes, or in excess of the plaintiffs' requirements. All they have to do is to read the Water Clauses Consolidation Act and govern themselves accordingly.

It is evident that the Chief Justice plainly indicates that questions as to the right of user of water are to be determined under the provisions of the Water Clauses Consolidation Act and not, in first instance, in any case by the Court and an injunction was granted in favour of the holder of a first record as against the second record holder. My opinion is that the defendant must seek his rights (if any) under the existing Act, Water Act, 1909, ch. 48, R.S.B.C. 1911, ch. 239.

The plaintiff should not suffer by any errors of the gold commissioner. My brother Martin in *Covert* v. *Pettijohn*, *supra*, at p. 126, said:—

> But the error in the record is that of the ministerial officer of the government authorized by statute to make the grant: *Martley* v. *Carson* (1889), 20 S.C.R. 634 at 678.

And at p. 127:—

> While it renders it imperative that there must be a record, it does not, in my opinion, invalidate it because of any irregularity therein; to hold otherwise would be contrary, I think, to the spirit of *Martley* v. *Carson*.

In the present case the plaintiff has expended large sums of money and constructed a ditch and has done everything to make available the water which stands duly recorded and has been the user thereof. In view of these facts I would further refer to the language of my brother Martin, at p. 128 in *Covert* v. *Pettijohn*, *supra*:—

> There is no suggestion that the plaintiff is wasting, improperly using, or does not require the water, in which case the gold commissioner has special power under secs. 18 and 28 of the Water Clauses Consolidation Act, 1897, to cancel or otherwise deal with the record.

Then again, as to the statement of the gold commissioner that the water grant was extended or would continue during the term of the lease, I would refer to the language of my brother Martin in *Brown et al.* v. *Spruce Creek Power Co. Ltd.* (1905), vol. 11, Martin's Mining Cases (B.C.) 254 at 255. It was, perhaps, strictly speaking, incorrect for the gold commissioner to say that

> the said 300 inches shall be considered as granted in response to the said application of Thomas Storey and others *in lieu of* a record and as appurtenant to the individual claims above designated,

yet, if the action taken was the proper one on the ground that the individual miners already had statutory grants, it will not be invalidated because the official used inapt language or erred in thinking he had power to make a grant "in lieu of record," which is something the statute does not authorize. The point is that what he did in recording the two records was lawful, though apparently, and very excusably, he did not appreciate the exact rights or status of the individual free miners in the circumstances.

Upon the facts of the present case, it cannot be contended that there is no record of the water right of the plaintiff. Clement, J., in *Cranbrook Electric Light Co. Ltd.* v. *East Kootenay Power and Light Co. Ltd* (1907), 13 B.C.R. 275 at 277, said:—

> This all comports with the idea that the "record" consists of entries in a book kept for that purpose by the various gold commissioners in the different sections of the province: see sec. 2, Water Clauses Consolidation Act, 1897, ch. 190, R.S.B.C. 1897.

The plaintiff is entitled, under sec. 19 of the Water Clauses Consolidation Act, 1897, ch. 190, R.S.B.C. 1897, to contend, and, in my opinion, successfully, that at the time the Water Clauses Consolidation Act took effect which was June 1, 1897, the grant of water right was appurtenant to the placer mining ground and duly passed with the assignment of the lease, and is still existent, and could only thereafter be affected by proceedings had and taken under that Act.

It cannot, in my opinion, be at all contended with any success that the grant of water right, namely, the 100 inches from Lightning Creek, granted to the predecessors in title of the

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plaintiff, ever became unrecorded water. Sec. 154, sub-sec. 2, [Water Clauses Consolidation Act, 1897] the repealing clause (of the provisions with respect to the grants of water as contained in the Placer Mining Act, 1891), reads:—

> 2. Provided that such repeal shall not affect any rights acquired or penalties incurred, or any act or thing done under any of the said Acts or parts of Acts.

This preserved the rights then existing of the predecessors in title of the plaintiff in the grant of water right.

In *Esquimalt Waterworks Co. Ltd.* v. *City of Victoria* (1907), 12 B.C.R. 305, 23 T.L.R. 763, [1907] A.C. 499; Martin's Mining Cases (B.C.), vol. 11 at 529, we have the following stated in the headnote:—

> The term, unrecorded water, in sec. 2 of the Water Clauses Consolidation Act means all water which is not held under this Act or (with a record) under the Acts repealed hereby or (is not held) under a special grant by public or private Act.

The expression "and shall include all water . . . unappropriated or unoccupied or not used for any beneficial purpose" does not refer to water already declared to "be outside the definition of unrecorded water."

Section 4 is clearly meant to preserve existing rights of appropriation or diversion under former Acts.

In my opinion, it is clear that the grant of water right passed to the plaintiff and was existent when the Water Clauses Consolidation Act, 1897, came into force, and was given validity—if any needed validity was required—by sec. 19 of the Act as being appurtenant to the placer mining property transferred to the plaintiff.

Therefore, the plaintiff is entitled to claim the full benefit and advantage of sec. 20 of the Water Clauses Consolidation Act, 1897, and that is that the placer mining property in respect of which the water was granted, not being worked out or abandoned, the water is still available for use. Sec. 20 reads as follows:—

> 20. Wherever a mine shall have been worked out or abandoned, or a pre-emption cancelled or abandoned, or whenever the occasion for the use of the water upon the mine or pre-emption shall have permanently ceased, all records appurtenant thereto shall be at an end and determined.

It is manifest that the grant of water right to which the plaintiff is entitled did not require to be renewed or extended in 1902, but was statutorily extended and would only cease when the mine was worked out or abandoned.

Finally, in my opinion, the plaintiff's title to priority of right in the water as against the defendant is established and it follows that the injunction prayed for should be granted and the plaintiff is entitled to such damages as may be proved to have been suffered by the interference of the defendant, the damages to be such as may be found by the registrar of the Supreme Court at Victoria, to whom the assessment thereof is hereby referred and the judgment of the learned trial Judge, in my opinion, should be set aside in the Court below with costs to the plaintiff, and the appeal allowed.

Appeal dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. LIMITATION OF ACTIONS (§ II G—65)—SUITS RELATING TO REALTY—LACHES.

Mere laches, short of twenty years from the accrual of the right to recover any land, will not bar the plaintiff's claim within the purview of sec. 16 of the Statute of Limitations, R.S.B.C. 1911, ch. 145.

2. CONTRACTS (§ V A—381)—ABANDONMENT—CLEAR RIGHTS, HOW GUARDED.

Abandonment of a clear right, by way of a half-interest in lands, cannot properly be inferred, except upon very convincing evidence, evidence reasonably consistent only with such conclusion.

[*Prendergast v. Turton*, 13 L.J. Ch. 268, referred to.]

Statement

APPEAL from the judgment of Clement, J., of June 26, 1913, in favour of the defendant, in an action to recover a half-interest in certain lands patented to the defendant, who, it was alleged, held in trust for the plaintiff as to the latter's half-interest.

The appeal was allowed, MARTIN and MCPHILLIPS, JJ.A., dissenting.

A. D. Taylor, K.C., for the plaintiff, appellant.

J. Macdonald Mowat, for the defendant, respondent.

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MACDONALD, C.J.A.:—James Cook died in September, 1890, unmarried and intestate, leaving heirs—his mother and two brothers, the plaintiff and defendant. He had pre-empted land situated about 5 miles from Vancouver, but had not completed his title to it. The defendant lived in Riviere du Loup, Quebec. The plaintiff and the mother lived in Scotland. A friend of deceased at Vancouver notified defendant of his brother's death, and of his said pre-emption, and of the right of heirs to complete the pre-emption duties, and obtain a Crown grant: see sec. 27 of ch. 66, Consolidated Acts B.C., 1888. Defendant wanted his mother and brother to quit-claim to him so that he could obtain the Crown grant in his name, but for the benefit of all. Plaintiff demurred to signing a quit-claim, but offered a power of attorney. The mother signed a quit-claim, and on this the Crown grant was issued to defendant by the Crown, but manifestly as a trustee for the heirs: see correspondence between the Land Department and defendant's solicitors at pp. 60-2-3.

The construction put upon sec. 10 of the Inheritance Act, ch. 58 of the Con. Acts of 1888, by the Crown officers, was that as the mother was entitled to the estate of her son for life, and the brothers to the reversion, the Crown grant might properly be issued to defendant as trustee for her, she having by her deed in effect (and in fact, as the correspondence shews, see particularly ex. 12, p. 143) authorized this to be done.

The learned Judge indeed finds that defendant took the fee from the Crown as trustee for the heirs, and in my opinion that finding is amply supported by the evidence. The defendant expended, he says, about $700 in perfecting the title, which sum includes his solicitors' charges of $300. He rendered no account to the plaintiff, and made no demand that plaintiff should furnish his share. The situation then is that on December 9, 1892, the date of the Crown grant, defendant became seised of the fee simple in the land in trust for his mother for life, and at her death for himself and plaintiff in equal shares. Shortly after this defendant raised $1,000 on the land by means of a mortgage, repaid himself his outlay of $700 and gave $200 to his mother, and apparently kept the other $100. This is all the mother appears to have got during the remander of her lifetime.

She died in 1900. Shortly after her death the brothers came together in a business transaction at Fraserville, Quebec, and plaintiff loaned the defendant $12,500 in that connection which has admittedly never been repaid. Their business connection lasted two years, when defendant severed it. During this time defendant says he spoke to the plaintiff on three occasions about the B.C. lands, and offered him a half interest if he would pay his half of the outlay in connection with them, but that defendant did not accept his offer. See p. 73. This is supposed to be corroborated by the evidence of defendant's wife, who relates what was said by plaintiff on the first of these three occasions, but as defendant himself is very hazy as to what was said, and the wife, as she frankly admits, discussed the matter with her husband before giving her evidence, she is not, I think, speaking from recollection altogether.

Then Montgomery, an adopted son of defendant, tells of a conversation with plaintiff after defendant had left Fraserville, and had gone to reside at Vancouver, in which plaintiff is said to have expressed the opinion that the B.C. lands were not worth paying taxes on. If plaintiff had renounced his claim before this, it is at least noteworthy that he should be still curious about the lands a year later.

Now the trial Judge appears to rest his judgment on this, that defendant asked plaintiff in 1902 to take up his share of the burden and that plaintiff distinctly refused to have anything to do with these lands, and hence should be deemed to have abandoned his interest in them, and he relies on *Prendergast* v. *Turton* (1843), 13 L.J.Ch. 268. The plaintiff denies the above, and says that he asked his brother to give him a statement of account, and expressed his willingness to bear his share of the expense, but that his brother replied that as he owed the plaintiff $12,500 he could not expect him to pay anything then. To my mind this story is the more rational and consistent with the facts. It is consistent also with defendant's own account of their third and last conversation on the subject in which defendant says that his brother's reply to his offer to deed him half the land was, "No, no, wait a while, wait a while."

The Judge below based his judgment on abandonment.

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"Abandonment" is an indefinite term when applied to real estate, or an equitable interest in real estate. If it is meant that the plaintiff waived his rights either by express declaration or by laches, then it is clear that this defence must fail.

Sir William Grant, M.R., defined the law on this branch of the case in *Stackhouse* v. *Barnston* (1805), 10 Ves. 453 at p. 466, [32 Eng. R. 921 at 925] as follows:—

> It is said, there is a positive waiver of their demand, upon letters by Mr. Stackhouse to Sir Richard Acton. As to a waiver, it is difficult to say precisely, what is meant by that term, with reference to the legal effect. A waiver is nothing; unless it amount to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be plea.

Mere laches short of twenty years from the accrual of the right will not bar the plaintiff's claim: *Ib.*, and also the Statute of Limitations, R.S.B.C. 1911, ch. 145, sec. 16.

The plaintiff's right to an undivided half interest in the land did not fully accrue until the mother's death. Up to that time he had not failed to bear his share of the burden, or if it could be said that he was legally or morally bound to contribute to the expense, he was relieved of that duty by the defendant recouping himself out of the mortgage moneys. There is a suggestion that the taxes were heavy, but in the beginning they were but $8 per annum, and this appears to have been the annual tax until 1901 or 1902, when it is suggested that the locality was included within an incorporated municipality, after which the taxes were higher.

As to what was done after 1902 we are left pretty much in the dark. I infer that defendant came to Vancouver to reside, but not on these lands, and that they were not improved beyond what was done originally in order to obtain the Crown grant. Defendant further incumbered them at some unstated time or times, because at the trial he admits that they were then subject to mortgage in the sum of $5,500. He also subdivided a portion of them into quarter acre lots, which he sold at from $250 to

$400 per lot. When plaintiff heard of these sales two years before the trial he asserted his right to a share.

Then it comes to this: Must plaintiff's silence from 1902 to 1911 be taken to be an abandonment of his rights? In this connection the evidence of plaintiff that he offered to pay his share of taxes and expenses, and that defendant declared he could not ask that in view of the money put in the Fraserville business by plaintiff, must not be overlooked. The facts and circumstances of this case are such as to exclude the doctrine of *Prendergast* v. *Turton*, 13 L.J. Ch. 268, assuming that doctrine to be applicable. Defendant has not shewn that he bore the burden, on the contrary there is enough in the evidence to indicate that the trust property has been made by him to bear much more than the defendant has been out of pocket. Again, the fact of his indebtedness to the plaintiff clearly distinguishes this case from *Prendergast* v. *Turton*, 13 L.J. Ch. 268. Why should plaintiff have paid money to defendant when the latter owed him a sum far greater than any sum he could claim, even if he had paid the cost of procuring the land, and the subsequent taxes out of his own pocket? Abandonment of a clear right cannot properly, in my opinion, be inferred except upon very convincing evidence—evidence reasonably consistent only with that conclusion. The evidence in this case falls far short of this even if that of the defendant be given the greater credence.

I would allow the appeal.

IRVING, J.A.:—The late James Cook, who died on September 9, 1890, had, in February, 1887, acquired a pre-emption right on some 160 acres on Seymour creek, near Vancouver. The property, afterwards increased to 193 acres, has since become of great value.

This action, launched January 18, 1912, by John, the youngest brother of the deceased against David, an elder brother, is with reference to the ownership of the 193 acres which were granted by the Crown to David on December 18, 1912. The deceased had a small interest in a building society and but little else.

James, who had done some work on his pre-emption, had not

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done enough to hold the pre-emption there. His heirs to obtain any benefit from the lands had to obtain a certificate of improvements under Consol. Acts, B.C. 1888, ch. 66, sec. 27, which is as follows:—

> In the event of the death of any pre-emptor under this Act, his heirs or devisees (as the case may be) shall be entitled to a Crown grant of the land included in such pre-emption claim, if lawfully held and occupied by such pre-emptor at the time of his decease, but subject to the issuing of the certificate of improvement as aforesaid, and payment for the land; but if no person makes any application in respect of the said pre-empted land, for a period of one year from the death of the said pre-emptor, the Chief Commissioner of Lands and Works may cancel the said record, and all improvements made on the said land, and all moneys paid in respect thereof, shall be forfeited:

Accordingly, David proceeded to occupy the land by an agent, and between September 9, 1890, and December 26, of the same year, had done sufficient work to justify him in making to the Government an application for the certificate of improvements. That certificate was issued to him on March 20, 1891.

Although the fact that James had died in September, 1890, and had left a pre-emption claim was made known to the defendant David in the same month, he did not communicate directly with his brother John until July, 1891, that is to say, he delayed making any communication about the land until after he had obtained the certificate of improvements and after an application for issue of a Crown grant (p. 113) to him in his own name had proved unsuccessful.

Having regard to the speed with which David completed the work necessary to acquire the land, it is difficult to believe that he kept the knowledge that he had acquired as to his brother's estate and as to the terms upon which the brother's estate would descend to his heirs until July, 1891, and that he—poor man that he was—in the short time should have expended, as he did, some $400 in obtaining the certificate of improvements, without applying to his brother for his share, if he intended that either his mother or brother should share in the land. This conclusion I could not reach on this omission if it stood by itself, but the correspondence, or rather so much of it as we have, bears out the inference that I have drawn, viz., the idea that David

meant to hold the land for himself, and that he only communicated with them when he found, in the way of his obtaining the grant, obstacles which he could not overcome. The foundation of credibility being honesty, I am driven to the conclusion that he, David, is a thoroughly unreliable witness.

James died on September 9, 1890. He was attended on his death-bed by one Jarrett, and through Jarrett, I presume, David got into correspondence with one Wattie, who had property adjoining the pre-emption in question. From a letter written by Wattie (p. 99) December 9, 1890, it is apparent that Wattie thought that David was the only brother in existence. It is also apparent that David was intermeddling with the estate of the deceased in respect of matters, other than that of this pre-emption, so he may be regarded as an executor *de son tort*. Wattie advised him as to the means of obtaining a Crown grant, and in that connection, or in connection with the issue of the certificate of improvements, says: "It will be necessary for you to make an affidavit to the effect that you are the only brother and next-of-kin of the deceased." The application for the certificate of improvements in the name of David was made on December 26, 1890. It did not issue until March 20, 1891, but from Wattie's letter of January 27, 1891, it is apparent that David was already making enquiries about the issue of the Crown grant. On April 22, 1891, Wattie asked David if he intended to apply for the Crown grant at once. On May 27, 1891 (p. 106), he wrote that he would get it (I think referring to certificate of purchase) through at once, and acknowledged receipt of power of attorney from David. This though not produced could only have been signed by David.

On June 6, 1891 (p. 108), Wattie wrote that he had made application for the Crown grant, and advised David that he is now at liberty to sell if he thinks proper. From this it is plain that, at this time, June, 1891, neither the name of the plaintiff nor that of the mother was being included in the application.

On June 17 (p. 111), Wattie reports that before the Crown grant will be issued to David, an application to the Supreme Court must be made, and, on such application, it will be necessary for him to produce an affidavit that he is the only brother,

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and to file a release by the mother of her interest. Up to this time the fact that there was such a person as the plaintiff had not been declared, although the certificate of improvements had been obtained and an application for the Crown grant had been put forward. No wonder that, in March, 1892, the plaintiff, writing to defendant, complained that nobody got an opportunity of doing anything, that is to get the certificate of improvements but yourself.

David is now compelled to explain to John the fact that James had left some land which would be available to his heirs and he writes the following letter:—

Fraserville, River du Loup Station, July 16, '91.

My Dear Mother, Father and Sister:—I hope this will find you all in good health, as it leaves us at present, for which we thank God our Father for all his love to us. I enclose you some papers, one for you and one for John. You must transfer all your rights to me in the estate of James and it must be done before the 2nd of September, or I will have lots of trouble over this matter, you will have to go before a lawyer, and father with you and have the paper signed that I send you. I have had them drawn up by a lawyer in this place so that you will just have to sign them and you will have to send one to John and let him transfer all his rights to me, you must know that this is only to allow me to get the deed and what the land brings you will both get your share, but in the meantime if you do not want to lose the land and cause me to lose one hundred pounds which I have already spent on the land for improvements, you will return those papers signed as soon as you can. You will send the paper to my brother John as I do not know his address and you can send him this letter if you like, he may understand what to do the 2nd of September it is one year since my brother died and we must try and get the deed before that or some one may take the land and give us the trouble to put them off the land. Give our love to all. I hope Aunt Mary is well my dear sister I do not think I will be able to take you out this year.

We remain your loving son and daughter,

D. & M. COOK.

P.S.—Mother have you got your marriage lines that is your marriage with my father, you will notice that the paper says that Drumhagart Scotland, you can tell the lawyer that it is in Ireland.

D. C.

Have this done at once please.

David, in April, 1892, suggests, p. 124, that this is not the first communication he had made, but, to my mind, this letter, on its face, shews that no previous communication had been

made as to the land. These may have been as to James' death. He writes, it is to be noted, that these transfers which he encloses for execution, are only to allow him to get the Crown grant, and whatever "the land brings you will both get your share." He does not ask John to contribute, nor does he mention that he has made any outlay to obtain the estate.

I am inclined to think that this letter of July 16, 1891, constitutes a declaration of express trust by David in favour of John.

On August 5, 1891 (p. 115), John acknowledged this letter and complained of having been kept in the dark, to which complaint David, on August 15, 1891, replied (p. 118), that the reason he had gone ahead in the matter of this property without consulting John was because his mother had told him that John thought that as David was the eldest it would be proper for him to act for all. We have not the mother's letter before us, but from the way John wrote on receiving the letter of July 16, it is difficult to believe that he ever wrote to her in that way. John says that he never authorized him to write in that way.

It is noticeable that David does not directly suggest that the letter of July 16, 1891, was not the first advice he had given of James owning or being entitled to land. He points out that he had to spend about $500 in completing the title, and adds "so you can see I would have been glad of your help in more ways than one." Then he proceeds (I have already set out in Wattie's letter of June 17, what material would be required on the application to the Court), David now puts it this way (p. 119):—

> The Crown Grant must be given by order of a Judge of the Supreme Court and I had (have, I assume he means) to make affidavit that I am the only brother, or get my mother and brothers, if any, to make (over) their right to me so that I can get the deed in my name, so I went to a lawyer in this place (Fraserville) and had these papers drawn up to save my mother any expense.

Now, as Wattie knew nothing about any other brother, this idea that John should make over his rights to David originated with David. Then David adds what seems to me must be an untruth: "I have sent him (Wattie) a power of attorney to act for *us*."

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As the power of attorney referred was sent to Wattie in May, and as in June, Wattie was still under the impression that David was the only surviving brother, I say this statement that Wattie was to act for *us* was intended to conceal from John the fact that David had been applying for the Crown grant in his own name. And once more he says:—

> Your giving me power will make no difference, you will get one-third of what it (the land) will bring—it is only to save time and trouble.

And on page 121, he says: "The law of British Columbia is that we all share the same." On August 31, p. 129, John, who by this time had received from David the correspondence between David and Wattie writes that he is astonished at finding no word therein of his rights or his existence. On August 18, David (p. 22) writes to John as to making *our* claim good, and that *we* are the right heirs. On September 7 (p. 133), John writes that he does not think the property can be sold until after the Crown grant has been obtained and not then without the consent of all parties, which consent he does not seem disposed to give. The next letter produced is one dated December 1, 1891, in which David, in a friendly letter, tells John to send in his claim, send it, he says, "to me or Mr. Wattie, and have your name put on the deed. You must (prove) that you are a brother of James Cook, deceased."

It will be convenient to sum up here that, at the close of 1891, David has acknowledged John's right, and has abandoned the idea of taking out the Crown grant in his own name, but it will issue in the name of all three, but before reaching that conclusion he has, in my opinion, shewn that he had no intention of letting John in as a participant, until he was compelled to do so. On January 22, 1892, David writes in an apprehensive tone:—

> I am surprised you have not written to me; neither you nor John answered my last letter, I do not think I have done you any harm.

He then stated (p. 143) that the matter has been placed in the hands of a Vancouver lawyer by Wattie, and that the lawyer had advised that John and his mother must sign the quit-claim deed in his favour and that the Government will not issue the

deed unless they do, and unless this is done the claim will be cancelled. There is nothing whatever in the evidence to bear this out, this threatened cancellation. He assures them, "I will give you all your rights when I get the deed. You are only keeping things back."

To this letter John replies on February 6, 1892, p. 146:—

I have read the Vancouver lawyer's letter and I am willing to sign anything to get the business satisfactorily settled. You will be handsomely repaid both for your trouble and all expenses put out.

Unfortunately, at this stage, David was taken with an illness, and a new lawyer was introduced in the correspondence, a Fraserville, Quebec, lawyer, Mr. Watersen, who wrote (p. 148) on February 22, saying that the Government would not issue a grant in the three names, as David expected they would, but insisted that John and his mother should "resign" to David, when the Crown grant would issue to him as he had made all the necessary improvements on the land and furnished the funds necessary for taxes, etc. There is nothing in the evidence to bear out the statement that the Government had made any such declaration. Mr. Watersen, at the same time, wrote a letter to John (p. 150), but it adds nothing to the matter. Here—in the early part of 1892—we have David and his agents deliberately misleading those who had a right to know from him the exact truth. John at once declined to sign the quit-claim deed (p. 151). He says that he has received a letter from Wattie who says that David has the "only claim" and he adds, "If that is so, there is no use in me signing anything in your favour." He then points out that, in obtaining the certificate of improvements,

you David alone had the opportunity of doing anything, while I am willing to let you have everything back that you spent and also pay you for your trouble, I am not prepared to give you the whole without getting anything. Put my name on the deed as well as yours. It has as much right as yours there, also that of mother.

On April 22, 1892, he again writes more fully (p. 153), he says:—

Karse View, Grangemouth, April 22, 1892. Dear Brother:—Since I last wrote you I have received information regarding the piece of land left

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by my brother James, and I find that both Mr. Wattie and yourself has been trying to mislead me to a certain degree. I find that the names of the whole of us that are entitled to participate in the estate can be put upon the deed and I may also inform you that each of us have an equal right to share the benefit, the value at present is nearly $3,000 and my man of business in Vancouver is prepared to state that it will become more valuable, now before I go any further what do you intend doing? I shall certainly look after my own interest in this matter also mother's but while that is the case, I do not wish to put any difficulties in the way of the business being settled in a business-like manner. I simply wish the deed issued in the names of the three heirs, I want no mean advantage nor any preference, but I will not sign any paper giving up my claim to any person as my business man in Vancouver says it is not necessary to do so. I will sign any document to allow the claim to be made up and all the names put upon the patent, let me know by return mail what you intend doing and if you still insist upon mother and me signing a quit-claim you make a mistake as after the last letter I received from Mr. Wattie I would sign no such document.

* * * * *

I know all about it David and if you are sensible, I will send you a power of attorney for mother and myself, giving power to make up the title to the land and get our name on the patent and the legal men can be dispensed with and the ground can be sold at any time suitable.

I must say that this seems to me a most sensible letter, and possibly would have brought these two brothers into harmony but, unfortunately, before its receipt, David had, on April 15, written John a letter (p. 124) upbraiding him for his conduct, and putting forward the statement that David had written to his mother in December, 1890, advising her of the death of James and of the existence of this pre-emption. As I have already said this I believe is a fabrication. He then takes up the position that John has been guilty of a breach of faith in not returning all this correspondence which has, in my opinion, proved so fatal to him, and goes on:—

You say you do not care how it goes, you want your right. I have offered you your right, but you will not accept it. You say that I insist on your signing the quit-claim deed. That is not true. I have never insisted. If you sign it is also well.

It is difficult to say how he could insist to any greater extent that he or his agents, who, without foundation, represented that unless the quit-claim deed was signed, the pre-emption would be cancelled, had done.

On April 25, 1892 (p. 156), John writes another letter: (1) denying that he had any letter from his mother, *i.e.*, in December, 1890, or that he had authorized her to tell David to go ahead; (2) recognizing David's right to be recouped for all money spent; and (3) offering to send a power of attorney from his mother and himself; but (4) refusing to sign a quit-claim deed. A fine manly letter. I don't see how it is possible for anybody to read it without having a good opinion as to the writer's honesty and straightforwardness.

To this letter David replied on May 4, 1892, referring John to the Chief Commissioner, as if to say he, David, would not act any more on John's behalf. But, on May 7, David addressed another letter (p. 127), in which he says it will only be the strong arm of the law that will make me consent to put your name—or mother's—on the patent, and he adds these pregnant words:—

> The whole strain of your letters shews me that if you could do anything without me you would not consult me at all.

With that quotation, which, in my opinion, expresses exactly what David's inclinations were, we can leave this correspondence.

At the trial David said that before he had sent the money to Wattie to pay for the land, he "had asked John to come in and help him" (p. 70), the obvious intention is that the Court should infer that John had refused to help him. If we turn to correspondence we find that David sent the $400 in May, 1891 (p. 106). It was not until August 15, 1891 (p. 119), until all the money for the land had been paid, that David wrote, "You see that I would have been glad of your help in more ways than one" (p. 119). At the trial the defendant said (p. 78), that the reason, and the only reason, he insisted on getting a quit-claim deed from the plaintiff was because he, the plaintiff, would not pay any money. The correspondence contains nothing to support that statement. It was put on quite a different ground, viz., that it would facilitate the issue of a Crown grant of land, in which they would all be interested.

Later on he says:—

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When I heard my mother was the sole heiress, I told her that John would do nothing and that if she would trust me, I would get the Crown grant in my own name, p. 72, and John had nothing to do with it.

This statement is astonishing. He was informed in September, 1890, that his mother was the sole heiress (p. 94). On December 1, 1891, long after the quit-claims had been sent over, he wrote to John (p. 123), "All our names will be on it." His next letter, January 22, 1892, contained the unproved threat that, unless the mother and brother in Scotland released their rights, the claim would be cancelled by the Government. The theory that the Government regarded the mother as the sole heiress was not put forward until the employment of the Vancouver lawyer. I should put the exact date of the Government adopting this theory as May, 1892, just before David wrote, "it would only be by the strong arm of the law" that his mother's name would appear on the Crown grant. We have then all sorts of theories put forward by David at the trial. First, that he had applied to John for money to assist him and that it was in consequence of that refusal that he went on at his own risk. Second, that he acted for his mother alone, and quite independent of John. Thirdly, he represented to his mother that John would do nothing—whereas in 1892 he was quite willing to send a power of attorney, but David (p. 127) said he would not accept from him a power of attorney. To John one story, to his mother a different one.

All these are inconsistent with the correspondence, and they are also inconsistent with the reasons put forward by David in his conversations with Alex. Montgomery after 1903, for refusing to recognize John's rights. The reasons given to Montgomery were, first, that John had been unkind to their mother; second, that John was responsible for the failure of the Fraserville business. The last ground seems to me to convey the idea that had the Fraserville business (to which reference will be made later) been a success, John's rights would have been recognized.

A great deal of unnecessary labour has been thrown upon us by the neglect of the solicitor preparing the appeal book, to observe the rule which requires exhibits to be placed in order

of date. The practice of including the correspondence produced from the Department of Lands and Works in the evidence of the clerk producing, is to be condemned.

I now turn to that correspondence. It was late in 1891 that Wattie placed the matter in the hands of a Vancouver lawyer. As the lawyer was to be paid $300 for obtaining a Crown grant of land to which a certificate of improvements had already been obtained, one naturally asks oneself why was so large a sum paid for so simple a job. If it was to secure the grant in the name of David alone, one can understand the price being a large one. They made an application in December, 1891, p. 61, in David's name, and it would appear that in May, the exact date is not stated, but I would infer prior to May 7, the date of "the strong arm of the law" letter, Mr. Russell had an interview with the chief clerk of the department, p. 60, and as a result a quit-claim deed executed by the mother alone was procured in October, 1892, and forwarded to the department. A statement was made in the letter that the defendant was all along morally and equitably entitled to this grant. With that statement I cannot agree. The department, however, asked (p. 60) for a quit-claim deed from John Cook, but upon obtaining, so it is said, an opinion from the Deputy-General of the day, that the mother alone was entitled (see p. 60), the Crown grant issued direct to David on December 18, 1892, dated September, 1892.

Now, is John to be bound by such a decision obtained by David, John's trustee, behind John's back, in order that David may obtain a grant in his own name? I think not. The whole transaction reeks with fraud.

The plaintiff seems to have made some steps towards asserting his rights, but being informed by counsel that he was sufficiently protected, I suppose by David's letters, did nothing.

After an interval of seven or eight years, the plaintiff came out to Canada, on a visit, I take it, and met his brother in 1900; according to the plaintiff nothing was then said about this land, but in the fall of 1901 when the plaintiff and his mother came out from Scotland and the plaintiff and the defendant went

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into business together, the plaintiff advanced David $12,500 to enable him to become interested in the business to the same extent that he was. The matter was spoken of and this business lasted some 18 months, when it proved a failure. A quarrel between the brothers followed because John wanted to charge the defendant with 6 per cent. interest on the $12,500 loan. After some time John returned to Scotland in 1906, and David came to British Columbia in the summer of 1903. The mother died while the two sons were in Canada, November 13, 1900.

While these people were living in Canada, this property was often spoken of. That is common ground. The plaintiff says:—

> I offered to pay my share of the taxes and expenses he had incurred if he would make up his account. That on the day I advanced him the $12,500, David offered to give me an acknowledgment in writing that I had a half interest in the land, but I said that as we were brothers that was not necessary.

The defendant says that, on three occasions he offered to let the plaintiff have an interest in the land if he would pay his share. The first time in defendant's house, Riviere du Loup, in 1900 (p. 72), again later in the Fraserville Co.'s office (p. 73), and a third time in the New York Building in Montreal (p. 73), but the plaintiff refused to take his share of the property and pay one-half of the cost. The defendant's wife corroborates the first conversation, which she says took place in 1901, and she adds, off her own bat, "Yes, and there was a letter that came out from him, and he said he did not want to have anything to do with bush lands." There is no such letter produced, nor in any of those produced is there a hint of such a thing. From what we have read of the plaintiff's letters I think it is highly improbable that he would so write. Had he so written I think it altogether improbable that a document so valuable to the defendant would not have been preserved. The wife's volunteered evidence being so improbable, I feel at liberty to disregard her direct corroboration. But another witness, Alexander Montgomery, who was living with the defendant in Fraserville, says that, in the fall of 1903, after David had gone out to B.C., the plaintiff said to him that he did not think it worth while paying taxes on bush lands in B.C. This young

man was adopted and brought up by the defendant, and it may be said that he was favourably disposed towards him. That may be, but his evidence to me rings true. Accepting it as true, it lends a certain amount to the story told by David, but it does not confirm his testimony as to any of the three conversations detailed by him.

Montgomery was speaking of something that had taken place in the fall of 1903. Ten years is a long time to remember the exact words of a conversation concerning a matter in which you have no personal interest. If he has recalled the exact words they, in themselves, do not amount to an abandonment. On the other hand, they do shew that the plaintiff, in 1903, had not altogether lost interest in the property.

We come then, to examine the defendant's own testimony as to these three offers. At the time they took place, the brothers were friendly, and the plaintiff had advanced $12,500 to the defendant, or on his account. In these circumstances, it seems to me unlikely that he, David, would say—I have obtained this property for my sole benefit, but as I feel the weight of the taxation, I now offer you a chance to obtain at cost price, a one-half interest in the property over which we had so much unpleasantness. Surely it would be more natural, more in accordance with that feeling of gratitude which he says he felt to the brother who had assisted him to the tune of $12,500, to speak of himself as a trustee for the other, but, subject to repayment of advances. To me, it seems difficult to understand how these brothers became reconciled as long as David claims that he was the sole owner of the property.

We have the learned trial Judge's finding in the defendant's favour, but that is by no means final. This Court has, in a case of this kind, to rehear the case, and although we must pay great regard to the learned Judge's finding, we must not shrink from upsetting his decision if we come to the conclusion that he was wrong. In *Paterson Timber Co.* v. *Can. Pacific Lumber Co.* (1909), 15 B.C.R. 225 at 236, I dealt at length with the duty of a Court of Appeal in dealing with questions of fact on appeals from a Judge. What I said there is quite consistent with the

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rule laid down by the Judicial Committee in *Khoo Sit Hoh* v. *Lim Thean Tong*, [1912] A.C. 323.

In Story's Equity Jurisprudence (2nd English ed.), 823m, where implied trusts are divided into two classes, viz., those which stand upon the presumed intention of the parties, and secondly, those which are independent of any such intention, and are forced upon the conscience of the party by operation of law, as for example, in cases of meditated fraud, imposition, notice of an adverse equity, and other cases of a similar nature, it is said that these latter are usually called constructive trusts, or trusts *ex maleficio*. If the declarations in David's letters do not amount to an express trust—he is certainly a trustee *ex maleficio*.

There is a line of cases of which *Keech* v. *Sandford* (commonly called the *Rumford Market* case) (1726), reported in Selected Cases in Chancery (2 Kelynge), p. 61, and also in Wh. & Tudor Leading Cases, is the leading case. There, on a bill brought by an infant against his trustee to have a lease, which had been granted to the trustees for his own benefit, it was shewn clearly that that lessor had refused to renew for the benefit of the infant. Lord Chancellor King said:—

> Though I do not say there is fraud in this case, yet he should rather have let it run out, than to have had the lease to himself.

It was held, on grounds of public policy, that the defendant was trustee of the lease for the infant, and must assign the same to him and account for the profits, and that he was entitled to be indemnified from the covenants contained in the lease.

That case has been followed again and again. Some striking instances of the principle are to be found in *Griffin* v. *Griffin* (1804), 1 Sch. & Lef. 352; *Fitzgibbon* v. *Scanlon*, 1 Dowl. 261; *Mill* v. *Hill* (1852), 3 H.L. Cases 828. The latest application of its principles is in *Griffith* v. *Owen*, [1907] 1 Ch. D. 195, a decision by then Parker, J. It is there pointed out that the principle is primarily applicable to renewal of leases, but in the notes to White & Tudor's report of the case, the learned commentators say the rule applies to all varieties of property and not merely to leaseholds—citing *Cooper* v. *Phibbs*,

L.R. 2 H.L. 149, 165. In Canadian Courts, the principle has been applied in several cases, viz., in *Foster* v. *McKinnon* (1856) —5 Gr. 510, where defendant took advantage of his position as administrator and completed a pre-emption title. In *Lamont* v. *Lamont* (1859), 7 Gr. 258, a dispute between two brothers, the defendant obtained letters of administration and by virtue of his position and by making false statements, obtained a Crown grant behind the plaintiff's back, a decision by Mowat, V.-C., and in *Re Robinson and Coyne* (1868), 14 Gr. 561 at 568, where defendant, though he did not prove the will, was held a trustee.

In *Bennet* v. *Gaslight and Coke Co.* (1883), 52 L.J. Ch. 98, where one of the trustees of a lucrative agency agreement procured the agency to be renewed to a firm, in which he was a partner, upon terms less lucrative, but still beneficial, it was held that the trustee's interest in the renewal agreement formed part of the trust estate.

I would hold that the defendant in obtaining the certificate of improvement and subsequently the Crown grant, which issued to him on December 18, 1892, became a trustee *ex maleficio* for the heirs of the deceased.

It is needless, perhaps, to observe that a person usurping the office of trustee cannot, by renouncing his intention of carrying out the duties placed upon him by law, vest the trust property in himself. Much reliance was placed by the defendant's counsel on this letter of May 7, 1892, but on the authority of those cases I think it is clear that the defendant, by interfering in the administration of James Cook's estate and obtaining the certificate of improvement, he, the defendant, thereby constituted himself a trustee for his mother and brother, and that it was his duty to protect their interests. I cannot agree that his solicitors were justified in asserting as they did in October, 1892, that he was all along morally and equitably entitled to the Crown grant: p. 59. In *Clegg* v. *Edmonson* (1857), 8 DeG. M. & G. 787, 44 Eng. R. 593 at 601, Lord Justice Turner said:—

> It is sufficient for me to state that the mere communication of the intention on the part of the managing partners to apply for the lease for their own benefit could not in my opinion be sufficient for the purpose.

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A defence relied on was that allowed in *Farmer* v. *Livingstone* (1882), 8 Can. S.C.R. 140, the principle contended for being that you cannot go behind the Crown grant and have it set aside by the Courts on equities existing before its issue. But how can it be said in this case that the Crown had all the facts before them, when the applicant, who was the trustee for the defendant, was representing that he alone was the person entitled to the Crown grant. *Farmer* v. *Livingstone* can have no application to a trustee *de maleficio* making an application in fraud of his *cestui que trust*.

There remains the question of laches, delay and acquiescence. The plaintiff was aware in January, 1893, that the Crown grant had issued. He did not issue his writ until 1912. Their mother did not die until 1900, and, the defendant and plaintiff both admit this, were talking about sharing the property until 1903. It cannot be said that the plaintiff slept on his rights as long as these conversations as to sharing the property were going on. If we accept the plaintiff's version, the defendant, as late as 1902 or 1903, was assuring the plaintiff that he regarded himself as trustee.

In *Cooper* v. *Phibbs*, L.R. 2 H.L. 149, the bill was filed in 1863, and it was there held that the defendant, a trustee of property for himself and others, had acquired, under an Act of Parliament passed in 1837, upon the representation that he was solely entitled, an absolute interest therein, but was nevertheless a trustee for all parties beneficially interested, subject only to the repayment to him by the parties entitled under the trusts of the moneys properly expended by him in acquiring the property and improving the same. *Prendergast* v. *Turton*, on appeal (1843), 13 L.J. Chy., 268, was a case of partnership and stands on a somewhat different footing. A partner must not wait to see whether the partnership business will result in a profit.

As to acquiescence, which, in its proper sense, means standing by and seeing another person about to commit, or, in the course of committing an infringing of your rights in such a manner as really to induce the person committing the act, and

who but for such acquiescence might have abstained from it, to believe that he assents to its being committed, acquiescence in this sense is not proved. The plaintiff protested again and again that he would not be a party to a quit-claim deed.

Then the defence is reduced to laches. Here, acquiescence in its other sense, that is to say, that the plaintiff refrained from seeking redress after he became aware that the Crown grant had issued to the defendant cuts an important figure. But lapse of time alone is not sufficient. The other factor, viz., whether there has been any change of position on the defendant's part must be considered.

In *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, lands were purchased in 1873; the plaintiff contended that they had been purchased by the defendant as trustee for her. The defendant became bankrupt, and in 1880 his trustee in bankruptcy repudiated the plaintiff's title. The defendant never expressly did so. The plaintiff apparently thought that it would be better to wait and see whether the defendant would not be able to make some arrangement with his creditors which would enable Lisa to regain control over the property, and then recognize her claim to it. The suit was brought in 1894, twelve years after the correspondence ceased. The Court of Appeal consisted of Lord Halsbury, L.C., Lindley, and A. L. Smith, L.JJ.

The principle upon which we must proceed is put in one sentence by Lindley, L.J., who delivered the judgment of the Court.

> The time which has elapsed since the plaintiff knew that her claim to the estate was disputed is so considerable that before giving the plaintiff the relief to which she would otherwise be entitled it is necessary to consider what her conduct has been and whether anything has happened to render it unjust to the defendant to compel him to account now.

The judgment then refers to the cases cited before us by Mr. Mowat, viz., *Erlanger* v. *New Sombrero Phosphate Co.*, (1878), 3 App. Cas. 1218, at 1279, and then proceeds:—

> In questions of this kind it is not only time, but the conduct of the parties which has to be considered.

The Court of Appeal in the *Rochefoucauld* case were dealing with an express trust, and assuming that an express trust can-

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not be made out *ex visceribus verborum* from the letters of July 16, 1891, August 15, 1891, and January 22, 1892, the defendant has a right to urge that, in dealing with a claim to establish a constructive trust the Courts exact a greater degree of promptitude. That, I think, is so especially where the property is of a speculative nature: see *Clegg* v. *Edmonson*, 8 DeG. M. & G. 787, 44 Eng. R. 593, a case between partners, concerning mining property, where nine years were allowed to lapse, the Court held the plaintiffs were precluded by laches. That case seems to me to be distinguishable, having regard to the property at stake.

Applying the test laid down by Lindley, L.J., in what way has the plaintiff given the defendant to understand that he had abandoned his claim beyond remaining silent from 1902 or 1903 to 1912? Or what equity can the defendant set up to resist the plaintiff's claim? He still owns the estate; the money borrowed by him except the $300 paid to the lawyer can be returned to him, and he recovers all he is entitled to.

I would allow the appeal, reverse the judgment and declare the defendant a trustee, with costs below, direct an account, and dismiss the counterclaim. The defendant should have obtained all that he there asks for had he admitted his trusteeship.

Martin, J.A. (dissenting)

MARTIN, J.A. (dissenting):—I dissent. The appeal should be dismissed for the reason that the learned Judge below has reached the right conclusion.

Galliher, J.A.

GALLIHER, J.A.:—So far as the correspondence between the parties is concerned, I can see nothing unreasonable in the attitude that John Cook took in refusing to sign the quit-claim deed, and it is useful here only in so far as it shews the attitude of both parties up to the time at which it ceased. After that the parties were at arms' length.

The learned trial Judge has found as a fact, and the evidence justifies that finding, that John Cook, some time subsequent to the issue of the Crown grant to David refused to assume his share of the burden of procuring the land and pay-

ing the taxes thereon. The judgment proceeds upon the ground that, after the issue of the Crown grant to David in 1892, David at most was only a trustee for John, and that John's refusal to bear his share of the burden, and repudiation of trusteeship, coupled with the lapse of time which intervened before John made his claim, amounts to abandonment.

It is not necessary to inquire what were the respective rights of the parties up to the time the Crown grant issued. Upon the issue of the Crown grant David became a trustee for John in respect of his interest in the property.

This action is brought to have David declared a trustee, and it resolves itself into a question of whether John, by his acts or omissions has so altered their position as to preclude him from now claiming as a *cestui que trust*. At the time the Crown grant was issued we find the parties at arms' length, David declaring any interest John got, he would have to get through the Courts, and John declaring that he would look after his own interests. The correspondence between the brothers ended, and for a period of some years nothing is said or done between them regarding the property. They then go into business together in a pulp manufacturing concern in the Province of Quebec, John advancing all the money and advancing for David $12,500, for which David receives shares in the company. This proves a failure, and the moneys advanced by John to David still remain unpaid. At the time of these advances David says he offered to deed half of the property in question to John, but John said it was not necessary or something to that effect. Later, the evidence is that David again offered to deed half the property to John, but this time insisted on John paying one half the cost of procuring and maintaining the property, and that John said he did not want anything to do with bush land in British Columbia. This is denied by John, but David is corroborated in this by his wife and one Montgomery, a boy whom David had brought up. Nothing further transpires until John learns in 1909 that David is bringing an action against the city of Vancouver for damages for interference with water rights pertaining to the property, when some correspondence takes place be-

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tween John and a Mr. Russell, solicitor for David, and this action is finally brought in 1912.

