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ANNOTATED

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VOL. 42

EDITED BY

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CASES REPORTED

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TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 42 INCLUSIVE.

Re GRAY. Re HABEAS CORPUS.

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Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. July 18, 1918.

CONSTITUTIONAL LAW (§ I D—82)—POWERS OF DOMINION PARLIAMENT—DELEGATED AUTHORITY—WAR MEASURES ACT, 1914—VALIDITY OF ORDERS-IN-COUNCIL CANCELLING EXEMPTIONS UNDER MILITARY SERVICE ACT, 1917.

The Parliament of Canada had power under the ambit of authority conferred upon it by the British North America Act to delegate to the Governor-in-council power to *make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable* as provided by the War Measures Act, 1914. These delegated powers are declared not to be limited or affected by s. 13 (5) of the Military Service Act, 1917, and are wide enough to include the orders-in-council of April 20, 1918, cancelling the exemptions granted under the Military Service Act.

[*Re Lewis*, 41 D.L.R. 1, referred to.]

Statement.

APPLICATION by way of habeas corpus for the discharge of applicant ffom military service and custody and for a declaration that the orders-in-council cancelling the exemptions under the Military Service Act, 1917 are ultra vires. Application refused.

F. H. Chrysler, K.C., and *Geoffrion*, K.C., for application.

E. L. Newcombe, K.C., contra.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I have no doubt respecting the right of this court to entertain the present application for a writ of *habeas corpus*. Indeed, in any case of an application for this writ which, as is said in Maitland's Constitutional History of England, "is unquestionably the first security of civil liberty," this court, the court of last resort in the country, would not willingly admit any doubt of its authority to grant to any of his Majesty's subjects the protection which the writ affords.

The facts out of which these proceedings arise are fully set out by Anglin, J., in the reasons for judgment which he has delivered. In these I concur. But, in view of the importance of the question involved, I desire to add a few words of my own to emphasize my view of the points raised.

The sole question for determination is whether there was authority for the order-in-council of April 20, 1918, cancelling the petitioner's exemption from military service, granted under the

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provision of the Act respecting military service, passed in the year 1917.

Parliament, after the declaration of war, passed the War Measures Act, 1914, to confer upon the Governor-in-council certain powers. S. 6 of the Act provides that:—

> The Governor-in-council shall have power to do and authorize such acts and things, *and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or* advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say: (a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communications; (b) arrest, detension, exclusion and deportation; (c) control of the harbours, ports, and territorial waters of Canada and the movements of vessels; (d) transportation by land, air, or water, and the control of the transport of persons and things; (e) trading, exportation, importation, production and manufacture; (f) appropriation, control, forfeiture and disposition of property and of the use thereof.
>
> 2. *All orders and regulations made under this section shall have the force of law and shall be enforced in such manner and by such courts, officers and authorities as the Governor-in-council may prescribe,* and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation.

The practice of authorizing administrative bodies to make regulations to carry out the object of an Act, instead of setting out all the details in the Act itself, is well known and its legality is unquestioned. But it is said that the power to make such regulations could not constitutionally be granted to such an extent as to enable the express provisions of a statute to be amended or repealed; that under the constitution parliament alone is to make laws, the Governor-in-council to execute them, and the court to interpret them; that it follows that no one of these fundamental branches of government can constitutionally either delegate or accept the functions of any other branch.

In view of *Rex* v. *Halliday*, [1917] A.C. 260, I do not think this broad proposition can be maintained. Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government. Such powers must necessarily be subject to determination at any time by

parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.

It is true that Lord Dunedin, in the case referred to, said: "The British constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any written instrument, obedience to which may be compelled by some judicial body." That, undoubtedly, is not the case in this country, which has its constitution founded in the Imperial statute, the British North America Act, 1867. I cannot, however, find anything in that Constitutional Act which, so far as material to the question now under consideration, would impose any limitation on the authority of the Parliament of Canada to which the Imperial Parliament is not subject.

The language of section 6 is admittedly broad enough to cover power to make regulations for the raising of military forces. That power is directly covered by the words "security, defence, peace, order and welfare." As Lord Halsbury said in *Rex* v. *Riel*, 10 App. Cas. 675: "These words are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to."

But it is said that the enumeration of several matters in s. 6 of the War Measures Act limits the effect of the general power conferred. The answer to this objection, as urged by Mr. Newcombe, would appear to be: (1) that the statute itself expressly provides otherwise; and (2) that the reason for introducing specifications was that those specified subjects were more or less remote from those which were connected with the war, and it was therefore thought expedient to declare explicitly that the legislative power of the government could go even thus far. The decisions of the Judicial Committee of the Privy Council, under s. 91 of the British North America Act, upon similar language exclude such limited interpretation. (See Lefroy, p. 119.)

It was also urged, at the argument, that the powers conferred by s. 6 were not intended to authorize the Governor-in-council to legislate inconsistently with any existing statute, and particularly not so as to take away a right (the right of exemption) acquired under a statute. Here, again, Mr. Newcombe's answer appears to be conclusive. There is no difference between statute law and common law, and consequently if effect is given to that point the

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government would be denied any power to amend the law as a war measure, no matter how urgent or necessary that might be for public safety. Such an interpretation seems absurd and impossible. It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order, and welfare of Canada. The enlightened men who framed that section, and the members of parliament who adopted it, were providing for a very great emergency, and they must be understood to have employed words in their natural sense, and to have intended what they have said. There is no doubt, in my opinion, that the regulation in question was passed to provide for the security and welfare of Canada and it is therefore *intra vires* of the statute under which it purports to be made.

Now, I want to add a few observations. In August, 1914, the Empire was at war. *De jure* and *de facto* Canada and all the British dependencies were at war. There can be no doubt as to the individual liability at that time of all the male population of Canada between the ages of 18 and 60 for military service. It is so expressly declared by s. 10 of the Militia Act, c. 41, R.S.C. 1906. By s. 25 of the same Act, the Governor-in-council is authorized to make regulations for the enrolment of persons liable for military service. That Act is merely a re-enactment with amendments of the Militia Act passed in 1868, immediately after Confederation—31 Vict. c. 40. S. 69 of the Militia Act authorizes the Governor-in-council to place the militia on active service anywhere in Canada, and also beyond Canada, for the defence thereof. Of course, it is unnecessary to add that so long as Canada remains a part of the British Empire, the defence thereof may depend, as suggested by Sir Louis Davies, in the course of the argument, on the success of the military and naval operations carried on far beyond its borders.

The main departure from the provisions of the Militia Act which the Military Service Act, 1917, was intended to introduce, is to be found in the recital in the latter Act that:—

By reason of the large number of men who have already left agricultural and industrial pursuits in Canada to join such Expeditionary Force as volun-

teers, and of the necessity of sustaining under such conditions the productivity of the Dominion, it is expedient to secure the men still required, not by ballot as provided in the Militia Act, but by selective draft.

When, in April of this year, the government came to the conclusion that it was necessary to cancel the exemptions granted under the Military Service Act of 1917, the effect of the order-in-council was really nothing but a return to the status under the Militia Act in force since Confederation, by which all are liable for service with the variations in the order of their calling out introduced by the Act of 1917.

There are obvious objections of a political character to the practice of executive legislation in this country because of local conditions. But these objections should have been urged when the regulations were submitted to parliament for its approval, or better still when the War Measures Act was being discussed. Parliament was the delegating authority, and it was for that body to put any limitations on the power conferred upon the executive. I am not aware that the authority to pass these regulations was questioned by a vote in either house. Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention.

Davies, J.

DAVIES, J.:—I concur with Anglin, J.

Idington, J.

IDINGTON, J. (dissenting):—The question raised herein is of a somewhat remarkable character.

In a brief session of the Dominion Parliament held in August, 1914, as a result of the declaration of war between the British Empire and Germany the War Measures Act, 1914, was duly passed and assented to on the 22nd of said month of August.

S. 6 (1) is as follows:—(See judgment of Fitzpatrick, C.J.)

Besides the sub-section 1 just quoted there was a sub-s. 2 which declared that all orders and regulations made under the said section should have the force of law, enforcible in such manner and by such courts, officers and authorities as the Governor-in-council might prescribe, and provided for variations and revocations by any subsequent order or regulation and then proceeded:—

But if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

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The Militia Act by its many provisions gave a much wider scope for the operations of a government to be carried on by orders-in-council than the above quotation from the said s. 6 of the War Measures Act indicates.

Moreover, there were in the latter Act itself three other sections which gave unusual powers to the government each of which obviously furnished scope for the possible and indeed probable exercise of some such power as conferred by s. 6 thereof.

All these and possibly cognate subjects by way of irrelevant details would give ample scope for the operation of the powers conferred by said s. 6 beyond those somewhat crudely indicated in its s.s. (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) in sub-s. 1 thereof.

And I have not a shadow of doubt that its widest conceivable operation within the minds of the legislators concerned was confined to subserving the purposes I have suggested. And I agree with such conception.

If any doubt could have existed relative to the scope of power conferred thereby it must have been regarding some minor details.

For the law relevant to government by order-in-council so far as directly connected with the war stood so till the session of 1917 when the Military Service Act was enacted in consequence of it being discovered that the Militia Act as it then stood providing for drafting men by ballot might operate to the detriment of agricultural and industrial pursuits, and hence it was necessary to reconcile the imperative demands for more men with a system of conscription that might not press unduly upon the productive capacities of the Dominion.

Hence that Act was passed after reciting many reasons therefor of which the last was as follows:—

> And whereas by reason of the large number of men who have already left agricultural and industrial pursuits in Canada to join such Expeditionary Force as volunteers, and of the necessity of sustaining under such conditions the productivity of the Dominion, it is expedient to secure the men still required, not by ballot as provided in the Militia Act, but by selective draft.

That Act was as clearly intended to be an absolute and paramount code for carrying out its provisions in the way therein indicated and provided as anything which can be described of in the English language.

Local tribunals, appeal tribunals, and a central appeal judge were provided thereby and powers were again conferred upon the

Governor-in-council to make regulations to secure the full effective and expeditious operation and enforcement of the Act.

The applicant Gray is a young farmer, unmarried, and a homesteader on land in Nipissing wherein he had done such settlement duties that he has some 36 acres in crop and no one to help him, and upon an appeal founded upon that situation, under the said Act, the local tribunal did not allow his claim for exemption, but upon an appeal taken to the appeal tribunal his claim was allowed, and at this moment he thereby stands exempt under said Military Service Act.

An appeal was taken by the military authorities to the central appeal judge.

Pending that appeal, he has been, without his case having been disposed of by due process of law, seized and tried as an offender against neither the Militia Act, the Military Service Act, nor any other statute of his country unless he falls within an order-in-council dated April 20 last and alleged to have been passed by virtue of the said s. 6 of the War Measures Act, 1914, which it is strongly argued before us overrides all the enactments in and regulations made under the Military Service Act to which I have adverted.

Reliance for such contention so far as I can understand the argument, is based solely upon the powers conferred by s. 6 of the War Measures Act of 1917, "to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada," coupled with the following subs. (5) of s. 13 of the Military Service Act, 1917:—

> Nothing in this Act contained shall be held to limit or affect the punishment provided by any other Act or law for the offence of assisting the enemy nor the powers of the Governor-in-council under the War Measures Act, 1914.

The fact that the order-in-council now in question was supported by a resolution of the two Houses of Parliament was very properly discarded by counsel for the Crown as failing to give any statutory efficacy thereto.

The bald proposition put forward in argument that notwithstanding the elaborate provisions of the Military Service Act evidently designed as a paramount code to govern the mode of

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selecting draftees under its provisions in substitution for the Militia Act and all therein contained was liable to be repealed or nullified by an order-in-council, I cannot accept.

Nor can I as a matter of law subscribe to any such doctrine as contained the startling propositions put forward that it was quite competent for the Governor-in-council to have proceeded under the War Measures Act of 1914 not only independently of but to repeal and render inoperative all the provisions of the Military Service Act of 1917, and to substitute therefor what the Governor-in-council might "deem necessary or advisable" including therein the levy of such taxes as needed to meet such exigencies; and in short to govern the country according to such conceptions save and except the possibility of parliament being convened once a year and invited to act and seeing fit to revote such orders.

Indeed, I venture to think that such conceptions of law as within the realm of legislation assigned by the British North America Act to the Dominion have no existence.

As I understand the situation with which we in Canada are confronted by this war, there is no activity which the mental and physical energies of every member of the entire population come to mature years is capable of but should be made so far as possible subservient to the success of our endeavours.

The several measures required to produce such results must be enacted by the Parliament of Canada in a due and lawful method according to our constitution and its entire powers thereunder cannot be by a single stroke of the pen surrendered or transferred to anybody.

The delegation of legislation in way of regulations may be very well resorted to in such a way as to be clearly understood as such, but a wholesale surrender of the will of the people to any autocratic power is exactly what we are fighting against.

Not only as a matter of constitutional law, sanctified by all past history of our ancestors, and prevalent in the legislative enactments of the Mother Country, but as a matter of expediency I venture to submit such view should be our guide.

The Military Service Act, 1917, and s. 6 of the War Measures Act are quite consistent if properly interpreted and construed as intended by parliament, but are quite incompatible according to the argument presented and the last legislative expression of

parliament from such point of view must govern else there is an end to parliamentary sanction.

Idington, J.

Test the matter of the question raised by supposing for a moment the quite conceivable case of a change of government having taken place after the Military Service Act had been passed, and the new government had desired to repeal it but possibly found the Senate bar the way, would the new men have dared to repeal it by an order-in-council under the War Measures Act of 1914? And suppose, further, they tried to do so and asked us by a reference for a judgment maintaining such an order-in-council, what could we have said? I should in such a case answer just as I do now that the War Measures Act could not be so stretched nor our constitution stand such a strain as repeal of a single line of the Military Service Act by any such methods.

I think the application should be granted.

Duff, J.

DUFF, J.:—The Governor-in-council shall have power "to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada."

These words constitute the first branch of the first subsection of s. 6.

The words (I put aside for the moment any suggestion of qualifying context or substantive modifying enactment) are comprehensive enough to confer authority, for the duration of the war, to "make orders and regulations" concerning any subject falling within the legislative jurisdiction of parliament—subject only to the condition that the Governor-in-council shall deem such "orders and regulations" to be "by reason of the existence of real or apprehended war, etc., advisable."

"Order" is a proper term for describing an act of the Governor-in-council by which he exercises a law-making power, whether the power exist as part of the prerogative or devolve upon him by statute. (See 21 & 22 Vict., c. 99, s. 2; Ruperts Land O. in C., 4 R.S.C. 57; B.C. O. in C., 4 R.S.C. 77 and 78; P.E.I. O. in C., 4 R.S.C. 77 and 78.)

"Regulation" when used in such a collocation as found in the sentence excerpted above is broad enough to extend to any rule in

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relation to a particular subject matter laid down in exercise of such authority; and past all possible doubt is sufficient to embrace provisions of the kind ordained by the order-in-council of 20th April.

In *Rex* v. *Halliday*, [1917] A.C. 260, it was held by the House of Lords that under a general power to "issue regulations for securing the public safety and defence of the realm" a "regulation" could validly be "issued" authorizing the detention of persons without trial and without charge. The judgments of the Law Lords in *Rex* v. *Halliday, supra*, afford a conclusive refutation of the contention that a general authority to make "orders and regulations" for securing the public defence and safety and for like purposes is as regards existing law resting on statute, limited to the functions of supplementing some legislative enactment or carrying it into effect and is not adequate for the purpose of supersession.

The authority conferred by the words quoted is a law-making authority, that is to say an authority (within the scope and subject to the conditions prescribed) to supersede the existing law whether resting on statute or otherwise; and since the enactment is always speaking, Interpretation Act, s. 9, it is an authority to do so from time to time. It follows that unless the language of the first branch of s. 6 is affected by a qualifying context or by subsequent statutory modification the order-in-council of April 20 (the subject matter of which in the above expressed view is indisputably within the scope of the War Measures Act) is authorized by it.

There is no qualifying context. There is in the second branch of the section an enumeration (an enumeration let it be said rather of groups of subjects which it appears to have been thought might possibly be regarded as "marginal instances" as to which there might conceivably arise some controversy whether or not they fell within the first branch of the section) of particular subjects and a declaration that the powers thereby given to the Governor-in-council extended to these subjects, so enumerated; but there is also a declaration that this enumeration shall not have the effect of limiting the "generality" of the language of the 1st branch of the section—the language quoted above. Thus the context, instead of qualifying the preceding language (the language quoted), emphasizes the comprehensive character of it and pointedly sug-

gests the intention that the words are to be comprehensively interpreted and applied.

It is here convenient to note the argument so strongly pressed—the argument of *reductio ad absurdum*—that under this construction of s. 6 the Governor-in-council acquired authority to repeal the Militia Act and pass by order-in-council provisions identical with the provisions of the Military Service Act, 1917. This, it is said, parliament could not conceivably have intended in August, 1914. The answer can be expressed in a sentence.

It is the function of a court of law to give effect to the enactments of the legislature according to the force of the language which the legislature has finally chosen for the purpose of expressing its intention. Speculation as to what may have been passing in the minds of the members of the legislature is out of place, for the simple reason that it is only the corporate intention so expressed with which the court is concerned. Besides that road—the road of speculation—leads into a labyrinth where there is no guide.

Ambiguous expressions may be interpreted in light of the general object of the enactment when that is known with certainty, and of the circumstances in which the enactment was passed, but subject to this the words of the statute must be construed in their natural sense.

It ought not, moreover, to be forgotten in passing upon this argument for a narrow construction, that this Act of Parliament supervened upon a decision which was the most significant, indeed the most revolutionary decision in the history of the country, namely—that an Expeditionary Force of Canadian soldiers should take part in the war with Germany as actual combatants on the Continent of Europe; a decision which would entail, as everybody recognized, measures of great magnitude; requiring as a condition of swift and effective action, that extraordinary powers be possessed by the executive.

It is convenient also at this point to note the objection raised by Mr. Geoffrion, that accepting this construction of s. 6 of the War Measures Act, that enactment must be held to be *ultra vires* of the Dominion Parliament.

It is a very extravagant description of this enactment to say that it professes (on any construction of it) to delegate to the Governor-in-council the whole legislative authority of parliament.

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The authority devolving upon the Governor-in-council is, as already observed, strictly conditioned in two respects: (1) It is exercisable during war only. (2) The measures passed under it must be such as the Governor-in-council deems advisable by reason of war.

There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law. Maitland's Constitutional History, pp. 1, 15, *et seq.*

Our own Canadian constitutional history affords a striking instance of the "delegation" so called of legislative authority with which the devolution effected by the War Measures Act may usefully be contrasted. The North West Territories were, for many years, governed by a council exercising powers of legislation almost equal in extent to those enjoyed by the provinces.

The statute by which this was authorized, by which the machinery of responsible government, and what in substance was parliamentary government, was set up and maintained in that part of Canadian territory, was passed by the Parliament of Canada; and it was never doubted that this legislation was valid and effectual for these purposes under the authority conferred upon parliament by the Imperial Act of 1871 "to make provision for the administration, peace, order and good government in any territory not for the time being included in any province."

That, of course, involved a degree of devolution far beyond anything attempted by the War Measures Act. In the former case, while the legal authority remained unimpaired in parliament to legislate regarding the subjects over which jurisdiction had been granted, it was not intended that it should continue to be, and in fact it never was, exercised in the ordinary course; and the powers

were conferred upon an elected body over which parliament was not intended to have, and never attempted to exercise, any sort of direct control. It was in a word strictly a grant (within limits) of local self-government. In the case of the War Measures Act there was not only no abandonment of legal authority, but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to parliament and dependent upon the will of parliament for the continuance of its official existence.

The point of constitutional incapacity seems indeed to be singularly destitute of substance.

The applicant does not point to any subsequent Act of parliament by which the enactments of s. 6 of the War Measures Act (in so far as they are now relevant) have been modified. A powerful argument might have been founded on the provisions of the Military Service Act of 1917, had it not been for s. 13 (5) of that Act, by which it is provided that "nothing in this Act contained shall be held to limit or affect the powers . . . . of the Governor-in-council under the War Measures Act of 1914." Here parliament appears to have anticipated and nullified in advance the contention now put forward that the provisions of the Military Service Act are exclusive as regards the subjects with which they deal and that the powers given by the War Measures Act in relation to these subjects were revoked in 1917.

The force of sub-s. 5 as touching any controversy at present material, is not affected by anything to be found in sub-s. 4. The last mentioned sub-section deals with a particular subject matter only, the extent, namely, of the reinforcements to be provided under the Military Service Act. These, it is enacted by sub-s. 4, shall not exceed one hundred thousand men "unless further authorized by parliament."

Assuming (without expressing any opinion upon the point) as Mr. Geoffrion contends, that the meaning of this sub-section is that the reinforcements to be provided under the Act shall not exceed the prescribed number in the absence of authority given by a new Act of parliament; in other words, that as regards that particular subject matter the Military Service Act is not to be amended except by a new Act of Parliament to be passed for the purpose.

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Assuming this, the provision is certainly an arresting one. It at once suggests that parliament must have assumed the existence of some instrumentality for amending the Act it was passing other than a new Act of parliament, this instrumentality being, of course, the authority created by the War Measures Act.

Sub-s. 4 thus adds, if possible, to the force of the 5th sub-section, indicating as it does a conscious and deliberate acceptance by parliament at the time (in 1917) of the view now put forward by the Crown concerning the scope of the powers granted by the War Measures Act.

This brief sketch is perhaps more than is strictly necessary to dispose of all the argument seriously advanced in support of the application.

Anglin, J.

ANGLIN, J.:—The applicant moved before me in chambers for a writ of *habeas corpus ad subjiciendum* under s. 62 of the Supreme Court Act. He is in military custody awaiting sentence of a court martial for disobedience as a soldier to lawful orders of a superior officer. Such disobedience is declared to be an offence punishable by imprisonment for any term up to life by the Army Act (44 & 45 Vict., Imp., c. 58, s. 9; Manual of Military Law, 1914, pp. 370, 387) made part of the law of Canada by the Militia Act, R.S.C., c. 41, ss. 62 and 74, and the Military Service Act, 1917, c. 19, s. 13. The "commitment" of the applicant is therefore "in a criminal case" under an Act of Parliament of Canada within s. 62 of the Supreme Court Act.

Before me in chambers and on the argument of yesterday before the full court, counsel for the applicant based their client's claim for discharge from military custody solely on the ground that he had been granted exemption under the Military Service Act, 1917, and that two orders-in-council of April 20, 1918 (Nos. 919 and 962), purporting to cancel or set aside exemptions so granted to men of Class A between the ages of 20 and 23 (which apply to him) are invalid. Counsel representing the Attorney-General frankly conceded that, if these impugned orders-in-council cannot be upheld, the applicant is entitled to his discharge. The issue is, therefore, clean cut and, while the circumstances of the two cases differ somewhat in points not material, is precisely that recently passed upon by the Supreme Court of Alberta in the case of Norman Earl Lewis. That court (Chief Justice Harvey

dissenting) held the two orders-in-council to be *ultra vires* (41 D.L.R. 1). As many thousands of young men throughout Canada, most of them already drafted and a considerable number of them already overseas or *en route* to Europe, are affected, the importance of the matter involved is obvious. It has occasioned much public excitement and unrest, and numerous applications for writs of *habeas corpus* are already pending in provincial courts. Under these circumstances it was obviously of great moment in the public interest that the questions of the validity of these orders-in-council should be authoritatively determined by this court. I therefore readily acceded to the suggestion of Mr. Newcombe, in which Mr. Chrysler concurred, that I should follow the course taken by Duff, J., and approved of by the majority of this court in *Re Richard*, 38 Can. S.C.R. 394, and subsequently sanctioned by rule 72 of our Rules of Court, and, instead of myself dealing with the motion, should refer it to the court.

The doubt which exists as to the appealability of the order for discharge made by the Alberta court in the *Lewis* case, *supra*, the unavoidable delay that the taking of such an appeal (which solicitors for the respondent could scarcely be expected to expedite) might involve, the probability that if I should make a like order in the present case it would not be subject to appeal (sub-sec. 2 of s. 62 gives a right of appeal to the court "if the judge refuses the writ or remands the prisoner") and the fact that it could not be expected that a decision of a single judge of this court would be accepted as binding in the provincial courts seemed to me most cogent reasons for taking the course suggested, in view of Mr. Newcombe's assurance that it had been already arranged with the Chief Justice and the Acting Registrar that, should the reference be directed, a special session of the court to hear the motion would be called for an early date so that the applicant would not suffer the prejudice of any undue delay.

Although some questions as to the case being within the s. 62 of the Supreme Court Act and as to the right of the full court to deal with it were raised by two of my learned brothers during the course of the argument, for the reasons already stated I entertain no doubt upon either point.

Against the validity of the orders-in-council it is urged (a) that parliament cannot delegate its major legislative functions to any

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other body; (b) that it has not delegated to the Governor-in council the right to legislate at all so as to repeal, alter or derogate from any statutory provision enacted by it; (c) that if such power has been conferred it can validly be exercised only when parliament is not in session.

(a) The decision of the Judicial Committee in *Powell* v. *Apollo Candle Co.*, 10 App. Cas. 282, cited by Harvey, C.J., in the *Lewis* case, *supra*, puts beyond doubt the sovereign character of colonial legislation within the ambit of the legislative jurisdiction committed to them and the constitutionality of limit delegations of their legislative powers. Such delegations have been so frequent that it is almost a matter of surprise that their legality should now be considered open to question. A very common instance is the provision that a statute shall come into effect in whole or in part on a day or days to be named by proclamation to be issued pursuant to an order-in-council. Here the limitation upon the extent of the powers delegated is found in the words of s. 6 of the War Measures Act of 1914 "as he may by reason of the existence of real, or apprehended war, invasion or insurrection, deem necessary or advisable." Their duration is expressly limited by s. 3. A further limitation as to sanctions is imposed by section 11. As was said in the *Apollo* case, *supra*, at p. 291:—

> The legislature has not parted with its perfect control over the Governor and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him.

In *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, at 588, their Lordships of the Judicial Committee said: "The Federal Act exhausts the whole range of legislative power." A complete abdication by parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is "as plenary and as ample . . . as the Imperial parliament in the plenitude of its powers possessed and could bestow." *Hodge* v. *The Queen*, 9 App. Cas. 117, 133. I am of the opinion that it was within the legislative authority of the Parliament of Canada to delegate to the Governor-in-council the power to enact the impugned orders-in-council. To

hold otherwise would be very materially to restrict the legislative powers of parliament.

(b) I am quite unable to appreciate the force of the argument based on the *ejusdem generis* rule. In opening, Mr. Chrysler rather disavowed invoking it. Mr. Geoffrion, however, appealed to it and in his brief reply Mr. Chrysler appeared to insist upon its application. If this rule of construction would otherwise have governed, its application to s. 6 of the War Measures Act of 1914 is clearly excluded by the words which precede the enumeration of the specified subjects, namely "for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared, etc." The same language is found in s. 91 of the B.N.A. Act, and I have never heard it suggested that the residuary powers of parliament under the general terms of that section "to make laws for the peace, order and good government of Canada" are restricted to matters and things *ejusdem generis* with the subjects enumerated in its succeeding clauses, or, as Mr. Chrysler put his argument on this branch in opening, that the specified subjects should be regarded as illustrative of the classes of matters to which the application of the preceding general terms should be confined. Rather, I think, as put by Mr. Newcombe and Mr. Tilley, the specification should be deemed to be of cases in which there might be such doubt as to whether they fell within the ambit of the general terms—wide as they are—that *ex abundanti cautela*—it was safer to mention them specifically. Beck, J., appears to have appreciated that this was the purpose of the words "for greater certainty, etc.," yet by some mental process that I am unable to follow, after saying (41 D.L.R. 16):—

> The enumeration of the particular subjects of jurisdiction is obviously made in order to remove doubts which might possibly arise as to whether or not the particularized subjects would fall within the general statement of the subjects of jurisdiction,

he proceeds to add that

> Such an enumeration of particular subjects . . . must necessarily be taken as interpretative and illustrative of the general words, which must consequently be interpreted as intended to comprise only such subjects, in addition to those particularly specified, as fall within a generic clause of which the specified instances are illustrated and definitive of the general characteristics of the clause,

makes a strict application of the *ejusdem generis* rule, thereby excluding the making of orders for the enlistment of certain men

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exempt under the Military Service Act, 1917, as to which, whatever else may be said of them, there cannot be a shadow of doubt that they were made "by reason of the existence of real . . . war," and because "deemed necessary or advisable for the security, defence and welfare of Canada." The very purpose of inserting the words "for greater certainty, but not so as to restrict the generality of the foregoing terms" would appear to have been to insure the exclusion of the rule of construction under consideration. The terms of s. 6, the generality of which is not restricted, are "to do and authorize such acts and things and to make from time to time orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada." More comprehensive language it would be difficult to find. The corresponding terms of the B.N.A. Act, s. 91, are "to make laws for the peace, order and good government of Canada in relation, etc." "Welfare" is substituted for "good government" and "security, defence" are added in s. 6 of the War Measures Act. In some constitutional Acts, for instance the New South Wales Constitution Act, we find the word "welfare" used with "good government" as a substitute for the word order. To introduce such a limitation as that suggested by Beck, J., and approved of by some of his colleagues would therefore appear to me to be to fly in the teeth of the very words of the Act of parliament itself.

Parliament by express recital in the Military Service Act, 1917, declares that the Canadian Expeditionary Force is engaged in active service "for the defence and security of Canada," and that it is necessary to provide reinforcements to maintain and support it. The position taken by counsel for the Attorney-General, that the orders-in-council fall within the very terms of s. 6 of the War Measures Act, as orders made for the security and defence of Canada, therefore has statutory sanction.

Nor does the use of the term "orders and regulations" present any serious difficulty. No doubt "regulations" is a term usually employed to describe provisions of an ancillary or subordinate nature which the executive, or a Minister, or some subordinate body is empowered to make to facilitate the carrying out of a statute. But, coupled with the word "orders" (which, as used

here, seems to me clearly to mean orders-in-council) and employed to connote provisions to be made "for the security, defence, peace, order and welfare of Canada," it has necessarily and obviously a more comprehensive signification. It was used no doubt because the Governor-in-council usually acts by making orders or regulations. "Ordinances" might have been a more apt expression; but the context leaves no room for doubt that it was intended to confer the power to pass legislative enactments such as should be deemed necessary or advisable by reason of "real or apprehended war, invasion or insurrection," which is declared by a definitive clause of the Military Act to establish an "emergency."

No doubt the amendment of a statute or the taking away of privileges enjoyed or acquired under the authority of a statute by order-in-council is an extreme exercise of the power of the Governor-in-council to make orders and regulations of a legislative character; but the very statute, the operation of which is affected by the orders now in question, contains a provision, not found, we are told, in the original draft and apparently inserted for the purpose of expressing the acquiescence of parliament in such a use being made of the power which it had conferred on the Governor-in-council by the War Measures Act. By sub-s. 5 of s. 13 of the Military Service Act it is provided that "nothing in this Act contained shall be held to limit or affect . . . the powers of the Governor-in-council under the War Measures Act of 1914." The very presence of this sub-section in the Military Service Act, 1917, imports that under the power conferred on the Governor-in-council by the War Measures Act, orders and regulations might be made with the validity of which, but for it, some provisions of the Military Service Act might be deemed to interfere. It carries confirmation of the view that the scope of the powers conferred by the War Measures Act was wide enough to embrace matters dealt with by the Military Service Act and it puts beyond question, in my opinion, the purpose of parliament to enable the Governor-in-council, in cases of emergency, as defined, to exercise the powers granted by s. 6 of the War Measures Act even to the extent of modifying or repealing, at least in part, the Military Service Act itself. The immediate juxtaposition of sub-s. 4 to sub-s. 5 of s. 13, as was pointed out by Mr. Newcombe, serves to emphasize the significance of the latter and to make it certain that its purview and operation did not escape the notice of parliament.

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The provision of sub-s. 2 of s. 6 of the War Measures Act was also relied upon as affording an indication that parliament did not mean to confer upon the Governor-in-council power to repeal statutes in whole or in part. Sub-s. 2 is probably only declaratory of what would have been the law applicable had it not been so expressed. Parliament, however, thought it necessary to express such powers in regard to its control over its own statutes. (Ss. 18 to 19 of the Interpretation Act, R.S.C., c. 1.) I fail to find in the presence of this clause anything warranting a court in cutting down such clear and unambiguous language as is found in the first paragraph of s. 6 of the War Measures Act.

Again, it is contended that should s. 6 of the War Measures Act be construed as urged by counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our parliamentary institutions. With such a matter of policy we are not concerned. The exercise of legislative functions such as those here in question by the Governor-in-council rather than by parliament is no doubt something to be avoided as far as possible. But we are living in extraordinary times which necessitate the taking of extraordinary measures. At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them. Upon both these points, after giving to them such consideration as has been possible, I entertain no doubt, and, but for the respect which is due to the contrary opinion held by the majority of the learned judges of the Supreme Court of Alberta, I should add that there is, in my opinion, no room for doubt.

It has also been urged that such wide powers are open to abuse. This argument has often been presented and as often rejected by the courts as affording no sufficient reason for holding that powers, however wide, if conferred in language admitting of no doubt as to the purpose and intent of the legislature, should be restricted. In this connection reference may be made with advantage to the observations of their Lordships in delivering the judgment of the House of Lords in *The King* v. *Halliday*, [1917] A.C. 260. As Lord Dunedin there said:—

> The danger of abuse is theoretically present; practically, as things exist it is, in my opinion, absent.

As Lord Atkinson observed at p. 271:—

However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the executive. What is contended is that the executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact.

(c) It may be open to doubt whether parliament had in mind when enacting the War Measures Act that legislative enactments such as those now under consideration should be passed by the Governor-in-council acting under it while parliament itself should be actually in session. We can only determine the intention of parliament, however, by the language in which it has been expressed. The terms of s. 6 of the War Measures Act are certainly wide enough to cover orders-in-council made while parliament is in session as well as when it stands prorogued. The fact that in the present instance a resolution was adopted by both Houses of Parliament approving of the orders-in-council, while it does not add anything to their legal force as enactments, makes it abundantly clear that no attempt was made in this instance to take advantage of the powers conferred by s. 6 of the War Measures Act to pass legislation without the concurrence and approval of parliament.

For the foregoing reasons I am of the opinion that the motion for *habeas corpus* must be refused. But, having regard to the fact that this has been made a test case and to its criminal character there should, in my opinion, be no order as to costs.

BRODEUR, J. (dissenting):—I concur in the opinion of Idington, J.

Application refused.

NATIONAL BENEFIT LIFE AND PROPERTY ASSURANCE CO. v. McCOY.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 10, 1918.

COMPANIES (§ VII B—374)—FOREIGN COMPANY DOING BUSINESS IN CANADA—BOUND BY ACTS OF GENERAL AGENT.

A foreign company doing business in Canada is bound by the action of its general agent appointed for a province, although the insurance policy contains a clause that "the company is not liable for loss . . . if any subsequent insurance is effected in any other company unless and until the company assents thereto" where such agent after a fire has occurred learns of subsequent insurance having been effected, and does not repudiate on account of the condition in the policy, but continues to treat the claim as good and appoints an adjuster with authority to make a settlement with the assured, his action constitutes an assent on behalf of the company.

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APPEAL from the decision of the Court of Appeal for British Columbia, which varied the judgment of Macdonald, J., at the trial, and maintained the action of the plaintiff for $1,309.10 instead of $581.80.

W. L. Scott, for appellant; *A. E. Honeywell*, for respondent.

FITZPATRICK, C.J.:—It is contended by the appellant that there is no question of waiver in this case; that any liability of the appellant could only arise from the creation of a new liability. I do not think that is so. A similar condition has been before the court in many cases but the exact wording of the condition varies considerably in different cases. In many of them the policy is conditioned to be absolutely void on subsequent insurance without notice. Such is not the case here where it is only provided that the company shall not be liable if any subsequent insurance is effected unless and until the company assent thereto. It is a good defence to an action on the contract so long as the company has not assented but the contract continues and if the company at any time assents the insured can recover under it.

In Kerr on Insurance it is correctly said that

> If after knowledge of any default for which it might terminate the contract, or if after all right to recover on the contract has to the knowledge of the insurer become barred by the very terms of the contract itself because of the failure of the insured to perform some condition precedent to his right of recovery, the insurer does any act or enters into any negotiations with the insured, which recognizes the continuing validity of its obligation, or treats it as still in force and effect, the default or forfeiture is waived.
>
> Forfeiture is not favoured either in law or equity, and the provision for it in a contract will be strictly construed, and courts will find a waiver of it upon slight evidence when the justice and equity of the claim is, under the contract, in favour of the insured.

There can be no doubt that if the company is responsible for the acts of its agents in this case these were abundantly sufficient to constitute a waiver of the forfeiture.

The fact that there was subsequent insurance came to the knowledge of the agents the day after the fire, that is, on January 2, 1916. The matter was placed in the hands of the adjusters on behalf of the companies, proofs of loss were duly made and accepted; many interviews and correspondence ensued, the matter being complicated by the fact that the city by-laws would not permit of the re-instatement of the premises. On March 31, 1916, the adjuster, who had been handling the case since the

middle of February, when he was substituted for the first one appointed, wrote to the respondent offering a definite sum which he said: "I am authorized to offer you in full settlement of the claim."

The appellant is an English company. The head office is in England and its general agents in British Columbia are Rutherford & Co.; Charles Rutherford was their attorney for British Columbia under the Companies Act. The trial judge said:—

> I consider that where a foreign company is doing business in the province, that the actions of its general agents should be binding upon the company. It is essential to the proper carrying on of insurance business at a distant point from the head office that they should have such general authority, not only to effect insurance, but also to adjust and pay losses.

Martin, J., says that Mr. Rutherford must be deemed to be for the purposes of this case in the same position as the head office. I am not sure that it is necessary to go quite so far as this; but I certainly think there is much weight in the opinion and that we should consider the authority of agents in such a position to be as extensive as possible.

The knowledge of the company's agents was the knowledge of the company; not that it is necessary to invoke for this any technical rule of law; but, as I have said, the agents had knowledge of the subsequent insurance on January 2 and, of course, the company could have been and presumably was informed of it months before it decided to repudiate liability. Yet, in the interval, so far as appears by this record, it not only gave no instructions to this effect to its agents but permitted them to go on taking action which could only be consistent with an intention to accept liability on the policy.

The fact that the company was carrying on business at such a distance from its head office that it might reasonably be expected to give to its agents here a large measure of authority to act on its behalf, coupled with the fact that there was ample time for all necessary correspondence with its agents must, I think, preclude the appellant from repudiating the acts of its agents by which accordingly I hold that they were bound.

It is satisfactory to be able to conclude that the appellant has effectually waived any forfeiture under the insurance contract. Were it not so, the insured would have been unfairly prejudiced by the appellants' course of action. As it is, the respondent has

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been forced, in order to obtain her rights, to bring this second action, which the company has endeavoured to defeat on doubtful technical grounds, though itself profiting by the subsequent insurance.

The appeal should be dismissed with costs. Judgment for $1,310 which is the amount of the loss incurred by the respondent.

DAVIES, J.:—This action is one brought on a policy of insurance taken out by the respondent in the appellant company against loss or damage by fire on the plaintiff's houses and buildings on a specified property in Vancouver, B.C., and any loss under the policy was made payable to Carrie M. Jamieson, the mortgagee thereof, as her interest might appear.

Subsequent insurance was placed by the respondent upon the premises in the North Empire Fire Insurance Co. for the sum of $3,500 and knowledge of this latter insurance only came to the general agent of the appellant for British Columbia on the morning after the fire which partially destroyed the insured premises.

The policy of insurance had the usual statutory conditions, namely: "The company is not liable for loss . . . if any subsequent insurance is effected in any other company unless and until the company assents thereto."

The appellant company was an English company with its head office in London, England.

Its general agents in and for British Columbia were Rutherford & Co. Policies in blank signed by the managing director and the fire and accident manager of the company in London were sent to their general agent with a provision that they were not valid until countersigned by their general agents in British Columbia.

It was agreed at the trial by both parties that the value of the building at the time of the fire was $3,750 and that the loss due to the fire was $1,600 and that the building by-law of Vancouver prohibited the reconstruction or repair of the building to a greater extent than 20% of the original value, with the result that the building could not be repaired.

Immediately after the fire adjustment of the loss was placed by both companies in the hands of one McKenzie; but subsequently the adjustment was taken from him and placed in the hands of one Shallcross, another adjuster, who took from respondent a "non-

waiver" agreement providing that any action taken by the company appellant in investigating the cause of the fire or the amount of the loss and damage to the property should not waive or invalidate any of the conditions of the policy.

The trial judge found that the company was protected by the non-waiver agreement while Shallcross was acting as adjuster and settling the amount of the loss.

It clearly appeared in evidence, however, that outside of his duties as adjuster he was authorized by the general agent, Rutherford, after the latter had full knowledge of the subsequent insurance, to settle with the respondent amicably if possible the amount which they should pay under the policy. After prolonged negotiations and with Rutherford's full knowledge and authority he offered respondent on behalf of both companies to pay her "in full settlement of her claim the National Benefit's proportion of the sum of $1,500."

Apart from the amount payable the question therefore is reduced down to this, whether Rurtherford, as general agent for this company in British Columbia, with power to issue, adjust and settle losses in that province on policies issued by him had also power to give the company's assent to the subsequent insurance effected by the respondent?

I have had the question of the extent of the powers of a general agent in Canada of a foreign company under consideration in several cases which have been before this court and have expressed myself as being of the opinion that such general agent must of necessity be held for certain purposes connected with the issuing of the policy, adjustment, proofs and settlement of loss and matters akin thereto to be *the company* itself.

I do not see how otherwise the business of the company could be carried on if the general agent could not give such an assent to subsequent insurance in another company as the condition in this case calls for. Such assent is not required by the condition to be in writing. Cases calling for it must constantly arise. If they have necessarily to be referred to the head office in London for the formal assent of the company, then much valuable time would be lost. It is a question peculiarly for the general agent whose knowledge must govern in any such case to say whether assent should be given or not. As general agent he has policies

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placed in his hands already signed by the company's officers in London and good only when countersigned by him.

Absolute reliance is and must be placed on his judgment as to the taking of the risk insured. If further insurance in his own company was asked he would have authority to take it and either issue a new policy for the increased amount and cancel the old one or by memorandum on the one already issued increase the amount insured. Surely then a general agent entrusted with such unlimited powers may give the "assent" called for by the condition to a subsequent insurance in another company not required even to be in writing. Of course the company can limit his powers but there is nothing in this case to shew any such limitation was ever made. The inference I draw from the admitted powers he possesses as general agent is that they extend to and embrace the case of giving assent to subsequent insurance effected in any other company.

The condition in question in case of prior insurance requires that the company's assent to it must appear in the policy or be indorsed thereon.

That clearly contemplates to my mind that such indorsement might be made by the general agent when he issues the policy. It further requires that if written notice of an intention or desire to effect subsequent insurance is given and the company does not dissent in writing within two weeks after receiving such notice the company should be held not to have dissented.

Surely the written notice so required may be given the general agent and if so and he does not dissent the company would be held not to have dissented. The two weeks time within which the company must dissent would not allow time for the company in London to be advised of the notice and to send their dissent in writing. It would seem to me that in all the cases dealt with in this condition the general agent must be held to stand for the company.