From the time of the death of the brother James to the present, David Cook has done all the work and paid all the moneys necessary for procuring the Crown grant, and paid all the taxes on the property in the whole amounting to several hundred dollars. John has contributed nothing directly, but I think we must not overlook the fact that, for over ten years, David has been indebted to John to the extent of several thousand dollars, and, although this is probably outlawed long ere this, yet, in considering the equities of the case as to the burden that David has been carrying, and which he urges, it is a matter for consideration. This money loaned to David is far in excess of what John could be called upon to pay as his share here. Taking this into consideration, we have left only the statement of John that he did not want to have anything to do with British Columbia bush lands, a statement made at a time when David was largely indebted to him, and was demanding half the expenses incurred by David up to that time.

It may very well be that John, so far from considering himself called upon to pay this, concluded not to do so as the balance was largely the other way; but be that as it may, the circumstances were as stated, and I fail to see, under all the circumstances, where John has done or omitted to do anything which a Court of equity could construe as an abandonment. It is true he has lain back for a number of years without actively asserting his rights, but that he might choose to do, relying on them all the time, but choosing his own moment to assert them, and I find nothing which satisfies me that he at any time abandoned those rights, nor do I find anything in the authorities which, under the circumstances of this case, would induce me to refuse the relief prayed.

I would allow the appeal with costs.

Judgment should be for the plaintiff as prayed, and the defendant should have judgment on his counterclaim with costs.

McPhillips, J.A. (dissenting)

McPHILLIPS, J.A. (dissenting):—This action is one brought to have it declared that the plaintiff (appellant) is entitled to

an undivided half share or interest in certain lands in the New Westminster district in the Province of British Columbia, consisting of 193 acres situate near the mouth of Seymour creek and numbered lot 851, group 1, New Westminster district. The land was held under a pre-emption record from the Crown by James Cook, who died in September, 1890. It would appear that the defendant, being a brother of the deceased pre-emptor, obtained the Crown grant to the land, having seen to all the provisions of the Land Act being complied with, also having obtained a quit-claim deed, under date of December 18, 1897, from his mother, the father of the deceased being dead.

The contention of the plaintiff being that as the mother died on November 13, 1900, the land became the absolute property of the plaintiff and defendant, in the proportions of one undivided half share to each. It was alleged that the defendant, well knowing that the plaintiff was one of the heirs-at-law of the deceased pre-emptor—entitled in the same degree as himself to an interest in the land—represented to the mother that she alone was entitled to the land, and upon such representation obtained the quit-claim deed and the grant from the Crown.

The learned trial Judge, in a considered judgment, with which I entirely agree, refused—upon the facts adduced at the trial—to hold that the plaintiff established any position on which the Court would be entitled to grant relief, and disturb the defendant in his position as the owner of the legal estate in the land—holding the title to the land by grant from the Crown, *i.e.*, that the defendant was not a trustee of the land to the extent of a one-half undivided interest therein for his brother, the plaintiff in the action.

The evidence is somewhat voluminous, and the findings of fact of the learned trial Judge are most definite and precise, and I do not consider that it is a case where the Court of Appeal ought to disturb those findings. The learned trial Judge had the opportunity to observe the demeanour of the plaintiff and defendant under examination, and to weigh the evidence, and where, at best, the plaintiff could only succeed by invoking

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equitable principles—and that against the view of the learned trial Judge—the Court of Appeal, should it overturn these findings and grant the relief asked in the face of the laches of the plaintiff and the now evident attempt to romp in—if I may be permitted to so express myself—and reap advantages—the risk of which the plaintiff would never assume throughout long years when the defendant alone had to stand by and without the vigilance of the defendant the land would have been irretrievably lost—would offend against all accepted principles of a Court of equity.

It seems to me that the decision of the Judicial Committee in *Khoo Sit Hoh and others* v. *Lim Thean Tong* (1911), 81 L.J. P.C. 176, [1912] A.C. 323, is very much in point where Lord Robson said, at p. 177:—

> Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses and can estimate their intelligence, position and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon (it is true here we have the transcribed stenographic notes, but on the particular facts of this case I do not differentiate the case), there are many points, which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony.

To my mind, argument has failed to disturb these findings of the trial Judge, and without it being held that the learned trial Judge is wholly wrong in his findings, the defendant cannot be disturbed in his title, holding as he does by express grant from the Crown.

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The quit-claim deed, being exhibit No. 10 in the action, and set out at pp. 135, 136, of the Appeal Book, truthfully sets forth the heirs-at-law of the deceased pre-emptor, James Cook, and the Crown was in no way deceived, as the quit-claim deed was filed in the Lands Department at Victoria before the issue of the Crown grant; and further, it is to be noted that the Crown is not a party to this action—and with the knowledge that the plaintiff was one of the heirs-at-law, the Crown granted and conveyed the land to the plaintiff. What is the result in law? It seems to me that the plaintiff is powerless to ask the aid and assistance of the Court, especially without the intervention of the Crown. In *Farmer* v. *Livingstone* (1884), 8 Can. S.C.R. 140, at p. 157, Strong, J., said:—

> Further, the bill does not shew that the patent was issued by the Crown in ignorance of the plaintiff's possession and improvements. It does not therefore shew that there was error or improvidence in this respect. It has been well settled by numerous decisions in Ontario in suits instituted under a provision similar to that of the statute now in question, that when the Crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot, as it is said, set up equities behind the patent.
>
> Now, in the present case there is no sufficient allegation to shew that the patent was issued by the Crown in ignorance of the facts of plaintiff's possession and improvements. It is true it is stated generally in the bill that the patent was issued in ignorance of his rights, but this allegation cannot, on the general rules applicable to equity pleadings, be construed as a sufficient allegation that the Crown was ignorant of the facts of the plaintiff's possession and improvements.

Here there can be no question the Crown was aware of the fact that the plaintiff was one of the heirs-at-law—the quit-claim deed in its recital shewed this, and as previously pointed out, the Crown is not a party to this action.

In *Templeton* v. *Stewart* (1893), 9 Man. L.R. 487, Bain, J., at p. 499, said:—

> The objection is also taken that the Crown having, after due investigation, issued the patents to Mrs. Stewart, this Court has not jurisdiction to grant the relief that is asked in the bill, and that at all events, the Attorney-General of the Dominion should have been a party to the suit.
>
> What the bill asks is that the defendant, the patentee from the Crown, be declared by the Court to be a trustee for the plaintiffs, and that she be ordered to convey the land to them. Now if the land in question had been

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ordinary Crown land, that is, had it been land vested in the Crown, it seems very clear on the authority of *Boulton* v. *Jeffrey*, 1 E. & A. 111, and *Crotty* v. *Vrooman*, 1 M.R. 151, and the cases referred to therein, that this Court would not have any jurisdiction to entertain the suit. The patent is not shewn to have been issued through fraud, error or improvidence, and it is shewn that it was issued after a full investigation into all the circumstances.

The situation here is that it was land vested in the Crown, and the facts as to who were the heirs of the deceased pre-emptor were fully disclosed to the Crown; it cannot be assumed that the Crown acted through legal error as to who were the heirs-at-law—certainly not without the Crown being a party to the action, and so contending—and the documentary evidence is to the contrary.

In *Crotty* v. *Vrooman* (1883), 1 Man. L.R. 149, Taylor, J. (afterwards Sir Thomas Wardlow Taylor, Chief Justice of Manitoba), said, at pp. 152-153:—

In that province (Ontario) it had been held, in the case of *Boulton* v. *Jeffrey*, 1 Ont. E. & A.R. 111, decided by the Court of Appeal as long ago as 1845, that where the Government had examined into the claims of opposing parties, to lands leased from the Crown, and had granted them to one of those parties, the Court of Chancery had no authority to declare the grantee of the Crown, a trustee of the lands for the opposing party.

The late learned Chief Justice Robinson in delivering the judgment of the Court, said, "We agree with the argument of Mr. Esten, that, even if it could be charged that the patent had issued improvidently, or that the Crown had been in any manner misled, the consequence of that could in general only be, that upon a proper proceeding by the Crown, at the instance (it might be) of the person shewing himself to be prejudiced by it, the grant should be repealed, and thus the land would be again vested in the Crown, which unquestionably must be allowed to exercise its will in disposing of its property." In a more recent case of *Lawrence* v. *Pomeroy*, 9 Gr. 474, the Court considered itself unable to grant relief, although the patent had issued in ignorance of the opposing claim of the plaintiff, upon the fraudulent representations of the patentee, and concealment by him of facts from the Crown Land Department.

The subsequent case of *Barnes* v. *Boomer*, 10 Gr. 535, was decided by the then V.-C. Spragge, now Chief Justice of Ontario, who held that the Court was precluded by *Boulton* v. *Jeffrey*, and that the Public Land Act, 16 Vict. ch. 159, sec. 26, did not extend the jurisdiction of the Court. . . . The late Chancellor VanKoughnet in the case of *Lawrence* v. *Pomeroy*, already cited, expressed a strong opinion, that in such a case, the Attorney-General was the proper party to invite the action of the Court. In *Barnes* v. *Boomer*, V.-C. Spragge said, that *Boulton* v. *Jeffrey* had de

cided, that the proceeding should be by the Crown itself. In the face of the unanimous decisions of such eminent Judges as those whose language I have quoted, it would be impossible for me to entertain the jurisdiction and to grant the relief prayed.

I am not unmindful of *Esquimalt & Nanaimo R. Co.* v. *Fiddick* (1908), 14 B.C.R. 412, wherein it was decided that, in the circumstances of that case, the defendant should be permitted, on giving notice to the railway company, to proceed with her application, and that the Crown need not be a party to the action. The judgment in the action was given by the Chief Justice of British Columbia (Hunter, C.J.), and went on appeal to the full Court, the judgment of the learned Chief Justice being set aside, the Court being composed of Irving, Morrison, and Clement, JJ. I do not think that it can be said that the decision really disturbs the opinion here expressed by me that the Crown grant cannot be affected, or the title thereunder disturbed, save in an action to which the Attorney-General is a party, as possibly the special circumstances of the case may be such as to render all observations to the contrary as *obiter dicta;* but if it should be the case that such is really the effect of the judgment, I respectfully dissent from that view, and agree with the judgment upon that point as expressed by the Chief Justice of British Columbia (Hunter, C.J.), at p. 414, where he said:—

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> There is no principle better established in our law than that in an ordinary suit between subjects, a patent from the Crown which is *ex facie* valid cannot be attacked in the absence of statutory authority on the ground of any irregularity, mistake, misrepresentation or fraud, which is alleged to have occurred in the proceedings leading up to its issue, but such matters may be canvassed only in a suit properly framed for that purpose by or with the assent of the Crown, such as an action by the Attorney-General or by petition of right. If it were not so, no man's title would be safe, and the foundations on which the right to real property at present rest would be swept away.

Then, unquestionably, there has been laches here. Halsbury's Laws of England, vol. 13, sec. 203, reads in part as follows:—

> A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which underlies the Statutes of Limitation, *vigilantibus et non dormientibus lex succurrit*. A Court of equity refuses its aid to stale demands, where the plaintiff has slept upon his

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right and acquiesced for a length of time: *Smith* v. *Clay* (1767), 3 Bro. C.C. 639, n., *per* Lord Camden; see *Pickering* v. *Stamford* (Lord) (1793), 2 Ves. 272, 280.

Then we have in the same volume the following, at p. 173, being sec. 209, in part:—

In certain classes of claims a stricter rule prevails, and the claim to relief in equity must be made with special promptitude. These are claims to establish constructive trusts, to set aside gifts made under undue influence, and to obtain specific performance or rescission of contracts. In cases of constructive trust, relief which would have been given originally will be refused after long acquiescence (*Beckford* v. *Wade* (1805), 17 Ves. 87, 97, P.C.), the equity must be pursued within some reasonable time: *Townshend* v. *Townshend* (1783), 1 Bro. C.C. 550, 554. Especially is this the case where the claim is to establish a trust in respect of property of a speculative nature: *Clegg* v. *Edmondson* (1857), 8 De G.M. & G. 787, C.A.; *Clements* v. *Hall* (1858), 2 DeG. & J. 173, C.A.; *Senhouse* v. *Christian* (undated) cited 19 Ves. 159; *Norway* v. *Rowe* (1812), 19 Ves. 144; see, however, *Turner* v. *Trelawney* (1841), 12 Sim. 49, where a trust of mining property was established notwithstanding the lapse of fifteen years and large expenditure on the mines.

Here we have the lapse of fourteen years and one month after the issue of the Crown grant to the defendant before action brought.

In view of present-day conditions, and bearing in mind the decisions of the Courts in later years, I think it can be well said that here we have such delay as would disentitle a Court of equity to grant any relief, were the facts even such as to warrant the Court in so acting if brought in time—which, in my opinion, upon the merits are wholly wanting.

I would therefore dismiss the appeal and uphold the judgment of the learned trial Judge dismissing the action.

Appeal allowed.

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Alberta Supreme Court, Harvey, C.J., Simmons, Stuart, and Walsh, JJ. April 8, 1914.

1. SEDUCTION (§ II—8)—GIRL UNDER SIXTEEN—PREVIOUS CHASTE CHARACTER—PRE-ARRANGED PROSTITUTION.

Where the girl was physically chaste, a conviction for her seduction when under the age of sixteen may be supported under Cr. Code (1906) sec. 211, although the circumstances indicated a fixed intention on her part, by arrangement with an intermediary, to surrender herself to the man for a stipulated price.

[See *R.* v. *Romains*, 13 Can. Cr. Cas. 68; *R.* v. *Lougheed*, 8 Can. Cr. Cas. 184; and *R.* v. *Comeau*, 19 Can. Cr. Cas. 350.]

Statement

CROWN CASE reserved on a conviction for seduction of a girl under sixteen contrary to the Cr. Code (1906), sec. 211.

The conviction was affirmed.

L. F. Clarry, for the Crown.

A. G. MacKay, K.C., for the accused.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—The accused was convicted by my brother Stuart of an offence under sec. 211 of the Code. He has reserved for the opinion of this Court the question

whether upon the facts as found by me and upon the other uncontradicted facts disclosed in the evidence submitted I was right in deciding that the girl Lillie Hunt was, prior to January 10, 1914, of previously chaste character within the meaning of sec. 211 of the Code.

These facts divide themselves into two classes, (*a*) those immediately preceding and leading up to the sexual intercourse which the accused enjoyed with this girl, and (*b*) those which relate to an incident which took place at an earlier date in the store of a second-hand dealer.

The girl left her home on January 2 last, because of a quarrel with her step-mother. A day or so later she fell in with a woman named Lizzie Ross, who was employed in some capacity in a shooting gallery, in which the accused appears to have been interested. This woman took the girl to her room which she shared with her for several nights. The girl frequented the shooting gallery at which the Ross woman worked, and was there introduced by her to the accused. The woman and the girl talked

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over sexual matters before the date on which this offence was committed. The woman asked her if she ever did business, a question the meaning of which the girl seems to have quite understood. The woman advised her to enter upon a sporting life, telling her how she could avoid trouble as a result of carnal intercourse with men. The arrangement under which the accused had connection with her was made by Lizzie Ross, who told her that a man, who was not named, would pay her $10 if she would stay all night with him. With no further arrangement than this she went on January 10 with the accused to a rooming-house with the fixed intention of prostituting her body to him for the promised cash consideration. She recorded the names, Mr. and Mrs. Jones, in the register of the house to represent the accused and herself. They were assigned a room, which they occupied all night and in which the offence of which he has been convicted was committed. This summarizes with sufficient fulness the facts in class (*a*).

The facts in class (*b*) are not so easily stated. At the trial she was cross-examined with reference to them, but all that could be got out of her then was that some days before this incident with the accused she was in the back part of the store of a second-hand dealer, talking with the proprietor, when he grabbed her by the hand and was just going to pull up her clothes when he was interrupted by some one who came into the store. In her evidence upon the preliminary enquiry she used very different language in describing this incident. The learned Judge draws the inference from what she said on the preliminary "that that man in the back of the second-hand store had made an attempt and had possibly gone so far as to have got his private parts in juxtaposition with hers with her consent, without much opposition from her." He describes this as "an inference which the Court *en banc* may modify, because it is only an inference, not a primary fact." He finds as a fact that before January 10, no man had succeeded in having connection with her.

Even if anything short of a previous actual physical unchastity in the girl whom he has carnally known can avail a man who finds himself in the plight of the accused, in my opinion none of the facts here established are sufficient to brand this

girl as one who was not at the time when she submitted herself to him "of previously chaste character."

The fact that she understood Lizzie Ross' talk on sex matters, even when couched in the peculiar phraseology which she employed, does not prove her to be of unchaste character. Knowledge of these things comes to all women, sometimes in one form of expression and sometimes in another, and, in the great majority of cases, long before they have any practical familiarity with them. To impute an unchaste character to this girl because of her understanding of the other woman's talk would be an exceedingly unsafe thing to do, for it would follow that every woman, no matter how pure of mind, who understood the meaning of catch phrases descriptive of impurity, must be similarly branded.

Nor do I consider her conduct in yielding herself to this man for money and in accompanying him for that purpose to the house of assignation and recording their arrival under assumed names in the register as proof of her unchaste character. In the face of the learned Judge's finding that no man before the accused had succeeded in having connection with her, no inference to the contrary can be drawn from these facts. The most that can be said of them is that they indicate a fixed intention on her part to surrender herself to this man for money, and a brazenness in carrying that intention into effect. The bait which the accused, through the woman Ross, held out to her was money. Instead of exciting her passions and leading her in this way perhaps by degrees to submit herself to him, he appealed to her avarice, or, it may be, to her needs, for she was absolutely without money, and in this way accomplished his end. If, instead of doing this, he had, by adopting the course which the practised seducer usually adopts, created a desire for sexual intercourse which after a time she found it impossible to control, and yielding to it, she had gone with him to this place, I do not see how that would have made her of unchaste character.

Such facts as those with which I am now dealing constitute the inducement-leading up to and practically forming part and parcel of the offence itself, for without preliminaries of some character the offence would never be committed. I cannot see how the chaste character of the woman can be affected by the

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nature of the motive which impels her, whether it be the lure of money or the excitement of passion. The registering of the name in the books was but a detail in the general scheme to which she had committed herself, which is no more suggestive of her unchaste character than is any other detail in that scheme.

Upon the other branch of the case there is more difficulty. There is no absolute finding of fact by the learned Judge as to what took place in the second-hand store. He merely draws an inference from what she said on the preliminary which is that this man "had *possibly* gone as far as to have his private parts in juxtaposition with hers, with her consent, without much opposition from her." Her story at the trial is quite at variance with this idea. The language which she used on the preliminary is ambiguous; standing by itself it is undoubtedly suggestive and might fairly bear the meaning which the learned Judge seems inclined to give it. If, on the other hand, her explanation of it as given at the trial is the true one, and upon its face it does not seem unreasonable, the expressions she used on the preliminary were quite innocent. It is not for this Court to find the facts; its function is to say from certain given facts what legal consequences shall flow. The onus is on the accused of proving the girl not to have been of previously chaste character, and upon the case presented to us I think it is impossible for us to say that the learned Judge erred in the conclusion which he reached.

I would, therefore, answer the question submitted in the affirmative.

I have carefully refrained from expressing an opinion upon the meaning to be given to the words "of previously chaste character," that is, as to whether or not actual physical unchastity must be proved by the accused to entitle him to be acquitted, for, as I have already said, in my view of the case, a determination of that question is not necessary to the disposition of it.

Conviction affirmed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher and McPhillips, JJ.A. April 7, 1914.

1. REFORMATION OF INSTRUMENTS (§ I—1)—FOR MISTAKE—STATUTE OF FRAUDS.

The Statute of Frauds is not available as a defence against the rectification of an executed agreement on the ground of fraud or mistake clearly shewn, although the antecedent contract was one which the Statute of Frauds required to be in writing and it was by word of mouth only.

[*Re Boulter*, 4 Ch. D. 241, applied; *Olley* v. *Fisher*, 34 Ch. D. 367; *Shrewsbury* v. *Shaw*, 89 L.T. Jour. 274; *May* v. *Platt*, [1900] 1 Ch. 616, and *Thompson* v. *Hickman*, [1907] 1 Ch. 550, considered.]

2. EVIDENCE (§ VI H—562)—RECTIFICATION OF MORTGAGE—MISTAKE.

Although there is no previous agreement in writing, rectification of a mortgage may be allowed on oral evidence when there is clear proof of the intention.

Statement

APPEAL from the judgment of Hunter, C.J.B.C., December 5, 1913, in favour of the plaintiff, decreeing the rectification of a realty mortgage.

The appeal was dismissed.

Joseph Martin, K.C., for the defendant, appellant.

Bodwell, K.C., for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—A mortgage was executed by the appellant Bertha F. Hall, as mortgagor, by her husband Alfred Hall, the other appellant, as party of the second part, to the respondent as mortgagee to secure an advance to Alfred Hall of $4,000. It was so executed because of a mistaken belief of their respective attorneys that the title to the lots mortgaged was in Mrs. Hall. The title in fact was in Alfred Hall, and hence this action to rectify the mistake. The appellants are unable or unwilling to repay the loan, yet they resist the rectification of what they cannot deny was a mutual mistake. They resist this on the technical ground that the Court cannot receive oral evidence of a mistake because of the Statute of Frauds. This is an attempt on the part of at least the appellant Alfred Hall to use the Statute of Frauds for the purpose of fraud. There is not even the poor pretext on his part that there could be a doubt about

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the merits of the respondents' case. The learned Chief Justice who tried the action in effect rectified the mortgage by declaring that Alfred Hall should be described not as party of the second part, but as mortgagor. No personal order for payment was made against Mrs. Hall: her name was not struck out of the mortgage, but the effect of the judgment is to relieve her of liability. The net result is that the mortgage has been rectified so as to make the owner of the lots, who was also the borrower of the money, the mortgagor: to put him in the position which but for the mutual mistake he would undoubtedly have been in from the beginning, and to release Mrs. Hall, though not formally, from the transaction. In that result I think the learned Judge was right, though I should have gone more directly to the point, and have struck Mrs. Hall's name out of the mortgage.

Apart from the defence of the Statute of Frauds, appellant's counsel contended that because there was some evidence that the original intention of the respondents was to have a mortgage in which some one should join as guarantor (that being the suggested reason for joining Alfred Hall as party of the second part, though the mortgage contains no guaranty clause) no reformation which the Court can make can effectuate the whole agreement of the parties, and hence the decree in effect makes a new agreement between them not in accord with their virtual understanding.

While there is some such evidence I think it nevertheless plain enough that the real agreement between the parties was that the respondents should loan the money to Alfred Hall and that Alfred Hall should secure the repayment of the loan by a mortgage of the lots in question, executed by himself if the title were in him, and if not, then by his wife, if the title were in her, and in the latter event, he, as the borrower, was to join to bind any interest he might have and to pledge his personal credit. Had the title been in him I do not gather from the evidence that his wife, or anyone else, would have been asked to join as guarantor. What was intended then was a conveyance of the property in mortgage, and Alfred Hall's personal covenant to pay, and, by the rectification decreed, that has been effectuated.

I now come to the defence of the Statute of Frauds. Mr.

Martin, for the appellants, relied mainly on *Woollam* v. *Hearn* (1802), 7 Ves. 211, 32 Eng. R. 86; *Davies* v. *Fitton* (1842), 2 Drury & Warren 225; *May* v. *Platt*, [1900] 1 Ch. 616; and *Thompson* v. *Hickman*, [1907] 1 Ch. 550. The first named decides that a Court of equity cannot because of the Statute of Frauds rectify an executory agreement for a lease on oral evidence. In other words, that the Courts will not decree specific performance against a defendant of an executory agreement together with rectification of the instrument sued on. The other cases shew this, that where it is sought to rectify a deed which was executed in pursuance of a prior written agreement, not on the ground that it does not conform to the terms of the agreement, but that neither conforms to the real bargain, the Courts will not rectify because that would be tantamount to reforming a written executory agreement on parol evidence, and then decreeing specific performance of it by in effect directing the execution by the defendant of a corrected deed. Had this mortgage been executed in pursuance of a prior written agreement, the case would come clearly within the very terms of these decisions. There was no prior written agreement in this case, and hence, assuming they were well decided, I think the cases relied upon by Mr. Martin are not authorities against the decree complained of.

This distinction to my mind explains the apparent contradiction between those cases and those upon which respondent's counsel relied: as for instance, *Re Boulter, Ex parte National Provincial Bank of England* (1876), 4 Ch. D. 241, in which a charge in the nature of a mortgage on real property was rectified on parol evidence notwithstanding that the Statute of Frauds was pleaded; and *Thomas* v. *Davis* (1757), 1 Dick. 301, 303, referred to with approval by Cozens-Hardy, J., in *Johnson* v. *Bragge*, [1901] 1 Ch. 28, at 36; and in Sugden on Vendors and Purchasers, 14th ed., 122. *Thomas* v. *Davis* was not a case of the rectification of a marriage settlement, but of a conveyance, and does not differ in principle from the case at bar.

That the absence of a prior written agreement materially distinguishes this case from *Davies* v. *Fitton* (1842), 2 Drury & Warren 225, and others of like character above mentioned. I

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need only refer to the language of the Lord Chancellor (Sugden) in that case, where at p. 233, he says:—

It is said that if a mistake was proved and that there was no written contract, the parol evidence would be admissible. Perhaps it might, because there is no settled rule of law in the way, and as there is no written contract the Court must endeavour to ascertain by the best evidence it can get what was the contract of the parties and whether there was any mistake.

Again, in *Murray* v. *Parker* (1854), 19 Beav. 305 at 308, 52 Eng. R. 367, 368, the Master of the Rolls, Sir John Romilly, said:—

In all cases the real agreement must be established by evidence whether parol or written. If there be no previous agreement in writing parol evidence is admissible to shew what the agreement really was. If there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly: if ambiguous, parol evidence may be used to explain it.

In that case the Statute of Frauds was set up, nevertheless the rectification was made, but I do not cite the case so much for the result as for the rule laid down by the Master of the Rolls, that

if there be no previous agreement in writing parol evidence is admissible to shew what the agreement really was.

Having reached the conclusion that the Statute of Frauds was not a bar in circumstances like these to the admission of parol evidence, either before or since the Judicature Act, it becomes unnecessary to express a settled opinion as to whether the statement in Fry on Specific Performance, 5th Canadian ed., p. 400, that—

This vexed question has, it is believed, been finally solved by the Judicature Act (1873), sec. 24, sub-sec. 7,

is a correct statement or not. It was argued that *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *May* v. *Platt*, [1900] 1 Ch. 616, and *Thompson* v. *Hickman*, [1907] 1 Ch. 550, shew that that statement is not a correct one, but as I read these cases they do not decide anything with respect to the effect of that sub-section upon a question of this kind. It would appear to me that the sub-section could hardly be said to have made any change because the principles applicable to the rectification of instruments was the

same before as since the Judicature Act, namely, equitable principles.

No difficulty arises in this case about the facts. The moment it was proven that the title was at the time the mortgage was given in the husband, a fact proved by the production of the certificate of title, it became manifest without more that a mistake had been made in the mortgage in inserting the name of the wife instead of that of the husband as mortgagor. Very little in this case depends upon oral evidence. Reading the mortgage in connection with the documentary evidence of title, it is just as obvious that a mistake had been made as it was that a mistake had been made in the instrument in question in *Wilson* v. *Wilson* (1854), 5 H.L.C. 40, 10 Eng. R. 811, where it was apparent to their Lordships that "John" ought to be read "Mary."

I would dismiss the appeal with costs.

Irving, J.A.

IRVING, J.A.:—With reference to Mr. Martin's second point —that assuming mistake proved—the Court will not enforce, by a decree of specific performance, an agreement to which the Statute of Frauds is applicable, but which has to be rectified on parol evidence.

The old rule which is set out in *Woollam* v. *Hearn* (1802), 7 Ves. 211, 32 Eng. R. 86, 2 W. & T.L.C. 513, has been modified since the passing of the Judicature Act. Two examples are *Olley* v. *Fisher* (1886), 34 Ch. D. 367, and *Shrewsbury, etc., Cab Co.* v. *Shaw* (1890), 89 L.T. Jo. 274. These were executory agreements, untouched by the Statute of Frauds, and, therefore, are not authorities in the present case. North, J., in giving judgment in *Olley* v. *Fisher*, said that now (since the passage of the Judicature Act) the Court can have no difficulty in entertaining an action for the reformation of a contract and for the specific performance of the reformed contract in every case in which the Statute of Frauds does not create a bar. It is on this opinion that Mr. Martin relies and he cites two cases which he claims support his argument, viz.: *May* v. *Platt*, [1900] 1 Ch. 616, and *Thompson* v. *Hickman*, [1907] 1 Ch. 550.

Before discussing these cases it may be well to consider the circumstances under which a deed will be reformed: Where there

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is previous agreement in writing which is unambiguous, the deed will be reformed — and parol evidence is unnecessary. Where the previous written agreement is ambiguous parol evidence may be allowed in to explain the ambiguity. Where there is no previous writing the rectification can only be allowed on oral evidence when there is clear proof of the intention and no contradiction on oath by the defendant.

Now in *May* v. *Platt*, [1900] 1 Ch. 616, which was for rectification of a conveyance, the previous agreement in writing was unambiguous, and Farwell, J., refused to admit parol evidence to contradict the previous agreement. In *Thompson* v. *Hickman*, [1907] 1 Ch. 550, here the application was to rectify a conveyance in unambiguous terms, the deed being of minerals "lying on each side of and adjoining a railway." It was proposed to make it read so as to include the mineral underlying the railway. The previous agreement used the same unambiguous terms. Neville, J., said that he would follow *Davies* v. *Fitton*, 2 D. & War. 225, and *May* v. *Platt*, [1900] 1 Ch. 616, the ground of these decisions being that the evidence of intentions was not admissible. These two cases do not bear on the Statute of Frauds—in neither of them was *Olley* v. *Fisher* cited, but in *Johnson* v. *Bragge*, [1901] 1 Ch. 28, the present Master of the Rolls, then Cozens-Hardy, J., when the dictum in *Olley* v. *Fisher* [34 Ch. D. 367] was read to him, scouted the idea that the Statute of Frauds formed any defence in an action of fraud or mistake, and he cited a case decided in 1757—*Thomas* v. *Davis* (1757), 1 Dick. 301—where the rectification of a conveyance of land was sought. The evidence of the attorney who received instructions to prepare the deed and did prepare the deed was admitted. This evidence, though admissible, was not deemed sufficient. Other cases of more recent date were cited, but the opinion of Cozens-Hardy, J., itself seems to remain unquestioned, and it is cited in text books as settling the law.

The decision of Bacon, C.J., *Re Boulter* (1876), 4 Ch. D. 241, seems to recognize the same doctrine, in the case of honest mistake.

I do not think I can put this part of the case better than

it is put by Mr. Cyprian Williams in the second edition (1900) of his Vendors and Purchasers at p. 783:—

> It is no defence to an action for rectification to plead that the antecedent contract was one which the Statute of Frauds requires to be in writing, and that it was made by word of mouth only. (*Johnson* v. *Bragge*, [1901] 1 Ch. 23.) For if made by word of mouth the contract was not void, but only not enforceable; and if the parties really assented to such a contract and had also a common intention of reducing or giving effect to all the terms of that contract to or by writing, and this intention were frustrated owing to the omission or mis-statement by mistake of some material term of the contract, it would be giving countenance to fraud to allow the defendant to repel proof of the mistake under cover of the statute. If, however, the writing purport to contain the contract but omit some material part thereof and there were no common intention to put the whole contract into writing, the document cannot be rectified. If this were not so, the Statute of Frauds could never be enforced.

The first and more difficult point remains, was there satisfactory proof of the mistake to justify the amendment?

It is always necessary to shew that there was an actual contract antecedent to the instrument which is sought to be rectified. A Mr. Bliss was authorized by Alfred Hall to obtain a loan, and he was authorized to execute a mortgage of his property. He applied through a firm of brokers, Chrimes & Jukes, who in turn applied to the plaintiffs' solicitors, and an agreement was reached to advance the money, but by some blunder the mortgage was drawn with Mrs. Hall as mortgagor—Alfred Hall being joined as guarantor. Alfred Hall was informed by Mr. Bliss that the loan had gone through and was asked if he himself would execute the mortgage, to which Hall replied, "No, you do it for me under your power of attorney."

There is no contradiction by Alfred Hall. I would hold the evidence sufficient to justify the rectification and dismiss the appeal.

Galliher, J.A.

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

It is abundantly clear upon the evidence that Bliss had full authority to execute a mortgage on the lands in question in the name of the owner, Alfred Hall, and that it was the intention of all parties to charge these lands with the mortgage as against the owner. Alfred Hall was the owner, but by error his wife was

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named in the instrument as mortgagor, Alfred Hall being named as the party of the second part presumably as guarantor for the payment of the moneys advanced, but with no covenant in the mortgage deed.

What is sought here is to rectify the instrument transposing the names of Alfred Hall and Bertha Fulton Hall so that Alfred Hall becomes the mortgagor and to have specific performance of the mortgage decreed. This transposition would make the instrument what it was originally intended to be as against Alfred Hall. The parol evidence is clearly admissible for this purpose, and since the Judicature Act (where the Statute of Frauds does not intervene at all events) the Court can rectify the agreement and decree specific performance in the one action. See *Olley* v. *Fisher* (1886), 34 Ch. D. 367.

Mr. Martin, counsel for the appellant, contended that when rectification was made the Court had before it a document partly written and partly dependent on oral testimony, and being so the Statute of Frauds (which was pleaded) comes in and says you cannot enforce specific performance.

The mortgage is an executed agreement and as it stands complies with the requirements of the Statute of Frauds.

The Court here is not making a new agreement between the parties, but declaring what the written agreement between the parties is.

It is true that conclusion is arrived at by the admission of oral evidence, but I do not think it is a case where the Statute of Frauds applies: *Re Boulter, Ex parte National Provincial Board of England* (1876), 4 Ch. D. 241, is, I think, in point.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal is one from the judgment at the trial of the Honourable the Chief Justice of British Columbia (Hunter, C.J.). The action was one brought to rectify a certain mortgage upon real estate in the city of Vancouver executed on December 1, 1911, it being alleged that by mutual mistake of the parties to the action, the defendant Bertha Hall was in the mortgage described as the mortgagor and the defendant Alfred Hall was described as the party of the second part. Whereas Alfred Hall should have been described as the mort-

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gagor and Bertha Fulton Hall as the party of the second part—the party of the first part being the plaintiff Fordham. The action was one also for foreclosure and possession of the lands. The defendants, who are husband and wife, severed in their defences and denied any mistake—advance of money under mortgage—authority in the attorney to execute the mortgage—that parol evidence was inadmissible to vary the mortgage, and sec. 4 of the Statute of Frauds was pleaded. The learned Chief Justice held that it was a case of mutual mistake and a proper case for rectification as claimed, and that in default of payment of the mortgage money, interest and costs, the defendants be foreclosed of and from all right, title and interest in the lands and that the plaintiff do have possession of the lands.

The defendants join in an appeal to this Court, alleging that the learned trial Judge erred in holding as he did—and that the evidence established (*a*) that the defendant Alfred Hall should have been the mortgagor, and that the defendant Bertha Fulton Hall should have been joined as guarantor thereof and that by mistake Bertha Fulton Hall was named as the mortgagor, and the defendant Alfred Hall was named as the party of the second part, and that by further mistake the mortgage did not contain a covenant on the part of the defendant Alfred Hall to pay the mortgage money and interest, and denying that a case was made out for rectification—as if rectification was ordered and the defendant Alfred Hall be the mortgagor, and the defendant Bertha Fulton Hall the party of the second part—as guarantor—in that the mortgage as executed was executed by and on behalf of the defendant Alfred Hall by his attorney (one Bliss) who also executed the mortgage for and on behalf of the defendant Bertha Fulton Hall—that the power of attorney from the defendant Bertha Fulton Hall did not authorize any such guarantee; (*b*) that even if the evidence could support rectification, no order could be made directing the payment of the mortgage money and interest, and in default foreclosure by reason of sec. 4 of the Statute of Frauds; (*c*) that the evidence did not support the learned trial Judge in his decision that the intention was that both defendants should be parties to the mortgage.

It was most strenuously and ably argued by Mr. Martin,

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and his argument was supported by a very careful citation of authorities, that no document can be rectified to the extent that the same be made good under the Statute of Frauds by the introduction of parol evidence, and change the legal effect of the document.

Upon the facts of the present case, however, in my opinion no difficulty arises in applying an admittedly well known principle—that being, that the Court will correct the mistake to carry out the real and manifest intention. Further, it is open to the Court in an action for rectification to admit of parol evidence being given to establish the nature of and the real intention of the parties. Malins, V.-C., in *Welman* v. *Welman* (1880), 49 L.J. Ch. 741, said:—

> Every case to be found in the books all go on this: although a vested interest may be acquired, yet if the Court is satisfied that a deed was executed in a form in which it ought not to have been, and not in conformity with the intention of the parties, it will, regardless of all interests acquired, and whatever the consequences to those who have acquired vested interests may be, put the deed into a proper form, and one which is in accordance with the intention of the parties. Therefore, I am not acting contrary to any case.

In the present case, with rectification decreed no vested or previously acquired interests are at all affected.

The Statute of Frauds is no bar and in no way prohibits the Court in the exercise of its power of rectification in a proper case.

Re Boulter, Ex parte National Provincial Bank England (1876), 46 L.J. Ch. 11, 4 Ch. D. 241, was a case where it was held that the bank having advanced their money upon an agreement for the mortgage of certain houses, was entitled in equity to have the memorandum rectified so as to carry out the agreement, and that they must be treated by the Court of Bankruptcy as possessing a valid security upon the two houses. Bacon, C.J., at p. 13, said:—

> In my opinion the whole argument has proceeded on an entirely erroneous principle. The Statute of Frauds, in my judgment, has no more to do with this case than Magna Charta has. The contract is plainly proved between these people. It is a contract for advancing money, and that there should be a security upon certain property.

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The facts of the present case to my mind are perfectly simple: the defendant Alfred Hall was advanced the money mentioned in the mortgage by the plaintiff; the land is rightly described; the mortgage is duly executed as it happens by the two defendants; but unquestionably the owner of the land to whom the advance was made was intended to be the mortgagor, but by error he is not so named, but is described as the party of the second part; and the party of the second part is not made a covenanting party in any way—unless it can be said that the proviso at the end of the mortgage supplies this deficiency, and it would, upon the facts of the case, be reasonable to so hold. The proviso reads as follows:—

> Provided and it is hereby declared and agreed by and between the parties hereto that all the covenants, clauses, agreements, powers, provisos and conditions herein contained shall be binding upon and enure to the benefit of the mortgagor and mortgagee, their heirs, executors, administrators, successors and assigns respectively. And it is further agreed that the words "mortgagor" and "mortgagee" and all words referring to the parties herein importing the masculine gender shall be construed as applicable to female as well as male parties, and if there are several mortgagors or mortgagees or other parties, shall be applicable to each and all of them, and if any party is a corporation, shall be applicable to it, and all covenants herein contained on the part of the mortgagor shall, if there be more than one, be construed as joint and several covenants.

The rectification being made, *i.e.*, Alfred Hall's name being inserted in the place of Bertha Fulton Hall as the mortgagor of the first part, nothing more is necessary as the mortgage is duly executed under seal, and the plaintiff becomes entitled to have the terms of the mortgage carried out, and the money advanced thereunder paid, or in default thereof, foreclosure as one of the remedies available to the plaintiff.

In *Johnson* v. *Bragge*, [1901] 1 Ch. 28, 70 L.J. Ch. 41 at p. 45, the Master of the Rolls (then Cozens-Hardy, J.) said:—

> The instrument of August 6, 1865, is under seal. No further deed will be required. The deed when rectified by inserting the few words needed to correct the blunder made by the solicitor friend, will be a perfectly valid appointment. The jurisdiction I am asked to exercise does not depend upon any doctrine peculiar to powers. When once the deed is made to accord with what I find to have been the real bargain and intention of all parties to it, no further relief will be needed.

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The distinction to be drawn from *Thompson* v. *Hickman*, [1907] 1 Ch. 550, 76 L.J. Ch. 254, and the present case is this—in that case there was a previous agreement in writing and a deed following it, and Neville, J., held that where a deed has been executed in pursuance of and in conformity with a previous agreement in writing, come to between the parties, the Court will not rectify the deed on the ground that due effect has been given to the intention of the parties. At p. 258, he said:—

> The Court will not, upon the ground of mutual mistake rectify a conveyance which has been executed in conformity with a previous agreement in writing come to between the parties. The ground of these decisions appears to be that evidence of the intentions of the parties *dehors* the written agreement cannot be received without infringing a well-known rule of law, and that to grant relief in such a case would be equivalent to the grant of specific performance of a written contract with a parol variation.

The present case is one where the mortgage—being the agreement entered into between the parties, and duly executed—does not give effect to the intention of the parties, and the aid of the Court is invoked to carry out the real intention of the parties.

In Halsbury's Laws of England, vol. 21, p. 21, we read:—

> Although where a written contract is followed by a conveyance the conveyance may, on the ground of common mistake, be rectified so as to correspond with the contract (*Beale* v. *Kyte*, [1907] 1 Ch. 564), yet when the two documents as executed correspond, common mistake will not, it seems, be sufficient ground for rectifying both.

And in the footnote (*a*) reference is made to *Thompson* v. *Hickman*, *supra*, amongst other cases, reading:—

> *Davies* v. *Fitton* (1842), 2 Dr. & War. 225; *May* v. *Platt*, [1900] 1 Ch. 616; *Thompson v. Hickman*, [1907] 1 Ch. 550, where Neville, J., at 561, said that the law was as stated in the text, but that he had great difficulty in following the reasoning on which the cases appear to be based. The above decisions were founded on the old equitable rule that the Court would not grant specific performance of a written contract with parol variation; but *quære* whether that rule should still prevail since the Judicature Act, 1873 (36 & 37 Vict. ch. 66), sec. 24(7); see *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *Shrewsbury and Talbot Cab and Noiseless Tyre Co.* v. *Shaw* (1899), 89 L.T. Jo. 274.

The course of conduct of the defendants in the present case well merits the application of the observations of the Lord Justice Turner in *Lincoln* v. *Wright* (1859), 4 De G. & J. 16-23 [45 Eng. R. 6, at 9]:—

Having considered this case since the hearing, I am quite satisfied that the decree is well founded. Without reference to the question of part performance on which I do not think it necessary to give any opinion, I think that the parol evidence is admissible, and is decisive upon the case. The principle of the Court is, that the Statute of Frauds was not made to cover fraud.

The defendants, although both executing the mortgage—it is true by their attorneys in fact—both attempt to escape liability, and relieve the land from an encumbrance which certainly was agreed to as security for the money advanced, and the money advanced was admittedly received by the defendant Alfred Hall.

In the notice of appeal which was given to this Court (the defendants, acting jointly in the appeal), paragraph 1 reads as follows:—

> That the learned Judge misapprehended the effect of the evidence and that the real meaning of the evidence was that the mortgage in question was drawn up in pursuance of instructions, which were that the defendant Alfred Hall, who was the owner of the property should be the mortgagor, and the defendant Bertha Fulton Hall should join in said mortgage as a guarantor of the amount of the mortgage money and interest; that by mistake the defendant, Bertha Fulton Hall, was made the mortgagor, and the defendant, Alfred Hall, was made party of the second part; and that by further error the said mortgage did not contain, as was intended, a covenant on the part of the said Alfred Hall to pay the said mortgage money and interest.

Now, the above was the view of the evidence taken by the learned counsel for the defendants, and it was contended that no case for rectification was made out as the attorney in fact for the defendant Bertha Fulton Hall was without authority to enter into any such guarantee, and in transposing the names the defendant Bertha Fulton Hall would become the guarantor; that does not necessarily follow, nor do I find that the evidence establishes that the defendant Bertha Fulton Hall was to be the guarantor, the intention was to make her a party, along with her husband, to the mortgage.

It would certainly be the utilization of the Statute of Frauds to perpetuate fraud to be constrained to hold that the statute is a bar to relief, and that rectification is not permissible, upon the facts of the present case, and even as the defendants themselves view the facts. I would also think that upon the facts in

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any case an equitable mortgage was created which would entitle foreclosure being decreed, apart from rectification. It is to be noted that no judgment has gone against the defendant Bertha Fulton Hall for the mortgage money, interest and costs.

With regard to the question of costs, these, as is well known under the law as we have it, follow the event unless the Court or Judge shall for good cause otherwise order. The practice of the Courts, where complete discretion exists, has been to consider the conduct of the parties in awarding and disposing of the question of costs in cases of mistake and rectification of documents. The defendants, to say the least, have acted unreasonably and unjustly in refusing to correct the mistake, and resisting rectification. I, therefore, think that this case is not one for making any special order, but that the costs should follow the event.

In my opinion, and for the foregoing reasons, I see no ground upon which the decision of the learned Chief Justice of British Columbia should be disturbed, and it follows that in my opinion the judgment appealed from should be affirmed, and the appeal dismissed.

Appeal dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips. April 7, 1914.

1. DENTISTS (§ I—6)—UNLAWFUL PRACTICE—FEES NOT RECOVERABLE, WHEN.

Dental work done in violation of the Dentistry Act, R.S.B.C. 1911, ch. 64, cannot constitute ground for an action for fees for such work, and moneys already paid in relation thereto may be recovered back.

Statement

APPEAL by the defendant from the judgment of Lampman, County Court Judge, in the plaintiff's favour in an action to recover fees for dental work, done in alleged violation of the Dentistry Act, R.S.B.C. 1911, ch. 64, with a counterclaim for a refund of the part payment already made.

The appeal was allowed, MARTIN, J.A., dissenting, and judgment entered dismissing the plaintiff's claim and allowing the defendant's counterclaim.

Tait, for the defendant, appellant.
Elliott, for the plaintiff, respondent.

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MACDONALD, C.J.A.:—I think there was a clear violation of the Dentistry Act, ch. 64, R.S.B.C. 1911, and therefore the plaintiff in the action (respondent in this appeal) was not entitled to recover for fees charged the defendant for dentistry work done in such violation.

Macdonald, C.J.A.

As regards the counterclaim for moneys already paid by the defendant to plaintiff on account of the bill, in view of the fact that defendant was not at the time aware that the plaintiff was violating the law, I think he is entitled to judgment for the sum for which he has counterclaimed.

The appellant should have the costs here and below.

IRVING, J.A.:—I would allow the appeal.

Irving, J.A.

In my opinion Hammond was practising as a dentist under cover of Burgess's professional license.

MARTIN, J.A. (dissenting):—It is admitted that the defendant had the benefit of the dentist's work that was done for him and his family, but he seeks to avoid paying for it on the ground that Hammond, the employee who did the work in the plaintiff's office, was not a registered dentist, and was therefore not entitled to practise as such under the Dentistry Act. We were referred to secs. 59, 60, 63, 64, 70 and 71, of that Act in support of this contention, but in my opinion, after a careful consideration of them in the light of the authorities they fail to do so because as a matter of fact, on the undisputed testimony, Hammond was not "practising" in the true sense of that term, but was an assistant to the plaintiff and employed as such in his office and was there subject to his supervision. This is not the case of a registered practitioner putting an unregistered one in charge of a branch office, or in charge of his chief office during his absence, but that of an assistant being employed by a registered practitioner. It is impossible for a dentist in large practice to carry on his occupation without assistants of various kinds and more or less highly skilled and correspondingly paid.

Martin, J.A. (dissenting)

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Martin, J.A. (dissenting)

As Mr. Justice Byles said in *De la Rosa* v. *Pricto* (1864), 16 C.B.N.S. 578, at 581:—

> A great many attendances in the case of a medical man in large practice, must be given by assistants.

and the higher the class of his practice the higher the skill of his assistants. Nor does anything turn upon the manner of payment, and I see no good reason why the remuneration should not depend upon the amount of work done: that method of payment is often an incentive to industry. There is nothing at all inconsistent with this view in the statement in sec. 63 that "the right . . . to practise" is "a personal right;" like many other personal rights it involves the employment of others to exercise it to the full extent. There is nothing in the Act which requires assistants to be indentured or to be certificated. Sec. 64 permits dental students to practise, *i.e.*, do dental work and surgery, "under the personal supervision of a member of the college," but sec. 64 prohibits them from being "placed in charge of any dental office." It is not contended that Hammond was placed in charge of the plaintiff's office. Sec. 70 does not touch this case and to apply it simply, in my opinion, with all due respect to that of others, evades the real point because Hammond did not, in fact, "practise or profess to practise" dentistry, unless it can be said that to act as a skilled assistant is to do so.

It must be remembered that in cases of this kind the prohibition and the offence must be undoubted because, as was said in *Turner* v. *Reynall* (1863), 14 C.B.N.S. 328 at 335, on a similar act, "This is a disqualifying statute, and therefore to be construed strictly." If the statute were intended to prohibit the employment of a skilled uncertificated assistant why does it not say so in plain terms? As was said in *Hatfield* v. *Mackenzie* (1860), 10 Ir. C.L. 289 at 296,

> Nothing could have been easier than for the Legislature if they had so designed,

where the reason is also given for refraining from doing so, viz.:—

> The framers of the Act were probably conscious that if they had proposed more stringent provisions, the measure would not have received the sanction of the Legislature.

The point is really put in a nutshell by Chief Justice Abbott in *Brown* v. *Robinson*, 1 C. & P. 264, thus:—

> No practice while in the service of another, can be a practising under this Act.

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GALLIHER, J.A., concurred in the judgment of MACDONALD, C.J.A.

McPhillips, J.A.

McPHILLIPS, J.A.:—This is an appeal from the County Court of Victoria from the judgment of the learned Judge of that Court (Lampman, County Judge), judgment being entered for $122, being a balance claimed to be due for professional services as a dentist, the account in the whole having been $243.50, upon which $121.50 was paid. The services rendered would appear to have been for work done upon the mouth and teeth of the defendant (appellant) and to the extent of $3.50 for Miss Elizabeth Zimmerli. It would not appear that any of the work done was simply mechanical, *i.e.*, the supply of false teeth, but was all work done in the mouths of the patients, being treatment, extractions, building up and the placing of crowns, and the supply of the materials therefor.

The defence was that the services were rendered by one Hammond, not a duly qualified or registered dental practitioner, although so held out by the plaintiff, and that under the provisions of the Dentistry Act, ch. 64, R.S.B.C. 1911, the plaintiff, although himself qualified, was not entitled to recover for any of the services rendered.

Mr. Tait in a very careful argument, on behalf of the appellant, urged most forcibly that not only should the action be dismissed, but that the counterclaim for the return of the $121.50 paid, should be allowed, upon the ground that the professional services rendered and the materials supplied were rendered and supplied illegally and contrary to the provisions of the Dentistry Act.

It would appear that Hammond was a graduate from the Philadelphia Dental College, but not qualified under the Dentistry Act, and he was not a duly indentured student of dentistry under the Dentistry Act. It would appear that the

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Dentistry Act is an Act passed for public protection, and may also be said to be in the way of protecting duly qualified dental practitioners, although I cannot say that this latter protection can be said to be spread in terms upon the statute book.

The plaintiff in his evidence dealing with the position and terms of engagement he had with Hammond said:—

> When he came with me our arrangement was there was no written agreement simply verbal, of course he was not a registered man, therefore I did not think it was the right thing to do to enter into a written agreement, so I told Mr. Hammond that I would allow him on the 50 per cent. basis until such time as he had passed the board.

The arrangement made in my opinion was clearly against the intention of the Legislature in the enactment of the Dentistry Act, see secs. 59, 60, 63, 64, 65, 70, 71, 72, and in my opinion the intention of the Legislature is clearly indicated in the language of the Act.

Secs. 63 to 68 inclusive follow under the heading "Provisions for Public Protection" and these words are to be found in sec. 63:—

> And every such member so practising shall at his office or place of practice by a proper sign conspicuously placed set forth his proper name so that all persons applying to him for professional aid and treatment may have certainty of his identity and means of availing themselves of the protective provisions of this Act.

Section 63(*a*) admits of partnership only between registered members of the College of Dental Surgeons, and therefore prohabits any partnership with any person not a member of the College.

Upon the argument, I was to a considerable extent impressed by *Hennan & Co. Ltd.* v. *Duckworth* (1904), 20 Times L.R. 436; and *Seymour* v. *Prickett* (1905), 74 L.J.K.B. 413, it being held by the Court of Appeal in England, that the Dentists Act, (1878), sec. 5 (*Seymour* v. *Prickett, supra,* 413).

> prevents an unqualified person from recovering any fee or charge for dental operations or dental attendance or advice, but there is nothing in the Act which renders the contract to do such work illegal, and notwithstanding sec. 5 an unqualified person can recover in respect of mechanical work done or materials supplied in the course of such dental operations or attendance.

It is to be however noted that this is not an action by an unqualified person but by a member of the College of Dental Surgeons, and whose right to practise arises only by reason of the Act and under its protection, and he permits an unqualified and unregistered person to do the work he is suing for.

Further the Acts differ; the English Act is aimed at the prevention of the practice of dentistry and dental surgery, and the prevention of recovery of any fee or charge for any dental operation, dental attendance or advice unless registered; the British Columbia Act provides against all this, but further provides (sec. 60) against

> the performance of any operation or for any medicine or materials that he may have prescribed or supplied as a dentist or dental surgeon unless he be registered.

Now it is apparent if one, not a member of the College, were to sue in this province, he could not recover—even to the extent it was held there was the right of recovery in *Hennan & Co.* v. *Duckworth* (1904), 20 Times L.R. 436 and *Seymour* v. *Prickett*, 74 L.J.K.B. 413.

Then upon the facts the materials supplied in the present case were worked *in* materials upon the teeth not merely materials of a mechanical nature supplied such as false teeth.

Mr. Justice Willes in *Hennan* v. *Duckworth*, 20 Times L.R. 436, said at 437:—

> Dental operation must mean an operation in the surgical sense upon a living patient, and not work in making false teeth.

Now the question that presents itself for consideration is this, if the unqualified or unregistered person could not recover for that which is sued for, can the qualified and registered person, which the plaintiff is, recover? I am of the opinion that what occurred was the doing of that which was illegal, and that being so, no part of the contract can be enforced. In arriving at this conclusion, I have considered and relied upon the following authorities: *Brown* v. *Moore* (1903), 32 Can. S.C.R. 93, 97; *Wright* v. *Elliott* (1911), 21 Man. L.R. 337; *Taylor* v. *Crowland* (1854), 23 L.J. Ex. 254; *Cope v. Rowlands* (1836), 2 M. & W. 149.

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I am also of the opinion that the money paid and covered by the counterclaim may be recovered back, and in arriving at this conclusion I have considered and relied upon the following authorities: *Browning* v. *Morris* (1778), 2 Cowp. 790; *Kearley* v. *Thompson* (1890), 24 Q.B.D. 742 (C.A.); *Barclay* v. *Pearson*, [1893] 2 Ch. 154; *Lodge* v. *National Union Investment Co.*, [1907] 1 Ch. 300; *Victoria Daylesford Syndicate Ltd.* v. *Dott*, [1905] 2 Ch. 624.

It therefore follows that in my opinion the judgment of the learned trial Judge should be set aside, the action dismissed with costs, the counterclaim allowed with costs, and the appeal allowed.

Appeal allowed.

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SILVERT v. CARLSON.

Manitoba King's Bench, Mathers, C.J.K.B. May 19, 1914.

1. SPECIFIC PERFORMANCE (§ II—42—PERFORMANCE PRO TANTO AND COMPENSATION—VENDOR AND PURCHASER.

Where the defendant, who had agreed to exchange real estate with the plaintiff, was unable to convey a small parcel of the lands to the plaintiff, the latter is entitled to be placed as nearly as possible in the same position as he would have occupied had the defendant carried out his agreement; the plaintiff may elect to take specific performance *pro tanto* with an abatement in price in respect of the part for which title cannot be given, but the abatement will be based upon the actual value and not upon the inflated value assigned to such parcel in the exchange agreement.

Statement

ACTION for specific performance of an agreement for the exchange of lands.

Judgment was given for the plaintiff.

E. J. Thomas, and *E. D. Honeyman*, for the plaintiff.
F. Heap, and *A. W. Clark*, for the defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—This is an action for specific performance of an agreement for the exchange of lands. The facts are as follows: The defendant had on July 7, 1911, entered into an agreement for the sale to the plaintiff of lot 1340, D.G.S. 39/40 St. John, plan 28, in this city, and on December 18, 1913, the plaintiff still owed in respect of that sale the sum of $335. On

this latter date a new agreement was entered into between the parties whereby the plaintiff agreed to sell and the defendant agreed to re-purchase the same lands for $3,160 subject to a mortgage then upon the land for $1,560 and to arrears of taxes amounting to $70 or a total encumbrance of $1,630, leaving a balance of $1,530. The defendant agreed to cancel the indebtedness of the plaintiff to the defendant in respect of the first purchase amounting to $335. The balance was to be provided for by the defendant paying to the plaintiff the sum of $150 cash, transferring to the plaintiff an agreement of sale which the defendant had entered into in respect of lot 27, in block 1, D.G.S. 43/44 St. John, plan 192, on which there was unpaid the sum of $552, and by also transferring to him lots 4, 5, and 6 in block 22, according to plan filed in the Winnipeg Land Titles Office as No. 1399. These latter lots are situate at Winnipeg Beach. It was a further term of the agreement that the plaintiff should rent the cottage upon lot 1340 for six months at a rental of $22 per month.

At the time the agreement was entered into the defendant prepared a quit claim deed of lot 1340 from the plaintiff to himself and the plaintiff there and then executed this deed and left it with the defendant. The defendant also within a few days paid to the plaintiff $50 of the $150 to be paid in cash. The plaintiff at the time the agreement was entered into was living in the cottage and he has ever since continued to live in it. Some time after the agreement was entered into the defendant discovered that he had made a mistake as to the Winnipeg Beach lots. He discovered that he owned no lots in block 22, but that he did own lots 4, 5 and 6 in block 32 and these were the lots that he had intended to include in the agreement. On discovering the mistake he offered to carry out the agreement substituting the lots in block 32 for those named in it, but the plaintiff refused to accept such substitution and insisted that the defendant should pay, in lieu of the lots, the sum of $500, the price at which they were named. I am satisfied that the lots in block 32 are of more value than those in block 22, but, of course, the plaintiff had a right to the lots mentioned in the agreement, and was not bound to accept any others.

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When the defendant discovered that he had not title to the lots in block 22, he obtained from the owner thereof an option to purchase them in order that he might carry out the agreement, and while this option was in force, he intimated to the plaintiff and his solicitors that he would carry out the agreement by giving them the lots named in it. At that time the parties were negotiating a settlement along other lines and the plaintiff allowed the option to expire. After the negotiations had failed, he attempted to renew the option, but the owner then refused to sell, and he found himself in the position of being unable to carry out the agreement.

Under these circumstances the plaintiff brings this action for specific performance, or, in the alternative, for the price at which he sold the cottage to the defendant.

I think I must hold that the contract has been completely executed on the plaintiff's part, and that he is entitled to have the relief asked for in one form or the other. Although the defendant made a mistake as to his title to the Winnipeg Beach lots the mistake was one on his part only and was in no way induced by the plaintiff, nor was the plaintiff aware of the fact that he had made a mistake until considerable time after the agreement had been entered into and he had conveyed his title in the cottage to the defendant. The defendant says that the quit claim deed was delivered to him to be held until the balance of the agreement was carried out. I do not think he is entitled to take that position. To set up such a claim would be in contradiction of the deed itself and it is quite manifest that he did exercise acts of ownership over the cottage, by attempting to sell it to others after he had received the deed. From that time on he treated it as his and I do not think he is now entitled to say that the deed was delivered to him conditionally, even if it were possible for him legally to take that position. As before pointed out the defendant took the cottage subject to a mortgage upon it of $1,560. A payment fell due upon the mortgage on January 1, following, which was not made, and because of that default the lot was sold under power of sale on April 18 last, during the pendency of this action, to a nominee of the defendant.

It is quite manifest that the defendant cannot specifically

perform the agreement, as he has no title to the Winnipeg Beach lots. The plaintiff is not, therefore, entitled to that relief. The plaintiff is clearly, however, entitled to some relief. The defendant has his cottage and must either give him what he agreed to give or the equivalent. The plaintiff is entitled to be placed as nearly as possible in the same position as he would have been in, had the defendant carried out his agreement. He is not entitled to be placed in a better position than the complete execution of the agreement by the defendant would have placed him in.

The defendant can give everything he agreed to give except the Winnipeg Beach lots. What does the plaintiff lose by not getting these lots? Clearly his loss is measured by their value. The price placed on the Winnipeg Beach lots in the agreement was $500, but I am convinced they are not worth anything like that sum and that the plaintiff knew at the time that the price named was a very much inflated price, as is commonly the case when lands are being exchanged. The evidence satisfies me that these lots are not worth more than $30 each, or $90 in all, and I fix that as their value.

If the plaintiff would prefer to accept the three lots in Block 32, he may have specific performance of the agreement on that basis without costs. If not, there will be a reference to the Master to adjust the taxes, interest and insurance upon the property sold by the plaintiff to the defendant as of December 18, 1913, under the terms of the agreement; to take an account of the amount due from the plaintiff to the defendant for rent of the cottage from that date at $22 per month and of the amount still due from the defendant to the plaintiff in respect of the $150 cash payment and in respect of the Winnipeg Beach lots, taking their value at $90, and of the sum of $552 payable under the agreement, Carlson to Osborne, which the defendant agreed to transfer, and interest at the rate of 7% per annum thereon from December 18 last until judgment.

If the defendant executes within two weeks a transfer of the Osborne agreement and pays over to the plaintiff any moneys he may have received thereunder since December 18, the amount

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for which judgment may be entered will be reduced by the said sum of $552 and interest as aforesaid, otherwise judgment will be entered as directed in the last preceding paragraph.

The plaintiff is entitled to a declaration that he is released from the payment to the defendant of the said sum of $335 still payable under the agreement of July 7, 1911. He is also entitled to a vendor's lien for the amount found to be due by the Master under the terms of this judgment upon lot 1340, and that a time be fixed for the payment of the amount so found, and in default, that the lands be sold to realize said claim.

The plaintiff is entitled to the costs of the action.

Judgment for plaintiff.

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Ontario Supreme Court, Middleton, J., in Chambers. June 30, 1914.

1. MUNICIPAL CORPORATIONS (§ II C 1—54)—BY-LAW AGAINST DRUNKENNESS IN PUBLIC PLACES—REMEDYING OMISSION TO AFFIX SEAL—CONVICTION FOR OFFENCE PRIOR TO SEALING.

Because of the validating provisions of the Ontario Municipal Act, 1913, sec. 258(3), R.S.O. 1914, ch. 192, sec. 258(3), in respect of municipal by-laws which were not duly sealed when passed, a summary conviction under an unsealed municipal by-law cannot be quashed, although the by-law was sealed only after objection taken before the magistrate at the hearing of the charge, as the effect of the statute is to permit the sealing to relate back to the date of passing the by-law.

Statement

MOTION by the defendant for an order quashing his conviction by a magistrate for being drunk in a public place in the township of Otonabee, contrary to a by-law of the township.

The objection was that a valid by-law was not proved; the original not having been sealed when passed, and the corporate seal having been affixed only after the objection was taken before the magistrate.

By the Municipal Act, 1913, sec. 258(3), it is provided: "Where, by oversight, the seal of the corporation has not been affixed to a by-law, it may be affixed at any time afterwards, and, when so affixed, the by-law shall be as valid and effectual as if it had been originally sealed."

Motion was dismissed.

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Middleton, J.

G. N. Gordon, for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—This motion, I think, fails. The true effect of the sealing of the by-law is to validate it from the beginning. The legislative will was then exercised, and the intention of the Legislature was to permit the sealing to relate back; and, after the sealing has taken place, I am to treat the by-law as a good and valid by-law from the date of the passing.

Motion dismissed with costs.

Conviction affirmed.

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County Court of District No. 1, Nova Scotia, His Honour Judge Wallace. June 23, 1914.

1. HUSBAND AND WIFE (§ IV—160)—NON-SUPPORT OF WIFE OR CHILDREN—SUMMARY PROCEEDINGS—WIFE AS A WITNESS.

The amendment to the Criminal Code in 1913 by the addition of new sections 242A and 242B (3-4 Geo. V., ch. 13), will not affect the interpretation of the words "the three last preceding sections" used in sec. 244; the three sections intended are 241, 242 and 243, and these relate to indictable offences as to criminal omission of duty, while the added sections relate to summary convictions for neglect to provide for wife or children; the reference in the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4, to offences against sec. 244 does not constitute the wife of the accused a competent witness against him on a summary hearing of a charge under the added section 242A.

2. WITNESSES (§ I B—16)—WIFE AS WITNESS AGAINST HUSBAND—CRIMINAL LAW—NON-SUPPORT TRIABLE UNDER SUMMARY CONVICTION PROCEDURE.

The evidence of the wife is not admissible against her husband on the hearing before a magistrate of a charge under Code sec. 242A (amendment of 1913) whereby it was made an offence punishable on summary conviction for a husband to neglect without lawful excuse to provide for his wife and children when destitute, as no corresponding amendment was made to the Canada Evidence Act when sec. 242A was added to the Code.

[See Annotation at end of this case.]

3. STATUTES (§ III A—139)—AMENDING STATUTES—NEW SECTION INTRODUCED WITH NUMBER AND LETTER DESIGNATION—CRIMINAL CODE.

Section 242A of the Criminal Code which was inserted by the Code Amendment Act, 1913, is not to be considered a sub-section of sec. 242, but as an entirely independent section.

Statement

APPEAL from a summary conviction for non-support. The defendant was convicted by a Stipendiary Magistrate in

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and for the County of Halifax for the offence of non-support under section 242A of the Criminal Code (3-4 Geo. V. cap. 13, sec. 14) and appealed to the County Court for District No. 1 at Halifax. On the appeal coming on for hearing, the wife of the defendant who was the prosecutrix, was tendered as a witness on her own behalf, which being objected to by the appellant, she was not permitted to be sworn as a witness against her husband and was rejected as such.

The conviction by the magistrate, based largely on the wife's testimony below, was set aside.

H. C. Morse, for the appellant, the defendant.
John J. Power, K.C., for the respondent, the prosecutrix.

Judge Wallace.

JUDGE WALLACE:—Under the Canada Evidence Act (R.S.C. cap. 145, sec. 4) the wife of a person charged with an offence against section 244 of the Code is made a competent and compellable witness for the prosecution. Section 244 declares that any violation of any of "the three last preceding sections" shall be an indictable offence, the guilty person being liable to three years imprisonment. Two new sections were enacted in the year 1913, and called 242A and 242B, and it has been contended by counsel before me in a prosecution for an offence against section 242A, that since the enactment of section 242A the words in section 244 "the three last preceding sections" would include 242A and, therefore, that the wife of a person charged under 242A would be a competent witness for the prosecution. Literally the words "the three last preceding sections" in section 244 would embrace 242A and 242B, but if the various sections from 240 to 244 are carefully examined it becomes plain that these words refer to section 241, 242 and 243 and do not include 242A and 242B.

Section 244 deals exclusively with indictable offences, whereas the new section 242A deals exclusively with a new offence punishable on summary conviction.

The evidence of the wife is not admissible, under the Canada Evidence Act in this prosecution under section 242A, because she is not the wife of a person charged with an offence against section 244. She is the wife of a person charged with an entirely different offence created by section 242A.

While it is a sound general principle that the law shall be con-

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sidered as "always speaking," nevertheless that principle must be applied so as to give effect to legislation according to its spirit, true intent and meaning. The construction which was contended for by counsel for the prosecution is calculated to defeat the object of Parliament in relation to section 241 and 242 and virtually to repeal these two sections,—which would be left to operate "in the air." I pointed out at the trial in rejecting the evidence in question that section 242A was not a sub-section of 242, but was merely placed in its present position in the Code, because it deals with a duty akin to other duties dealt with by this particular group of sections and that it had no further relation to section 244 than if its number had been 1500.

But even if there were any ambiguity or doubt as to the scope of section 244, such doubt should not be interpreted against an accused where Parliament has failed to express itself clearly.

Wife's evidence rejected and conviction set aside.

Annotation—Witnesses (§ I B—16)—Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code, sec. 242A

Annotation

Competency of wife as witness against husband.

The case of *Rex* v. *Allen*, above reported, raises an interesting question which there appears to have been no occasion to consider in England since the Criminal Evidence Act, 1898 (Imp.) or heretofore in Canada since the Canada Evidence Act. That is whether, assuming as is done in the *Allen* case that sec. 242A is to be viewed as an entirely separate section of the Code apart from sec. 242, and notwithstanding the non-inclusion of sec. 242A in the list of sections referred to in sec. 4 of the Canada Evidence Act, the wife is not a competent witness against her husband on a summary charge for failure to provide for her, whereby she falls into destitute or necessitous circumstances.

It seems clear that on the creation of a new offence without restriction as to the class of evidence or the competency of the witnesses, the analogy of the common law would apply, together with such general statutory enactments as were referable to the offence or to witnesses or evidence. The Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 2, makes sec. 4 applicable to "all criminal proceedings"; and while sec. 4 specifies particular offences as to which the wife of the accused shall be a "competent and compellable witness for the prosecution" without the consent of the person charged, it further provides, in the fourth sub-section, that "nothing in this section shall affect a case where the wife or husband of a person charged with an offence may *at common law* be called as a witness without the consent of that person."

Before it can be concluded that the evidence of the wife is not admissible, it is necessary not only to find if the offence is specially designated in sub-

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Competency of wife as witness against husband.

Annotation (*continued*)—**Witnesses (§ I B—16)—Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code, sec. 242A.**

section 2 of sec. 4 of the Canada Evidence Act, but to ascertain if the case comes within the class of common law exceptions under which the wife's testimony was admissible. The common law rule as to the evidence of husband and wife either for or against each other is thus stated in Pritchard on Quarter Sessions (1875), p. 278:—

"In criminal, as in civil cases, there is only one relationship which disqualifies, viz., that of husband and wife. In no case, *except* those where either husband or wife complains of an injury directly inflicted by the one on the other, can either party in this connection give evidence for or against the other. Even where the husband consented to the wife being examined *against* him, the evidence was rejected, 1 Hale, Pleas of the Crown, 47. In case of personal violence or wrong, the wife is from necessity a competent witness against the husband, and the husband against the wife. It is said that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person. *Per* Hullock B. in *R.* v. *Wakefield*, 2 Lewin, C.C. 1, 279, 2 R.C. & M. 605. So on an indictment against the husband for an assault upon his wife, *R.* v. *Azire*, 1 Str. 633, Buller, N.P. 7th ed. 287. And upon an indictment under the statute of Henry VII. for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*, and being competent against him she was consequently competent as a witness for him; *R.* v. *Perry*, Ry. & Mov. N.P.C. 353; though it has been doubted whether if the woman afterwards assented to the marriage and lived with the man for any considerable time, she would be capable of being a witness either for or against him. Roscoe Cr. Evid., 13th ed., 106. In *R.* v. *Wakefield*, 2 Lewin C.C. 288, 2 R.C. & M. 607, Hullock, B., was of opinion that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution on the ground of necessity, although there was no evidence to support that part of the indictment which charged force, and also on the ground that the defendant, to whom she had been married after having been illegally taken from her father's custody contrary to the statute then in force as to heiresses, could not by his own criminal act found a claim to exclude such evidence against himself.

It would seem that it is not necessary that there should be force employed in the offence in order to make the husband or wife competent. *R.* v. *Wakefield*, 2 Lewin C.C. 279; R. v. *Perry* (1794), cited in *Rex* v. *Serjeant*, R. & M.N.P.C. 354; 3 Russell on Crimes, 5th ed. 626 (*n*).

A wife is always permitted to swear the peace against her husband Taylor on Evid., 10th ed., vol. 2, p. 973; Roscoe's Crim. Evid., 12th ed. 109, 13th ed. 106. Upon the trial before justices under the Vagrancy Act, 5 Geo. IV (Imp.), ch. 83, for neglect to support wife and children whereby they became chargeable to the parish as paupers, it was held that the wife's evidence was not admissible against her husband, for the neglect was considered merely as an offence against the parish. *Reeve* v. *Wood* (1864), 10 Cox C.C. 58, 5 B. & S. 364, 34 L.J.M.C. 15. In that case the court of King's Bench (Crompton, Blackburn and Mellor, JJ.) all concurred in the view

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Competency of wife as witness against husband.

Annotation (*continued*)—Witnesses (§ I B—16)—Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code, sec. 242A.

that the punishment provided by the statute was in respect to the chargeability to the union or workhouse funds and *not* for an alleged wrong to the wife and therefore that the evidence of the wife could not be received against her husband. Crompton, J., said it did not fall within the rule of necessity, for there are many other persons by whom the case may be made out without her evidence. Blackburn, J., thought it was not within the principle of *Lord Audley's* case, 1 St. Tr. 393, which made to the general rule an exception admitting the wife's evidence where she may be the only person who is cognizant of the offence concerning her person. Mellor, J., said there had been no personal wrong done to the wife in the sense of any of the decided cases. *Reeve* v. *Wood*, 10 Cox C.C. 58; and see *Sweeney* v. *Spooner*, 3 B. & S. 330.

But the Criminal Evidence Act (Imp.), 1898, made the wife not only a competent but a compellable witness in prosecutions under the Vagrancy Act, 1824, for neglect to maintain, such as was before the court in *Reeve* v. *Wood*, 10 Cox C.C. 58, 34, L.J.M.C. 15, *R.* v. *Acaster* and *R.* v. *Leach* [1912], 1 K.B. 488 at 493.

In *R.* v. *Jagger*, Russell on Crimes, 5th ed., vol. 3, p. 625, the prisoner was indicted for attempting to poison his wife by giving her a cake which contained arsenic, and the wife was admitted to prove the fact that her husband had given her the cake. The ruling by which the evidence was admitted was affirmed by all of the judges *en banc*. The ground for the admission could only be founded upon the exception *ex necessitate* to the general common law rule of incapacity between consorts to give evidence one against the other.

In the Ontario case, *Reg.* v. *Bissell*, 1 Ont. R., 514, decided by the Ontario Queen's Bench Division in 1882 before the passing of the Canada Evidence Act, it was held that the evidence of the wife was inadmissible on the prosecution of her husband by indictment under the Canada statute 32-33 Vict., ch. 20, sec. 25. That statute made it a misdemeanor in any person who was legally liable as husband, guardian, etc., to provide for any person as wife, child, apprentice, etc., necessary food, clothing or lodging, wilfully and without lawful excuse to refuse or neglect so to provide. The majority of the Court in *R.* v. *Bissell*, 1 O.R. 514, (Hagarty, C.J., with whom Cameron, J., concurred) thought the prosecution had failed to shew that the case falls within the exceptions allowed to the general rule. As said by Hagarty, C.J., at p. 519:—

"Force or injuries to her person or liberty, forcible or fraudulent abduction, or inveigling into a marriage procured by friends have been held to be admitted exceptions. I have not met with any case where the charge was wholly of non-feasance, decided to be an exception to the rule. It is said, not very directly, that there is also an exception from necessity where the offence cannot be proved except by the wife. Conceding for the argument that it is so, the case presented to us does not shew any such necessity. The charge against defendant is stated to have been proved by other witnesses. The wife was called to prove the non-supply of money from a named date, with a refusal so to do. In cases like these it may be that the charge can be fully made out without the wife's evidence."

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Competency of wife as witness against husband.

Annotation (*continued*)—**Witnesses (I B—16)—Competency of wife in crime committed by husband against her—Criminial non-support—Cr. Code, sec. 242A.**

Armour, J., afterwards of the Supreme Court of Canada, dissented from the opinion so expressed by Hagarty, C.J., and thought the wife was a competent witness. He based his reasoning on two grounds, first from the necessity of the case, and secondly, because it is a crime committed by her husband against her. He added:—

"The second ground really springs from the first, for the reason of the wife being admitted as a witness against her husband where a crime has been committed against her by her husband is "from the necessity of the case," for were she not admitted, the crime might go unpunished and in all the authorities that I have been able to examine upon the subject, I find necessity to be the foundation for the admission of a wife to testify against her husband; and if on a prosecution such as the one I am now considering a failure of justice must take place unless the wife is admitted to testify. I think she is competent to testify."

See also reference to the Bissell decision in *Mulligan* v. *Thompson*, 23 O.R. 54.

The decision in the *Bissell* case cannot well be said to have passed into settled law for the subsequent statute, the Canada Evidence Act, 1893, made the wife a competent and compellable witness in such a case. See now secs. 242 and 244 of the Criminal Code, 1906, and the revised Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4.

The importance of the *Bissell* decision is now revived because of the legislation creating the new offence stated by the added sec. 242A, inserted in the Code by the Code Amendment Act of 1913 (1913 Can. Statutes, ch. 13). The legislation is of a similar character to that under consideration in the *Bissell* case, and it furthermore bears indications that it was to be available as a remedy for the wife against her husband. The offence is made punishable "on summary conviction"; a new duty in so far as the criminal law is concerned is created with a criminal penalty for infraction, and one of the elements of the new offence is in case of the wife, that she is in "destitute *or* necessitous circumstances." The destitution or necessity of the wife may frequently be provable *ex necessitate* only by the wife's evidence. The statute was passed for the wife's further protection by summary process and seems to imply that she may be the informant and chief witness. Section 242B as to inference of marriage and parentage appears to forecast the calling of the wife as a witness, and to be intended to aid her in proving her status as a wife, although she may not be able to prove that the marriage ceremony was in accordance with the laws of the country in which it took place. These considerations seem to favour the admission of the wife's testimony under the common law exception *ex necessitate* above referred to, and to be opposed to the ruling of Judge Wallace in *Rex* v. *Allen*, above reported (head note 2). As regards the force of the decision of *R.* v. *Bissell*, 1 Ont. R. 514, above referred to, there is much to be said in favour of the dissenting opinion of Armour, J.

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Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. June 30, 1914.

1. PERJURY (§ II B—50)—STATUTORY CORROBORATION—"MATERIAL PARTICULAR"—CR. CODE 1002—KNOWLEDGE OF FALSITY.

The corroboration required on a charge of perjury need only be as to the falsity of the previous deposition, although the circumstances may be such that to prove guilt a further element must be shewn such as the knowledge of the accused that the party with whom he claimed he had entered into a contract on behalf of another had in fact no authority to do so.

2. WITNESSES (§ III—58)—CORROBORATION—PRISONER'S TESTIMONY ON PERJURY CHARGE—INCONSISTENCIES WITH FORMER TESTIMONY.

Where the accused gives evidence on his own behalf in defence of a charge of perjury, material variances in such testimony from that in respect of which the charge is brought may in themselves supply the statutory corroboration which Cr. Code, sec. 1002, requires, namely, that the accused shall not be convicted "upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused."

[See also *R.* v. *Girvin*, 45 Can. S.C.R. 167; *R.* v. *Wakelyn*, 21 Can. Cr. Cas. 111, 10 D.L.R. 455; *R.* v. *Fraser*, 7 Cr. App. R. 99; *R.* v. *St. Pierre*, 19 Can. Cr. Cas. 82.]

Statement

CROWN case reserved by His Honour Judge Crawford of the Edmonton District Court, on a conviction for perjury.

The conviction was affirmed, STUART, J., dissenting.

E. B. Cogswell, for the Crown.

H. A. Mackie, for the prisoner.

Harvey, C.J.

HARVEY, C.J.:—The prisoner was convicted before Crawford, D.C.J., of having committed perjury by swearing to the effect that he and one Williams had a contract in March, 1914, with the Fort Saskatchewan Brick Yard Company for the delivery to them of five hundred tons of coal.

Certain points were reserved by him, one being as to whether there was corroborative evidence to satisfy the Code. At the close of the argument the appeal was dismissed. The only point upon which there was any doubt in the minds of any one of us was that of corroboration. On the criminal trial it appeared that the Brick Yard Company was the name under which a certain man carried on business and he swore that there was no such contract as had been sworn to by the prisoner.

If the matter had rested there, there would perhaps have been

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no corroboration such as is required, though there were suspicious circumstances which had apparently some importance in the learned Judge's opinion.

However, the prisoner gave evidence, but did not repeat the evidence he had given before, but stated that the contract he referred to had been made with one Perrais, an employee of the Brick Yard Company.

It appears to me that this is entirely corroborative of the evidence of the proprietor, who swore that there had been no such contract, having also sworn that Perrais had no authority to make such a contract.

The prisoner might still not have been guilty, because he might not have known that Perrais had no authority. That, however, is not a matter upon which the corroboration is required, but merely the truth or falsity of the fact sworn to.

On this point, however, the suspicious circumstances were important; for the prisoner though he had known Perrais for some time and had seen him frequently, yet stated that he could not recall his name when in the former action he had sworn to the contract, but on the criminal trial he remembered his name, the fact being that at this time he was dead. The learned trial Judge seeing and hearing the prisoner give his evidence had a good opportunity of estimating what weight should be given to the circumstances referred to.

I am of the opinion, however, that on the evidence of the accused himself, qualifying, as it did, the sworn statement upon which the charge was based, there is the corroboration that is called for by the Code.

Stuart, J. (dissenting)

STUART, J. (dissenting):—For the reasons given at the hearing of the argument in this case, I think the answer to question one of the reserved case should be in the affirmative.

With respect to questions two and three, I had some doubt at the close of the argument, not having had, yet, an opportunity of reading all the evidence, as to what the proper answer should be. A more careful reading of the evidence has confirmed my hesitation and I am now inclined to the view that these questions should be answered in the negative.

In the first place, it has to be observed that in giving his evi-

dence on the trial of the civil action Nash was not cross-examined at all as to the terms of the verbal contract to which he referred. There is nothing at all to shew that if he had been so cross-examined and had been asked to tell what was said, he would have given any different account from that which he gave upon his defence at the trial of the criminal charge.

I am unable to assent to the view that because there are some doubts from a legal point of view as to whether the conversation to which he swore as having taken place between himself and Perrais would in law constitute a binding contract that, therefore, he should be convicted of perjury because he referred to it in general terms upon the trial of the civil action as a contract. An examination of the evidence of McLellan when he gave an account of the dealings between himself and Williams in the spring of 1912, will show that while he was careful to refuse to use the word "contract" in deciding his arrangement with Williams, he nevertheless did insist on calling it an "arrangement." Practically it was the same sort of arrangement that the accused stated he had made with Perrais, and I cannot assent to the view that a man should be convicted of perjury for describing an "arrangement" as a "contract." I cannot see anything of a corroborative nature within the meaning of the statute in these circumstances.

It is further said that the fact that he was unable to give the name of the man with whom he had made the arrangement when he was giving his evidence at the trial of the civil action should be treated as corroborative testimony implicating him in the charge of perjury, with respect to his assertion that there had been such a contract. Upon consideration I feel myself unable to treat this as corroborative within the meaning of the Code. It is altogether too slender a string. How often do all of us have the experience of knowing a man's face but forgetting his name? There is no more common experience. To refer to a particular case of my own: I remember that I had to do with the appointment of one of the professors of the Provincial University and that I examined his credentials, that I met him after his appointment time and time again, that I met him and his wife socially on many, many occasions, that I had business dealings with him in respect of the administration of the university and I recall that very, very frequently I found myself embarrassed by the fact that it was ab-

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solutely impossible for me to speak his name and that I had to resort to subterfuges sometimes to avoid the embarrassment. Not only that, but in order to get over the difficulty I repeated his name to myself in his presence after I learned it again and over and over again, and notwithstanding that on the next succeeding occasion I could not possibly recall his name, although it was a very common English surname. In the case of this accused he was not given any length of time to think about the name and he was not recalled to ask if he could not remember the name. Then the fact that the man happened to die and he afterwards recalled the name is to my mind not a circumstance which should be treated as corroborative testimony implicating the accused in a charge of perjury.

As I intimated on the argument, I also do not think that the fact that he omitted to call witnesses to prove his alleged contract, who could have supported his testimony if it were true, is any circumstance of a corroborative nature. He probably should have been better advised by his counsel in preparing his case and should have been told that it would be very advisable for him to call the men or the man with whom he had made the contract, but that was the fault rather of his counsel, it seems to me, in the preparation of the case.

Finally it is suggested that he gave a different account of the date on which he made the contract at the trial of the civil action from that which he gave upon his defence. A careful examination of the evidence will, I think, show that this point is obscure. It is true he said in answer to a question which did not refer to the alleged contract at all, but to the subletting of the mine to some one else, "No, I got a contract along late in the winter," but it does not appear to me to be by any means certain that he was, in the use of those words, referring to the contract for the sale of coal. It must be remembered how this man was making his money out of this mine. He was subletting it and getting a royalty from his sublettee of 50 cents a ton and it was to his interest that as much as possible should be sold by the sublettee and therefore to his interest to secure purchasers for the output. He was therefore interested in two sorts of contract, first, a contract with the man working the mine, and, secondly, with people purchasing the output.

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Now, the question which was directed to him which he answered in the words I have quoted, referred to a sublease and an examination of the rest of the evidence shows that he had, according to his statement, and he is not contradicted anywhere else, got a contract with one Clarke just before this for subletting the mine for the coming summer and from this man he was to get the royalty which he expected. In the answer which I have quoted he was answering a question about a sublease and it is not by any means clear to my mind that the answer referred to the contract for coal. It may be said that the following questions suggest that that was what he was thinking of, but under the whole circumstances there seems to me to be too much opportunity for misunderstanding between the counsel who was examining and the witness being examined as to what they were talking about to justify any necessary inference that he was then saying that he had got a contract for the sale of the output "along late in the winter." In order to furnish corroborative evidence within the meaning of the statute, I think the contradictory statement suggested against him should be free from obscurity; and that I do not think it is.

There being no other corroborative testimony suggested, I think the conviction should be quashed.

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

Simmons, J.

Conviction affirmed.

BERESFORD v. HALLORAN CONSTRUCTION CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. January 19, 1914.

1. CONTRACTS (§ IV C—345)—WORK AND LABOUR—PART PERFORMANCE—PREMATURE ACTION—REMEDYING DEFECTS IN WORK.

Where a contract for work and labour provides that after giving notice to the contractor to remedy any defective work, the owner may, on his default, have the defective work remedied and the cost charged to the contractor, the latter cannot sue on the original contract for lack of its completion, nor can he sue in the alternative, on the owner's election to have the contract finished by another, until the cost of remedying the defective work can be ascertained.

[See Annotation on Failure to complete building contract, 1 D.L.R. 9.]

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APPEAL by the defendant from the trial judgment in the County Court in plaintiff's favour in an action to recover upon a painting contract.

The appeal was allowed, McPHILLIPS, J.A., dissenting.

Buchanan, for the defendant, appellant.

Todrick, for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The only ground of defence to the action is that it is premature. The appellant accepts the view of the learned Judge that the contract entitled the defendant to dismiss the plaintiff for defective work, pay the costs of completion from the contract price. The Judge found that there was good cause for removing the plaintiff from the work, and he found that there was at the time of trial a balance of $210 coming to the plaintiff. The plaintiff does not appeal, but the defendant does, complaining that while there was at the time of trial, the work then being complete, a balance due to the plaintiff of $210 yet there was nothing due and no right of action when the plaint was issued. That, as I understand the case, is a fair statement of it as it comes before this Court.

In my opinion, although it becomes now unnecessary to express it, the contract did not enable the defendants to put the plaintiff off the work. The contract provided that, after giving the plaintiff notice to remedy the defects, the defendant might make good the defects at the plaintiff's expense. It does not contain any clause that defendant should take charge of and complete the work. But at the trial both parties seem to have fallen in with the view of the Court that any balance the plaintiff should be entitled to recover should be recovered under the contract. Of course, there was the other way of treating it, that by reason of defective work plaintiff had broken the contract and defendant might say, "I shall pay you nothing." But that was not the course adopted at the trial and the question now is, viewing the case in the way that it was tried, was the action premature? It is with a good deal of regret that I have come to the conclusion that it was.

The right of the plaintiff was to recover the balance, being

the difference between the contract price and what it cost the defendant to complete the work. That balance did not become due until the work was completed. Plaintiff had no right to recover until the work was completed, and it seems to be abundantly clear that the work was not completed at the time the plaint was issued.

So I have no other course than to set aside the judgment, but there may be another action if the plaintiff sees fit to bring it.

[*Mr. Buchanan* (appellant's counsel):—I will undertake to see the amount is paid.]

IRVING, J.A.:—The general principle is that the plaintiff is not entitled to recover for a partial performance. Yet parties can break away from that principle and where they have so broken away and there has been an election to waive complete performance and accept benefit of the partial performance, the plaintiff may sue on his contract for the amount subject to the deductions to be made.

Irving, J.A.

The letter of June 27 set out on p. 91 seems to me to be an election of that kind. Defendants write:—

> You have not done your work, we have got to get rid of you and shall now proceed to have your contract finished and shall charge the cost of completion to you.

Then a reference is made to the contract, and as I understand it it is, "You will get cost of work less cost of completion."

Until that cost is ascertained the plaintiff is not in a position to sue. He cannot sue on the original contract as completed because that obviously has not been done. Nor can he sue on the new agreement because that has to wait until the difference is ascertained. The difference was not ascertained until September, but plaintiff brought this action in June. As soon as the action was brought the defence raised the point that the work was not completed at the time of issue of summons. The work they said was not then completed and they were, therefore, unable to ascertain what amount, if any, would be payable to the plaintiff. At the trial the defendants insisted on this objection. Mr. Buchanan asked for nonsuit on the ground that

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the action was premature. I think the objection ought to have prevailed. On this ground I would set aside this judgment.

GALLIHER, J.A.:—I concur with what has been said by both my learned brothers.

McPHILLIPS, J.A. (oral, dissenting):—I would sustain the judgment of the Court below. In the first place, many cases are tried in the County Court each day, and it is not expected that the learned Judges take full notes. We cannot disabuse our minds of these facts and when we get the evidence here we get it in a skeleton form, but perhaps it is as complete as the learned trial Judges can make it having so much work before them. When I look at the notes of evidence, if they appear to fail in any respect, it seems to me that the onus is upon the appellants when they go into these County Court cases without a stenographer, it is a risk they take in case of appeal. I find that when the motion was made for nonsuit the counsel for the defendants (the appellants) did not rest there, but entered into the defence, and without having the learned trial Judge's reservation of the right to move again at the close of the case; and when I further find, as I do on p. 109, the defendant Halloran saying:—

> Our contract with owner. Paid plaintiff $800 when he was removed from the work. The work has now been accepted by the architects. Plaintiff did not stain the fir right. It is blotched. The work was improperly stained. The white rooms are poorly done. None of it is rubbed right. Continually complained to plaintiff. Plaintiff should have smoothed the wood before treating it. After plaintiff left I had to go over his work and finish the work. It (this work) cost $640 as per bills.

The plaintiff is a painter who enters into a contract which says this—that for the sum of $1,550 payable on the architect's estimate of the work done and accepted at the rate of 75% every thirty days. If we turn to the specification on p. 25, we merely have this statement:—

> The contractor must, at his own expense, within a reasonable time remedy any defective work, and in the event of his failure to do so after three days' written notice shall have been given, the owner or the architects shall have the right to have same executed and the cost charged to the contractor.

This was apparently done and the defendant knew at the time of trial what the cost of that work was.