The mere appointment of an adjuster to adjust the loss under the policy might not be sufficient to indicate any assent to subsequent insurance but in this case the evidence shewed specific authority given to Shallcross, the adjuster, by Rutherford, the general agent, to pay plaintiff in full settlement of her claim the company's proportion of the sum of $1,500.

This specific authority was given after full knowledge of the subsequent insurance by the general agent and beyond doubt amounted to an assent to such insurance by the general agent if he had the power to give it.

I assume it will not be denied that the principal officers of the company at the head office conducting its affairs there would be held to have authority to waive the conditions invoked without having special authority from the directors and so I hold in like manner the general agent for the company residing and conducting its affairs in British Columbia had such authority.

The case of *Western Assurance* v. *Doull*, 12 Can. S.C.R. 453, was strongly relied upon by Mr. Scott for the company as a binding authority in this case. It would appear to me from the facts as stated in the judgments of the court in that case that the agent there, Greer, was a local agent merely and not a general agent for the province. He is referred to by several of the judges in their judgments as a local agent and his powers were very limited. In that case the condition of the policy required that in cases of subsequent insurance notice in writing must at once be given to the company and such subsequent insurance indorsed upon the policy. No such written notice or indorsement was required in the present case but simply the "assent" of the company to the subsequent insurance. In the *Doull* case, 12 Can. S.C.R. 453, Mr. Justice Strong said, at p. 445, that: "It does not appear very clearly whether he (the adjuster Cory) was instructed directly from the principal officer of the appellant company or through Greer. The latter in his evidence said he had a telegram from defendant company authorizing me to request Cory to adjust the loss and I requested him to do so. In cross-examination he said: After a loss I notify the head office and I get *instructions from them what to do.*"

Manifestly, therefore, Greer's authority was a limited one and not a general one. He was simply authorized to investigate and adjust the loss. In the case now before us there is no suggestion that the general agent's authority was a limited one. On the contrary, he appeared to have all the powers necessary for the issue of policies and in case of loss, for its adjustment and settlement. In the *Doull* case, 12 Can. S.C.R. 453, the plaintiff relied alone upon the adjuster's action in adjusting the loss as amounting to a waiver by the company.

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But in the present case the plaintiff relies not upon the mere adjustment of the loss but upon the special authority given to him by the general agent, Rutherford, to settle it if he could and the offer to pay her the company's proportion of the sum of $1,500.

Mr. Scott strenuously contended that under the condition where subsequent insurance was effected without the company's approval its liability under the policy ceased and that no agent could create a new liability. But I do not think that is the proper construction of the condition. It says that the company shall not be liable if any subsequent insurance is effected *unless* the company assents. But if it does assent that assent makes the non-liability provision inapplicable. The liability is one depending on the "assent" and once that is given no question of any new liability arises.

I therefore would allow the appeal and as to the amount, while I confess I am not without doubt on this point, I will not dissent from the amount determined on by a majority of the Court of Appeal and of this court, viz., $1,300.

Idington, J.

IDINGTON, J.:—The appellant is an English insurance company which carried on business in British Columbia and insured the respondent's property in Vancouver for the sum of $2,000 for one year from April 14, 1915, subject to the stipulations and conditions endorsed on the policy. One of the said conditions so endorsed was as follows:—

> The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected in any other company unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent insurance is effected.

The only question raised herein is whether under the said condition and the circumstances I am about to relate the appellant has been relieved from liability.

The respondent shortly after obtaining said policy of insurance assigned same to her mortgagee. A condition indorsed upon it provided that in the event of the property being assigned without a written permission indorsed thereon "by an agent of the company duly authorized for such purpose" the policy should thereby become void.

The person to whom she applied in that event was the agent who had signed the policy and issued it to her. He duly signed same without raising any question of his authority.

On the heading of the policy is printed in large type the name of the appellant and under same is printed in large type also the words "Head Office, London, England," and under those the words "Agency No. Vancouver, B.C."

And the policy at the foot thereof after the attesting clause has the following:—

This policy shall not be valid until countersigned by the duly authorized agents of the company at Vancouver, B.C., and then besides being executed by the managing director and the fire and accident manager is countersigned by Rutherford & Company, general agents.

We are informed by the record that Chalmers Rutherford was in fact the general agent.

It may be necessary to observe all those details in considering the weight to be given the acts of this agent and of those authorized by him upon which respondent relies, and to which I am about to refer, because counsel for appellant contends no authority is shewn for such acts.

The respondent on July 19, 1915, obtained, by virtue of the policy of insurance of that date, issued to her by the North Empire Fire Insurance Co. at Vancouver, further insurance for the sum of $3,500 for 1 year from said date.

That policy provided as follows:—"Further concurrent insurance permitted."

Unfortunately notice had not been given to the appellant of this insurance as required by the above quoted condition.

The dwelling house thus insured was partly destroyed by fire on January 1, 1916.

The said general agent of the appellant says he learned of the last mentioned insurance the morning after the fire.

He, nevertheless, instead of repudiating on behalf of his company all liability to respondent by reason of her failure to give notice of the subsequent insurance, suggested and procured, through his chosen adjuster, proof to be made by her of the loss and when presented to him by the respondent accepted the said proof without objection. Indeed he had previously unsolicited, as if no question of liability existed, appointed Mr. McKenzie to act as adjuster on behalf of appellant along with the adjuster for the other company.

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He acted, doubtless, under the authority of the general agent, in meeting respondent and making the many proposals he seems to have made to her for a settlement of her claim under the policy.

He never pretended to claim for a single instant that her rights had been lost by the failure to give notice of the subsequent insurance, but evidently assumed throughout that there was no doubt of her right to claim under the policy. The only question in dispute was the amount she might be entitled to under the very peculiar circumstances to which I will advert presently and certainly raising a question of much difficulty. These negotiations extended over six weeks and involved some fifteen to twenty meetings she swears. It was in the course of these negotiations that he told respondent she should have proof of loss made out and took her to a solicitor to have same prepared when they were prepared accordingly pursuant to the suggestion of Mr. McKenzie who never made any objection in any way to her actual right to claim.

He offered her $1,150 to be expended by the company in repairs.

If all that done under the authority of the general agent does not constitute an assent to the subsequent insurance I am puzzled to know what would unless an express declaration in writing, which is not required by the terms of the condition now invoked. All that is required thereby is an assent to the subsequent policy which under the circumstances was a very fortunate thing for the appellant by reason of the other company becoming liable to bear a share of the loss which by reason of the amount of its contract constituted it the bearer of the larger part thereof.

These negotiations having failed the general agent says he appointed, in substitution for Mr. McKenzie, Mr. Shallcross, who had been appointed as adjuster for the other company.

Rutherford, the general agent of the appellant, was examined for discovery herein on November 22, 1916, and explains how and why that came about and relative to what was done thereunder as follows:—

> Q. And Mr. Wilson asked you to employ the same adjuster? A. Yes, if I recollect, it was placed first in the hands of Hector McKenzie, and then we took it out of his hands, the reason being our policy was a smaller policy, and where a company has a large interest to decide on a course of action, it is a matter of insurance courtesy to follow the company having the larger interest. It is not obligatory—it is a custom.

Q. And the actual negotiations towards the adjustment were carried on by Shallcross as your adjuster? A. Yes.

Q. You have authority, I suppose, to appoint, or employ an adjuster? A. Yes.

Q. You do not know personally, I presume, the negotiations that were carried out by Shallcross? A. More or less acquainted with them.

Q. Did you keep in touch with him? A. Yes, more or less, but things like that are generally left in the hands of the adjuster, and we interfere as little as possible.

Q. The proof of loss as handed to you apparently was made out to the Mutual Benefit instead of the National Benefit? A. Yes.

Q. But you accepted it as a sufficient compliance with the policy? A. Yes.

Shallcross, following a usual practice of his, obtained a non-waiver agreement from the respondent which was signed also by him "on behalf of the above named companies." That provides

> That any action taken by said parties of the second part in investigating the cause of fire or investigating and ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occurred on January 1st, 1916, shall not waive or invalidate any of the conditions of the policies of the parties of the second part, held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement.

That ordinary form used by an adjuster may prevent any inference of waiver, if any further needed, relative to rights under the conditions in question, derivable from the actions taken so far as limited thereby, but does not extend to the fair inference from the act of the manager in making the appointment or to what I am about to refer to, as happening beyond the scope thereof, and of the investigating duties of an adjuster as such. But Mr. Shallcross by and with the authority of the appellant's general agent went far beyond that. He repeated the offer of doing work to the extent of $1,150 in repair of the buildings.

He wrote her on July 24, 1916, a letter pointing out that the premises were being neglected and damage therefrom had arisen which could not form a claim against the insurance companies and that loss was being incurred by their exposure to the weather and that these further losses could not form a claim against the company, and notified her of the earnest effort made by the companies through him to agree as to total damages and that responsibility must rest with her for failure to meet such agreement that day. Not a word is said of any doubt as to the validity of her claims to damages for loss.

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On March 16, 1916, he wrote her solicitor as follows:—

Having failed to arrive at any reasonable settlement with your client as to her claim for loss under policy No. 39483 in the National Benefit Co. and policy No. 400006 in the North Empire Co., I now on behalf of the two companies interested notify you that they will in accordance with the condition of the policies proceed to repair the property damaged by fire and that the companies have for that purpose obtained the necessity permit from the building inspector of the City of Vancouver.

He went further and got a permit, from the proper city authority, to make the repairs to the amount to which the city by-laws limited repairs.

And here I may observe that the real difficulty in adjusting the loss was that the city by-laws had prohibited repairs beyond 20% of the loss, yet the insurance companies were bound to make good the loss thereby incurred by the proprietor as one of the results of the fire. It would seem that the companies did not take that view, and hence the resort to litigation which decided that point against them. It is not now contended that the view so taken by the courts is erroneous.

The appellant was quite willing to bear the loss on that basis contended for by it and then offered to carry out repairs to that extent of its liability.

On March 23, 1916, the general manager wrote respondent's solicitor as follows:—

I have to-day received proof of loss dated March 18, made out to Mutual Benefit which I assume is intended for National Benefit and so understand the proof. I cannot accept the valuation or claim sworn to therein. I have requested Mr. P. G. Shallcross to deal with the case.

On March 24, 1916, Shallcross wrote the respondent as follows:—

Damage by fire January 1, 1916, to house situate 639 Alexander St.

Please note that under the condition of policy No. 39483 the National Benefit Fire & Property Assurance Company may, should it appear that they are liable under such policy, notify the insured of their intention to repair within fifteen (15) days after the filing of proof of loss. I wish therefore to advise you that failing arriving at a reasonable settlement with you that the company will formally notify you of this intention to repair within the time allowed them for giving such notice.

And again on March 31, 1916, he wrote her as follows:—

Re house, 639 Alexander St., damaged by fire January 1, 1916.

Policy No. 39483 issued by the National Benefit Fire & Property Assurance Co. for $2,000. Referring to my letter to you dated March 24, 1916. Subject to the terms and conditions of the policy, including the application of insurance policy issued by the North Empire Fire Insurance Co., I am author-

ized to offer you in full settlement of the claim the National Benefit Co.'s proportion of the sum of fifteen hundred dollars ($1,500). Failing your immediate acceptance, then on behalf of the National Benefit Co., I give you notice of their intention to repair the above described house to the extent permitted by the by-laws and in accordance with the terms and conditions of the policy.

An action was brought by the respondent against the North Empire Life Insurance Co. on its policy which was tried before Murphy, J., who in May, 1916, decided in respondent's favour, assessed the damages at $3,750, less some salvage which he fixed at $150, and in light of the foregoing facts, and absence of any repudiation by appellant or pretension such as now set up, gave judgment for the proportionate amount of $3,600 for which that company would be liable after taking into account the concurrent insurance which is now in question. Such is the net result of the policy of absolute silence on the part of the appellant under so many and divers circumstances requiring it or its officers to be honest and straightforward instead of lulling at every step respondent into feeling assured that whatever might come the condition now relied upon would not be invoked.

I am of opinion that its entire course of conduct including the appointment of Shallcross and his letters as well as what had preceded same as outlined above was evidence of that assent which is all that ever was necessary to put beyond peradventure any doubt as to its continued liability and that it is thereby estopped from denying such assent.

I am reminded by the very peculiar circumstances in question herein, and the unworthy attempt to escape from liability on such ground as set up, of the case of *Tattersall* v. *The People's Life Insurance Company*, 9 O.L.R. 611, which was tried before me in Toronto in 1904, wherein the company sued upon a life insurance policy for which the last premium had not been paid, but by the terms of which it might be paid within thirty days after the death. It was not paid within that time. The circumstances which led to this result are detailed in the report of the case.

The parties concerned in making inquiry in order to decide upon the payment of the premiums in default had perhaps no legal right to insist upon making a tender of payment.

The officers of the company who failed to make answer to such inquiries were perhaps as destitute of authority to answer

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as counsel would wish us to hold the general agent herein was for what he did and permitted and directed, yet the judgment directed at the trial, proceeding upon estoppel, was upheld in the Divisional Court as above cited; in the Court of Appeal for Ontario, 11 O.L.R. 326; and in this court, 37 Can. S.C.R. 690.

I need not dwell upon the many peculiar facts in that case for they are fully reported in the first citation I have given, but I cannot help thinking that there was much more to be said for the company in that case than there exists on the facts in this case for appellant.

See also the cases of *Royal Guardians* v. *Clarke*, 17 D.L.R. 318, 49 Can. S.C.R. 229; *Canadian Railway Insurance Co.* v. *Haines*, 44 Can. S.C.R. 386; *Evangeline Fruit Co.* v. *Provincial Fire Insurance Co.*, 24 D.L.R. 577, 51 Can. S.C.R. 474; *Mahomed* v. *Anchor Fire & Marine Insurance Co.*, 15 D.L.R. 405, 48 Can. S.C.R. 546.

It is suggested the condition herein having been broken the policy was at an end before the fire. The general manager of the company did not think so, for in his examination for discovery he was asked and answered as follows:—

Q. And the policy was in force on the 1st January, 1916? A. Yes.

There was an insuperable barrier to anything else being said, for by the terms of the assignment to the mortgagee assented to by the general manager of the appellant it was rendered impossible of invalidation as to the mortgagee by reason of any such condition and hence cannot be said to have become null as suggested.

And had the mortgagee sued upon it appellant could have had no effective answer. And I venture to think that had the appellant in such case under such circumstances as exist in question herein sought after all that transpired up to and including the trial and judgment for only a proportionate part of the loss to pay the other part of such assessment and to be subrogated to the mortgagee and enforce the mortgage on its behalf as against the respondent it would have failed. That apportionment of damages was clearly induced by the conduct of the appellant leading all concerned to assume that appellant was making no other contention than in common with the concurrent insurers as to the extent of damages.

Again, whilst in one breath denying that the policy existed after default, in the next it is urged that all that is now relied upon by the respondent answering, by way of estoppel, or as I

suggest evidence of assent, was done in relation to the mortgagee's rights. As there never was in all the dealings of the general manager or the adjuster or either of them the slightest attention paid to the mortgagee and indeed her existence or rights were ignored throughout, such a suggestion seems hardly worthy of consideration.

It is because of the misleading dealings with the respondent and her alone that the result was reached of only a proportionate part of the whole loss being allowed by the judge that they form an impassable barrier in the appellant's way if justice is to be done.

Again, it is said there is no evidence of authority in the general manager to do or authorise to be done these things which respondent relies upon.

The circumstances I have already adverted to as well as the presumption arising from his admitted position as the general agent of the appellant for British Columbia not only by virtue of the facts in evidence but also the requirements of the British Columbia statute put him in the same legal category as those whom this court has in several cases held agents entitled to bind their respective principals.

I may refer to *Royal Guardian* v. *Clarke*, 17 D.L.R. 318, 49 Can. S.C.R. 229; *Evangeline Fruit Co.* case, 24 D.L.R. 577, 51 Can. S.C.R. 474, and the *Mahomed* case, 15 D.L.R. 405, 48 Can. S.C.R. 546, above cited, and the general law of the subject as set forth in May on Insurance, par. 126; Bunyon on Fire Insurance, 233 *et seq.*; Cameron on Insurance, pages 231, 390, 412, and the several cases cited therein respectively. The case of *Mutchmor* v. *Waterloo Mutual Fire Ins. Co.*, 4 O.L.R. 606, in appeal contains a judgment by Osler, J., in which I agree. He expressly lays down therein that assent before or after the liability has accrued is sufficient. This is not the case of a condition where the policy is declared void. In such case, the consequences might be entirely different. See also the case of *Richard* v. *Springfield, etc., Ins. Co.*, 108 Am. St. R. 359, I think the problem of solving the authority of an agent is well put as follows:—"The authority of an agent must be determined by the nature of his business, and is *primâ facie* co-extensive with its requirements, 1 May on Insurance, 4th ed., sec. 126, p. 231."

I think the appeal should be dismissed with costs.

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ANGLIN, J. (dissenting):—I understand that on the question of the liability of the defendant company the other members of the court are in favour of upholding the judgment against it. I am, with respect, inclined to take the contrary view for the reasons assigned by Macdonald, C.J.A., and Galliher, J.A.

The existence of co-insurance unassented to when the loss occurred afforded the defendant company an absolute defence to the plaintiff's claim. It would probably be necessary to the conduct of the business of a foreign insurance company like the defendant that it should have an agent in British Columbia empowered to assent to co-insurance before loss. Were such assent not readily given the assured might discontinue the policy, claim a refund of a proportion of his premium and insure with another company prepared to assent to co-insurance. The continuation of the risk, mutually advantageous, would afford sufficient consideration to warrant the giving of the assent. But after loss the position is entirely changed. An assent then given would amount to a relinquishment of an unanswerable defence to the claim of the insured and would be tantamount to an assumption of liability which would be purely gratuitous. In my opinion the giving of an assent entailing such consequences would not be within the apparent scope of the authority of any mere agent however general his representation of the company. Nothing short of an express provision conferring such authority could be relied upon to support it. The burden of proving its existence was upon the plaintiff. That burden she did not discharge. I do not find in the evidence enough to warrant a finding of acquiescence on the part of the company itself in what its agent had done.

In *Mutchmor* v. *Waterloo Ins. Co.*, 4 O.L.R. 606, relied on by the respondent, there was a finding ,warranted by the evidence, that the company itself had express knowledge of the co-insurance when its general manager authorized steps similar to those authorized by the defendant company's agent in this case. *Doull* v. *Western Ins. Co.*, 12 Can. S.C.R. 446, seems to me to be more closely in point. But I am apparently alone in holding these views and therefore confine myself to the mere statement of them to which I conceive the appellant is entitled.

There remains for consideration the question of the amount which the plaintiff is entitled to recover. The company's lia-

bility rests upon the assumption of an assent binding upon it having been given to the co-insurance. Under the 9th statutory condition, indorsed upon the defendant's policy, when co-insurance has been assented to the company is liable only for "a ratable proportion of such loss or damage," *i.e.*, of the loss or damage insured against. That, according to the terms of the policy, is "all direct loss or damage by fire, except as hereinafter provided." Re-instatement of the plaintiff's premises in the condition in which they were before the fire admittedly could have been effected for $1,600. That was the amount of "the direct loss or damage by fire." Owing to a municipal by-law, however, re-instatement of the premises as they were before the fire was impossible. Re-building in conformity with the by-law would have cost $3,600. While that may be in one sense the plaintiff's "loss," it is a "loss" due to the fire plus the effect of a municipal by-law. The greater part of it is not "direct loss and damage occasioned by fire," and is loss against liability for which the defendant company expressly stipulated.

By the 18th statutory condition the defendant company instead of making payment under its policy was entitled to repair, rebuild or replace the property damaged or lost. It gave notice of its intention to do so. But the municipal by-law prevented re-instatement. A variation of this condition, properly held to be reasonable in itself and duly endorsed on the policy, provided that:—

> If in consequence of any local or other laws, the company shall in any case be unable to repair or reinstate the property as it was it shall only be liable to pay such sum as would have sufficed to repair or reinstate the same.

The company, therefore, never became liable in respect of a rebuilding on a $3,600 basis. The effect of the variation was, in my opinion, notwithstanding the notice which had been given, clearly to limit liability to the $1,600 which it would have cost to effect reinstatement had the by-law not prevented it. The effect of reinstatement being rendered impossible by the by-law was to deprive the company of that alternative method of satisfying its liability. It remained liable under the policy itself to pay the amount of "the direct loss or damage by fire"—$1,600. I cannot perceive any good reason why it is not entitled to the benefit of the co-insurance condition in respect of that sum.

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There was concurrent insurance to this extent, but to this extent only.

My attention has been drawn to two Ontario decisions—*Trustees of the First Unitarian Congregation of Toronto* v. *Western Assurance Co.*, 26 U.C.Q.B. 175, and *McCausland* v. *Que. Fire Ins. Co.*, 25 O.R. 330, the latter based upon the former. I think the former is clearly distinguishable from that now before us. Both policies dealt with in that case covered the entire risk. The apportionment provided for by the condition there under consideration was to be made in the proportion which "the amount hereby assured shall bear to the whole amount assured *on the said property*," *i.e.*, in the opinion of the court, on any part of the property which the policy covered. In the case at bar the provision is for payment of a ratable proportion of the loss, *i.e.*, of the loss for which the defendant company should be liable and for which there should be co-insurance assented to. The *McCausland* case, except on the question of costs, was the decision of the late Mr. Justice Rose alone. I am, with respect, unable to accept his view that the 9th statutory condition therein dealt with does not differ from the language upon which the decision in the *Unitarian Congregation* case was based. The condition under which the question of apportionment arises in the case at bar differs essentially in my opinion from those presented in either of the Ontario authorities to which reference has been made. I allude to them merely to indicate that they have not been overlooked.

It may have been—it probably was—unfortunate for the plaintiff, as the trial judge points out, that this action was not tried at the same time as the plaintiff's action against the other insurance company. The latter might, in that event, have been required to pay all of the $3,600 for which the present defendant should not be held liable. But for that this defendant is not responsible. It had no control over the other action. It took no part in the trial of it and I find nothing in the record to support the contention that by reason of what then took place the present defendant is estopped from claiming the full benefit of the 9th statutory condition. It was for the plaintiff, if she desired to do so, to have taken proper steps to secure the trial of both actions at the same time.

I agree with McPhillips, J., that the defendant, if liable at all, is entitled to have the plaintiff's recovery limited to its ratable proportion of the sum of $1,600, *i.e.*, $581.80, as found by the trial judge, whose judgment should therefore be restored.

BRODEUR, J.:—The most important question in this appeal is whether the subsequent insurance taken by the respondent is a bar to her claim. By the statutory conditions of the Province of British Columbia, it is provided that an insurance company is not liable for loss "if any subsequent insurance is effected in any other company, unless and until the company assents thereto."

It is claimed by the respondent that the company has given, through its attorney and representative in British Columbia, Mr. Rutherford, the necessary assent. The appellant company, which is a company having its head office in London, England, was bound, under the Companies Act of British Columbia, to appoint an agent or attorney in that province. We have not before us the deed appointing Mr. Rutherford; but in complying with the provincial statute a company is expected to give all the necessary powers to exercise his rights and obligations with regard to the business they intend to carry on in that province.

In this case, the appellant company or its agent became aware of the existence of a subsequent insurance only the day after the fire took place. However, the attorney, Rutherford, appointed adjusters with authority to settle the loss. Negotiations were carried on for several months without the company, at any time, denying liability or intimating to the respondent that the condition above quoted had put an end to its liability.

There was a clause in the policy that if in consequence of any local loss the company should, in any case, be unable to repair or reinstate the property as it was, then the company should only be liable to pay such sum as would have sufficed to repair it.

Under the provisions of that agreement, the company, through its adjusters and agent, offered to rebuild.

It seems to me that all those circumstances shew that the company, through its attorney, elected to consider the policy in force and to be bound by it, though subsequent insurance had been taken.

It is suggested, however, that the negotiations were carried on by the agent because they had in mind the company's liability

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to the mortgagee, which, under the mortgage clause of the policy, would not be affected by the default of the mortgagor in giving to the appellant notice of the subsequent insurance.

If these negotiations had taken place with that end in view, it seems to me that a reference to that mortgage would have been made during those negotiations or they would have negotiated with the mortgagee. But all negotiations were carried on with the respondent; all offers were made to her and no reference has ever been made to the mortgagee.

It seems to me, in reading over the evidence, that the difference, during all those negotiations, was as to the amount which was to be paid for the loss. Respondent was claiming $6,000.00.

A reference was made to the case decided by this court of *Doull* v. *Western Assurance Co.*, 12 Can. S.C.R. 446. It is to be borne in mind that this case of Doull was a different one. In that case, it was provided that the assent had to be endorsed upon the policy. This was not required in the present case. Besides, when the insurance company in the *Doull* case gave instruction to its inspector to adjust the loss, it had no notice of the subsequent insurance.

I would rely on the case decided by the Court of Appeal of Ontario of *Mutchmor* v. *Waterloo Mutual Fire Ins. Co.*, 4 O.L.R. 606, where it was held that the assent to the subsequent insurance is sufficiently shewn by the insurance company joining in the adjustment of the loss.

The appellant company contended before this court that it should be condemned to pay only $581.80 and not $1,390.00 as decided by the Court of Appeal. The total loss suffered by the plaintiff was $3,600; and she was insured for $5,500, of which $2,000 was in the appellant company and $3,500 in the North Empire Company. If the two insurance companies had the same risk, the proportion could be determined without any difficulty. In such a case the appellant company would be liable for 20-55ths of the sum of $3,600 and the other company 35-55ths of the same sum. In other words, the appellant company would have to pay $1,309.10 and the North Empire $2,290, a total of $3,600.

But the appellant says: I was not liable for the total loss of $3,600. I had a protective clause in my policy which restricted my liability in this case only to $1,600. Then my ratable pro-

portion of the loss should be 20-55ths of $1,600, viz., $581.80, and all the rest of the loss should be supported by the North Empire Co.

That was the amount granted by the trial judge, but the Court of Appeal decided, on the contrary, that the ratable proportion to be paid by the appellant should be 20-55ths of $3,600, viz., $1,309.10.

It seems to me that the proper method of ascertaining the relative amount payable by the companies when the risks are different is to add the amount of all policies together, without reference to the division of the risks and that each company is liable for its relative proportion to the whole amount insured. *McCausland* v. *Quebec Fire Ins. Co.*, 25 O.R. 330; *Trustees of the First Unitarian Congregation* v. *Western Assurance Co.*, 26 U.C.Q.B. 175. The appeal should be dismissed with costs.

Appeal dismissed

HANEY v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Haggart, JJ.A. July 8, 1918.

RAILWAYS (§ I—8) PROVINCIAL RAILWAY COMPANY—EXPROPRIATION UNDER MAN. EXPROPRIATION ACT—AMALGAMATION WITH DOMINION COMPANY—AWARD PRESERVED AGAINST AMALGAMATED COMPANY.

The award of arbitrators appointed under the Manitoba Expropriation Act (R.S.M. 1913, c. 61) to fix the compensation for lands crossed by a provincial railway company is not rendered void by the amalgamation of such company with a Dominion company, after the appointment of the arbitrators but before the award has been made, the arbitration proceedings having been continued after the amalgamation without objection on the part of either company. Sections 362 and 363 of the Dominion Railway Act continue and preserve the award against the amalgamated company. [*Fargey* v. *Grand Junction R. Co.*, 4 O.R. 232, followed. *Van Horne* v. *Winnipeg & Northern R. Co.*, 18 D.L.R. 517, referred to.]

Statement.

Appeal by defendant from 36 D.L.R. 674, in an action on an award. Dismissed.

O. H. Clark, K.C., for appellant.

Perdue, C.J.M.

PERDUE, C.J.M.:—This is an action brought to recover the amount of an award, made under arbitration proceedings, to ascertain the amount of compensation which the plaintiff was entitled to be paid by reason of the construction of a railway through his lands. The facts are very fully set out in the judgment of the trial judge. There are a few salient features which must be particularly noted. The Winnipeg and Northern Railway Company (which I shall call the W. & N. Co.) was incorporated by an Act of the Legislature of Manitoba: 5 & 6 Edw. VII., c. 122. The Canadian Northern R. Co. (hereinafter referred to as the

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C.N.R.) was incorporated by Acts of the Parliament of Canada. Each of these corporations had power to amalgamate with another railway company. The W. & N. Co. commenced the construction of the first fifty miles of its railway in the spring of 1911. Construction of the railway proceeded and in the fall of 1914 the completed road was opened for commerical purposes. The road was constructed through the plaintiff's lands. The plaintiff was entitled to compensation under the Manitoba Expropriation Act, R.S.M. 1913, c. 61, the special Act, 5 & 6 Edw. VII. (Man.), c. 122, and the Manitoba Railway Act, R.S.M. 1913, c. 145. The parties could not agree as to the amount, and the W. & N. Ry. initiated arbitration proceedings by serving notice of expropriation on the plaintiff on January 18, 1912, and appointing Mr. Cooper its arbitrator. The plaintiff appointed an arbitrator and on February 26, 1912, a third arbitrator was appointed by a Judge of the Court of King's Bench.

The arbitration proceedings commenced in March, 1912. These were prolonged over a considerable period and the award was made on January 29, 1914.

While the arbitration proceedings were going on, an agreement dated May 12, 1913, was entered into between the W. & N. Co. and the C.N.R. for the amalgamation of the two companies under the name of the Canadian Northern R. Co. The agreement was recommended by the Railway Commissioners on May 17, 1913, and sanctioned by the Governor-in-Council on June 2, 1913.

The arbitration proceedings on the part of the railway were conducted by the solicitors of the C.N.R., who acted for the W. & N. Co. before the amalgamation, and after that event took place the same solicitors represented the railway in the arbitration proceedings. Mr. Cooper, the arbitrator appointed by the W. & N. Co., continued to act for the railway after the amalgamation. He signed the award and the same was unanimous.

The main argument of the defendants is that the arbitration proceedings fell to the ground when the amalgamation of the two companies came into force. No doubt as a general rule the death of one of the parties to an arbitration revokes the submission, unless there is a clause in the contract guarding against such an event: Russell, 9th ed., 129-130. But the plaintiff argues that upon the amalgamation of the two companies taking place, ss. 362-

363 of the Dominion Railway Act, R.S.C. 1906, c. 37, preserved the rights of all parties and enabled the arbitrators to proceed with the arbitration and make an award.

Under the above s. 362:—

> The amalgamated company shall possess and be vested with all the railways and undertakings and all other the powers, rights, privileges, franchises, assets, effects, and properties real, personal and mixed, belonging to, possessed by or vested in the companies, parties to such agreement, or to which they, or any or either of them, may be or become entitled; and shall be liable for all claims, demands, rights, securities, causes of action, complaints, debts, obligations, works, contracts, agreements, or duties, to as full an extent as any or either of such companies was, at or before the time when the amalgamation agreement came into effect.

It would be difficult to frame an enactment more fully and completely declaring not only what the amalgamated company shall receive under the amalgamation but also what liabilities it incurs. In effect, it shall be liable for everything for which either of the amalgamating companies was liable. The words are amply wide enough to render the amalgamated company in the present case liable to pay the plaintiff compensation for the taking of his land. It is liable for his claims, demands and rights against the W. & N. Co., which would include his right to have the arbitration, which was proceeding at the time of the amalgamation, gone on with and completed and his claim against that company ascertained by the award.

By s. 363, the amalgamated company shall for all purposes stand in the place of and represent the companies who are parties to the amalgamation, as to every act, matter, or thing done, effected or confirmed under the Dominion Railway Act or the special Act. I take it that the term "special Act" includes any Act, whether Dominion or provincial, under which an amalgamating company received authority to construct its railway and that in the amalgamation in question it refers to the W. & N. Co. and the provincial Act incorporating it: Ry. Act, R.S.C. 1906, c. 37, s. 2 (28). Now some of the acts, matters or things done by the W. & N. Co. before the agreement for amalgamation were initiating proceedings for expropriating the plaintiff's land, appointing an arbitrator and proceeding with the arbitration. When the amalgamation was completed, the officers of the newly amalgamated company carried on the arbitration to its completion and took up the award. The officers or persons who so acted were not acting

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for the W. & N. Co. or for the former C.N.R., both of which had been merged by the amalgamation. They were acting for the new company produced by the amalgamation. We must assume that they acted lawfully in what they did, and they had no lawful authority to take up the award except as officers of, and acting for, the amalgamated company.

In *Fargey* v. *Grand Junction R. Co.*, 4 O.R. 232, which was an action to enforce a decree obtained against a company which had amalgamated with another, Osler, J., in giving the judgment of the Common Pleas Division, said:—

> The case of *Cayley* v. *Cobourg, Peterborough and Marmora Ry. & Mining Co.*, 14 Gr. 571, . . . is authority, if one be needed for this proposition, that the new company must be taken to have assumed all the liabilities of the old ones to third parties; and if the former action had been pending in the sense of not having arrived at final judgment, when the amalgamation of the companies was effected, I have no doubt the name of these defendants might, on an *ex parte* application, have been substituted for that of the *Belleville & North Hastings R. Co.*: Daniell's Chancery Practice, 5th ed. p. 1374; *West Hartlepool Harbour and R.W. Co.* v. *Jackson*, 36 L.J.N.S. Ch. 189.

If the arbitration in the present case had been an action brought against the W. & N. Co. the name of the amalgamated company might have been substituted for that of the W. & N. Co. on an *ex parte* application. Not being an action no order was necessary and by force of ss. 362-363 of the Railway Act the parties proceeded with the arbitration and the arbitrators made the award.

In *Van Horne* v. *Winnipeg & Northern R. Co.*, 18 D.L.R. 517, 24 Man. L.R. 626, which dealt with this very same amalgamation, it was held by this court that where an arbitration had been commenced before, but the award was made after, the amalgamation, the W. & N. Ry. Co. could not appeal against the award, and that only the amalgamated company could do so.

The operative part of the award in the present case is as follows:—

> The said John R. Haney is entitled to compensation for taking of the lands aforesaid for the purposes of the Winnipeg and Northern Railway the sums following, viz.: for the value of the land actually taken, $759.50; for damages by reason of the construction of the railway through the said property a further sum of $9,500, making a total of $10,259.50.

The arbitration under the Expropriation Act, R.S.M. 1913, c. 69, is for the purpose of ascertaining the value of the lands

taken and the compensation for the damages sustained (ss. 4 (*h*), 23, 24, 33). It is sufficient under the Act if the award states clearly the sum awarded and the lands or other property, right or thing for which such sum is to be the compensation; and it is not necessary that the party or parties to whom the sum is to be paid be named in the award: s. 41.

I have no hesitation in holding that the award is binding on the amalgamated company, the defendants in this action.

I do not think that it was necessary that the plaintiff should tender a conveyance of the land before bringing this action. This is not a case of vendor and purchaser. It is a case where land was taken *in invitum* and the owner is seeking to enforce compensation the amount of which has been fixed by an award under the statutes. The defendants will be fully protected in respect of adverse claims, if any, against the land or the purchase money by paying the latter into court in pursuance of the provincial statutory provisions. See Act of Incorporation of W. & N. Ry. Co., 5 & 6 Ed. VII., c. 122, s. 13; Manitoba Expropriation Act, R.S.M. 1913, c. 69, ss. 49-55; Manitoba Railway Act, R.S.M. 1913, c. 168, ss. 7 & 8.

I would dismiss the appeal with costs.

Cameron, J.A.

CAMERON, J.A.:—The Winnipeg and Northern Railway Company was incorporated by special Act of the Manitoba Legislature, c. 122, 5 & 6 Edw. VII. The line of the railway crosses certain lands of the plaintiff, and three arbitrators were appointed to fix the compensation therefor. They held their first meeting March 12, 1912, and finally made their award January 29, 1914, fixing the compensation at $10,259.50. Before this, however, by agreement dated May 12, 1913, the Winnipeg and Northern R. Co., under s. 23 of the Act above mentioned, amalgamated with the Canadian Northern R. Co., the defendant in this action. This agreement was duly sanctioned by order of the Governor-General-in-council June 2, 1913.

This action was brought on the award, December 19, 1914, and came on for trial before Curran, J., who gave the plaintiff judgment for the amount. From this judgment the defendant company appeals.

We have here arbitration proceedings regularly carried on and concluded under the provisions of the Manitoba Railway Act and of the Manitoba Expropriation Act, which are made part of the

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special Act above referred to. The main question is whether they were rendered nugatory after the amalgamation of the Winnipeg and Northern R. Co. with the defendant company from the time of the sanctioning of the amalgamation agreement by the above order-in-council. It is argued that the Winnipeg and Northern Railway lost its corporate existence; that the award was made by arbitrators not authorised by the Dominion Railway Act; that their award is, therefore, ineffectual and void, and that the plaintiff has no cause of action. The case of *Van Horne* v. *Winnipeg & Northern R. Co.*, 18 D.L.R. 517, 24 Man. L.R. 626, was referred to, but I cannot see that it has any direct application to that before us.

We have to consider ss. 362 and 363 of the Dominion Railway Act, which the trial judge held had the effect of continuing and preserving the award as against the amalgamated company.

Under s. 362 as it reads, the amalgamated company in this case is "liable for all claims, demands . . . obligations . . . or duties to as full an extent" as was the Winnipeg and Northern R. Co. prior to the amalgamation.

Counsel for the defendant company admits that it is ultimately liable to make compensation, but contends that all proceedings under the provincial Act are suspended and rendered nugatory by the amalgamation and that proceedings to determine the amount must be taken *de novo* under the Dominion Act. It is argued that the provisions of the provincial Act as to arbitration are really provisions relating to procedure and that they are in effect repealed by the amalgamation, leaving the arbitration proceedings in mid air and the arbitrators without authority in the absence of any express provision to the contrary maintaining and preserving the proceedings, as is in fact provided for by the provisions of the English Railway Acts. See the Railway Clauses Act, 26 & 27 Vict. c. 92, s. 44, whereby references to arbitrations pending and incomplete at the time of the amalgamation are made valid and effectual as against the amalgamated company. 23 Hals. 709.

Darling v. *Midland R. Co.*, 11 P.R. (Ont.) 32, and *Barbeau* v. *St. Catharines & Niagara R. Co.*, 15 O.R. 586, were cases where the railways there in question had been declared to be for the general advantage of Canada under the provisions of 46 Vict. c. 24. These statutory provisions do not enter into this case.

The above cases and others such as *Demorest* v. *Midland R. Co.*, 10 P.R. (Ont.) 73 and 640, and *Fargey* v. *Grand Junction R. Co.*, 4 O.R. 232, arose under statutory provisions and circumstances which make them of little direct application to that before us.

There is no vested right in procedure, but it does not seem to me that the arbitration proceedings in this case were merely of the nature of procedure. In *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369, an application was made to the Judicial Committee to dismiss an appeal from the judgment of the Supreme Court of Queensland, on the ground that the power of the court below to give leave to appeal had been taken away by s. 39 of the Commonwealth Judiciary Act, 1903. The action in which the appeal was brought was commenced on October 25, 1902. The Judiciary Act came into force on August 25, 1903, and the leave to appeal was given on September 4, 1903. The Judicial Committee dismissed the application, saying (*per* Lord Macnaghten, p. 372):—

> As regards the general principles applicable to the case there was no controversy. On the one hand, it is not disputed that if the matter in question be a matter of procedure only, the petition (to dismiss) is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the (Judiciary) Act, it is conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants (the Sugar Co.) would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment, and, therefore, the only question is, was the appeal to His Majesty-in-council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.

So it seems to me that we have here more than a mere matter of procedure involved. The plaintiff had the right to have his compensation determined according to the provincial Act, just as in the *Colonial Sugar* case there was the right to appeal to the Privy Council at the time the action was commenced. There was, therefore, in the plaintiff a right in existence. To deprive a party to an arbitration of his right to have the proceedings brought to a conclusion and finally determined is surely a very different thing from regulating procedure, as Lord Macnaghten says of the right of appeal to the Privy Council and if there is no express statutory provision in the relevant legislation taking away that right, such a provision will not be read into it.

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Apart, however, from these considerations we have to consider the effect of the provisions of ss. 362 and 363 as they stand. There is no doubt whatever that the intention of parliament was to conserve the rights of third parties intact as against either of the companies amalgamated. It was surely the intention that proceedings properly begun under a provincial enactment should not on the merger of a provincial into a Dominion corporation *ipso facto* become void. By the interpretation Act we must give the sections in question a fair, large and liberal construction so as to ensure the attainment of their object according to their true intent, meaning and spirit. And when we read s. 362 there can certainly be gathered from its words the intention of parliament that the amalgamated company is to stand in the place of the merged company to all intents and purposes so far as outsiders are concerned. The amalgamated company remains liable for all the obligations of the merged company to the full extent to which the provincial company was liable at the time of the amalgamation. No wording could be more general or inclusive. No exceptions are made. It can make no difference whether the obligations are statutory or contractual. Nor is any exception made as to matters of procedure, though, as I see it, the right to have compensation fixed by arbitration is not a mere matter of procedure but a valid right created by statute.

It was stated by counsel for the plaintiff that the case would be on no different basis if there had been an agreement for arbitration between the parties before the amalgamation, which is to be found in these provincial statutory provisions, and I think the contention sound. It could not be argued that such a contract was affected by the amalgamation. Nor can it, in my judgment, be maintained that the effect of the amalgamation is wholly different because the obligations are statutory and do not arise out of an express agreement. They are equally binding on the parties.

If we were to adopt the opposite conclusion, results would follow as in this case which would justify the conclusion that parliament did not intend to pass legislation which would bring about such injurious consequences to innocent third parties. We would have all the trouble and expense of an arbitration, regularly begun, completely thrown away. Evidence already given might

not again be available. These considerations apply to the one company, as well as to the other. Such results are to be avoided if possible and, to my mind, there is no difficulty in doing so in view of the broad and comprehensive terms of s. 362.

We must remember that the effect of an amalgamation is not to repeal the provincial enactments. These remain in force. The effect is to transfer to the Dominion company the obligations of the provincial company as they were at the date of the amalgamation. Those obligations are here to be found in the provincial Acts which remain in force and can be effectually and validly worked out to their proper determination just as the obligations of a contract made prior to the amalgamation can be worked out to their remotest legal consequences.

In my judgment, these arbitration proceedings were properly concluded, the award properly made and this action is properly brought.

It is urged that, even if the award be good, the plaintiff cannot succeed in the absence of the tender of a transfer of the lands averred and proved. It is argued that in order to support a claim for the purchase price of land sold there must be a conveyance. Bullen & Leake, p. 285; *La.rd* v. *Pim*, 7 M. & W. 474, 151 E.R. 852. In *Guardians of the East London Union* v. *Metropolitan R. Co.*, L.R. 4 Ex. 309, it was held that, where after notice to treat, the amount of compensation to be paid for land compulsorily taken has been fixed by an award under the Lands Clauses Act, 1845, an action for such compensation cannot be maintained until a conveyance of the land has been executed holding that the rule in *Laird* v. *Pim* applied. "If the award be one giving compensation for land taken under the Lands Clauses Acts, an action seems the proper remedy and that will not lie until after a conveyance of the land has been executed." Russell, Arbitration 9th ed., 322, 323. The *East London Union* case was followed by Chitty, J., in *Howell* v. *Metropolitan Dist. R. Co.*, 19 Ch. D. 508, at 514. See also *Re Milford Docks Co.*, 23 Ch. D. 292.