I submit that we must look at the evidence as being applied to an action brought for the balance due under the contract subject to deduction and not, as we do, look at other cases of building contracts. And being a mere matter of deduction I say, with all respect, in view of the opinions expressed by my learned brothers that the evidence being before the Court, no legal exception should be allowed to prevail. The proper course for counsel for the defence was to then and there state that his clients were ready and willing to pay the $210, the amount admittedly due the plaintiff, in fact it should have been paid into Court. I must say I would be sorry indeed that any rule or principle of law should constrain me here not to do that which I consider the interests of justice require and that is to sustain the decision of the learned trial Judge. This is a case which if proper procedure had been adopted by the defence did not necessitate coming to this Court, and to admit of the appellants coming here and saddling the plaintiff with the cost on a mere legal technicality at most, offends against, to my mind, the proper course of justice.

MACDONALD, C.J.A.:—The appeal is allowed. Judgment set aside. Macdonald, C.J.A.

Appeal allowed.

BOUTHILLIER v. DES GAGNES.

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Manitoba King's Bench, Galt, J. May 6, 1914.

1. BROKERS (§ II B—10)—REAL ESTATE—COMPENSATION—ONUS OF PROVING CONTRACT EXPRESS OR IMPLIED.

In order to entitle a real estate broker to a commission there must be proved a contract therefor with the vendor either express or implied; proof that the broker's services were not gratuitous because of an agreement with the buyers whereby they paid half commission if the vendor paid none, tends to negative any presumption arising from acceptance of the service and to establish a defence that the vendor stipulated that he would pay no commission.

[See Annotation on Real estate agent's commission, 4 D.L.R. 531.]

ACTION by a real estate agent against a vendor for commission on a sale of realty, the defence being an alleged oral agree- Statement

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ment relieving the vendor from the payment of any commission whatever.

The action was dismissed.

P. C. Locke, for the plaintiff.

W. B. Towers, for the defendants.

Galt, J.

GALT, J.:—This is an action brought by the plaintiff for commission on the sale of certain property owned by the defendants Joseph and Celina Des Gagnes under the terms of the will of one Joseph Charette. The defendant Pierre Charette is a beneficiary under the said will, but so far as I can see he has no direct interest in the property in question and I think he was needlessly brought into this action.

It appears that the plaintiff had entered into an arrangement with Messrs. Holbert & Wark, dealers in real estate, to bring them in propositions of sale, and part of that arrangement was that if possible the plaintiff should secure the commission from the vendor on any deal that went through and was to divide the commission with Messrs. Holbert & Wark. But it was further agreed, as shewn by the evidence of Holbert, that in case his firm themselves arranged a net price with any particular vendor, or, in other words, if no commission was payable by the vendor, they would pay the plaintiff one-half of the usual commission. In the present case, the plaintiff went to see the defendants Des Gagnes with the idea of ascertaining whether they would be willing to sell a certain block of land consisting of upwards of forty acres. In discussing terms, the plaintiff says Des Gagnes asked him if he was an agent and as to the commission, whereupon, the plaintiff says, he produced his card and stated that the commission would be five per cent. The defendant Des Gagnes absolutely contradicts this statement, and says that he distinctly told the plaintiff that he would pay no commission. One of the defendants' daughters states that she saw the card referred to by the plaintiff and that it was a card containing the names of Holbert & Wark and not the card of the plaintiff. Nothing was definitely closed on this first occasion in November, 1912, but in December, Mr. Wark accompanied the plaintiff to Des Gagnes'

house and a further discussion took place lasting for several hours, namely, from about half past two p.m. until nearly nine p.m. The evidence is very contradictory as to what was stated at this interview on the subject of commission. It must be borne in mind that in order to entitle an agent to a commission there must be a contract with the vendor either express or implied. Up to the date of this second interview certainly no agreement had been made and if nothing had been said whatever about commission it would be at least strongly arguable that the contract to pay the usual commission upon any deal that might go through might be implied. But not only does Des Gagnes himself expressly state that he refused to pay any commission whatever, but his refusal is clearly confirmed by the evidence of his wife and his two daughters. The general purport of the evidence which appears not to conflict with the plaintiff's story materially as to this interview is, that before the agreement was signed on this second occasion the question of commission was raised by Mr. Wark. Des Gagnes said that he had refused to pay any commission and inquired from Mr. Wark whether the plaintiff had not already told him that before coming to the house that day. Mr. Wark seemed to be disappointed, but inquired whether Des Gagnes would not pay $500, and Des Gagnes refused; and Mr. Wark then inquired whether he would pay $250 of the commission if he (Wark) should pay the other $250. Des Gagnes appears to have been willing to do this, but the plaintiff absolutely refused to accept any such payment and relied upon his rights. The agreement was signed, but it was necesary to obtain the approval of Mr. A. J. H. Dubuc to the transaction. Matters drifted along until some time in February, when a deal was put through to which Mr. Dubuc assented upon terms which Mr. Dubuc states were very much more favourable to the Des Gagnes. The sale was accordingly closed and the defendants realized considerably more by way of purchase money than they would have secured under the agreement made in December, which had never been approved of by Mr. Dubuc.

The circumstances of this case are very peculiar. As a rule an agent earns his commission by being employed by the vendor to sell his property, and as a general rule, the agent has to take

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a good deal of trouble in finding a purchaser. In exceptional cases the trouble may be very slight. In the present instance the plaintiff was really acting in conjunction with Messrs. Holbert & Wark and when he secured the authority from Des Gagnes to find a purchaser he really had the purchasers' names in his pocket all the time. Moreover, his remuneration was provided for whether he secured a commission or not, by the arrangement he had with Holbert & Wark, namely, that in case the property was bought at a net figure, or, in other words, without commission payable by the vendor, Holbert & Wark would pay the plaintiff one-half the usual commission.

Now, it appears to me, that that is precisely what has occurred in this case. Joseph Des Gagnes, who was the spokesman for his co-defendants, on each occasion always asserted that he would pay no commission. I think his evidence upon this point is so strongly corroborated that it is difficult to explain it away by stating that the other witnesses were members of his family. So far as I could see they were at least respectable people and endeavouring to tell the truth. Mr. Wark then found that Des Gagnes would not pay the usual commission and would not pay the $500, but was willing to give $250 as some remuneration for the plaintiff's services. It was not expected by Mr. Wark that the plaintiff would share up the $250 with him, because, on the contrary, his suggestion was that he should pay another $250.

An arrangement such as the plaintiff entered into in this case must necessarily at times land him in a difficult and awkward position: his duty and his interests are apt to conflict and if such a confliction occurs he is liable to lose his entire commission on any particular deal.

In the present instance, I think he has failed to shew that there was any agreement, express or implied, with the defendants or any of them, and I must, therefore, dismiss the action with costs.

Action dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. SALE (§ I B—5)—PASSING OF PROPERTY—EXECUTORY CONTRACT—APPROPRIATION FROM STOCK.

Where an order is given for goods with an implied assent to appropriation by the seller to fill the order, the contract is an executory one of bargain and sale until the appropriation has actually been made, and property in the goods does not pass before appropriation so as to support an action for goods sold and delivered if the buyer countermands the order.

2. SALE (§ III C—73)—REPUDIATION BY BUYER—GOODS NOT APPROPRIATED TO CONTRACT—DAMAGES.

Where goods for future delivery are sold under an implied term that the seller may appropriate the goods to the contract, the authority so to appropriate is withdrawn by the buyer's notice of repudiation of the contract; it is not open to the seller thereafter to select and ship the goods and to sue for the price as upon an executed contract, but his remedy is only for damages for the buyer's failure to carry out the agreement.

[*Hochester* v. *De la Tour*, 2 El. & Bl. 678, 118 Eng. R. 922; *Tredegar Coal Co.* v. *Hawthorn*, 18 Times L.R. 716, distinguished; *Ginner* v. *King*, 7 Times L.R. 140, referred to.]

Statement

APPEAL from the judgment of McInnes, County Judge, in favour of the plaintiffs in an action to recover the price of goods sold.

The appeal was allowed.

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

Buchanan, for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The defendants, a company of booksellers doing business in Vancouver, ordered from the plaintiffs, a publishing company doing business in London, England, but licensed in this province, twenty-five volumes of a book having the title of "British Columbia," etc. These volumes were to be taken out of stock, and would have to be appropriated to the contract in order to pass the property therein to the defendants. The contract falls within rule 5, sub-sec. (1) of the Sale of Goods Act, ch. 203, R.S.B.C., 1911, ch. 26, which reads as follows:—

Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state

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are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

I take it that in this case there would be an implied assent to the appropriation of the goods by the seller. Until such an appropriation the contract would be an executory one of bargain and sale.

The defendants cabled to the plaintiffs cancelling the order for a balance of 13 volumes which had not then been sent out. Counsel for the plaintiffs admitted that no appropriation of these had been made prior to the receipt of the cablegram. The plaintiffs nevertheless thereafter appropriated 13 volumes to this contract, and the defendants having refused to accept the books action was brought for the price as upon a contract for goods sold and delivered. I have therefore to ask myself whether or not the implied assent of the defendants, to the future appropriation of goods, to the contract, was withdrawn or destroyed by the notification that they would not accept the goods; in other words, whether or not the plaintiffs, after receipt of that notification, could proceed to convert the executory agreement into an executed one by setting the goods apart as applicable to the contract and thus pass the property in them to the defendants against their will. I have not been able to find any direct authority upon this point. I am, however, of opinion that the implied assent to an appropriation of the goods was withdrawn by the notice, and that the plaintiffs could not thereafter without defendant's assent convert the executory contract into an executed one.

The case relied upon by Mr. Buchanan, counsel for the plaintiffs, *Tredegar* v. *Hawthorn* (1902), 18 Times L.R. 716, does not in my opinion assist him. That was an action for damages for breach of a contract and not for the price. The repudiation there was made before the time had arrived for the delivery of the coals. The sellers declined to accept the repudiation, but waited until the time for delivery and then brought their action for damages for non-acceptance of the coals. The point in issue

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was this; the defendants claimed that the measure of damages was the difference between the market price at the date of repudiation and the sale price; whereas the plaintiffs claimed, and the Court held, that it was the difference between the market price, at the date when performance was due and the sale price. In other words, that the sellers were not bound to re-sell immediately they got notice of the buyer's intention not to take the goods, but might, if they chose, wait until the time for performance had arrived and sue on the footing of the transaction at that date. In that case there was no attempt to appropriate the coals to the contract and convert what was an executory agreement into an executed one and sue for the price. The case is really of no assistance in the determination of the question now under consideration.

The action is grounded solely upon a contract for goods sold and delivered, and no alternative claim is made for damages for breach of the executory agreement of bargain and sale. As the action is, therefore, in my opinion not properly founded, I would allow the appeal and direct that the action be dismissed with costs here and below.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal. The distinction is well settled between a debt for the price of the goods, the property in which has passed, and an action of damages for breach of contract to buy and pay for the goods. In the former case the debt due is the balance of the price, the purchaser keeping the goods. In the other case the vendor retains possession of the goods, but he sues for the damages that he has sustained by the purchaser not carrying out his agreement to buy as stipulated.

The plaintiff has not proved his damages, if any. The learned County Judge proceeded on the basis that the property in the books had passed. That I think was a mistake. The case of *Tredegar Coal Co.* v. *Hawthorn*, 18 Times L.R. 716, cited by Mr. Buchanan is merely an application of the principle laid down in *Hochester* v. *De la Tour*, 2 El. & Bl. 678, 118 Eng. R. 922. It does not assist his case, so far as I can see. The vendors refused to allow the proposed rescission and accept the proposed purchasers, and said we shall sue you for damages if you

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do not accept the coal according to contract. If Mr. Buchanan's argument is sound they would have been entitled to recover the price of the coal.

Ginner v. *King* (1890), 7 Times L.R. 140, is in the plaintiff's favour as to the appropriation. That action was in the alternative for the price of the goods or for damages for not accepting; as the defendant had cancelled the authority before the goods had been appropriated, it was held that plaintiff was entitled to damages only.

Galliher, J.A.

GALLIHER, J.A., concurred in allowing the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This action was one brought to recover $600 for goods sold and delivered, being 25 copies of "British Columbia, its History, Commerce, Industries and Resources." The plaintiff (respondent) claimed $30 per copy, less discount of 20%. The learned trial Judge, McInnes, C.C.J., gave judgment for the plaintiff for $312, it being admitted at the trial that after the action was commenced the defendant company (appellant) paid the plaintiff for twelve copies of the book and the costs up to that time; that number of the books having been shipped before cancellation of the order by the defendant company.

The defence in effect was that the books were not as represented in an advertisement appearing in a Vancouver newspaper, and the defendant company assumed therefrom that it was a work of small cost, not of elaborate binding, as it proved to be, that the defendant company had fully paid the plaintiff, and that the order had been cancelled before the shipment of the remaining thirteen books.

The order was given by letter in the following terms:—

Salesman:

The Thomson Stationery Co., Ltd.
Gaskell & Odlum, Props.
325 Hastings Street,
Vancouver, B.C.

Order No. 4127.
Vancouver, B.C.,
18th Feb., 1913.
To Messrs. Sells, Ltd.,
Address: 167 Fleet St.,
Province or State,
London, England.

Please enter our order as below:

Ship via mail, Mark K. Dept.
25 "British Columbia, Its History, People, Commerce, Industries, and Resources." H. J. Boam: Ed. by Ashley G. Brown.

(Signed) THOMSON STATIONERY CO., LTD.
per J. P.

It will be seen that the price is not mentioned, and apparently no price was agreed upon or known at the time the order was given. It is clear that where no specific price is agreed upon, the vendor cannot set up a price which has not been agreed upon and if the plaintiff be entitled to recover at all it can only be on a *quantum meruit*: *Hoadly* v. *McLain* (1834), 10 Bing. 482, 492, 131 Eng. R. 982, 986; *Valpy* v. *Gibson* (1847), 4 C.B. 837, 16 L.J.C.P. 241.

Although it is true the defendant company accepted and paid for twelve of the books, evidently believing there was liability therefor, the shipment not being by mail as ordered, in my opinion the remaining thirteen books being shipped—not by mail—but by freight—and after cancellation of the order—no delivery to the defendant company took place by delivery to the carrier, and no acceptance of the books followed—in fact, acceptance was refused. In my opinion, upon the facts it was open to the defendant company to cancel the order upon discovering that the books were not as ordered, and this the defendant company did at the earliest moment upon being apprised of the nature and contents of the books—not being as advertised. The production is certainly not such as could reasonably be expected, and does not fulfil the terms of the advertisement, being largely nothing but advertising matter and material gleaned from existing publications. The Sale of Goods Act (2 Geo. V. ch. 203, R.S.B.C. 1911) provides, sec. 49, that where goods are delivered which have not been previously examined—which is the present case—the buyer is not considered to have accepted them until there is the opportunity of inspecting them to ascertain whether they are in conformity with the contract. Therefore, in my opinion, upon the facts of this case, there can be no successful contention that there was any acceptance of the books. If upon the facts, defendant has wrongfully refused to accept the books, the true cause of action is not properly estab-

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lished, and it cannot be remedied now as no damages, such as have to be shewn, were proved: Lord Esher in *Ginner* v. *King* (1890-91) 7 Times L.R. 140 at 142:—

> Then came the order of the 30th of September to appropriate the bags of sugar when they arrived to different persons named. That, however, was an authority which the defendant might have cancelled before it was acted upon. That was a plain, simple question of fact which might easily have been decided at the trial, but it had not even been pleaded and was not put before the Judge while the case was being tried by the jury. Still this Court was bound to express their opinion as to the letter, and it appeared to them that it had been intended and understood to cancel the authority. He believed that letter was received by the plaintiffs before they had sent off the sugar. The appropriation therefore was cancelled, and the defendant had repudiated the contract so that the action was properly for not accepting the goods, and the damages would be the difference between the price contracted for and the price which could have been realised at the time of delivery, which was only £7 10s.

If I thought the action was one that might or could reasonably succeed by way of assessing the damages for not accepting the books, it would be right and proper to direct a new trial. Can this right, though, be properly extended when the facts are looked at? Apparently, a discussion took place at the trial, and the learned trial Judge allowed an amendment to the plaintiff by way of an alternative claim for damages for not accepting the books; but no evidence was given to establish what (if any) these damages were. The learned trial Judge has given judgment for the plaintiff for the thirteen copies of the book at $30 each, less discount of 20% viz., $312, the quoted price of the books, but never agreed to by the defendant. This could not be the damages if the action was sustainable, and this Court has no evidence before it to ascertain the damages, if of opinion that damages to any amount are legally claimable. It is true that if the property in the books passed to the defendant the plaintiff was at liberty to sue, either for the price, or under the Sale of Goods Act; but if the latter course be adopted, it is an election to treat the buyer's conduct as a repudiation of the contract: Halsbury's Laws of England, vol. 25, note (*m*), p. 267.

In the present case the price was sued for; but a price never agreed to; and the books, although they may be said to have been ascertained or specific goods, there is no evidence as to whether

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the books were then printed or published; and with the right of examination before acceptance, I cannot hold that the property in the books passed to the defendant at the time of the contract, or at any later date. In determining the question of whether the property in goods sold, has or has not passed, it is to be arrived at upon consideration of all the surrounding circumstances, and these to my mind are not sufficient for me to hold that the property therein did pass to the defendant: Sales of Goods Act, ch. 203, R.S.B.C. 1911, sec. 25.

If the question of the *quantum meruit* were to be gone into, and it is only upon that footing that the plaintiff could recover anything, in my opinion the $288 already paid by the defendant is a sum amply sufficient to constitute full payment for the books, were the contract one that the defendant should be held to.

It therefore follows that in my opinion the judgment entered for the plaintiff by the learned trial Judge should be set aside, the action dismissed, and the appeal allowed, with costs here and below to the defendant.

Appeal allowed.

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Manitoba King's Bench, Mathers, C.J.K.B. May 5, 1914.

1. PARTIES (§ II B—115) — DEFENDANTS — JOINDER OF — RELIEF, JOINT, SEVERAL OR IN ALTERNATIVE.

Where the plaintiff has two causes of action against certain of the defendants, arising out of the same relationship, and, in respect to one of such causes of action, certain others of the defendants are jointly liable with their co-defendants, the entire issue may be tried in a single action under Rules 196 and 197 of the King's Bench Act, R.S.M. 1913, ch. 46, relating to relief whether joint, several or in the alternative, with proper protection against embarrassment or expense in any particular part of the trial in which some of the defendants may have no interest.

[*Stewart* v. *Teskee*, 20 Man. L.R. 167, followed.]

Statement

APPEAL from a referee's order striking out certain paragraphs of a statement of claim, involving relief, joint, several or in the alternative, under Manitoba Rules 196 and 197.

The appeal was allowed.

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H. M. Hannesson, for the plaintiff.

W. K. Chandler, for the defendants McLean and Simpson.

MATHERS, C.J.K.B.:—Appeal from order of referee striking out paragraphs 2, 3*a*, 4, 5, 6 and 7 of the plaintiff's amended statement of claim on the application of the defendants McLean and Simpson.

The plaintiff alleges that the defendants Cairns had for years acted as his financial advisers and that by wrongfully using their influence over him, and by false and fraudulent representations, induced the plaintiff to exchange his farm for certain city property in Winnipeg and Brandon. The statement of claim further alleges that the defendants Cairns by further false and fraudulent representations and by a further wrongful use of their influence over the plaintiff, persuaded him to exchange the said Winnipeg and Brandon property for some worthless property in the State of New Jersey and that in consequence thereof the plaintiff conveyed the said Winnipeg and Brandon properties to the defendant Simpson. It further alleges that the latter fraudulent representations were made pursuant to a conspiracy entered into by all the defendants to defraud the plaintiff out of said property. The relief claimed is rescission in respect to the last transaction and damages presumably in default of rescission as to the former.

Upon the application of the defendants Simpson and McLean the learned referee struck out of the statement of claim the above mentioned paragraphs as relating exclusively to charges of fraud against the defendants Cairns.

With deference, I think the referee was wrong in so dealing with this statement of claim. Briefly stated, the plaintiff's claim is that the defendants Cairns by fraud induced the plaintiff to exchange his farm for Winnipeg and Brandon property and then fraudulently induced him to exchange the latter property for land in New Jersey and that in this latter fraud the defendants McLean and Simpson participated. There is no doubt that these two transactions gave rise to separate causes of action. The plaintiff, if he chose, might have sued Cairns alone in respect of the first and brought a second action against all the de-

fendants in respect of the second. The question is, may he not, under the rules, have the whole matter disposed of in one action?

By rule 196, all persons may be joined as defendants against whom the right to any relief is alleged to exist "whether jointly, severally or in the alternative" and by rule 197 [King's Bench Act, R.S.M. 1913, ch. 46]:—

> It shall not be necessary that every defendant to an action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest.

The corresponding Irish rule was interpreted in *O'Keefe* v. *Walsh*, [1903] 2 Ir. R. 681, followed as to similar Ontario rules in *Copeland* v. *Business Systems*, 11 O.L.R. 292, and as to the Manitoba rules by our own Court of Appeal in *Stewart* v. *Teskee*, 20 Man. L.R. 167.

It seems to me the principle of these cases applies here. The plaintiff has two causes of action against Cairns arising out of the same relationship and in respect to one of such causes of action the defendants McLean and Simpson are jointly liable with them. These rules were designed to cover just such a case.

The appeal will be allowed, the order of the referee set aside, and the application to the referee will be dismissed, all with costs in the cause to the plaintiff in any event.

Appeal allowed.

GRAMM MOTOR TRUCK CO. v. FISHER MOTOR CO.

Ontario Supreme Court, Boyd, C. December 9, 1913.

1. TRADE NAME (§ I—9)—PROTECTION—UNFAIR COMPETITION.

Where a trade name has not by long user acquired a secondary meaning so as to be merely descriptive of a general class of goods, the company using a name for its product may be granted an injunction against another company which attempts to use for goods of the same class a hyphenated trade name, of which the first component part is the name theretofore used by the plaintiff company, where such user works an injury to the plaintiff by confusing the two businesses with the public, and would tend to give the defendant company the benefit of plaintiff company's prior advertising of the distinctive name applied to their goods.

[*Kingston Miller & Co.* v. *Kingston*, [1912] 1 Ch. 575, 29 R.P.C. 289; *Lloyd's* v. *Lloyd's* (Southampton), 29 R.P.C. 433, 28 Times L.R.

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338, applied; and see *Lloyd's Bank* v. *Lloyd Investment Trust Co.*, 29 R.P.C. 545, 28 Times L.R. 379.]

ACTION to restrain the defendants from using the word "Gramma" in their business as descriptive of motor trucks sold by them in competition with the plaintiffs.

Judgment was given for the plaintiff.

H. E. Rose, K.C., for the plaintiffs.

A. W. Anglin, K.C., and *R. C. H. Cassels*, for the defendants.

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December 9. BOYD, C.:—The plaintiffs conceived the design of starting a company in Canada for the supply of commercial motor trucks for the carriage of goods. A connection was formed with the Gramm Motor Company of Lima, Ohio, United States, and the plaintiff company was incorporated, under the name it bears, in November, 1910. Gramm was the name of a man who had planned the construction of a motor truck distinct from other like trucks called by the names of their designers, in the United States. He was a member of the American company, and also joined the Canadian company as shareholder and director. The use of his name was sanctioned by him, and also the subsequent use of the same word for the purpose of a registered trade mark in July, 1913. The course of business of the plaintiffs was not *manufacturing* trucks, in the strict sense of the term, nor did they bring in machines as a whole, but they procured from the American company and elsewhere, as found convenient, separate parts, and assembled them together in their Walkerville premises, and put them on the market as finished products. The parts in each machine ran into the hundreds, and it is said that this making-up of the constitutents is the most important part of the business. In the get-up of the motor truck various changes are being made by those in the business from year to year, and the plaintiffs are said to have developed many variations and improvements in the method of combination, which differentiate the Gramm motor as made by them from the original American Gramm motor, as well as from those which are called Gramm-Bernsteins, now turned out in the United States by a new company called by that name, formed in July, 1912, of which the first designer, Gramm, is now a member. The motor

truck was a new thing in this country in 1910, and to establish a business required a good deal of advertising to bring it into the public eye. This task the plaintiffs undertook, and have for three years expended about $20,000 in advertising, and have also in that time introduced, as has been said, various changes in the motors they "manufacture" as a result of these years' experience. The result of the evidence is, that they have established a recognised business for the sale of motor trucks in Canada, under the trade name "Gramm," and that this word has become and is associated with the Walkerville business of the plaintiffs. Apart from one or two isolated instances of the Gramm motor from the United States being brought into Canada, the plaintiffs are the first dealers who have held their ground and supplied motor trucks for Canadian use to the practical exclusion of the American trade. The trucks made by them have a distinctive character and reputation in Canada, and are generally known as the Gramm Motor Trucks.

The evidence fails, in my opinion, to shew that the words "Gramm truck," in this country, means a truck of the Gramm type, no matter by whom made or by whom sold. The word "Gramm" has here acquired no such superinduced secondary meaning.

In the United States, Gramm himself says, his present developed truck is of different design in a great many particulars from that made by the first Gramm company in the United States; and generally it appears that there has been great evolution and development in the construction of these trucks and their different parts, both in the United States in the hands of the original designer and under the experience of the plaintiffs in Canada.

Nevertheless, confusion is sure to arise and has arisen when two rival machines are put on the same market, one called the "Gramm" motor and the other the "Gramm-Bernstein" motor. This difficulty has arisen from what the defendants attempted to do at the last exhibition in Toronto, and this display of the compound name was stopped by interim injunction. I am now asked to make this permanent. The defendants, *i.e.*, the individual incorporators, had applied to the plaintiffs to be taken

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into their company at Walkerville, and, being refused, they became incorporated as the Fisher Motor Company, and started business opposite the plaintiffs' place of business in Walkerville, and gave themselves out as being entitled to sell the Gramm motors. The alleged justification is because an arrangement has been made with the Gramm-Bernstein Company by which supplies for assembling motor trucks from the American company are being procured by the defendants, and they obtained one of the Gramm-Bernstein completed machines to exhibit in their name at the last exhibition, as above stated. The witness Fisher, president of the defendant company, said that ultimately they intended to use the name "Gramm" on a name-plate for the truck "manufactured" by them, and admitted that he had an eye on the plaintiff company. Asked, "If the Gramm motor truck of Canada has created a field here and a name by the advertising it has done, you are quite willing to get the advantage of that, if selling the truck under the name of the Gramm-Bernstein could give you that advantage? A. I do not see — Q. You are quite willing to have it if you get it? A. We are willing to take all the benefit that accrues to us justly. Q. You are willing to take all you can get from the use of the Gramm-Bernstein by the ——. A. If it is honestly and intelligently derived. Q. And if it is derived from the fact that the plaintiff company has created a market by the advertising and by its selling, you are quite willing? A. That benefit will accrue to us" (pp. 123-4).

The defendants' counsel urged that this answer and these questions are to be limited to the use of the Gramm-Bernstein trucks as advertised by the plaintiffs. But that is not, I think, a proper result. True it is that for a year the plaintiffs had an arrangement to get supplies from the American Gramm-Bernstein Company after the former American Gramm company had gone out of existence, but the advertising was all along with reference to the Canadian Gramm company, and that was the distinctive catch-word used, of which the defendants are willing to reap the benefit.

Evidence was given, and it is common experience, that when you have a compound or hyphenated word the tendency is to use only part of it, and usually the first part, especially if it is

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shorter than the latter part. I agree with what the witnesses say, that the use of "Gramm-Bernstein" in advertising motor trucks will breed confusion to the disadvantage of the plaintiffs, and that thereby the new-comers will interfere certainly with the trade of the older company.

I would note that Mr. Gramm is not in any way connected with the other company, and that they have no right to use his name as against the plaintiffs.

The case falls within the authority of *Kingston Miller & Co. Ld.* v. *Thomas Kingston & Co. Ld.* (1912), 29 R.P.C. 289, and also within *Lloyd's* v. *Lloyd's (Southampton) Ld.* (1912), 29 R.P.C. 433. As the defendants have no right to use the name "Gramm" (as a personal name), I think that they should be enjoined from the use of it in labelling and advertising and selling their motors.

As to prohibiting the use of the leading word in a company's name, see *Facsimile Letter Printing Co. Ld.* v. *Facsimile Typewriting Co.* (1912), 29 R.P.C. 557. A case cited in Sebastian on Trade Marks, 4th ed., p. 260, may be usefully referred to—*Shaver* v. *Shaver* (1880), 54 Iowa 208.

It has not appeared needful to discuss the registered trade mark obtained by the plaintiffs: enough has been proved as to the trade name to justify the intervention of the Court. The name "Gramm" was the badge selected by the plaintiffs by which the motor trucks dealt in should be identified with the company. The business of the plaintiffs was to select or procure the component parts and set up thereout the complete vehicle with various modifications and improvements which resulted in a distinct product that was extensively advertised, and so became generally known in Canada in connection with the name "Gramm." This was a new line of business of recent growth, and there has been no such lapse of time and length of user as is required to transform a distinctive word into one merely descriptive of a motor truck generally.

The plaintiffs are entitled to judgment for the injunction asked, to restrain the defendants using the word "Gramm," as indicated, in their business; the defendants to pay the costs of litigation.

Judgment for plaintiff.

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Saskatchewan Supreme Court, Brown, J. April 24, 1914.

1. TRUSTS (§ III A—62)—MISAPPLICATION OF FUNDS—FIDUCIARY RELATION—FOLLOWING THE FUND.

Where a trust fund is traceable into land, and the entire land is clearly the fruit of the trust fund, the *cestui que trust* has a right to take the land itself whether the purchase was or was not of the description authorized by the trust; but where the diverted fund constitutes a part only of the money laid out in the purchase and is mixed with the trustee's own money there is a right only to a charge or lien on the land for the trust money and interest.

[*Re Hallett's Estate*, L.R., 13 Ch.D. 696, referred to.]

Statement

TRIAL of action for damages for alleged negligence and for a declaration that certain lands bought by defendant were held as trustee for plaintiffs by reason of the application of certain of plaintiffs' money by defendant Winter, their general manager, in negotiating the purchase on his own account.

The action was brought against Oscar O. Winter individually and against the Hughton Elevator Co. as co-defendant with him, the Elevator Company in which he was the principal shareholder being charged with having illegally benefited by the diversion to it of the use of plaintiff company's equipment, supplies and time of employees. There was a counterclaim by the individual defendant for reimbursement of moneys expended on plaintiff's account, and by the elevator company for storage charges on wheat stored to the order of plaintiff.

Success was divided on the issues presented.

J. A. Allan, K.C., for the plaintiffs.

J. F. Frame, K.C., and *P. E. Mackenzie*, K.C., for defendants.

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BROWN, J.:—Mr. Allan, for the plaintiffs (hereinafter called the company), at the outset of his argument abandoned all claim to any relief under paragraphs 15, 16 and 17 of the statement of claim, and I have therefore only to consider the other causes of action, which, briefly put, are as follows:—

(1) Damaged wheat, said damage alleged to have been brought about by the negligence of the defendant Winter (hereinafter called the defendant);

(2) Profits from operation of the store alleged to have been operated on behalf of the company;

(3) A declaration that the north-east quarter and the north-west quarter of section 20, township 26, range 14, west of the 3rd meridian, and the townsite of Hughton situate thereon are held by the defendant as trustee for the company;

(4) Claim for hauling elevator material and damages to equipment in hauling such material; and

(5) A return of storage charges made by the defendant elevator company in respect of the storing of the company's grain.

As to claim numbered (1): the negligence alleged is that the defendant allowed the grain to remain in the granaries on the farm during a large portion of the summer of 1912 without any inspection of the same or any attention or any examination to ascertain its condition, and with the result that a large quantity became heated and was destroyed. The weight of evidence is that this grain must have become heated and spoiled long before the summer of 1912. Counsel for the company, at the close of the case, asked leave to amend the statement of claim so as to extend the period of time within which such negligence was committed back to the date when the grain was threshed, and as evidence was given by both parties bearing on the question for that full period of time without objection from counsel for the defendant, I will allow the amendment. I am of opinion that a farmer of experience would have taken the precaution to examine this grain from time to time after it was stored in the granaries, so as to guard against the possibility of its spoiling, but I cannot find that the defendant should be held responsible in damages for his failure to do so. This farm which the defendant managed for the company was one of very large proportions, and was operated in a large way, requiring the services of many men and much machinery. The defendant was appointed manager of the farm largely because of his wide experience in handling large numbers of men in railway construction work. As a matter of fact, he had had very little experience in the actual work of operating a farm, and did not

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pretend otherwise. He seems to have worked early and late in an effort to make a success of the enterprise, and it would appear, as one witness put it, that he perhaps attempted to do too much. I do not find that the defendant knew that the grain was likely to spoil or needed attention. I accept the evidence of Mr. Rutten as correctly representing the defendant's knowledge and state of mind when he says that, in the fall of 1912 he, in company with the defendant, when inspecting this wheat, found that it was spoiled, and that the defendant was at that time as much surprised as he (witness) was as to its actual condition. There were so many things to look after in operating this large farm, including the very trying difficulties in financing, that one could hardly expect that close supervision over details on the part of the defendant that would be demanded under other circumstances. In my opinion, the failure all round, so far as operating this farm is concerned, lay in the attempt to do too much.

Claim No. (2) does not present any difficulty. This store was built and conducted on the premises of the company, but it was in charge of Mrs. Winter. It was apparently started largely as a result of a suggestion made by Mr. Wilbert, of the Continental Oil Co. It was started and carried on not as a means of personal advantage or profit to the defendant, but in the interests of the company and for their accommodation. It enabled the company to get oil for the farm on credit, and most of the goods furnished from the store to the company were supplied at wholesale prices. The percentage of profit on other goods was reasonable. The store building was erected at the expense of the defendant, and although it was well known to the directors of the company, or at least the more active of them, that the store was operated as that of the defendant, there was no protest or objection of any kind to it being so carried on. Neither verbally nor otherwise do I find any evidence of any objection being taken to its operation at any time before action brought. I am of opinion that the company themselves had no authority, under their articles of incorporation, to conduct a store business, and that on no ground have

they any room for complaint against the defendant in this matter.

Claim No. (3) has to deal with two quarter sections of land purchased by the defendant and the townsite of Hughton located thereon. The construction of a line of railway and the possibility of a townsite being built on or near the company's lands was, no doubt, discussed and emphasized at the time of the organization of the company, but the likelihood of the townsite being actually upon the company's lands was evidently a matter so problematical that there is no mention whatever made of it in the otherwise somewhat glowing prospectus of the company; in fact, it was at that time necessarily a somewhat speculative matter. Moreover, after looking at the articles of incorporation, one can scarcely imagine that it was ever contemplated that the company was to engage in the business of subdividing land for townsite purposes, and subsequently selling the lots in such subdivision. I am not, however, prepared to say that they have not such power. If it had been intimated in any way to the defendant that the railway company were desirous of securing any part of the company's land for townsite purposes, and he had refused to consider the suggestion, without consulting the directors, the matter would have been quite different. The evidence shews that the railway company's agent came to the defendant with his blue-print and intimated that the townsite was to be located, not on the company's land, but on a quarter section owned by one Hintze. The defendant, with this information given him, purchased the quarter and also the adjacent quarter in his own name, and subsequently subdivided a part of same as the townsite. The company contends that the defendant should not have done this without first consulting them. I cannot see that there was any legal obligation to either consult or inform the company about this purchase. The location of the townsite is just as suitable and convenient where it is for the purpose of carrying on the company's farming operations as if it had been located upon the company's property. There was nothing in what the defendant did that came in conflict with his duty to the company. The defendant's information was that the townsite was to be located on pro-

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perty other than the company's, and that being so, he was, in my judgment, perfectly free to buy on his own account if he saw fit. The mere fact that it might or would have proved a good investment for the company had he purchased for them does not affect the question. To hold otherwise would be to hold that the defendant could not, without consulting the company, invest his money in a profitable mining enterprise simply because the company's charter authorized them to carry on the business of mining.

It is further contended that the defendant, in purchasing this land, used company's money in part payment of the purchase-price. The company's own account at the bank at Rosetown was overdrawn, and it became necessary for the defendant to open an account in his own name to prevent any further deposits being applied on the overdraft. This account was opened with the concurrence of the bank manager, and, although it stood in the defendant's name, it was opened for the company, and the moneys deposited to the credit of this account were company's moneys. The first payments on the land in question were made by cheques drawn on this account, and I am clearly of opinion that they must be held to have been made out of the company's moneys. I am further of opinion, however, that the defendant in so issuing these cheques did so in the belief that he was doing only what he had a right to do, and not in breach of any trust towards the company. These moneys so taken constitute only a small portion of the moneys that the defendant paid for the land in question, and that being so, the company would not have a right to the land or to a declaration that the defendant holds the land in trust for them, but only to a lien on the land for the amount of their money and interest. See *Re Hallett's Estate*, L.R. 13 Ch.D. 696 at 709, where Jessel, M.R., is reported as follows:—

> Where a trustee has mixed the (trust) money with his own, there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee. The moment you

get a substantial portion of it furnished by the trustee, using the word "trustee" in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows.

See also Lewin on Trusts, 12th ed., 1156, where it is stated:—

> Where a trust fund is traceable into land, and the fund constitutes a part only of the money laid out in the purchase, the Court has usually given a lien merely on the land for the trust money and interest; but where the entire land is clearly the fruit of the trust fund, the *cestui que trust* must, upon principle, have a right to take the land itself, whether the purchase was or was not of the description authorized by the trust.

The company, however, do not ask and do not desire a lien on the land. So far as the money is concerned, they are secured by bond.

As to claim No. (4): I find that there were sixteen trips made by the engines and outfit in hauling elevator materials, which I value, in accordance with the defendant's own letter, at $55 per trip, making a total of $880. Of this amount the defendant has paid $600, thus leaving a balance of $280. I also find, under this item, that the defendant is liable in damages for injury done to the company's waggons in hauling this material, which damages I assess at the sum of $100, thus making a total finding in favour of the company with reference to the hauling of the elevator material, of $380.

I am of opinion that the defendant company was entitled to the storage charges under claim (5). There are two reasons why the storage charges are collectable. The grain was more secure in the elevator than it would have been in the bins situate on the company's farm; and, again, when stored in the elevator it was much more convenient for shipment immediately the railway company began to operate their line of railway.

In the result, therefore, the plaintiffs will have judgment against the defendants for $380 on the claim for hauling elevator material, and as to all other matters their action will be dismissed. As the defendants have virtually succeeded in their action as a whole I will dispose of the costs as follows:—

The company will have their costs of action on the District Court scale of the tariff, but they will not be allowed any witness fees or costs of examination for discovery. The defendants

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will have their costs of defence on the Supreme Court scale of the tariff, but will be allowed witness fees for the witnesses Cooney, Wilbert and Richardson only. The plaintiffs' claim and costs will be set off against the defendants' costs, and execution issue for the balance.

Judgment accordingly.

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TREMAYNE v. HUDSON'S BAY CO.

Manitoba King's Bench, Mathers, C.J.K.B. April 20, 1914.

1. PLEADING (§ I C—20)—DEFINITENESS; PARTICULARITY—STATEMENT OF CLAIM—FACTS FROM WHICH MALICE INFERRED.

Although King's Bench Rule 331, R.S.M. 1913, ch. 46, prescribes that a statement of claim, which alleges malice as a fact, need not set forth the facts from which malice may be inferred, yet the plaintiff may plead such facts if he sees fit.

Statement

APPEAL from a referee's order striking out certain paragraphs of a statement of claim.

The appeal was allowed in part.

S. J. Rothwell, for the defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—Appeal from order of the referee striking out paragraphs 9 and 10 of the statement of claim, and allowing an amendment of paragraph 11, under King's Bench Rule 331 [R.S.M., 1913, ch. 46].

It is sufficient to allege malice as a fact without setting out the circumstances from which it is to be inferred, and yet I see no reason why the plaintiff should not be permitted to give the defendant this information in his statement of claim if he wants to, or why the defendant should object to his doing so. The order of the referee striking out paragraphs 9 and 10 and giving leave to amend paragraph 11 might be construed as forbidding the incorporation in such amended paragraph of any of the facts set out in the excised paragraphs. This, apparently, was not intended.

The order of the referee will be amended by allowing the plaintiff, if he sees fit, to amend by pleading facts from which malice may be inferred.

Costs to be costs in the cause.

Appeal allowed in part.

GRAND TRUNK PACIFIC COAST S.S. CO. v. THE LAUNCH "B. B."

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Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. March 25, 1914.

1. Salvage (§ I—2)—Right to—Towage with appreciable risk.

Where a large boat picks up and tows into harbour a gasoline passenger launch which had become disabled through depletion of the gasoline supplies and was drifting in the track of large vessels in an inlet, an allowance should be awarded on a salvage rather than a towage basis, although the gasoline launch was not in immediate danger, if there was an appreciable risk to the larger boat in her manœuvres by being carried by the tide to a position close to the land.

2. Admiralty (§ II—9)—Bail—Salvage claim for excessive amount—Costs.

Costs of furnishing bail in an admiralty salvage case may be set off in favour of the unsuccessful defendant where the claim upon which the boat was arrested was extravagantly large.

Statement

Trial of a salvage action in admiralty.

Judgment was given for the plaintiff.

A. Alexander, for plaintiff.

J. Edward Bird, for defendant.

Martin, L.J. in Adm.

Martin, L.J., in Adm.:—This is an action brought by the owners of the "S.S. Prince George" to recover $2,000 for alleged salvage services rendered to the gasoline launch "B.B." about 6.15 p.m. on November 29 last, off Prospect Bluff, when approaching the entrance to the First Narrows in Burrard Inlet. The "Prince George" is a twin screw, high-powered passenger vessel of 3,379 tons gross, 320 feet long, with a speed of about 18½ knots, and valued at half a million dollars. The "B.B." is a small launch, 60 feet in length, valued at $3,000, carrying passengers and freight between Vancouver and Howe Sound, and at the time in question it is admitted in the defence that she had fifteen or sixteen passengers on board, and a crew of two, the master and the engineer. She had become disabled because the gasoline was exhausted and was drifting about in the track of vessels approaching the Narrows, about two miles west of Prospect Bluff. I note here that the one boat on the "B.B." could only hold ten persons. The night was dark, but clear; the wind from the west was, I find, a fresh breeze, strong enough to raise a fairly rough sea against the strong ebb tide, though not suffi-

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Martin, L.J. in Adm.

ciently so to make it dangerous to the "B.B.," but the situation was doubtless alarming to the passengers, whose calls for help attracted the attention of the master of the "Prince George," who was on the bridge and went to their assistance, and finally, after breaking one line after towing her for about a mile, made fast with another and towed her into Vancouver harbour. This service delayed the "Prince George" not more than half an hour, and the question is whether it is to be considered as a salvage or a towage service. The defence submits that there was no element of danger in it and that it should be deemed to be merely a towage service, to satisfy which the sum of $100 is brought into Court. A good deal of evidence was given as to the state and direction of the tide at the point where the launch was picked up, and the evidence is conflicting in this respect, and as to the varying positions of both vessels. I am, however, of the opinion that, whatever may be said about danger to the launch, no valid reason has been shewn why credence should not be given to the testimony of the master and first officer of the "Prince George" as to the different positions that she was forced into, and then there is no escape from the fact that there was an element of appreciable risk to her in the position close to the land that she was carried by the tide during her manœuvres, which, I am satisfied, were expeditiously and skilfully carried out. The case must, therefore, be dealt with on a salvage basis, and I award the sum of $500 as an adequate compensation.

Objection was taken to the fact that the "B.B." was arrested to answer an extravagant claim of $2,000, two-thirds of her value, and the case of *Vermont S.S.* v. *The Abby Palmer* (No. 3), 8 Can. Ex. 462, 10 B.C.R. 383, was cited in support of an application to reduce the costs for that reason, as bail had to be furnished for $2,000. I am of opinion that the claim, in all the circumstances (upon which each case must depend) was so excessive as to be within the rule there laid down as to oppression, and, therefore, it is ordered that the costs of furnishing bail be costs to the defendant; in other respects they will follow the event.

Judgment for plaintiff.

MOMSEN v. THE "AURORA."

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Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. April 21, 1914.

1. ADMIRALTY (§ II—8)—ARREST OF SHIP—TUG HIRE.

No greater sum than 10c. per mile can be taxed to the marshal for boat-hire and travelling expenses in executing a warrant to arrest a ship under the Exchequer Court Admiralty tariff.

[For previous decisions in the same proceedings, see 13 D.L.R. 429, and 14 D.L.R. 31.]

Statement

APPLICATION to review the registrar's taxation of the marshal's bill of costs in respect of an item of $440 for hire of a tug for eleven days for proceeding from Vancouver to Sea Otter Cove, at the northern end of Vancouver Island to arrest the ship "Aurora," and thence towing her to Vancouver under arrest. The registrar allowed the sum of $50 only, being at the rate of 10c. per mile from Vancouver to Sea Otter Cove and returning, following the note to part 5 of the table of fees in the Admiralty rules of the Exchequer Court of Canada, as follows:—

> If the marshal or his officer is required to go any distance in execution of his duties, a reasonable sum may be allowed for travelling, boat-hire, or other necessary expenses in addition to the preceding fees, but not to exceed 10 cents per mile travelled.

The Registrar's ruling was affirmed.

Argument

E. A. Lucas, for the plaintiff:—This was a "payment necessary for the safe custody of the ship" and should be allowed under the proviso in that behalf in the third item of part 5 of the table of fees. The note at the end of the said part as to 10c. a mile refers to the marshal's travelling expenses only, and while it is conceded that he could have travelled by mail steamer *via* Victoria to Winter Harbour and hired a launch there to Sea Otter Cove, about twenty miles further on, yet to keep the ship in safe custody it was necessary to lay alongside her and tow her to Vancouver.

Sears, for Nosler, a claimant on the funds in Court:—It was not necessary to employ a tug from Vancouver. The marshal's officer could have taken the regular steamer and hired a local launch, and it must be presumed that the "Aurora's" crew,

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with the marshal's officer aboard, would have brought her to Vancouver in pursuance of the marshal's orders.

Price, for the bondsmen of the ship:—The note to part 5 of the table of fees expressly mentions travelling and boat hire and this is the only provision for such disbursements; parties providing the marshal for more expensive means of travelling must bear the cost over and above 10c. per mile.

Martin, L.J. in Adm.

MARTIN, LOCAL JUDGE IN ADMIRALTY.—The learned registrar's ruling is the only one possible under the table of fees, and it is hereby confirmed. No greater sum than 10c. per mile can in any circumstances be allowed in executing a warrant to arrest.

Motion dismissed.

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HAYWARD & DODDS v. LIM BANG.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. SALE (§ I C—17)—CONDITIONAL SALES—STATUTORY REQUIREMENTS.

Where goods are bought, under a conditional sale agreement, by a tenant who attached them to the freehold, under an agreement with his landlord that they were to remain attached and become the property of the landlord as part of the freehold, such goods, after the determination of the tenancy, cannot be taken by the original seller of the goods under his lien for the unpaid purchase price, if he has not filed the conditional sale agreement as provided by sec. 28 of the Sale of Goods Act, R.S.B.C. 1911, ch. 203, read with sec. 29.

Statement

APPEAL from the judgment of Murphy, J., of November 25, 1913, in favour of the defendant landlord, such judgment being based on the plaintiff vendor's failure to file his conditional sale agreement under the Sale of Goods Act (B.C.).

The appeal was dismissed.

McDiarmid, for the plaintiff, appellant.

F. E. Elliott, for the defendant, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Unless it can be said that the goods in question did not, when attached, become part of the freehold, the appeal must fail. The fair result of the evidence is that Lim Bang allowed his tenant to attach the articles in question to the freehold on the definite understanding that they were to

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remain attached and become the landlord's property. Lim Bang would not consent to the freehold being disturbed on any other terms. The fair result of the evidence rather than the inapt verbal expressions of witnesses, particularly witnesses having an imperfect knowledge of the language, must be given effect to. Had the contract of conditional sale been filed, under sec. 28 of the Sale of Goods Act, R.S.B.C. 1911, ch. 203, then, by virtue of sec. 29 of that Act, the appellants might have recovered the goods, notwithstanding that they were affixed, and had become part of the realty, subject, of course, to the conditions mentioned in said section. But the contract was not so filed, and hence the appellants get no assistance from the section dealing with conditional sales. It is unfortunate for the appellants that they should suffer the loss of their goods, or their price, but that result has been brought about by failure on their part to observe the plain provisions of the Act.

I think, therefore, the appeal must be dismissed.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal.

Our statute law on the sale of goods and factors is very similar to the English statutes 56 & 57 Vict. ch. 71, Sale of Goods Act, 1893, and 52 & 53 Vict. ch. 45, Factors Act, 1889. We have, however, a system first introduced in 1892, requiring registration of conditional sales, etc., for the protection of subsequent purchasers and mortgagees, without notice, in good faith for valuable consideration, and an amendment section, now sec. 29 of the present Act, passed to meet the decision of the Court of Appeal in *Reynolds* v. *Ashby & Son*, [1903] 1 K.B. 87.

Lim Bang, in my opinion, became, in December, 1911, certainly in January, 1912, a purchaser or mortgagee without notice of the plaintiff's lien in good faith and for valuable consideration, to wit, the alteration of his premises. The agreement sworn to by Lim Bang that "the fixtures were to be mine when he (the tenant) left" was in truth an agreement that the fixtures were not to be removed in the interim. Had the tenant attempted to remove them at any time during the term of the lease I think Lim Bang would have been entitled to an injune-

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tion on what seems to me the true construction of the agreement between him and his tenant.

The notice, given in March, relied upon by the plaintiff, cannot, in my opinion, be regarded as sufficient to take the place of the registration which ought to have been made within 21 days of the first delivery, as the contract of sale between Lim Bang and his tenant was an executed contract as soon as the machinery was installed.

Mr. McDiarmid suggests that we should apply the principle followed in *Chapman* v. *Edwards*, 16 B.C.R. 334; *Loke Yew* v. *Port Swettenham Rubber Co.*, [1913] A.C. 491, seems to support our decision, where the Judicial Committee laid down as a principle of general application even where registration was compulsory, that where the rights of a third person do not intervene, no person can do that which it is not honest to do, and no person can enforce rights which formally belong to them only by reason of their own fraud. Those cases are entirely different from that now under consideration. Here there is no suggestion of fraud. Our Factors Act expands the doctrine of estoppel to a very great degree, but to counterbalance this the Act of 1892, [ch. 21 "An Act to regulate the law with regard to the conditional sale of goods"] now sec. 29, R.S.B.C. 1911, ch. 203 (Sale of Goods Act), was introduced. In *Edwards* v. *Edwards* (1876), L.R. 2 Ch.D. 291, the Lords Justices point out that it is not desirable that fine, equitable distinctions depending upon the doctrine of notice should not be imported into cases requiring registration.

The plaintiffs have only themselves to blame for the loss of their lien.

Galliher, J.A.

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

Sec. 29, of ch. 203, Sale of Goods Act, R.S.B.C. 1911, has no application as the plaintiffs failed to register their hire or purchase agreement within the time specified.

We have then to determine whether the applicances put in by appellants are fixtures in the same way as if sec. 29 had not been passed. I am of opinion, on the evidence, coupled with the clear intention of the parties that they are and are not remov-

able. The appellants relied upon *Gough* v. *Wood & Co.*, 63 L.J. Q.B. 564, [1894] 1 Q.B. 713, but all that case decided was that where a mortgagee of premises permitted the mortgagor to remain in possession for the carrying on of his trade, and the mortgagor for the purpose of carrying on his occupation, installed certain trade fixtures, there was an implied authority that the mortgagor might, during occupancy, remove the fixtures, as also the parties claiming under a hire or purchase agreement with him; while here, so far from authority, express or implied, the landlord has stipulated with the tenant that they shall remain and become the property of the landlord on the tenants leaving the premises.

The matter is put very concisely by Farwell, L.J., in *Ellis* v. *Glover & Hobson Ltd.*, 77 L.J.K.B. 251 at 258, [1908] 1 K.B. 388], and Fletcher Moulton, L.J., at 256, says:—

> The same principle applies to the case of landlord and tenant where it has been held that trade fixtures may become irremovable if upon a true interpretation of the contract between the tenant and his landlord, it appears that the tenant has renounced his right to take them during the term.

The Sale of Goods Act before referred to gives ample protection and the appellants have only themselves to blame for failing to comply with the provisions of that Act.

McPHILLIPS, J.A.:—This is an appeal by the plaintiffs (appellants) from the judgment of Murphy, J., dismissing the action as against the defendant Lim Bang, the respondent. The action was one brought by the plaintiffs, appellants, against the defendants for the return of the grill and kitchen fixtures installed by them in the Prince George Hotel, the premises at that time being held under lease from the defendant Lim Bang, the owner thereof, by the defendant Jason Graham. McPhillips, J.A.

The learned trial Judge held that the property in the goods in question passed to the owner of the building, the defendant Lim Bang, when attached to the building—becoming fixtures. The action was dismissed as against the defendants other than the defendant Jason Graham, but as against him judgment

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went for the balance due to the plaintiffs in respect of the goods supplied, and affixed to the premises, namely, $847.26.

The appeal is brought upon two grounds as stated, that is, that the dismissal of the action as against the defendant Lim Bang is (*a*) against the law and against the weight of evidence; (*b*) that the learned trial Judge erred in finding that the goods in question became the property of the defendant Lim Bang on installation.

The Prince George Hotel was carried on for some time under lease by the defendant Jason Graham, but when action brought he was out of possession.

At the time of the purchase of the goods by the defendant Jason Graham from the plaintiffs, the defendant Lim Bang agreed, at the request of the defendant Jason Graham, to allow same to be installed and affixed to the premises conditional upon the same being left upon the premises when his tenancy expired. The defendant, Lim Bang, was in no way a party to the purchase of the goods, and knew nothing of the conditional sale agreement at the time it was entered into, and all that is shewn is that some considerable time afterwards—six months or more—the statement was made to him that the plaintiffs held a lien note, but it was never shewn to him and even this is not admitted by the defendant Lim Bang. The goods installed were a steam boiler (vertical), 220 gallon storage tank with steam coil, ventilating stack, smoke stack, pipe and fittings, valves, basin in basement, waste pipe, gas pipe, hot and cold water pipe, hangers for coils and ventilators, and all connections; there was evidence that the majority of the fittings could be removed from the premises without damage to the building, but would leave openings that would have to be closed or covered but that this could easily be done and at slight cost.

Apparently the intention was—but not carried out by the plaintiffs—to secure themselves by a conditional sale agreement. An agreement was executed by the parties reciting that:—

> The property or title to the labour and material or goods shall not pass to the purchaser until such purchase money hereinbefore mentioned shall have been fully paid.

The agreed upon purchase price was $1,382.

The plaintiffs, however, did not pursue the provisions of the Sale of Goods Act, ch. 203, 2 Geo. V., R.S.B.C. 1911, having reference to conditional sales, and file the agreement in the County Court registry as required by the Act.

It was strenuously argued by Mr. McDiarmid, counsel for the appellants, that as there was evidence, although after the event, that is to say, after the agreement between the defendant Lim Bang and his tenant, the defendant Jason Graham, admitting of the installation of the fixtures conditional upon same becoming part of the freehold, and not capable of being removed by the tenant; that the agreement that the property in the goods would not pass was good and effective as against the defendant Lim Bang without filing in the County Court registry, as his position could not be held to be stronger than that of his tenant; and further, that the defendant Lim Bang in any case did not come within the protection afforded by the Sale of Goods Act, not being a subsequent purchaser or mortgagee of the goods without notice in good faith for valuable consideration; and that the fact of the goods being affixed to the realty was not conclusive as the Sale of Goods Act provided against this resultant effect, relying upon secs. 28 and 29 of the Act.

In my opinion, the property in the goods in question is in the defendant Lim Bang, the owner of the premises, to which the same have been affixed, and that they are fixtures and part of the realty. The defendant Lim Bang upon the facts, in my opinion, is a subsequent purchaser without notice in good faith for valuable consideration—there is no definition of "valuable consideration" in the Act, but, in my opinion, the facts support it sufficiently and within *Currie* v. *Misa* (1875), L.R. 10 Ex. 153.

To invoke the remedies provided in secs. 28 and 29 of the Act as against the defendant Lim Bang, in my opinion, it was necessary for the plaintiffs to establish that a good and sufficient conditional sale agreement was duly filed in the County Court registry, and it is not attempted to establish this, in fact this was not done.

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It is to be noted that sec. 29 of the Act was first enacted in the Sale of Goods Act Amendment Act 1904, and was sub-sec. (2) to sec. 25 of ch. 169, of the Revised Statutes 1897. It has become a separate section, but it is still under the heading "Conditional Sales," and follows after sec. 28, which remains in the same terms as sec. 25 of ch. 169 of the Revised Statutes 1897. In my opinion, the intention of the Legislature was to preserve the right in the bailee of chattels to follow the goods where he had established his position under a duly filed conditional sale agreement in the County Court registry, notwithstanding that the goods had, by operation of law, become a changed character, *i.e.*, realty and not personalty.

It is rightly said that it is not for the Courts to balk at giving effect to the statute law upon grounds of inconvenience, or other startling resultant effect, but, nevertheless, it must be manifestly clear that a radical change in the substantive law is intended and sufficiently expressed before effect is given thereto.

If the argument of counsel for the appellant is to prevail, no security whatever exists in the ownership of realty—as without the filing of any conditional sale agreement, goods or chattels affixed to the realty, or worked into the realty, may be disposed of the same—subject only to the owner of the realty paying the amount due or owing thereon—and no period of limitation whatever as to the time when this right of recovery back of the goods and chattels by the manufacturer, bailor, or vendor may take place. It is true that, by pursuing the provisions of the Mechanics' Lien Act, ch. 154, 2 Geo. V., R.S.B.C. 1911, both the workman and the materialman may receive protection; but in that Act all proper provisions are found compelling prompt proceedings, otherwise the lien expires or is cancelled. In my opinion, it was never intended—reading the Sale of Goods Act as a whole, and considering the Conditional Sales provisions in particular—to enact any such law as would permit of the exercise of the rights here contended for, namely, without compliance with the provisions of sec. 28 of the Act to have the right to the return of the goods in question in this action, and that notwithstanding they have become a part of the realty.

There is, of course, the further consideration that, had the tenant, the defendant Jason Graham, not made the agreement which he did with regard to the transfer of the property in the goods in question, which may, I think, be said to come within the category of trade fixtures, the right of removal of the same could only have existed during the term of the tenancy, and what higher right can the plaintiffs claim than that which at any time resided in the purchaser from them? It would be an act of trespass for a tenant to remove trade fixtures after the expiry of the tenancy without the leave of the landlord; and assuredly would it be an act of trespass for the plaintiffs upon the facts of the present case to enter upon the premises of the defendant Lim Bang, and possess themselves of the goods in question—yet the Court is asked to declare this right.

In *Meux* v. *Jacob* (1875), 44 L.J.Ch., 481, [L.R. 7 H.L. 481] Lord Hatherley, at 485, said:—

> I apprehend it is too late at this time of day to contend that a regularly-executed mortgage of a lease will not carry the fixtures of that property which is in lease, and of which the deeds are deposited. I apprehend that the reason for that is, not simply because the chattels are there in the house which has been so mortgaged, but because whilst attached to the land, although for the benefit of trade, the law has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him, yet if he do not remove them during the lease (as in the old case that was cited before Holt) he is held to have allowed them to pass to the owner of the reversion, because, and only because, they are attached to his reversion, and if they are not removed, as the law would have enabled the person to remove them during the lease, they must be considered to have passed over at once and finally to the owner of the reversion. The doctrine, therefore, was that they were a part of the land during the time they remained attached, but that, for the benefit of trade, they might, during the interest of that person who had only a partial interest in the land, be removed so long as he had that interest, although there was no power whatever given to him for the purpose of removal if he chose to allow the time to pass during which he might have removed them, and so far severed them from the property.

In my opinion, the action fails upon this latter point alone, and apart from the question of the property in the goods in question—passing under the agreement between the defendant Jason Graham and the defendant Lim Bang, the property therein passed by operation of law.

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In my opinion, therefore, the decision of the learned trial Judge was right, and I would affirm the judgment appealed from and dismiss the appeal.

Appeal dismissed.

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PITT RIVER LUMBER CO. v. SHAAKE.

British Columbia Supreme Court, Murphy, J. April 29, 1914.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION—NOTICE OF.

A stipulation in an agreement for the sale of land providing for notice "by the vendors" in writing if they elect to rescind for default in payment, is to be construed strictly.

[*Bark Fong* v. *Cooper*, 16 D.L.R. 299, referred to.]

2. VENDOR AND PURCHASER (§ I E—25)—NOTICE OF RESCISSION—TWO VENDORS—NOTICE BY ONE.

A notice to rescind a contract of sale of land for default must be executed by both vendors where the agreement stipulates for execution of any such notice "by the vendors."

[*Hedican* v. *Crow's Nest Pass Lumber Co.*, 17 D.L.R. 164, applied.]

Statement

ACTION on an agreement for the sale of land.

Judgment was given for the plaintiff.

Baird, for the plaintiff.

Whiteside, for the defendant.

Murphy, J.

MURPHY, J.:—The stipulation in the agreement for sale calling for notice to effect cancellation provides that it shall be given by the vendors in writing. Such provision must be strictly construed: *Bark Fong* v. *Cooper*, 16 D.L.R. 299, 49 Can. S.C.R. 14.

To be effective I think it must be a valid notice from both vendors. The notice from the North American Lumber Co. was, in my opinion, effective, as it was given by the president of the company, but that from the Pitt River Lumber Co. was given without any authority. I consider myself bound by the recent decision of the Court of Appeal in *Hedican* v. *Crow's Nest Lumber Co.*, 17 D.L.R. 164, to hold that defendants cannot make an assumption of implied authority on the part of Weeden. If these premises are correct, it follows the agreement is still in force and plaintiff must succeed. As the sum sued for is within the jurisdiction of the County Court, costs will be on the appropriate County Court scale.

Judgment for plaintiff.

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Saskatchewan Supreme Court, Brown, J. April 30, 1914.

1. EXECUTION (§ I—8)—LIEN AGAINST LANDS—BENEFICIAL INTEREST.

The cancellation of an unregistered transfer of title under the Land Titles Act (Sask.) and the substitution of a transfer by the registered owner to another party at the request of the first purchaser so as to save double registration on the latter's re-sale of the land, will not re-vest in the registered owner any exigible interest in the property so as to subject it to an execution against the lands of such beneficial owner filed after he had parted with all beneficial interest therein to the first purchaser.

[*Jellett* v. *Wilkie*, 26 Can. S.C.R. 282, referred to.]

2. PLEADING (§ III B—309)—ESTOPPEL TO BE SPECIALLY PLEADED.

An estoppel must always be specially pleaded unless there is no opportunity to plead it; and if the matter relied upon as an estoppel appears on the face of the adverse pleading, it is ground for an objection in point of law in lieu of a demurrer.

[*Coppinger* v. *Norton*, [1902] 2 I.R. 232; Odgers on Pleading, 7th ed. 223, referred to; and see Annotation on Objections in lieu of demurrers, 16 D.L.R. 517.]

3. PLEADING (§ I N—114)—AMENDMENT AT TRIAL—PLEA OF FRAUD.

Unless there are exceptional circumstances, an amendment will not be allowed on the trial for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance.

Statement

TRIAL of action to remove the registration of an execution against lands as a cloud on the title, the execution being against a prior owner but having been filed before the recording of the transfer.

Judgment was given for the plaintiff.

P. M. Anderson, for the plaintiff.

W. L. McLaws, for the defendant company.

No one for defendant (sheriff) Calder.

Brown, J.

BROWN, J.:—On or about October 23, 1908, the defendants Gray and Sons Co. Ltd. (hereinafter called the defendants) obtained judgment against one W. R. Gardiner in the sum of $1,067.54, and issued execution thereon against Gardiner's lands.

At that time Gardiner was the registered owner of the northeast quarter of section 32, township 35, range 16, west of the 2nd meridian, and the writ of execution was duly registered against this land on October 29, of the same year. In the month of August or September, 1910, and while the land was occupied by Gardiner, he sold the same to H. C. Pierce, of Wadena, for valuable consideration, and executed and delivered

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to Pierce a transfer therefor, but this transfer was never registered. Shortly after the sale to Pierce, Gardiner vacated the premises. On October 22, 1910, Pierce, for valuable consideration, sold the land to the plaintiff, and at that time the plaintiff paid Pierce $300 on account of the purchase-price. This sale to the plaintiff, however, was not closed out until January 13, 1911. On that date the balance of the purchase-money was paid, either in cash or by notes, and, in order to save the expense of double registration, Pierce got Gardiner, who was still the registered owner of the land, to execute a transfer direct to the plaintiff, and the transfer which Gardiner had given to Pierce was at that time destroyed. This transfer to the plaintiff was registered on January 23, 1911. The defendants had neglected to renew their writ of execution against the lands, so that it had ceased to have any binding effect on this land by October 29, 1910. On January 5, 1911, the defendants issued an *alias* writ of execution on their judgment, and the same was duly registered against the land in question on January 7, 1911. The plaintiff's title to the land issued subject to this *alias* writ of execution, and he now brings this action to have it declared that this writ is a cloud on his title, and for its removal therefrom.

Apart from the fact that this was Gardiner's homestead when he sold to Pierce, and was therefore exempt from seizure or sale under the defendants' writ of execution, when the defendants failed to renew their original writ of execution, Pierce, immediately upon its expiry, was entitled to register his transfer free from the execution. Gardiner, by giving the transfer to Pierce, had parted with all his interest in the land. He was still the registered owner, it is true, but no longer the beneficial owner, and had no right to deal with it in any way whatever. There was therefore nothing to which the defendants' *alias* writ of execution could attach when registered on January 7, 1911: *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, 26 Can. S.C.R. 282, *sub nom.* *Jellett* v. *Wilkie et al.*].

It is contended on behalf of the defendants that when, on January 13, 1911, the Pierce transfer was destroyed and another

one was issued to the plaintiff direct from Gardiner, any rights existing under the Pierce transfer were gone forever and that the plaintiff elected to accept his title from Gardiner and to stand on that title. The substantial question is, did anything that took place at that time have the effect of re-conveying to or re-creating in Gardiner any beneficial interest in the property which he had already parted with and to which the execution could attach? I am of opinion that it did not. Gardiner executed the transfer to the plaintiff simply as Pierce's agent and under his instructions and on his behalf. He got his authority to do so entirely from Pierce, and without such authority he had no right whatever to execute such transfer. I must therefore hold on the issue on which the parties have come down to trial in favour of the plaintiff.

The defendants at the opening of the trial moved to amend their statement of defence by alleging fraud and estoppel against the plaintiff. I refused to allow these amendments at that time, but the application was with my permission renewed at the close of the case. The pleadings in this case were at issue on May 13, 1913. The action was set down for trial at Saskatoon and placed on the peremptory list for January last, and at the instigation of the defendants the trial was adjourned for the regular February sittings of the Court at Regina, where the same came on for trial before me. The matters which the defendants now wish to set up at this late stage are matters which were within their knowledge from the very outset. There is, so far as I can see, no valid reason why they should not have been pleaded in the very first instance. They raise matters of defence which the plaintiff could not hope to adequately meet without getting an adjournment; and, the case having been set down peremptorily at Saskatoon, and further adjourned for trial in February, the plaintiff should not, in my opinion, be forced to take another adjournment. The Courts are disposed to favour an amendment wherever it can be done without injustice. But there is a limit where even costs will not compensate, and I think this case had reached that stage.

It is, however, contended that these matters which are sought to be set up are proved out of the plaintiff's own mouth, as it

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were, and that therefore no injustice can be done him by allowing the amendments even now. If I could so find I would not hesitate to allow the amendments even on the question of fraud, although, to quote from the Annual Practice of 1914, at p. 451:—

It is the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance.

I am not prepared to say or hold that the plaintiff could not have given other and material evidence bearing on the questions of both fraud and estoppel had he had sufficient notice and opportunity of doing so. Counsel for the defendants, however, contend that as to the plea of estoppel which they desire to set up being an estoppel *in pais*, it is not necessary that it should be pleaded, and numerous authorities were cited in support of that contention. The modern practice seems to require an estoppel to be pleaded whether it be an estoppel *in pais* or otherwise. In the Annual Practice of 1914, at p. 340, it is stated, under the head of "Estoppel":—

All estoppels must now be specially pleaded, unless there is no opportunity to plead them: *Coppinger* v. *Norton*, [1902] 2 I.R. 232.

Odgers on Pleading and Practice, 7th ed. (1912) 223, says:—

An estoppel must always be specially pleaded, unless it appears on the face of the adverse pleading, when it is ground for an objection in point of law; or unless there was no opportunity to plead it.

In 13 Halsbury 350, this matter is dealt with as follows:—

Under the modern practice the facts relied on to establish an estoppel of any kind (including estoppels *in pais*), should be pleaded in any case in which it is intended to rely upon it, except in answer to a claim in ejectment, and in the cases (if any) in which "not guilty by statute" may still be pleaded, even though the doing so involves a special reply.

Everest & Strode, in their Law of Estoppel, 2nd ed. 458, state:—

Formerly matters of estoppel were usually raised on the pleadings. It is, however, somewhat doubtful, according to the older authorities, whether it was necessary that an estoppel by record should appear on the pleadings, and whether, if it did not, it was conclusive if offered in evidence. On the other hand the balance of authority seems to be in favour of the proposition that formerly an estoppel by deed ought to have been raised on the pleadings, and that an estoppel *in pais* need not.

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An estoppel might be raised on the pleadings, either by means of a special plea, or by special or general demurrer. There are numerous instances of an estoppel being raised by demurrer. But now, by the new rules, demurrers are abolished, and any party shall be entitled to raise by his pleading any point of law. And the defendant or plaintiff (as the case may be) must raise by his pleading all matters which shew the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, statute of limitations, release, payment, performance, facts shewing illegality either by statute or common law, or statute of frauds. The above rules, therefore, seem to make it necessary, or at any rate advisable, in all cases to raise any matters that are relied upon by way of estoppel on the pleadings.

At any rate I have no hesitation in holding in this case that the matters sought to be set up as constituting an estoppel should have been pleaded. It is contended that the plaintiff at no time intimated to the defendants that he secured the land from Pierce, but that he always, on the contrary, claimed that he bought direct from Gardiner, and rested his title absolutely on the transfer which Gardiner executed in his favour, and further, that the defendants, relying on these representations, sold the land under their writ of execution and incurred heavy expense in doing so. It is admitted in the plaintiff's pleadings that the defendants did offer the land for sale under their writ of execution on May 16, 1912, but the evidence shews that the defendants themselves bought in the property at such sale. In support of their contention the defendants produced a number of letters written by the plaintiff, in all of which he refers to Gardiner as the party from whom he secured the land; and the witness Nicholson (the only witness who gave evidence for the defendants) states that the plaintiff informed him in January, 1911, that he bought the land from Gardiner. In no letter, and in none of the evidence, does it appear that the plaintiff ever intimated that he purchased from Pierce, or that he set up the actual state of affairs. I am, however, thoroughly satisfied, from the evidence of Gardiner, Thom and Pierce, and from the correspondence which took place between Pierce and the plaintiff at the time of the sale to the plaintiff, that the plaintiff did purchase from Pierce, and that the facts are as I have set them

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out in the opening part of this judgment. There is considerable evidence before me which would indicate that at no time did the plaintiff reveal the real situation to the defendants, but that, on the contrary, for some reason which I cannot understand, he kept the defendants in the dark. If the plaintiff had had an opportunity he might have been able to get hold of correspondence or witnesses to prove that the defendants were fully informed. But, moreover, in any event, there is no evidence offered by the defendants to shew that, as a matter of fact, they were not informed of the real situation by the plaintiff or by Pierce or someone else. There is nothing to shew that they went ahead and incurred the costs of the sale because of and relying on these representations of the plaintiff, and in ignorance of the real facts of the case. So that, even though the amendment were allowed, the defendants could not hope to succeed on their plea of estoppel. To create an estoppel the defendants would have to shew that they incurred the expense through reliance on the letters or words or conduct of the plaintiff. They have failed to shew that they so relied, and the plaintiff has not had a full opportunity to shew that they were fully informed. Likewise it can be said, with reference to the question of fraud that is sought to be set up, that the evidence does not go far enough to justify a finding against the plaintiff. The proposed plea on this point is as follows:—

(15a). This defendant further says that the plaintiff and the said Sinclair Elliott referred to in the statement of claim were employed as the solicitors or agents of this defendant, for the purpose of collecting its indebtedness against the said Gardiner, and they did undertake said employment and procured for this defendant the judgment and execution referred to in the statement of claim, and caused the same to be registered against the said lands.

(15b). Subsequently, in breach of their said employment, and in fraud of this defendant, the plaintiff, in conjunction with the said Elliott, conceived the fraudulent idea of permitting the defendants' execution and the registration thereof against the said lands to expire, in order that the plaintiff might thereby be enabled to procure title to the said lands freed, cleared and discharged from the defendants' said execution; and this defendant charges that, while representing to this defendant that they were looking after its interests and protecting same, and endeavouring to recover the amount of the said judgment, the plaintiff, in conjunction with the said Elliott, wilfully, knowingly, and fraudulently permitted the

said execution to expire, and the registration thereof to become vacated, in order to carry through their said scheme.

The evidence shews that in June, 1908, F. A. C. Ouseley, who was at that time practising as a barrister-at-law with head office at Humboldt, had a branch office at Quill Lake, and that the plaintiff had charge of that branch office. The defendants, through their Winnipeg solicitors, sent their claim against Gardiner to Mr. Ouseley's Quill Lake office for suit, and the same was acknowledged by the plaintiff, and in his letter acknowledging he states that the claim is being forwarded to Mr. Ouseley himself at Humboldt. It also appears that the plaintiff knew of the writ of summons being served on Gardiner, as the affidavit of service was made before him, and I do not doubt that he knew of judgment having been obtained in the action and execution issuing thereon. In 1909, Mr. Ouseley left Humboldt for Lloydminster, and the plaintiff states that their relationship ceased from that time. The plaintiff is a notary public; he is not, and never was, a solicitor or barrister-at-law; and he could not renew the writs of execution, nor does it appear that he ever had any instructions in the matter of renewing same. It cannot, therefore, very well be held that the plaintiff conceived the fraudulent idea of permitting the writ of execution to expire in order that he might get title clear of it. Even though he had purchased direct from Gardiner this contention could not very well have been made, and much less so when, as a matter of fact, he purchased from Pierce, and Pierce himself had purchased from Gardiner while Gardiner was still in occupation of the land and while the land was exempt, as a homestead, from the defendant's execution. In the late fall of 1910, long after Pierce had purchased the land from Gardiner, and after the plaintiff had purchased from Pierce, there is evidence to shew that the defendants were in correspondence with the plaintiff in an effort to get information with reference to their claim and the possibility of realizing. The evidence satisfies me that the plaintiff's conduct in answering such inquiries was most reprehensible. Instead of giving all the information within his power, or of stating that he, as an interested party, could not advise them—as an honest man would have done—it ap-

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pears that he deliberately set out to keep the defendants in the dark, and I have no hesitation in stating that the plaintiff's conduct in this respect has led me, in dealing with this case, to exercise no leniency towards him.

Having, however, reached the foregoing conclusions, I hold that the plaintiff must succeed in his action. The defendants' writ of execution is declared a cloud on the plaintiff's title and will be removed therefrom, and the sale by the sheriff under the writ is declared void. The plaintiff will have his costs against the defendants. There will be no costs against the sheriff.

Judgment for plaintiff.

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LEWIS v. BRAGG.

Alberta Supreme Court, Harvey, C.J. May 14, 1914.

1. SALE (§ III A—51)—RIGHTS AND REMEDIES OF PARTIES—IN GENERAL—RIGHT OF ACTION—DAMAGES.

A vendor can recover damages under a written contract for the sale of cattle on a breach thereof, notwithstanding a subsidiary agreement having been arrived at as to delivery, the subsidiary agreement not being deemed an essential part of the contract, but merely collateral thereto.

Statement

ACTION for damages for breach of contract to purchase cattle. Judgment was given for the plaintiff.

H. T. Maber, for the plaintiff.

A. A. McGillivray, for the defendant.

Harvey, C.J.

HARVEY, C.J.:—As to the last point which Mr. McGillivray has argued, it does not seem to me that that is open under the pleadings. The plaintiff is not called upon to give evidence as to that and if he had been, he could have called Mr. Lynch to give evidence as his evidence might have been material on that point.

The only question that I feel any hesitation about is the question of the statutes, but in the view I take, the provision as to the delivery was not an essential part of the contract for sale at all. It was something subsidiary to it, agreed on at that time, it is true, and probably there was a consideration for it in

the agreement of sale, but I do not think on the evidence given by the plaintiff with reference to the way that agreement came about, that it was any part of the agreement of sale as such, but that it was something collateral to it. For that reason I do not think the statutes stand in the way.

As regards the agreement, it is quite inconceivable to me that the agreement that the defendant alleges to have taken place should have been the agreement that was come to. The evidence of the defendant is not satisfactory to me. The evidence of Mr. McDonald as to what was to be paid Mr. Kenny on the sale shews that there was no contemplation of selling the animals at such a price as this. This price would have given Mr. Lewis just $22 profit, which would be absurd in a case such as this. Then there is the document signed by the defendant. The statement that that provision as to the price was put in afterwards does not appeal to me at all. The evidence of Mr. Kenny is opposed to it and I find that the document contained that clause at the time it was executed and that it was a valid agreement for the sale of the cattle. There is a breach of it which entitles the plaintiff to damages. I think his conduct in respect of the disposition of the animals was reasonable and the price obtained was as fair as could be obtained under the circumstances. The price obtained for the animals by Mr. Lazzell appears to be $5,864.25. There is a difference of some $12 which is not accounted for and I will have to give the benefit of that to the defendant. There is a difference of $1,073.25 between it and the contract price. The evidence is not very clear as to the amount of freight there was for cattle and half a car for horses. I have deducted one-fourth for the horses, which leaves that amount. There is $144.40 for feed, $292.60 for the auctioneer's fees, $20.80 for stock yard fees and $24 for the man's time in looking after the cattle and bringing them in and out, comprised in a total of $562.47, which, added to the $1,073.37, makes a grand total of $1,635.84, for which there will be judgment for the plaintiff with costs.

Judgment for plaintiff.

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ATTY.-GEN. FOR CANADA v. RITCHIE CONTRACTING AND SUPPLY CO. and ATTY.-GEN. FOR B.C.

British Columbia Supreme Court, Macdonald, J. April 8, 1914.

1. HARBOURS (§ I A—5)—PUBLIC HARBOURS—WHAT CONSTITUTES—B.N.A. ACT.

A "public harbour," to come within the scope of sec. 108 of the B.N.A. Act, must be either a place naturally or artificially made for the safe riding of ships, or one that, at the time of union within the Dominion, sheltered ships from the wind and sea and to which ships came for commercial purposes, i.e., to load and unload goods.

[*Reg.* v. *Hannam* (1886), 2 Times L.R. 234, specially referred to.]

2. HARBOURS (§ I A—5)—PUBLIC HARBOURS—CONTROLLING NAVIGATION, EFFECT OF.

In construing the operation of sec. 108 of the B.N.A. Act as to vesting in the Dominion the property in public harbours, the mere fact that the Dominion has jurisdiction over the waters of an alleged public harbour for the purpose of controlling and regulating navigation does not establish in favour of the Dominion any proprietary interest in the land forming the bed and foreshore thereof, unless such property under the Act passed to the Dominion as being a public harbour.

3. HARBOURS (§ I A—5)—PUBLIC HARBOURS—PUBLIC RIGHT TO USE THEM, AS TEST.

In construing the operation of sec. 108 of the B.N.A. Act as to vesting in the Dominion the property in public harbours, the test is not whether such harbours might have been artificially constructed by the province prior to Confederation, but rather, whether the public had a right to use them, and if a body of water with its bed and foreshore did not pass as a public harbour to the Dominion under the Act at the time when the province entered Confederation, then it would not subsequently become the property of the Dominion.

[*McDonald* v. *Lake Simcoe Ice Co.* (1899), 26 A.R. (Ont.) 111; *Attorney-General for British Columbia* v. *Canadian Pacific R. Co.*, [1906] A.C. 204, specially referred to.]

4. CONSTITUTIONAL LAW (§ I A 3—25)—APPLICATION OF FEDERAL CONSTITUTION TO PROVINCES—BRITISH COLUMBIA.

In construing the operation of sec. 108 of the B.N.A. Act as to vesting in the Dominion the property in public harbours within the Province of British Columbia the year 1871, when that province entered confederation, is the determining period.

[*Pickels* v. *The King* (1912), 7 D.L.R. 698; *Attorney-General for British Columbia* v. *Canadian Pacific R. Co.*, [1906] A.C. 204; *Attorney-General for Dominion of Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia*, [1898] A.C. 700, specially referred to.]

Statement

ACTION for injunction and damages for trespass to alleged property of the Dominion of Canada, namely, the bed and foreshore of English Bay in British Columbia.

The action was dismissed.

Maitland, for the plaintiff.

L. G. McPhillips, for the defendant.

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MACDONALD, J.:—This action was commenced against the defendant company claiming damages and an injunction for an alleged trespass to the property of the Dominion of Canada, namely, the bed and foreshore of English Bay in the Province of British Columbia. It was contended that such body of water was a public harbour and that the defendant company was without authority removing sand and gravel therefrom. Upon application being made for an injunction, the Attorney-General for the Province of British Columbia intervened, and an order was made adding the province, through its Attorney-General, as a party defendant.

The defendant company had for a number of years, in common with others, been taking sand for building purposes from the Spanish Banks, being a portion of the locality in question. No question arose that a right, in the sense of an established custom, had been created to remove such material, nor was it contended that, even if English Bay were a public harbour, the Spanish Banks did not form a portion of such harbour.

The province disputed the right of the Dominion to interfere with the defendant company in its operations, and the important point to be decided is, whether the bed and foreshore of English Bay are the property of the Crown in the right of the Dominion or in the right of the province. British Columbia entered Confederation in May 1871, under the "Terms of Union" and sec. 10 thereof provided that the B.N.A. Act, 1867, should, except those parts which were specially applicable only to one of the provinces then comprising the Dominion,

> be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the colony of British Columbia had been one of the provinces originally united by the said Act.

Sec. 109 of the B.N.A. Act, 1867, provided that

> All lands . . . belonging to the several provinces . . . shall belong to the several provinces in which the same are situate. . . .

The scope of this section was considered in *St. Catharines Milling & Lumber Co.* v. *The Queen* (1888), L.R. 14 App. Cas. 46, at 57, as follows:—

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The enactments of sec. 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired right to, under sec. 108, or might assume for the purposes specified in sec. 117.

If the land forming the bed and foreshore of English Bay did not pass to the Dominion either under sec. 108 or 117 of the Act, then it remained the property of the province and the Dominion had no right or interference therewith; but it is contended that it became the property of the Dominion as being a "public harbour" and was included within the third schedule referred to in sec. 108.

Sec. 108 of the Act provides that:—

The public works and property of each province enumerated in the third schedule of this Act shall be the property of Canada.

This section is an exception from sec. 109 and is carved out of it and the onus rests upon the Dominion of shewing that the land in question did not remain the property of the province but passed to the Dominion under such section. The caption to such third schedule is, "Provincial public works and property to be the property of Canada." Amongst such public works and property, "public harbours" is enumerated. There is no doubt that all matters connected with trade and commerce, including shipping and navigation, became, by the B.N.A. Act, vested in the Dominion. The Dominion thus might have jurisdiction over the waters of English Bay for the purposes of controlling and regulating navigation and still have no proprietary interest in the land forming the bed and foreshore unless such property passed to the Dominion as being a public harbour.

The Governor-General-in-council has power by proclamation under sec. 849, of ch. 113, R.S.C. 1906 (Shipping Act):—

(*a*) to declare to be a public harbour any area covered with water within the jurisdiction of the Parliament of Canada; and (*b*) extend the area of any existing public harbour in Canada.

It does not appear that this authority was exercised at any time so far as concerns Vancouver Harbour or English Bay.

In the year 1912, an order-in-council was passed under sec. 850 of such Act, defining the limits of the port of Vancouver as being the navigable waters east of a straight line drawn from the west tangent of Grey Point to Point Atkinson lighthouse, including Burrard Inlet with Port Moody and North Arm to the head of navigation. This was passed for the purpose of applying Part 12 of the Act. It thus brought into operation certain powers and procedure outlined in that portion of the Act, but I do not think such proclamation could have bearing upon the issue to be determined in this case.

Whether the public harbours were so well known at the time to the high contracting parties that it was deemed unnecessary to enumerate them, is not apparent, but, at any rate there does not appear to have been any list of the harbours that were transferred either at the time of Confederation or subsequently when British Columbia became part of the Dominion. The point thus arises, at this late date, whether English Bay was a public harbour in 1871, and on that account ceased to belong to the province and became the property of the Dominion. This involves consideration of the important questions as to what is a "public harbour" within the meaning of the British North America Act. It was contended in *Holman* v. *Green* (1881), 6 Can. S.C. R. 707, in support of a provincial Crown grant of a portion of the foreshore of Summerside Harbour, that sec. 108 of the B.N.A. Act only contemplated the transfer to the Dominion of "public works" and that it would not include a natural harbour as distinguished from an artificial harbour, upon which a province had expended public money. The Court did not accede to this contention, and held that there was nothing in the Act to justify such restriction. It was pointed out that the general scope of the Act in relation to matters with which harbours are connected made it apparent that,

> Parliament intended the words "public harbours" to be considered in their full grammatical sense.

Reference was made by Sir Henry Strong in that case to the fact that no public works had been erected or no public money expended for the improvement or in any way in con-

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nection with Summerside Harbour, either by the Dominion Government since, or by the Provincial Government before or since Confederation, so that, in this respect, the facts are similar to the present case. It is worthy of mention that this finding is questioned by Chief Justice Burton in *McDonald* v. *Lake Simcoe Ice Co.* (1899), 26 A.R. (Ont.) 411 at 415, and he states that Strong, C.J., was mistaken in supposing that there had not been a large expenditure of money upon Summerside Harbour. The judgment, however, is a binding authority that the harbours that passed to the Dominion under the term "public harbours" were not necessarily such harbours as had been artificially constructed by the provinces prior to Confederation. It applied to such harbours as the public had a right to use. The facts are not of assistance in the present case, as that particular harbour had been recognized by the provincial Government and, assuming the correctness of Chief Justice Burton's remarks, had become a public work in the sense that public moneys had been expended in its improvement before Confederation, while English Bay was in a state of nature at the time when British Columbia joined the Dominion.

In my opinion, the statutory conveyance created by sec. 108 was intended to operate at the time so as to apply to and transfer to the Dominion only then existing "public harbours." If a body of water with its bed and foreshore did not pass as a public harbour to the Dominion under the Act at the time when the province entered Confederation, then it would not subsequently become the property of the Dominion. Should the Dominion desire further property for harbour purposes, it would require to compensate the owners for any property thus acquired. There could not well be a condition of affairs whereby without legislation to that effect, after a number of years the Dominion could claim ownership in property which had not passed from the province under the B.N.A. Act. This point was considered by the Privy Council in *A.-G. for British Columbia* v. *C.P.R. Co.*, [1906] A.C. 204 at 209 (*Streets Ends* case), where it was decided that whether the foreshore of Burrard Inlet at the city of Vancouver formed part of the harbour de-

pended upon the facts and circumstances existing prior to 1871. After referring to the judgment in the *A.-G. for the Dominion of Canada* v. *The A.-G. for Ontario, Quebec and Nova Scotia*, [1898] A.C. 700, at 712, that, because the foreshore on a margin of a harbour is Crown property, it does not necessarily form part of the harbour and that it may or may not do so according to circumstances, *e.g.*,

> if it had been actually used for harbour purposes such as anchoring ships or landing goods, it would no doubt form part of the harbour,

the judgment then applies such ruling in the case then being decided as follows:—

> The question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact and evidence was given bearing upon it directed to shew that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes such as the landing of goods and the like. That evidence was somewhat scanty, but it was, perhaps, as good as could reasonably be expected with respect to a time so far back, and at a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial Judge and the full Court agreed with him.

This decision carries increased weight in coming to a conclusion that the year 1871 was the determining period when property previously owned by British Columbia either passed to the Dominion as a public harbour or remained vested in the province when it is considered that between that year and the advent of the Canadian Pacific Railway to Burrard Inlet there had been considerable commercial advancement and increased landing of goods, evidence of which, if useful or essential, could have been easily obtained to support the contention of the railway company.

In *Pickels* v. *The King* (1912), 7 D.L.R. 698, the question in the Exchequer Court was, whether a suppliant's property on Annapolis river was, at the time of Confederation, situated on a public harbour so as to pass to the Dominion and thus render the provincial Crown grant therefor invalid. The condition of the river at the point in question in 1867 governed, and not the subsequent expenditure by the Federal Government for wharves or other purposes incidental to a harbour.

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If the facts existing in 1871 are to govern as to whether English Bay is a public harbour or not within the Act, then a fair test to apply in order to determine the question is, if, at that time, the public harbours of the Province of British Columbia had been enumerated, would this body of water have been designated as a property thus passing to the Dominion? Would it have been termed English Bay? It certainly could not have been called "Vancouver" harbour as the name "Vancouver" was not applied to any portion of the mainland of British Columbia for a number of years afterwards. The evidence shews that there was no one then resident on the shore of the bay which was then in a state of nature. There was no trade or commerce, and, except at uncertain intervals, ships did not utilize these waters for anchorage, and then only to a limited extent. The townsite known as Old Granville townsite, which subsequently formed a portion of the city of Vancouver, had been laid out on what is now charted as Vancouver harbour or Burrard Inlet and a sawmill had been located on the opposite side of the inlet. But this early indication of commercial development had no relation to English Bay.

In the scheme of Confederation, it was deemed advisable that the Dominion should have full control of navigation and shipping, and, incidental thereto, a proprietary interest in the public harbours throughout the different provinces should become vested in the Dominion. This would remove any financial burden from the provinces which existed previously, with respect to establishing, maintaining and improving the harbours from time to time. If it had been decided that the Act intended to convey only harbours upon which public moneys had been expended by the provinces, then it could speedily be determined that English Bay did not come within this category. However, the decision to the contrary, already referred to, imposes the consideration of a more difficult question.

The same point as is to be decided in the present action arose in *McDonald* v. *Lake Simcoe Ice & Cold Storage Co.*, 26 A.R. (Ont.) 411, where the question was whether a small bay on Lake Simcoe was a public harbour and thus transferred to

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the Dominion at Confederation, or whether the ownership remained vested in the Province of Ontario. Maclennan, J., in his judgment in that case refers to the fact that there was no authoritative definition of a "public harbour" within the meaning of the British North America Act, and I believe the matter remains in the same position at the present time.

In the *A.-G. for Canada* v. *A.-G. for Ontario, Quebec and Nova Scotia*, [1898] A.C. 700, a number of questions which had already been submitted to the Supreme Court of Canada were considered by the Privy Council. In the submission of these questions, advice was not sought as to what constitutes a public harbour within the B.N.A. Act, but the Dominion and the provinces interested sought to obtain judicial decision as to the ownership of the beds of public harbours. Counsel dwelt upon the fact that the question as to harbours was confined to the ownership of the bed and foreshore. The Lords of the Privy Council, in dealing with this particular question, decided as follows:—

> Their Lordships think it extremely inconvenient that a determination should be sought on the abstract question of what falls within the description public harbour. They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment be likely to prove misleading and dangerous. It must depend to some extent at all events *on each particular harbour what forms a part of the harbour*. It is only possible to deal with definite issues which have been raised.