The provisions of the Lands Clauses Act, 1845 which govern the English cases are to be found in ss. 69, 75, 76 and 77. Where the parties refuse or are unable to convey the promoters can pay the purchase money or compensation into the bank and execute a

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conveyance to themselves. Our provincial statutory provisions differ widely from these. These are to be found in s. 13 of the special Act (c. 122, 5 & 6 Edw. VII.); s. 49 *et seq.* of the Manitoba Expropriation Act, c. 69 R.S.M. 1913, and ss. 8 and 24 of the Manitoba Railway Acts, c. 168, R.S.M. 1913.

As I read the above sections together it follows that upon payment or tender to the owner or upon payment into court of the amount of the compensation awarded, the title to the property becomes absolutely vested in the railway company, and there is no necessity for a conveyance by the owner or by the promoter to give the company title. Such a case is not precisely that of vendor and purchaser though the relations of the parties are in some respects analogous thereto. Russell on Arbitration, p. 75. The provisions of our legislation, allowing the money to be paid or tendered or to be paid into court and there stand in the stead of the land, obviate all difficulties in procuring title and dispense with the necessity for shewing the same or making tender. As our legislation stands a formal tender would not appear necessary, and the English cases cited are of doubtful application.

Now this action is brought on the award which is referred to in the statement of claim. A statement in the simple form set out in Bullen & Leake would have been sufficient to disclose the cause of action, without the additional lengthy allegations which are incorporated in the statement of claim for reasons that, no doubt, commended themselves to the judgment of the draughtsmen. In para. 16 the plaintiff's title to the lands taken is set out. The statement of defence is voluminous and deals with para. 16 of the statement of claim simply by denying that the proceedings mentioned therein were taken by the Winnipeg & Northern Railway Company on behalf of the defendant company. There is no denial of the taking of the lands or of the plaintiff's title. Para. 20 of the statement of claim alleges the award. To this the statement of defence merely says in substance that it was the Winnipeg and Northern R. Co. that was a party to the arbitration and not the defendant company. Nowhere have I been able to find it alleged in the statement of defence that the plaintiff has not executed and tendered a conveyance of the lands taken. No such issue is raised on these pleadings. In the *East London Union* case there was such a plea to the declaration and the hearing was

on a demurrer to the sufficiency of the plea. In *Laird* v. *Pim*, *supra*, where in an action by a vendor against a purchaser a plea that no conveyance had ever been made or executed to the defendants was held bad on demurrer, because the declaration alleged that the purchaser had discharged the vendor from tendering a proper conveyance. As this defence of want of tender has not been raised in the defence, I think we should not give effect to it, even if it were a good defence in an award under the Manitoba Acts in question. It is a purely technical defence and not to be looked on with favour.

The award was made January 29, 1914. It was taken up by the defendant's counsel. The defendant company intimated an intention to appeal, and as I understand attempted to appeal from it, and refused to pay the amount, and this action was accordingly brought December 19, 1914. In such circumstances it may well be that a tender was unnecessary. "The vendor may maintain an action for the purchase money before he has executed the conveyance, or before he has declared his readiness and willingness to execute it, if the purchaser by any act of his has discharged him from doing so." Harris Law of Tender, pp. 268-9. It is not necessary "to go further and do a nugatory act," as said by Lord Mansfield in *Jones* v. *Barkley*, 2 Doug. 684, 99 E.R. 434. But in the absence of an allegation that the plaintiff had not executed and tendered a conveyance which would have called for a reply that execution and tender had been dispensed with, there is no need to lay stress on this branch of the case.

I have proceeded in considering this branch of the case as if the provincial legislation must be followed out in proceedings upon this award, and I think that point of view correct.

There is another objection taken that this award is invalid because an action was commenced January 26, 1912, by the plaintiff on an alleged agreement of purchase, made with the Winnipeg & Northern R. Co., which action is now pending. I can see no force in this contention.

That action is on an agreement; this award fixes the compensation for lands compulsorily taken, without regard to any agreement. If, however, the compensation paid on the award goes to the consideration on the agreement it will no doubt be so applied if the action ever is revived and brought down to trial and judgment. It

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goes without saying that the pleadings would be amended to set out the facts. The case of *Doleman* v. *Ossett Corporation*, [1912] 3 K.B. 257, was relied on by defendant's counsel. There was an action on a contract which contained a provision for an arbitration under which an award was made by the arbitrator pending the action. It was held that the jurisdiction of the court was not ousted by the agreement to arbitrate, and that the award was no bar to the action. I cannot see that this case has any application to the one before us.

Cameron, J.A.

There were other considerations brought before the court on the argument, with which I do not find it necessary to deal, as, for instance, the contention that the defendant company adopted the arbitration proceedings after the amalgamation and is thereby estopped from questioning their validity.

In my opinion the appeal must be dismissed.

Haggart, J.A.

HAGGART, J.A., concurred. *Appeal dismissed.*

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. June 10, 1918.

LAND TITLES (§ IV—45)—CAVEAT—MARRIED WOMAN—MARRIED WOMAN'S PROPERTY ACT—AFFIDAVIT OF BONA FIDES.

Section 85 of the Land Titles Act (Alberta), which requires that all caveats with the exception of a caveat filed by the registrar under s. 100 must be supported by an affidavit of good faith, applies to a caveat filed by a married woman under the Married Woman's Home Protection Act (Alta. Stats., 1915, c. 4).

[See annotation, 7 D.L.R. 675.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta reversing the judgment of Hyndman, J., at the trial, 12 A.L.R. 111, in favour of the defendant. Affirmed.

J. D. Matheson, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Some time prior to August 12, 1916, the appellant commenced an action against her husband for alimony and on this date filed a caveat under the Married Woman's Home Protection Act, c. 4, statutes of 1915, against his land.

The claim for alimony was refused by the trial judge on the ground that the appellant had sufficient means of her own. On April 27, 1917, the respondent executed a transfer of his land to one D. Gillen. The Dower Act, c. 14 of the 1917 statutes, came

into force on May 1, 1917, and by that Act the Married Woman's Home Protection Act was repealed. On June 1, 1917, the respondent gave notice of motion for an order to remove the caveat and in October, 1917, judgment was rendered refusing the application.

The judge of first instance held that under the Interpretation Act, s. 48, saving acts done and rights existing, "the wife was entitled to maintain her caveat, notwithstanding the repealing statute, until the same is removed in the manner provided by the Act creating the right and in the Land Titles Act.

The judge does not deal otherwise with the application to remove the caveat.

Four Judges of the Appellate Division, without giving any reasons, reversed that judgment and ordered the caveat removed.

It was argued here that because Walsh, J., held in the alimony action that the wife was provided for to the extent that an award of alimony was unnecessary she was not entitled to her caveat.

The judgment of Walsh, J., is not in this record and there is no evidence that the appellant has a private estate.

It is also urged that the caveat should be removed because it is not supported by affidavit as required by the provisions of s. 85 of the Land Titles Act, and in that contention I concur.

The Married Woman's Home Protection Act was passed subsequently to the Land Titles Act, but s. 8 of the former Act provides: "This Act shall be read with and as part of the Land Titles Act."

If the Land Titles Act is read with the provisions of the Married Woman's Home Protection Act inserted in the proper place, having regard to those provisions, we have a statute which enables any married woman to file with the registrar an instrument to be known as a married woman's caveat and which is described in all the sections dealing with the matter as a caveat and for which a special form is provided.

Then we have s. 85 which reads as follows:—

Every caveat filed with the registrar shall state the name and addition of the person by whom and on whose behalf the same is filed and *except in the case of a caveat filed by the registrar* as hereinafter provided shall be signed by the caveator, his attorney or agent, and shall state some address or place within the province at which notices and proceedings relating to such caveat or the subject matter thereof may be served and the nature of the interest claimed and the grounds upon which such claim is founded, and shall be supported by an affidavit that in the belief of the deponent the person by

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whom or on whose behalf the caveat is filed has a good valid claim in respect of the land, mortgage or encumbrance intended to be affected by the same, and that the caveat is not filed for the purpose of delaying or embarrassing the applicant, or owner, or any person claiming through him, which affidavit or affidavits may be in the form X in the schedule to this Act

This section provides that all caveats with the single exception of a caveat filed by the registrar under s. 100 must be supported by an affidavit as to good faith, etc.

Independently of the very broad terms of s. 85, there are very obvious reasons why such an affidavit should be required in the case of a caveat filed by a married woman.

It is quite conceivable that an unscrupulous adventurer alleging herself to be the wife of a homesteader or even a lawfully married woman moved by some unworthy motive should improperly and without justification seek to embarrass a man in dealing with his property. I can see no difficulty in framing an affidavit in accordance with the general provisions of form X to meet the requirements of s. 85 with respect to the married woman's caveat.

I would dismiss the appeal with costs.

Davies, J.

DAVIES, J. (dissenting):—The single question to be determined on this appeal is whether a caveat filed and registered by the appellant, the wife of the respondent, against the sale of their homestead, was a valid caveat without the affidavit required to an ordinary caveat by the Land Titles Act.

The trial judge held it was a good caveat. His judgment was reversed by the appeal court which ordered that the caveat should be removed from the register and vacated. No reasons were given for their judgment.

I am of the opinion that the appeal should be allowed and the judgment of the trial judge restored.

The reasons for the appeal court judgment must, of course, have been that as the Land Titles Act required all caveats to be supported by an affidavit of the caveator in the form given in the schedule to that Act, and as the Married Woman's Home Protection Act, which was passed subsequently to the Land Titles Act, provided that "it should be read with and form part of the Land Titles Act," it was not a valid caveat unless supported by the affidavit. That affidavit required the caveator to swear amongst other things "that this caveat is not being fyled for the purpose of delaying or embarrassing any person interested in or proposing

to deal therewith," that is in or with the lands to protect the estate or interest in which the caveator fyled his caveat.

The answer which seems to me to be a good one to this argument is the one advanced by Mr. Bennett at bar, viz., that the Married Woman's Home Protection Act, which came into force April 17, 1915, was a special Act passed with a special purpose, viz., to protect a married woman thereafter from being deprived of all her interest in the homestead property which she in many cases did as much to make valuable as her husband did. The caveat required covered the homestead property only and did not affect other lands of the husband. A special form was set out in a schedule to the Act which was strictly followed in this case. It was called a married woman's caveat and had no form of affidavit attached to it nor did the Act itself in any way refer to or suggest that any affidavit was required.

There are many differences in the object and purpose of the ordinary caveats, and those of the married woman's caveat. The object of the former is to protect some right or interest of the caveator in certain lands and the caveator is properly obliged to swear that he does not fyle the caveat for the purpose of delaying or embarrassing any person interested in the land or proposing to deal therewith. The main object of the married woman's caveat was to protect her rights in the homestead and in order to do so to delay her husband so that he could not sell the homestead over her head and deprive her of her rights. That being her object and purpose, how could she conscientiously make affidavit that it was not? Reading the two Acts together, it does seem to me an unfair construction to put the married woman in such a position or dilemma that she must swear falsely or lose her rights in her homestead? A reasonable construction should be placed upon both of the statutes in question when read together so that effect may be given to the intention of the legislature.

Such construction is not consistent with requiring an affidavit to be made which could not have been intended to apply to the Married Woman's Home Protection Act, because an honest, truthful woman could not swear that her caveat was not intended to hinder or delay her husband in dealing with the homestead by sale or otherwise. It was so intended. It was the manifest intention of the Married Woman's Home Protection Act to delay and em-

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barrass the husband so that he should not convey away or mortgage the homestead and deprive her of her rights. To say you must either swear to that which is false or your caveat will be vacated is to put an unreasonable and improper construction upon the two Acts which are to be read together.

I am, therefore, of the opinion that in following strictly the form given in the Married Woman's Home Protection Act and in omitting the affidavit required in the cases of ordinary caveats by the Land Titles Act, which she could not honestly or conscientiously take, the appellant was within her rights and her caveat was good.

I would allow the appeal and restore the judgment of the trial judge.

Idington, J.

IDINGTON, J.:—The Alberta Legislature passed an Act called the Married Woman's Home Protection Act, which by s. 1 enacted as follows:—

> Any married woman may cause to be filed on her behalf with the registrar an instrument to be known as a married woman's caveat in form WW in the schedule to this Act against the registration of any transfer, mortgage, encumbrance, lease or other instrument made by or on behalf of her husband affecting a homestead as defined in s. 2 of this Act.

The last section of the Act reads as follows: "This Act shall be read with and as part of the Land Titles Act."

This seems clearly to have intended the Act to constitute part of the Land Titles Act just as much as if under a distinct caption it had been placed therein originally, otherwise there was no sense in such a provision.

The Land Titles Act by s. 85 enacts as follows:—(See judgment of Fitzpatrick, C.J.)

The form of affidavit by the second clause is as follows:—

> I believe that I have (or the said caveator) has a good and valid claim upon the said land (mortgage or encumbrance), and I say that this caveat is not being filed for the purpose of delaying or embarrassing any person interested in or proposing to deal therewith.
>
> Sworn before me, etc.

The Land Titles Act, by s. 100 thereof, specifically exempts certain caveators from making an affidavit, thereby emphasising the necessity for an affidavit in all other cases where the Act provides for the use of a caveat.

The appellant filed a document in the form of the caveat and was enabled to use under the Act with the registrar relative to certain lands of respondent her husband, without any affidavit or

proof of who she was or in any manner pretending to verify the facts as required by the above s. 85 of the Land Titles Act.

This was done pending an alimony suit which she had instituted against respondent and which ended in the trial judge finding she was so circumstanced as not to need any alimony.

Then respondent moved to set the registration aside. Hyndman, J., refused the application, on the ground that no affidavit was necessary. The Court of Appeal reversed that judgment and directed the removal of the caveat.

We have no notes of why the court so directed, but the counsel arguing here seem to admit it was because of non-compliance with the Land Titles Act in failing to file the affidavit I have referred to and that is the point most elaborately dealt with in respondent's factum.

I agree with that view and hence think the appeal should be dismissed with costs.

I see no difficulty in any honest married woman complying with the Act if in truth she needs to resort to that means for her protection.

If she does not then she is quite clearly not one of those the legislature desired to protect and hence should not attempt its use. I can conceive of no reason why she should if entitled to file the caveat refrain from making the affidavit. Moreover, I can conceive of many reasons why she should be required to make the affidavit, and cannot understand the argument addressed to us for distinguishing in that regard this caveat from others when the Act has not made any exception in its favour and if so minded could so easily have applied the excepting part of the Act thereto.

To pretend that the legislature when enacting this statute and declaring it part of an Act which in most imperative terms required by said s. 85 every caveat filed with the registrar saving the specified exception to have an affidavit of verification and negation of improper motive did not mean it to apply to a married woman's caveat seems like a mockery of the legislature so enacting.

The kind of argument that is presented for supporting the appeal I respectfully submit seems to be that which the rules in *Heydon's* case suggested it should be the office of the judges to repel, by requiring them to suppress the mischief and advance the remedy, and to "suppress subtle inventions and evasions for the

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continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*."

It seems to me obvious that this class of caveat, such as enabled, more than any other needs the restraint of an affidavit such as the statute requires in all but the specifically excepted cases and hence it must have been intended that it should be made. The reason for making the claim, in short, the foundation for it, which the statute required set forth in any affidavit, is needed so that the court on whom the burden is cast may have had defined that which is to be tried.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Notwithstanding the able and forceful argument presented by counsel on behalf of the appellant, further consideration of the Married Woman's Home Protection Act with the Land Titles Act—with and as part of "which the former Act is by its s. 8 required to be 'read'"—has convinced me that the legislature intended that the requirement of s. 85 of the Land Titles Act as to an affidavit of *bona fides* should apply to a married woman's caveat.

No good reason has been advanced for depriving the owner of property upon which it is sought to register such a caveat of the protection against fraudulent and purely vexatious claims which an affidavit of *bona fides* by the caveator may afford. She should at least be required to pledge her oath that she is the wife of such owner and that the property was occupied by her as a homestead. These facts are implied in the first clause of par. 2 of the prescribed affidavit: "I believe that I have a good and valid claim upon the said land." Nor does the further clause, "that this caveat is not being filed for the purpose of delaying or embarrassing any person interested in or proposing to deal therewith," *i.e.*, with such land —present the difficulty which at first blush seemed most serious. Embarrassment and delay to the owner and to any other person proposing to deal with the land are no doubt consequences likely to ensue as a result of the lodging of a married woman's caveat, just as they are likely to ensue as a result of the filing of any other caveat. But the primary "purpose" of the married woman must be the same as that of any other caveator—to protect the "good and valid claim" which she believes she has upon the land. To

the existence of that purpose she may well be obliged to pledge her oath. I am satisfied that a judge required to construe an affidavit made in the prescribed form upon a charge of perjury should direct a jury or himself that the affiant could not be convicted unless it was established beyond reasonable doubt either that she did not honestly believe that the claim in respect of which she lodged her caveat was good and valid, or that her purpose in filing it was not to protect such a claim but solely to delay or embarrass some person interested in or proposing to deal with the land. The requirement of an affidavit imposed by s. 85 is, in my opinion, mandatory and not merely directory and a caveat lodged without such affidavit, although accepted by the registrar, is fatally defective. Solely upon this ground I would dismiss the appeal.

Brodeur, J.

BRODEUR, J. (dissenting):—We have to decide in this case if a woman who has executed a caveat under the Married Woman's Home Protection Act of Alberta is obliged to file the affidavit required by s. 85 of the Land Titles Act of the same province.

There was also a question of jurisdiction which was raised before us as to the right of the Appellate Division of the Supreme Court of Alberta; but it was not strongly pressed. Besides, it appears that the appellant, who was respondent in the Appellate Division, had not thought fit when they were before that court to discuss that question of jurisdiction; and it seems to me now too late, when the parties are before this court, to say that the Court below was without authority to deal with the case. The jurisdiction of the Appellate Division was then accepted by both parties and the appellant should not be permitted now to set aside the jurisdiction of a court which has been accepted.

Coming to the question of registration of the *caveat*, it is advisable to state that the Torrens System established in Alberta by the Land Titles Act provided that a person claiming an interest under a will, a transfer or a mortgage in any land may file a caveat forbidding the registration of any instrument affecting that land, unless that instrument be subject to the claim of the caveator (s. 84).

It was also provided that the caveator was bound to file an affidavit shewing, (1) that he has a valid claim and (2) that the caveat is not filed for the purpose of delaying or embarrassing any person interested in the land in question.

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In 1915 the Legislature of Alberta passed the Married Woman's Home Protection Act which gave to a married woman the right to file with the registrar a caveat forbidding the registration of any sale by her husband of her homestead.

That Act gave also the power to the husband to apply to a judge for the removal of that caveat; and s. 8 provides that: "This Act shall be read with and as part of the Land Titles Act."

The appellant, Mrs. Russell, filed such a caveat under the Married Woman's Home Protection Act and the respondent, her husband, has applied to a judge for the removal of the caveat. His application was dismissed but in appeal he obtained judgment in his favour.

Mrs. Russell is now appealing from that judgment and contends that the Appellate Division has erroneously held that her caveat should be removed because she has not filed the affidavit required by s. 85 of the Land Titles Act.

I am, with due deference, unable to agree with the view expressed by the Appellate Division. The Married Woman's Protection Act is an enactment which is to be considered by itself. It is true that it is to be read, as s. 8 declares, with and as part of the Land Titles Act; but in all cases where the provisions of the Land Titles Act are inconsistent with the Married Woman's Home Protection Act, or where there is a formal provision in the latter Act, then the provisions of the Married Woman's Home Protection Act, should prevail.

The instrument which the married woman is entitled to register should not be, if it had not been so determined by the Act, called a *caveat*. The ordinary *caveat* is a claim made by a person that he has some interest in certain lands; it is essentially of a temporary nature according to s. 89 and is deemed to have lapsed after the expiration of sixty days, unless some proceedings have been instituted in the meantime.

The ordinary caveat also would not prevent the property encumbered to be sold; it could be sold subject to that incumbrance. The ordinary caveat also being based upon a statement of a person that he has a claim upon the property by way of an agreement of sale or mortgage, it is only reasonable that it should be accompanied by a sworn statement.

None of those requirements of the ordinary caveat present

themselves in the right which the wife may exercise under the Married Woman's Home Protection Act.

First, the statute declares that the wife may register an instrument which will be called a married woman's caveat. It is not then, as we see, the ordinary *caveat*; but it is a particular instrument which the law calls a *caveat*.

The law also declares (s. 3) that "upon the receipt of such married woman's caveat the registrar shall take the same proceedings as in the case of the filing of any other caveat under this Act."

The law does not say that upon the receipt of that instrument and of an affidavit the registrar will do this and will do that; but it simply says that upon the receipt of the instrument in question the registrar will give notice. The law does not require there any affidavit and s. 4 says that so long as such caveat remains in force the registrar shall not register any transfer or other document affecting the homestead in question.

That is very different from the ordinary *caveat*, which requires it. A sale could take place but subject to the right of the person claiming a right upon the property.

This right of the woman is not an uncertain right like the one of the person who would claim under an agreement of sale or a mortgage. It is an absolute right which is given to the woman and I could understand that, in such a case, an affidavit would not be required. The affidavit required by s. 86 is for the object of swearing that the caveator has a good and valid claim. Here, in the case of the wife, it is not a claim that she asserts; it is her right which the legislature has granted. It seems to me that the affidavit is not required in the case of the married woman's caveat.

For these reasons, the appeal should be allowed with costs.

Appeal dismissed.

***THE KING v. QUEBEC GAS Co. AND CITY OF QUEBEC.**

Exchequer Court of Canada, Audette, J. July 7, 1917.

EXPROPRIATION (§ III B—110)—CONVERSION OF RIGHTS—COMPENSATION—COMPANIES—ACTION—PARTIES—MARKET VALUE—SPECIAL ADAPTABILITY—RAILWAYS.

By virtue of s. 8 of the Exchequer Court Act, the deposit of the plan and description of the land expropriated has the effect of vesting the property in the Crown, and from such time, under s. 28 of the Act, the

*Affirmed on appeal to Supreme Court of Canada, May 7, 1918.

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compensation money stands in lieu of the land, and any claim to the land is converted into a claim for the compensation money.

2. A corporation holding the shares of a subsidiary company has no *locus standi* to prosecute a claim for compensation on behalf of the latter; the action of the subsidiary company must be brought in its own corporate name.

3. The special adaptability of land for railway purposes is but an element of the market value of the land. In assessing compensation for the taking of such land regard must be had of its value to the owner, not the value to the taker. The doctrine of reinstatement does not apply to the taking of lands not used as a going manufacturing concern. The best test of the market value is what other properties in the neighbourhood have brought when acquired for similar purposes.

Statement.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

G. F. Gibsone, K.C., *Arthur Holden*, K.C., and *J. P. Gravel*, for Crown; *E. A. D. Morgan*, K.C., for Quebec Gas Co.; *A. Taschereau*, K.C., for Royal Trust Co.; *L. G. Belley*, for Quebec Ry., L., H. & Power Co.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Att'y-Gen'l of Canada, whereby certain lands, belonging to the defendants, were taken and expropriated for the purposes of the National Transcontinental Railway, by depositing on April 24, 1913, and on February 24, 1915, plans and descriptions of the same with the Registrar of Deeds at the City of Quebec.

These lands are situate in St. Peter's Ward, in the City of Quebec, and since the expropriation form part of the new C.P.R. Union Station, at the Palais.

The Crown by the information offers $144,400 and interest. The Quebec Gas Co. by its statement in defence claims the sum of $822,704, and the Quebec Railway, Light, Heat and Power Co. claims the sum of $860,176.90, inclusive of 10% for coercion.

It is admitted by all parties that the total area of land taken is of 62,558 1-3 sq. ft.—that is: lot 1937 contains 16,098 1-3 sq. ft.; and the whole lot 1937 A. contains 46,460 sq. ft; making a total of 62,558 1-3 sq. ft.

It is further admitted by all parties that the value of the buildings upon the lands in question, at the time of the expropriation, was $32,000, therefore the evidence in respect of valuation will be limited to the land only—the value of the buildings having thus been ascertained by consent.

Mr. Morgan, K.C., counsel at bar for the Quebec Gas Co., at the opening of the trial, filed the following declaration of admission, which reads as follows, to wit:—

The defendant, the Quebec Gas Company, by way of amendment to the statement of defence put in by them, declare that they now admit that the filing of the plan and the taking of the lands described in the information was actually made and done on behalf of His Majesty the King, and by reason thereof said lands are now, and have been since the filing of the said plan, vested in His Majesty the King.

This declaration or admission speaks for itself, and removes one of the traversed allegations of the information.

It was also admitted, in the course of the trial, that the indications on plan 3-a, made with arrows by Mr. Trembly, are correctly marked in accordance with the deeds, including the yellow portion, which is an exchange between the Harbour Commissioners and the Transcontinental. The deeds indicated on the plan were executed after the plans for expropriation for such land had been deposited.

In order to follow the trend and the development of the different phases of this case, it is thought advisable to mention here that on January 21, 1915, Mr. Morgan, K.C., moved the court for an order directing that the question of title or ownership of the property in question be disposed of before going into the question of compensation, alleging in his motion paper that his clients claimed the sole ownership of the land in question. The application was then enlarged *sine die*.

Then on February 9, 1917, Mr. Morgan, K.C., alleging his application of January 21, 1915, just referred to, and also a resolution of the City of Quebec (at that time the only other defendant), by its council, at a meeting of June 29, 1916, setting out that the city had no interest in the properties herein, prayed for an order, in view of the said resolution, declaring that the Quebec Gas Co. was the sole and only defendant in this case, and that it be declared that the other defendant (the City of Quebec) is no longer a defendant. . .

Mr. Chapleau, K.C., of counsel for the City of Quebec, then shewed cause and declared he withdrew from the case.

Under these circumstances an order was made *donnant acte* of such disclaimer or withdrawal from the case by the City of Quebec, with, however, no further pronouncement for the time being. Subsequently thereto, two other parties were added defendants to this suit, namely, the Royal Trust Co., which company did not file any written plea, but by its counsel, Alexandre Taschereau, K.C., at the opening of the trial, declared *s'en rapporter a justice*, that

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is, submitted itself to the judgment of the court, and the Quebec Railway, Light, Heat and Power Co., which filed of record a set of pleadings.

In the result there is now on the record a claim by the Quebec Gas Co. for the land taken herein, and there is also a claim by the Quebec Railway, Light, Heat and Power Co. (hereinafter called the Power Company) in respect of the land itself, and also in respect of the Montmorency and Charlevoix Railway.

Before entering into the consideration of the compensation to be paid under the present expropriation, it becomes necessary *in limine* to establish the actual rights of both the Quebec Gas Co. and the Power Company, respectively.

THE QUEBEC POWER CO.—The manager of the Quebec Power Company, heard as a witness, testified that he was the manager of that company, which might be called the holding company, or the merger, as it is popularly called; that he was also manager of all the subsidiary branches or companies under the merger, that is to say: the Quebec Gas Co., the Frontenac Gas. Co., the Quebec Jacques Cartier Electric Co., the Quebec Railway, Light and Power Co., the Quebec County Railway, the Canadian Electric Light Co., the Lotbiniere & Megantic Railway Co., and the Quebec and Saguenay Railway. He did not mention or include among these subsidiaries the company known as the Quebec, Montmorency & Charlevoix Railway, but it was always taken for granted at trial that it was one of the companies of which the Power Company held the stock.

The merger deed so much spoken about and relied upon at trial has not been filed of record in this case, although asked for by the tribunal. We are told by the manager that the merger took place in the early part of 1910, but it might be inferred from the trust deed to the Montreal Trust Co., bearing date December 15, 1909, that it must have been in existence in 1909. That fact, however, has no bearing upon the case.

Now, it is important to bear in mind, that on April 24, 1913, the date of the expropriation, both the City of Quebec and the Quebec Gas Co. appeared, on the registry, to be the only parties having any real registered rights upon this property.

As the partial result of an agreement entered into on September 11, 1916 (long after the expropriation) between the City of Quebec

and the Quebec Power Co., it was among other things covenanted and agreed as follows, to wit:—

Et en considération de tout ce que dessus, la dite cité (City of Quebec) cede et abandonne a la dite Compagnie (the Quebec Railway, Light, Heat & Power Co.) toutes les prétentions et tous les droits de propriété que la dite cité peut avoir sur le terrain précédemment occupé par la "Quebec Gas Works" et connu sous le numéro (1937 A) dix neuf cent trente sept A du cadastre officiel pour le Quartier St. Pierre de la Cité de Québec.

Under the provisions of s. 8 of the Expropriation Act, by the deposit of the plan and description of this property on April 24, 1913, such property became vested in the Crown; and under s. 22 of the same Act, a like provision is made, and it is further thereby enacted that from such time the compensation money shall stand in the stead of the land, and that any claim thereto is converted into a claim to such compensation money. *The Queen* v. *McCurdy*, 2 Can. Ex. 311; *Partridge* v. *Great Western R. Co.*, 8 U.C.C.P. 97; *Dixon* v. *Baltimore & Potomac R. Co.*, 1 Mackey 78; *Lamontagne* v. *The King*, 16 Can. Ex. 203; *Dawson* v. *G.N. & C. Railway*, [1905] 1 K.B. 260, 273; *Mercer* v. *Liverpool, St. Helens & South Lancashire Ry. Co.*, [1904] A.C. 461; and Halsbury, vol. 6, p. 33.

On September 11, 1916, the lands in question had, since April 24, 1913, the date of the expropriation, become under the statute, the property of the Crown, and all mutations of this property subsequent to the expropriation are null and void on their face—the only effect such mutations may have is between the parties to the deed itself, which at its best can be construed as a transfer to any right "to the said compensation money" which the City of Quebec may have had, and I hereby so find.

Then follows in this chain of title the deed of May 12, 1917—a deed passed a long time after the expropriation and even pending the instruction of the trial—between the Quebec Gas Co. and the Quebec Railway, Light, Heat & Power Co., Ltd.—to confirm the statement therein mentioned, to the effect that the Power Company had, before January 1, 1912,

already acquired and taken possession of a certain part or parcel of the land in question with the approval and consent of the Quebec Gas Co., and enjoyed the same as its own and absolute property, and has always been considered, even by the Quebec Gas Co., as sole and absolute owner of the same. Furthermore, that no deed or instrument in writing was executed at the time between the said parties to state and establish the same, and that it is expedient to then execute the deed.

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All of what has just been said in respect of the deed of September 11, 1916, may equally be said with respect to this deed of May 12, 1917, and that in the result it is a transfer by the Quebec Gas Co. to the Power Company of its rights to "the compensation money" herein, coming also within the ambit of s. 22 of the Expropriation Act.

However, the contention of the Power Company goes beyond that. While it claims to have been the owner of the land in question before the expropriation, as the holding company, I should say they hold and own the shares of the Quebec Gas Co., and they ask that the compensation to be paid should be ascertained as if the property did belong to them, and as the Power Company is also the holding or parent company of the Montmorency & Charlevoix Railway, also holding and owning the shares of the latter, they conclude similarly.

The Power Company is the owner of the shares of the Quebec Gas Co., and of the Montmorency & Charlevoix R. Co.; the Power Company represents and is effectively nothing but the shareholders of these two companies.

Dealing first with that part of the claim made by the Power Company, as owner of the lands in question and described in this deed of May 12, 1917, executed during the trial, I must confess I cannot accept, under the circumstances, the statement made in that deed, to the effect that the Quebec Gas Co. had, as far back as January, 1912 (a carefully selected date which would take the transaction prior to the expropriation), sold their property to the Power Company, in view of the fact that the latter is only the holding or parent company. Moreover, the inherent rights of the City of Quebec in this property had not passed to the Power Company until September 11, 1916, also a long time after the expropriation. It is obvious and conclusive that this statement is but the result of a misconception of the respective rights between a holding or parent company and a subsidiary company, and the seemly result of an afterthought which originated only at the trial. Therefore, it must be again found, taking into consideration all these surrounding circumstances, and the allegations in its pleadings, that this deed can but amount to an agreement between the Power Company and the Gas Company, whereby the Power Company are made entitled to receive the compensation money for the

lands expropriated. In other words, it is a transfer by the Quebec Gas Co. of its rights, not to the land, but to the compensation money, as the transfer is made after the expropriation—the whole pursuant to the provisions of s. 22 of the Expropriation Act.

However, the Power Company makes a claim which, if it were allowed, would let in a very important element under the head of injurious affection to the Montmorency & Charlevoix R. Co., one of its subsidiary companies—the whole as more particularly set out in par. 13 of the Power Company's statement in defence, which reads as follows, to wit:—

13. L'expropriation en cette cause et la prise de possession de sa Majesté a occasionné à la défenderesse des dommages considérables dans l'exploitation de son chemin de fer Montmorency et Charlevoix, en le privant des immeubles expropriés, dont elle avait absolument besoin pour son terminal a Quebec.

This is a claim made by the Power Company for damages alleged to be suffered by the Montmorency & Charlevoix Railway, a subsidiary company, for which the Power Company is holding the shares.

What is therefore the position of the Power Company in its relation to the Montmorency & Charlevoix R. Company? The relation is nothing more than that of a shareholder in a corporate body is to a company. The Power Company holds the shares of that company, and is in the same position as a shareholder of the Montmorency & Charlevoix R. Co., and as such can no more than an ordinary shareholder take an action for that company or defend an action against it. Any action on behalf of the Montmorency & Charlevoix R. Co. must be taken in its corporate name and not by one or all of its shareholders individually. Therefore, that part of the claim set up by the Power Company for any damages which might result to the Montmorency & Charlevoix R. Co., not having been taken by that company in its corporate name, must obviously be dismissed.

Although the Montmorency & Charlevoix R. Co. is not a party to this suit and cannot be bound by this judgment, yet, as the voluminous evidence adduced in respect of the rights of that company does not disclose any proprietary rights in the land in question, it was thought advisable under the peculiar circumstances of the case, to offer a few observations in this respect for the sake of argument only, which really become exclusively academic, since the Montmorency & Charlevoix R. Co. did not set up a claim in

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its corporate name. For instance, what is the position of that company? If the property expropriated herein did form part of the terminal of the Montmorency & Charlevoix R. Co., it has already passed to the Crown under the provisions of 6-7 Geo. V., c. 22, the order-in-council of August 4, 1916, and the agreement of July 25, 1916, made under the provisions of the said Act. This is too obvious. A summary perusal of the schedule to the Act and to the deed in question, and Schedule "C" thereof, will establish that point beyond controversy. Both the Quebec & Saguenay Railway, and the Quebec, Montmorency & Charlevoix Railway passed to the Crown under these instruments, "inclusive of its terminals in the City of Quebec."

If, on the other hand, as the case is, notwithstanding contention to the contrary, the property in question did not and does not form part of the Terminal—and even if part of it was used for the company's *stone business*, with or without the assent, consent or tolerance of the Quebec Gas. Co, or those controlling that company —it does not make the land part of the Terminal. See Cripps on Compensation, 5th ed., p. 148. It only shews, as will be hereafter referred to, that this property was a discarded gas property, where gas had not been manufactured for several years (since 1910), and that the property was not a gas proposition or a going concern as such; but a property practically idle and which on the market would sooner or later be taken by some of the railway companies that had already property in the neighbourhood.

It may also be said casually that these damages, in the nature of injurious affection to the Montmorency & Charlevoix Railway, and the Quebec & Saguenay Railway, are grossly exaggerated by some of the witnesses, when it is actually established that only a very small portion of the land expropriated of the Quebec Gas Co., property was used for this stone business, and that the property is entirely separate and distinct from the railway company—a street lying between both properties. Moreover, it is difficult to conceive that the alleged congestion at the Quebec Terminal did actually exist, in view of the fact which glaringly struck me on the visit to the premises during the trial at the request and in the company of counsel for all parties, that the company has almost right alongside of its station, as shewn on the plan, its workshops. If there were actual congestion in the yard, at the Terminal, would

not a company conducted as it is on a sound business basis, have transferred these shops to their Limoulou yard to give them more space at the Terminus? But it is unnecessary to elaborate upon this point, since I have found, for the reasons above mentioned, that the Power Company has no *locus standi* when claiming damages to the Terminal of the Quebec, Montmorency & Charlevoix Railway. There can be no compensation for injurious affection, if no legal right is interfered with. Cripps on Compensation, 5th ed., 140.

COMPENSATION.—Proceeding now to the examination of the evidence and the ascertainment of the compensation to be paid for the land so taken, it will be seen that quite a few engineers were examined on behalf of the defendants, and their evidence tends to shew that the Quebec Gas Co.'s land could be added with advantage to the railway companies' property already owning land in the neighbourhood. Two of these engineers are of opinion that the Quebec Gas Co.'s property would be more valuable to the Canadian Pacific R. Co., or the National Transcontinental, than to the Quebec Railway, because it is adjoining the C.P.R., and that for the Quebec Railway to use it effectively and economically it would be necessary to acquire some city property and some property from the Quebec Harbour Commissioners.

In view of what has already been said it becomes unnecessary to go into this class of evidence, more than repeating here what I have already said, and that is that this property decidedly falls within the class of property which sooner or later would be taken by some of the railway companies that have already property in this neighbourhood.

On behalf of the defendants the following witnesses were heard upon *the question of value*: Henry G. Matthews, George W. Parent, Fitzjames E. Browne, George Beausoleil and Lucien Bernier.

Henry G. Matthews, the general manager, testified that if an offer of $50 per sq. ft. had been made on behalf of the holding company he would have advised not to accept it. But if $75 a sq. ft. had been offered he would have advised to accept it—that amount representing over $4,000,000—which would have "allowed us to sell the railway for scrap and the Montmorency Railway go out of business."

Yes, this property of 62,558 1-3 ft. at $75 a sq. ft. would repre-

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sent $4,681,875. Such a valuation calls for no comment, as it is of no help to a tribunal desirous to do justice in a conscientious manner.

George W. Parent, a resident of Montreal, who, however, in 1906, 1907 and 1908, made some subdivisions in Quebec, arrives at an average price of $14 a foot for the land in question. To establish this value he reasons in the following manner. He considers that the Canadian Pacific Railway and the Quebec Railway are both cramped for space, and that, therefore, the situation is different from that of an expropriation visited upon a private individual who could move his establishment to another place. He takes it that the only available block to replace the property expropriated is between Place d'Orleans and St. Paul Street, containing about the same area; and he concludes that the only price he could place upon the land taken would be what it would cost to replace it—the price asked on the Ramsay-Henderson block—that is $8 to $20—or, as he says, an average of about $14. He further adds that from a real estate standpoint, the block between Place d'Orleans and St. Paul st. is perhaps worth more, but the advantage of the Quebec Gas Co. being near the water is a set-off.

Fitzjames E. Browne, a well-known real estate broker, of Montreal, prefaces his statement as to his valuation by stating he bases such valuation on common sense and on *what has been paid for extension of railroads in Montreal*, and concludes by saying the only way to arrive at the value of the property in question is what will have to be paid for adjoining property to replace it. The sum of $20 a foot is asked for the corner of Henderson st., and other owners ask $14. He fixes the value of the property expropriated at the average price of $15 a square foot. And on cross-examination he further states the prices asked on Henderson-Ramsay st. are of and in 1917, and he did not know what they asked in 1913, the year of the expropriation.

George Beausoleil, who has had experience as valuator both in Montreal and New York, states he visited the Quebec Gas property recently and seeing the advantage that the Quebec Railway has to be in a position to replace in the proximity the land expropriated, and that for so doing the company would have to pay $15—the claimants would be entitled to recover $15—*C'est une valeur de remplacement*. It is a reinstatement value, he says. He further

adds, that out of two properties available to replace the land expropriated there is also what is known as the Clint and Young property, for which the same price would have to be paid as for the Henderson-Ramsay block.

Lucien Bernier, a resident of Montreal, who had known Quebec for 54 years, and resided near the Quebec Gas property for 20 years, says he is a real estate broker, with, however, a more extensive and special experience in respect of farms (*des terres*). He says the property in question is indispensable for the C.P.R., or the Transcontinental. The sum of $14 or $15 a square foot is asked on Henderson and Ramsay streets, therefore he would value the land taken at $15, because it is a railway property.

This witness, it follows, seems to arrive at his valuation, both upon the reinstatement basis and upon seeking the value to the taker and not to the owner. Both elements are erroneous in the present case.

On behalf of the Crown the following witnesses were heard on the question of value: Joseph G. Couture, Edmond Giroux, Joseph Samson, Gustave Proteau and Eugene Lamontagne.

Joseph G. Couture, notary, of Quebec, with quite an experience to his credit in land transactions, says the property expropriated could be used for garage, warehouse, industrial and railway purposes. He bases his valuation upon prices paid for property at Quebec, in the neighbourhood of the land taken, and cites, among others, the following sales. In St. Peter's Ward, City of Quebec —as will be more readily understood by reference to plan, ex. 3A —he relies upon: ex. 4—sale of the Dombrowski property, including wharves and buildings. Lots Nos. 2009 and 2010 sold in 1914 at $1.23 a sq. ft.; ex. 5—same lot 2009, sold in 1915 to Harris Abattoir at $1 a ft.; ex. 6—Racy property, lot 2008, sold in 1910 at $1.95½ a sq. ft.; ex. 7—sale of Amyot to Delisle, in 1909, of lots 1993, 1994, with extensive buildings, at $2.65 a sq. ft.; ex. 8—sale of Piddington to Gorrie, in 1911, lot 2005, beach lot, at 65c a sq. ft.; ex. 9—sale of Ritchie to Drouin, in 1911, lots 2008-2, and 2008A, at $1 a sq. ft.; ex. 10—Dupuis to Archer, in 1912, lot No. 2004, at $1.06; ex. 11—Lamontagne to Mackenzie, Mann & Co., on June 5, 1909, lot 2001, at $1.60. This is a sale repeatedly mentioned and often referred to as the Archer property, or the sale from Archer to the Canadian Northern. This transaction is some-

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what apposite to the purchase in question herein, in that it was bought by a railway at the extreme north-eastern end of its yard, to enlarge it. The property was partly covered with wharves, with access on the one side to the Louise Basin, and on the other to St. Andrew st.; ex. 12—sale of Quebec Seminary to Lake St. John Railway, in 1903, of lot 2006, a beach lot, at 40 cents; ex. 13—sale between Renaud and Lemoine, in 1906, of lot 2011b, with buildings, at $1.45; ex. 14—sale by Renaud to the Canadian Northern R. Co., in 1907, of lots 2011e and 2012a, no buildings, at $1.90 a sq. ft.

Coming now to St. Roch Ward.

Ex. 15—sale of Moraud to the Quebec Progressive Realty Co., in 1912, of lot 886, adjoining the C.P.R. yard, at $1.42, *i.e.*, $60,192, with buildings of a value of at least $15,000; ex. 16—sale, Cie. Carrier to Moraud, in 1911, of same property for $60,000; ex. 17—sale, Archer to Leclerc, in 1909, of lot 886, at about $1.06 a sq. ft.; ex. 18—sale, Walcot to McKay, in 1913, of lot No. 733a, at $1.83 per sq. ft., with buildings; ex. 19—sale of Delisle to the Quebec & Lake St. John R. Co., in 1906, of lot 557-I., etc., at Limoulou, at 4½c. a sq. ft. The witness also relied upon some other sales, and at this stage of the case counsel for the Crown put in the following exhibits: Ex. 21—Judgment, *The King* v. *Peters*, July 24, 1914, respecting lots 576a and 577, at $2.08, 32 D.L.R. 692, 15 Can. Ex. 462; ex. 22—Dorchester Electric Co. to Transcontinental, lot 578, at $2.08 per sq. ft.; ex. 23—Stadacona Land Co. to Transcontinental, part of lot 579, at $1.87 per sq. ft.; ex. 24—Stadacona Land Co. to Transcontinental, part of lot 579, at $1.87 per sq, ft.; ex. 25—sale of Martel to Drouin, lot 719, in 1911, of 62,380 sq. ft. at $60,000; ex. 26—sale of Dunn to Drouin, in 1906, lot 720, of 16,800 ft. for $18,000.