In view of the question submitted with respect to public harbours and the context of this portion of the judgment, I think, if I may be permitted to place an interpretation on this language, that it was only decided that the extent of the property that "falls within" or "forms part of" a public harbour is a question of fact, dependent upon the circumstances of each particular case. Whether this interpretation be correct or not, I am in the same position as the learned Judge found himself when deciding the *McDonald* v. *Simcoe* case, 26 A.R. (Ont.) 411—I have no authoritative definition to assist me. I have thus come to a conclusion whether, upon the facts, in 1871 English Bay was a public harbour within the Act, bearing in mind

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that this means, so far as the decisions have gone, simply a harbour which the public have the right to use.

Stroud's Judicial Dictionary, vol 2, p. 849, thus defines a harbour:—

> A harbour in its ordinary sense is a place to shelter ships from the violence of the sea, and where ships are brought for commercial purposes to load and unload goods. The quays are a necessary part of the harbour: *per* Lord Esher, M.R., in *Reg.* v. *Hannam* (1886), 2 Times L.R. 234.

The same case is also reported in 34 W.R. 355, and there the Master of the Rolls, in dealing with the harbour of Ramsgate, says:—

> The word "harbour" in this section (Harbours and Passing Tolls Act, 1861), in the absence of any special definition, being used in the ordinary sense, is a place to shelter ships from the winds and sea, and where ships come for commercial purposes to load and unload goods.

In the Encyclopædia of the Laws of England, vol. 6, p. 152, the only definition of the word "harbours" is derived from *Regina* v. *Hannam* in terms already quoted. If this definition of "harbours" be accepted, then English Bay was not a harbour in 1871 and did not pass to the Dominion. Aside from the question of whether it afforded shelter to ships or not, they were not brought there for commercial purposes—to load and unload goods. No business of any kind was carried on there until many years after. It is true that since 1871 some wharves have been constructed upon the shore of the bay and that the Department of Marine and Fisheries, in exercising its control of navigable waters, has approved of the location of such wharves; but having taken place long after the determining period of ownership, it does not affect the situation. The Dominion has also placed certain lighthouses, buoys and beacons on the shores of, and in, these disputed waters, but this was in accordance with the general practice and expenditure throughout the Dominion. It was also in compliance with the requirements of the 5th par. of the Terms of Union.

It is contended, however, that a more liberal construction should be given to the term "harbour."

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Should the definition given in Coulson & Forbes on Waters, 3rd ed., 464, as follows:—

> A harbour or haven is a place naturally or artificially made for the safe riding of ships

be applied? Hall, De Portibus Maris, ch. 2, is cited as supporting this definition. If a public harbour within the meaning of the Act is as thus defined, then does English Bay fulfil the requirements of such definition? This involves a question of fact. I am quite satisfied that a bay in order to be a natural harbour does not require to be land-locked. First one has to consider what degree of shelter for the safe riding of ships is necessary to constitute such body of water a harbour. Is it to be absolute safety from the winds and sea or only partial safety? If only a limited degree of security is required, then what is the measure of safety that determines whether it is a harbour or not? What would be safe anchorage for one ship might mean disaster to another. A number of witnesses were called on both sides. Some of them dealt with facts shewing the degree of safety to be obtained in English Bay and others outlined the dangers attached to endeavouring to use it for anchorage purposes. I am not, however, to any appreciable extent, required to decide as to the credibility of the witnesses. The major portion of the evidence consists of opinions given by witnesses, more or less familiar with the locality, as to whether it was a harbour or not. It was termed by one of the witnesses for the Dominion as being a "roadstead."

Assuming that the natural harbours of Canada, unimproved and unused for commercial purposes, passed to the Dominion under the Act, then I must determine whether this body of water is a natural harbour or not.

English Bay is more than three miles wide at its entrance between Point Grey and Point Atkinson, and carries the same breadth for nearly its entire length of almost four miles. The Spanish Banks, extending from Point Grey for a distance of two miles along the southern shore of the Bay, reduce its width to some extent. These banks, composed of hard sand, form a protection or breakwater, and, even with westerly winds, af-

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ford anchorage in that portion of the bay lying to the east. I am not overlooking the evidence of some of the witnesses that there is anchorage in some other parts of English Bay under certain conditions, but it does not differ from the anchorage that may be obtained at many other points in the very much indented coastline of British Columbia. Particulars of such favourable places for anchoring are afforded by a copy of the "Vancouver Island Pilot, 1864" which I allowed as evidence, though its admission was objected to. The principal portion of the bay on the south shore terminates in a shoal arm known as False Creek. It was held in *A.-G. for Canada* v. *Keefer* (1889), 1 B.C.R., pt. 2, p. 368, on an unopposed application for an interim injunction, that this body of water was a public harbour within sec. 108 of the British North America Act, but I do not think this decision affects the question at issue. The portion of the bay affording the limited anchorage referred to forms a small part of the area claimed by the Dominion as a public harbour. It was admitted the prevailing winds in summer are from the west and thus the bay with its open entrance is exposed to the stress of weather. It does not, except under the circumstances and to the limited extent referred to, afford for ships a haven of safety. Several Canadian and American decisions were cited, but they were not, in my opinion, of any assistance, as each case was dependent upon its own particular facts.

I do not think any useful purpose would be served by my dealing specifically with the evidence of the different witnesses. Giving such evidence due consideration, and even applying the more liberal definition to the term "harbour," I find that English Bay was not, within the meaning of the B.N.A. Act, a public harbour in 1871. It follows that its bed and foreshore remained the property of the Crown in the right of the province and the Dominion has no proprietary interest therein or right of interference.

The action is dismissed with costs.

Action dismissed.

BASKIN v. LINDEN.

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Manitoba King's Bench, Mathers, C.J.K.B. May 19, 1914.

1. ACTION (§ I B—5)—PREMATURE—CONDITIONS PRECEDENT—VENDOR AND PURCHASER—DEFECTIVE TITLE—RIGHT TO SUE FOR PURCHASE PRICE.

An action by a vendor of realty for the purchase price is premature if launched before the vendor himself had title or the right to title enabling him to convey, although during pendency of suit his title was perfected, and the action will be dismissed accordingly.

[*Hartt* v. *Wishard*, 18 Man. L.R. 376, applied.]

2. ESTOPPEL (§ III D—60)—BY AGREEMENTS GENERALLY—RIGHT TO OBJECT TO TITLE—ROOT OF TITLE.

Under an agreement for the sale of realty, a covenant by the purchaser accepting the plaintiff's title does not estop the purchaser from subsequently objecting to the title where the objection goes to the root of the title.

[*Armstrong* v. *Nason*, 25 Can. S.C.R. 263 at 268, specially referred to.]

Statement

ACTION by a vendor of realty for the purchase price or in default thereof foreclosure, with a defence that, the title not being in the vendor when suit launched, the action was premature.

The action was dismissed.

F. J. Fisher, and *G. Moody*, for the plaintiff.

A. C. Campbell, and *A. E. Moore*, for the defendant.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is an action by a vendor for the purchase price of a house and lot, and in default of payment, foreclosure.

The purchase money is payable by monthly instalments and the plaintiff is willing to accept, and the defendant to pay, according to the terms of the agreement, so that nothing remains to be disposed of but the costs of the action.

The defendant's contention is that the plaintiff, at the time the action was brought, had no title to the land, and if he had that it was encumbered by mortgages to more than three times the purchase money, amounting to $2,100 agreed to be paid by the defendant. As a fact the title stood in the name of the plaintiff's wife and was subject to three mortgages for $1,000, $1,900 and $4,500 respectively. The plaintiff says the land was his, but he had nothing from his wife in writing as evidence of that fact and we have nothing but that bald assertion to go upon.

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I am by no means satisfied that he could have compelled her to convey to him, or to the defendant, and I find the fact to be otherwise on the evidence before me. This was the state of the title when the plaintiff brought his action. It is said that by the terms of the agreement the defendant accepted the plaintiff's title. Such a covenant has no application when the objection, as here, goes to the root of the title: *Armstrong* v. *Nason*, 25 Can. S.C.R. 263 at 268.

Since the action was begun the plaintiff has procured a conveyance from his wife and has procured discharges of the two last mentioned mortgages. His title is now complete, but his right to bring this action must be judged by the condition of his title at the time it was commenced. If he had then no title or no right to compel a title he had no right to sue for the purchase money: *Hartt* v. *Wishard*, 18 Man. L.R. 376. I find that at the time the action was commenced the plaintiff had no title at all, and the action must, therefore, be dismissed with costs.

Action dismissed.

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NEBRASKA v. MORESBY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. BROKERS (§ II A—6)—REAL ESTATE—OPTIONS TO PURCHASE OR SELL—MONEY LENT.

Where the owner of property employs an agent, under a combined option and agency contract for the sale of such property at a fixed price, with stipulation that the agent shall advance moneys to keep up the property for the promotion of the sale, a provision that, in case the sale is effected by the owner himself, such advances shall be deemed a loan and repayable to the agent, is governed not by the principles applicable to an option automatically ending at a fixed time and importing forfeiture, but rather as a loan constituting a debt due from the owner to the agent.

Statement

APPEAL from the decision of Gregory, J., of December 9, 1913, dismissing the plaintiff's action for money paid under an option, and alleged to be money lent.

The appeal was allowed.

W. J. Taylor, K.C., for the plaintiff, appellant.

Bodwell, K.C., for the defendant, respondent.

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MACDONALD, C.J.A.:—Further consideration of this case serves to confirm the opinion I entertained at the close of the argument, that the appeal should be allowed. The case does not depend to a very large extent upon the oral evidence, but rather in my opinion upon the documentary evidence. The learned trial Judge has left us untrammeled by any findings or intimations respecting the credibility of witnesses. In his reasons for judgment he states that he found some difficulty in coming to a satisfactory conclusion. That conclusion, as I understand it, did not depend so much upon the impressions made upon him by the oral evidence as by the logic of the one position as against the other. It appeared to him that the case made by the defence, particularly Corlett's evidence, was more consistent with the circumstances in which the transaction was involved than was the plaintiff's case. The documentary evidence, in my opinion, strongly supports the plaintiff's contention. The bulk of the money sued for was entered in defendant's books as a liability, and, while this is not conclusive against them, it is a fact of some significance. A close analysis of the agreement and correspondence coupled with the conduct of the parties, leads me to a firm conclusion in favour of the plaintiffs. Exhibits 4, 16, 7 and 8 must be read to enable one to arrive at the status of the parties with respect to each other, November 22, 1910, Ex. 7, being the controlling instrument.

That document contains alternative agreements—(1) an option in the strict sense of the term, or, to use the words of Ex. 16, "The right (of the plaintiff) to purchase or contract the sale of" the defendants' mill and assets. This is exclusive, and while it subsisted, the vendors had no right to make a sale to other persons.

(2) On notice before November 22, 1910, that the London negotiations were ended, the exclusive option would cease, and the other alternative agreement would come into operation, namely, that plaintiffs might, up to November 22, "purchase or contract the sale of" the property at the price of not less than $606,000, but that defendants also might sell to others at a like price in either of which events plaintiffs should not lose

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the moneys already paid to the defendants. The extension of this agreement was also contemplated by the terms of the agreement itself, in case the London negotiations should still be pending on November 22.

By Ex. 8, dated November 21, 1910, the day before Ex. 7 would expire, the defendant acknowledged receipt of $5,000 from the plaintiffs in these terms:—

> I have received from the Nebraska Investment Co. . . . the sum of $5,000 this day which is paid and accepted on the same terms as the $20,000 and $6,000 heretofore paid me and referred to and set out in statement bearing date of October 5th, 1910 (Ex. 7), it being agreed and understood that this is a duplicate to be attached to and (form) a part of said mentioned memoranda and agreement.

This is signed by Corlett, defendant's managing director.

This memorandum, though inaptly worded, can mean only that the time limit fixed by Ex. 7 is extended. The London negotiations were then still pending and the only reasonable inference is that the $5,000 was paid for an extension of time. This inference, which I draw from the documents themselves, is borne out by the subsequent course of events.

I then ask myself what is the effect of that extension? No time limit is fixed, but obviously, the primary object was to enable the plaintiffs to carry forward the London negotiations, and when these came to an end and the defendants were notified thereof on June 11, 1911, the exclusive option to "purchase or contract the sale of" the properties, in my opinion, came to an end. Between the date of Ex. 8 and June 11, plaintiffs paid over other sums to defendants to keep the mill in operation, as it was deemed important that it should be offered as a going concern. $5,000 was paid on December 9, 1910, and $2,500 on April 24, 1911, and a personal loan was made to Corlett of $3,000 on April 17.

In my opinion, all these sums, except, possibly, the $3,000, would have been lost to the plaintiffs on the termination of the London negotiations had the conduct of the parties thereafter not been such as to imply that, while the exclusive option was at an end, yet the alternative arrangement, set forth in Ex. 7 with the time limit removed, was still recognized as subsisting.

This recognition is best evidenced by the correspondence between the parties subsequent to June 11. The first letter was from plaintiffs to defendant, dated June 19, and in it the writer assumes that the old agreement still subsisted. The plaintiffs having failed in London, proposed another disposition of the property, but said, at p. 257:—

> It being understood, of course, that you are to receive the amount provided for in your agreement with the Nebraska Company, the balance of the money due you and the Nebraska Company to be paid in the following manner.

This is a clear intimation that the plaintiffs regarded the old agreement as still subsisting. In the defendant's reply to that letter, dated July 3, 1911, no exception is taken to that assumption, and the correspondence from that time onward to the time defendants themselves made a sale of the property on terms within those contemplated by Ex. 7, indicates no departure from that assumption, in fact, to my mind, the correspondence is consistent only with that assumption, there being no evidence of any other new arrangement between the parties. That arrangement could, no doubt, have been terminated by either party on reasonable notice to the other, or by conduct on the plaintiff's part from which abandonment could be inferred, but so long as it was allowed to continue, each party was entitled to the rights and advantages given by it up to the time when it should be legally terminated. The rights which the plaintiffs could have claimed had the London negotiations been terminated before November 22, they still could claim after the termination of those negotiations and before the agreement was put to an end, or came to an end in the manner above suggested.

That arrangement was not terminated either by notice or by abandonment before the defendants effected a sale of the mill at the end of the year 1912, a sale which was within the terms contemplated by ex. 7. If this view be the correct one, the solution of the case is very simple. So soon as defendants tired of the arrangement they could, acting in good faith, have put an end to it by giving reasonable notice to the plaintiffs. Had they done this before making the sale, the plaintiffs could, I think, have had no claim to the return of their moneys.

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The item of $3,000 stands on a different footing to that of the other items. I confess some doubt as to how this item should be treated. The witness Coleman, for the plaintiffs, says that it was paid to Corlett, the plaintiffs' manager, for the same purposes as were the other sums.

It is very clear that Corlett applied to Coleman for this sum for his own personal use, and told Coleman so. That sum was paid to Corlett, who gave a personal due bill for it, but if Coleman did not intend to accept it as such, he should have had the matter put right at once. I think it best to resolve what doubt I have in favour of the defendants; the onus of proof being upon the plaintiffs, and leave the plaintiffs, if they should be so advised, to pursue their remedy against Corlett.

The appeal should be allowed and judgment should be entered in favour of the plaintiffs for $38,500. They should also have the costs of the appeal and of the action.

Irving, J.A.

IRVING, J.A.:—I would allow the appeal.

I have read and would adopt the reasons of the learned Chief Justice, except as to the $3,000. I think the plaintiffs are entitled to recover that sum also.

Martin, J.A.

MARTIN, J.A.:—I agree that the appeal should be allowed.

Gallihier, J.A.

GALLIHER, J.A.:—Considerable evidence was adduced at the trial which tends to becloud rather than illuminate the issue but after the best consideration I can give the case, I cannot adopt the view of the learned trial Judge. Neither in the document, Exhibit 7, A.B. 242, nor in any of the correspondence, nor in the entries in the respondents' books, nor in the stand taken by Corlett in his interviews and dealings with the appellants, do I find any suggestion that the moneys paid by appellants were to be treated as forfeited under any circumstances, in fact the contrary. I can very readily understand and appreciate the case appellants set up. Here was a property which was going behind in its operations and which respondents were anxious to sell. Negotiations were entered into with the appellants to endeavour to effect such sale. All parties were on friendly terms.

and though it is to be deprecated that the matter was left open to doubt as to what the real understanding between the parties was, yet I have no doubt, in my own mind, upon the whole evidence what that understanding was.

Where moneys paid under option are to be forfeited upon failure to effect a sale, it is a most usual thing to find it so expressed in the instrument. This is entirely absent in Ex. 7, and on the other hand we find this clause:—

> and in the event of my selling said property after they (the Nebraska Company) have advised me that the London deal is off, I (Corlett, for the Moresby Company), agree to pay and refund them the said $26,000, the same in such event to be considered as a loan.

The further sum of $5,000 subsequently advanced, was under the same arrangement, and with respect to the further sums advanced (except the $3,000 which I will deal with later) I treat them on the same basis, although not so specifically dealt with. I think the true inference to be drawn from the evidence is that the operating company being in debt and anxious to sell the property the appellants took an option agreeing, as a consideration for such, to advance moneys from time to time, these moneys to be dealt with as provided in Exhibit 7. Outside the $20,000, the comparatively small sums (considering the magnitude of the transaction) advanced from time to time, and at short intervals, at the request of the respondents, cannot, I think, be considered as paid in respect of extensions of the option in the sense that they should become forfeited if the transaction did not go through, and on the other hand are quite consistent with the contention of the appellants. In connection with this there is a piece of evidence interjected by Mr. Corlett by way of explanation, p. 189 a.b., as follows:—

> My proposition was to get as much money as I could from them believing that they would take up the property, and I owed this $15,000 at the Seattle National Bank,

and this, I think, is not without its significance. Again, Corlett, when approached by appellants as to repayment of the moneys advanced (after sale made by him), does not say, you have no claim, these moneys are forfeited, but says he wishes to

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await Coleman's return as his dealings were mostly with Coleman and that matters can be adjusted, and in his evidence says that, in running the mill at applicant's request, a loss of some $14,000 was incurred and also some losses in connection with a logging contract intimating, as I regard it, that these might be matters for adjustment, but as the defence here is absolute forfeiture, we are not called upon to go into that phase of the question. Mr. Bodwell suggested that the appellants' contention was unreasonable for two reasons:—

First, because the appellants could keep the property tied up indefinitely, but that is not so as provision was made by which either party could sell, and until either party did sell, the appellants could not receive back their money advanced, and *secondly*, that it was unreasonable to suppose that appellants, if they were advancing their money as claimed would be satisfied to get back merely the principal advanced without interest.

The answer to the latter is that they were taking the gambler's chance. If they succeeded in selling they would realize probably much more than moneys advanced and the money was advanced for the privilege of that opportunity.

I cannot accede to Mr. Bodwell's contention, that some of the later advances were in respect of a new option, the first having fallen through. This could only be based upon the supposition that because they were not earmarked by reference to the $26,000 advanced in the same way as the $5,000 advanced, November 25, 1910, therefore the old agreement was off and a new one entered into. The evidence will not bear this out.

In respect of the $3,000 for which a personal due bill was given by Corlett, I treat that as a personal debt of Corlett's. I think that is made clear by Exhibit 37, A.B. 244. It may be that appellants desired that to be treated in the same way as other advances, although it must have been understood that Corlett was applying for it as a personal loan; however, that was not done.

In the result, the judgment below should be set aside and judgment entered for the appellants for $38,500 with costs here and below.

McPHILLIPS, J.A.:—This is an appeal from the judgment of the Honourable Mr. Justice Gregory, who dismissed the action of the plaintiffs (appellants), being a claim for payment by the defendants (respondents), to the plaintiffs of the sum of $41,500 for money lent by the plaintiffs to the defendants under an agreement in writing between the defendants and the plaintiffs, dated October 5, 1910. I have had the benefit and advantage of being enabled to read the judgment of my learned brother the Chief Justice of this Court, and I may say that with it I entirely agree, and it is in accord with the view that I formed at the time of the hearing of the appeal. I only wish to add some few observations in the way of further explaining my reasons for arriving at the conclusion which has been so forcibly presented by the Chief Justice.

The present case is one that cannot be said to be devoid of difficulty, and the transaction was one of long and tortuous course, and I would be loath to believe that there has been any real intention upon the part of the defendant to evade any legal liability—yet, it is manifest to me that to sustain the judgment of the learned trial Judge, and I say this with the utmost of deference to the learned trial Judge, would be to ignore the true situation of matters, and the, to my mind, undoubted obligation upon the defendant to repay the moneys received from the plaintiffs—that this is the legal position is, to my mind, clear beyond peradventure, all the attendant facts being looked at and duly analyzed, and especially the documentary evidence — the latter lifting the matter in controversy out of the maze of things—while a voluminous amount of parol evidence has weighted down this case.

The present case is not one of an option with which we are so familiar, and which may be said to automatically end at a fixed time—and, to my mind, the erroneous belief that it was one of that character, has led to the advance of a defence which, I think, is absolutely untenable. The amounts paid in all, $41,500 (although as to $3,000 same cannot be treated as an advance or loan to the defendant, as expressed by my learned brother the Chief Justice) were not paid only as a consideration

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for an option—to quote in part from Exhibit 7, under date October 5, 1910, when an acknowledgment was given as to the $26,000 then advanced:—

> And, in the event of my (this was J. E. Corlett, managing director of the Moresby Island Lumber Company, the defendant), selling said property after they (the plaintiffs) have advised me that the London deal is off, then I agree to pay and refund them the said $26,000, the same in such event to be considered as a loan, and in case negotiations are still pending with the English syndicate and the shewing is such as to satisfy both parties hereto that the investigations are in good faith being pursued with the prospect of concluding a sale, then it is agreed that further negotiations and continuance of said option will be mutually arranged between the parties hereto.

In the way in which I read the evidence, the relationship between the parties commenced by this document was never severed, but was continued up to the time the sale was made, and that being the case—it must and does inevitably follow, that not only this sum of $26,000 but the subsequent sums advanced, viz., $5,000 on November 21, 1910; $5,000 on December 9, 1910; and $2,500 on April 24, 1911, in all $38,500, were advanced as the facts shew, referable only to this assured provision in the document of October 5, 1910, that upon a sale being made under the circumstances detailed therein, then the moneys advanced should be considered as a loan. That the possible eventuality foreshadowed and provided for occurred, to my mind, cannot be gainsaid; it therefore follows that the moneys advanced must be deemed to have been a loan and constitute a debt due and owing from the defendant to the plaintiffs. The moneys advanced cannot be viewed as a deposit—and were it only a deposit—it could only be forfeited if the plaintiffs failed to carry out the agreement: *Howe* v. *Smith*, 27 Ch.D. 89; *Sprague* v. *Booth*, [1909] A.C. 576, 579, 580. Wherein have the plaintiffs failed to carry out the agreement? I fail to see that there has been any breach upon their part. Then could it be said—if there had been a breach of the agreement upon the part of the plaintiffs that the whole $38,500 was merely a deposit capable of being forfeited? I certainly would not agree to any such contention ——and that would appear to be the contention of the defendant. No doubt some confusion has arisen upon this question

owing to the decision of Cozens-Hardy, M.R. (then Cozens-Hardy, J.), in *Cornwall* v. *Henson*, [1899] 2 Ch. 710.

Mr. Williams, in his work on the Law of Vendor and Purchaser, 2nd ed. (1911), vol. 11, at 1054, deals with the liability at law where a party rescinds the contract for the other's breach —and states that rescission must as a rule be accompanied by *restitutio in integrum*—noting that there is an exception in the case of a deposit. Mr. Williams proceeds though, and at pp. 1055, 1056, says:—

> But it appears that this exception applies only to money paid as a deposit, that is in earnest or as a guarantee for the payer's due performance of the contract and does not extend to other sums of money paid on account of the purchase money.

citing, as authority for the proposition, *Palmer* v. *Temple*, 9 A. & E. 508, 520, 521, 112 Eng. R. 1305, 1309; *Cornwall* v. *Henson*, [1900] 2 Ch. 298, 302, 305, and refers at p. 1017 of vol. 11, note (*c*) being appended to a statement in the text at pp. 1016, 1017, which reads as follows: "for the rule is that the rescission of a voidable contract cannot take place without entire restitution" —note (*c*) reads as follows:—

> (*c*) *Clough* v. *London & N.W. Ry. Co.*, L.R. 7 Ex. 26, 37; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392, 423—above pp. 829, 830, 834, 852, 1004. It is submitted that this rule was overlooked by Cozens-Hardy, J., in *Cornwall* v. *Henson*, [1899] 2 Ch. 710, reversed on another point, [1900] 2 Ch. 298, where he decided that, on a contract to sell land for a price payable by instalments the vendor *rescinding* the contract for the purchasers' remuneration of it (see below, pp. 1040, 1042), before payment of the last instalment was nevertheless entitled to retain all the instalment already paid. It became unnecessary to review this decision in the Court of Appeal, but they very plainly intimated their doubts of its correctness: [1900] 2 Ch. 302, 305. The rule in *Wincup* v. *Hughes*, L.R. 6 C.P. 78, to which Cozens-Hardy, J., appealed as a general rule ([1899] 2 Ch. 715), was that applicable in the case not of *rescission* of the contract, but of its discharge for impossibility of performance. In such case the contract is not rescinded; the parties are simply excused from further performance: below, pp. 1018-1021.

I had occasion to express my dissent from the majority view of this Court that instalments could be forfeited in the case of *Vancouver Land & Improvement Co.* v. *Pillsbury Milling Co.*, [15 D.L.R. 775, 26 W.L.R. 880].

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The decision of this Court though in the last case above cited may be distinguished from the present case in this—that in that case the decision proceeded upon the abandonment of the contract which is not the present case. Therefore, apart from the question of the moneys being a loan which the defendant is bound to repay—there would be the right of recovery in the plaintiff of the moneys paid to the defendant.

Lord Alverstone (then Webster, M.R.) in *Cornwall* v. *Henson*, [1900] 2 Ch. 298, at p. 302:—

> It is not necessary to deal with the question whether the plaintiff is entitled to a return of the instalments which he has paid, because he has not insisted upon that relief, but I feel very great doubt whether the doctrine of *Howe* v. *Smith* (27 Ch.D. 89) would apply to a case in which the purchase-money was to be paid in instalments.

Lord Justice Collins, in the same case, said, at pp. 304-5:—

> It is not necessary, therefore, to consider whether, even if the appellant could be said to have declared an intention not to pay the last instalment, and the vendor's reciprocal claim thereon is nothing short of what he would have got upon a complete rescission *ab initio*, namely, resumption of the land which formed the whole consideration moving from him under the contract, he is nevertheless entitled to retain the purchase-money; or whether in such a case the rights of the parties must not be adjusted upon the footing of *restitutio ad integrum*: see *Clough* v. *London and North Western R. Co.* (1871), L.R. 7 Ex. 37.

In my opinion, it is impossible that any intention can be gathered from the documentary evidence that any of the moneys advanced should become forfeited, and, certainly, when an event contemplated actually did occur, the defendant made a sale—unquestionably the moneys advanced were to be considered as a loan—the agreement is inconsistent with the right of forfeiture of the moneys advanced.

Upon this point of claimed forfeiture we have Lord Justice Collins saying in *Cornwall* v. *Henson*, [1900] 2 Ch. 298, at 304:—

> Indeed, if the contract had contained an express stipulation that, on the non-payment of any instalment, the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty, and would have relieved him from it, as was done *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022.

It may be said in the present case that none of the moneys paid were instalments of purchase money—upon the view I take—that is so—the moneys upon the eventuality provided for occurring, *i.e.*, sale by the defendant were to be treated as moneys loaned by the plaintiffs to the defendant—but if no sale had taken place—the payments would have been, it seems to me, payments analogous to those made upon an agreement for sale not completed by the purchasers—and could they have been forfeited?

In *Palmer* v. *Temple*, [9 A. & E. 508, at 520, 112 Eng. R. 1304, 1309], 48 R.R. 568, Lord Denman, Ch. J., said:—

> The ground upon which we rest this opinion is, that, in the 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 £1,000, the intent of the parties is clear that there should be no other remedy.

The learned editor's note to *Palmer* v. *Temple*, in 48 R.R. 568, reads as follows:—

> (1) Cited in judgment of Bovill, Ch.J., in *Hinton* v. *Sparkes* (1868), L.R. 3 C.P. 161, 164, 37 L.J.C.P. 81, 82; distinguished in *Howe* v. *Smith* (1885), 27 Ch. D. 89, 53 L.J.Ch. 1055; discussed in *Cornwall* v. *Henson*, [1899] 2 Ch. 710, 68 L.J. Ch. 749, 81 L.T. 113; reversed in C.A. (1900), 2 Ch. 298, 69 L.J. Ch. 581; 82 L.T. 735.

In my opinion, the period of time admitting of the plaintiffs becoming the purchasers of the property which was sold was still continuing—at the time the defendant effected the sale—but, of course, then it was rendered impossible by the act of the defendant for the plaintiffs to become the purchasers; and when no provision for forfeiture of the moneys paid is contained in the agreement—the true intent of the parties was that, in such event—as I think it has been sufficiently expressed—the moneys paid should be considered as a loan.

In my opinion, and for the reasons expressed, the cause of action of the plaintiffs for the recovery of all the moneys paid—referable to the agreement—of October 5, 1910—in amount $38,500—is well established—and the plaintiffs' claim is clearly one which this Court should enforce. I agree, therefore, that

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the judgment of the learned trial Judge should be set aside and judgment be entered for the plaintiffs for $38,500 with costs in the Court below, the appeal to this Court being allowed.

Appeal allowed.

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OAK BAY v. GARDNER.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. April 7, 1914.

1. QUIA TIMET (§ I A—5)—ESSENTIALS NECESSARY TO OBTAIN INJUNCTION —MUNICIPAL BY-LAW.

In order to obtain an injunction, on the *quia timet* principle, the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury (if it does come) will be irreparable, and affidavits that a building: (1) is erected in defiance of a municipal by-law, and (2) amounts to a menace to the public, are insufficient to support such an application. (*Per* Macdonald, C.J.A., and Irving, J.A.).

[*Fletcher* v *Bealey*, L.R. 28 Ch.D. 688, followed.]

2. MUNICIPAL CORPORATIONS (§ II—30)—POWERS, DUTIES AND LIABILITIES —RIGHT TO MAINTAIN AN ACTION—PUBLIC NUISANCE.

A municipal corporation cannot maintain an action, except as relator on an information by the Attorney-General, where a defendant neglects to perform a duty to the public under a municipal by-law and thereby creates a public nuisance. (*Per* Macdonald, C.J.A., and Irving, J.A.).

[*Attorney-General* v. *Tod-Heatley*, [1897] 1 Ch. 560; *Bermondsey Vestry* v. *Brown* (1865), L.R. 1 Eq. 204, followed.]

3. ATTORNEY-GENERAL (§ I—1)—RIGHT TO BRING PUBLIC NUISANCE ACTIONS.

Primâ facie all actions in respect of public nuisances must be brought in the name of the Attorney-General. (*Per* Macdonald, C.J.A., and Irving, J.A.).

Statement

APPEAL by the defendant from the judgment of Gregory, J., of January 5, 1914, ordering, by way of mandatory injunction, the removal of a certain wooden structure alleged as erected contrary to a municipal by-law.

The appeal was allowed, MCPHILLIPS, J.A., dissenting.

McDiarmid, for the appellant.

E. V. Mayers, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred with IRVING, J.A.

Irving, J.A.

IRVING, J.A.:—The affidavits filed by plaintiff set up (1) that the building in question has been erected in defiance of the

by-law; and (2) the building amounts to a menace to the public. The affidavits, in my opinion, would not justify an injunction on the *quia timet* principle: see *Fletcher* v. *Bealey* (1885), L.R. 28 Ch. D. 688, 54 L.J. Ch. 424, and the injunction therefore, if supportable at all, must be by virtue of the by-law.

The case of *Tompkins* v. *Brockville Rink Co.* (1900), 31 O.R. 124, shews that this action could not be maintained by a private person. Mr. McDiarmid contends that it cannot be brought by the corporation—or by any body or person, other than the Attorney-General assuming that the Supreme Court has jurisdiction in the premises.

We have not been referred to any direct authority which will support the right of the plaintiffs to maintain an action where there has been an infringement of their by-laws: *Atty.-Gen.* v. *Campbell* (1872), 19 Gr. 299, was a case very similar to this. The defendant having been twice fined under the by-law persisted in building in violation of the by-law. Application was made to the Court of Chancery for an injunction. Strong, V.-C., expressed a doubt as to whether the infraction of a municipal by-law constituted a nuisance, but he refused the application on the ground that the by-law was in excess of the legislative powers conferred upon the council. That case is a precedent for bringing the action in the name of the Attorney-General.

Attorney-General v. *Tod Heatley*, [1897] 1 Ch. 560, shews the Attorney-General is a proper party under the Public Health (London) Act, 1891, to represent the public where the defendant neglects to perform the duty which lies upon him, notwithstanding that power is given by the statute to the corporation to remove the nuisance and charge the cost to the defendant.

Under that statute although the local authority is empowered to cause proceedings to be taken in the High Court, it has been held that this power does not, in the absence of a particular interest justify them in proceeding in their own names: *Wallasey Local Board* v. *Gracey* (1887), L.R. 36 Ch.D. 593; *Tottenham Urban District Council* v. *Williamson & Sons*, [1896] 2 Q.B. 353. These cases confirm the decision of Rommilly, M.R., in *Vestry of Bermondsey* v. *Brown* (1865), L.R. 1 Eq. 204.

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In *A. G.* v. *Logan*, [1891] 2 Q.B. 100, the right of the local board to bring an action in their own name in respect of a nuisance affecting property of which they were the owners was upheld, so too where a statute gave the local board a special protection, and breaches of that statute were being committed: *Devonport Corporation* v. *Plymouth Devonport & District Ry.* (1884), 52 L.T. 161. This case was relied upon by Mr. Mayer, but I think there is a plain distinction between the specific rights that were there conferred and the breach of the duty to the public which is being dealt with in this action. In the *Plymouth Tram* case, the right might almost be regarded as falling within the principle of the *Logan* case.

In my opinion, this case falls within the general rule that requiries that all actions in respect of public nuisances must be brought in the name of the Attorney-General.

Martin, J.A. MARTIN, J.A.:—I agree in allowing the appeal.

Galliher, J.A. GALLIHER, J.A., concurred in allowing the appeal.

McPhillips, J.A. (dissenting) MCPHILLIPS, J.A. (dissenting):—This is an appeal by the defendant in the action from the decision of the Honourable Mr. Justice Gregory, of January 5, 1914, directing, by way of a mandatory injunction, that the defendant (appellant) do forthwith pull down and remove a wooden structure erected for a garage on lot 2, block L., subdivision of part of sections 23 and 69 Victoria District, within the Municipality of Oak Bay, as being erected without a written certificate from the Engineer of the Corporation, and contrary to the provisions of the "Building by-law" (1908).

The notice of motion for a mandatory injunction being by consent turned into a motion for judgment.

It would appear from the facts upon affidavit before the learned trial Judge, that the written certificate called for by the by-law before the erection of the building could be commenced, was applied for, but refused—the Acting Municipal Engineer in a letter appearing at p. 50 of the Appeal Book stated that it was refused "on the ground that it was not considered in the public interest."

The learned counsel for the appellant contended that upon facts appearing in the affidavits filed that the refusal was wrongful and not justified under the terms of the by-law, and advanced reasons which if at all forceful would be efficacious in proceedings by way of mandamus to compel the engineer to issue the necessary certificate—but that course was apparently not adopted.

The material provisions of the by-law which require consideration are sections 1, 2 and 3, and are as follows:—

CORPORATION OF THE DISTRICT OF OAK BAY.

A BY-LAW

TO REGULATE THE ERECTION AND CONSTRUCTION OF BUILDINGS, AND TO REGULATE THE REMOVAL OF BUILDINGS.

The Municipal Council of the Corporation of the District of Oak Bay enacts as follows:—

REGULATIONS PREVIOUS TO ERECTIONS:—

1. Every person intending to erect a building in the municipal limits of the District of Oak Bay shall, before commencing the excavation for or the erection of any such building, deposit with the engineer of the corporation a plan or plans of such proposed building, drawn to a scale of not less than eight feet to an inch, and at the time of lodging such plan or plans shall pay to the clerk of the corporation a fee of $2 for the use of the municipality in respect of every proposed new building. Notice of any deviation in the constructional parts of the proposed building shall also from time to time be given immediately determined upon.

2. No person shall commence the erection of a building or the structural repair or alteration of any old building within the municipal limits of the District of Oak Bay where the work of such repair or alteration exceeds the sum of $100, until he shall have submitted the plan provided for in the preceding section, and also, the specifications for the proposed building, alterations, or repairs, and shall have obtained the written certificate of the said engineer that the same are in compliance with this by-law, and will not involve a violation of any by-law or regulation as to line of the street, or by-law or regulation of the municipality relating to the prevention of fires or the erection, repair or alteration of buildings or the public health.

3. The engineer may refuse to give the certificate referred to in section 2 of this by-law.

(*a*) Whenever from any plan or particular furnished in accordance with section 2 hereof it shall appear to him that the proposed building or erection is intended or proposed to be used for the purpose of any manufactory, trade or occupation of a character which cannot be carried on without creating a nuisance, or which is noisome,

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noxious or offensive in its operations, and where the present or prospective assessable value of the property adjacent to which it is proposed to be erected will, in the opinion of the engineer, be prejudicially affected.

(*b*) Whenever the plan of any building or erection or alteration or addition to any existing building or erection discloses to the engineer that the building or erection, when erected, or the alteration or addition when made, will be or constitute, having regard to the ugliness, deformity, incongruity, or want of conformity of the proposed building, or altered or added building, with the adjacent buildings a nuisance and offensive to good taste, and an eyesore, and that, in addition, the construction of such building, alteration, or erection, would tend to have the effect to depreciate the assessable value of adjacent residential property.

(*c*) Whenever the engineer shall, in pursuance of this section, refuse his consent by withholding the certificate mentioned in section 2 to any building operation, no owner or builder shall proceed with the building operations to which such consent has been refused or in respect of which such certificate has been withheld. Any person committing an offence against this by-law shall be liable to a penalty not exceeding $500 in addition to any other remedy the council may have for the removal of any building or erection or by way of injunction. Any person aggrieved by such refusal may appeal by petition to the council, who may thereupon give such directions in the matter as may to them seem fit.

It is shewn by affidavit on the part of the plaintiff—the Corporation of the District of Oak Bay—that a wooden garage is a menace to the owners of the adjoining property by reason of the increased hazard of fire, and its use will be dangerous to the public safety—however, this would all be matter for consideration upon mandamus proceedings. In *The Queen* v. *Tynemouth*, [1896] 2 Q.B. 451, mandamus proceedings were taken and the Court held that the plans submitted must be approved.

The Court in approaching all these questions arising with respect to municipal by-laws will not without good reason come to the conclusion that they are in their terms unreasonable, as the local authority may be said to be the best judge: *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; *White* v. *Morley*, [1899] 2 Q.B. 34; 68 L.J.Q.B. 702; *Salt* v. *Scott-Hall*, [1903] 2 K.B. 245.

The present case is not one in which it can be said that the by-law is prohibitive, as was the case in *French* v. *Municipality*

of North Saanich (1911), 16 B.C.R. 106; in that case upon an application to quash the by-law it was quashed as being prohibitive.

However, the question of the validity of the by-law, in my opinion, does not come up for consideration in this action—when we have it an admitted fact that the required written certificate from the engineer as called for in the by-law was not obtained—that is, when it is apparent that there was legislative authority to pass a by-law of the general character which the by-law for consideration in the present case would appear to be.

The Municipal Clauses Act (1896), sec. 50, sub-sec. 32 [R.S. B.C. 1911, ch. 170, sec. 53] under the authority of which the by-law was passed, makes provision for the passage by the council of every municipality for the regulation and prevention of erection of wooden buildings, and for authorizing pulling down or removal at the expense of the owner of any building constructed in contravention of any by-law.

Therefore, when the admitted fact is, as previously stated, that the required written certificate was not obtained, and its requirement would seem to be a reasonable regulatory provision, the erection of the building was distinctly an illegal act upon the part of the appellant—and it is in effect in defiance of a statutory enactment.

In *Tompkins* v. *Brockville Rink Co.* (1900), 31 O.R. 124, Meredith, C.J., stated that he saw no difference between acts prohibited by direct enactment of the legislature and those prohibited by by-law—no doubt this involves and is upon the assumption that there is legislative authority admitting of the passage of the by-law.

The learned counsel for the appellant strongly urged that as penalties were provided in the by-law, there was no right to an injunction.

In *Cooper* v. *Whittingham* (1880), 49 L.J. Ch. 752, [L.R. 15, Ch.D. 501], Jessel, M.R., at p. 755, said:—

> It was said that the 17th section of the Act created a new offence of importation, and enacted a particular penalty; and it was argued that where a new offence and a penalty for it were created by statute, a person proceeding under the statute was confined to the recovery of the pen-

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alty, and that no other relief could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right—that is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal, and is threatened, the Court will interfere and prevent the act being done; and as regards the mode of granting an injunction, the Court will grant it either when the illegal act is threatened, but has not been actually done, or when it has been done, and seemingly is intended to be repeated.

The second exception is that created by the Judicature Act, section 25, sub-section 8, which enables the Court to grant an injunction in all cases in which it shall appear to the Court to be "just and convenient." This section may be said to be a general supplement to all Acts of Parliament.

I think, therefore, that in this particular case an injunction could issue on both those general grounds.

This case was followed by Channell, J., in *Carlton Illustrators and Another* v. *Coleman & Co.* (1911), 80 L.J.K.B. 510, and we have a number of other decisions which well support the right to the injunction which was granted in the present case, notably, *Mayor of Devonport* v. *Plymouth, Devonport etc Tramway Company* (1884), 52 L.T. 161, *per* Bowen, L.J., at p. 164; *Mackett* v. *Herne Bay Commis.* (1876), 24 W.R. 845; *Hamilton and Milton Road Co.* v. *Raspberry* (1887), 13 O.R. 466.

The learned counsel for the appellant took the further point although it apparently was not taken at the trial, nor in the notice of appeal, that the action was not properly brought, but should have been in the name of the Attorney-General. I am disposed to think that the objection is too late—however—it being a most important exception—as to the right in the municipality to institute this action. I have decided to deal with the question. I may say that when at the Bar I at times felt that this requirement that the Attorney-General should be a party to actions or proceedings that admittedly were questions of municipal government was pressed unduly and too far, and having filled the office of Attorney-General for this Province, it is the more impressed upon me, and I must confess that the decision in *Attorney-General* v. *Garner*, [1907] 2 K.B. 480, 76 L.J. K.B. 965, comports with the view I have long held, and that is

that where the interests of a small part of the community only are involved and not those of the community at large, the Attorney-General should not be required to be joined as the plaintiff. The action was one brought by the district council as successors to the surveyors of highways against the defendant for damages, and an injunction for wrongfully depasturing cattle on the road, the Attorney-General being joined on their relation; and it was held that as the property in the herbage was in the parish council as representing the inhabitants of the parish, who had the beneficial interest—the parish council and not the district council was held to be the proper plaintiff, and that it was not necessary that the Attorney-General should be a party. It was strongly pressed in this case that it was not a case of a public wrong, and that therefore the Attorney-General need not be joined—the only persons affected being the inhabitants of the parish.

Now, in the present case, the inhabitants of the Municipality of Oak Bay only are interested. Further, the legislature has delegated to the municipality the authority for regulating the erection of buildings and preventing the erection of wooden buildings, and authorizing the pulling down of any building constructed in contravention of any by-law—and upon what grounds of public policy or necessity should the Attorney-General of the Province be required to intervene—it not being a matter of public wrong or affecting the public at large whose interests undoubtedly the Attorney-General is to conserve and safeguard?

Channell, J., in *Atty-Gen.* v. *Garner*, *supra*, at 967, said:—

> This action is brought not only by the district council, but also by the Attorney-General on the relation of that council. The question therefore arises, whether the Attorney-General can maintain this action, and is entitled to an injunction against the wrongful acts of the defendants. *Att.-Gen.* v. *Logan*, [1891] 2 Q.B. 100, at 106, and the cases upon which it was founded, shew that it is of no importance whatever, when the Attorney-General has a right to bring an action, that the relator is the wrong person to appear as plaintiff. The relator comes in only for the purpose of costs, for which he becomes liable, the Crown—at any rate in former times, for the rule is not always observed now—neither paying nor receiving costs. The relator conducts the action, and receives the costs, if any are awarded

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to the plaintiffs, being responsible for them; but this does not prevent the Attorney-General having a right to bring an action if he has a good cause of action, either on an information filed by himself without any relator, or filed on the relation of a person other than the person who does become relator. This is established by *Atty.-Gen.* v. *Logan, supra*. Therefore the question I have to consider is, whether the Attorney-General alone could have taken proceedings to get this injunction.

The Attorney-General comes in as the representative of the public, because he represents the Crown, and the Crown represents the public. I have had a good deal of trouble in dealing with this point, because it is not very familiar to me; but as I knew that Mr. Justice Joyce had been for a great number of years in a position to be more likely to know about informations by the Attorney-General than almost anybody else, inasmuch as most of them are dealt with on the Chancery side, I have consulted him in this matter, and have derived a great deal of assistance from what he has told me, although the matter is not, to my mind, free from doubt. The position seems to be this. I quote from a book which I understand is of authority on the Chancery side—namely, Calvert on Parties, 2nd ed., 1847)—which states the matter thus, on page 26: "The Attorney-General is by law the representative of the public interests. The reason is that he is the officer of the Crown, and that, according to the principles of our law, the interest of the public is vested in the Crown. 'The Attorney-General,' said Lord Eldon (*Atty.-Gen.* v. *Brown* (1818), 1 Swanst. 265, at 294) is the officer of the Crown, and in that sense only the officer of the public.' Whenever, therefore, the rights of the Sovereign, as the guardian of the interests of the public are affected, they must find their protection in the presence of the Attorney-General. The analogy between this case and that of a corporation is still further maintained, inasmuch as the presence of the Attorney-General does not prevent the necessity of bringing any individuals before the Court, who have interests peculiar to themselves, and independent of those, which they hold in common with all the rest of the community. In respect of the latter"—that is, interests in common with the rest of the community—"such persons are represented by the Attorney-General, but in respect of the former, they must appear in their own behalves." There it is to be observed that the learned author says, "interests which they hold in common with all the rest of the community." The difficulty in the present case is to see whether the Attorney-General can interfere in a case where the interests, not of the whole community, but of a limited portion of it, such as the inhabitants of a parish, are involved. In *Stoke Parish Council* v. *Price* (1899), 68 L.J. Ch. 447; [1899] 2 Ch. 277, Mr. Justice North held that the Attorney-General was a necessary party, and dismissed the action, which related to a spring of water and a supply of water, on the ground that the Attorney-General ought to have been made a party. The right there was claimed by the parish council, but it clearly was not a right of property; at any rate, the case has been distinguished on that ground in the more recent case of *Sheringham Urban Council* v. *Holsey* (1904), 20 Times L.R. 402. And I think Mr. Justice North held that it was not a right peculiar to the par-

ish or its inhabitants, but a general public right of all her Majesty's subjects, to take water at this source.

In *Sheringham Urban Council* v. *Holsey, supra*, Mr. Justice Joyce held that the matter in question was a right of property in the parish. It was an action by the district council for removing a post which it was alleged that they had wrongfully put up on a footway to prevent it being used as a carriage-way. The learned Judge held that the district council had a property in that post, and, under those circumstances it was not necessary to join the Attorney-General as a party. *Stoke Parish Council* v. *Price supra*, was cited, and Mr. Justice Joyce distinguished it on the ground that, in the case before him, the district council had interests peculiar to themselves, and that therefore it was not necessary to join the Attorney-General. The same proposition is also to be found in *Atty.-Gen.* v. *Logan, supra*, and I think there really is no doubt about it.

The consequence of that in this action is that the parish council might have maintained the action; and in the next place that in that case it would not have been necessary to join the Attorney-General. Upon those propositions I have no doubt at all; but they do not go quite the whole way, because it might still be the case that, although it would not be necessary to join the Attorney-General, the Attorney-General might have been joined; and upon that it is that I find an almost complete absence of authority. But, forming the best judgment I can, it does seem to me that the rights which the Attorney-General interferes to protect, as representing the Crown —as *parens patriæ*, as it is said in some of the cases—must be rights of the community in general, of all his Majesty's subjects, and not rights of a limited portion of those subjects, especially when that limited portion has a representative which can bring the action. Therefore, although with very considerable doubt, I have come to the conclusion that the Attorney-General has no right to come here and ask for this injunction.

The action succeeded upon the merits because the defendant was in the wrong, but it was brought by the wrong parties. I was told that the consent of the parish council to be joined could be obtained, but I think it is rather late for that. It is all very well for the parties to come in and be made plaintiffs by way of amendment when they do not know what the issue of the action is going to be, when they may lose and be responsible for costs; but it is rather objectionable to allow persons to come in after their success has been assured, and therefore I am not inclined to allow an amendment in this case.

In *London County Council* v. *South Metropolitan Co.*, 73 L.J. Ch. 136, [[1904] 1 Ch. 76] the point was taken that the action was brought to enforce the performance of a public duty, and in such a case the Attorney-General was the proper plaintiff; but it was pointed out that the London County Council—as likewise the plaintiffs in the present case—were entrusted with complete control of the matters in question: Romer, L.J., at 141:—

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With regard to the other two points which were for the first time taken on this appeal, I can only say that, as to one of them, I am clearly of opinion that the County Council is entitled to sue. It was suggested that the County Council had no sufficient interest in the subject-matter of this action to justify it being made plaintiff. But the County Council is the controlling authority under the Acts, and, in particular, it has the control and management of the testing stations committed to it. And why? Clearly in order to enable it to carry out the duties and obligations cast upon it as a controlling authority. Now, it appears to the County Council that, gas being delivered on a Sunday, it ought also to be tested on a Sunday, according to the words of the Act; but it finds that the gas examiners, the testing operators, are not allowed by the defendant company to go to the testing stations, which are under the control and authority of the County Council. The County Council, having the control, finds that but for the interference of the defendant company the testing would go on, the testers being quite willing and ready to go there. In fact, wishing to act according to its duty as controller of the testing stations, the council is prevented from allowing the testers to go there because the defendant company chooses to say that no tests shall be made on the Sunday, and that no person, except the company itself, shall have any access to the testing stations on Sundays. It appears to me that the County Council has sufficient interest, obligations, and rights to justify it in coming to this Court and seeking for an injunction to restrain the defendants from practically excluding the County Council and the testers from the testing stations; and that, in substance, is the nature of this action, the real question being that which we have decided—namely, whether, according to the Act of Parliament, the testings ought to go on at all on Sundays.

And Stirling, L.J., at p. 142, said:—

With regard to the points which have been raised for the first time in this Court, the point of most substance is that which would exclude the jurisdiction of the Court by reason of the penalty being attached by section 34 of the Gasworks Clauses Act, 1871, to a refusal on the part of the gas company to give proper access to the testing stations. But when section 55 of the Metropolis Gas Act, 1860, is referred to, it appears that the jurisdiction of the Court is preserved, and it was really admitted by counsel in reply that that section affords an answer to the argument based on the Act of 1871.

The other question is, whether the London County Council is the proper plaintiff in the present action. Now, I agree with what has been said by my Lord that that is not an objection to which effect ought to be given having regard to what took place at the hearing in the Court below. I also agree with what has been said by Lord Justice Romer, and, if it were necessary to decide it, I should be of opinion that the London County Council is the proper plaintiff. The Act of Parliament entrusts to the County Council the control and management of the testing places, materials and apparatus provided by the company, and it seems to me

that so far from the company being entitled to control those places, the view taken by the Acts—especially the Act of 1880—is that everything which is necessary to be done for carrying into effect the directions of the Act with respect to testing shall be dealt with by the controlling authority—namely, the London County Council—and not by the company. That, to my mind, is made very strong by section 10 of the Act of 1880, which, whilst it gives the company the power, if it thinks fit, to be represented by an officer at each testing, provides: "the controlling authority shall state at what times it is proposed to make such testings on any particular day upon receiving a request in writing from the company in the forenoon of the previous day." That seems to me to shew that it is for the company to apply to the controlling authority, the London County Council, for the purpose of giving effect to this portion of the Act, and that the company has no power of excluding the controlling authority and the persons authorized by them from the testing stations which have been established under the Acts.

It seems to me that in this case there was a clear interference by the defendant company with the control and management which is by statute vested in the London County Council. I think, therefore, that the appeal fails and ought to be dismissed.

In my opinion, the action was rightly constituted, and the Corporation of the District of Oak Bay is properly the plaintiff without the necessity of the Attorney-General of the Province being joined.

It therefore follows, in my opinion, that the judgment of the learned trial Judge was right, and should be affirmed and the appeal should be dismissed.

Appeal allowed.

ALABASTINE COMPANY, PARIS Ltd. v. CANADA PRODUCER and GAS ENGINE CO. Ltd.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. SALE (§ II—25)—WARRANTY—CONDITION—THING SOLD NOT IN EXISTENCE OR ASCERTAINED.

When the subject-matter of a sale of personalty is not in existence, or not ascertained, at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, going to the very identity of the thing sold.

[*Alabastine Company, Paris, Ltd.* v. *Canada Producer and Gas Engine Co. Ltd.*, 8 D.L.R. 405, affirmed.]

2. SALE (§ I D—20)—ACCEPTANCE—RETENTION—"TRYING OUT" THE THING SOLD.

When a sale of personalty, not yet in existence or ascertained, is made with a condition that it shall, when existing or ascertained,

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possess certain qualities, the "trying out" of the thing sold after delivery covering a protracted period does not constitute an acceptance against the buyer, where such "trying out" was, as understood by both parties, to be for the purpose of discovering whether or not it answered the conditions of the contract.

[*Alabastine Company, Paris, Ltd.* v. *Canada Producer and Gas Engine Co. Ltd.*, 8 D.L.R. 405, affirmed.]

3. SALE (§ I B—5)—PASSING OF TITLE—PERFORMANCE—DELIVERY OF DIFFERENT KIND OF ARTICLE.

An agreement for the sale of an engine with a condition that it should be of a stipulated type and power is not carried out or performed by the seller merely furnishing an engine of a different type and power.

[*Alabastine Company, Paris, Ltd.* v. *Canada Producer and Gas Engine Co. Ltd.*, 8 D.L.R. 405, affirmed; *Wallis* v. *Pratt*, [1911] A.C. 394, at 396, applied.]

4. SALE (§ II A—27)—IMPLIED WARRANTY—PROVISION AGAINST, HOW CONSTRUED.

The implied warranty that on a sale of personalty the thing sold shall be reasonably fit and proper for the purpose for which it was designed, cannot be evaded by the seller inserting a provision in the contract of sale whose language does not clearly deprive the buyer of the benefit of the implied provision, especially where the inserted clause appears on its face to have a distinctly different function.

[*Alabastine Company, Paris, Ltd.* v. *Canada Producer and Gas Engine Co. Ltd.*, 8 D.L.R. 405, affirmed.]

5. SALE (§ III C—70)—RESCISSION—OBLIGATION TO RETURN SUBJECT-MATTER, HOW LIMITED.

While ordinarily a purchaser of personalty who elects to treat the contract as repudiated is bound to restore the article which has been furnished to him in the condition in which it was, yet, where his inability to do this is not the result of anything he has done, but is due to the thing sold breaking down, owing to defects for which the other party is responsible, it is sufficient if the purchaser offers and is ready to return it in the condition in which it thus was after the breakdown.

[*Alabastine Company, Paris, Ltd.* v. *Canada Producer and Gas Engine Co. Ltd.*, 8 D.L.R. 405, affirmed.]

Statement

APPEAL by the defendant from the judgment of Clute, J. *Alabastine Company, Paris, Ltd.* v. *Canada Producer and Gas Engine Co. Ltd.*, 8 D.L.R. 405, in favour of the plaintiff in an action to recover $5,500 paid by the plaintiff on account of purchase money for an engine bought from the defendant and alleged to be useless for the purpose intended, and for damages and for rescission.

The appeal was dismissed.

I. F. Hellmuth, K.C., and *W. A. Boys*, K.C., for the defendant, appellant.

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G. H. Watson, K.C., and *F. Smoke*, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH C.J.O.:—This is an appeal by the defendant company from the judgment, dated the 17th December, 1912, which was directed to be entered by Clute, J., after the trial before him, sitting without a jury, at Brantford, on the 25th November, 1912, and the four following days.

The action is brought for the rescission of an agreement made between the parties on the 5th May, 1911, by which the appellant agreed to furnish to the respondent a 3-cylinder 19 x 20 natural gas engine, with extended shaft arranged for outboard bearing, and outboard bearing complete, together with a pulley of specified dimensions, and a gas regulator, and to supply all piping within 10 feet of the engine and foundation plans and foundation bolts, the work to be done in accordance with the specifications annexed to the agreement, which, together with the guarantee and special agreements mentioned in the specifications, were made part of the agreement, for the sum of $6,000; and the claim of the respondent is for rescission of the agreement, for the payment of $5,500 which had been paid on account of the purchase-price, with interest, and damages for alleged misstatements and misrepresentations by the appellant, by which the respondent was induced to enter into the agreement.

In the statement of claim it is alleged that the engine and machinery "did not work properly and were not fit for the purpose for which the same were, to the knowledge of the" appellant "purchased by the" respondent, and that they were not "merchantable or marketable," and "were of no use or value" to the respondent for the purposes for which they were required; that, in the course of the operation of the engine and machinery in the respondent's factory in the month of March, 1912, and not long after they had "been attempted to be used from time to time" by the respondent, they "exploded and collapsed and broke down, became smashed, and for the most part destroyed, from the defective and improper construction

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and bad workmanship and material of the same," and they "became and were useless and of no value" to the respondent.

The evidence is conflicting, especially as to the cause of the engine having broken down in March, 1912, the contention of the appellant being that it was due to the neglect of the respondent's engineer in charge of it, and the contention of the respondent that the break-down was caused by defects in the engine itself, due to improper workmanship and the use of improper materials; and the finding as to this is against the appellant.

The learned trial Judge also found that there was an implied warranty that the engine should be fit for the purpose for which it was intended to be used, and that it was not fit and was never made fit for that purpose.

According to the specifications, it was provided that the engine should develope 250 actual brake horse power, and the finding is that it was never capable of continuously carrying 250 horse power.

There is no finding as to the immediate cause of the break-down. According to some of the testimony, it was the breaking of the crank-shaft, and, according to other testimony, the weakness of the crank-case and other parts of the engine. I mention this because, if the break-down had been due to defects in the crank-case and to that only, the contention of the appellant that the remedy of the respondent was confined to a claim on the 5-year guarantee, which was given after the existence of cracks in the crank-case was discovered, would probably have prevailed.

Although there is no express finding as to the cause of the "break-down," it is manifest from the reasons for judgment that the learned trial Judge was of opinion that it was due to defective workmanship and the use of improper material in various parts of the engine, and not only to the defects in the crank-case.

It is impossible for us to reverse the findings of fact to which I have referred. There was evidence to support them, and we cannot say that the conclusions to which the trial Judge came are clearly wrong.

It is reasonably clear, we think, that there was no such acceptance of the engine as precluded the respondent from rejecting it if it did not fulfil the requirements of the contract. It was being "tried out" from September, when it was set up in the respondent's factory, until the time of the break-down in the following March. The evidence, no doubt, shews that throughout this period the respondent's manager was hoping, and perhaps believing, that the appellant would succeed in making such changes in the engine as would put it in a condition to meet the requirements of the contract, but there is nothing to shew that the respondent at any time accepted the engine as answering those requirements. And, besides this, by the terms of the contract, "the title to the machinery or material" furnished was to remain in the appellant until the purchase-price should be fully paid.

Upon this state of facts, what were the remedies to which the respondent, assuming that they were not abridged by the terms of the contract, was entitled, and how far, if at all, are they abridged by the terms of the contract?

One of the rules deduced from the authorities is that "where the subject-matter of the sale is not in existence, or not ascertained, at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract: because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted:" Benjamin on Sale, 3rd Am. ed., para. 895, quoting from the Leading Cases, vol. 2, p. 27.

In the recent case of *Wallis Son & Wells* v. *Pratt & Haynes*, [1910] 2 K.B. 1003, [1911] A.C. 394, the difference between a condition and a warranty was considered, and the rule referred to by Mr. Benjamin was stated, in somewhat different language, by the Lord Chancellor ([1911] A.C. at p. 395.) He there says: "If a man agrees to sell something of a particular descrip-

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tion, he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty."

In giving his reasons for judgment in the Court of Appeal, Fletcher Moulton, L.J., whose dissenting judgment was adopted by the Lords, said ([1910] 2 K.B. at pp. 1012-13): "But from a very early period of our law it has been recognised that" the obligations of a contract "are not all of equal importance. There are some which go so directly to the substance of the contract, or, in other words, are so essential to its very nature that their non-performance may be fairly considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and a breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance, and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognising this distinction between the two classes of obligations under a contract, there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss the matter, because later usage has consecrated the term 'condition' to describe an obligation of the former class and 'warranty' to describe an obligation of the latter class. I do not think the choice of terms is happy, especially so far as regards the word 'condition,' for it is a word which is used in many other connections and has considerable variety of meaning. But its use

with regard to the obligations under a contract is well known and recognised, and no confusion need arise if proper regard be had to the context. . . . But in the case of a breach of a condition" the other contracting party "has the option of another and higher remedy, namely, that of treating the contract as repudiated."

The Lord Justice then referred to sec. 11, sub-sec. 1 (c), of the Sale of Goods Act, and said that two cases are there "given in which he will be deemed as a matter of law to have elected to content himself with his right to damages. The two cases named are, the case where the buyer has accepted the goods or part thereof, and the case where the contract is for specific goods, the property in which has passed to the buyer."

In that case the contract was for the sale of seed of common English sainfoin, and the contract provided that the sellers gave no warranty. The sellers had delivered seed of giant sainfoin, which is a different article, of inferior value, and the view of the Lord Justice was (p. 1014): "Inasmuch as by the law the obligation to deliver the kind of goods stipulated for in a contract of sale is an obligation which has the status of a condition, this breach gave to the purchasers the choice of the two remedies, either of rejecting the goods and treating the contract as repudiated or suing for damages for delivery of the inferior article." But, as the purchasers had resold the goods in ignorance of the breach, they had prevented themselves from exercising the higher right, and must be content with suing for damages for breach of the contract.

What then is the application of the law to the facts of this case? The engine did not possess the qualities which the appellant agreed that it should possess. It was neither of 250 horse power nor was it reasonably fit for the purposes for which it was required, and the respondent was, therefore, not bound to receive or pay for it. As I have said, the property in it did not pass to the respondent, and there was no such acceptance of the engine by the respondent as to exclude the right to treat the contract as repudiated. It is, I think, the proper conclusion on the evidence that the "trying out" of the engine was, as understood by both parties, to be for the purpose of discovering

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whether or not it answered the conditions of the contract, and what was done by the respondent in "trying out" the engine cannot be treated as an acceptance of it, or as evidence that it had been accepted by the respondent.

There remains to be considered the question whether there is any provision of the contract which has the effect of abridging what otherwise would have been the rights of the respondent.

The contract contains a provision in these words: "It is expressly agreed that there are no promises, agreements or undertakings outside of this contract with reference to the subject-matter; that no agent or salesman has any authority to obligate this company by any terms, stipulations or conditions not herein expressed."

This provision, it was contended, had the effect of excluding the condition that the engine should be reasonably fit for the purposes for which it was required, but the argument was not pressed to the extent of contending that it excluded the condition that the engine should be of 250 horse power.

As was said by the Lord Chancellor in *Wallis Son & Wells* v. *Pratt & Haynes*, [1911] A.C. at p. 396: "There is no doubt that when you are dealing in a commodity the inspection of which does not enable you to distinguish its exact nature, there are risks both on the buyer and on the seller if they think fit to sell by description. But if it is desired by a seller to throw the risk of any honest mistake on to the buyer, then he must use apt language, and I should have thought the clearer he tries to make the language the better."

It is, I think, quite clear that the provision with which I am dealing does not exclude the condition that the engine should be a gas engine of the 3-cylinder type and of 250 horse power. What the respondent contracted to furnish was an engine of that type and power, and the furnishing of an engine of a different type or power would be no more a performance of the contract than was the delivery of giant sainfoin when the contract was to deliver common English sainfoin.

If, as has been found, the engine was to be suited for the purpose of the respondent's business—what the appellant has

delivered is not such an engine, and the respondent was not bound to accept or pay for it.

The language of the provision is more appropriate to express promises, agreements, or understandings, than to an agreement or condition which the law implies from a given state of circumstances; and, if the appellant intended that such an agreement or condition should be included, clearer language should have been used to express that intention.

The other provision of the contract on which the appellant relies—that as to the appellant not being liable for damages on account of defects of design, material, or workmanship, other than to furnish without charge repairs or new parts "as mentioned in the preceding paragraph"—does not help the appellant.

The provision of the preceding paragraph referred to is that "it is understood that the machinery is to be free from latent defect in material and workmanship, and should any part of it be found within one year from the date of shipment to have been defective at the time furnished, the company will repair said part f.o.b. the company's works, or will furnish without charge, f.o.b. the company's works, a similar part to replace, provided the original part is returned to the company's works, freight prepaid, and the company's inspector establishes the claim."

These provisions, in my opinion, have no application where there has been no acceptance of the machinery by the buyer, at all events if the property in it has not passed to him, but were intended to protect the appellant from claims for damages where the machinery has been accepted, and defects of the character mentioned are afterwards discovered. The language used is more consistent with that being the purpose of the provisions than with the intention being that they were to be applicable where the purchaser had still the right to reject. Under ordinary circumstances, a purchaser who elects to treat a contract as repudiated is bound to restore the article which has been furnished to him. In the case at bar, the respondent is not in a position to return the engine in the condition in which it was when set up. But his inability to do so is not the result of anything he has done, but is due to the engine having broken down

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owing to defects for which the appellant is responsible, and the offer and readiness to return it in the condition in which it was after the break-down were sufficient to entitle the respondent to claim the relief which is sought.

The judgment may also, I think, be supported upon the provision of the contract that "the plant shall not be rejected for any cause except for failure to meet the duty guaranteed," which implies the right to reject in the excepted case.

Although not necessary for the disposition of the case, in the view I have taken, to say anything as to the other findings of the trial Judge, it is proper that I should give expression to my view as to them.

I am unable to agree with some of them. The finding that the appellant was guilty of fraud and fraudulent concealment is not, I think, warranted by the evidence. The crack in the crank-case was visible to any one who examined it, as it was to the respondent's manager when he saw it in Barrie. There was no concealment of the crack, and there is nothing in the evidence to warrant the conclusion that Greaves, the appellant's manager, did not believe what it was testified he said as to the crack not being of any consequence. The conduct of the appellant in giving the five years' guarantee also indicates that there was a desire on its part to act fairly. Nor was the fact that one of the cylinders had been plugged sufficient to warrant a finding of fraud. The plugged cylinder ought not to have been put into the engine, but putting it there does not necessarily indicate fraud.

It is also to be observed that when the crack in the engine developed, owing perhaps to the plugging, the defective cylinder was replaced by a new one, and all ground for complaint on that score was then at an end.

I am also unable to agree that it was the duty of the appellant to have told the respondent that as large an engine as the respondent desired to purchase had not before then been manufactured by the appellant, or with the conclusion that the failure to communicate that information was in any sense fraudulent.

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I am of opinion that the trial Judge was right in giving judgment for the respondent for the amount which had been paid on account of the purchase-price, with interest, and for damages for breach of the contract to furnish the engine; and that there is no reason to complain of the amount at which damages have been assessed; and it follows that the appeal should be dismissed with costs.

Appeal dismissed.

STACEY LUMBER CO. v. CAZIER.

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Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ. June 30, 1914.

1. GARNISHMENT (§ II—35)—EFFECT OF SERVICE—DEBTOR'S RIGHTS AND LIABILITIES, HOW LIMITED.

The effect of the service of a garnishee summons is merely to stop or bind the debt, that is, to prevent the person who owes it, or the defendant, from dealing with it in any way so as to prejudice the rights of the attaching creditor, but subject to these rights being secure the defendant may deal with the debt as he chooses.

2. EXECUTION (§ I—3)—AGAINST WHAT—HOW LIMITED—WHEN RATABLY APPORTIONED.

The Alberta Creditors Relief Act does not pretend to give a creditor who issues a *fi fa* any right to levy, or to direct the sheriff to levy, for any more than his claim, but merely provides that when the amount *is* levied the sheriff may retain it so as to give other creditors a right to share, that is, the levy is to be for the benefit of the creditors under certain specified conditions.

3. EXECUTION (§ I—3)—RIGHT TO—AGAINST WHAT—WHEN EXCESSIVE.

When a sheriff levies goods under a writ of execution against a debtor he is not *primâ facie* entitled to seize more than enough to satisfy the writ, and any exception to this rule is rather apparent than real, *e.g.*, where there is but a single chattel greatly exceeding the execution debt, in which case the excess seizure is by necessity merely.

Statement

APPEAL from the judgment of His Honour Judge Jackson, involving garnishment and execution rights as against the debtor.

The appeal was allowed.

C. F. P. Conybeare, K.C., for plaintiff (appellant).

Nobody *contra*.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is an appeal by the Stacey Lumber Co., Limited, from a judgment of His Honour Judge Jackson.

A firm of Marquardt & Calwait were contractors doing work for the City of Lethbridge. On November 4, 1912, A. Cazier issued and served on the city a garnishee summons claiming

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that the city was then indebted to Marquardt & Calwait, who were his debtors. The learned District Judge held that at the date of this service there was a debt due by the city to the firm of Marquardt & Calwait and that service of the garnishee summons effectively bound it. On November 18, 1912, Marquardt & Calwait assigned to the Stacey Lumber Co., Ltd., an assignment which the learned Judge held to be a good and valid assignment, a sum of $2,399 out of the moneys due them from the city.

The claim of A. Cazier was for $600, but he subsequently obtained judgment only for $450 and costs.

There appears to have been a sum of $3,821.68 in the hands of the city due to Marquardt & Calwait. On December 24th, 1912, the Hick-Sehl Hardware Co. issued a garnishee summons and served the same on the city, claiming that Marquardt & Calwait owed them $684.39. There were other persons also seeking to secure some of the money, but the exact nature of their claims is not here material.

The city interpleaded, and the learned Judge held that, by the Cazier garnishee summons the whole debt was bound, that the city were bound to pay the whole amount into the sheriff's hands under the Creditors Relief Act, and that the Stacey Lumber Co.'s assignment, although a good and valid one, could not stand in the way of the creditors receiving the benefit of the Creditors Relief Act.

From this judgment the Stacey Lumber Co. appeal, and although properly notified, none of the other parties appeared on the hearing of the appeal. Sec. 385 of the Judicature Ordinance reads:—

> Service of such summons on the garnishee shall bind any debt due or accruing due from the garnishee to the defendant or the judgment debtor.

It is clear from *Yates* v. *Terry*, [1902] 1 K.B. 527, 71 L.J. K.B. 282, and *Chatterton* v. *Watney*, 17 Ch.D. 259, 50 L.J. Ch. 535, that the effect of the service of a garnishee summons is merely to stop or bind the debt, that is, to prevent the person who owes it, or the defendant, from dealing with it in any way so as to prejudice the rights of the attaching creditor, but that, subject

to those rights being secure, the defendant may deal with the debt as he chooses. The service does not affect the property in the fund except to that extent.

It is also clear from the cases above cited that, aside from the Creditors Relief Act, a good and valid assignment intervening between a first and a second garnishee summons takes priority over the second garnishee summons.

The only ground upon which the learned Judge below acted, was based upon the provisions of the Creditors Relief Act. Sec. 4 of that Act says:—

> A creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor as well as for himself.

And sec. (2) says:—

> Payment of such debt shall be made to the sheriff of the district in which the garnishee resides.

This last sub-section is, in one respect at least, inconsistent with the contents of the garnishee summons authorized by sec. 384 of the Judicature Ordinance which provides that the garnishee summons may be in form C in the schedule or to the effect of that form. This form directs the garnishee "to shew cause why he should not pay *into Court* [not to the sheriff] the said debt *to the extent* of the *plaintiff's claim and costs.*" I am not aware that this form has been amended. The learned Judge must, I think, be under some misapprehension here, because he states in his judgment that the garnishee summons added, "to be dealt with in accordance with the provisions of the Creditors Relief Act, 1910." I cannot find those words in the copy of the Cazier summons given in the appeal book, nor do I think they are authorized, if inserted by any official because they certainly are not "to the effect" of Form "C." They clearly add something very specific to that form. In any case they do not, in fact appear in the summons and therefore nothing can be rested upon them.

It seems to me that there must be among practitioners some misapprehension as to the spirit and intent of the Creditors Relief Act insofar as it relates to attachment proceedings.

When a sheriff levies goods under a writ of execution against

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a debtor, he is never supposed to seize more than enough to satisfy the writ. That is all a writ of execution directs him to do. If the judgment debt and costs amount to $500 I am not aware of any authority, either under the Creditors Relief Act or otherwise in the sheriff, to realize $600, that is, $100 more than is called for by the writ, or writs directed to him and to keep it in waiting for the appearance within a month of other execution creditors. Surely, if the writs in his hand already are satisfied, the debtor is entitled to demand from the sheriff the balance in his hands. Indeed, a sheriff is liable in trover if he sells more goods than are necessary to satisfy the execution in his hands (Mather, Sheriff Law, 2nd ed., 106).

Now, by the Creditors Relief Act, an attempt has apparently been made to assimilate the results of an attachment of a debt to those of a levy under execution. Where goods are seized under execution, the property remains in the execution debtor until they are sold. They are in the meantime merely held as security. Such also is the effect of the service of a garnishee summons under the decision in *Yates* v. *Terry*, [1902] 1 K.B. 527. The debt attached is bound as security for the claims of the plaintiff and costs, but subject to that it remains the property of the defendant or debtor. Is there anything in sec. 4 of the Creditors Relief Ordinance which changes this law? In so far as the first sub-section is concerned, I cannot see that there is. That section says nothing about the legal effect of the service of the garnishee summons. It does not purport to alter the terms of Rule 385. It merely says that what is done shall be not merely for the benefit of the plaintiff, but of all the creditors as well. That means, as it seems to me, that the exclusive right of the plaintiff to retain for himself the money he has realized, *i.e.*, his own debt, because he has no right to anything more, is done away with and he is to share it up with other creditors. But just as the Creditors Relief Act does not pretend to give a creditor who issues a *fieri facias* any right to levy, or to direct the sheriff to levy, for any more than his claim, but merely says that when the amount *is* levied the sheriff must retain it so as to give other creditors a right to share, that is the

levy is to be for the *benefit* of all the creditors; and if no more is ever levied under following executions then all must share *pro rata* with the creditor under whose writ the levy has been made, if coming in within a certain time; so, under the first sub-section of sec. 4, I am unable to see that anything more was intended than that the sum which the attaching creditor realized under his attachment should be shared, like the money realized under an execution, with all other creditors who comply with the conditions. I am unable to see anything in the section which reveals an intention in the Legislature to put it in the power of an attaching creditor to tie up an unnecessarily large fund of money, to withdraw it absolutely from all control of the person entitled to it and owning it merely for the benefit of *contingent* creditors. Certainly there is no corresponding power in an execution creditor to seize a larger quantity of chattels than is necessary and have them sold so that a fund to satisfy contingent creditors may be created.

Of course, a more perfect analogy would be the case where the execution debtor owned only a single chattel worth a good deal more than the debt. If that is the only chattel discoverable in his bailiwick the sheriff, no doubt, has a right to seize it and sell it because it cannot be broken up or divided, but clearly all that he really "levies" under the execution is the judgment debt and costs. The balance is not money "levied" under execution, but is merely necessarily in his hands as a consequence of the unavoidable facts of the case, and belongs clearly to the debtor to whom he must return it.

I can see nothing in the first sub-sec. of sec. 4 which means that the service of the summons deprives the debtor of all interest in the debt, so that he cannot dispose of it in any way even subject to the plaintiff's claim. There may never be any other creditors entitled to anything. To whom does the balance belong in the meantime if not to the debtor? The ownership cannot be in a state of suspension pending the contingent appearance of other creditors. And if he has an ownership in it then he has a right to dispose of it as Marquardt & Calwait here did to the Stacey Lumber Co.

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I think this would be true even if the effect of sub-sec. 2 of sec. 4 were held to be that the garnishee must pay the whole debt or fund into the sheriff's hands. Even when *there* it must belong to some one. Certainly it would not belong to the sheriff. To whom then would it belong? It will be said, "to all the creditors." But to what creditors? Surely only those who comply with the terms of the Act and that class has not yet, in this particular case, been created. For all that was known when the Cazier garnishee summons was served there might never have been any other creditor. Surely it was not the intention of the Legislature to withdraw a man's property absolutely from his control upon the mere contingency that some creditors might appear. The case might be different if there were already executions in the sheriff's hands though it is not strictly necessary here to consider that case because there do not appear to have been any such. But I may point out that these provisions of the Creditors Relief Act ought to be read along with and in harmony with other legislation already existing on the subject assuming that to be possible. The Judicature Ordinance still prescribes the form of a garnishee summons, and that form, at any rate when this case arose, still directed the garnishee to state why he should not pay into Court, not the whole debt, but the debt "to the extent of the plaintiff's claim and costs." By the process served lawfully upon him this is all the garnishee is required to do. He need only pay the debt into Court to *a limited extent*. Then does sub-sec. 2 of sec. 4 do anything more than alter the place at which or the person to whom the payment is to be made? There is nothing in the section saying directly that the "whole debt" must be paid. There is nothing to indicate that the Legislature was thinking of the question of *amount*. It is the destination of the payment that is being dealt with. For these reasons I have very grave doubt whether any change has been made at all in the duty of the garnishee except with regard to the destination of his payment.

But in any case no payment into Court seems to have been made here. And even if it had all been paid in, certainly, at least, where there are no previous executions, creditors with

executions already in the sheriff's hands, I cannot see that there is anything to deprive the original debtor of his right of property in, and of disposition over the balance of the debt over and above the garnishing creditor's claim.

For these reasons I think this appeal should be allowed with costs, and that the order below should be varied and a judgment entered declaring the appellants entitled to be paid the sum of $2,390 and their costs of appeal and below, out of the money in the hands of the City of Lethbridge after satisfaction of the claim of A. Cazier for his judgment and costs.

Appeal allowed.

Annotation—Exemptions (§ II A—5)—What property is exempt.

Annotation
Exemptions—From execution.

Supplemental to the Annotation on Exemptions in the different provinces published with *Hart* v. *Rye*, 16 D.L.R. 1, the following summary of the exemption laws of the Province of Quebec so far as prescribed by Articles 598, 599 and 641 of the Code of Civil Procedure will be convenient for reference.

QUEBEC.

EXEMPTIONS FROM SEIZURE.

Art. **598.** The debtor may select and withdraw from seizure:—

1. The bed, bedding and bedsteads in use by him and his family;

2. The ordinary and necessary wearing apparel of himself and his family;

3. Two stoves and their pipes, one pot-hook and its accessories, one pair of andirons, one pair of tongs and one shovel;

4. All the cooking utensils, knives, forks, spoons and crockery in use by the family, two tables, two cupboards or dressers, one lamp, one mirror, one washing-stand with its toilet accessories, two trunks or valises, the carpets or matting covering the floors, one clock, one sofa and twelve chairs, provided that the total value of such effects does not exceed the sum of fifty dollars;

5. All spinning wheels and weaving looms intended for domestic use, one axe, one saw, one gun, six traps, such fishing nets, lines and seines as are in common use, one tub, one washing machine, one wringer, one sewing machine, two pails, three flat-irons, one blacking brush, one scrubbing brush, one broom;

6. Fifty volumes of books, and all drawings and paintings executed by the debtor or the members of his family, for their use;

7. Fuel and food sufficient for the debtor and his family for three months;

8. One span of plough-horses or a yoke of oxen; one horse, one summer vehicle and one winter vehicle, and the harness used by a carter or driver for earning his livelihood; one cow, two pigs, four sheep, the wool from such

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Annotation

Exemptions —From execution.

Annotation(*continued*)—**Exemptions** (§ II A—5)—**What property is exempt.**

sheep, the cloth manufactured from such wool, and the hay and other fodder intended for feeding the said animals; and moreover, the following agricultural tools and implements; one plough, one harrow, one working sleigh, one tumbril, one hay-cart with its wheels, and all harness necessary and intended for farming purposes;

9. Books relating to the profession, art or trade of the debtor, to the value of two hundred dollars;

10. Tools and implements or other chattels ordinarily used in his profession, art or trade to the value of two hundred dollars;

11. Bees to the extent of fifteen hives;

12. The things mentioned in Articles 1743 to 1748 of the Revised Statutes and their amendments.

Nevertheless, the things and effects mentioned in paragraphs 4, 5, 6, 7, 8, 9 and 10, are not exempt from seizure and sale when the suit is to recover the price of their purchase, or when they have been given in pawn.

Art. **599.** The following are exempt from seizure:—

1. Consecrated vessels and things used for religious worship;

2. Family portraits;

3. Immoveables declared by a donor or testator, or by law, to be exempt from seizure; and sums of money or objects given or bequeathed upon the condition of their being exempt from seizure;

4. Alimentary allowances granted by a court, and sums of money or pensions given as alimony, even though the donor or testator has not expressly declared them to be exempt from seizure. They may, however, be seized for alimentary debts;

5. All vessels, boats, and other fishing craft, tackle, nets, seines, lines or other fishing apparatus, and provisions belonging to any fisherman and necessary for his subsistence and that of his family or for his fishing operations. Such effects may, however, be seized and sold for their purchase price, but not between the first day of May and the first day of November;

6. Pay and pensions of persons belonging to the Army or to the Navy;

7. Contingent emoluments and fees due to ecclesiastics and ministers of worship by reason of their current services and the income of their clerical endowment;

8. The salary of professors, tutors and school-teachers;

9. Salaries of public officers; with the exception of those of public officers and employees of the Province, whether permanent or not, which are seizable for:

(a) One-fifth of every monthly salary not exceeding one thousand dollars per annum;

(b) One-fourth of every monthly salary exceeding one thousand dollars but not exceeding two thousand dollars per annum; and

(c) One-third of every monthly salary exceeding two thousand dollars per annum;

10. Salaries of city or town clerks in incorporated cities or towns, except as to the proportions mentioned in Paragraph 9;

11. All other salaries and wages, at whatever time and in whatever manner payable, for

(a) Four-fifths, when they do not exceed three dollars per day;

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Annotation

Exemptions —From execution.

Annotation (*continued*)—**Exemptions** (§ II A—5)—**What property is exempt.**

(b) Three-quarters, when they exceed three dollars but do not exceed six dollars per day; and

(c) Two-thirds when they exceed six dollars per day.

12. Books of account, titles of debt and other papers in the possession of the debtor, except as mentioned in Article 641.

Art. **641.** Debentures, promissory notes, whether negotiable or not shares in corporations and other instruments payable to order or to bearer, bank notes included, may be seized like all other moveable effects belonging to the debtor.

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THOMPSON v. THOMPSON.

Ontario Supreme Court, Falconbridge, C.J.K.B. August 19, 1914.

INJUNCTION (§ III—138)—*Affidavit for—Will—Action to set aside—Restraining executors from dealing with estate.*]—Motion by the plaintiffs to continue an injunction granted ex parte by BRITTON, J., restraining the defendants from dealing with the estate of Thomas Thompson or taking proceedings under the letters probate. The learned Chief Justice said that the material filed on behalf of the plaintiffs disclosed a very weak case. With the exception of a statement on hearsay alleged to have been made by a Minister of the Gospel, who did not himself make an affidavit, the only real material was what was contained in the affidavit of a medical practitioner, who said that he visited the testator on the 22nd May last—the will having been made on the 20th May. The doctor says: "I verily believe that the said Thomas Thompson was not capable of making a will on the said 22nd day of May." He did not swear that, in his opinion, the testator was not capable of making a will on the 20th. In other words, the Court was asked to draw an inference which the deponent evidently did not venture to draw. It was sworn in the affidavits filed by the defendants that the doctor visited the testator on the 19th; and it seemed strange that this fact was not mentioned in the doctor's affidavit. It looked as though these omissions were designedly made; but the affidavits were drawn in a very slovenly fashion. For example, the plaintiff Alice Thompson was made to swear in her affidavit that "I am one of the above-named defendants." Motion adjourned until the trial, the injunction not being continued in the meantime. Costs of this motion to be costs in the cause to the defendants in any event, unless the Judge at the trial should otherwise order. W. J. McLarty, for the plaintiffs. John King, K.C., for the defendants.

Motion adjourned until the trial, without injunction meantime.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

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PRIER v. PRIER.

Ontario Supreme Court, Falconbridge, C.J.K.B. August 10, 1914.

SPECIFIC PERFORMANCE (§ I E—30)—*Conveyance of farm by parents to son — Bond for maintenance — Consideration.*]—Action originally brought by the father and mother of John Prier to enforce bonds given by him for their support and maintenance, the defendant being the executor and devisee of John Prier, to whom the original plaintiffs had conveyed their farm, in consideration of the bonds, etc. The action was continued by the executor of the father, and an alternative claim to set aside the conveyance of the farm was made. The learned Chief Justice said that the old people were both dead; and, on the great preponderance of testimony, they had nothing to complain of in their lifetime—e.g., many witnesses deposed to offers made to them to build a house, as contemplated by the bonds. This was no case of failure of consideration. The contract was executed on both sides. Action dismissed—under all the circumstances, without costs. J. S. Fraser, K.C., for the plaintiff. F. F. Pardee, K.C., for the defendant.

Action dismissed.

McKINNEY v. McLAUGHLIN.

Ontario Supreme Court, Falconbridge, C.J.K.B. August 6, 1914.

PLEADING (§ III B—310)—*Failure to plead lien—Statement of defence—Action for possession of motor car.*]—Motion by the plaintiff for judgment on the pleadings in an action to recover possession of a motor car and damages for detention. The defendants asserted a lien upon the car. The learned Chief Justice said that it was quite clear that the statement of defence did not disclose a defence to the cause of action alleged in the statement of claim. The lien should

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be specially pleaded, and particulars of the debt in respect of which the lien was claimed should be given: Bullen & Leake on Pleading, 6th ed. (1905), p. 866 et seq.; Halsbury's Laws of England, vol. 27, p. 911; *Halliday* v. *White* (1864), 23 U.C.R. 593; *Somers* v. *British Empire Shipping Co.* (1860), 8 H.L.C. 338; *Monarch Life Assurance Co.* v. *Mackenzie* (1913), 15 D.L.R. 695, 25 O.W.R. 743(P.C.) The plaintiff was, therefore, entitled to judgment, with costs, and with a reference as to damages. The defendant should be allowed to amend on payment of costs. W. Laidlaw, K.C., for the plaintiff. L. F. Heyd, K.C., for the defendants.

Leave to defendant to amend.

Re NATIONAL AUTOMOBILE WOODWORKING CO. Ltd.

Ontario Supreme Court, Falconbridge, C.J.K.B. August 19, 1914.

CORPORATIONS AND COMPANIES (§ VIII D—380)—*Winding-up—Order under Dominion statute—Consent of creditor or shareholder—Section 12 of Winding-up Act.*]—Motion by the assignee of the company for an order for the winding-up of the company under the Dominion statute. The learned Chief Justice said that, upon filing the written consent of a creditor or shareholder to the amount required by sec. 12 of the Winding-up Act, the usual order should go; Frederick Curzon Clarkson to be provisional liquidator; reference to the Master in Chambers to appoint a permanent liquidator and exercise the other usual powers. J. F. Boland, for the applicant. Grayson Smith, for A. J. H. Eckhardt.

Motion granted.

Re KIRK.

Ontario Supreme Court, Kelly, J. May 13, 1914.

APPEAL (§ II—35)—*Jurisdiction—Appeal from Surrogate Court—Right of appeal by administrators—Amount—Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 69, sub-sec. 6.*]—Appeal by the administrators of the estate of Charles Thomas Kirk, deceased, from an order of the acting Judge of the Surrogate Court of the United Counties of Northumberland and Durham allowing against the estate the claim of Charles J. Goodfellow and Martha M. Goodfellow at $194, the amount claimed being $247.50.

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W. F. Kerr, for the claimants, objected that no appeal lay.
F. M. Field, K.C., for the appellants.

KELLY, J.:—The administrators, in pursuance of 1 Geo. V. ch. 18, sec. 3 (Surrogate Courts Act, R.S.O. 1914 ch. 62, sec. 69), served notice disputing the claim except in respect of the sum of $2, and the proceedings to determine the validity of the claim taken under that section.

On the argument, counsel for the claimants took the preliminary objection that no appeal lies, contending that under sub-sec. 6 of sec. 69 (above), what is here to be considered is the amount in dispute upon the appeal, and, that amount not exceeding $200, there is not the right to appeal.

The position taken by the appellants is, that sub-sec. 6 gives a right to appeal even in cases where the amount involved in the appeal does not exceed $200, if the amount of the original claim exceeded that sum.

The question involved in this appeal is, whether the appellants are liable for payment of $194. Should they succeed, they would be relieved from payment of that sum; should they fail they would remain liable for it; so that what is in dispute, or, as the statute puts it, what is contested (in the appeal), is their liability to pay $194.

In *Lambert* v. *Clarke*, 7 O.L.R. 130, the right to appeal under sec. 154 of the Division Courts Act, R.S.O. 1897 ch. 60, where the sum in dispute in appeal did not exceed $100, was discussed and dealt with; the line of reasoning there adopted can be applied here. But, apart altogether from that authority and that reasoning, I am of opinion that, upon the true construction of sub-sec. 6, an appeal does not lie in this case; and the appeal should be dismissed with costs.

Appeal dismissed.

BALDWIN v. CANADA FOUNDRY CO.

Ontario Supreme Court (Appellate Division). May 13, 1914.

SALE (§ II—25)—*Warranty—Sale and installation of machinery—Fuel consumption—Breach—Delay—Limitation of liability—Damages.*]—Appeal by the defendants from the judgment of LENNOX, J., 6 O.W.N. 152, declaring the plaintiff entitled to damages and directing a reference.

J. A. Paterson, K.C., for the appellants.
McGregor Young, K.C., for the plaintiff, the respondent.

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THE COURT dismissed the appeal with costs thereof to the plaintiff upon the final taxation.

Appeal dismissed.

HEIMBACH v. GRAUEL.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. May 12, 1914.

FRAUD AND DECEIT (§ I A—1)—*Misrepresentation — Sale of land—Action for deceit—Evidence—Findings of fact of trial Judge—Damages.*]—Appeal by the defendants from the judgment of KELLY, J., 5 O.W.N. 859.

E. E. A. DuVernet, K.C., for the appellants.

R. McKay, K.C., and *A. B. McBride*, for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs.

Appeal dismissed.

BENNETT v. STODGELL.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 12, 1914.

VENDOR AND PURCHASER (§ III—35)—*Realty sale—Option in lease—Acceptance.*]—Appeal by the plaintiff from the judgment of MIDDLETON, J., 6 O.W.N. 163, dismissing the action.