Then witness Couture concludes in fixing upon the land taken a value of $2.25 a sq. ft.

Edmond Giroux, basing his valuation upon sales in the neighbourhood, values the land taken, with the buildings thereon erected (which have been by consent admitted at the value of $32,000) at $2.60 a sq. ft. However, he values the land at $2 and the buildings at $42,600.50—which would bring the balance of the land slightly below $2 a ft.

In the course of a valuation made by this witness of the value

of the C.P.R. lands in that neighbourhood, with the view of establishing a value of that property for a Union Station, he placed a value of $3 a ft. on St. Paul st., for a depth of 125 to 150 ft., at 50c. a ft., from the Harbour Commissioners' line to the south of the projected street on plan 3a, and the space between at $1.50 a sq. ft.

He says he could have bought Madame Fortin's property on February 15, 1913, between Henderson and Ramsay sts., lot 1946, at $5.13 a sq. ft., including buildings, leaving the land at $3.37. Lot 1948 was sold, with buildings, at between $6 and $7 a sq. ft.

Jos. Samson assumed, in arriving at his valuation, that the Quebec R. Co. were the owners of the property taken, and that the Gas Company was not a going concern, and basing his valuation upon the figures paid on sales in the neighbourhood, valued the property taken at $2.50 a foot. In this valuation he allowed 50c. a foot for damages, taking into consideration the Electric Company needed it.

Gustave Proteau bases his valuation upon sales in the neighbourhood, taking also into consideration the fact that the gas property is detached from the yard of the Quebec Railway. He values the land taken at between $2.25 and $2.50 a sq. ft.

Eugene Lamontagne, taking into consideration the prices paid for sales in the neighbourhood, values the land taken at $2.25 to $2.50. He knows the property for a long while, and says that before he last visited the property, with witness Couture, he thought it was worth from $2.50 to $3; but, when he went there, came to the conclusion it was only worth $2.50.

This concludes the evidence upon the question of value.

In view of the conclusion arrived at on the question of law above referred to, it is unnecessary to go into any other part of the evidence.

Now, this property must be valued and assessed, as at the date of the expropriation, at its *market value* in respect of the best uses to which it can be put, taking into consideration any prospective capabilities, potentialities or value it may obtain within a reasonably near future.

Market value is defined in the case of *The King* v. *Macpherson*, 15 Can. Ex. 215, as:—

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The value that a vendor not compelled to sell, not selling under pressure, but desirous of selling, is to get from a purchaser not bound to buy, but willing to buy.

Most of the engineering evidence, if I may call it so, adduced on behalf of the claimants, is to shew the Quebec Gas property is an advantageous piece of land for a railway operating as the Montmorency & Charlevoix and the Saguenay companies, and that from being surrounded by several railways, this property has acquired special adaptability for railway purposes. It was obviously the ultimate fate of the property to be acquired for railway purposes. It is perhaps of more value to the C.P.R., whose yard and station are immediately adjoining it, than it would be to the Quebec Railway (or the Montmorency & Charlevoix Ry., etc.), from which it is separated by a street, and which would have had to acquire that triangular piece of property to the north belonging to the Quebec Harbour Commission to be in a position to work and use this property in a business-like and economic manner, and that would tend to make it rather expensive for them. And the Montmorency & Charlevoix Railway and the Quebec & Saguenay Railway have almost already passed to the Crown under the statute above mentioned.

There may, indeed, be here competition in the prospective purchasers of this property by railway companies owning property in this neighbourhood; but in no sense should the compensation to be awarded be more than the price that legitimate competition by purchasers would reasonably force it up to. And when it is claimed that the property has a high value on account of its special adaptability for railway purposes, it is not claimed that such special purposes are limited to the C.P.R., or the Transcontinental; but that the situation of the land in the neighbourhood of railways will bring these railway companies as prospective competitive purchasers, and in such a case it becomes an element in the general value.

However, when the owner of such property is given more than the price or the value of his property to him for his own purposes and all that any one else would offer him, except the taker, what else can he ask, if not part of the value of that land to the taker—and in no case should the value be the value to the buyer, but the value to the seller. *Fraser* v. *The City of Fraserville*, 34 D.L.R. 211, [1917] A.C. 187, and the *Sidney* case, [1914] 3 K.B. 629.

In the present case the land expropriated was of very little value to the Quebec Gas Co., the company having for a number of years discontinued manufacturing gas there—it was a discarded gas proposition, and the property would be of much more value for railway purposes. Therefore, the Crown has offered more than the land is worth to the owners for their own purposes, assuming the full title is in the Gas Company. Moreover, the owners are offered the market value of this land in which its special adaptability for railway purposes is an element. This special adaptability does not, however, reside in its conformation or topography, as in the *Lucas* case, but from being in the neighbourhood of several railways. In the amount offered by the Crown is merged both the intrinsic value and the market value of the land, including the special adaptability for railway purposes due to prospective competitive purchasers; as special adaptability is nothing more than an element of the market value, and forms part of the same. Indeed, this element of potentiality, or prospective capability, call it what you may, is after all nothing but an element in the market value itself. *Sidney* v. *North E. Railway, supra; Cedar Rapids* case, 16 D.L.R. 168, [1914] A.C. 569, 576.

In the *Sidney* case will be found a very instructive discussion on the question of special adaptability, in which Rowlatt, J., says:—

> Now, if and so long as there are several competitors including the actual taker, who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail to what can any further value be attributed? The point has been reached when the owner is offered more than the land is worth to him for his own purposes and all that anyone else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers the owner need not sell to that one and that one would need to make higher and yet higher offers. In respect of what would he make them? There can be only one answer—in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed.

The evidence adduced on behalf of the defendants, eliminating the testimony of the manager, whose valuation would amount to $4,681,875, is by residents of Montreal, and partly based upon

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mutations of property in Montreal which is obviously another proposition than the value of property in the city of Quebec. Moreover, their evidence is arrived at entirely upon the reinstatement basis, which does not apply in a case of this kind. This doctrine of reinstatement is thus defined by Cripps on Compensation, 5th ed., p. 118:—

> There are some cases in which the income derived, or probably to be derived, from land would not constitute a fair basis in assessing the value to the owner, and then the principle of reinstatement should be applied. This principle is that the owner cannot be placed in as favourable a position as he was in before the exercise of compulsory powers, unless such a sum is assessed as will enable him to replace the premises or lands taken by premises, or lands which would be to him of the same value. It is not possible to give an exhaustive catalogue of all cases to which the principle of reinstatement is applicable. But we may instance churches, schools, hospitals, houses of an exceptional character, and business premises in which the business can only be carried on under special conditions or by means of special licenses. In a case heard at Edinburgh it was sought to extend the principle of reinstatement to a case in which a portion of a public garden had been taken, but such a contention was rightly set aside by the arbitrator (Lord Shand).

See also Browne & Allan, Law of Compensation, 2nd ed., pp. 103, 656.

The doctrine of reinstatement does not apply to a case of this kind. The property was not a going concern manufacturing gas.

Then this basic element of the reinstatement valuation bears also on its face an apparent fallacy, since it rests upon the assumption the market price of these properties rests upon what the owners on Henderson or Ramsay sts. we are told said, in 1917, they would ask for their property, which is entirely built upon. True, the buildings are of no value to the taker, the party expropriating; but they represent to the owner a substantial value which forms part of the market value of such property, and it would be another reason to differentiate the price of these as compared to the Gas Company's property. And it may well be assumed that if these proprietors on Henderson and Ramsay sts. were so approached they knew the actual position of affairs in that neighbourhood in 1917 when seen by these witnesses or other persons; but they are not entitled to share in the value of the land to the taker. Then, if not to rebut, to mitigate this inflation in the price of properties in the block, we have the testimony of Giroux, who says that in February, 1915, he could have bought lot 1946, in the Henderson and Ramsay block, at $5.13 a sq. ft.,

including buildings, and which without the buildings would bring the land down to $3.37, and that lot 1948 was sold at $6 or $7 with buildings.

The evidence of the claimants is therefore adduced entirely upon a wrong basis, a wrong principle, leaving the court without any help therefrom.

The Crown's evidence appears to be based upon the value of properties in the neighbourhood, and while with perhaps one exception where the buildings were of great value, the prices paid were all below the amount of their valuation of the present property, although the block taken is large as compared to some of these sales and that a smaller piece usually commands a larger price than a large block proportionately.

The claimants' and the Crown's evidence with respect to value is very far apart. It runs from $75 and $14 to $2 a foot. How can these valuations be best reconciled, without, however, overlooking the claimants' evidence is on a wrong basis and of no help to the court? What can help out of this conflict and difficulty, if not sales made in the neighbourhood? What can be better evidence of the market value of the present parcel of land, if not the actual and numerous sales made by neighbouring owners, and some of them under similar circumstances? These sales are a determining element to be guided by—and what can be more cogent evidence than the sales of almost adjoining properties? *Dodge* v. *The King*, 38 Can. S.C.R. 149; *Fitzpatrick* v. *Town of New Liskeard*, 13 O.W.R. 806.

Indeed, while the claimants in a case of this kind are entitled, not only to the bare value of their properties, but to a liberal compensation, it does not follow that because this property is expropriated by the Crown, and that the compensation is to be paid out of the public exchequer, that the Crown in matters of expropriation is to be penalised, and it is not because the owners claim a very extravagant amount that they should be paid a larger amount than the market value of that property.

Now, I have had the advantage of viewing the premises in question, in the company of the counsel for the respective parties at bar, and after weighing the opinion of the valuators, and giving effect to such part of the evidence as appears credible and trustworthy, and taking into consideration the numerous sales of prop-

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erties in the neighbourhood and the surrounding conditions, I have come to the conclusion to allow, not the bare value of the land, but the most liberal and generous price possible under the circumstances, namely, the sum of $3 a foot, this amount to include all damages whatsoever, if any, resulting from the expropriation, as well as the usual 10% for compulsory taking; and in arriving at that figure, due consideration has been given to the enhanced value flowing from the element of special adaptability which went to establish the market value of that land at such a high price.

The area expropriated of 62,558 1-3 sq. ft., at $3 a foot, will represent the sum of $187,675, to which shall be added the sum of $32,000 as representing the value of the buildings, as above set forth, making the sum of $219,675.

Undoubtedly, the property was taken against the will of the owners, and in consideration of this compulsory taking, 10% has been included in the liberal amount allowed for the land taken. I advisedly say for land taken, because the value of the buildings having been arrived at by consent, and the parties are praying for judgment therefor, and were 10% added to the value of the buildings the owners would be given that which they do not ask—it would be allowing *ultra petita*. Therefore 10% has been allowed on the amount of the compensation for the land only.

The Power Company is the transferee to the compensation money, as above set forth, of such rights the City of Quebec had in this property at the time of the expropriation, under the deed above referred to. Mr. Morgan, K.C., counsel at bar for the Gas Company, states he is quite willing that the compensation money herein should be paid either to the Quebec Gas Co. or to the Power Company. Therefore, it becomes unnecessary to investigate and ascertain the compensation in respect of the respective rights of these two companies and segregate the same. The moneys will, therefore, be made payable to the defendants, the Quebec Gas Co. and the Power Company, upon giving good title to the Crown, the trust companies releasing their pledge or lien upon the property, if they have any. Therefore, there will be judgment as follows—To wit: (1) The lands expropriated herein are declared vested in the Crown as of April 24, 1913; (2) the compensation for the land taken, for the buildings thereon erected, and for all damages whatsoever, if any, resulting from the expropriation, is hereby fixed at

the sum of $219,675, with interest thereon at the rate of 5% per annum from April 24, 1913, to the date hereof; (3) the defendants, the Quebec Gas Co. and the Quebec Railway, Light, Heat and Power Co., are entitled to be paid the said sum of $219,675, with interest as above mentioned, upon giving to the Crown a good and satisfactory title, free from all hypothecs and incumbrances whatsoever, including a release from the Royal Trust Co. and the Montreal Trust Co. respectively; (4) the Quebec Gas Co. is further entitled to its full costs as against the plaintiff on the issue traversing the information. The City of Quebec, and the Quebec Light, Heat and Power Co., are, as against the plaintiff, entitled to such costs necessarily and legitimately incurred in respect of such rights the defendant, the City of Quebec, had in the lands herein. The Crown will recover, as against the Quebec Light, Heat and Power Co., the general costs on the contention raised by the latter, the said costs to be set off, *pro tanto*, as against the other costs the Power Company is recovering.

The Royal Trust Co. is also entitled, as against the plaintiff, to its costs on the appearance of counsel at trial, under the circumstances above set forth. There shall be no costs to either party on the issue as between the Quebec Gas Co. and the Quebec Railway, Light, Heat and Power Co.

Judgment accordingly.

LONDON AND LANCASHIRE FIRE INSURANCE Co. v. VELTRE.

Supreme Court of Canada, Fitzpatrick, C.J., Idington, Anglin, and Brodeur, JJ., and Cassels, J., ad hoc. June 25th, 1918.

TENDER (§ I—2)—CANCELLATION OF INSURANCE POLICY—TENDER OF MONEY FOR UNEARNED PREMIUM—REGISTERED LETTER—NOTICE—ACTUAL RECEIPT.

Notice of cancellation of a policy of insurance may be given by registered letter addressed to the insured as required by condition 15 of the Ontario Insurance Act (R.S.O. 1914 c. 183, s. 4) and a sufficient tender to comply with condition 11 is made if the money for the unearned premium is enclosed with the notice so properly addressed and registered. The notice, however, is effective only from the time it is actually received by the insured.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, reversing the judgment on the trial in favour of the defendants, 39 D.L.R. 221, 40 O.L.R. 619. Affirmed.

R. S. Robertson, for appellants; *A. C. Kingstone*, for respondent.

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FITZPATRICK, C.J.:—I concur in the opinion stated by Anglin, J.

IDINGTON, J.:—This appeal ought to turn upon the construction of two conditions endorsed upon the policy of insurance in question and the application of the relevant facts.

The respondent, an Italian woman, whose maiden name was Franzesco Veltre, entirely ignorant of English, married one Savino, carried on with his assistance a shop in Thorold and obtained from appellant an insurance against fire upon the contents thereof for a year from June 17, 1916, which were consumed by fire on December 25 following.

The policy was issued to F. Veltre, Esq., and had endorsed amongst other conditions the following:—

11. The insurance may be terminated by the company by giving seven days' notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium paid, for the unexpired term, calculated from the termination of the notice, and the policy shall cease after such notice or notice and tender as the case may be, and the expiration of the seven days.

15. Any written notice to the assured may be by letter delivered to the assured or by registered letter addressed to him at his last post office address notified to the company or where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received.

The appellant decided to avail itself of the said No. 11 condition and sent a registered letter enclosing the money mentioned and addressed as set forth therein, which letter reads as follows:—

F. Veltre, Esq., Toronto, 15th December, 1916.
82-84-86 Claremont St.,
Thorold, Ont.

Dear Sir:—I beg to hand you enclosed herewith in legal tender the sum of $11.34 being the unearned premium for balance of the current term of Policy No. 10514765 of this company issued to you dated June 17th, 1916, expiring June 17th, 1917, covering $1,200 on groceries, meats, cigars and tobacco and $300 on store furniture and fixtures, including refrigerator, cheese-cutter, shelving, electric fans, clock, table and stove, all while contained in the three storey brick building, occupied as laundry, grocery store, hall and dwelling situate as above, which is hereby cancelled and this company will not be held liable should any loss occur after the 22nd December, 1916.

ALFRED WRIGHT, manager.

The letter never was received by respondent till some time after the fire.

The appellant contends it was by such a letter so addressed, being so sent, relieved from any possible claim under the policy.

There never was any address notified to the company within the language of condition No. 15 and I cannot think that it was

entitled to assume that such an address as used could be effective for such a purpose. If the sender had tried to have a letter miscarry he could hardly have done better.

Either the correct address was known or unknown. If known it should have been sent correctly addressed and not sent to a woman with the addition of "Esq." If unknown it should, in order to comply with the condition, if available to it, have been sent to Merritton.

That might not have been any more successful in reaching the respondent.

I do not feel called on to express any opinion upon the question of what the result might have been if the letter had been properly addressed within the meaning of any alternative in condition No. 15.

I should be the more reluctant to do so seeing there are no less than four other conditions endorsed on the policy, each involving the question of how written notice from the company may in certain cases respectively affect the legal relations of insurer and insured.

It may well be that condition No. 15 is intended to become operative only in regard to any one of three of these other conditions and yet ineffective in the case of tendering money.

In confining myself to the narrow issue I have dealt with I am only adhering to an observance of the issue joined by the pleadings.

And I am by no means troubled over the suggestion of appellant's counsel that respondent is incorrectly described in the policy. She is the person insured, no matter how blunderingly described by appellant.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—This action is brought to recover on a fire insurance policy. The issue on the appeal is as to the sufficiency of a notice of cancellation given under the 11th and 15th statutory conditions, prescribed by the Ontario Insurance Act, R.S.O., c. 194, s. 183. It is stated in the principal judgment of the Appellate Division, delivered by Hodgins, J.A., as follows:—

The respondent company pleads that it validly cancelled the policy under statutory conditions Nos. 11 and 15. This was effected, as the company contends, by mailing to the appellant in a registered letter addressed to her

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under the name, "F. Veltre, Esq., 82-84-86 Claremont St., Thorold, Ont.," a notice cancelling the policy, and by enclosing in this letter the respondent company's cheque for $11.34 or legal tender to that amount "being the unearned premium for balance of the current term of Policy No. 10514765.

The letter containing the notice and money was never delivered to, or received by, the appellant until after the fire.

The sole question raised is whether the method thus adopted was an effective compliance with the conditions which require a tender of the unearned premium to be made as well as the giving of notice.

It was held by the trial judge that if the notice putting an end to the policy, the distinct end aimed at, can be given in writing by registered letter the tender of the unearned portion of the premium may be made in the same way.

The judge held the tender insufficient and that the notice would be effective only from the time of its receipt by the insured. Magee, J.A., concurred as to the insufficiency of the notice and Maclaren and Ferguson, JJ.A., agreed in the result. Meredith, C.J.O., dissented, holding that a tender by letter was authorized and that the notice was effective from the time of posting, or, at all events, from the time when in the ordinary course the letter would reach the person to whom it was sent.

Mailed at Toronto on the 15th of December, 1915, the notice reached Thorold in the ordinary course of mail on the 16th, but was never actually received by the insured and only came to her knowledge after the loss, which occurred on the 25th. The $11.34 enclosed ($11.25 in legal tender and 9 cents in postage stamps) was admittedly more than sufficient to cover the unearned proportion of the premium.

The insured was the wife of one Sam Savino. It is customary with the peoples of countries where the civil law prevails, that a married woman should be designated by her maiden name in business transactions, legal documents, etc. The plaintiff was accordingly insured as "F. Veltre, Esq."—the Esq. being added through some unexplained mistake. That is her designation in the policy, which she accepted and retained and on which she now sues.

There is no local mail delivery in Thorold. Probably owing to the notice of cancellation having been addressed to "F. Veltre, Esq.," instead of to Mrs., Mde., or Signora Savino, it was not placed in Sam Savino's box at the local post office, or otherwise delivered, although it seems probable that some inquiry was made for the Savino mail at the general delivery wicket. The Savinos

left Thorold on the 24th December, apparently for the purpose of spending Christmas in Toronto. The fire occurred during their absence. The 11th and 15th statutory conditions endorsed on the policy read as follows:—(See Idington, J.'s, judgment.)

For the assured it was contended that

(1) Condition 15 does not apply to a notice of cancellation. (2) The notice of cancellation was not addressed as condition 15 prescribes. (3) Tender of the proportion of the premium for the unexpired term cannot be made by post; it must be made personally. (4) A notice given under condition 15 is effectual only from the date of its actual receipt. (5) If effectual from the time at which it would in the ordinary course of post have reached the insured, the notice given for cancellation on the 22nd would be insufficient: a date having been named it could not operate to effect cancellation at a later date on the expiry of seven days from the time at which it should have reached the insured in the ordinary course of post.

The company on the other hand asserts its right to give written notice of cancellation by registered post if the letter contains a sum of money at least equal to the proportion of the premium unearned, and that such a notice, if addressed as prescribed, should be deemed to have been given when deposited in the post office.

(1) I have no doubt that a written notice of cancellation under the 11th statutory condition is within the 15th condition and may be given by registered post. The literal terms of the 15th condition, taken in their ordinary acceptation, cover it. The collocation and history of the condition and a comparison with its counterpart, condition No. 7, seem to me to put the matter beyond doubt. The provision for sending written notice of cancellation by registered post, formerly itself part of the 19th statutory condition providing for cancellation by notice (R.S.C. 1897, c. 203, s. 168), was made the subject of a separate condition (No. 15) and extended to all written notices to be given by the company when the Ontario Insurance Act was re-enacted, preparatory to the revision of 1914, by 2 Geo. V., c. 33. The obvious purpose was to have a general provision applicable to all notices in writing to be given by the company to the insured, precisely as condition No. 7—formerly condition No. 23, R.S.O. 1897, c. 203, s. 168—provides that all notices in writing to the company may be sent by registered post.

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(2) In the policy the insured is designated as "F. Veltre, Esq." It is proved that the Savinos resided over their grocery shop (which contained the property insured) described in the policy as "Nos. 82-84 on the north side of Claremont St., in the town of Thorold." This was either the post office address notified to the company within the meaning of condition 15, or it was the known address of the insured. In either case the notice was rightly addressed to "82-84-86 Claremont St., Thorold, Ont." The addition of the figures 86 to the 82-84 mentioned in the policy is immaterial. Suing as she does in the name of F. Veltre on the policy issued to F. Veltre, Esq., and accepted by her on that name, the plaintiff cannot, in my opinion, successfully maintain that the address of the notice was insufficient.

(3) For the reasons assigned by the Chief Justice of Ontario, I am satisfied that the tender provided for by the 11th condition is properly made if the amount of money to be tendered be enclosed with the notice of cancellation in a duly registered envelope, properly addressed to the insured. I cannot place any other reasonable construction on the word "therewith" in the 11th condition, if that condition contemplates, as I think it clearly does, that the notice of cancellation may be in writing, and the 15th condition applies to it. It certainly was not the purpose of the 11th condition, in my opinion, to impose compliance with the formalities of a strict legal tender on the company. "Tendering" is used in the sense of "offering presently to refund."

(4) In considering from what time the 7 days which are to elapse between the notice of cancellation and the determination of the policy are to be computed, the nature of the condition and the purpose for which the 7 days are allowed must be taken into account. Rights both of the insured and of the insurer are expressed in the eleventh condition. The latter is entitled to terminate its risk. The former is entitled to a reasonable period, fixed by the legislature at 7 days, within which to protect himself, if he so desire, by procuring other insurance. The condition must, if at all possible, be so construed that these reciprocal rights shall be given fair and full effect. The insurer solely for its own benefit is allowed the option of giving the notice by making use of the post office as its agent to convey it in lieu of making a personal communication of it to the insurer. If it selects the latter, which

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may be regarded as the normal method, the policy is determined only on the expiry of seven full days from the moment of communication to the assured of the intention to cancel. Can it have been intended that the company by choosing to make use of the alternative method of giving notice through the mail should be entitled in practically every case to lessen the comparatively short period which the legislature meant the insured should have in which to reinsure, and, in some cases, to deprive him of it entirely? That would be the necessary effect of holding that the 7 days should be computed from the moment of depositing the notice in the post office. I am satisfied that was not intended. Strong, J., in *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, 11 Can. S.C.R. 212, at 238, speaks of a condition as "grossly unfair in not providing that notice should be given a reasonable time before the cancellation should take effect, so that the assured might have the opportunity of covering himself by another insurance." The cases cited by Mr. Robertson are all readily and clearly distinguishable. They were cases in which numerous persons, who might be scattered in many places, were to be notified of calls or meetings, etc. It would be impossible in such a case to fix any one definite date at which the term of the notice should expire unless that term should commence from the moment of deposit in the post office. No such difficulty arises in the case of a notice to a single insured.

On the other hand, it is said that if the notice was meant to be effective only from the moment of its actual receipt by the insured, it is difficult to appreciate the object of the legislature in imposing the registration of it on the company, and it is, therefore, argued that the notice must have been intended to be operative at least from the time at which it would have reached the insured in the ordinary course of post. It seems to me to be a more reasonable explanation that the legislature directed that notice, if given by mail, should be by registered post in order to facilitate proof of the fact whether a notice so sent had or had not reached the insured. It would be a strong thing to hold that the insurer could extinguish the contractual rights of the insured under his policy without any prior actual notice being given to him. In the absence of an explicit statement that notice of cancellation should be deemed effectual from the time at which it would in the ordinary course of post have reached the insured, nothing short of an irresistible

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inference from the terms in which the condition providing for notice by post is couched that that was the purpose and intention of the legislature would suffice to justify a court in holding that the contractual rights could be thus extinguished. Dealing with a substantially identical provision made by what was then the 23rd statutory condition (R.S.O. 1897, c. 203, s. 168)—now the 7th—the Ontario Court of Appeal in *Skillings* v. *Royal Ins. Co.*, 6 O.L.R. 401, affirming a judgment of Lount, J., 4 O.L.R. 123, unanimously held that a letter from the insured to the insurance company notifying it of his intention to cancel his insurance would take effect only from the time of its actual receipt. Maclennan, J.A., says, at p. 403:—

> An actual delivery of notice is evidently what the statutory condition intends.

Garrow, J.A., citing with approval the unanimous decision of the New York Court of Appeal in *Crown Point Iron Co.* v. *Ætna Ins. Co.*, 127 N.Y. 608, says, at p. 405:—

> The notice sent before, but not received until after, the fire was wholly ineffectual.

It was argued that the *Skillings* case is distinguishable because the notice there sent was wrongly addressed. But the decision turns on the fact that it was not received—not that it did not fulfil the requirement of the condition as to address.

Notwithstanding s. 20 of the Ontario Interpretation Act (R.S.C., c. 1) it may fairly be assumed that in making the 15th condition a counterpart of the 7th in the Act of 1912, c. 33, the legislature was not unmindful of the construction which the Court of Appeal had, as recently as 1903, put upon the 7th clause.

There is no provision in the Ontario practice for the service of legal process or notice by registered post such as is found in the English O. XLVII., r. 2. It is noteworthy that in that rule, in order to make a notice so sent operative, not from its actual receipt, but from the time at which it would be delivered in the ordinary course of post, an explicit provision to that effect was apparently deemed necessary. A not unreasonable inference is that without it the service would be effectual only from the time of the actual receipt of the mailed document. A provision in the English Interpretation Act of 1889, c. 63, s. 26, creates the like presumption in regard to any document which a statute authorizes

or requires to be served, given or sent by post—"unless the contrary is proved." Here the contrary has been proved.

It would, no doubt, have been much more satisfactory had the statute explicitly declared from what time the 7 days should be computed in the case of notices by registered post, but in the absence of some such provision as is found in the English rule cited the terms of condition 15, in my opinion, do not warrant a holding that by resorting to it an insurance company can deprive an insured of the benefit of the whole or any part of the seven days' notice upon giving which condition 11 enables the company to terminate its risk. Notice, unless the contrary be clearly provided, must mean actual notice.

(5) Although in view of the conclusion that the 4th objection to the notice of cancellation must prevail it may be unnecessary to deal with the 5th, it is perhaps better that I should express the opinion I have formed upon it. Since a power of cancellation must, no doubt, be strictly exercised, I was at first much impressed with the view that because the company's letter expressed its intention to terminate the risk on December 22 its notice could not be good for any subsequent date. But, on further consideration, I incline to think otherwise. *Emmott* v. *Slater Mutual Fire Ins. Co.*, 7 R.I. 562, was a very similar case. A notice of intention to cancel on February 20, mailed on the 13th, was received by the insured on the 14th. The property covered was destroyed on the 22nd. Ames, C.J., delivering the judgment of the Superior Court of Rhode Island, upholding the cancellation as effectual, said, at p. 565:—

> The notice received by the plaintiff on the 14th day of February, informed him, in substance, that from and after the 20th of that month, "no member of his class would be held insured," as the policy would be cancelled at noon on that day, under the power reserved by the by-law, and in pursuance of the vote of the company. The purpose of the by-law, in requiring seven days' notice of the intent to cancel his policy, to be given to a member before the cancellation would become effectual, was, to give him seasonable warning, if he would be protected by insurance, to get it elsewhere. This purpose seems to us to have been as fully answered by the notice given to the plaintiff, as if the 21st day of February, instead of the 20th, had been inserted in the notice as the day from and after which his policy would stand cancelled. By warning him to procure other insurance earlier than the by-law, considering the time he received the notice, permitted, it could not mislead him to his injury; and when the seven days had expired after his receipt of the notice; he had all the notice which the by-law either in its letter or spirit, required; that is, seven days' notice of the intent of the company to cancel his policy on a day subsequent to the giving of the notice.

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As the loss happened after the plaintiff had received the seven days' notice of the intent to cancel his policy, we hold that his policy was then cancelled, and order judgment to be entered up for the defendants, with costs.

I find in *Philadelphia Linen Co.* v. *Manhattan Fire Ins. Co.*, 8 Pa. Dist. 261, cited in 19 Cyc. at p. 646, an authority to the same effect. I have unfortunately been unable to see the report itself. The notice of intention to cancel need not specify any date as that on which the risk is to come to an end. When it is given, the statutory condition applies and effects the cancellation on the expiry of 7 days. The statement of the date on which the notice is to become effective is therefore superfluous. The insured knows, or must be presumed to know, that he is entitled to 7 days from the time at which he receives the notice. I, therefore, incline to the opinion that, if the plaintiff had actually received the notice of cancellation 7 days before the fire occurred, she could not have recovered on the policy, which would have ceased to be in force, not upon December 22, but at the expiry of 7 days after actual receipt of the notice.

In the result the appeal fails and should be dismissed.

Brodeur, J.

BRODEUR, J.:—The question is whether the insurance was terminated when the fire took place on December 25, 1916.

The insurance was for a year from June, 1916, to June, 1917. S. 11 of the statutory conditions gave power to the company to terminate it sooner "by giving 7 days' notice to that effect and if on the cash plan by tendering therewith a ratable proportion of the premium paid for the unexpired term."

The statutory condition No. 15 provided that any written notice could be given by a registered letter addressed to the assured "at his last post office address notified to the company or where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received."

In this case the notice cancelling the policy was sent on December 15, 1916, by registered letter to F. Veltre, Esq., 82-84-86 Claremont street, Thorold, Ont., and there was enclosed therein the sum of $11.34, representing the unearned premium for the balance of the current term of the policy.

The letter was not delivered to the insured and remained in the post office at Thorold until after the fire which took place on December 25.

The insured never had any intimation before the fire that the policy was cancelled or to be cancelled. Everything points to the good faith of the insured.

The insurance had been taken through the agency of the company at Merritton, a suburb of the town of Thorold. The insured was an Italian lady married to a man named Savino. The application for the insurance was taken by the agent of the company on a stock of groceries and on fixtures situated in a store bearing Nos. 82-84-86 Claremont St., in Thorold. By the mistake of the company or of the agents, the policy was issued in the maiden name of Mrs. Savino, "F. Veltre." It is customary amongst Italians that the married women preserve and are called by their maiden name.

The company added, however, on the policy to the name of F. Veltre, "Esq."

Mr. Savino had a box in the post office at Thorold and he was well known there. But the name of "F. Veltre, Esq." was entirely unknown to the postmaster or the employees of the post office; and it does not appear by the evidence that the address of F. Veltre was known to be in Thorold. "F. Veltre, Esq." was certainly unknown in Thorold. The address of the respondent was never notified to the company. So the company, not knowing the address of the respondent and not having been notified of her address, its duty was, according to the statutory condition 15, to send the notice to its agency in Merritton.

Besides, I am of opinion that the tender of money should have been made personally to the insured or at least at her domicile or place of residence and that on that ground the alleged tender made in this case is not valid.

The statutory condition never contemplated that an insurance company could be at liberty to deposit legal tender money in the post office and that from that moment the notice of cancellation would have its effect. Sir Edward Coke (Co. Litt., p. 210,) says that tender must formally be made only to the creditor himself.

It is contended by the appellant that the use of the word "therewith" in statutory condition 11 entitled the company to enclose the money with the notice and that a personal tender is not required.

I am unable to agree with that contention. The right which

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the company possesses to cancel a valid contract is contrary to the ordinary rules affecting contractual relations. If the legislature intended to avoid the necessity of a tender being made personally they would then have so provided in the clearest of language. I am unable to find such an intention in construing the conditions referred to. The company had no right to depart from the ordinary rule that the tender should be made to the creditor personally. (Harris, Law of Tender, p. 97.)

For those reasons the judgment *a quo* which maintained plaintiff's action should be maintained and the appeal dismissed with costs.

Cassels, J.

CASSELS, J.:—As the majority of the court are in favour of dismissing this appeal, I concur.

Appeal dismissed.

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REX v. MALCOLM AND OLSON.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Hyndman, JJ. July 16, 1918.

COMPANIES (§ VIII—390)—SALE OF SHARES ACT (ALTA.)—SALE OF SHARES IN COMPANY WITHOUT LICENSE OF UTILITY BOARD—SCOPE OF ACT.

Section 4 of the Sale of Shares Act (Alta. stats. 1916, c. 8) making it unlawful in Alberta to sell or offer to sell any shares, stocks, bonds . . . of any corporation or company . . . without first obtaining from the Board of Public Utility Commissioners, a certificate . . . and a license . . . applies to agreements to sell as well as completed sales in companies not yet incorporated, and to foreign as well as to domestic companies.

A certificate purporting to be given under the authority of a federal order-in-council dated December 22, 1917, giving approval for the issue and sale is no defence as it only removes the prohibition of the order but gives no authority beyond the right to disregard such order-in-council.

Statement.

APPEAL from a refusal of a police magistrate to state a case on a conviction for selling shares in a company contrary to the provisions of the Sale of Shares Act. (Alta., 1916, c. 8.) Affirmed.

Alex. Hannah, for appellants; *O. E. Culbert*, for the Crown.

Harvey, C.J.

HARVEY, C.J.:—The defendants were, on May 3, 1918, convicted by the Police Magistrate of the City of Calgary for that on the 16th day of April, A.D., 1918, and for some time previous thereto they did unlawfully sell or offer for sale or to directly or indirectly attempt to sell in the Province of Alberta aforesaid, shares, stocks, bonds or other securities of 420 Gold Bar Placer Company of Potato Creek, in the Province of British Columbia, without first obtaining from the Board of Public Utility Commissioners a certificate as required by the provisions of the Sale of Shares Act, being c. 8 of the statutes of Alberta, 1916.

S. 4 of the said Act provides that:—

4. It shall hereafter be unlawful for any person or persons, company, or any agent acting on his, their or its behalf, to sell or offer to sell or to

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directly or indirectly attempt to sell in the Province of Alberta any shares, stocks, bonds or other securities of any corporation or company, syndicate or association of persons, incorporated or unincorporated, other than the securities hereinbefore excepted, without first obtaining from the Board of Public Utility Commissioners a certificate to the effect hereinafter set forth and a license to such agent in the manner hereinafter provided for.

It is apparent that the section covers many different offences, and the charge in this case which the conviction follows was evidently intended to cover all of them, though by changing part only of the verbs from the infinitive to the indicative a confused and insensible meaning has been given to part of the charge. No objection, however, is taken on this score, and the case comes before us by way of an appeal from the magistrate's refusal to state a case.

The application to state a case was in the following terms:—

Notice is hereby given that pursuant to the provisions of s. 761 of the Criminal Code and the Rules of Court made in that behalf, we the undersigned, James Malcolm and Magnus E. Olson, do hereby make application to you to state and sign a case in respect of the conviction entered against us by you after trial on Friday, May 3, 1918, in the prosecution instituted against us as defendants charging a contravention of the provisions of the Sale of Shares Act for the Province of Alberta.

The applicants desire to appeal to the Appellate Division of the Supreme Court of Alberta upon the following grounds upon which the conviction is questioned.

1. That the defendants were charged with selling or offering shares for sale in a company described in the information and complaint as "The Four Twenty Gold Bar Placer Company," in contravention of the provisions of the Sale of Shares Act for the Province of Alberta, whereas the prosecution in attempting to prove the said charge led evidence that the sales of shares, if any, took place in connection with a company to be incorporated, and to be known as "The Four Twenty Gold Bar Placer Company, Limited."

2. That there is no evidence to support the conviction and that the magistrate erred in holding the charge proven.

3. That the magistrate erred in holding that the instances of sales of shares sought to be established in evidence by the prosecution fell within the ambit of the provisions of the Sale of Shares Act, inasmuch that the case for the prosecution, if establishing anything, established that the defendants, if guilty of selling shares as charged, had sold shares to parties who of their own volition wished to purchase these and did so in a company to be incorporated and not already formed.

4. That the magistrate erred in holding that the voluntary purchase of shares by private individuals in a company to be formed in the circumstances mentioned, in the absence of express words in the Act to that effect, constituted an offence under and by virtue of the Sale of Shares Act.

5. That the defendants proved that the defendant James Malcolm, on behalf of the company to be incorporated, had applied for and obtained the necessary leave from the Minister of Finance for the Dominion of Canada

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before incorporation, as required by Dominion order-in-council (3439), dated December 22, 1917.

6. That the magistrate erred in not holding that the issue and sale of shares in companies are now governed by the Dominion of Canada under order-in-council as aforesaid and that the said order-in-council and the Sale of Shares Act for the Province of Alberta are thus in conflict in the same field and that in these circumstances the provisions of the Dominion order-in-council should prevail, and that having complied therewith the defendants should have been acquitted.

7. That the defendants proved that a company had been formed in the Province of British Columbia known as "The Four Twenty Gold Bar Placer Company, Limited," and the magistrate erred in holding the defendants guilty of the charge as laid in the absence of evidence that the Board of Public Utilities for the Province of Alberta had any jurisdiction over the sale of shares in the said company.

8. That having regard to the evidence adduced by the prosecution, the instances sought to be established in evidence, of sales of shares by the defendants, were specific and separate acts and fall within the exception provided by s. 17 of the Sale of Shares Act, as not being "continued and successive acts" and that the magistrate erred in holding to the contrary.

9. That having regard to the evidence adduced by the prosecution the magistrate erred in holding that the defendants had sold or offered for sale shares in the company as charged or in any other company.

10. That having regard to the evidence adduced for the prosecution and the objections tendered on the defendants' behalf at trial the magistrate erred in holding that the defendants were guilty of the charge as laid, and, in any event, erred in holding that the defendant James Malcolm had been guilty of a contravention of the Sale of Shares Act as charged, or had authorized as agent or otherwise the sale of shares sought to be proved in support of the charge.

11. That having regard to the evidence and the law applicable to the case, the defendants should have been acquitted.

12. That the magistrate erred in not dismissing the charge against the defendants for all and each of the reasons appearing in paras. 1 to 11 hereof inclusive.

Dated at Calgary, Alberta, this 9th day of May, A.D., 1918.

JAMES MALCOLM.
MAGNUS E. OLSON.

Calgary, May 23rd, 1918. Application refused.

W. S. DAVIDSON, P.M.

This application seems to assume that the conviction was for selling or offering to sell shares and the argument before us was based on the same assumption, and I will, therefore, confine my consideration to that view.

The main argument advanced on behalf of the defendants was that there being no company in existence, there were no shares which could be sold or offered for sale.

At the opening of the case, counsel for the defence stated that the charge was against a private syndicate and not a company,

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and asked for particulars of the persons to whom sales were alleged to have been made. He was, thereupon, furnished with the names of 14 persons. Of these 14, 6 were called to give evidence to shew that they had gone voluntarily at different times by reason of information or advice from some friend to an office in the "Herald" Building, in the city of Calgary, which had the name of the defendant Malcolm on the door, and that there they met the defendant Olson and entered into an agreement with him and paid him money or money's worth for certain shares in a company to be incorporated. The transactions took place in November, 1917, and January, March and April, 1918.

One of the agreements entered into was as follows:—

Calgary, Alta., Nov. 1, 1917.

Regarding "Four-Twenty Gold Bar Placer Company" of Calgary.

This agreement is entered into by, and between Jas. G. Malcolm and M. E. Olson of the first part, and Ellen M. Jennings of Calgary, Alta., of the second part.

The parties of the first part agree to form a $50,000 company under the laws of British Columbia on certain grounds staked on Potato Creek, B.C., as placer, and which will be known as the "Four-Twenty Gold Bar Placer Company" in the interests of those who subscribe towards the said shares. It being understood that this is a private corporation.

It is hereby agreed that the said Jas. G. Malcolm and M. E. Olson in consideration of $52 paid and herewith acknowledged; the parties of the first part sells outright to the party of the second part 65 shares in the above named proposed corporation; it being understood and agreed that the party of the second part shall share and share alike *pro rata* with the parties of the first part in all dividends and disbursements made, or through the sale of the property, according to the extent of their holdings.

It is agreed and understood that these shares are sold and purchased with the understanding that those who enter into this agreement are the promoters of the company, as no stock will be offered publicly, but merely among ourselves as friends, and are subject to the conditions as outlined in our agreement.

It is further agreed that the parties of the first part are herewith given the power to act for those who are associated with them, until said certificates are delivered, which will be on or before May 1st, 1918.

The parties of the first part undertake and agree to make the best possible arrangements for the benefit of the parties of the second part to the best of their knowledge and ability.

It is understood that Messrs. Hannah, Stirton and Fisher, attorneys, shall act for us in this matter.

It is agreed and understood that the party of the second part thoroughly understand the speculative nature of this proposition entered into and agree to accept such responsibility.

In witness whereof the parties have hereunto set their hands.

JAMES MALCOLM.
Witness M. E. Olson. M. E. OLSON.
ELLEN M. JENNINGS.

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The others produced were in exactly the same words except for the name of the party of the second part and the amount of the consideration and the number of shares, which are in handwriting, the remainder being typewritten, and that Olson is not a witness in all, and except that one is dated 1918. Malcolm was not present in any of the cases, the document being already signed by him, his signature being admitted by counsel. A cash book was obtained in the office and is produced with the name "Four Twenty Gold Bar Placer Company" in it, which shewed receipts from November 8 to 30, 1917, from 30 persons, of amounts from $10 to $310, amounting in all to $1,995. The receipts for December, January, February and March do not vary greatly from those of November, but there are several amounts of $5, and one amount as high as $550. The entries end on May 2, the day before the conviction, and many of the entries for April and May are marked "Loan." The amounts paid by all of the 6 witnesses appear in this book.

Correspondence was also found connecting the defendant Malcolm with the transactions.

The last of the alleged sales, of which evidence was given, took place on April 2, and the company was incorporated, as appears by the certificate of incorporation of the Registrar of Joint Stock Companies of British Columbia, on April 5. Whether the shares referred to in the agreements had been delivered to the purchasers at the time of the trial does not appear from the evidence.

The contract purports to be a sale outright of shares in a proposed company.

S. 7 of the Sale of Goods Ordinance provides that:—

> The goods which form the subject of a contract of sale may be either existing goods owned or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract of sale, in the ordinance called "future goods," and (3) Where by a contract of sale the seller purports to effect a present sale of future goods the contract operates as an agreement to sell the goods.

Though shares are not "goods" within the meaning of the ordinance, they are dealt with commercially in the same way.

This contract then is either a sale or it operates as an agreement to sell, or, in other words, an offer to sell which has been accepted. Surely if the shares have been or may be issued and delivered there will be then a completed sale and delivery though nothing further takes place than the actual delivery.

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It is contended that the Act being one restricting rights should not be extended so as to apply to such a sale or contract of sale, but the Act uses the term "offer to sell," which shews that it is not limited to actual completed sales, and, as already indicated, sales of non-existent things are thoroughly recognized in law. I see no reason for doubting that such transactions as these shewn in the present case are sales or offers to sell within the meaning of the Act.

Then it is said that the company being a foreign company the Act does not apply to its shares. I can see no warrant whatever for such a conclusion. The Act apparently is to protect persons from investing their money in wildcat schemes, by requiring the Public Utilities Board to investigate before shares are offered. Since the opportunity of a probable purchaser to investigate the affairs of a foreign company would be less than in the case of a domestic company it is to such companies especially that it should apply. Then the exceptions in s. 2 of securities of "any province" shew clearly that it is intended to apply to other than domestic companies.

It is urged, however, that these sales are not an infringement of the Act because s. 17 provides that:—

> It shall not be an offence against this Act or unlawful for any corporation or company, or its officers or agents, or for any person who owns shares, stocks, bonds or securities thereof, to sell or attempt to sell such shares, stocks, bonds or securities, if not made in the course of continued and successive acts.

I cannot agree with this view. The evidence clearly shews that there were continued and successive sales in a regular course of business and they quite clearly do not come within this section if they otherwise would. I cannot see that anything can be advanced in the defendants' favour by reason of the fact that the purchasers came to their office instead of their going to the purchasers. The office and one of the defendants were there just for the purpose of making these sales just as a merchant keeps his shop for the purpose of selling his wares. The Act says nothing about the manner in which the party seeks to bring about a sale.

The only other objection was that the defendants had the authority of the Minister of Finance to sell these shares and therefore are excused.

On December 22 last a federal order-in-council was passed which recited that the Canadian investment market should be

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conserved to facilitate borrowing for the purposes of the war and then enacted that *inter alia* it should be unlawful for any corporation to issue or sell any shares without the approval of the Minister of Finance. An application for approval was made by Malcolm and a certificate issued giving approval for the issue and sale of capital stock of the par value of $25,000. The certificate purports to be given under the authority of the order-in-council and contains a notice shewing that it is only a permission under that order-in-council. Assuming that the order-in-council is otherwise *intra vires* it does not purport to give the Minister of Finance power to authorize the issue and sale of shares. All it purports to do is to prohibit such issue or sale without leave of the Minister. That permission, consequently, can have no further effect than to remove the prohibition of the order-in-council and leave the matter as if there had been no such order-in-council in respect of the issue and sale permitted, but in no way does it give any authority beyond the right to disregard the prohibition of the order-in-council. This certificate of approval, therefore, can have no bearing whatever on the case so as to make it different from what it would have been before the order-in-council was passed. For the reasons stated, I am of opinion that none of the legal objections can be sustained and that, therefore, the appeal should be dismissed with costs and the conviction affirmed.

Stuart, J.

STUART, J.:—I agree that this conviction should be affirmed. There will be nothing in this decision which will interfere with the promoters of a company getting as many people as they please to sign the memorandum of association. By that act, they agree to "take" shares, but do not buy them from anyone nor does anyone sell them to them. The agreements here, however, provided that the defendants agreed "to sell shares." That is what the parties by their agreement *said* they were doing, and although I was impressed with the reasons for my brother Beck's limitation of the law, I see no reason why the parties should not be taken at their word. The way in which the agreement was drawn is almost tantamount to the use of some such expression as "we hereby agree that we are not violating the law." A law forbids anyone from selling or offering or attempting to sell shares. A person does agree to sell shares by the words which he uses and which are his own. It would be strange if in defence he could

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say: "Oh, but there never were any shares to sell." It is the act and agreement of the party which is the essential thing in the prohibition, not the existence or non-existence of the subject-matter of the agreement.

Upon the other grounds taken, I agree also with the Chief Justice, but I wish to take the opportunity of saying that if the conviction had been objected to on the ground of multiplicity, it must, I think, certainly have fallen.

Stuart, J.

BECK, J.:—I think the correct view of this case is that the accused sold actually existing shares in an actually existing syndicate and that they were, on this ground, rightly convicted. My impression is that the effect of the Chief Justice's reasoning is to extend the words of the statute beyond the letter so as to cover the spirit of the enactment, something, in my opinion, not admissible in the construction of a criminal statute. This statute creates a "provincial crime." Guarding myself in this way, I concur in the result arrived at by the Chief Justice.

Beck, J.

HYNDMAN, J.:—I concur in the result.

Hyndman, J.

Appeal dismissed; conviction affirmed.

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June, 1918.

WHARVES (§ I—3)—DEFECTIVE SUPPORTING PILES—COLLAPSE—DAMAGE TO CARGO—LIABILITY OF OWNER.

A warehouseman is a bailee for hire of goods stored in his warehouse and as such must use reasonable care to keep his premises in a safe condition. The collapse of a wharf due to the supporting piles becoming worm-eaten and unable to support the superstructure, when reasonable care would have discovered the defect, renders the owner liable for resulting damage.

Statement.

APPEAL from a decision of the Supreme Court of Nova Scotia, 35 D.L.R. 150, 51 N.S.R. 291, reversing the judgment at the trial in favour of the plaintiffs. Affirmed.

Jenks, K.C., for appellants; *Henry*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—There can, I assume, be no doubt about the law which governs the relations of the parties to this case. At the argument, both parties agreed that the wharfinger stands in the position of an ordinary bailee for hire and is therefore not

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an insurer of the safety of his dock. But he is under an obligation to use reasonable care to keep it in a safe condition.

The whole controversy here turns upon the condition of the dock at the time the appellants (the owners) and warehousemen agreed to discharge, pile and reload the cargo of the "Camino," a Belgian relief ship which put into Halifax harbour for repairs. The bare fact of the accident may not be sufficient to cause a presumption or permit an inference of negligence; but that fact taken in connection with the physical cause or causes of the accident may shew that the responsible human cause of the particular accident in question was a fault of commission or omission on the part of the defendant.

Ritchie, E.J., gave judgment for the plaintiffs (appellants) for $7,107.64 and dismissed the counterclaim. He said:—

> There is danger about every wharf, because as soon as the supporting piles are driven the worms attack them—the failure of one pile may cause a collapse. The plaintiffs, no doubt, were fully alive to the danger of worms. The question is whether or not, having regard to the danger, they used reasonable care as prudent men in the maintenance of the wharf. The evidence of . . . witnesses called by the plaintiffs has convinced me that they did use such care.

The late Chief Justice Sir Wallace Graham, with whose opinion Russell and Chisholm, JJ., concurred, said:—

> The company cannot claim that this was a case of inevitable accident or that the defect in the piles was a latent defect so far as they were concerned. It was either known to the company or should have been known to them, if they had used proper care in examination and in renewing the piles which had been ravaged by the worms.

He quotes at length from the testimony in respect to the cause of the breaking of the piles and the opportunity of knowing the condition of the defective piles.

The wharf was constructed in 1899 and the evidence is that in Halifax the average life of piles is 10 years. The Chief Justice says:—

> If 10 years is the life of a pile, the company in the course of 15 years would, at least, be expected to have renewed all the piling under this wharf. There is no evidence to that effect. As a fact, a majority had not been replaced.

I entirely agree in the conclusions reached by the court *en banc*. The diver, who was in the best position to give evidence as to the conditions under the water, was not produced as a witness and no explanation is given for his absence. His name is not mentioned and therefore the respondent had no opportunity to

discuss his competence. Ample opportunity existed on the other hand to check the accuracy of the statement made by Mr. Jefferson Davis and in the absence of any attempt to contradict him I am disposed to accept the conclusion he reached. If, as appears to be admitted by both sides, the life of a pile in Halifax harbour is 10 years and the wharf was over 16 years old, every original pile put in had outlived its usefulness at the time of the accident and the omission to prove that the piling had been renewed or properly inspected taken with the fact of the accident is sufficient to permit an inference of negligence.

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—This was an appeal from the judgment of the Supreme Court of Nova Scotia holding the defendant appellants liable for the damages caused to the respondent's goods warehoused on their wharf by the defendants.

The wharf collapsed after the goods were so warehoused, the underpinning piles of the wharf giving way and many of them breaking off about at or below low-water mark. The evidence shews, I think, clearly that a number of the supporting piles of the wharf had been eaten almost through by worms and that they had in consequence become unable to give the necessary support to sustain the weight placed in the warehouse of the plaintiffs' goods, and had not been replaced by sound and strong piles.

There is no doubt that the plaintiffs took great pains to keep that part of their wharf which was above low water in good order and repair. Reasonably constant inspections of this part of the structure were made from time to time and if anything in this case depended upon the discharge by the appellants of their duty in that regard I should have for one been prepared to say that they appeared to have fully and fairly discharged that duty.

But it does not appear to me that the full discharge by the appellants of their duty in respect of the superstructure of the wharf down to low water affects the question whether they discharged their duty with respect to the piling below low water on the strength and soundness of which the whole superstructure depended. The appellants were, it is true, as warehousemen only bailees for hire of the goods warehoused and as such had a limited liability. They were not insurers but were obliged to take reasonable care of the goods and chattels warehoused by them. In the

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case of *Searle* v. *Laverick*, L.R. 9 Q.B. 122, Blackburn, J., in delivering the judgment of the court, says at p. 126:—

> The obligation to take reasonable care of the thing intrusted to a bailee of this class (amongst which he had previously mentioned warehousemen as included) involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state so that the thing deposited may be reasonably safe in it.

The question in this case is thus reduced to the single one whether the appellants did take such reasonable care with respect to their warehouse on their wharf. Reasonable care necessarily, of course, required such care of the underpinning of the wharf on which the warehouse rested.

Did the appellants prove reasonable care in that respect? I think not. They, it is true, employed a diver to make the necessary examination of the underpinning below low water on which the safety of the whole structure above depended. But this diver was not shewn to be a competent person for the task assigned him, nor was he called at the trial, nor evidence given shewing that the presence could not be had. As far as I can gather, his name was not even given or his absence from the trial explained, or his qualifications for the important duties assigned him shewn. It is true that it was proved a diver had been employed to make the necessary inspection and Mosher's evidence is to the effect that wherever this diver told him a new supporting pillar should be placed in lieu of the one destroyed by the worms, he, Mosher, placed it.

On this crucial and necessary point of the competency of the diver employed to discharge the duties assigned to him either by his own evidence or by other evidence the appellants failed to shew they had discharged their duty and their obligation to take reasonable care of the goods entrusted to them.

The proper inference to be drawn from the collapse of the wharf and the warehouse and the examination of the supporting and broken piles made after the collapse in the absence of any direct evidence on the point is that the diver was not a competent man for the important duty entrusted to him and failed to discharge it.

On this ground I hold that the appeal must be dismissed with costs.

Idington, J.

IDINGTON, J.:—I do not think the evidence adduced on behalf of the appellants at the trial satisfies the requirements of the law

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imposed upon them as the result of the unexplained reason for the collapse of the wharf in question in face of the assurances given the respondent to induce him to unload his vessel.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I have not been convinced that the conclusion reached by the majority of the learned judges of the court *en banc* is erroneous. The evidence makes it reasonably certain that the cause of the collapse of the defendants' wharf was the weakening of supporting piles due to the action of limnoria, rendering it incapable of sustaining the weight of the cargo of the "Camino," which, as placed on the dock, averaged 311 lbs. to the square foot, with a possible maximum weight of 413 lbs. to a square foot at some points. It was well known that wooden piling of wharves in Halifax harbour is exposed to this cause of deterioration. Adequate inspection at reasonably frequent intervals, followed by such repairs and replacements as such inspection discloses to be necessary, is admittedly the proper means that should be taken to guard against this danger. Under the circumstances of this case the onus was upon the defendants to establish that they had taken these means. In my opinion they failed to discharge that burden satisfactorily. The evidence and absence of evidence which warrants this conclusion has been fully stated by the late learned Chief Justice of Nova Scotia and no good purpose would be served by again detailing it.

I would dismiss the appeal.

Brodeur, J.

BRODEUR, J.:—It is common ground that it was the duty of the appellant company to exercise reasonable care that the condition of the wharf was such that the vessels using it would not be exposed to injury. That principle of law placed upon the appellants the burden of proof that reasonable care was taken to avoid accidents.

There is no doubt that the wharf collapsed on account of the piles being defective and worm-eaten. The evidence shews that after the accident the piles were examined and found to be in that condition.

The appellants claim, however, that they had during the previous year the wharf examined and repaired. The report of their inspector shews, in fact, that he had examined a certain part of those piles; but he could not say himself whether or not the

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part which was covered by water at that time had been duly inspected.

The appellants claim that a diver had been sent to examine that part covered by water; but they failed to bring the diver in evidence to shew that he was a competent man and that he had duly performed his work. It was the duty of the appellants under these circumstances to adduce such evidence; and having failed in that respect to shew that they had exercised reasonable care of their property they should be held liable for the accident which has destroyed the cargo of a vessel of which the respondent was the master.

For these reasons, the appeal should be dismissed with costs.

Appeal dismissed.

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THE KING v. DOHERTY.

New Brunswick Supreme Court, Barry, J. May 10, 1918.

INTOXICATING LIQUORS (§ III D—70)—CASES WHERE PECUNIARY PENALTY PROVIDED—NO APPEAL—INTOXICATING LIQUOR ACT, N.B.

There is no appeal from a conviction under the Intoxicating Liquor Act (1916 N.B., c. 20, s. 176 (1)) in cases where a pecuniary penalty is provided, although default in payment of the fine imposed may be followed by imprisonment.

Statement.

APPEAL from a conviction by a police magistrate under the Intoxicating Liquor Act, N.B. Dismissed.

J. J. F. Winslow, for defendant; *P. J. Hughes, contra.*

Barry, J.

BARRY, J.:—On January 11 last the defendant was convicted before Walter Limerick, police magistrate in and for the City of Fredericton, for having, on December 25 last, at Kingsclear, unlawfully sold intoxicating liquor without having the license therefor as required by law, and for the said offence the defendant was adjudged to forfeit and pay the sum of $200, together with $34.35 costs, and in default of payment to be imprisoned in the York county gaol for 6 calendar months with hard labour.

AN appeal by way of review, against the said conviction, has been brought before me, and now motion is made to quash the conviction on the following grounds:—(1) In trying together as one charge what are alleged to have been fourteen separate and distinct charges against the defendant, the police magistrate exceeded his jurisdiction. (2) The defendant, not knowing for which of the fourteen charges he was being tried, was prevented from entering upon a fair and full defence. (3) The conviction is not warranted by the evidence.

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Counsel for the prosecutor raises the objection that under the Intoxicating Liquor Act, 1916, there is no appeal in a case of this kind, and if that contention be true, then there will be no need to consider the merits of the several objections to the conviction, which I have mentioned.

The Summary Convictions Act, c. 123, Con. Stat., 1903, which furnishes the governing procedure in appeals of this character, gives a general right of appeal by way of review "in every case of summary order or conviction made under or by virtue of any law of this province." The appeal may be either to a Judge of the Supreme Court, or a Judge of a County Court, who are given co-ordinate jurisdiction in matters of this kind. But the generality of this provision in regard to appeals has been greatly restricted and cut down by the special provisions which are to be found in the Intoxicating Liquor Act, 1916, and which, of course, must govern. Except in a limited number of cases mentioned, there is no appeal from a conviction for an offence against the Act, and, in the excepted cases, the appeal is only to a Judge of the Supreme Court, sitting in chambers, without a jury.

Under the Intoxicating Liquor Act, 1916, a conviction or order of a magistrate for an offence against the Act is final and conclusive in all cases except, (*a*) where the person convicted is a licensee; (*b*) where the conviction is for an offence committed on, or with respect to, premises licensed under the Act; or (*c*) where the person convicted has been sentenced to imprisonment (s. 176). A further appeal from the decision of a Judge of the Supreme Court is given to the inspector or other prosecutor, to the Court of Appeal in certain circumstances and under certain restrictions (s. 177), but with this class of appeals we are not at present concerned.

For an offence similar to the one of which the defendant has been convicted, that is to say, for the offence of selling intoxicating liquor in contravention to s. 5, the Act provides four classes of penalties or punishments. For a first offence, the person offending is liable on summary conviction to a penalty of from $50 to $200 and in default of immediate payment to be imprisoned for not less than 3 nor more than 6 months, with or without hard labour, in the discretion of the convicting magistrate; for a second offence, the offending party is liable to a penalty of from 6 to 12

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months' imprisonment; for a third offence, to from 9 to 12 months' imprisonment; and any person who, having been three times convicted shall thereafter be convicted of violating any of the provisions of the Act, shall be considered as a persistent violator of the Act, and liable to be imprisoned at hard labour for 1 year (s. 97).

So far as I have observed in all cases where, by the Act, a pecuniary fine is authorized to be imposed, default in the immediate payment of the fine is followed by imprisonment. So that while imprisonment may, in the ultimate result, be the necessary consequence of a conviction for any offence against the Act, it need not necessarily be so for the first offence of selling. If the offender pays the fine imposed, he escapes imprisonment.

It is argued by Mr. Winslow, counsel for the defendant, that inasmuch as imprisonment may be the result of the defendant's conviction by the police magistrate, his right of appeal cannot be excluded by any mere inference. It is undoubtedly clear law that, as a right of appeal cannot be extended by equitable construction, so the operation of a general clause in an Act of the legislature which gives a right of appeal, cannot be excluded by inference only without some positive enactment in the statute on the matter in question. As regards the right of appeal, a distinction seems, however, always to have existed between cases where imprisonment is imposed as an original punishment, and cases where, as here, it is adjudged as the means of enforcing the payment of a pecuniary fine. The question to be determined is whether the words "sentenced to imprisonment" in s. 176 (1) of the Act, include a sentence of imprisonment awarded by way of commutation, or mean only an original sentence passed by the court.

Where a statute assigns imprisonment as a mode of punishment in the first instance, it follows immediately upon, and is the legal consequence of the judgment. But where it is merely subsidiary to enforcing payment of a pecuniary penalty, a commitment cannot legally follow until default is made in payment of the fine. The defendant has not, I think, been "sentenced to imprisonment" within the meaning of the subsection under discussion, so as to give him a right of appeal. The sentence is that he do forfeit and pay the sum of $200 to be paid and applied according to law . . . and in default of payment, I do order that the said John F.

Doherty be imprisoned in York county gaol at Fredericton, there to be kept at hard labour for a space of 6 calendar months.

Obviously, he need not suffer imprisonment at all if he pays the fine; so that I think the imprisonment cannot be said to be the sentence of the court, but rather a consequence which the accused brings upon himself by defaulting in the payment of the fine; the imprisonment is merely a means which the law authorizes for collecting the penalty. See *Reg.* v. *Flory* (1889), 17 O.R. 715.

The legislature could, no doubt, have put the matter beyond controversy, by adding after the words, "sentence to imprisonment" the words "without the option of a fine," or "as an original punishment," but not having done so, we have to get at the intention of the law-makers by reading the Act as a whole and regarding its scope and the evils it was intended to remedy. To give s. 176 the broader construction contended for, would be in effect to say that an appeal would lie from any conviction for any offence whatever against the Act, for there is no offence created by the statute which is not punishable either by imprisonment in the first instance as the only penalty, or by a pecuniary penalty enforceable by imprisonment. I cannot think that that was the intention of the legislature.

It may be pointed out that while the Summary Convictions Act, 1879 (Imp.), 42 and 43 Vict., c. 49, provides for an appeal in cases where a person is adjudged to be imprisoned without the option of a fine, it in terms excludes the right of appeal where the imprisonment is adjudged for failure to comply with an order for the payment of money: Paley, Con., 6th ed., 359-582. The express terms of this statute cannot, of course, be imported into our own unless we can find in the latter statute language justifying the importation, yet a consideration of the Imperial statute is not, I think, without its value as shewing the principle upon which Parliament has acted in providing and denying appeals from summary convictions. Where imprisonment without the option of a fine is imposed, an appeal is allowed, but where imprisonment is adjudged for failure to comply with an order for the payment of money, there is no appeal.

By a special definition of the term "sentenced to imprisonment" in the Colonial Prisoners' Removal Act (Imp.), 47 and 48 Vict., c. 31 (which provides for the removal of prisoners under-

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going sentence, from one British possession to another), that term is made to include a sentence awarded by way of commutation as well as an original sentence passed by the court, from which, I think, the inference may be fairly drawn, that without the extended definition of the term defined, it would not apply to the formal description of imprisonment: 2 Chit. Stat., 6th ed., 423.

The defendant is not a licensee; the conviction is not for an offence committed on or with respect to licensed premises; the defendant has not, in my opinion, "been sentenced to imprisonment" within the meaning of s. 176 (1) of the Act. The appeal must, therefore, be dismissed with costs to be paid by the defendant to the prosecutor, which costs I tax and allow at the sum of $15. *Ordered accordingly.*

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ELLIOTT v. WINNIPEG ELECTRIC R. Co.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 25, 1918.

HIGHWAYS (§ IV A—145)—STATUTORY POWERS CONFERRED ON COMPANY—REMOVAL OF SNOW AND ICE—NUISANCE—HIGHWAY RENDERED UNSAFE—DAMAGES.

Where statutory power has been conferred on a street railway company for the removal of snow from its tracks "so as to afford a safe and unobstructed passageway for carriages and vehicles" the company is liable in damages, if in the exercise of such power it renders the highway unsafe for traffic thereby causing injury to a pedestrian.

[*Elliott* v. *Winnipeg Electric R. Co.*, 38 D.L.R. 201, reversed.]

Statement.

APPEAL from a decision of the Court of Appeal for Manitoba, 38 D.L.R. 201, 28 Man. L.R. 363, reversing the judgment at the trial in favour of the plaintiff. Reversed.

B. L. Deacon, for appellant; *Laird*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree that the appeal should be allowed with costs for the reasons given by Idington, J.

Davies, J.

DAVIES, J. (dissenting):—This is an appeal from the unanimous judgment of the Court of Appeal for Manitoba setting aside a judgment for $4,000 in favour of plaintiff entered by the trial judge on a general verdict of a jury who found that amount as damages.

The claim of the plaintiff is one for personal injury caused to her as she was about to enter one of the defendant's cars and is and must be based upon the defendant's negligence.

The plaintiff, it appeared in evidence, was with her daughter at the corner of Portage Avenue and Belmont St. waiting for a

west bound car which, when it came along, stopped a little west of its usual stopping place. They walked west to where the car was standing and when they arrived opposite to the entrance door of the car, but before plaintiff had reached up her hand to grasp the rail, she slipped and fell. The evidence shewed that there was a slope or incline in the snow starting about three and a half or four feet north of the north rail of the car track and sloping to the edge of the rail. Deacon, one of plaintiff's witnesses, stated that at the point where the accident happened the snow "was swept clear from the track between the rails and swept back, sloping back to a ridge about four feet;" and that from that point to the north curb the street was level. The same witness further states that at the time "there was a lot of automobile and jitney traffic on Portage Avenue, that they ran one wheel between the rails and the other on the incline in order to keep off the deep snow and that the effect of this traffic was to make the incline or slope hard and slippery."

Some evidence was given by defendant's witnesses to the effect that the incline was not as great as Deacon stated but of course the jury had a right to accept his evidence in preference to that of others and assuming they did so the vital question arises in what respect were the defendants guilty of negligence causing or contributory to the accident?

The defendant company was incorporated by the Legislature of Manitoba by legislation which expressly validated and confirmed a by-law of the City of Winnipeg giving to the defendant company the right to construct and operate a street railway on the streets of the city of Winnipeg for the carrying of passengers and prescribing the terms and conditions of such construction and operation. Full provision is made as to the location and manner of construction of such railway subject to the approval of the city engineer.

Sub-clause *f* of clause 3 of the by-law deals with the main question of the defendants' liability in such a case as this and is as follows:—

(*f*) The said applicants shall at all times keep so much of the streets occupied by the said line of railway as may lie between the rails of every track and between the lines of every double track and for the space of eighteen inches on the outside of every track cleared of snow, ice and other obstructions and shall cause the snow, ice and other obstructions to be removed as speedily

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as possible, the snow and ice to be spread over the balance of the street so as to afford a safe and unobstructed passageway for carriages and other vehicles. Should the said engineer at any time consider that the snow or ice has not been properly or as speedily as possible removed from or about the tracks of the railway lines or not properly or as speedily as possible spread over the street, he may cause the same to be removed and spread as aforesaid and charge the expense to the said applicants who shall pay the same to the city. If, however, the engineer is of opinion that the snow or ice should be removed entirely from the streets so as to afford a safe passage for sleighs and other vehicles the said applicants shall at once do so at their own expense and charge, or in case of their neglect the engineer may do so and charge the expense to them and they shall pay the same.

Apart from the question of negligence in carrying out the obligations which this sub-clause (*f*) imposes upon it the company is not liable for the condition or non-repair of the city's street. It is the duty of the city to keep the streets in repair and if by reason of its failure to do its duty in that respect any one sustains injuries it is the city that would be liable.

The city is not a party to this action and I do not desire to express any opinion whatever as to its liability for the plaintiff's injuries.

The question then in this case is whether or not the defendants have been guilty of negligence in discharging their obligations with respect to the removal of the snow and ice which would from time to time in Winnipeg gather on and alongside of their car tracks.

I do not think the defendants' obligation as to the removal and disposition of the snow can be expressed more clearly than the sub-section above quoted has expressed them. The city engineer is to determine whether the company has or has not properly removed the snow from about the track of the railway lines and if he decides they have not he is empowered to remove it at their expense. There was not a scintilla of evidence to shew that the engineer had at any time determined that the company had not properly removed the snow at all times. The only inference to be drawn from the evidence is that he was quite satisfied.

If the company complies with its obligation in that regard without negligence and causes injury to others no liability for damages rests upon them, on the plain and simple ground that the doing of an act authorised by the legislature cannot, without negligence, involve liability to others for injuries they may suffer in consequence.

The rule or principle of law on this point seems clearly beyond doubt. In the case of *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220, their Lordships of the Privy Council held expressly that a railway company authorised by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence but by the ordinary and normal use of its railway or, in other words, by the proper execution of the powers conferred by statute. In that case some sparks which escaped from an engine drawing a train of the railway company set fire to and destroyed the plaintiff's barn, but as there was no negligence on the part of the company they were held not to be liable for the loss.

See also *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430, at 455-6, and *Hammersmith R. Co.* v. *Brand*, L.R. 4 H.L. 171 at 215.

The claim in this case is that the accident to the plaintiff was caused by a slippery incline from the main surface of the snow on the street to the rail upon which incline the plaintiff slipped and fell. But this incline was necessarily caused by the company in the exercise of its statutory powers and obligations in removing the snow from its tracks and spreading it upon the street. That afterwards it was pressed down by motor and jitney traffic leaving a hard smooth "surface" sloping upwards from the rails is something for which the company is in no way responsible. Such a slope or incline as made by the company was unavoidable if they were to fulfil their obligations. If the defendant company had removed all the snow from the 18-inch strip outside of the rails leaving a perpendicular wall at the 18-inch distance from the street the incline or slope would naturally have been greater, and the danger to the public much greater than its removal from the rails on a gradual incline. The fact, as Perdue, J., remarks, that part of the snow remained upon the strip was not an act of negligence which either caused or contributed to plaintiff's accident. The 18-inch strip of the incline complained of was entirely covered by the overhanging car and the steps of the car and plaintiff's accident occurred further up on the incline just before reaching out her hand to catch the rail or raising her foot to step on the car.

The actual facts are that in a city like Winnipeg, where there are such heavy falls of snow in the winter time, there must without negligence necessarily be in the removal of the snow from the

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track by the most modern and improved methods an incline or slope to the top of the snow in the street, that this incline or slope was at the time of the accident to the plaintiff made hard and slippery by the automobile and jitney traffic and that this condition was aggravated by a recent light fall of snow. Neither for the effect of the motor and jitney traffic in hardening and making slippery the incline or slope or for the light fall of snow which aggravated and increased the danger of these conditions the combination of which caused plaintiff's accident can the company be held liable.

There was no evidence whatever that the city's engineer was not satisfied with the manner in which the company had discharged its obligations with regard to the removal of the snow from and adjoining its tracks and on the other hand there was clear and undisputed evidence that they had so removed it by the latest and most approved methods and without negligence of any kind.

I agree with the learned Judges of the Court of Appeal that the only evidence from which negligence could possibly be inferred was with regard to the incline and that no such inference could properly be drawn. It is not stated by anyone that this incline was steeper than it should have been or that defendants could have avoided making an incline if they discharged their obligations.

There were only two ways in which the company could discharge its obligations with respect to the snow outside of the outer rail for the distance of 18 inches; one was to remove it entirely for that distance and either leave a perpendicular wall of snow 18 inches outside the rail and from the top of that wall leave or make an incline or slope to the top of the snow on the street level or remove the snow as they did by well-known modern appliances in an incline or slope from the rail to the snow on the street level. They adopted the latter course which had the approval, as I infer, of the engineer inasmuch as he never disapproved in any way. The other course of leaving a perpendicular wall at the 18 inches limit from the rail would obviously have created an intolerable and dangerous condition alike to vehicular traffic and to pedestrians and would doubtless have met with the prompt disapproval of the engineer. The slippery condition of the incline was caused by the motor and jitney traffic and was increased by a light fall of

snow the night before the accident. For neither of these was the defendant in any way responsible.

For these reasons I would dismiss the appeal with costs.

IDINGTON, J.:—The legal foundation upon which, beyond question, appellant's right of action herein can be rested is that what was improperly done or left undone by respondent resulted in unjustifiably putting a public highway so out of repair as to constitute thereby that sort of public nuisance for which an action will lie at the suit of any traveller injured thereby, as she claims she was, against the party so creating the nuisance or contributory thereto.

The relevant law is daily applied for example against the negligent teamster who has left improperly his waggon or machine or load on the highway, or the contractor engaged in repair or reconstruction of part thereof, who has improperly done or left undone something whereby he has endangered needlessly those using, as of right, the highway, and thereby caused any injury and damage to any of them.

The Electric Railway Co. given by virtue of any legislation a franchise for the use of any highway is protected, so far as acting within the powers so conferred, from liability to any action for accidental results solely and necessarily due thereto. But it must so absolutely live up to the terms and conditions of its franchise that the accident complained of, in any action for damages arising therefrom, cannot be attributed to its having done or left undone that which the terms of its legalised franchise may have imposed or rendered obligatory upon it.

Its license is limited to that which it can rightfully enjoy, concurrently with an observance of such terms. An habitual disregard thereof may entitle the Attorney-General or other duly constituted public authority in that behalf to move the courts to deprive it of the franchise or enforce its observance.

Under our English system of law the private individual has, however, no such right to complain to the courts, unless and until he has suffered injury resulting from the non-observance of the said terms and conditions. Then he or she suffering have, in case a public nuisance is created, a right to complain.

It is this phase of the law which distinguishes the case of *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A.C. 111, from some other cases.

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The law as laid down in that case relative to the result of non-observance of the terms and conditions of the franchise leading to the creation of a nuisance is applicable here.

The observance of the respective set of terms and conditions used in any such like cases of a purchase may lead to different results as illustrated by the case of *City of Montreal* v. *Montreal Street R. Co.*, [1903] A.C. 482, where that complained of was held to have been conceded to the railway company by the city's by-law and hence could furnish no ground of complaint. See also the cases of *Morrison* v. *Sheffield*, [1917] 2 Q.B. 866, distinguishing *Great Central R. Co.* v. *Hewlett*, [1916] 2 A.C. 511, which itself illustrates in how the company had been adjudged liable and then protected by a later Act enabling it to maintain what had formerly been adjudged a nuisance, and the cases of the *Dublin United Tramways* v. *Fitzgerald*, [1903] A.C. 99; *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430; *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 93; *Metropolitan* v. *Hill*, 6 App. Cas. 193, and *C.P.R. Co.* v. *Parke*, [1899] A.C. 535 at 544 *et seq*, where the obligation not be to negligent is implied in the legislative grant if proven. See also cases cited in earlier reports of these cases.

The law, I take it, rendering liable one so transgressing its rights and disregarding its duties needs no elaboration, but from the argument adduced it seemingly needs, in order to have confusion in thought and law eliminated from the discussion, to have it pointed out that though the city may also have incurred liability in regard to what has taken place and is in question herein that does not, in law, excuse or exonerate the respondent.

In like manner, and for the like purpose, I may observe that it is quite possible that the appellant's action may be rested upon the statute which confirmed the contract between the city and respondent.

I avoid passing any decisive opinion upon that subject for the two-fold reason that it is not necessary herein to do so, and the elaborate examination of the law on that point to bring the question so raised within the range of easy solution and determination would be useless and needlessly confusing.

Once it might be shewn that the statute by its purview or language, to adopt the rule laid down by Lord Cairns in the case of *Atkinson* v. *Newcastle*, 2 Ex. D. 441, would support the action what have we gained?

We need not go further than the elementary principles of law which I have adverted to.

If the statute gives an action it can herein only proceed upon the same identical principles relevant to the application of the facts in either case. The whole question involved and all the questions involved, in any way one can look at the matter, must turn upon the tests of whether or not the respondent lived up to the terms and conditions of its license to invade the highway and whether or not it was a result of its non-observance thereof which caused the appellant's injuries.

In directing the jury the trial judge used the word "negligence" which at first blush I was inclined to think might not most aptly describe all that was needed to direct the jury, once they were told the nature of the obligation resting on respondent.

I have tested it in many ways in my own mind and I cannot find any one that would better convey to the jurors' minds what in the last analysis was left for them to decide upon the evidence as applicable to the obligation resting upon the respondent when exercising its powers.

There certainly was evidence that would have to be submitted to the jury and their determination of it ought to have been held final and left undisturbed unless some misdirection shewn.

There was nothing complained of at the trial by counsel for respondent which gives any legal ground for setting the verdict aside.

The disregard of the request to submit questions to the jury is not in Manitoba a misdirection.

Much often is to be said in favour of submitting questions but I cannot think an obligatory rule of that sort would promote the administration of justice. Take for example the case of *Jamieson* v. *Harris*, 35 Can. S.C.R. 625, which presented ordinary everyday sorts of facts which any jury ought to have been able to decide upon, by applying their comon sense, yet after twenty-six questions submitted and answered it was decided here that the trial judge had missed the right mark to direct attention to.

The next ground of complaint made at the trial in regard to the charge was that the action had not been based on any breach of alleged statutory duty.

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Inasmuch as (which I have already tried to explain) the real question to be decided, was (so far as facts upon which the jury had to pass were concerned), identically the same whether presented as a breach of statutory duty or as the liability arising from the creating of a nuisance, I fail to see any valid ground of objection in what is thus put forward.

The more elaborate presentation which was made of the objection resolves itself into a mere verbal distinction without containing anything in substance.

So far as pointed at the question raised as to the possibility of resting an action upon the statute it can be of no avail, in my view, that the action can rest upon the liability for nusiance quite independently of the statute.

It is not always that a charge which possibly proceeded in the misconception in the mind of the trial judge of the exact expression applicable to the name of the relevant law can be upheld.

But in this case it could by no possibility have misled the jury in the most rigorous discharge of their actual duties. They were identical in either way that the case might have been presented.

And still more is that the case when we come to weigh the term negligence to which, in some way not made clear, objection may have been intended to have been taken.

The trial judge upon mere mention of it at once assumed the question of contributory negligence had not been passed upon and corrected as it seems to me the erroneous impression of counsel, who seems to have assented.

There seems to have been some ten or more acts or omissions which appellant had put forward as acts of negligence on the part of the respondent.

In one part of the charge the judge seems to say that if respondent was guilty of any of these it must fail. This seems too broadly stated but is not objected to and the general tenor of the charge was such as to confine the jury's attention to the question of whether respondent had properly observed its obligations in a clause of the contract referred to as "F" and which imposed upon it a manner of dealing with the snow which certainly does not seem to have been observed else the situation created thereby would not have been that which was presented in evidence.

A slope of 18 inches over the 3½ ft. of snow turned into ice on

any street lying next outside the rail seems to have been the condition which produced the accident in question.

That certainly was not what one would have expected to find as the product of the due observance of the contract in question, nor was it a fit condition for vehicular travel.

If that resulted from respondent's treatment of the snow problem, then I see no defence to the action, or reason for interfering with the verdict of the jury.

But even falling a long way short of such a product there seems no reason for a new trial which is prohibited by the Court of Appeal Act unless there has in truth been a miscarriage of justice within the meaning of same.

It has occurred to me that the specification "F" requiring a clear space between the rails and 18 inches outside the rail was not very suitable for probable conditions and that a slope may have been treated by way of compromise.

Moreover, that is only surmise and at best could not help the respondent which could be no party to anything but that specified.

The afterthought suggestion that the snow was to be spread over the balance of the street so as to afford a safe and unobstructed passageway for carriages and other vehicles but did not provide for pedestrians does not seem to have much weight. If such a passageway for carriages and other vehicles had been produced, the walking would not have been bad.

What is complained of was neither fit for pedestrians nor passengers by carriages or other vehicles. No doubt the jury understood this and assumed rightly pedestrians had full right to travel there to reach the car.

If the slope had only been a full 18 inches wide it would have been overcome by the overhanging side of the car and have done appellant no harm.

Had the actual specification in "F" been adhered to, pedestrians would have been quite safe in trying to get aboard a car, but I imagine the city and its engineer would have had to face a problem they do not, as was their duty, seem to have efficiently tried to have discharged.

That is no reason for setting aside appellant's judgment.

The respondent asks for a new trial if we should be disposed to disturb the Appellate Court's judgment.

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The only thing put forward in that regard not already considered and dealt with is the interesting question of the non-reception in evidence of photographs of the street as it existed a month or more after the accident. I think the learned trial judge was right in such refusal.

There has been quite enough of confusion of law and of fact introduced into this simple case without giving such another cause therefor. Whether photographs can ever be insisted upon or not I will not pass upon but certainly as a guide to the condition of snow and ice on a street in Winnipeg a month before taken is asking too much.

The appeal should be allowed with costs here and in Court of Appeal and the judgment of the trial judge restored.

Anglin, J.

ANGLIN, J.:—I am with respect unable to accept the conclusion reached in the Court of Appeal in this case that there was no evidence on which a jury could reasonably base a verdict for the plaintiff. The very condition of the roadway as described by some of the witnesses—a slope extending from the rails outward rising 18 inches in 4 ft.—might (of course I must not be understood as saying or meaning that it should) be considered by the jury to have been not "safe . . . for the passage of carriages and other vehicles," and to have been due, in part at least, to some negligence on the part of the defendant company's servants in exercising its statutory right to spread "over the balance of the street" the snow removed from the railway tracks and the adjoining 18-inch strips.

But I am of the opinion that the case was not properly submitted to the jury on this vital issue and that the defendant is entitled to a new trial. As the action should therefore, in my opinion go before another jury, it would not be proper for me to discuss the issues involved further than is necessary to make clear the ground on which I would direct a new trial.

Upon the charge of the trial judge, although the jury should be of the opinion that, in disposing of the snow handled by them, the company's servants had done all that was required "to afford a safe and unobstructed passage for carriages and other vehicles," they might, if they thought that there was a condition dangerous *to pedestrians* ascribable in some degree to the acts of the defendants' servants, find a verdict for the plaintiff. After reading the

first sentence of clause (*f*) of the regulations embodied in by-law 543 of the City of Winnipeg, validated by s. 34 of 55 Vict., c. 56, whereby the defendant company was declared to be entitled to "all the franchises, powers, rights and privileges thereunder," the learned judge said to the jury:—

But apart altogether from the statute, but at the same time not inconsistent with it, the street railway company may remove such snow from its tracks and such portions of the streets as may be necessary for the operation of its cars. But if it does remove the snow, or alter its natural condition in any way, there is a duty cast upon it to do so in a reasonable manner and without negligence. If it removes snow from its tracks and throws it upon part of the highway adjoining the tracks in a careless and negligent manner or leaves it piled up or heaped up with a dangerous slope upon a highway, and if it was by reason of such negligence that the plaintiff slipped and fell, then (subject to the rule of contributory negligence which I will presently explain) the defendant would be liable.

You may quite properly require a high degree of care to such of the public who may in the ordinary course of events attempt to board a street car or who, in other words, are invited to cross, to the car, that portion of the street cleaned and distributed, but excepting in so far as the defendant may have rendered the street dangerous by its acts, it is not liable for the dangerous condition of a public street on which it receives and discharges passengers. However, in removing snow from one part of the street and depositing it on another part at an angle, you may fairly charge the defendant with knowledge of the traffic and its probable effect upon the snow so distributed.

Except under the authority of the by-law ratified by the legislature the defendant company had no right to interfere with the normal conditions of the highways. Anything in the nature of an obstruction or danger to lawful traffic thereon of any kind caused wholly or in part by its interference resulting in injury would, apart from the statutory sanction, amount to an actionable nuisance. The legislature saw fit, however, to give the company the right to remove snow and ice from their tracks and a defined space on either side of them in order to permit of the free operation of their tramcars. In doing so it thought proper to approve of the condition annexed by the city by-law to the exercise of the right so conferred, viz., that the company should spread the snow and ice so removed "over the balance of the street." It had no right to take away any of the snow or ice to any other place, unless the city engineer should so direct, when in his opinion that should become necessary "to afford a safe passage for sleighs and other vehicles."

The by-law approved by the legislature specified the manner in

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which the snow should be spread by the company, *i.e.*, "so as to afford a safe and unobstructed passageway for carriages and other vehicles."

No doubt, as put by the judge, in this connection the defendant may fairly be charged with knowledge of the traffic on the highway and its probable effect. But the measure of its duty—the condition of the exercise of its right—is that, having regard to such traffic, it should spread snow and ice removed from its tracks, etc., so as not to obstruct or render unsafe vehicular traffic—always of course so far as the exercise of reasonable care and skill will enable that to be done. If, notwithstanding the exercise of such care and skill, a condition dangerous to pedestrians should ensue—either because of the excessive quantity of snow and ice thus accumulated on "the balance of the street," or because of other conditions not attributable to any neglect of the company's servants in the exercise of its statutory right with its incidental obligation, the company is not legally responsible. It would only have done that which the legislature authorised it to do in the very manner and to the extent specified by the approved by-law. It is solely because this aspect of the case was, in my opinion, improperly presented to the jury that there should be a new trial.