M. K. Cowan, K.C., and *J. W. Pickup*, for the appellant.

E. D. Armour, K.C., for the defendants, the respondents.

THE COURT granted a new trial, on terms, with leave to amend and add parties. The costs of the last trial and of this appeal to be costs to the respondents in any event, unless the trial Judge should otherwise order.

New trial granted.

SANDWICH SOUTH v. MAIDSTONE.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. June 15, 1914.

MUNICIPAL CORPORATIONS (§ II G—235)—*Drainage—Insufficiency of drain—Report of engineer—Assessment against ad-*

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joining townships—"Surface water"—Municipal Drainage Act, R.S.O. 1914, *ch.* 198, *sec.* 3, *sub-sec.* 6.]—Appeal by the plaintiffs and cross-appeal by the defendants from a judgment of the Drainage Referee.

J. G. Kerr, for the plaintiffs.
J. H. Rodd, for the defendants.

The judgment of the Court was delivered by MULOCK, C.J. EX:—This is an appeal from the decision of the Drainage Referee, and we are asked to set aside the report and assessment of James S. Laird, engineer of the township of Maidstone, in respect of a proposed improvement of the west town line and Mooney Creek drain.

The townships of Maidstone and Sandwich South adjoin each other, and originally portions thereof, which may be referred to as the drainage area, were a swampy swale. Southerly, easterly, and westerly of this area were higher lands, from which surface water flowed in a northerly direction towards this swampy swale, thereby contributing to its swampy character, the water partly escaping therefrom by certain natural watercourses into Big Pike creek. Nevertheless, the drainage area remained in a condition calling for artificial drainage, and work of this character has for many years been carried on under the provisions of the drainage laws.

Amongst such works was the construction of a drain on the town line which runs northerly and southerly between the two townships. The Michigan Central Railway crosses this town line, and it was necessary to have a sufficient passage for water along this drain, including the point where it was crossed by the railway. Accordingly at this point a culvert was put in as forming part of the town line drain construction work. This culvert was not in accordance with the engineer's report, and proved insufficient.

Complaints as to the insufficiency continued for some years without bearing fruit. The waters, obstructed by the insufficient culvert, . . . injured the lands of one Deehan, who brought an action under the Drainage Act against the Corporation of the Township of Maidstone, and recovered a verdict of $200 and costs.

In his judgment the Drainage Referee says: "The culvert crossing the Michigan Central Railway is admittedly insufficient for the purpose intended, not being the culvert which was intended by the engineer who made the report under which the town line drain was constructed. As a result of the insufficiency

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of the culvert, the water brought down by the west town line drain to that point has been in part blocked, and thus, as I find upon the evidence, caused to overflow on to the lands of Graves and from these on to the lands of the plaintiff. . . . In the event of the municipality deeming it necessary, in order to prevent a continuation of damage, to improve, extend, or alter the town line drain work, it may add the damage and costs incurred in this action to the engineer's estimates of the cost of such improvements, extensions, or alteration."

In consequence of this judgment, the Corporation of the Township of Maidstone, under the Drainage Act, instructed their engineer to report the scheme for remedying the defective condition of the west town line drain and for assessment of the cost. Thereupon the engineer made his report, whereby he recommended that the town line drain be cleaned out and improved for a distance of 300 rods northerly of the railway, at an estimated cost of $1,467.87, this sum to include the sum of $80, the cost of spreading on the road earth to be taken from the drain, and he also added to the cost of the work the sum of $958.78, being the damages and costs in the Deehan case, making the total cost $2,426.65. This sum he recommended to be assessed as follows: Against Maidstone, because of benefit to roads, $442.80; because of outlet for water from roads, $186.55; lots for improvement, $23.65; lots for benefit from outlet, $1,024.40; making a total assessment against Maidstone and lots in Maidstone of $1,677.40. Against Sandwich South, because of benefit to roads, $358.85; because of outlet for water from roads, $67.50; lots for improvement, $229.65; lots benefited by outlet, $93.25; making the total assessment against Sandwich South and lots in Sandwich South, $749.25.

From this report Sandwich South appealed to the learned Drainage Referee and . . . he gave judgment refusing to disturb the engineer's recommendations except as to the disposition of the amount of the judgment and costs in the case of Deehan v. Township of Maidstone. As to those items, he ordered that the amount awarded for costs should be "chargeable against the lands and roads in the township of Maidstone alone."

From the Referee's judgment Sandwich South appeals, on the general ground that the report and assessment are illegal, unjust, and excessive. Maidstone cross-appeals because of the costs in the Deehan case being assessed exclusively against the lands and roads in Maidstone.

As to that part of the plaintiffs' appeal respecting the assess-

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ment of the cost of the work, Mr. Kerr very ably argued that in fixing the assessment the engineer should have taken into account the assessment in connection with the Tooney outlet and other assessments for other works in respect of the same drainage area, and contended that the lands in Sandwich South, having already been assessed for cut-off purposes, were no longer assessable in respect of new works of a like nature.

The evidence shews that in about the year 1881 drainage works were begun; the first attack on natural conditions being to improve Tooney creek, which was the natural outlet for the swale district. Then followed the construction on the east side of the town line of a drain which intercepted some water from the higher level on its way down to the swale, thereby furnishing an artificial outlet northerly to Pike creek. This work, so far as it was effective, operated as a cut-off in respect of the lands on the west side of the town line drain, and to that extent relieved the Tooney creek drain. From time to time other drains were constructed whereby surface water was conducted to the town line drain. These various side drains diverted into the town line drain waters from higher levels, which but for the town line drain would have flowed into the swale and upon the lands on the north-westerly side of the town line.

Further, these various side drains accelerated the flow of water into the town line drain; and, silt having there accumulated, it was deemed advisable to clean out and deepen the town line drain; otherwise it might prove insufficient to take care of all the water, in which event there might be an overflow across the town line and upon the lands of lower level.

Accordingly the work in question was undertaken. It consisted of cleaning out the west town line drain for a distance of 300 rods and deepening and otherwise improving it in order to benefit the drainage area in question.

Mr. Kerr strongly contended that the improvement in question took care of the artificial flow only, and not as a cut-off of surface water, within the meaning of sub-sec. 6 of sec. 3 of the Municipal Drainage Act, R.S.O. 1914 ch. 198. . . . I do not think that surface water has ceased to be "surface water" within the meaning of this section the moment it reaches a drain which is but one part of a system of drains constructed for the purpose of taking care of such surface water. If any part of such system proves insufficient, the water not so taken care of continues to be surface water within the meaning of the subsection.

That is the position here. The evidence justifies the improve-

ment of the town line drain as a necessary work in order to cut off the surface water, and thereby prevent it overflowing upon the lands in Sandwich South.

Therefore, the work, in my opinion, serves as a cut-off of surface water, within the meaning of the sub-section, and the cost is properly assessable against the lands thereby protected.

Mr. Kerr attacked the item of $80 for spreading on the town line the earth excavated from the drain in connection with its improvement. For all that appears, the spreading of the earth upon the road is the cheapest way of getting rid of it. Further, its utilisation in that manner improved the road by raising the grade upon the water level in the drain, and by widening it, whereby it is less dangerous. Thus it constitutes a necessary and proper part of the cost of the work, and the item is properly included in such cost. The facts respecting the item did not bring it within sec. 11 of the Drainage Act.

I have carefully studied the evidence and the report of the engineer, and am unable to see wherein that officer has disregarded the requirements of the statute in respect of his assessment of the sum of $1,467.87, being the estimated actual cost of the work.

The remaining question is in regard to the costs and damages in the Deehan case.

That action was against Maidstone alone, and in his judgment the learned Referee said: "In the event of the municipality deeming it necessary, in order to prevent a continuance of damage, to improve, extend, or alter the town line drainage work, it may add the damages and costs incurred in this action to the engineer's estimate of the cost of such improvements, extension, or alteration. I assume that any engineer instructed will not overlook the fact that these damages and costs have been occasioned by reason of the insufficiency of the outlet of a drainage work provided for the benefit of lands higher upstream than those of the plaintiff."

It further appears from that judgment that two conflicting views then existed as to the proper remedy for the condition then complained of, the Municipal Council of Maidstone taking the view that the improvement of the culvert under the railway crossing would meet the requirements of the case, whilst the plaintiffs' engineer and others thought that the improvement of the drain northerly from the railway was necessary. The council was at that time negotiating with the railway company to improve the culvert, and the learned Referee approved of their efforts, and for that reason did not see fit to penalise

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Maidstone with the costs of that action, but disposed of them in the manner set forth in the foregoing extract from his judgment.

The council appears to have reached the conclusion that, in order to prevent a continuance of the damage, it was necessary to adopt the alternative plan of cleaning out and enlarging the town line drain, and in reaching that decision they had before them the judgment of the learned Referee that the costs and damages might be added to the cost of the work.

Sandwich South was not a party to that action, and may properly be held not bound by the disposition there proposed to be made of the damages and costs, and the whole matter is now before us and must be dealt with as res integra.

Nevertheless I feel that the proper disposition to make of these damages and costs is in accordance with the view expressed by the Referee . . . by permitting Maidstone to have them added to the engineer's estimated cost of the work.

It is obvious that the cleaning and enlargement of the town line drain was necessary in order to bring about a satisfactory solution of the question in issue, and that Maidstone was no more responsible than was Sandwich South for its proving insufficient to take care of all the water.

For these reasons, the appeal should be dismissed with costs, and the cross-appeal allowed with costs.

Appeal dismissed and cross-appeal allowed.

JORDAN v. JORDAN.

Ontario Supreme Court (Appellate Division) Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. June 15, 1914.

TRIAL (§ I—1)—*Conduct and disposal—Alimony — Settlement—Repudiation—Statute of Limitations—Evidence—Findings of trial Judge—Husband and wife.*]—Appeal by the plaintiff from the judgment of MIDDLETON, J., of the 12th December, 1913, dismissing an action brought by Kate M. Jordan to set aside a settlement of a former claim against the defendant, her husband, for alimony, and upon several other causes of action.

The appellant, in person.
Shirley Denison, K.C., for the defendant.

The judgment of the Court was delivered by LEITCH, J.:—

. . . The plaintiff and defendant were married in the year

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1879 . . . and immediately after their marriage went to the defendant's home at Rosseau, where the defendant was carrying on business as a general merchant, and lived there until the year 1891, when the business was sold and the defendant moved his family to Toronto, where they lived until the autumn of 1894.

The plaintiff and defendant did not live happily. The wife brought an action for alimony against the defendant in 1896. The plaintiff, the wife, was represented in the action by eminent counsel who is now an occupant of the bench. The action came on for trial in October, 1896; and, on the advice of counsel, a settlement was effected on the 27th. The settlement was eminently proper, and, considering the circumstances of the defendant, was advantageous to the plaintiff. The defendant, the husband, was not in opulent circumstances. The settlement was not carried out with undue haste, but after discussion before the trial Judge and with the full knowledge on the part of the plaintiff, the wife, of the position and circumstances of the defendant. Everything was fair and above-board. There was no misrepresentation on the part of any one; in fact the wife, who had been taking an active interest in his business for a considerable time, was well aware of his circumstances and of his financial position. No fault was found with the settlement. Mrs. Jordan thoroughly understood it and what she was doing, and did not seek to repudiate what she had done for several years—until she brought this action. The husband carried out the settlement on his part, and Mrs. Jordan was paid the amount of the notes he gave at the time or shortly after the settlement.

The husband has not increased his estate, and has not become a rich man. He is now in no better position to pay a large amount of alimony than he was at the time of the settlement. The benefits which the plaintiff received under the settlement she has made no effort to return.

The plaintiff admits that she procured a divorce in the United States after the settlement; and that she was the plaintiff in an action for breach of promise in the Courts of that country. The plaintiff claims damages for various grievances, but she has not established any cause of action; and, if she had, the Statute of Limitations would be a complete bar.

A perusal of the evidence satisfies me that the trial Judge allowed the plaintiff every latitude in the trial of the action. She was treated with every possible consideration; the trial was most fair; the Judge was most patient. The evidence, which I have spent several days in perusing, satisfies me that there was

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no ground for any suspicion that she had been in any way wronged. She thoroughly undertood the position of her husband at the time of the settlement; there was no concealment; no misrepresentation.

The trial Judge has found that many of the statements made by the plaintiff are untrue and that she is absolutely unreliable and unscrupulous. It is not necessary for me to comment on the evidence given in this case in detail. I have spent several days in its perusal, and I agree with the trial Judge. . . . He has made no mistake either in law or the facts.

I need say nothing about the vicious attacks made by the plaintiff upon the defendant, her husband, except to observe that the charges she levelled at him, as found by the trial Judge, were without foundation.

The plaintiff's case has no merits that I can discover, after a careful perusal of the evidence; and this appeal is dismissed with costs.

Appeal dismissed.

WHITE v. NATIONAL PAPER CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Hodgins, J.A., Riddell, and Leitch, JJ. June 15, 1914.

PRINCIPAL AND AGENT (§ III—36)—*Commission on sale of goods—Commission-agreement — Construction — "Commission on all accepted orders"—Evidence.*]—Appeal by the defendants from the judgment of MIDDLETON, J., 6 O.W.N. 83.

C. A. Masten, K.C., and *G. Cooper*, for the appellants.
Hamilton Cassels, K.C., for the plaintiff, the respondents.

The judgment of the Court was delivered by HODGINS, J.A.:—The liability, if any, for the commission, sued for under the contract, arises under two letters exchanged between the parties and dated the 15th and 19th January, 1912, under which the respondent accepted the selling agency of the appellants' goods for Ontario (except Ottawa).

The material terms of the agreement are as follows:—

1. We (the appellants) shall pay you (the respondent) a commission of five per cent. on all accepted orders.

2. This commission shall be payable immediately the order is shipped, and, failing the customer paying the account, we shall deduct from the first settlement with you the commission paid on said orders.

3. You shall have the exclusive agency for the Province of

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Ontario, with the above exception, and at any time this agreement should cease, we shall pay you on all accepted orders up to the termination of this agreement.

4. Lastly, we agree to pay you said commissions whether or not the order is sent by you direct or whether by any party within your district. We . . . shall forward you at the end of each week a statement of all commissions due on orders received. We shall forward you a copy of each invoice as sent to the customer. We shall also keep you advised with any information in respect to all orders and send you copies of any letters we write to customers. If either of us wish to terminate this agreement, we can do so by giving one month's written notice to either party. All commissions to be paid at the end of each month."

From the above it will appear, as was the opinion of the learned trial Judge, that the provision for payment of commission "on all accepted orders" is the dominating and controlling clause.

The question is what the word "orders" means under this contract. The judgment in appeal construes it as meaning or including "contracts," whereas the appellants contend that its import is more limited, i.e., orders for particular goods given either under a contract previously made or sent in in the form of a request for a specific quantity of named paper.

I think the latter is the correct interpretation.

The appellants in fact apply the coating to paper, and in that sense are manufacturers of enamel book, lithographic, and coated label papers. The agency is not restricted to any special kind of paper, but extends to all kinds manufactured by the appellants.

The claim in the present case is for commission amounting to $1,491.36, being five per cent. on $35,000 worth of paper, the order for which is said to have been accepted by the appellants by virtue of a contract made by them with the Buntin-Reid Company dated the 4th June, 1912, less what was in fact supplied, on which the commission was admitted and paid to the respondent.

In construing the words used by the parties, it is well to remember the principle stated by Lord Esher, M.R., in *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q.B.D. 499, at p. 501: "If the words are capable of two meanings, you may look to the object with which they are inserted, in order to see which meaning business men would attach to them."

The situation of the parties, their respective occupations,

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what they were contracting about, and the way in which they contemplated the business was to be done, are all legitimate factors in this determination. But in this case the question is really narrowed down to ascertaining whether the contract with the Buntin-Reid Company in itself is an "accepted order," within the meaning of the principal agreement.

The Buntin-Reid Company contract contains a consent to purchase "certain papers" known as "Reliance coated book, coated either one or two sides." The appellants, in consideration of the agreement of the Buntin-Reid Company to purchase "goods of the Reliance grade amounting to not less than the sum of $35,000," were to supply "such coated papers known under the trade name of Reliance Coated Book, or Reliance Coated Litho., at a price of $6.50 per 100 lbs." There is a further provision that this price of $6.50 per 100 lbs. shall include delivery free of all charges to such points as Toronto, Hamilton, etc., and a guarantee "that the quality in all particulars is fully up to standard of samples submitted."

Under this contract the grade is specified, the trade names designated, and the quality is referred to certain samples, but the quantities, sizes, and thickness of paper, within these limits, is apparently left to be determined by the requirements of the Buntin-Reid Company, and the delivery is to be made at various named points.

If no further action were taken by the Buntin-Reid Company in the way of designating just what they wanted from time to time, it may be that an action would lie against that company. If it did, the action would be for damages, for it is not a contract which could be ordered to be specifically performed. But, if they asked for certain shipments to be made of designated sizes, etc., and these were not responded to, or, when furnished, failed to come up to the grade and quality demanded, then the liability would be the other way. Clearly something further was to be done before the appellants became in default. This illustrates the course of dealing that might naturally arise under the agreement sued on; and, as the respondent took part in the consummation of the Buntin-Reid contract, it is not unreasonable to consider it as throwing light upon the construction of his contract. It is an example of a state of affairs which might occur and with regard to which his contention may well be tested.

Dealing first with the main agreement, the words "accepted orders" imply that all orders may not be accepted, and that there was a right in the appellants to accept or reject. Under clause 2 shipment is to fix the time of payment, and the cus-

tomer's default in payment is to absolve the appellants from liability for the commission on the particular shipment, and entitles them to charge it back to the respondent.

Under clause 4, the order may be sent by the respondent or by the customer. Weekly statements of commissions on order received were to be sent by the appellants, as well as a copy of the invoice sent each customer.

It is obvious that the provisions of clauses 2 and 4 contemplate a definite requisition for certain kinds of paper from customers, procured either by the respondent's direct intervention or originating in his territory without it, and shipment pursuant to direction, to certain points, as well as payment by such customer.

These provisions fit in well with the course of dealing intended by the Buntin-Reid Company contract, and are inapplicable if that contract is to be deemed an "accepted order," because there can be no shipment and no copy of an invoice unless and until directions are received as to the former, and specifications are forwarded as to the exact paper required.

The judgment in appeal minimises these preliminaries, which, in my opinion, are essential, on the ground that, as the shipments might be either immediate or future, the appellants could not free themselves from liability to pay commission by breach of contract. But there could be no breach of contract until the appellants were put in default by neglecting or refusing to fill the order, which they could not do till they knew what was required.

That the parties contemplated that both would perform their obligations, and that the Buntin-Reid Company were of good financial standing and answerable in damages, is true, but good faith and solvency are not equivalent to the performance of acts necessary to bring into play the provisions of the contract and required to be complied with before it can effectually be executed. The agreement is not that, if a contract is made under which orders may be, but are not, given, then the appellants will pay commissions upon the orders intended to be given, nor is it to pay commission upon damages for default in not carrying out the agreement. It is to pay on orders given and accepted.

If the Buntin-Reid Company, being dissatisfied with the mode in which the orders they gave were being complied with, desisted from sending in any more, or if they for other reasons ceased to require further shipments, then a question might arise as to whether they or the appellants were liable inter se for non-performance of the contract existing between them.

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But I am unable to persuade myself that the respondent can treat default in the same way as performance, and require payment on orders not given and not accepted, unless he has specially provided for that contingency in his contract. In the case cited of *Lockwood* v. *Levick* (1860), 8 C.B.N.S. 603, the recovery is expressly put by Erle, C.J., on the ground that the defendant had the option of delivering the goods and so making a profit, and that, having accepted an order—in that case for a specified amount of web—which he should have performed, he could not contend that he was not liable to pay a commission as upon the "goods bought." If the order had in this case been given by the Buntin-Reid Company, and, after their acceptance, the appellants had refused or neglected to fill them, the respondent might be entitled to recover.

The question of responsibility as between the appellants and the Buntin-Reid Company is one thing, and the rights of the respondent against the appellants is quite another.

The respondent has failed to shew that there were any orders given which were accepted, and on which commission has not been paid.

The Buntin-Reid Company contract establishes a relationship which, if acted upon, would have benefited the respondent, and is in that respect very similar to the agreement in *Field* v. *Manlove* (1889), 5 Times L.R. 614, in which it was held that the plaintiff could not recover commission upon the full market-price of the twenty-seven engines which were not taken by Messrs. Bath & Son, to whom the defendants had given a monopoly of sale in Canada on condition that they would take thirty engines.

I think that the respondent must be confined to the actual result as between the parties to it, as was the case in *Field* v. *Manlove*, *supra;* and if, by their lack of action, nothing was done to create a state of affairs such as is required to make a basis of liability under his contract, he cannot, in my judgment, recover.

I have not referred to the subsequent correspondence between the parties and the Buntin-Reid Company as illustrating what the word "orders" meant or the evidence upon that point, the admissibility of which is doubtful. See *North Eastern R.W. Co.* v. *Hastings*, [1900] A.C. 260. But, if it is read and if the cases I have already mentioned are considered, there will not, I think, be much difficulty in concluding that the word "order" in a commercial contract is a well-understood word, and that it was used in its usual signification in the contract in this case.

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The appeal should be allowed and the action dismissed with costs.

Appeal allowed and action dismissed.

LAIRD v. TAXICABS Ltd.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. June 15, 1914.

TRIAL (§ I H—39)—*Remarks of Court—Jury — Irrelevant evidence—Misleading observations—General verdict—Prejudice —New trial.*]—Appeal by the defendant company from the judgment of LATCHFORD, J., upon the verdict of a jury, in favour of the plaintiff for the recovery of $1,750, in an action for damages for injury to the plaintiff's automobile resulting from a collision with a taxicab of the defendant company in High Park, shortly after midnight of the 25th September, 1913.

The verdict was a general one, no questions having been submitted to the jury.

J. P. MacGregor, for the appellant company.

T. N. Phelan, for the plaintiff, respondent.

The judgment of the Court was delivered by MULOCK, C.J. EX.:— . . . A careful perusal of the evidence leaves me in great doubt as to which, if either party alone, caused the accident. In a case like the present, it would have been preferable to submit questions to the jury. They might have served the useful purpose of not only directing the jury's attention to the determining issues of fact, but also that of reducing the danger of the jury being unconsciously swayed by considerations foreign to the issue. . . .

The defendant company's counsel complains that undue prominence was given and unfair reference made throughout the trial to certain circumstances which may have prejudiced the jury against the defendant company, and that in consequence it did not have a fair trial. . . .

[References to the evidence and the trial Judge's charge.]

The issue was not whether the defendant company carried on the business of letting taxicabs for immoral purposes, but whether its chauffeur, when in charge of one of its taxicabs, had by negligence caused the accident. Much of the evidence . . . was not pertinent to the issue. To intimate to a jury that the defendant company hired out its taxicabs for immoral

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purposes as "travelling brothels" would in all probability create a prejudice in their minds against the defendant company; and, considering the prominence given to the supposed character of the women and the object of the parties in the two vehicles, I doubt if that prejudice was removed by the learned Judge's instructions to them not to consider the suggested purposes of the defendant company in letting out its taxicabs.

Further, while perhaps all the women in the car and the taxicab may have belonged to the same unfortunate class, still the jury (and juries are not always logical), with their attention frequently and pointedly called to the apparently immoral purposes of the two parties in those vehicles, may have been more prejudiced against the defendant company, whose taxicab was in use with its consent, than against the plaintiff, whose car was being used without his consent. In the weighing of the conflicting evidence, the prejudice thus aroused may have been thrown into the scale and turned it against the defendant company.

Under the circumstances, it appears to me that the trial has not been satisfactory, and that the defendant company has reasonable grounds for questioning its fairness; and, therefore, the Court, in the exercise of its discretion, should set aside the judgment and direct a new trial.

The costs of the former trial and of this appeal to be costs in the cause.

Appeal allowed and new trial granted.

FEHRENBACH v. GRAUEL.

Ontario Supreme Court (Appellate Division) Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. June 17, 1914.

VENDOR AND PURCHASER (§ I B—5)—*Realty sale—Payment of purchase money—By instalment—Title—Rescission — Damages—Costs.*]—Appeal by the defendant from the judgment of LENNOX, J., 6 O.W.N. 39.

E. E. A. DuVernet, K.C., and *W. H. Gregory*, for the appellant.

R. McKay, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts at length):—The notice of motion restricts itself, and the argument was limited to, a claim that it

should have been found that there was nothing payable at the time of the issue of the writ. No appeal is taken against the dismissal of the counterclaim. . . .

The state of affairs at the time of the payment in February, 1913, was this: the defendant owed to the plaintiff a note and about $3,000 balance of the payment due in November, 1912; these were already payable. Then there was a debt not yet due, debitum in præsenti, solvendum in futuro, of over $8,000; all of this the defendant *might*, part of it, viz., $3,000, he *must*, pay on the 1st November, 1913.

An agreement was made whereby the price of 210 acres should be paid in February and land conveyed which, under the agreement, was not to be conveyed till the last payment of the purchase-money had been made. The money was paid generally; as the defendant says, he "paid it on the whole of the land contract;" before any claim was made by the defendant as to any application to be made of this sum, the plaintiff applies it to the "whole of the land contract," by applying it, first to pay the amount overdue and the balance on the whole contract. The defendant claims the right to apply the balance after paying overdue claims, upon the instalment due on the 1st November, 1913, and so establish that there was nothing due at the date of the writ.

At the time of the payment, the defendant had no right under the contract to pay any sum except the amount overdue and unpaid; even his right to pay more than $4,000 as of the 1st November, 1912, had gone with the day. Consequently, he must be considered as paying the excess under the agreement made specially as to the land sold to Fleager. The land was then considered as actually sold to the defendant, and he entitled to a conveyance. The right to a conveyance accrued only when all the purchase-money was paid, and it seems to me that it must be considered that this amount was paid as part of the final instalment. The argument that the plaintiff had, after the payment, a balance of money in his hands belonging to the defendant, cannot avail; neither considered the balance the money of the defendant; and, after payment, it was undoubtedly the money of the plaintiff, and not that of the defendant.

The argument which might be made that the defendant, in making the excess payment, did so under the option given him of paying more than $4,000 in November, 1912, does not assist him. The application made by the plaintiff of the money has precisely the same effect as though he had been in February, 1913, allowed to exercise the option he had in November, 1912.

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None of the circumstances succeeding February, 1913, has displaced the right of the plaintiff to appropriate the payment as he has done; and I do not see anything inequitable or unfair in his insisting on his rights when he made a conveyance of the land at the request of the defendant.

Whether the defendant has any rights against the plaintiff not raised by his pleadings, we need not consider.

I think the appeal should be dismissed with costs.

Appeal dismissed.

RAINY RIVER NAV. v. ONTARIO AND MINN. POWER.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. June 15, 1914.

[*Rainy River Nav. v. Ontario and Minn. Power*, 12 D.L.R. 611, varied.]

WATERS (§ I C 5—52)—*Navigation—Obstructions — Power companies' dam—Decrease in supply—Injury to steamboat business—Nuisance—Damages.*]—Appeal by the plaintiffs from the judgment of BRITTON, J., 12 D.L.R. 611, 4 O.W.N. 1591.

The appellants sought to increase the damages allowed by the trial Judge against the two defendant companies, the Ontario and Minnesota Power Company and the Minnesota and Ontario Power Company.

I. F. Hellmuth, K.C., and *A. R. Bartlet*, for the appellants.

A. W. Anglin, K.C., and *Glyn Osler*, for the defendants, the respondents.

The judgment of the Court was delivered by MULOCK, C.J.Ex.:—This is an action for damages because of the defendant companies penning back water from the Rainy river to such an extent as to interfere materially with the operation of the plaintiffs' steamboat called the "Aguinda" plying between the town of Fort Frances, situated at the easterly end of the river, and the village of Rainy River, which is at its mouth, for the period extending from about the 28th June, 1911, until the 5th August, 1911.

Mr. Justice Britton, without a jury, tried the case and directed judgment for the plaintiff for $540 and costs. The plaintiffs complain that this sum is inadequate and appeal in order to have it increased. The defendants in resisting the appeal contend that the plaintiffs are not entitled to maintain the action. . . .

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The Rainy river is an international boundary between Canada and the United States: *Rainy Lake River Boom Corporation* v. *Rainy River Lumber Co.* (1912), 6 D.L.R. 401, 4 O.W.N. 5, 27 O.L.R. 131.

The north part of the dam is within Canadian territory, the southerly within that of the United States. Thus no one corporation could be empowered to build such an international work; hence the two companies, for the common purpose, erected it as one work.

For the defence it was contended that the injury complained of by the plaintiffs was not different from that suffered by all persons navigating the river; that, consequently, the conduct of the defendants, at most, constituted a public nuisance only; and that the plaintiffs were not entitled to maintain this action. The defendants' counsel also urged that, as there was no physical injury to the plaintiffs' property, but at most merely an injurious interference with their business, they were not entitled to damages for loss of trade, and *Ricket* v. *Metropolitan R.W. Co.* (1867), L.R. 2 H.L. 175, was relied upon in support of this latter contention. . . .

[Reference also to *Metropolitan Board of Works* v. *McCarthy* (1874), L.R. 7 H.L. 243, at p. 256.]

These cases do not decide that the measure of damages recoverable at common law is limited to what would be recoverable by way of compensation for lands injuriously affected when a claim is made under these Acts, nor do they decide whether at common law an action would or would not in any particular case lie for injury to trade. Any such expressions of opinion as to the rights of parties at common law which may be found in either of those cases were obiter—the sole question involved in each of them being, what compensation was intended by the Land Clauses Act and the Railway Clauses Act. . . .

[Reference to *Greasley* v. *Codling* (1824), 2 Bing. 263.]

The facts of the present case shew that for some years the plaintiffs had been engaged in the carrying trade throughout the whole length of the river, and for the purposes of such trade owned or were interested in wharves or other properties along the river, and were actually engaged in prosecuting the business for the season of 1911, when on the 29th June the "Aguinda," which had with difficulty reached Fort Frances, owing to shallow water, was compelled to lie up there from that day until the 5th August, because the river had ceased to be navigable in consequence of the penning back of the water by the defendants.

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The general principle is that a private action may be maintained in respect of a common nuisance where the complaining party has sustained some special damage not common to the general public, and thus in each case it becomes a question of fact whether the injury complained of specially affects the plaintiff or a limited few, the plaintiff being of the number: *Bell* v. *Corporation of Quebec* (1879), 5 App. Cas. 84. . . .

[Reference to *Rose* v. *Miles* (1815), 4 M. & S. 101; *Drake* v. *Sault Ste. Marie Pulp and Paper Co.* (1898), 25 A.R. 251; *Ireson* v. *Holt Timber Co.* (1913), 30 O.L.R. 209; *Winterbottom* v. *Lord Derby* (1867), L.R. 3 Ex. 316, 322; *Page* v. *Mille Lacs Lumber Co.* (1893), 53 Minn. 492.]

Dealing then with the facts of this case, the question is, whether the defendants by their works so interfered with the navigability of the river as to occasion special damage to the plaintiffs. The evidence shews that the dam above the falls so prevented water escaping as to render the river non-navigable for the plaintiffs' vessel the "Aguinda" from the 29th June, 1911, until the 5th August, a period of five weeks. During this time she was tied up at Fort Frances, daily expenses being incurred. In addition, this serious interruption of about five weeks, a very substantial portion of the vessel's whole summer season, which ended on the 15th September, must have injured the goodwill of the route and prejudicially affected the company's earnings throughout the remainder of the season.

If running duirng those five weeks, the vessel would have earned money for carrying the mails, passengers, and freight. This the defendants, by their unlawful and highhanded conduct, prevented; and, in my opinion, they are liable for the loss thus occasioned. The plaintiffs had a subsidy from the Dominion Government for carrying the mails between Kenora and Fort Frances, which, estimated on a mileage basis, amounted to about $66.75 per round trip between Fort Frances and Rainy River. But for the defendants' interference with the water, the vessel would have been able during the five weeks to make 15 round trips, thereby earning at least $1,000 of this subsidy.

From the examination of the trip reports, I think it reasonable to assume that the vessel's receipts from other sources for the five weeks would have amounted to $600. Against these earnings would have to be charged the difference between the expenses incurred when the vessel was tied up and the probable expense if operated. I find no satisfactory evidence enabling me to fix this amount. The plaintiffs should furnish the Court with a statement, and if it is not satisfactory to the defendants then there should be a reference to ascertain the amount of such

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difference, and the parties may speak to the question of costs of the reference.

If no inquiry as to such expenses is desired, the plaintiffs will be entitled to the two sums of $1,000 and $600, without any deduction.

The plaintiffs also claim damages for the interruption of their business. They had been at expense in advertising and otherwise making it known, and there is evidence to warrant the inference that the plaintiffs' business was materially prejudiced by the five weeks' interruption, and for this interference I would give them $360, being at the rate of $20 per trip for 18 trips between the 5th August and the close of navigation.

The judgment appealed from will be amended by increasing the damages to $1,960, subject to the reference, if any. If it be found that the cost of operating the vessel during the five weeks would have exceeded the actual cost incurred in keeping her in commission when she was tied up, then such excess should be deducted from the sum of $1,960.

The plaintiffs are entitled to the costs of the appeal.

Appeal allowed varying judgment below.

Re HARTWICK FUR CO. Ltd.; MURPHY'S CLAIM.

Ontario Supreme Court, Kelly, J. May 18, 1914.

CORPORATIONS AND COMPANIES (§ VI F—350)—*Preferences—Wages—Dominion Winding-up Act, sec. 70—Commercial traveller—Commission.*]—Appeal by the liquidator of the company from a decision of the Master in Ordinary.

G. W. Adams, for the liquidator.

C. F. Ritchie, for the claimant.

KELLY, J.:—On the reference before the Master in Ordinary, in proceedings to wind up the Hartwick Fur Company Limited, he declared that Harry Murphy was entitled to rank in respect of a preferred claim for $837.47 under the provisions of sec. 70 of the Dominion Winding-up Act.

The liquidator appeals against this decision on two grounds: (1) that the claimant does not come within the class of persons entitled to the preference given by sec. 70; and (2) that the money so allowed the claimant did not accrue to him in such manner and at such time as to entitle him to that preference.

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In *Re Morlock and Cline Limited*, 23 O.L.R. 165, it was held that a commercial traveller is of the class of "clerks or other persons" mentioned in sec. 70. Murphy, the claimant, is, it is in evidence, a commercial traveller. His engagement with the company was to sell furs, and in the months during which he made the sales for making which he now claims, his whole time and services were to be given, and, so far as the evidence shews, were given, to the company. By the terms of the engagement he was to be paid, not a fixed salary or wages, but a commission on the amount of his sales. The contention is, that the character of his services and the mode of payment adopted took him out of the class entitled under the statute to a preference. The only circumstance which might be urged as against the claimant's right is the payment by commission instead of by straight salary; but the adoption of that means of payment does not, in my judgment, affect the relationship of the parties towards each other or take the claim out of the class intended to be benefited by the section referred to.

Nor do I think that the right of the appellant to succeed can be established on the other ground. The sales for making which the claim has been allowed were made in the months of March and April, 1913—perhaps some trifling sales later. The agreement was that payment should be made after the 1st July. The winding-up order, I am informed—it is not before me—was made on the 28th August, 1913. The Master had sufficient evidence before him to find that the amount allowed was due under the terms of sec. 70 so as to give the preference, and he so found. I see no reason for disturbing that finding.

The appeal is dismissed with costs.

Appeal dismissed.

HALLETT v. ABRAHAM.

Ontario Supreme Court, Lennox, J. May 15, 1914.

MASTER AND SERVANT (§ V—340)—*Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 4—Injury to servant—"Workman"—"Contractor."*]—Action for damages for injury sustained by the plaintiff, a carpenter, by falling from the roof of a house upon which he was working. The plaintiff was in the employment of the defendant Fisher; but the negligence alleged was that of the defendant Abraham, who was said to be the contractor for the work which the plaintiff was engaged upon.

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Harcourt Ferguson, for the plaintiff.
R. J. Gibson, for the defendant Abraham.
G. W. Holmes, for the defendant Fisher.

LENNOX, J.:—There is no ground upon which I can direct judgment against Fisher. The jury acquitted him of negligence, and I do not see that they could have done anything else. Their findings, at all events, are conclusive.

The defendant Abraham is not liable at common law. It is true that the negligence, if any, from which the plaintiff suffered, was not negligence of a fellow-servant, but of this defendant himself; the plaintiff was, however, in no sense Abraham's servant, but the servant of Fisher.

The doubts I expressed, in charging the jury, as to the want of a ladder being the cause of the injury, have not been entirely removed from my mind; but, in the face of a charge emphatically favourable to the defendants, upon this point, the jury have come to the conclusion that it was the cause of the accident, and I cannot say that there was not any evidence to support their finding.

Even with this question settled, I have had a good deal of difficulty in coming to the conclusion that the defendant Abraham is liable, that is, that he owed any duty to the plaintiff. Outside of the statute he certainly did not. The main contest in the case was as to whether this defendant acted solely in the capacity of an architect, as he contended, or as a contractor, upon an accepted tender, doing the work and supplying the material for a specified sum. It ultimately turned upon whether McWilliams, the building owner, accepted Abraham's tender. The jury found that he did, and in this finding I entirely concur. This defendant then occupied the unique position of being at once contractor and architect—the builder and supervisor and judge. The sharp contrast between his evidence as first given, and his evidence in reply, when unexpectedly confronted by McWilliams, was not creditable to him, or calculated to win the sympathy or confidence of the jury. The plaintiff has to recover under sec. 4 of R.S.O. 1914 ch. 146, the Workmen's Compensation for Injuries Act, if at all. I think he can. It might be argued, perhaps, that this section is confined to the case only of the owner of the property who supplies "ways, works," etc., but I think it is not necessarily so confined. A statute of this character is to receive a liberal interpretation. This defendant it was who contracted with Fisher, the plaintiff's employer. He was in sole charge and possession, and, as contractor and architect, was in exclusive control until the work

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was completed and passed. "The execution of the work was being carried out under a contract." He was the person owning and supplying the "ways, works, machinery, plant, . . . used for the purpose of executing the work;" the plaintiff was "a workman" of Fisher, "a contractor or . . . sub-contractor," and "the defect," as found by the jury, "arose from the negligence of the person for whom the work . . . is done."

There will be judgment for the plaintiff against the defendant Abraham for $2,500 with costs. I think it is the duty of a jobbing contractor, such as Fisher is, to know something of the conditions under which his men are working. The action as against Fisher will be dismissed without costs.

Judgment against defendant Abraham, action dismissed as against defendant Fisher.

B. C. HOP CO. v. ST. LAWRENCE BREWERY.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 11, 1914.

SALE (§ I D—20)—*Refusal to accept—Breach of contract—Damages.*]—Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of LEITCH, J., 6 O.W.N. 114.

G. A. Stiles, for the defendants.
H. E. Rose, K.C., for the plaintiffs.

THE COURT dismissed both the appeal and the cross-appeal with costs.

Appeal and cross-appeal dismissed.

LOVELL v. PEARSON.

Ontario Supreme Court, Kelly, J. May 15, 1914.

INJUNCTION (§ I B—22)—*Restraint of trade — Agreement between master and servant—Selling goods.*]—Motion by the plaintiffs for an order restraining the defendant until the trial of the action from soliciting orders for or engaging in or being interested in any business within the Dominion of Canada similar to that carried on by the plaintiffs, contrary to the defendant's covenant with the plaintiffs, as alleged.

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R. G. Agnew, for the plaintiffs.
J. E. Jones, for the defendant.

KELLY, J.:—The defendant, who, prior to the 3rd January, 1914, had been in the plaintiffs' employ as a travelling salesman, on that day entered into a written agreement with the plaintiffs to serve for one year from that date in the capacity of a salesman of stationery merchandise. The agreement, which is in the terms of a printed form in use by the plaintiffs, contains provisions of a somewhat exacting character, including one that the defendant "shall not during the continuation of his employment with the employer or within the space of 12 months after its termination, however determined, solicit orders within the Dominion of Canada for any other person or persons, firm, company or corporation carrying on or engaged in dealing in any business within the Dominion of Canada similar in whole or in part to that of the employer, or engage in or directly or indirectly become interested in any such business."

This application is to restrain him until the trial from so soliciting orders or so engaging or becoming interested in business.

Each party to the agreement had the right to determine the employment on thirty days' notice. Because of receiving notice from the plaintiffs, about a month after the commencement of the term of the employment, changing the scale of prices at which he was required to sell the plaintiffs' goods, and which change, he contends, affected to his prejudice the amount of commission he would be able to earn, the defendant gave one month's notice of his intention to quit the employment, and he did accordingly sever his connection with the plaintiffs.

Granting the injunction asked for would have the effect of depriving the defendant of his earning power in selling goods of the class referred to, not in a limited territory, but any place in the Dominion of Canada. This occupation is the one with which he is best acquainted, and upon which he chiefly, if not wholly, relies as a means of earning a livelihood for himself and those dependent upon him. I fail to see that the protection to the plaintiffs' business requires that the defendant should, pending the action, be deprived of this means of employment. Nor do I understand the law to go so far. The right to put restraint upon an employee after the termination of the term of the employment, and where he contracted not to continue in the class of business in which he served the employer, was considered in *Allen Manufacturing Co.* v. *Murphy*, 23 O.L.R. 467,

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where the Court of Appeal dealt with facts much similar to those here present, and where a distinction was drawn between restraint in such cases and that which may be imposed in connection with the sale of a business or goodwill, or the dissolution of a partnership. Much of what was there said is applicable here. Quite sufficient reasons were put forward in the argument in opposition to the motion to convince me that this application should not be granted; and I, therefore, dismiss it; the costs to be disposed of at the trial.

The defendant, through his counsel, was willing, on the argument, to be restrained from operating in certain territory in which he had sold for the plaintiffs, but the plaintiffs were not satisfied with that limited restraint, and refused the offer.

Application refused.

FESSERTON v. WILKINSON.

Ontario Supreme Court, Middleton, J. May 14, 1914.

VENDOR AND PURCHASER (§ I D—20)—*Material difference in subject-matter of sale—Right of way—Parties not ad idem.*]—Action for a declaration that the defendant had no further interest in or right to certain lands the subject of an agreement for sale by the plaintiff to the defendant.

H. F. Upper, for the plaintiff.
A. C. Kingstone, for the defendant.

MIDDLETON, J.:—Northrup and Beaumont owned the lands in question, subject to a right of way reserved to one Skinner over the western eight feet. This right of way was reserved to afford access to the rear of a large block fronting on the next street, upon which Skinner proposes erecting an apartment house.

When the house in question was sold to Wilkinson by Misener, agent for the owners, he had no knowledge of the right of way, and the agreement makes no mention of it. This was an honest mistake; but the parties never were ad idem, for the vendors never intended to sell save subject to the right.

The right of way makes the subject-matter materially different, and the purchaser has the right to refuse to accept something other than what he thought he was purchasing and which the contract calls for: *Paget* v. *Marshall*, 28 Ch.D. 255; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

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The contract, being executory, should be rescinded, and the purchaser should be declared to have a lien on the lands for the sum paid, with interest, and for $25, which I allow for improvements, less an allowance for use and occupation, which I fix at $25 per month, and upon which interest should be allowed as it accrued from month to month.

The defendant should have his costs of the action added to the balance due him.

If the parties cannot agree on the amount, the Registrar may compute it on entering judgment. There was no dispute as to the figures.

Judgment accordingly.

PORTERFIELDS v. HODGINS.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. March 6, 1914.

[*Porterfields v. Hodgins*, 14 D.L.R. 832, affirmed.]

ASSIGNMENTS FOR CREDITORS (§ VIII A—74*a*)—*Priority of claims—Rights of assignee—Wages Act*, 10 *Edw. VII. ch.* 72, *sec.* 3 (*O.*).]—Appeal by the defendant from the judgment of LENNOX, J., 29 O.L.R. 409, 14 D.L.R. 832.

W. Proudfoot, K.C., for the appellant, contended that sec. 3 of the Wages Act, 10 Edw. VII. ch. 72 (O.), required payment of wages to be made to the wage-earner himself and to no other person. He cited *Beifield* v. *International Cement Co.* (1898), 79 Ill. App. 318; Starr & Curtis's Annotated Illinois Statutes, 2nd ed., vol. 2, p. 2185; *In re Westlund* (1900), 99 Fed. Repr. 399.

M. K. Cowan, K.C., for the plaintiff, the respondent, argued that the wording of the Illinois statute was different from the Ontario Act, and so the decisions under the former enactment were no guide. Our statute does not say that the wages must be paid to the wage-earners themselves. It says: "The assignee shall pay . . . the wages of all persons in the employment of the assignor at the time of the making of the assignment," etc. The intention of the statute is, that these wages shall be paid to the person to whom they had been assigned. He referred to *Re Morlock and Cline Limited, Sarvis and Canning's*

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Claims (1911), 23 O.L.R. 165; *McLarty* v. *Todd* (1912), 4 O.W.N. 172, 7 D.L.R. 344.

Proudfoot, in reply.

At the conclusion of the argument, the judgment of the Court was delivered by MULOCK, C.J.EX.:—Mr. Proudfoot has argued this case as if sec. 3 of the Wages Act required payment of wages to be made to the wage-earner himself, and to no one else.

The statute, however, does not say that the money must be paid to the wage-earner. What it does say is, that "the assignee shall pay . . . the wages of all persons in the employment of the assignor at the time of the making of the assignment," etc.

To whom must he pay? Not to the wage-earners, who have by assignment of their claims ceased to be entitled to receive the money, but to the person to whom their claims have been assigned.

The plaintiff is that person, and his receipt will effectually discharge the liquidator.

We, therefore, think that this appeal should be dismissed with costs.

Appeal dismissed.

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CASES—*continued.*