Objection to the judge's charge on this ground was probably sufficiently taken by the counsel for defendant when he urged that "no person can set up a claim in law for damages based on negligence against a party who has complied with a statutory power or a statutory duty," and again, that the plaintiff would not have a cause of action arising out of the slope in the highway unless that defect falls "within the purview of the statute"—meaning, I take it, that a condition due to the acts of the company's servants, which, although unsafe for pedestrians, was reasonably safe and unobstructed for vehicular traffic, would not entail liability on the company.

I would merely add, with respect, that this appears to be a case in which the trial judge might very properly have yielded to the suggestion of counsel for the defendant that questions covering the several issues should be submitted to the jury.

Brodeur, J.

BRODEUR, J.:—This is a case arising out of a street railway accident. By virtue of a by-law passed by the City of Winnipeg, respondents were bound to keep the part of the street occupied by

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their lines for a space of 18 inches on both sides of the track clear of snow, ice and other obstruction and to spread over the balance of the street the snow or the ice so as to afford a safe and unobstructed passageway for carriages. This by-law was validated and confirmed by the legislature in all respects "as if the said by-law had been enacted by the legislature."

It appears by the evidence that, on the day of the accident, there was a slope which might be of a dangerous nature spreading at the rail and extending back about four feet to a height of about 18 inches. When the appellant came to board the street car she fell by reason of that dangerous condition and was very seriously hurt.

It is claimed by the appellant that the duty imposed upon the respondent company was a statutory one in view of the declaration made by the legislature and that the by-law should be considered as being enacted by the legislature itself. That view has been accepted by the trial judge but the Court of Appeal would not adopt it and reversed on that ground the judgment of the Court of King's Bench of Manitoba.

If the legislature had simply confirmed the by-law, the latter should be considered as a contract between the city and the street railway company. But in declaring that this by-law becomes a legislative enactment that duty imposed upon the railway company becomes a statutory duty and if in the exercise of those powers, or in the carrying out of those duties, the company acts negligently then there is liability on its part towards any person who might be injured as a result of that neglect.

Some evidence has been adduced to shew that this incline on the street was caused by the company and by the way the snow had been removed from the centre of the street and there was certainly sufficient evidence to justify the jury in coming to the conclusion that the duty imposed upon the company had been negligently carried out. On that ground, I should be of opinion that the findings of the jury should be sustained. Besides, the company in exercising a statutory power is under a common law duty not to injure the public. *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430.

It is suggested, however, that a new trial should be ordered because the judge did not properly instruct the jury as to the nature of the duty and obligation of the company.

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If I refer, however, to that charge I fail to see that he has not given those proper instructions. I notice that he uses, in one part of his charge, the following words, and I think they cover the objection which has been raised:—

But apart altogether from the statute but at the same time not inconsistent with it, the street railway company may remove such snow from its tracks and such portions of the streets as may be necessary for the operation of its cars, but if it does remove the snow, or alter its natural condition in any way, there is a duty cast upon it to do so in a reasonable manner, and without negligence. If it removes snow from its tracks, and throws it upon part of the highway adjoining the tracks, in a careless and negligent manner, or leaves it piled up or heaped up with a dangerous slope upon the highway, and if it was by reason of such negligence that the plaintiff slipped and fell, then the defendant would be liable. You may quite properly require a high degree of care to such of the public who may in the ordinary course of events attempt to board a street car, or who, in other words, are invited to cross to the car that portion of the street so cleaned and distributed. But excepting insofar as the defendant may have rendered the street dangerous by its acts, it is not liable for the dangerous condition of a public street on which it receives and discharges passengers. However, in removing snow from one part of the street and depositing it on another part, at an angle, you may fairly charge the defendant with a knowledge of the traffic and its probable effect upon the snow so distributed.

In those circumstances, I think that the judgment appealed from should be reversed and the judgment of King's Bench should be restored with costs of this court and of the courts below.

Appeal allowed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. June 21, 1918.

1. PEACE OFFICER (§ I—10)—WARRANT TO SEIZE—WARRANT INVALID—OFFICER EXECUTING—RESISTANCE.

A person in possession of property is not bound to relinquish it to one who assumes to act under legal process, but who has not clothed himself with proper and sufficient authority to rightfully take possession of the property in question. If the person in possession obstructs such officer in attempting a seizure of the property he is not thereby guilty of a breach of sec. 169 of the Criminal Code.

2. SEARCH AND SEIZURE (§ I—4)—INFORMATION TO OBTAIN A SEARCH WARRANT—SUFFICIENCY OF.

An information to obtain a search warrant under s. 629 of the Criminal Code (Form 1) need not be signed by the complainant if he in fact takes his oath before the magistrate as to its truth; such information must state the cause of suspicion, whatever it may be, as provided for in such form.

3. SEARCH AND SEIZURE (§ I—2)—SEARCH WARRANT—SUFFICIENCY OF.

The search warrant issued by the magistrate as provided by form 2 of s. 629 is invalid if it does not describe the things to be searched for and the offence in respect of which the search is made, and a search made under such warrant is illegal.

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CROWN case reserved from Victoria County Court, by which is sought to quash a conviction against the defendant for obstructing a peace officer in the discharge of his duty.

A. R. Slipp, K.C., moves to quash conviction.

J. P. Byrne, K.C., Attorney-General, *contra*.

HAZEN, C. J., agrees with McKeown, J.

McKEOWN, C.J.K.B.D.:—At a session of the Victoria County Court held in January last, Arthur LaVesque was arraigned upon an indictment charging him, under s. 169 of the Criminal Code, that he did—(1) obstruct a peace officer in the discharge of his duty; and (2) assault a peace officer in the discharge of his duty. To these charges the accused pleaded not guilty and was acquitted upon the count for assault, but was convicted for the offence of obstructing the peace officer as charged. The facts are few and undisputed. The accused had purchased a horse from one George DeMerchant, and it is claimed that he took away the wrong horse. DeMerchant, after some delay, laid an information against LaVesque before Bruce Ritchie, police magistrate and a justice of the peace for the County of Victoria, charging theft of the horse so taken. Upon this information, a search warrant was issued directed to all or any of the constables or other peace officers of of the county of Victoria, directing such officer to enter the premises of the accused and to search for the horse and bring it before said justice of the peace. This warrant was delivered to Miles McRae, a constable for the parish and county aforesaid, and armed therewith, he accompanied the complainant DeMerchant to the residence of LaVesque, and there in the presence of the accused, McRae attempted to seize the horse in question, and, after considerable trouble, he secured the animal and took it away. LaVesque claimed that, in his purchase, he was to have his choice of two horses from DeMerchant, and the one he took first, having become lame, he substituted the animal in question for that which had so gone lame. It is not necessary to discuss the validity or *bona fides* of this contention. When the constable and DeMerchant appeared, LaVesque resisted their attempt to take possession of the horse. His resistance culminated in a fight in which he appears to have been worsted, and the testimony shews he was badly beaten and suffered the loss of much blood. However, the constable and DeMerchant secured the horse and

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took it away, and then laid the information against LaVesque for obstruction and assault. He was committed for trial in due course, and was arraigned for such offences with the result above indicated. At the trial, the prosecution put in evidence the information laid by DeMerchant against the accused for alleged theft of the horse, and also the search warrant issued by the justice of the peace, and delivered to constable McRae, under the authority of which he took the proceedings above outlined. It is admitted on all sides that both the information and the warrant are defective. I do not think it is necessary to set them out in full, but the information is seriously defective, in my opinion, because, by s. 629 of the Code, it is necessary that the applicant for a search warrant satisfy the justice, that he (the informant) has reasonable grounds for believing that the article or thing upon, or in respect to which, the offence was committed, is in a specified place, etc. (I am confining my recital of the section to the facts applicable to the case in hand) and following this statutory requirement, the form of information in such case, after a description of the article, and stating that he (informant) has reasonable cause to believe, etc., proceeds as follows:—"here add the causes of suspicion whatever they may be." This has not been done, and it seems to me to be impossible to carry out the requirements of the section without such statement.

The warrant is even more faulty, because, for all that appears, LaVesque may have been the absolute owner of the horse. The form requires that the offence in respect to which the search is made must be described. This has been altogether ignored, and its omission, in my opinion, invalidates the process.

The Judge of the County Court admitted these papers in evidence, expressing doubt as to their admissibility, and reserved for this court the following questions:—(1) Is the information sufficient in law to warrant the issuing of a search warrant? (2) Is the warrant itself sufficient in law? (3) If the answer is in the negative to both or either of these questions, was the defendant, in the circumstances, justified in resisting the warrant?

I think it is apparent that questions 1 and 2 must be answered in the negative, and such answers make it necessary to decide whether or not the accused was "justified in resisting the warrant."

Notwithstanding the testimony given by the constable and

DeMerchant, the jury has found that the accused did not assault McRae. If the evidence of various witnesses, called on behalf of the defendant, accurately sets forth what really took place, LaVesque was badly beaten, and the jury, under directions given by the County Court Judge, acquitted LaVesque of assault, but found that he did obstruct the officer while in the discharge of his duty. This raises a question which is not by any means new, namely, whether a person in possession of property is bound to relinquish it to one who assumes to act under legal process, but who has not clothed himself with proper and sufficient authority to rightfully take possession of the property in question: and consequently, whether if the person so in possession puts an obstruction in the way of such officer in attempting a seizure of the property, he (the possessor) commits thereby a breach of the statute. The section dealing with the matter is as follows:—

169 *Obstructing Peace Officer.* Everyone who resists or wilfully obstructs:

(*a*) Any peace officer in the execution of his duty or any person acting in aid of such officer;

(*b*) Any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure;

Is guilty of an offence punishable on indictment or on summary conviction and liable if convicted on indictment to two years' imprisonment, and, on summary conviction before two justices, to six months' imprisonment with hard labour, or to a fine of one hundred dollars.

It seems to me, even in the absence of authority, that the offence of obstructing a peace officer in the discharge of his duty, must predicate that such officer is duly and properly clothed with authority. An analysis of the section leads me to conclude that unless the officer who affects to make a seizure of property in the possession of another person has been duly and properly authorized and commissioned to do so, he can have no official status in performing such act. And not having warrant or authority to take this horse, it is not open to him, in the performance of such act, to claim a privilege or immunity which takes its rise wholly from the official status which he lacked. Many cases decide that a police officer is fully protected in the discharge of his duty, and that such protection even goes so far as to render him safe when he acts mistakenly, provided he honestly believes in a state of affairs which, though non-existent, would have justified him in taking the course pursued, if it really had existed. These considerations have to do with the civil liability of a police officer, but they do

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not touch, in any degree, the question as to whether a man, who does not acquiesce in the officer's act, is guilty of a breach of the statute, and that is the question before us at present. I think a peace officer must be fully clothed with all authority necessary to enable him to make a lawful seizure before he can claim that an obstructor is within the wording of this section of the code. In view of the defective character of the paper which McRae had that day, he had no right to take the horse at all. That being so, it seems to me necessarily to follow that he cannot be said to be "in the execution of his duty" when taking it, and, therefore, I conclude that LaVesque was not obstructing him in the sense mentioned in the statute. In the case of *Reg* v. *Cumpton*, 5 Q.B.D. 341, the defendant was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who arrested him in the city of Worcester under a warrant issued by two justices of the peace of and for the county of Worcestershire. The warrant was not backed by a justice of the city of Worcester as it should have been to empower the constables to arrest within the city. Upon his arrest under the warrant, the accused violently resisted and assaulted the constables, and was charged by them of an assault upon the constables in the execution of their duty as well as with common assault. He was convicted on both charges, and upon a Crown case reserved, the question argued was, whether the conviction on the charge of assault upon the constables while in the execution of their duty could be supported, inasmuch as the warrant had not been backed. The argument of counsel and the decision of the judges was mostly concerned with the contention made by the prosecution, that by certain statutes, unnecessary to be referred to, the county constable was given authority to act within the city. This contention was not upheld by the court and the conviction was quashed. It was not argued or contended that the conviction could be upheld unless the statute gave such authority, because the warrant under which he acted was defective, and it seems to have been so thoroughly taken for granted that such was the law, that hardly any attention was given to that phase of the matter at all. In other words, it was admitted that if the warrant was defective, as alleged, the conviction could not be sustained. Field, J., said at p. 345:—

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In this case it lies on the prosecution to make out that the constable has the power contended for and in this I think they have failed.

The Supreme Court of Manitoba held in the case of *The King* v. *Finlay*, 4 Can. Cr. Cas. 539, that an owner of goods could not be convicted of unlawfully obstructing or resisting by force an officer in the execution of his duty, when it appeared that the officer (a bailiff) was acting under a writ of replevin which was void, because it was *ultra vires* of the court which caused it to issue: 13 Man. L.R. 383. See also Roscoe's Criminal Evidence, 13th ed., p. 638.

In Halsbury's Laws of England, vol. 9, at p. 506, the authorities are summed up thus:—

A person resisting a peace officer cannot be convicted of this offence, unless the officer was acting strictly within the limits of his powers and legal duty.

In my opinion, the answers to the first two questions will be in the negative, and to the third question in the affirmative, and consequently I think the conviction should be quashed, no action to be brought against the constable McRae for anything done by him under said warrant.

Grimmer, J.

GRIMMER, J.:—This is a case reserved by the Judge of the County Court for the County of Victoria. The case was tried in the Victoria County Court on the 22nd and 23rd days of January last past, under an indictment containing two counts, one for obstructing a peace officer in the discharge of his duty, and the other for assaulting a peace officer in the discharge of his duty. The defendant was found guilty by the jury for obstructing a peace officer and not guilty of the assault. The Judge of the County Court reserved the case, submitting the following questions to this court:—(1) Is the information sufficient in law to warrant the issuing of a search warrant? (2) Is the warrant itself sufficient in law? (3) If the answer is in the negative to both or either of these questions, was the defendant in the circumstances justified in resisting the warrant?

As far as the facts can be gathered from reading the evidence, it appears that one George DeMerchant was the owner of two young horses of the age of two years and sold one of them to the defendant LaVesque for the sum of $200, receiving the price in cash. Upon going to get the animal which he had purchased it was found to be lame, and, apparently in the absence of the

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owner, DeMerchant, the defendant LaVesque took another horse which he found in the stable and removed it to his own premises, which was the offence charged. On October 29, 1917, information was laid by DeMerchant against the defendant, before Bruce Ritchie, police magistrate and justice of the peace for the county of Victoria, in the words following:—

Canada, Province of New Brunswick, County of Victoria.

The information of George DeMerchant, of the Parish of Drummond in the said County of Victoria, farmer, taken this 29th day of October, in the year 1917, before me, Bruce Ritchie, Police Magistrate and one of His Majesty's Justices of the Peace in and for the said County of Victoria, who says that Arthur LaVesque, of the Parish of Grand Falls in the said County did on the 27th day of the present month of October, instant, at the said Parish of Drummond in the said County of Victoria, steal one gelding horse, sorrel colour, with white face and white hind feet, two years old, the property of the said George DeMerchant, and that he has just and reasonable ground and cause to suspect, and suspects that said horse is concealed in the barn or outbuildings or premises of the said Arthur LaVesque, situate in the said Parish of Grand Falls in said County.

Wherefore he prays that a search warrant may be granted to him to search the said barn and outbuildings and premises of the said Arthur LaVesque, as aforesaid, for the said horse so stolen as aforesaid.

Sworn before me the day and year first above mentioned, at Andover in the County of Victoria.

(Signed) R. BRUCE RITCHIE,
A Justice of the Peace in and for the County of Victoria.

Upon this information or complaint a search warrant was issued in the following words:—

Canada, Province of New Brunswick, County of Victoria.

To all or any of the constables or other peace officers in the County of Victoria:

Whereas it appears on the oath of George DeMerchant, of the Parish of Drummond in said County, that there is reason to suspect that a gelding horse, sorrel colour, with white face and white hind feet, two years old, the property of the said George DeMerchant is concealed in the barn and outbuildings on premises of Arthur LeVesque in the Parish of Grand Falls, in said County. This is therefore to authorize and direct you to enter at any hour of the day or night into said premises and to search for the said horse and to bring the same before me or some other Justice.

Dated at Andover in the said County of Victoria, the 29th day of October, in the year 1917.

(Signed) R. BRUCE RITCHIE. [L.S.]
Justice of the Peace in and for the County of Victoria.

So far as the evidence is concerned, the facts are as previously stated, and there is no doubt there was sufficient evidence of interference and obstruction by LaVesque with the peace officer in the execution of the warrant to justify his conviction, and in

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that respect in my opinion he was properly convicted. Objection appears to have been taken that the information was not signed by the complainant, and in this respect was bad.

I find it laid down in Seager's Magistrates' Manual, that the information must in every case be signed by the complainant, and in a second edition of his work, referring to s. 654 of the Criminal Code, relating to the procedure, upon summons or warrant and providing for the information or complaint being laid, he says that the information must, as required by this section, be in writing, which includes signature by the complainant and justice. These statements, however, are not supported by any decision from any court of justice, so far as the writer of the Manual is concerned, nor is any quoted in support of his statement, and I am not at all prepared to say that the information is bad because it was not signed by the complainant. S. 654 of the Criminal Code is as follows:—

> Anyone who upon reasonable or probable grounds believes that any person has committed an indictable offence under this Act, may make a complaint or lay an information in writing and under oath before any magistrate or justice having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.
>
> Sub-section 2: Form. Such complaint or information may be in Form 3 or to the like effect.

Form 3, provided for by this section in itself is very short, and is as follows:—

> Information and complaint for an indictable offence:—
> Canada,
> Province of
> County of
> The information and complaint of C.D. of , (yeoman),
> taken this day of , in the year ,
> before the undersigned, (*one*) of His Majesty's Justices of the Peace in and
> for the said County of , who saith that
> (etc., stating the offence).
> Sworn before (me), the day and year first above mentioned,
> at
>
> J. S.
> J. P. (Name of county)

from which it does not appear that the complainant has to sign the information; nor does it likewise appear that any provision was made in the form from which it can be surmised that it was the intention of the statute that the information should be signed. This form, as will be seen, provides only for the signature of the magistrate. The apparent object of having the information on

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oath is that the party complaining pledges his oath to the truth of it. In the present case the complainant swore distinctly before the magistrate to the commission of the offence which he charged, and if it was false he certainly could be charged with perjury in connection therewith, and as has been stated in cases previously tried, this would seem to be a fair test as to whether or not it was necessary to have the information signed in the absence of the statute or the form directly providing that it must be signed by the complainant.

In my opinion, the real question in the matter is, did the complainant swear to the information; and, in this case he did so, so that, as I have stated, I am not at present prepared to acquiesce in the objection that the information was bad simply because the complainant had not signed it. There is, however, a more serious objection, in my judgment, which does not appear to have been argued in connection with the information for the search warrant. This information, as provided in Form 1, under the authority of s. 629, has omitted what seems to me a material qualification in the information.

S. 629, provides that

> Any justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in any building, receptacle or place (a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed . . . may at any time issue a warrant under his hand authorizing some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division, to be by him dealt with according to law.

After describing the article in respect of which the offence has been committed, and that he has reasonable cause to suspect that it is concealed, etc., form 1 provides the following words:—"Here add the cause of suspicion whatever they may be." This has been omitted in the information, and might have been considered as a material fact on the trial of the defendant, but does not appear to have been taken advantage of nor did it suggest itself to counsel representing him. I am of the opinion, however, that it is a very serious defect so far as the information is concerned, and has not been overcome.

Form 2 provides the warrant which may be issued under the information which has been referred to. The form of the warrant contained in the Code is as follows:—

Canada
Province of
County of
To all or any of the constables and other peace officers in the said County of
Whereas it appears on the oath of A.B. of , that there is reason to suspect that (describe things to be searched for and offence in respect of which search is made) are concealed in
at
This is, therefore, to authorize and require you to enter between the hours of (as the justice shall direct) into the said premises and to search for the said things; and to bring the same before me or some other justice.
Dated at , in the said County of
this day of
In the year

J. S.
J. P. (Name of county).

It will be noticed in this form that it distinctly provides that the things searched for must be described and the offence in respect of which the search is made must likewise be described to make the warrant valid and the procedure thereunder legal. In the warrant which was issued in this case this was entirely omitted, nothing further being done than describing the article which it was sought to recover. The offence in respect of which the warrant was issued is not stated nor referred to in any respect, so that I am of the opinion that the warrant itself was not sufficient in law. In my opinion, then, so far as the information and the warrant are concerned, neither of them were sufficient, and under ordinary circumstances, if application had been made, the search warrant would have been quashed.

The other question then is, was the defendant, under the circumstances, justified in resisting the warrant, and was his conviction for obstructing the peace officer legal. So far as I understand the authorities in respect to procedure of this kind, under the criminal laws of this country, it is not the duty of an officer to question the validity of the warrant which is placed in his hands. It is his duty to execute the same according to the exigencies thereof, and to follow the instructions which are contained in the document. Having received the warrant, the officer proceeded to the premises of the defendant where it was stated reason existed why it might be suspected or believed that the animal sought for was concealed. There he found the defendant and also found the animal, which was identified by its owner. He proceeded to

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make known to the defendant the business which took him to his premises, and among other things read the warrant which he had in his possession to the defendant, who states that he understood at least a part of it, but from his evidence it would appear to me he fully understood not only the contents of the warrant but the object and purport thereof. Knowing this, he made a most determined effort to prevent the officer from executing the warrant, which, in my opinion, was entirely unjustified on his part and, ordinarily, would render him liable to the indictment which was made and to the conviction which followed. As, however, the information and warrant are insufficient, the officer cannot be held to be acting in the legal discharge of his duty under the statute in seizing the horse under the warrant, and the conviction of the defendant will be quashed. *Conviction quashed.*

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(Annotated.)

Supreme Court of Canada, Fitzpatrick, C.J., and Idington, Anglin, Brodeur, JJ., and Cassels, J. (ad hoc). June 25, 1918.

INTEREST (§ IIB—65)—LOANS—STIPULATED RATE—ONLY TILL MATURITY—EXPLICIT TERMS NECESSARY TO CARRY BEYOND—VOLUNTARY PAYMENTS—RECOVERY BACK.

A stipulation for interest at a certain rate on a loan "until paid" imports a contract to pay interest at the specified rate only until the maturity of the loan. To carry the contract for the stipulated rate beyond the maturity of the loan, explicit terms so providing must be made. Payments at the higher rate voluntarily made can not be recovered back.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 39 D.L.R. 797, 40 O.L.R. 475, reversing the judgment at the trial 36 D.L.R. 760, 39 O.L.R. 440, in favour of the defendants.

The appellants gave promissory notes for money borrowed from respondents agreeing to pay interest at the rate of 2½% a month. In an action on the notes two defences were offered, that the respondents were money-lenders and the transaction was harsh and unconscionable and therefore void under the Dominion or Ontario Money-Lenders Act. The Supreme Court held that they were not money-lenders and these Acts did not apply.

The second ground of defence was that in any case the rate of 2½% a month would only govern until maturity of the notes.

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The trial judge held that respondents were money-lenders and the transaction harsh and unconscionable. The Appellate Division reversed his decision and gave judgment against appellants for the full amount claimed.

J. M. Ferguson, and *Coffey*, for appellants; *A. A. MacDonald*, and *W. J. McCallum*, for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be allowed in part and the judgment modified as stated by Anglin, J.

Idington, J.

IDINGTON, J.:—At the close of the argument of counsel for appellant the substantial part of the appeal was held untenable.

He failed to establish either that respondents were money-lenders within the meaning of the Ontario Money-Lenders Act, R.S.O. (1914), c. 175, or that the rate of 2% per month for such loans as in question could be held harsh and oppressive within the meaning of s. 4 of said Act, even if it is applicable to transactions between a borrower and another not such a money-lender that fall within the meaning of the Act.

The appellants' counsel took, however, the further point that the contracts in question did not provide for such an excessive rate of interest as 2% per month after maturity.

As to so much of said interest at said excessive rate as was paid (if any) in respect of interest falling due after maturity, the payments must be held to have been voluntary, and hence not recoverable, or to be interfered with in the accounting.

Beyond the date of maturity, or time after maturity up to which interest may have been paid, and up to the signing of judgment for the principal, the rate should only be computed at the rate of 5% per annum unless a higher rate is clearly stipulated for in the respective contracts in question.

The $2,500 note bore no rate of interest as expressed on its face and such contract as existed relative thereto does not seem to extend to renewals of which that sued on seems to have been one of many.

The same would seem to hold good of the two smaller notes sued upon.

The note for $950 reads at end thereof: "Int. 2% per mo. till paid." It is dated November 22, 1915. There appears in the case a letter of July 22, 1915, which refers no doubt to the original

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note for same loan which expressly provides for interest at the rate of 2% per month until paid, but I cannot see how that can be extended to renewals, for it is not so expressed.

The note sued on, therefore, must, in such case, stand on what it expresses. It has been held that such like expressions mean, *primâ facie*, when due, but this note is on demand. And the evidence shews such demand was made within a few days after given.

A moderate rate of interest even exceeding the rate of 5% per annum might well be held as extended beyond the due date when coupled with later payments at such moderate rates but that reasoning from conduct does not extend to such an excessive rate as 2% per month. See Leake on Contracts (4th ed.), p. 784, and cases there cited, also cases of *St. John* v. *Rykert*, 10 Can. S.C.R. 278, and *Peoples Loan and Deposit Co.* v. *Grant*, 18 Can. S.C.R. 262, cited by appellants' counsel in argument.

I conclude, therefore, that if the sum of $452.22 allowed by the Appellate Division is based, as claimed and not denied, upon the computation of interest at 2% per month on any of these several contracts there is an error in the judgment which should be rectified by a computing of the rate of interest at 5% per annum from the respective dates thus in question up to which the appellant had paid interest, down to the date when judgment was entered for the principal sum.

If the parties cannot agree as to the result of such computation, the matter should be referred to the registrar to determine the amount.

The appeal to that extent should be allowed, and the judgment appealed from reformed accordingly.

The appeal having failed in its main object, I cannot say there should be costs thereof allowed, but think under all the circumstances there should be no costs to either party here or in the Court of Appeal.

Anglin, J.

ANGLIN, J.:—The defendants, in my opinion, have failed to establish that "having regard to all the circumstances the cost of the loan(s) is excessive (or) that the transaction(s) (are) harsh and unconscionable" within the meaning of s. 4 of the Ontario Money-Lenders Act (R.S.O., c. 175).

The male defendant is a solicitor and real estate dealer of considerable experience and is a most unlikely person to be the victim

of a "harsh and unconscionable" bargain. He was in a position to know whether the rate of interest was or was not excessive, having regard to the conditions of the money market during the currency of the loans. Presumably he would also know the nature and value of such securities as he had to offer, and would appreciate the risk which the lender was taking. A perusal of the evidence does not enable me to say that the Appellate Division erred in finding that a case within s. 4 of the Money-Lenders' Act has not been made out.

The contention that the respondents were "money-lenders" within the meaning of either the Ontario Money-Lenders' Act or of the Dominion Interest Act (R.S.C., c. 122) is still more hopeless. There is no evidence whatever to support the suggestion that they carried on money lending as a business.

But on another branch of the appeal, I think the plaintiffs are entitled to some relief. A stipulation for interest at a certain rate on a loan "until paid" is established by a long series of cases, of which it is needful to refer only to *St. John* v. *Rykert*, 10 Can. S.C.R. 278, and *People's Loan and Deposit Co.* v. *Grant*, 18 Can. S.C.R. 262, in this court, to import a contract to pay interest at the specified rate only until the maturity of the loan. To carry the contract for the stipulated rate beyond the maturity of the loan, explicit provisions to that effect must be made. It follows that after the maturity of the several obligations taken by the plaintiffs (including any renewals which specified the rate of interest) the defendants were under no contractual liability to pay interest at the high rate agreed upon. They were liable only for the statutory rate of 5%.

But payments at the higher rate actually made cannot be recovered back. They were voluntary. If made under any mistake, it was a mistake of law. *Union Bank* v. *McHugh*, 10 D.L.R. 562, [1913] A.C. 299; 44 Can. S.C.R. 473, may be cited as a comparatively recent illustration of the application of this well-known doctrine of English law.

In respect of the periods which have elapsed since the several dates at which the respective obligations (including such renewals as specified the rate of interest) matured, any interest unpaid can be recovered only at the statutory rate of 5%. The judgment in appeal should be modified accordingly.

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In view of the divided success there should be no costs of this appeal or in the Appellate Division.

Our attention was called during the argument to what was said to be an accidental error in the judgment of the Appellate Division under which the female defendant might be required to pay $2,196 in addition to the amount recovered against her co-defendant. This was admittedly not intended and any correction necessary to limit the whole recovery to the amount for which Donald C. Hossack is found liable should be made. His co-defendant is jointly liable with him for a portion of that amount.

Brodeur, J.

BRODEUR, J., concurred with Anglin, J.

Cassels, J.

CASSELS, J. (*ad hoc*):—I have carefully considered the questions argued on appeal in this case. The question has resolved itself into the one question of what rate of interest should be allowed after maturity of the loans and from the date of the payments after maturity.

I have had the benefit of a perusal of the reasons for judgment of Anglin, J., and can add nothing further to what he has stated. I concur with his conclusions and with the disposition of the appeal as stated in his reasons for judgment.

Appeal allowed in part.

Annotation.

ANNOTATION.

INTEREST—RATE THAT MAY BE CHARGED BY BANKS ON LOANS.

Prior to the statute 29 and 30 Vict., c. 10 (1866) a bank exacting a higher rate of interest and discount than 7% was liable under the law of the late province of Canada to the penalties and forfeitures of C.S.C., 1859, c. 58—these having been kept in force as regards banks after they were repealed against individuals. *Drake* v. *Bank of Toronto* (1862), 9 Gr. 116, 133. The first mentioned statute enacted that no bank should be liable to any penalty or forfeiture for usury under C.S.C., c. 58, but that the amount of interest or commission should remain as limited thereby. It was held that the amending statute relieved the bank not only from the penal consequences of contravening the former Act, but also from the loss or forfeiture of the money advanced and of the security received. *Commercial Bank* v. *Cotton* (1867), 17 U.C.C.P. 447.

In 1867 the provision was enacted which was re-enacted by the general banking Act of 1871, and from there transcribed into the Act of 1890, as s. 80, in the following words:

"80. The bank shall not be liable to incur any penalty or forfeiture for usury and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable

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by the bank; and the bank may allow any rate of interest whatever upon money deposited with it."

In the revision of 1906 the first clause of the section just quoted was omitted, and the remainder of the section was re-enacted in the present ss. 91 and 92. Sub-secs. 2 and 3 of s. 91 were added in 1913. (*a*) A bank failing to make the returns directed by the section is liable to a penalty under s. 147C.

In 1872 a further statute relating to interest was passed. It recited the provisions of the Act of 1871 (s. 80 of the Act of 1890 above referred to), and recited further that in some of the provinces of Canada laws might be in force imposing penalties on parties other than banks for taking, or stipulating, or paying more than a certain rate of interest, and that doubts might arise as to the effect of such laws in certain cases as to parties, other than the bank, to negotiable securities discounted or otherwise acquired and held by any bank. The statute then enacted the provisions which were afterwards re-enacted in the Bank Act of 1890, as s. 81. This section was omitted from the Bank Act in the revision of 1906. It became practically obsolete in 1890, when by 53 Vict., c. 34, the various provincial statutes relating to interest and usury consolidated in R.S.C., (1886) c. 127, secs. 9 to 30, were repealed. *Cf.* s. 59 of the Bills of Exchange Act.

The Interest Act (R.S.C. 1906, *c.* 120), provides (ss. 2 and 3): "2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon. 3. Except as to liabilities existing immediately before the seventh day of July, one thousand nine hundred, whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be five per centum per annum." Prior to July 7, 1900, the rate in such cases was 6%. The expression "liabilities existing" means liabilities for interest, so that interest falling due on or after July 7, 1900, where no rate is fixed by agreement or by law, is payable at the rate of 5% notwithstanding that it is payable in respect of a debt, agreement or transaction arising before that date. *Plenderleith* v. *Parsons* (1907), 14 O.L.R. 619. *Cf. Kerr* v. *Colquhoun* (1911), 2 O.W.N. 521.

The Money-Lenders' Act (R.S.C. 1906 c. 122), which limits the rate of interest in certain cases, applies only to "money-lenders" as defined in the Act and to loans of less than $500.

There is, then, no law now in force which renders a bank "liable to incur any penalty or forfeiture for usury."

If a bank retains or debits the debtor's account with interest in excess of seven per cent., the debtor is entitled to recover back the excess or is entitled to credit for the excess so charged in an action by the bank. *Canadian Bank of Commerce* v. *McDonald* (1906), 3 W.L.R. 90, at 101, *et seq.*; *Banque de St. Hyacinthe* v. *Sarrazin*, 2 Que. S.C. 96. To allow recovery back of such interest is not in effect to enforce a penalty or forfeiture for usury; it is not a proceeding for usury, though the action is brought on account of usury. *Kierzkowski* v. *Dorion* (1868), L.R. 2 P.C. 291, at 314.

A bank may stipulate for any rate of interest or discount whatever without thereby invalidating the contract of loan or pledge. *Quinlan* v. *Gordon* (1861), 20 Gr. (appendix) 1; *Adams* v. *Bank of Montreal* (1899),

Annotation. 8 B.C.R. at p. 316, 1 Com. L.R. at p. 250; 32 Can. S.C.R. 719. It has been held that the contract is valid except in so far as it stipulates for more than 7%, and that the stipulation for a higher rate than 7% is unenforceable by action though not illegal, and that if the bank is obliged to sue for the interest, it cannot recover the excess. *Bank of Montreal* v. *Hartman* (1905), 12 B.C.R. 375; *Williams* v. *Canadian Bank of Commerce* (1907), 13 B.C.R. 70. But in *Bank of British North America* v. *Bossuyt* (1903), 15 Man. L.R. 266, Richards, J., held that if a bank stipulates for more than 7% it can recover nothing in respect of the stipulation for interest, although the express stipulation would not prevent the bank from recovering 5% if the transaction were such that a contract to pay interest might be implied. The correctness of the view of the statute taken in the last mentioned case is virtually established by the recent case of *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299, 316 (reversing 44 Can. S.C.R. 473), in which it was held that notwithstanding prior dealings between the bank and its customer by which he had for a number of years acquiesced in the payment to the bank of interest on advances at a higher rate than seven per cent., the rate limited by the Bank Act R.S.C. (1906), c. 29, s. 91, his subsequent mortgage to the bank settling the balance of undebtedness and containing a stipulation for the like excessive interest contravenes s. 91 of the Bank Act, R.S.C. (1906), c. 29, and the insertion by the bank of such a stipulation was *ultra vires* on its part and the stipulation itself was inoperative; the interest collectable in respect of such mortgage must be calculated at the rate of five per cent., as being the legal rate where no special rate has been legally fixed, and not the intermediate rate of seven per cent. for which the bank was entitled to contract.

In *Northern Crown Bank* v. *Great West Lumber Co.*, 11 D.L.R. 395, a bank had charged on loans more than seven per cent. the maximum rate of interest or discount allowed by the Bank Act. The court following *McHugh* v. *Union Bank*, held that the stipulation was *ultra vires* and inoperative See also *McKinnon* v. *Lewthwaite* (1914), 20 D.L.R. 220, in which the Court of Appeal for British Columbia disapproved of *Plenderleith* v. *Parsons*, 14 O.L.R. 619, and held that the interest after maturity by way of liquidated damages upon a promissory note maturing prior to July 7, 1900, not made with interest, which is to be allowed under the Bills of Exchange Act and the Interest Act, R.S.C. (1906), c. 120, s. 2, is six per cent. from the date of maturity to the entry of judgment although the latter took place subsequent to the passing of the Interest Act, July 7, 1900, whereby the legal rate was reduced from six to two per cent; the exception by that Act as to "liabilities" existing at the time of its passing has reference to the debt and not the accrued interest to that date, and the interest rate on then existing debts on which 6% would be allowed therefore was not reduced to five per cent, even as to interest to be computed from and after July 7, 1900. See also *Canadian Northern Investment Co.* v. *Cameron* (Alta.), 32 D.L.R. 54, reversed 38 D.L.R. 428; *Stubbs* v. *Reliance Mortgage Co.* (Man.), 32 D.L.R. 57, annotated, reversed 38 D.L.R. 435, also annotated.

The section does not authorize the charging of compound interest at 7%. Where the bank makes a discount or an advance for a specified time, it may deduct the interest in advance. In other cases, where there is an overdraft, and payments are made, interest should be reckoned up to the date

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of each payment, and the sum paid should be applied to the discharge of the interest in the first place and any surplus that may remain to the discharge of so much of the principal. The fact that the customer has month by month confirmed the statements contained in the pass book does not amount to a ratification of or acquiescence in a charge of compound interest. *Montgomery* v. *Ryan* (1907), 16 O.L.R. 75, C.A., Maclaren, J.A., at p. 102; *cf.* Clute, J., at p. 88.

If the debtor volumtarily pays the excess of interest over 7% as, *e.g.*, by giving his cheque to the bank for such excess as shewn by the bank's monthly statement, he cannot recover back the excess and is not entitled in an action by the bank to have the amount of the excess so paid applied on account of the principal or on account of the interest calculated at 7% only. *Canadian Bank of Commerce* v. *McDonald, supra*; *Bank of B.N.A.* v. *Bossuyt, supra*; *Quinlan* v. *Gordon, supra*; *Hutton* v. *Federal Bank* (1883), 9 P.R. (Ont.), at p. 581. The dictum of Pagnuelo, J., in *Banque de St. Hyacinthe* v. *Sarrazin supra*, to the effect that the prohibition of the Act is one "of public order," and that, therefore, a person who has paid to a bank interest in excess of the rate fixed by the Act, may recover back the excess, was not necessary to the decision of the case. In that case the excess of interest was retained by the bank, but was not in any other sense *paid* by the debtor. In *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299, 316, it was held that the borrower must be taken to have known that the bank had no right to stipulate for and no power to recover interest at a higher rate than 7%, but that when he voluntarily assented to a settlement of accounts which was equivalent to payment of interest at a higher rate, he had no right to recover back any excess which he had thus voluntarily paid.

It has been held that a third party, *e.g.*, an execution creditor of the debtor, is not entitled to compel the bank to account for interest charged by it in excess of 7%. *Benallack* v. *Bank of B.N.A.*, 1905, judgment of the Territorial Court of the Yukon Territory (cf. 36 Can. S.C.R. 120), as explained in *Ritchie* v. *Canadian Bank of Commerce* (1905), 1 W.L.R. 499, at 501.

A bank may also receive and retain, in addition to the discount, the collection or agency charges authorized by secs. 93 and 94.

In *Royal Canadian Bank* v. *Shaw* (1871), 21 U.C.C.P. 455, it was held, under a similar section, that on a note bearing no rate of interest on its face and discounted at 8%, the bank could charge only 6% (which was then the rate of interest where no rate was fixed by agreement or law), notwithstanding a provision of the bank's charter permitting it to charge the same rate after maturity that it had charged on discounting the note.

If a negotiable instrument or other document provides for payment of interest at a given rate and there is no unequivocal stipulation that in the event of default in payment interest shall be paid after maturity at the same rate or at some other named rate, then the rate mentioned is payable only during the currency of the instrument. An agreement to pay interest at a given rate upon the principal "until paid" or "until such principal money and interest shall be fully paid and satisfied" means merely that interest is to be paid at such rate until the day fixed for payment, and not that it is to be paid at the same rate after maturity. *St. John* v. *Rykert* (1884), 10 Can. S.C.R. 278; *People's Loan and Deposit Co.* v. *Grant* (1890), 18 Can. S.C.R. 262.

After maturity interest is payable not *qua* interest under the contract but *qua* damages for the wrongful detention of the money, and the rate payable

Annotation. in the absence of an unequivocal stipulation to the contrary is 5% (if the liability as to interest, *Plenderleith* v. *Parsons* (1907), 14 O.L.R. 619, accrued on or after the 7th of July, 1900, otherwise 6%.) *Cf.*, however, the opinion expressed in *Powell* v. *Peck* (1888), 15 A.R. (Ont.), 138, at 147, that the rate stipulated for during the currency of the agreement may, *primâ facie*, be adopted as the reasonable rate of interest payable by way of damages for detention. As shewing the leaning of the courts towards construing an agreement as one providing only for payment *ad diem* and not for payment *post diem*, see *Biggs* v. *Freehold Loan and Savings Co.* (1900), 31 Can. S.C.R. 13, reversing 26 A.R. (Ont.) 232.

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Exchequer Court of Canada, Audette, J. June 28, 1917.

EXPROPRIATION (§ I C—16)—BEACH—HARBOUR OF QUEBEC—VALIDITY OF GRANT—COMPENSATION—VALUE—PUBLIC LANDS.

The right to alienate part of the public domain by the King of France has always been recognised even subsequent to the Ediet of Moulins. A title to certain beach lots, in Quebec, founded on a grant from Louis XIV. is perfectly good and valid, and cannot be attacked by the Crown. Furthermore, such lands do not form part of the Harbour of Quebec.

2. In estimating compensation for the expropriation of land by the Crown, the value of the property for expropriation purposes cannot be taken as a basis; the value of the property to the owner, not to the party expropriating it, is to be considered.

Statement. PETITION of right to recover compensation for the expropriation of land by the Crown.

G. G. Stuart, K.C., *A. Marchand*, K.C., and *Alleyn Taschereau*, K.C., for suppliant; *A. Bernier*, K.C., and *V. de Billy*, for respondent.

Audette, J. AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $800,085.65, as compensation for the value of certain lands expropriated from him by the Crown, on January 13, 1913, for the purposes of a public work of Canada, namely, for the construction, maintenance and repair of the Harbour of Quebec, and the improvement of navigation in the River St. Charles, at Quebec.

The lands taken are composed of two different lots, to wit: Of part of lot 513, containing an area of 295,652 square feet, and the whole of lot 560, containing an area of 1,863,599 sq. ft., making a total of 2,159,251 sq. ft., for which the suppliant claims $800,085.65 —namely, 50c. a sq. ft. for lot 513 and 35c. a sq. ft. for lot 560.

The Crown denies the suppliant's title and makes no offer in money by its statement in defence; but declares that, if the suppliant proves title, a reasonable sum, ascertained under the pro-

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visions of the Expropriation Act, should be paid him for the value of such land and damages. The respondent further contends, *inter alia*, that the original title from the Crown never transferred the property in question to the predecessor in title of the suppliant and that the lands in question form still part of the public domain. Furthermore, the Crown avers by the statement of defence that these beach lots form part of the Quebec Harbour, and that as such they are vested in His Majesty in the right of the Dominion of Canada.

Upon reading in the statement of defence an allegation contending that the lands in question formed part of the Crown lands of the Province of Quebec, I made an order directing that a copy of the pleadings herein be served upon the Attorney-General of the Province of Quebec, to allow him to intervene in the present case, if he saw fit. The pleadings were served, and the Attorney-General of the Province of Quebec did not intervene or ask to be added a party to the present proceedings.

The original titles of concession of the lands in question go back to one of the first French regimes of our colony.

The first title consists in letters-patent issued on March 10, 1626, by Henri de Levy, Duc de Vantadour, Lieutenant-General de Sa Majeste le Roi de France au Gouvernement de Languedoc, Vice-Roy de la Nouvelle France, whereby the following piece of land, called Seigneurie de Notre Dame des Anges, was granted to the Jesuits, viz:—

La quantite de quatre lieues de terre tirant vers les montagnes de l'ouest ou environ, scitues partye sur la riviere St-Charles, partye sur le grand fleuve St-Laurent, d'une part bornees de la riviere nomme Ste-Marie, qui se decharge dans le susdid grand fleuve de St-Laurent, et de l'autre part, en montant la riviere St-Charles, du second ruisseau qui est au-dessus de la petite riviere dite communement Lairet, lesquels ruisseaux et la dite petite riviere Lairet, so perdent dans la dite riviere St-Charles: item nous leur avons donne et donnons comme une pointe de terre avec tous les bois et *prairies* et *toutes autres choses* contenues dans la dite poirte scittuee, vis-a-vis de la dite riviere Lairet, de l'autre cote de la riviere St-Charles, montant vers les Peres Recollets d'un coste et de l'autre coute descendant dans le grand fleuve.

Subsequently thereto, by an Edict of the King of France, all concessions made were revoked, with the object of transferring all such titles in La Compagnie de la Nouvelle-France. On January 15, 1637, however, la Compagnie de la Nouvelle-France granted

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to the Jesuits the lands above described, confirming thereby the first grant of the Duc of Vantadour, including "*les bois, pres, lecs, etc.*"

In compliance with an *Ordonnance* of January 12, 1652, with respect to "la confection d'un papier terrier contenant le denombrement des terres mouvantes, tant en fief qu'en roture," Monsieur de Lauzon, conseiller ordinaire du Roy en ses conseils d'Etat et prive, Gouverneur et Lieutenant-General pour sa Majeste en la Nouvelle-France, etendue du fleuve St.-Laurent, did on January 17, 1652, again grant and confirm the previous grants of the lands in question, "mesme les prez la mer couvre et decouvre a chaque maree."

Then under a Royal Edit et Ordonnance, being an Arret du Conseil d'etat du Roi, bearing date at St. Germain en-Laye, May 12, 1678, the King of France, Louis XIV., granted total *amortissement* of the lands referred to in the above grants, with the object of removing any doubt as to the title granted the Jesuits by the Duc de Vantadour, la Compagnie de la Nouvelle-France and le Sieur de Lauzon. This deed of *amortissement*, which was registered at Quebec, on the last day of October, 1679, also mentions in the description of the lands, "les pres que la mer couvre et de couvre a chaque maree."

Now, it is contended by the respondent that all of these grants did not divest the Crown of its ownership in these foreshores and beds of navigable rivers which form part of the public domain, and which cannot be alienated. And counsel at bar for the respondent rests his contention upon l'Ordonnance de Moulin, of February, 1566, by Charles IX., which is to be found in the Recueil d'edits at Ordonnances Royaux, by Neron et Girard, at p. 1999, whereby it is forbidden to alienate the public domain, except under the circumstances therein mentioned, and the present case does not come within such exception.

There can be no doubt that this doctrine has been the basis and foundation of the old public law in France. It was supported by the authors, and maintained by the courts down to the time of the Revolution, when the law governing the public domain was subjected to material modification. However, the old doctrine was followed by the Code Napoleon, art. 538, which afterward found its way in our art. 400, C.C. P.Q. This law, however,

was necessarily subject to flexible modifications, under the unlimited powers of the King.

Then it must be said that a number of Edits et Ordonannces passed subsequent to the Ordonnance de Moulin, were cited by Mr. Smith, of counsel for the suppliant, whereby parts of the public domain were allowed to be sold and alienated, and in some of these the grant goes so far as to say that it thereby derogates to that effect, as much as need be, from all the laws, *ordonnances et coutumes* to the contrary.

And this right to alienate part of the public domain by the King of France has always been recognized by the courts of France, even subsequent to the Edit de Moulins: Merlin. Questions de droit, vol. 7, Vo. Rivage de la mer. Edits et Ordonnances, vol. 3, p. 122. Pieces et Documents relatifs a la Tenure Seigneuriale, vol. II., pp. 126, 128, 567.

Authorities have also been cited by the suppliant to the effect that this right has been recognized in France since the Revolution: Sirey (Perodique) 1841, I, p. 260. Dalloz, vo. Domaine Public, 29, 30. Dalloz, vo. Organization Maritime, 751.

And after the cession many laws were passed in Canada recognizing the validity of the grants made before 1760: 47 Geo. III., c. 12; 4 Geo. IV., c. 17.

After the Revolution, the authors assert that all these concessions became null under the provision of a law of l'Assemblee Nationale Constituante of 1789, which abolished all these grants. These grants were then abolished by a new law because they were considered good legal grants, until such new law would decide to the contrary. But all French legislation of 1789; in fact, all legislation since 1760, when Canada passed under the British flag, have no effect in Canada, not any more than the Code Napoleon has.

It is, indeed, a somewhat strange proposition for the Crown to take in denying the power of the King of France at the time the grant was made. No one, says Mr. Migneault (Droit Civil Canadien, vol. 9, p. 195) would dream of contesting the original title of concessions and it is the ancientness of these titles which dispensed them from registration.

However, to properly appreciate the grants in question, and more especially the last one, which covers them all, and is under the signature and seal of the great King Louis XIV., one must go

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back to that heroic period. It was the period of great and lofty politics, and when justice resided in the acts of the Prince, and where there was no other justice than the Prince's justice. The King at that time was all power. He could one day legislate by such Edit and Ordonnance as he saw fit, and the following day he could, at his pleasure, derogate therefrom by another Edit and Ordonnance. He was the source and foundation of power; and, indeed, well he knew he was possessed of this absolute power, when the famous words, said to have fallen from his lips, were pronounced by him, "*L'Etat, c'est moi.*" He did then mark, as if with the engraver's tool, upon the table of the laws of France, the very character of his power. The monarchy existing in France in the 17th century was a royal monarchy and not a seignorial monarchy, and the monarchs wielded sovereign power, independent of les etats de la nation: Furgole 10.

Even if the will of the King of France, either by special grant or by general edicts, did clash with the edicts of his predecessors on the throne, there was no way to reproach him from a legal standpoint, whilst he might perhaps be criticized from a political view. The King was the sovereign master of the kingdom in an absolute and unlimited monarchy. Parliament during his reign even became nothing but a court of justice, losing its right of *remonstrance.*

The Seignorial Court created under 18 Vict., c. 3, whose great weight and authority, to which an almost authoritative sanction has been given by statute, commanding also the highest respect by reason of the composition of the tribunal, have passed upon the very point in question, recognizing the validity of the seignorial titles from the King of France. Answering the 27th question submitted to them, that court answered it as follows, to wit:—

3. Quant aux droits des seigneurs sur les greves des fleuves et rivieres navigables; dans ceux de ces fleuves et rivieres qui etaient sujets au flux et reflux de la mer, ces droits, sur l'espace couvert et decouvert par les marees, resultaient d'une octroi expres dans leurs titres; et, sans un tel octroi, s'etendaient jusqu'a la ligne de haute maree seulement.

4. Les seigneurs avaient le droit de percevoir des profits des lods et ventes sur les mutations des greves situees entre haute et basse maree sur le fleuve St-Laurent, ou dans les autres rivieres navigables, lors qu'ayant droit a ces greves par leurs titres, ainsi qu'il a ete dit, ils les avaient concedees, et ce, dans les memes cas, ou ces profits seraient accrus sur d'autres ventes. (See Seignorial Court Decisions, p. 69a).

Then the Act of Commutation granted to the suppliant or his predecessor in title, together with the receipts for the rents and seignorial dues, or of their commuted capital, have recognized his right of ownership and made his title incommutable. See 3 Geo. IV., c. 110 (Imp.), secs. 31 & 32-8 Vict., c. 42; and R.S.Q. (1909), 7277, 7278, 7282.

These lands which had been granted to the Jesuits and which still belonged to the Jesuits in 1800 were then confiscated by the British Crown.

Then in 1838 the administration of the Jesuits' Estates was confided to Commissioner Stewart, but this commissioner had nothing to do with the lands which had already left the hands of the Jesuits.

Moreover, the Jesuits' Estates, under art. 1587 of the R.S.Q. (1909), have been declared to be in the control of the Department of Lands and Forests. Therefore, the original title has been recognized, and all grants, deeds and titles given by the Department, or those acting under it, must be considered good and valid.

See also Journals of the Legislative Assembly, 1824-25, Appendix "Y."

Comm. Stewart has granted and sold some of the land from the Jesuits' Estate to the Hotel-Dieu, who in turn sold to the suppliant or his predecessor in title.

I hereby find, following the decision of the Seignorial Court, and for the reasons above mentioned, that the original grant from Louis XIV., as well as the other three primordial grants, constitute a good title with full force and effect. And I further find that all titles, deeds or grants made by Commissioner Stewart, who was invested with full power, are also good and effective titles, and more especially after the Crown has taken the rents and revenues derived from such grants, waiving thereby the formality of the deed. *Peterson* v. *The Queen*, 2 Can. Ex. 67.

Then with the object of removing all doubts, the statute of 6 Geo. V., c. 17, passed in 1916, with retroactive effect, has positively declared that the Crown has the right and power to alienate the beds and banks of navigable rivers and lakes, the bed of the sea, the sea-shore and land reclaimed from the sea, comprised within the said territory and forming part of the public domain. See also *Commrs. Havre Quebec* v. *Turgeon and Attorney-General*

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P.Q., decided June 24, 1910—unreported. This Act removes all doubt, if any could exist, and makes it clear that all previous grants, whatever may have been the system of government, are good and have full force and effect.

Only a few words need be said with respect to the contention that these lands formed part of the Harbour of Quebec, and thus became vested in His Majesty, as representing the Dominion of Canada. By s. 2 of 22 Vict., c. 32, an Act to provide for the Improvement and Management of the Harbour of Quebec, the lands forming part of the Jesuits' Estates are excluded from the harbour. By the same Act, the rights of all the riparian proprietors are further duly saved and recognized. See also 62-63 Vict., c. 34, s. 6, sub-s. A to sub-s. 2 thereof, whereby acquired rights are saved and acknowledged. Therefore, the lands in question do not form part of the Harbour of Quebec.

Having disposed of the two great objections raised against the suppliant's title, it becomes unnecessary to enter here into the long catena of title-deeds under which the suppliant claims. It will be sufficient to find the suppliant has proven his title, and is entitled to recover the value of the land expropriated from him.

Coming now to the question of compensation, a summary review of the evidence on the question of value becomes of interest.

On behalf of the suppliant the following witnesses were heard upon the question of value: C. E. Taschereau, Edmond Giroux, Joseph Collier, Malcolm J. Mooney and Eugene Lamontagne.

C. E. Taschereau: This witness prefaces his valuation by citing a number of sales, at Limoilou, at figures ranging from 64 cents to $2.27, but of small biulding lots varying in size from 40 and 30 feet by 60 feet. He also cites a number of other sales, mostly on *terra firma*, but with the exception of lot 514, these sales are more or less apposite. He relies, however, on the sale of lot 514, at 23 cents, to the government in June, 1914. He further cites sales on the Quebec side of the River St. Charles, and after stating that the lands in question may be used for wharves, warehouses, etc., he values, on January 13, 1913, lot 513 at 35 cents and lot 560 at 30 cents a square foot, making a total sum of $662,557.90. Lot 560 is a vacant lot, without wharf, upon which there was no commercial activity. Filling would be necessary on lot 513 before it could be used for building purposes. He considers

that the public work now being constructed has enhanced the value of this property ever since the works have been decided.

Edmond Giroux, between 1911 and 1912, held for 6 months an option on lot 514, at 22½ cents, for the Canadian Northern. However, the option was not exercised, and he says he would have recommended to renew it at 24 cents and at even 30 cents.

He values lots 513 and 560 in January, 1913, at 25 to 30 cents a square foot. He contends that of lot 513 about one-third or one-half is land and the balance foreshore; and that of lot 560, one-third is land and two-thirds are covered by ordinary tides—but that in the usual monthly high tides the whole of lot 560 is covered by water.

He places a value on the shore of Honore Lortie at one to one and a half cents, the price paid by Dussault & Turgeon.

Joseph Collier states that with the development of the St. Charles River these lots 513 and 560 will acquire a great value. He considers the front part, the water front, of more value than the rear part of the lot, and values lot 513, for 300 feet in depth from the water front, at 60 cents and the back at 25 cents. Lot 560—the front part for 300 ft., at 45 cents and the back or balance at 20 cents. That would represent $597,600 for the two lots. He took into consideration that the river would be dug, and that the depth of the river would be increased.

Malcolm J. Mooney contends that the land in question would be useful for the development of wharves, shipping, pulp and iron industry, and values lot 513 at 40 cents a foot, and lot 560 at 30 cents.

Eugene Lamontagne states that this property could be used for industrial purposes, lumber business, mill and railway yard, and values lots 513 and 560 at 30 and 35 cents a square foot.

The suppliant has also produced a number of deeds of sales of building lots by the Quebec Land Co., and witness Lefebvre was also heard in respect of the several options obtained in connection with lot No. 514, which was finally bought by the government at 23 cents. It is true the government did purchase this lot 514, in June, 1914, at 23 cents a foot; but under such circumstances that that will take that transaction out of the ordinary course of business, and prevent one using it as a criterion. Indeed, as will appear partly by the evidence of witness Lefebvre and by the case now

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pending on appeal to the Supreme Court of Canada from this court, it having become known that 514 was required by the Crown, speculators got hold of it—option after option, linking into one another, and even under fictitious names, were executed, with the object of inflating the price of this lot 514. The Crown, through its officers under the circumstances, did not wish to allow the property to pass into other hands, went over to the owners, bought the property in face of this skein of options, and undertook to indemnify the owners in case they would be troubled by the parties to whom they had consented these options—as it will appear from the deed filed of record as ex. No. 78. Visionary wealth at the expense of the Crown was in that transaction seen, but not realized; but the Crown's hand was then forced and the property had to be bought at these high figures.

The suppliant, as will appear by his testimony and ex. N, has paid the sum of $18,165.32 for these two lots 513 and 560—with still the sum of $4,200 unpaid, as representing the capital of the rent due the Community of the Hotel-Dieu. He has received in revenues from these two lots since January 18, 1901, the sum of $1,224.25, of which $924.50 was from lot 560, but with $200 still outstanding, and $299.75 from lot 513. The revenues from lot 560 were pasturage and from lot 513 from the rent of a small building, with no new erection or improvement, and the taxes amounted to more than the revenues.

On behalf of the Crown, the following witnesses were heard on the question of value: J. Arthur LaRue, Joseph G. Couture, H. Octave Roy, and Joseph A. Dumontier.

J. A. LaRue says that to his knowledge lot 560 was never made any use of for 20 to 25 years; that it is not advantageous and has not much value. He says lot 513 is of more value because it is smaller and of easier access. At the time of the expropriation, these properties had not much value, but for the purpose of public utility he values lot 513 at 16 cts. a sq. ft. and lot 560 at 10 cts. a sq. ft. Of lot 560 about one-fifth is land, which he values at 30 cts. a sq. ft., and the balance, which is beach property, he values at 5 cts. a foot. Of lot 513, one-third is solid ground, which he values at 35 cts., and the balance he values at 6 cts. He cites the Nesbitt sale on October 14, 1912, being parts of lots 515, 546, and 594, with stone and brick buildings erected thereon, at 20 cts. a

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foot, including buildings. In September, 1912, Lortie sold to Park St. Charles lot 586, fronting on Beauport road, at 8½ cts. He mentioned a number of other sales, but the most apposite is the Nesbitt property.

Lot 560 is entirely submerged in high tides.

Joseph G. Couture values lot 513 at 9 to 10 cts. and lot 560 at 10 cts. For a very long time these lands were idle and unoccupied. He says lot 513 is not worth anything for building purposes. Property divided into building lots has gone up, but not industrial properties.

J. H. Octave Roy values 513 at 15 cts. and 560 at 10 cts. He sold the Nesbitt property, composed of between 150,000 to 160,000 ft., with stone buildings of two or three storeys, large building—comprising a large brick chimney for factory—and one other brick building, near the Beauport road, for $30,000.

Joseph A. Dumontier values 513 at 15 to 18 cts. and 560 at 10 to 15 cts.—citing the sale of Dussault & Turgeon, of February 29, 1909, for lots 583 and 582, comprising a beach lot of 67 arpents—ex. L.

From the evidence of witness Decary, the Superintendent Engineer of the Public Works Department for Quebec, it appears there are tides at Quebec of 25 to 26 ft., and that a tide 18 ft. will entirely submerge the two lots in question. The locks or dams are being built on 560.

The lands in question were acquired by the suppliant for the sum of $18,165.32, and were practically yielding no revenue, save the renting of one house on lot 513, and pasture on lot 560. These lots lie in the estuary of the river St. Charles, and are nothing but a stretch of muddy soil upon which, in the case of 560, some marine grass grows, upon which cattle may feed; but the land is entirely covered by water at high tide, and the lot has been practically idle and no use has been made of it for years and years. Wharves may be built upon the same, as wharves may be built in fields, but it has no access to deep water, except to the height of the water brought in by the tide. Lot No. 513 is impracticable for building purposes. It is a beach lot. Retaining walls and fillings would have to be resorted to. Some of the witnesses contend that lot 560 might be used as a railway yard. Is it, indeed, conceivable that a railway could afford to spend thousands and

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thousands of dollars in building wharves for a railway yard, when other property is available inland? Some of the witnesses were candid enough to say they thought the property had very little value, but it might have value for public purposes and assessed it on that basis. In other words, that the property was of very little value to the owner, but might be of some good value to a party expropriating for public purposes or for a scheme like the present works. However, it is now settled law that in assessing compensation for property taken under compulsory powers, it is not proper to consider as part of the market value to the owner such value as the land taken may have to the party expropriating when viewed as an integral part of the proposed work or undertaking. But the proper basis for compensation is the amount for which such land could have been sold, had the present scheme carried on by the Crown not been in evidence, but with the possibility that the Crown or some company or person might obtain those powers and carry on their scheme. And, in the present instance who, outside of the Crown, should undertake such colossal works? *Cedars Rapids Co.* v. *Lacoste*, [1914] A.C. 569, 16 D.L.R. 168; *Sidney* v. *North Eastern R. Co.*, [1914] 3 K.B. 629, 641.

The scheme must be eliminated, notwithstanding works had been started, subject, however, to what has just been said. *Fraser* v. *City of Fraserville*, [1917] A.C. 187, 34 D.L.R. 211.

When parliament gives compulsory powers and provides that compensation shall be made to the person from whom property is taken, for the loss he sustains, it is intended that he shall be compensated to the extent of his loss; and his loss shall be tested by what was the value of the property to him, not by what will be its value to the person acquiring it. *Stebbing* v. *Metropolitan Board of Works*, L.R. 6 Q.B. 37, 42.

The question is not what the party who takes the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him. *Sidney* v. *North Eastern R. Co*, [1914] 3 K.B. 629.

The policy of the Expropriation Act is to enable the court to compensate the owner; but not to penalize or oppress the expropriating party. The court must guard against fostering speculation in expropriation matters, and must not encourage the making of extravagant claims, and more especially must guard

against being carried away by the subtle arguments of real estate speculators or expert witnesses and thus render the execution of public works impossible or prohibitive. While the owner must be amply compensated in that he is no poorer after the expropriation, it is no reason to charge the public exchequer with exorbitant compensation built upon imaginary or speculative basis.

These remarks, I must confess, are provoked by the extravagant amount of the claim of the suppliant, namely, the sum of $800,085.65, for a property which has cost him, a few years before, the sum of $18,165.37, as above set forth—and more especially when the property has been idle for years and years, and the public work in question herein is but the only thing which will give it any value. But since the suppliant's property is required for the erection and building of this public work, he cannot derive any additional value to his property on its account, because if the property is not taken, the public work will not be built.

I need not here repeat the observations made in the case of *Raymond* v. *The King*, 29 D.L.R. 574, 16 Can. Ex. 1, and in the case of *The King* v. *Hearn*, 16 Can. Ex. 146 (reversed in 55 Can. S.C.R. 562), in respect of the law which should govern in assessing compensation, but they equally apply in this case.

The transaction that presents the most similarity to the present property is that of lot 583, which changed hands at a very low figure only a few years ago, as shewn by the evidence. And when assessing the compensation of such a large area of land, as in the present case, it must be borne in mind that a lesser price should be paid than where a small piece of land is expropriated. What similarity, indeed, could there be between the sale of this present property compared to the sale of building lots of 60 by 30 ft., upon which some of the witnesses have based their valuation?

Under all the circumstances of the case, I will bracket the two lots together and will allow an average price of ten (10c.) cents a sq. ft. for the same, making the total sum of $215,925.40; and in fixing such compensation, although remaining within the evidence adduced, I feel I am perhaps allowing too high an amount for a property composed of waste flats and beach entirely covered with water at high tides, which a few years ago cost in round figures $18,000 and which had been for years practically unproductive

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and has been a charge upon the owner, the taxes being larger than the revenues, and but for the public work in question would have very likely remained idle for years to come. While the owner cannot share in the benefits derived from the development of this public work, such development has given rise to a market bringing forth a purchaser. And this compensation also appears to me too large when I consider the low figures at which the 67 arpents of beach and flats on lot 583 were sold only a few years before the expropriation.

In the days when the lumber trade was flourishing at Quebec, the property would have been of some advantage, but since the disappearance of this industry there was no market for it. And had not the question of this public work been mooted, no such price could be paid, because there would have been no market at all for this class of property.

To this sum of $215,925.10 will be added the usual 10% for compulsory taking, the land having obviously been taken against the will of the owner, making in all the sum of $237,517.61.

Therefore, there will be judgment, as follows, to wit:—(1) The lands expropriated herein are declared vested in the Crown as of January 13, 1913. (2) The compensation for the land so taken and for all damages whatsoever, if any, resulting from the expropriation, is hereby fixed at the sum of $237,517.61, with interest thereon from January 13, 1913, to the date hereof. (3) The suppliant is entitled to recover the said sum of $237,517.61, with interest as above mentioned, upon giving to the Crown a good and satisfactory title free from all hypothecs, mortgages, ground rents and all incumbrances whatsoever. Failing the suppliant to discharge the ground rents, the capital of the same may be discharged by the Crown out of the compensation moneys and the balance thereof paid over to the suppliant. (4) The suppliant is also entitled to the costs of the action.

Judgment accordingly.

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. May 7, 1918.

EXPROPRIATION (§ III C—140)—FIXING COMPENSATION—GENEROSITY—TEN PER CENT. ALLOWANCE.

Generosity is not an element which should enter into the arbitrator's or judge's consideration, when fixing the compensation to be allowed for compulsory purchase.

An additional allowance of 10 per cent. of the award for the compulsory taking will not be allowed where the circumstances which justify such allowance do not exist.

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, awarding, in expropriation proceedings taken by appellant, for the value of land expropriated, the sum of $47,080, being $39,800 for 398,000 sq. ft., $3,000 for two buildings on the property and $4,280, being 10% for compulsory taking. The Supreme Court of Canada, allowing the present appeal, reduced the amount to $34,840. Davies, J., was of opinion to reduce it to $22,900 and Idington, J., to $26,540.

Amyot, for appellant; *Belleau*, K.C., and *St. Laurent.*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree in the conclusion reached by Brodeur, J., and would allow the appeal in part with costs. Cross-appeal dismissed with costs.

Davies, J.

DAVIES, J.:—This is an appeal from the judgment of Audette, J., of the Exchequer Court fixing the compensation to be allowed for a certain property of the respondent situate at Lauzon in the District of Quebec expropriated by the Crown.

The area of the land expropriated was 398,000 sq. ft. and the compensation fixed by the judge was 10 cents a sq. ft. There were two buildings on the property for which $3,000 was allowed. In all therefore $42,800 was allowed for the land and buildings and to this the judge added the sum of $4,280, being 10% for compulsory taking.

The appellant did not challenge the $3,000 allowed for the buildings or the interest allowance made. The sole questions were as to the allowance per foot to be made for the land and the 10% for the compulsory purchase.

The judge upon reviewing some of the evidence as to value concludes that:—

Under all the circumstances of the case, taking into consideration that a large area is expropriated, a fair and generous market price for the same

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would be about 8 to 10 cents a foot, and to make it very generous compensation I will make it 10 cents a foot.

In appellant's factum and in counsel's argument at bar five cents was submitted as the price which should be allowed.

Counsel for the respondent pressed certain offers which, it was stated in evidence by the defendant Larivée, had been made to him of $100,000 and other sums for the land expropriated.

But the judge made no reference to these alleged offers evidently not considering them *bonâ fide*. Only one of the three parties who were said to have made offers was called as a witness (Lagueux), and his offer, if made at all, was after the expropriation had been made. From the report of the stoppage by the judge of the defendant's cross-examination, it was evident that he had concluded that the defendant's evidence, considering his age and infirmities, should not be accepted on the question of these offers. It appeared that if the other offers were made at all it was after the project of the dock had been determined on and its location fixed. Assuming their *bona fides*, they were mere speculative offers as to the compensation which might be allowed and not evidence at all of what, apart from the project of the dry dock, the market value of the land would be worth.

After considering all the facts, and evidence called to our attention, I have reached the conclusion that the offer of the appellant of 5 cts. a sq. ft. is a very reasonable and fair one and that the compensation allowed of 10 cents should be reduced accordingly.

I cannot see any grounds for allowing in a case such as this the 10% for compulsory purchase. The reasons which prevail and justify this 10% in many cases do not exist here and I would disallow this item.

Before concluding, I would again protest against "generosity" being an element entering into the arbitrator's or judge's consideration when fixing the compensation to be allowed for compulsory purchase. I am quite unable to find how much the judge added to the market value of the land taken in this case for generosity. He says a fair and generous market price would be about 8 to 10 cts. a foot and to make it "very generous compensation" he would make it 10 cents. I would respectfully submit that the market value of the property to the owner when taken is the true test of the compensation to be allowed excluding any advantage

due to the carrying out of the scheme for which the property is compulsorily acquired.

The element of generosity is not one which should enter into consideration in determining the compensation. If allowed, it would simply mean the addition to the market value of the land such sum as the arbitrator or judge might in the goodness of his heart think it desirable to add, and penalising the party expropriating to that amount.

I would allow the appeal with costs, and reduce the compensation to 5 cts. a sq. ft. disallowing the 10% for compulsory purchase and confirming the judgment as to the value ($3,000) to be allowed for the house.

Idington, J.

IDINGTON, J.:—The respondent bought some land in Lauzon in 1897 at sheriff's sale for $1,475, and in 1902 sold a lot thereout, of irregular shape, at a price which stated in argument, and not denied, would amount to 2½ cts. a sq. ft.

The remainder of the land so bought by respondent, which it is agreed by the parties amounts to 398,000 sq. ft., was expropriated in January, 1913, and the judgment of the Exchequer Court has awarded him therefor $47,880 including an estimated value for buildings of $3,000.

Deducting that estimate for buildings leaves $42,880 for the bare land.

I assume that the sheriff's sale may have been at a sacrifice price yet an award that gives the respondent who paid it 32 times as much for market price at the end of 16 years is startling.

I assume that the price of 2½ cts. a ft. for that sold in 1902 must be taken as the market value at that time. I cannot agree that the stipulation to build a good house was of such a character as to render the price named an untrustworthy guide to the value. Men buy land to build houses upon. And the purchaser in that instance had long and easy terms of payment with interest at 6% per annum.

It is alleged by respondent, however, that the sale had been bargained for 2 years before.

If I am right in assuming that price to have been the market value in 1902, or 1900, as alleged, then this award can only be maintained as correct by finding that such property in Lauzon had, within 11 years, or 13 if the bargain was made 2 years earlier,

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more than quadrupled in market value. It was a town of 3,000 population and, like many such, practically stationary, as Mr. Charland admits, but yet had increased to 4,000 during that time. It had long had an important industry in the shipbuilding and repairing line. We are not told how many hands employed. Respondent's factum modestly says a considerable number of workmen are employed there. Another old industry is that of manufacture of trunks and boxes. A more recent establishment of the same kind is mentioned. These seem to tell all there is of sufficient importance to be called large or substantial industries.

The evidence of actual market value at the time of the expropriation is unusually unsatisfactory.

It seems almost impossible to get witnesses testifying to values as of a given date when speaking three or four years after the given date, and when there has been in the meantime some great impulse given to the apparent progress of a town and hence a sudden rise in values, to bear in mind exactly what is wanted and distinguish accurately between past and present values. Even when the right question is put an ambiguous answer is given by one leading witness herein.

The respondent's witnesses in this case as a group hardly furnish an exemplary exception to the truth of these general observations. I am not surprised, therefore, to find that the trial judge has not accepted their opinions as his guide.

They have, besides their mere opinions, given a great many illustrations of transactions which, unfortunately, for one reason or another, can hardly assist us much in determining by comparison the market value of the property in question. And some of these the judge seems to assume might help to arrive at the truth.

I desire to test the matter by using the respondent's price for what he sold and another sale beside it.

Besides the part of the property sold by the respondent, there is one other transaction directly bearing upon the earlier value of that in question and that is a sale of lots in an adjoining plot, No. 6, said by Mr. Charland to be of substantially as good value as that now in question. It took place in 1905 and was a sale of 29 lots at 1 cent per sq. ft.

Two slight difficulties arise in the way of possibly making too

much use of this. One is that the quality of the land is said by respondent to be inferior to that in question and that it has not the same advantage for needed drainage. The other is that the transaction was 8 years prior to this expropriation.

Yet, making all due allowance for the alleged difference in want of drainage facility, I think it is a fair index that property there had not increased since respondent's sale already mentioned, and of the value of property immediately beside that now in question.

As a matter of common knowledge we know, or ought to know, that property in towns such as described and presenting no greater rate of increase than shewn, does not quadruple in value within 11 years.

Upon the advent of some great project likely to double the population very shortly, there may be found such rapid rises within very brief periods. But these exceptional cases can all be verified by clear and convincing testimony and the causes therefor explained. The extent to which these causes in any cases may have operated are also susceptible of lucid explanation.

We have no such evidence offered in this case. That presented of estimated value of the property in question has been so extravagant that the trial judge seems to have discarded it entirely. I think he was right in doing so.

I cannot accept the theory that such properties as in question had quadrupled in value in Lauzon within 11 years. Much less can I accept opinion evidence which would require in some of the estimates put forward a rise in values based on such slow progress in the town that it would imply an advance in values of 15 to 20 fold in 11 years, or even 13 years. It rather seems to me that witnesses forget the actual foundations of real market values and the increase thereof.

At all events I cannot, in the absence of any better reasons than those given, accept such estimates, involving such rise in values as I have just pointed out.

There is also the municipal assessment for the property in question which was $2,100 for years 1906-1908 and 1910, then raised, in 1912, to $2,400, and after the expropriation was raised to $6,000.

Assuming that it did not comply with the law and did not

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represent actual values, yet there is little doubt in my mind but that it would be approximately on the same low level throughout the town. If I am right in that, curiously enough Mr. Lagueux gives a piece of evidence that when applied destroys his high estimate. It is this: He tells of buying a property valued by the assessor at $2,000, and selling part for $3,000. And then says he would not give what is left for $5,000. Assuming from these figures the reasonable deduction that the witness does not draw, but I do, that 4 times the assessed value is what might be expected for the property, and apply that to the assessments of this property now in question, would fix the value of it at about $9,600.

And yet we are asked to maintain a valuation of $42,800 for land alone and houses at $3,000 and add 10% for the cruel taking of it.

I really cannot believe that the assessor for so many years assessed this property, of such an attractive character as Mr. St. Laurent so well and ably painted it to us, at one-twentieth part of its value, and then, when he raised it, only added, at the dawn of better days, $300.

But when those better days had come he could yet find it worth only $6,000.

The respondent was one of those men whom nothing could change after he had made up his mind not to sell, and hence some could well afford to practice the joke of offering him $100,000 knowing he would refuse it.

I notice they did not venture to lay down the gold less a year's discount and give the respondent a fair chance, or succeed in inducing the judge to accept the words as representing a sincere reality.

In argument, counsel for appellant pointed out that the trial judge had made an error regarding the price of some larger sales, and thus, in effect, misdirected himself. I assume that would have been denied if incorrect, and I think it quite possible the error of calculation may have led to error in the judgment.

Another test of the intrinsic worth of the property and the demands for more house room, is the fact that the houses were used only in summer, although appellant says one of them had double windows and was fit to live in during winter.

The trial judge has not accepted the views of any set of wit-

nesses and has come to his judgment from a survey of the general evidence in the case.

Following the same lines, I cannot accept his conclusions as to the value of the land, and would cut the allowance for latter down to one-half what has been allowed therefor, including such additional percentage as he has added to value he finds, and reduce the amount of the judgment to $26,540.

I would therefore allow the appeal with costs, and dismiss the cross-appeal with costs.

Anglin, J.

ANGLIN, J.:—I concur with Brodeur, J.

Brodeur, J.

BRODEUR, J.:—This is an appeal from a judgment of the Exchequer Court awarding a sum of $47,080 for the expropriation of land belonging to the respondent, which the government needed for the construction of a dry dock at Lauzon.

This land comprises 398,000 ft. and the court below valued it at 10 cts. a foot. The court awarded in addition 10% for compulsory taking and $3,000 for the buildings erected upon the land. There is no difficulty as to this last item. It is admitted that the sum of $3,000 represents the value of these buildings.

The respondent Larivée is not satisfied with the amount awarded for the value of the land itself, and by cross-appeal he claims 50 cts. a foot instead of 10 cts. awarded to him.

This land is of great extent and was bought by the respondent several years ago for a very moderate sum. It is indisputable that there has since been an increase in the value of the property in this place. The evidence shews that large blocks of land in the vicinity were sold to be subdivided into building lots. The respondent has proved that these building lots were then sold up to 17 cts. a foot, but the judge of the court below, I believe with reason, has not been willing to accept this price for subdivided lots in order to establish the market value of the respondent's property. This is what he says:—

A number of sales were referred to in the course of the trial, and deeds in respect of a number of these sales were also filed of record.

With a few exceptions, most of the sales have reference to small building lots which sales represent no similarity to the piece of land in question in this case, which is composed of 398,000 sq. ft., and therefore would be a very misleading guide to follow.

However, from the evidence of promoters and real estate men heard as witnesses, it appears that large farms were bought, at Lauzon, not long before the expropriation, at three cents and four to five cents a foot when buying

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a large area; and, after passing through the usual process of promotion, by sale and re-sale to syndicates and companies at very large figures, compared with the original purchase price, these lands were afterwards placed upon the market and sold as small building lots at 14 to 17 cents a foot and perhaps more. It is not rational to use as apposite the value of these building lots, but it is the original sale for a large area that really offers similarity with the present case, and helps to reconcile and bridge the gap between the opinion evidence adduced by the plaintiff and the defendant respectively.

In these circumstances I believe that these sales *en bloc* are a better guide for determining the value of the respondent's property than the sale of subdivided lots.

On the other hand, the Crown has itself offered a price greater than that paid for the farms but less than that paid for the subdivided lots.

The judge of the court below has had the advantage of hearing the witnesses and he says:—

> A fair and generous market price for the same would be about 8 to 10 cents a foot, and to make a very generous compensation I will make it ten cents a foot.

I understand by this extract from his judgment that the sum of 8 cts. a foot would be a reasonable indemnity. I cannot, for my part, accept the principle that these indemnities should be based upon great generosity. Therefore, I consider that we should reduce the compensation awarded to 8 cts. a foot.

I am of opinion that we should also refuse the 10% additional given by the court below.

The respondent received only the sum of $285 a year as revenue from this property and should consider himself fortunate to receive a capital sum of $34,840 which he could easily invest in war loans or otherwise so as to receive a revenue of nearly $2,000 a year, that is to say nearly seven times more than what he gets to-day.

There is some question of offers of $100,000 made to the respondent for his land. One of these offers was made by the witness Lagueux; another by a man named Légare; and the last by a man named Couillard.

Lagueux, in his evidence, tells that he made this offer in May, 1913, that is to say, after the expropriation. As to the offers of Couillard and Légare they are presented by the respondent himself. Now the evidence of the latter, who is an old man, was deemed so unsatisfactory that the judge was obliged to stop the cross-examination. Not much importance, therefore, can be

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attached to it. As to Couillard's offer it is indisputable that it was made after the expropriation.

For all these reasons, the appeal should be maintained with ...ts in this court and the respondent should receive as indemnity for his land $31,840, for his buildings $3,000, total, $34,840.

The cross-appeal should be dismissed with costs.

Appeal allowed; cross-appeal dismissed.

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MAN.
C. A.

Manitoba Court of Appeal, Cameron, Haggart and Fullerton, JJ.A. July 8, 1918.

RAILWAYS (§ II D—70)—ANIMALS KILLED BY—FARM CROSSING—SWING GATES—MAINTENANCE OF—RAILWAY ACT.

Section 295 of the Railway Act provides that "no person whose horses . . . are killed or injured by any train shall have any right of action against any company in respect of such horses . . . being killed or injured, if the same were so killed or injured by reason of any person (*a*) for whose use any farm crossing is furnished failing to keep the gates at each side of the railway closed when not in use." This section is no defence to an action for damages if the gates when erected would not swing, and the hinges and fastenings have not been maintained as required by s. 254 and have become useless.

[See Annotations 32 D.L.R. 397; 33 D.L.R. 423.]

Statement.

APPEAL by defendant from a County Court judgment, in an action for damages for animals killed on defendant's railway. Affirmed.

O. H. Clark, K.C., for appellant; *G. R. Coldwell*, K.C., for respondent.

The judgment of the court was delivered by

Fullerton, J.A.

FULLERTON, J.A.:—This is an appeal by the defendant from the judgment of Barrett, County Court Judge, in favour of the plaintiff for the sum of $475 damages for the loss of 4 horses killed on the defendant's railway on the night of March 4, 1916.

The horses were kept in a yard on the plaintiff's farm which was enclosed by a barbed wire fence. During the winter of 1915-1916 there was a very heavy fall of snow. A bank of snow had formed inside the yard, which at one point extended over the fence.

On the night of March 4, 1916, the horses escaped from the yard by walking over the snow-bank. They followed a private road across the plaintiff's farm until they came to the gate in the railway fence, passed through the gate, which was open, crossed

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the railway to a road allowance, and after travelling a considerable distance along the road allowance, returned to the railway at another point, where they were killed by a train.

S. 294 of the Railway Act, c. 37, R.S.C. 1906, sub-s. 4 provides that:—

> Where any horses . . . at large, whether upon a highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent.

The trial judge has found as a fact that the defendant has failed to establish that the horses in question "got at large through the negligence or wilful act or omission" of the plaintiff within the meaning of the last quoted section.

I think the evidence fully warrants the finding he has made.

Mr. Clark, for the appellant, relied on s. 295 as a complete answer to the action. That section provides that:—

> No person whose horses . . . are killed or injured by any train shall have any right of action against any company in respect of such horses . . . being so killed or injured, if the same were so killed or injured by reason of any person (a) for whose use any farm crossing is furnished failing to keep the gates at each side of the railway closed, when not in use.

In *Atkin* v. *C.P.R. Co.*, 18 Man. L.R. 617, it was held that if a gate at a farm crossing of a railway was left open by the person for whose use the crossing was provided or any of his servants or by a stranger or by any person other than an employee of the company, the company was relieved by s. 295 from the liability imposed by sub-s. 4 of s. 294 to compensate the owner for the loss of an animal at large without his negligence or wilful act or omission getting upon the railway track through such gate and being killed by a train.

Mr. Coldwell, who appeared for the respondent, contended that s. 295 had no application to the facts established here because the company had failed to furnish and maintain the gate required by the statute, and that until it had fulfilled its statutory duty in that respect the duty imposed on the owner to keep such gate closed did not arise.

S. 254 of the Railway Act provides that:—

> The company shall erect and maintain upon the railway:—
>
> (*a*) fences of a minimum height of four feet six inches on each side of the railway.

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(*b*) swinging gates in such fences at farm crossings of the minimum height aforesaid, with proper hinges and fastenings.

The trial judge has made the following findings as to the condition of the gate:—

. . . the evidence establishes I think beyond question that the gate at the private crossing was at the time the horses went through, and had been for a long time prior, out of repair. It was badly hung. The posts were only ordinary fence posts instead of the usual gate posts. The posts were not braced. The fasteners could not be used and it would not swing.

The plaintiff says that when the gate was first put there it would not swing, and that the only way to operate it was to lift it up and drag it around.

The last time plaintiff saw it before the accident was on January 7, when he closed it and fastened it with wire. When he examined it after the accident it was off its hinges and lying in the snow.

In my opinion, the gate erected by the defendant was not a "swing" gate within the meaning of the statute.

The fastenings, even if "proper fastenings" within the meaning of the statute when first placed on the gate, had not been "maintained" and had become useless.

In *McMichael* v. *G.T.R.*, 12 O.R. 547, it was held that where the fastenings were not properly made, the owner was not obliged to keep the gate shut.

I think that, before the company can take advantage of s. 295 it must erect and maintain the gate, with proper hinges and, fastenings, required by the statute.

I would dismiss the appeal with costs.

Appeal dismissed.

GAGNON v. LEMAY.

CAN.

S. C.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 11, 1918.

VENDOR AND PURCHASER (§ I E—28)—STIPULATION IN DEED—FAILURE TO PAY PURCHASE MONEY—VENDOR'S RIGHT TO CHOOSE BETWEEN RESCISSION OR PERFORMANCE.

A stipulation in a deed of sale or promise of sale of land that if the buyer fails to make any payment in capital or interest at the specified dates such deed shall become null and void *ipso facto* without *mise en demeure*, is exclusively in the interest of the vendor, who has the right on default to choose between rescission or performance of the contract.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 27 Que. K.B. 59, confirming the judgment of the

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Statement.

Superior Court, District of Montreal, and maintaining the plaintiff's action with costs. Affirmed.

On June 14, 1910, a deed comprising promise of sale was passed between the parties, by which the appellant leased to the respondent for a term of 10 years from May 1, 1911, a certain lot of land. As a condition of said deed, the respondent reserved to himself the faculty to buy and the appellant bound himself to sell that lot for the price of $1,000 per acre, payable $5,000 on the date of the deed of sale to be passed and the balance $2,000 per year.

On July 2, 1914, a deed of transfer was passed between the parties by which the respondent retroceded to the appellant all his rights belonging to him in virtue of the above deed of promise of sale, in consideration of the payment of a sum of $60,000. This sum was payable $2,000 cash, $13,000 on July 17, 1914, $5,000 on July 2, 1915, and $5,000 per year, with interest of 6% per annum.

The appellant paid to the respondent $2,000 cash and the payment of $13,000 due on July 17, 1914; but failed to pay the instalment of $5,000 due on July 2, 1915, and $2,700 for interest.

Antonio Perrault, K.C., and *J. W. Jalbert*, for appellant; *Robert Taschereau*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—In this case, the appellant, in June, 1910, leased to the respondent a piece of property for 10 years with a promise of sale; the purchase price was fixed at $30,000. In July, 1914, the same property was reconveyed by the respondent to the appellant for the sum of $60,000, payable $2,000 in cash and the balance in instalments, on account of which the respondent received $15,000. The appellant having failed to pay the difference of $45,000, this action was brought to recover a further instalment due on the purchase price.

The appellant denies all liability on the ground that the promise of sale sued on contains a stipulation in these words:—

> If Mr. Gagnon fails to make the first payment of $13,000 or any other payment of interest and capital the present conveyance will be void *ipso facto* without *mise en demeure* and the agreement of sale shall revive in favour of Mr. Lemay in full force. Lemay will look after the payment of $2,000 above mentioned as being payable in cash as well as every subsequent payment, in case Gagnon allows himself to be in arrears for more than 30 days for any sum of capital or interest coming due and this without *mise en demeure*.

The question to be decided is: What is the legal effect of this

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stipulation? There can, I think, be no doubt that of the whole contract it may be said:—

The parties have expressly stipulated that they intend to make a contract for rent, but in law it follows from clauses in the deed, that it corresponds to the contract of sale of which the special feature, the transfer of the property, has been realized.

S. 1888, 1, 87; D. 96, 1, 57; D. 91, 1, 271.

The appellant contends that the stipulation in question is a resolutive condition which, when accomplished, effects of right the dissolution of the contract; and that the words used evidence the intention that it was to operate for the benefit of both parties. On the other hand, the respondent submits that this is a special stipulation to the effect that the deed of sale is voidable but only at his, the vendor's, option, if the purchase price or any portion of it is not paid at the dates fixed, that is the *lex commissoria* of the Roman law.

I am inclined to hold that the peculiar form in which the stipulation is expressed reveals an intention on the part of both the contracting parties to make a special agreement, the effect of which would be in case the purchaser failed in his engagements to put both parties back in the position in which they were at the date of the contract, the appellant purchaser forfeiting, however, all payments made on account up to the date of the breach.

The differences between the Quebec Civil Code and the Code Napoléon must be borne in mind when considering the effect of this contract. (Compare articles 1536 C.C., 1088 C.C., 1065 C.C., with 1184 C.N. and 1654 C.N.) Under the Quebec law the seller of an immovable cannot demand a dissolution of the sale of the immovable by reason of the failure of the buyer to pay the purchase price, unless there is a stipulation to that effect. A *lex commissoria* is never presumed. The rule of the French law is to the contrary.

It must also be borne in mind that, according to Pothier, Vente, vol. 3, No. 459, a *lex commissoria* does not entitle the vendor, in the absence of express stipulation, to rescind *ipso jure*. He can only bring an action to have the contract declared void and, until judgment is given in such action, the buyer may still save his position by tendering the money, notwithstanding that the term fixed for payment has elapsed. In a word, if the condition fails through the money not being paid by the date fixed, the con-

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tract does not become *ipso facto* void, but the vendor has the option of rescinding it. The reason why the vendor has the option of rescinding or adopting the contract is obvious. If the contract became *ipso facto* void on non-payment of the purchase money, it would always be in the power of the purchaser by withholding it to rescind the sale from the moment of its conclusion and so to throw on the vendor the loss which would result from accidental destruction or damage occurring after delivery. If the condition is resolutive, the purchaser becomes owner of the property by delivery. He has all the ordinary rights of an owner and the loss falls on him if the property perishes before the condition is fulfilled. And in either case, whether the stipulation in question is a *lex commissoria* or a resolutive condition, in the absence of special agreement to the contrary, the avoidance of the contract entitles the purchaser to recover back any portion of the purchase money if it has been paid, subject always to claims for damages, revenues, etc. But here the contract does not say that the sale is voidable at the purchaser's option, the stipulation is that if the respondent fails to make any of his payments "le présent transfert sera nul *ipso facto*," the sale ceases to exist on the happening of the condition and then it provides against loss by the vendor. The promise of sale in his favour revives and the purchaser Gagnon forfeits all payments made on account of his purchase, $15,000.

I must confess that the language of the stipulation conveys to my mind the impression that the parties must have intended to make a special agreement to meet the very special conditions under which this agreement was entered into and producing results entirely different from those which would follow from a *lex commissoria*. *Vide* Beudant, "Effets de la Vente," pp. 196 and 197.

But as all the judges below and my colleagues here have reached a different conclusion, I submit to their better judgment.

Vide Pothier, vol. 3, No. 473.

Davies, J.

DAVIES, J.:—I would dismiss this appeal with costs.

Idington, J.

IDINGTON, J.:—The intention of the parties, so far as can be gathered from the contracts in question must govern. And the neat, though by no means simple, point raised herein is whether or not the nullification of the last contract between the parties as therein provided was intended to be dependent on the will of the vendor alone or on the will of either seeking to terminate it.

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Idington, J.

I cannot by elaboration help any one for the case as presented in the judgments below and in argument here has been considered from every point of view.

I need only say that if the appellant had in truth the rather improbable purpose in view of procuring the unusual right of a vendee to terminate the contract after he had paid one-fourth of the price, he would have been well advised in having had it expressed in less ambiguous language.

The point made by Cross J., that the obvious right of the respondent to sue, within the 30 days specified for the vendee to save his rights, after default, is rather a formidable barrier in the way of construing the contract as appellant desires.

I admit the suggestions made in the appellant's factum in reply thereto are very plausible and worthy the consideration I have given them, but do not carry the question far enough or indeed beyond the region of ambiguity which stands in appellant's way.

It is not a case where authority can help us much, for the meaning of one contract is rarely helped by a decision upon another though only varying slightly from the one which has been decided. In truth it is not the law but the fact which troubles us herein.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.—I am of the opinion that this appeal should be dismissed for the reasons assigned by the Chief Justice of the Court of King's Bench. The fact, as pointed out by that learned judge, that art. 1536 of the Civil Code of Quebec makes a provision directly contrary to that of art. 1654 of the Code Napoléon, materially lessens, if it does not destroy, the value in Quebec of the French authorities cited in his very able argument and factum by M. Perrault. A construction of the clause on which the purchaser (appellant) relies that would enable him to terminate his contractual obligations by making default in fulfilling them could be justified only by terms admitting of no other interpretation.

The clause in question, if we omit from it the terms "*ipso facto, sans mise en demeure*" is the ordinary "*pacte commissoire*" of the French law, of which Casault, J., in *Price* v. *Tessier*, 15 Que. L.R. 216, said, at pp. 218-19:—

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"*Le pacte commissoire*" says Aubry & Rau, vol. 4, par. 302, p. 82, "is a clause by which the parties agree that the contract may be void if one or the other of the parties does not fulfil the obligations imposed upon him."

The mere stipulation in the deed of sale of its avoidance on failure of payment is not in our law that of a *pacte commissoire* which lacks the perfection of that of the Roman law, will result in the nullity of the sale. With us it imports only the right to judicially demand its nullity. The Civil Code, art. 1536, makes of this pacte a condition of the demand for nullity in the sale of immoveables.

In the old law this condition of nullity was silent and the nullity which it authorized to attain had to be judicially claimed. This still exists in the sale of immoveables, but for that of immoveables the Civil Code has put an end to the tacit nullity and makes it definite on failure of payment on a special stipulation which is, as I have said, the *pacte commissoire*. The latter leaves the sale in existence until in an action the judgment has pronounced its nullity which can only be claimed by the vendor.

The law as thus stated has been recognized in *Brisson* v. *Plourde*, 1. Rev. de Jur. 95, by the Court of King's Bench; in *Picard* v. *Renaud*, 17 Que. S.C. 353, by the Court of Review (Taschereau, Cimon and Archibald, JJ.); in the judgment of Demers, J., in *Halcro* v. *Gray*, 33 D.L.R. 140, 50 Que. S.C. 350, affirmed by the Court of Review; and in *Pépin* v. *Savignac*, 35 D.L.R. 715, 51 Que. S.C. 207. It may perhaps be noted that in the two latter cases the term *sans mise en demeure* occurred in the condition, but not the term *ipso facto*.

Under such a stipulation containing neither of these terms, where, as here, the contract is silent as to the place of payment, the debt is "*quérable*" and not "*portable*" (art. 1152 C.C.) it is necessary that the debtor should be put in default (*mise en demeure*) by a demand of payment at his abode, and the right of rescission can only be asserted by judicial proceedings. The clause is regarded merely as an expression (rendered necessary by art. 1536 C.C. in the case of contracts for the sale of immoveables) of a condition implied in other contracts by art. 1065 C.C., and as having the like effect, 7 R.L. (N.S.) 471 *et seq.* The seller alone can invoke it. It is a privilege or right of which he is at liberty to take advantage or not; and, until dissolution of the contract has been judicially declared, the debtor may avoid that consequence by fulfilling his obligation. Art. 1538 C.C. What then is the purpose and effect of inserting the terms "*ipso facto*" and "*sans mise en demeure*"? In my opinion, the latter term is merely designed to dispense with the necessity for demanding payment at

the debtor's domicile. It does not alter the nature of the stipulation or render it any the less a "*pacte commissoire.*" Such was the view maintained in *Halcro* v. *Gray, supra,* and *Pépin* v. *Savignac, supra.* The purpose of the term "*ipso facto*" is to enable the creditor to assert the dissolution of the contract without being obliged to resort to the courts, and either immediately upon default, or upon the expiry of any stipulated period of grace, to deprive the debtor of the right to purge his default by payment under art. 1538 C.C. Requisite for these purposes, in accomplishing them these provisions are given operation and effect—the operation and effect which I think the parties must have intended. It is quite unnecessary, and, in my opinion, unwarranted, to attribute them to the extraordinary purpose of enabling the purchaser to relieve himself of his contractual obligations by making default in fulfilling them. They do not sufficiently, or indeed at all, express such an intention. They, therefore, do not change the nature of the facultative (potestative) condition in which they are found and make of it an absolute resolutive condition having the effect stated by art. 1088 C.C. It remains a provision inserted for the benefit of the vendor, 7 Mignault 137. Indeed the presence of the term "*sans mise en demeure,*" because of its utter inapplicability to the case of a purchaser asserting that by his default he has put an end to the contract, affords an additional reason for taking this view of the stipulation under consideration.

In at least two instances the courts have so construed clauses so nearly identical in terms with that before us that no real distinction between them can be suggested. In *Péloquin* v. *Cohen,* 28 Que. S.C. 193, Tellier, J., held that such a clause confers the right of rescission on the vendor alone, and in *La Compagnie Impériale d'Immeubles* v. *Collerette,* not reported but quoted *in extenso* in the factum of the respondent, Panneton, J., was of the same opinion. As stated by the Chief Justice of Quebec: "The jurisprudence of the Superior Court is almost unanimous on the question."

It is, I think, reasonable to assume that in inserting the clause in question the parties to the contract now sued upon meant it to have the effect which had been thus given to similar clauses in the jurisprudence of the province. No doubt such clauses have been placed in many contracts of sale in the belief that they would be

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given operation and effect in accordance with these decisions. We have it on the authority of such an experienced judge as Cross, J., that "in conveyancing practice clauses such as the one in question have for many years been treated as giving a right of rescission to the seller but as not opening any right in favour of the buyer."

The wisdom of not overruling judicial decisions of some years' standing, where numerous contracts must have been made and moneys paid on the footing of the law as established by them, and of not breaking away from previous decisions upon the construction of a well known document in constant use for a number of years, even in cases where, were the matter *res integra*, a different view might have prevailed, is fully recognized in the English system of jurisprudence. *Palmer* v. *Johnson*, 13 Q.B.D. 351, at 354, 357, 358; *Dunlop & Sons* v. *Balfour Williamson & Co.*, [1892] 1 Q.B. 507, at 518. I cannot think that anything so mischievous as unsettling the law in regard to matters affecting rights of property should be countenanced by courts administering the civil law. That would seem to have been the view of the Judges of the Court of King's Bench in the present case.

Appeal dismissed.

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Ex. C.

THE KING v. BRADBURN.

Exchequer Court of Canada, Audette, J. February 2, 1916.

EXPROPRIATION (§ I C—144)—COMPENSATION—WATER LOTS—VALUATION—ADVANTAGES—SET-OFF.

In estimating the amount of compensation upon the expropriation of water lots by the Crown for harbour improvement purposes, regard will be had to the local market value of the land, its state of improvement respecting water frontage, and the advantage and benefit accrued to the owners as a result of the undertakings, the latter of which, under s. 50 of the Exchequer Court Act, must be considered by way of set-off.

Statement.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

F. R. Morris, for plaintiff; *H. W. White*, K.C., for defendants.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were, under the provisions of the Expropriation Act, taken and expropriated for the purposes of a public work of Canada, namely, the improvements and enlargement of the harbour of Fort William, in the Province

of Ontario, by depositing, on September 16, 1913, plans and descriptions of the lands so expropriated in the office of the Local Master of Titles in and for the District of Thunder Bay, Ontario, in which district the lands are situate.

Two pieces or parcels of land were so expropriated. One being part of lot 7, concession E, Island No. 1, of the city of Fort William, and containing by admeasurement one and twelve one-hundredths (1.12) acres.

The second piece or parcel of land so expropriated is lot No. 6, concession E, island No. 1, of the said city of Fort William, and containing by admeasurement two and thirty-four one-hundredths (2.34) acres.

The Crown, by the information, offers the sum of $3,360 in respect of lot No. 7, and the sum of $7,020 with respect to lot No. 6, making in all the sum of $10,380.

Together with the said sum of $10,380, the Crown further undertakes and consents that the defendants and their successors in title be at liberty to construct, maintain and use, upon the space of 25 feet lying between the line of expropriation and the harbour line, owned by the plaintiff, such wharves, docks or piers as they may desire.

The Crown further undertakes to dredge to the harbour line, and in the event of docks or other structures being so built to the harbour line, to dredge forthwith clear of such docks or other structures as to enable vessels to approach to and along the same. The whole as more specially described and set forth in pars. 5 and 6 of the said information.

The defendants at bar contend that the amounts offered by the Crown, in the manner above set forth, are not sufficient, and claim the sum of $65,000.

The defendants' title is admitted.

The several questions of law respecting the road allowance, the right of the riparian owners on a navigable river, have already been passed upon, in the case between the same parties, namely, in the case of *The King* v. *Bradburn*, 14 Can. Ex. 419, and do not come up for decision in the present issues. The only question to be now decided is one of the *quantum* of the compensation to be paid with respect to the lands taken and the damages, if any, resulting from the expropriation.

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EX. C.

THE KING v. BRADBURN.

Audette, J.

Dealing first with lot No. 6, it may be said, that taking into consideration the condition of the real estate market at Fort William at the date of the expropriation—the unimproved condition of the lot respecting water frontage and without any water-front on account of the road allowance, and further the material advantage derived from the two undertakings above mentioned, I have come to the conclusion that the offer, at the rate of $3,000 an acre, for the said lot 6, is over and above the actual market value of the same—and specially so indeed if full effect is given to s. 50 of the Exchequer Court Act, whereby the advantage and benefit accrued to the owners of the property from the undertakings must be taken into account, and consideration given to it by way of set-off. Therefore, the amount of $7,020 offered by the Crown for the 2.34 acres expropriated with respect to lot No. 6 is declared sufficient and adequate in respect of the land taken and for all damages resulting from the expropriation of the same.

Coming to lot No. 7, for which the Crown has also offered a compensation at the similar rate of $3,000, inclusive of all damages, I must say that if lot No. 6 is worth $3,000 an acre, lot No. 7 must necessarily be worth more, as it had already been improved by the dockage and frontage improvements given by previous expropriations, and furthermore, it has been damaged by the manner in which the 1.12 acres have been carved out of the same, although the increased frontage given by the present expropriation must not be lost sight of. The plaintiff has taken a piece of land of irregular shape, at the expense of the frontage on the Kaministiquia River.

Therefore, taking into consideration the irregular shape of the piece taken on No. 7, the advanced value derived by the defendants from the improved piece fronting on the McKellar River, with the above mentioned undertakings and the state of the market at the date of the expropriation, I have come to the conclusion that this piece should be assessed on a basis of $5,000—thus allowing a compensation that is ample and liberal under the circumstances. The sum of $5,600 will be allowed for the 1.12 acres expropriated and taken from lot No. 7.

Therefore, there will be judgment as follows, to wit: (1) The lands expropriated herein are declared vested in the Crown from the date of the expropriation, namely, September 16, 1913; (2) the compensation for the lands expropriated herein is hereby fixed

at the total sum of $12,620, with interest thereon at the rate of 5% from September 16, 1913, to the date hereof. The whole in full satisfaction for the land taken and all damages whatsoever, resulting from the said expropriation; (3) the defendants are entitled to be paid, by the said plaintiff, the said sum of $12,620, with interest thereon, as above mentioned—upon giving to the Crown a good and sufficient title, free from all mortgages and encumbrances whatsoever; (4) the defendants are also entitled to the rights, powers and privileges conferred upon them and their successors in title by the two undertakings mentioned in the information herein; (5) the defendants are further entitled to the costs of the action. *Judgment accordingly.*

STEVENS v. MERCHANTS BANK OF CANADA.

Manitoba King's Bench, Macdonald, J. June 16, 1918.

BANKS (§ III C—35)—OFFICERS—LIABILITY FOR ACTS OF ACCORDING TO USAGE—GUARANTEE BY MANAGER—MANAGER HAVING NO AUTHORITY—BANK RECEIVING BENEFIT.

The officers of a bank are held out to the public as having authority to act according to the general usage of their business, and their acts, within the scope of such usage and of their several lines of duty, will, in general, bind the bank in favour of third persons who possess no other knowledge.

A bank is liable on a guarantee given by its local manager for the repayment of a loan made to a customer of the bank, the loan to be used by the customer in assisting it in its business and reducing its indebtedness to the bank, and being paid to the manager and by him deposited to the credit of the customer, the fact that the manager had no authority to give such guarantee being unknown to the lender, and the bank receiving a benefit from the transaction.

Statement.

ACTION to recover moneys advanced by way of loan to the Winnipeg Motor Co. and alleged by the plaintiff to have been advanced at the request of the defendant through the defendant's manager at the city of Winnipeg, and to recover a further sum as a bonus in consideration of the granting of the said loan.

I. Pitblado, K.C., and *A. E. Hoskin*, K.C., for plaintiff; *H. J. Symington*, K.C., and *H. V. Hudson*, for defendants.

Macdonald, J.

MACDONALD, J.:—The facts are these: The Winnipeg Motor Exchange Co. was largely indebted to the said bank, and the bank's manager becoming dissatisfied with the company's management, and in the hope that if a new management of his choice could be placed in charge the business could be made to pay and the indebtedness to the bank paid off, arranged with the owners

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that they should dispose of the business; and to accomplish this he agreed with and paid to the owners the sum of $5,000. Before negotiating with the then owners of the business, he arranged with two young men, Baxter and Martin, that in the event of his succeeding in his negotiations with the owners that they should take charge of the business and run it under the name of the Winnipeg Motor Co., and the new business under the new name assumed the indebtedness of the Winnipeg Motor Exchange Co., together with the $5,000 paid for the business.

There was no formal agreement between the bank and the new firm, but the evidence leads to the conclusion that the object of the change was the benefit of the bank's position with respect to the indebtedness to it, and after the debt to the bank was liquidated the new firm would own the business. In the meantime, the principal object and intent was the liquidating of the bank's claim.

Baxter and Martin took control and charge of the business with some limitations as to their management of it with respect to finances connected therewith, this being to some extent under the control of the manager of the bank.

On October 6, 1917, more capital became necessary and Mr. Baxter, evidently with the knowledge and consent of the bank manager, applied to one Clarence C. Fields for an advance of $7,500 for one week. (This is material to this issue only as tracing the disposition of the $10,000, the subject-matter of this action.) Fields was advised by Baxter that the bank was interested and would secure the payment of a note which the Winnipeg Motor Co. would give for the amount. Fields interviewed the bank's manager, who confirmed Baxter's statement. A note was given by the Winnipeg Motor Co. in favour of Fields, together with a post-dated cheque, dated October 13, 1917, for $7,500, made by the company in favour of C. C. Fields, initialled by the bank's manager, indicating that payment would be made on that date. This cheque was not paid until October 16, the day succeeding the negotiating of the loan which is the subject of this action.

On October 8, Baxter approached Mr. Dalgleish, a solicitor of this court, to see if he could arrange a loan of $10,000 for the Winnipeg Motor Co., and as a consequence of the conversation

between them, Dalgleish interviewed the bank's manager and intimated that he had a client who he thought would advance the amount if properly secured, and asked how it was proposed to secure and repay the amount. The bank's manager then stated that the amount would be repaid at the rate of $2,000 per month for 3 months and the balance at the end of 4 months, and for this accommodation the plaintiff was to be paid a bonus of $1,000, payable with the final instalment.

It was agreed that post-dated cheques (exs. 4 to 8 inc.) would be made by the Winnipeg Motor Co. in favour of the plaintiff, initialled by the bank's manager (as in the Fields loan) to cover the monthly payments, and a letter (ex. 9) was also given by the manager, addressed to the plaintiff, in these words:—

In connection with the loan of $10,000 which we understand you are granting to the Winnipeg Motor Co., to be repaid at the rate of $2,000 per month and the balance at the end of the fourth month, we beg to notify you that the bank is prepared to grant the company a credit sufficiently large to enable them to take up these instalments as they mature, and hereby guarantee payment of the said loan.

The cheques and letter were delivered to the plaintiff, on the strength of which she issued her cheques on the defendant's Bannerman Ave. branch for $7,900 and $2,100 respectively (exs. 2 and 3) and these cheques were handed to the bank's manager and endorsed with the bank's stamp and deposited to the credit of the company in the ledger sheet (ex. 11).

This deposit placed the current account of the Winnipeg Motor Co. on October 15, 1917, in the position of having a credit of $15,405.71, against which the cheque of $7,500 in payment of the Fields loan was charged on the following day and further cheques were issued on the 16th and 17th October which reduced the credit to an amount less than the credit on October 15 prior to the deposit of the $10,000. Although the current account of the Winnipeg Motor Co. with the bank shews a credit at the opening of the day of October 15, 1917, the company was indebted to the bank in the sum of $47,278, which, by the deposit of the sum of $10,000, the subject-matter of this action, was reduced by that amount, and the manager in his report (ex. 14) to head office draws attention to this reduction by the notation "new capital invested."

It is evident that the bank's manager was deceiving his head office, possibly in the hope and expectation that the business

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would improve and the bank's claim be reduced without discovery of the methods that he had resorted to. But matters did not improve and the inevitable followed. The manager was removed from his charge of the Winnipeg office and under a change of management the agreement between the plaintiff and the retiring manager was repudiated by letter (ex. 16), dated November 16, 1917, as follows:—

> The letter given to you by Mr. Patterson, formerly of the Winnipeg branch of the Merchants Bank, dated the 15th October, 1917, in connection with the loan which you were apparently making to the Winnipeg Motor Co. for $10,000 came to the writer's notice a few days ago, and I hasten to notify you on behalf of the bank that it recognizes no liability thereunder; that the bank has not signed the same; Mr. Patterson had no authority to give it, and the bank has no power in law to give guarantees.

There is no question about the loan having been made, and so far as the plaintiff is personally concerned, in the best faith and on the strength of and after the receipt of the letter (ex. 9) and post-dated cheques initialled by the bank's manager.

The first of the cheques was duly presented for payment on November 15, 1917, but the defendant has refused to pay the same and has repudiated all liability for the said sum of $11,000 and each and every part thereof, and the plaintiff brings this action for the recovery of the said amount.

The only defences set up which call for consideration and determination are contained in paras. 15, 16 and 17 of the statement of defence, and are briefly:—That the writing referred to (ex. 9) is not the act or deed of the defendant and is not binding upon the defendant, not being under its corporate seal; that the bank's manager was not acting in the course of his employment as manager of the defendant's branch, nor on its behalf, nor within the scope nor apparent scope of his authority, and was in fact acting without authority as the plaintiff well knew; that the defendant has no power to make or enter into the transaction or promises, agreements, representations or warranties alleged and set forth in the statement of claim, nor to guarantee payment to the plaintiff.

Mr. Symington, counsel for the bank, strongly contends that the transaction is of such an unusual and peculiar character that it must have excited suspicion, and having excited suspicion, that the plaintiff was put on inquiry. The Winnipeg Motor Co. were

customers of the bank to the knowledge of the plaintiff, and that the bank, a money lending institution, should guarantee or enter into an arrangement by which it would undertake to pay $1,000 of a bonus for a loan of $10,000 to one of its customers for 4 months is of such an irregular and questionable character that it should place the party contemplating entering into such a transaction upon inquiry, and if an inquiry had been made, the advance would not have been made.

The bank, it is urged, is liable for the acts of its manager only if acting within the scope of his authority.

> The usual rules of the law of agency apply to a bank manager. If, for instance, he does an act outside the apparent scope of his authority, and makes a representation to advance his own private ends (or what is the same thing, the private ends of someone other than the bank), it can in no sense be called the representation of the bank—in other words, it is not a representation by him as agent, and the bank is not affected by reason of its agent's knowledge of the transaction.

Falconbridge on Banking, 2nd ed., p. 88, citing the case of *Richards* v. *Bank of Nova Scotia*, 26 Can. S.C.R. 381.

There is a distinction between that case and this. There the agent of the bank does an act outside of the apparent scope of his authority and makes a representation to the person with whom he acts to advance his own private ends. Besides acting as the manager of a bank he carried on a business for himself without the knowledge of the bank and was in the habit of applying to customers of the bank for accommodation under various pretences. In this instance he exhibited to one Richards an invoice of molasses and vainly endeavoured to persuade him to purchase and to accept a draft drawn upon him by his (the manager's) brother in Halifax. He then said that the goods were held by the bank and that the bank would see that they were sold and would look after the draft when it became due, adding that in case the goods were not sold the bank would want a renewal, he thereupon accepted. The acceptance, it was found, was for the benefit of the manager's brother in Halifax and not in any way for the benefit of the bank.

In *Bank of Nova Scotia* v. *Robinson*, an appeal from the decision of the Supreme Court of New Brunswick, 33 N.B.R. 326, in a case arising out of the same transaction as those in the case of Richards, the jury found that the drafts were accepted by Robinson for the accommodation of the bank and that he was induced to accept by

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untrue representations of the manager. The defendant had a verdict which the Supreme Court of New Brunswick refused to set aside.

The ground of appeal, however, was because of the improper reception of evidence at the trial. No other ground of appeal being taken, the appeal was dismissed and the judgment for the defendant was affirmed.

The defendant lays considerable stress on the case of in *Re Southport and West Lancashire Banking Co.*, 1 T.L.R. 204:—

It is not within the ordinary scope of a bank manager's authority to guarantee the payment of a draft, and unless such guarantee is specially authorized it cannot be enforced.

The above company, by its manager, gave an undertaking to retire an acceptance of its customers, Messrs. Chadwick & Co., to meet a draft upon them, and the drawers required that the payment should be guaranteed by a bank.

Chitty, J., held that the giving of such an undertaking was not within the ordinary scope of banking business, there being apparently no consideration given by the customers to the bank for the guarantee. On appeal it was held:—

That the act was really a perfectly unauthorized act on the part of the manager and it was not even communicated to the directors. It was impossible to say that the shareholders of the company could be made liable in such a case. The judgment of Chitty, J., was in every respect right.

That the act of the manager is within the scope of his authority is a matter of fact, the burden of proof of which is upon the plaintiff, and as to this there is no proof, and no inference of authority can be drawn. The burden of proof is upon the one affirming the relation, and the courts generally require the proof to be clear and specific: 1 A. & E. Encyc. 969. That the transaction is within the scope of banking business must be proved by the plaintiff: 3 A. & E. Encyc. 843.

It was an abnormal transaction altogether, and there was nothing in the position of Hunter or in the nature of his employment to justify his entering into the transaction or to authorize him to bind the company by it.

In *Re Cunningham & Co. Ltd.*, 36 Ch. D. 532.

In *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, the plaintiff supplied oats to one D., a customer of the defendants' bank, for the purpose of enabling D. to perform a contract with

the government for the supply of oats on the faith of a guarantee given by the defendant's manager that on receipt of the moneys to be paid by the commissariat department to the defendants for D. for the price of the oats supplied to the government by D. the defendants would pay the plaintiff out of that money the sum due to him, subject only to the debt due the bank from D. D. was at the time so largely indebted to the bank that it was practically impossible that there should be any surplus to come to the plaintiff after payment of the debt due the bank. But the manager concealed this from the plaintiff. The bank having appropriated the whole of the money to the payment of their own debt: *Held*, that the defendants were answerable for such false representation, that is, the concealment of the indebtedness of D. to the bank.

The bank in this case received a benefit through the unauthorized act of its manager, but with respect to the question whether a principal is answerable for the acts of his agent, done in the course of his master's business, and for the master's benefit, no sensible distinction can be drawn between the case of fraud and that of any other wrong if committed in the course of his service and for his benefit.

In *Lloyd* v. *Grace*, [1912] A.C. 716, at 723, Lord Halsbury referred to *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526. There is no case in which a master has been held liable for a tort committed by a servant for the servant's benefit where the act has not been done within the scope of the servant's employment or authority.

British Mutual Banking Co. v. *Charnwood* (1887), 18 Q.B.D. 714.

In *Thorne* v. *Heard*, [1894] 1 Ch. 599, when in the Court of Appeal, A. L. Smith, L.J., said, at p. 615:—

> A principal cannot be sued for the fraudulent acts of his agent, even though the agent purported to act within the scope of his employment, if, when the agent committed the fraud, he did so, not in the interest of his principal, but in his own interest.

There is no doubt, as appears from all the authorities, that the principal is answerable for the act of his agent in the course of his master's business and the words "and for his benefit" mean that is something in the master's business.

In Story on Agency, the author states the general rule that the principal is liable to third persons in a civil suit for the frauds,

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deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances and omissions of duty of an agent in the course of his employment, although the principal did not authorize or justify or participate in or indeed know of such misconduct or even if he forbade the acts or disapproved of them, but although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency, for the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit.

The expressions "acting within his authority," "acting in the course of his employment," and the expression "acting within the scope of his agency," as applied to an agent, speaking broadly, mean one and the same thing. What is meant by these expressions is not easy to define with exactness. To the circumstances of a particular case one may be more appropriate than the other: *Lloyd* v. *Grace*, *supra*.

Can it be said that Paterson, the bank manager, was not acting in the course of his employment?

It is a well known fact that banks and bank managers frequently enter into business deals and transactions that would not be classified within the strict limits of banking business.

Simpson v. *Dolan*, 16 O.L.R. 459. A firm of dealers in fruit, whose account was overdrawn at their bank, applied for further advances which the bank refused to make unless one D. was employed to look after the business, act as bookkeeper, receive all produce and countersign cheques given for the same. D. was so employed and represented to producers of fruit that it was safe for them to bring their produce to the factory, and that cheques given therefor countersigned by him would be paid by the bank. The plaintiff, relying on these representations, delivered peaches, for which he received the firm's cheque countersigned by D. The bank, which at the time had liens on the plant and property of the firm, through D., disposed of the whole output of the factory, including the plaintiff's goods and received the entire profit. On the cheque being presented, the bank refused payment, upon which this action was brought.

Held,—That the bank had such an interest in the goods delivered by the plaintiff as prevented the application of s. 4 of the Statute of Frauds, and were therefore bound by D.'s promise or representation that they would pay the cheque, though not made in writing.

D. was employed in the interests of the bank, and it was held that he had authority to give parties having produce to under-

stand that if he countersigned cheques therefor the bank would pay them at once. To that extent he was the agent of the bank.

If a man in the position of D. could so bind the bank, on the authority of the bank's manager, how much stronger would be the position and authority of the manager himself.

It is to be observed in this case that the bank received a benefit from the sale of the plaintiff's goods.

Adams v. *Craig*, 24 O.L.R. 490. The plaintiff sold goods to C. and received from C. a cheque upon a bank of which C. was a customer . . . The manager of the bank knew that a sale had been arranged by C. of goods which included the goods of the plaintiff, and that the proceeds were to be placed to C.'s credit in the bank, and that, without the plaintiff's agreement and acquiescence, the sale arranged could not be carried through. In these circumstances (C.'s account in the bank being much overdrawn) the manager made an oral promise to the plaintiff that, upon the sale being completed and the purchase money placed to the credit of C., the bank would pay the amount of the cheque. The sale was carried out and the proceeds paid into the bank; and the plaintiff sued the bank and C. for the amount of the cheque:—

Held,—that there was a new and distinct consideration for the promise made by the bank manager . . . and the direct interest of and benefit to the bank in the property passing to their customer; and, therefore, the bank were bound by the manager's promise, and were liable for the amount of the cheque. Here again is a benefit to the bank.

In *The Ontario Bank* v. *McAllister*, 43 Can. S.C.R. 338, it was held, in view of the powers conferred by s. 81 and other sections of the Bank Act, that notwithstanding s. 76, s-s. 2 (*a*) of the Bank Act, which precludes a bank, either directly or indirectly, to engage or be engaged in any trade or business whatsoever, this provision does not prevent a bank from agreeing to take in payment of a debt from a customer an assignment of a lease of the latter's business, but the question as to the carrying on the business for a time with a view to disposing of it as a going concern at the earliest possible moment is commented upon but not decided.

Osler, J.A., in the Ontario Court of Appeal, *Peterborough Hydraulic Power Co.* v. *McAlliste*, 17 O.L.R. 145, at 162, says:—

Parliament has authorized the bank to carry on the business of banking and that is the only business it can engage in or carry on directly or indirectly. But it is in the nature of things that in such a business bad debts will from time to time arise, and it can hardly be supposed that the bank is shut up in that case to suing its debtor or taking mortgage security from him even though both parties may agree that the simplest and least costly way of closing out a hopeless account is to give the debtor an immediate release in consideration of a direct transfer of his property. Morse on Banks and Banking, pp. 169, 246.

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I think that such a transaction may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized and ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*.

It was urged that the transfer was avoided by s. 76 (2) which provides that except as authorized by the Act, the bank shall not, directly or indirectly, deal in the buying or selling or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatever. This was not in my opinion a dealing within the meaning of the section, which is directed against trafficking in or carrying on the business of buying and selling goods, wares and merchandise, but was an isolated transaction entered into for a wholly different purpose, namely, the settlement of the bank's overdue debt. Morse on Banks and Banking (1888), vol. 1, p. 169.

I say nothing of the carrying on of the milling business by McAllister for the bank, for, whether this was *extra vires* of the bank or not, it was separable from and not incident to the agreement for settlement.

The officers of a bank are held out to the public as having authority to act according to the general usage of their business, and their acts within the scope of such usage and of their several lines of duty will in general bind the bank in favour of third persons who possess no other knowledge: 3 A. & E. Encyc. of Law 843.

If the moneys, the subject-matter of this action, were advanced for the purpose of assisting in carrying on the business for the bank and without the authority or knowledge of the bank and the business failed and the moneys were lost, in my opinion, such moneys could not be recovered back, as the manager in carrying on such a business was acting beyond the scope of his authority and in contravention of the Bank Act.

But were the moneys advanced to the bank, and was the business that of the bank?

Mr. Paterson, the manager, in his examination, in speaking of Baxter and Martin with reference to the business, says: "They were there because I asked them to take it over; the bank was a large creditor. I asked them to go in with the intention of benefiting the bank's business. They were to work out this debt for the bank and then they would have the business. That is, the understanding was that they would go in and work out the debt for the bank, and after the debt was worked out they would own the business. They were to consult me in regard to every payment that was made and every step that was taken."

The evidence, however, leads me to the conclusion that the business was that of Baxter and Martin from its commencement

under the name of the Winnipeg Motor Co., and it was to be conducted under the supervision of the manager of the bank until the bank's claim was paid off, the only interest the bank had in it being that of a creditor.

The moneys advanced by the plaintiff were in the interests of the business of Baxter and Martin, with a view of assisting such business and benefitting the interests of the bank under the arrangement already set forth.

From a perusal of the authorities, I am of the opinion that, had the moneys been paid by the plaintiff direct to Baxter and Martin and the bank had received no benefit, there would be no liability on the part of the bank, as the manager acted beyond the scope of his authority, a position which the plaintiff must be held to have known.

The question remains, did the bank receive any benefit?

The money was paid to the bank manager and was by him deposited to the credit of the Winnipeg Motor Co.

The cheque of the Winnipeg Motor Co. for $7,500 in favour of C. C. Fields, initialled by the manager of the bank, would increase the indebtedness of that company to the bank, and this was paid out of the plaintiff's money. Apart from this the indebtedness of the company to the bank on October 15, 1917, was reduced by the deposit of the plaintiff's $10,000, and if the bank paid the money out on the cheques of the company it cannot, it seems to me, be heard to say that they received no benefit from it, if such is the case the fault is that of their manager.

The plaintiff is, in my opinion, entitled to judgment for $10,000 with costs. *Judgment for plaintiff.*

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CAN.
Ex. C.

Exchequer Court of Canada, Audette, J. February 10, 1916.

EXPROPRIATION (§ I C—144)—WATER LOTS—BASIS OF VALUATION—MUNICIPAL ASSESSMENT—ADVANTAGES—WHARF.

The basis or starting-point for the valuation of water lots, expropriated by the Crown for the purpose of wharf improvements, may be had from a municipal assessment of the property, taking into consideration the higher assessable value of the land owing to its location, and the advantage afforded to the owners as a result of the improvements.

Statement.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

CAN.

EX. C.

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Audette, J.

H. E. Kennedy and *E. Bailey Fisher*, for plaintiff; *S. J. Rothwell*, K.C., and *H. A. Bergman*, for defendant.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were taken, under the provisions of the Expropriation Act, by His Majesty the King, for the purpose of a public work, namely, for an approach to a proposed wharf on the Pas River, by depositing on October 6, 1914, a plan and description of such lands, in the office of the Registrar of Titles for the Land Registry District of Neepawa, in the Province of Manitoba, in which Land Registration District the same are situate.

The total area of the land taken—inclusive of the two pieces of land respectively described in paragraph 2 of the information—contains by admeasurement (0.13) thirteen one-hundredths of an acre.

The Crown, by the information, offers the sum of $1,000 in full compensation for the lands so taken, and for all damages resulting from the expropriation.

The defendants at bar, by their plea, as amended at the trial, claim the sum of $5,500 for the lands taken and for all damages consequent thereto.

The defendants' title is admitted.

By expropriating the piece of land (0.02) two-hundredths of an acre—described in sub-par. (b) of par. 2 of the information, the access, by Larose Ave., to the defendants' property has been absolutely taken away, and the expropriation made in that manner would, indeed, have resulted in very serious damages to the defendants' property. However, counsel for the Crown, acting under the provisions of s. 30 of the Expropriation Act, filed at trial an undertaking dedicating to the public for the purposes of a public road or highway for ever this piece of land of (0.02) two-hundredths of an acre. As a result of such undertaking the parcel of land marked "A" on plan "C" will now be used by the public and the defendants as a continuation of Larose Ave., leaving thus free, open and untrammelled, the access to the defendant's property by that avenue.

This undertaking removes entirely from the consideration of this case the question of damages, leaving for adjudication only the question of the value of the lands taken.

On behalf of the defendants the following witnesses were heard:—

Auguste de Tremaudan, eliminating the question of damages, and the rights of wharfage, valuing the lands taken at $5,000.

Neil T. McMillan values Plot "B" at $1,925, and Plot "A" at $760—in all the sum of $2,685, eliminating the two elements above mentioned.

Under similar aspect, C. S. Tyrrell, values Plot "B" at $1,900 and Plot "A" at $760—making in all $2,660.

George M. Brown values the two plots at $2,500—although upon being asked by the Crown to place a value upon the land, his valuation for the same, as appears by ex. 6, is only $1,000. This witness's mentality and judgment are obviously affected by the interest of the party who calls upon him for the expression of his opinion, a circumstance which will necessarily go to make his valuation of very little use and reliability. Eliminating wharfage rights and damages, witness Harry C. Beatty values the two pieces of land at $7,000. There was some further evidence on behalf of the defendants with respect to the general facts of the case.

On behalf of the Crown the following witnesses were heard:—

C. H. Anderson and David E. Brown, who placed a value upon the two plots at the total sum of $1,000.

Henry Elliott, the secretary of the town of Pas, states that the defendants' property, containing 3.30 acres, was assessed in 1914, at the sum of $30,000. In 1915, exclusive of buildings, the land was also assessed at $30,000. The original valuation of the assessors for that year (1915) had been $40,000, but was reduced by an order of the court to $30,000.

Two of the defendants' witnesses, de Tremaudan and Beatty, hold substantial interests in real estate at The Pas for speculative purposes, and I venture to say that their valuation is based more on speculative value than upon the real market value. G. M. Brown's testimony, for the reasons given above, must be eliminated. Then we remain with the disinterested evidence of both McMillan and Tyrrell at $2,685 and $2,660 respectively, based upon the market value of the property, as against the evidence of the Crown at $1,000.

To reconcile this conflicting evidence recourse should be had to

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the municipal assessment to be used only as a basis or starting-point. Although such assessments are under the statute directed to be made at the actual value of the property (R.S.M., c. 117, s. 29), it must be taken to be so done in a conservative manner. Under the municipal basis for the 3.30 acres at $30,000, the (0.13) thirteen one-hundredths of an acre would represent a valuation of about $1,181.81. Using this as a starting-point, one must consider that a small piece of land, carved out, as it is in the present case, in an irregular shape, with the base of the triangle abutting on the river, the apex of the triangle where the property is worthless, cut in that shape, would call for a larger price than the regular piece of land. Hence, the proper valuation of a parcel of land taken in that shape would be assessed at a higher figure than where the whole of the property or a large part thereof is taken, and also at a higher figure than the municipal assessment made, as said before, in a conservative manner.

The defendants own the land abutting on the river, but they are not proprietors of the part covered by the water and have no right to build wharves or make any erection in the river, without leave from the Crown. *Gillespie* v. *The King*, 12 Can. Ex. 406.

This prospective public work, this wharf which the Crown is now putting up, will be of great advantage to the defendants.

Taking all these circumstances into consideration, I hereby assess the value of the land at the sum of $1,700, to which should be added 10% for the compulsory taking of the same against the wish of the owner, making in all the sum of $1,870.

Therefore, there will be judgment as follows: (1) The lands expropriated herein are declared vested in the Crown since the 6th day of October, 1914; (2) the compensation for the land taken, and for all damages resulting from the said expropriation, is hereby assessed at the sum of $1,870, with interest thereon at the rate of 5% per annum, from October 6, 1914, to the date hereof; (3) the defendants are entitled to be paid the said sum of $1,870, with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all mortgages and incumbrances whatsoever; (4) the defendants are further entitled to the rights and privileges mentioned in the undertaking filed at trial herein; (5) the defendants are further entitled to their costs.

Judgment accordingly.

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SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

COVENANTS AND CONDITIONS (§ III C—35)—PARTY TO DEED NOT SIGNING—RIGHTS AND LIABILITIES.

A party to a deed who has not executed it cannot enforce the provisions of the deed by action without performing or observing all the covenants and stipulations on his part; but, on the other hand, he is not liable to an action of covenant by the other party to the deed.

Statement.

APPEAL by defendant from the trial judgment in an action for the purchase money due under an agreement for sale; the agreement having been assigned by the purchaser to the defendant company as collateral security, the defendant company not having executed the assignment. Reversed.

W. B. Willoughby, K.C., for appellant; *P. H. Gordon*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S. (dissenting):—The only question involved in this appeal is, whether the plaintiff has a right of action against the defendant company for the purchase money due to him under his agreement with Creighton. The statement of claim is not properly framed to raise this issue, but, as the trial judge has disposed of the case on that point, the necessary amendments may be assumed to have been made.

The agreement for sale between Hart and Creighton provides that:—

> Any sale, transfer or pledge of this contract or any interest on any of the premises herein described shall not be binding on the vendor unless the vendor shall consent thereto in writing hereon.

The assignment from Creighton to the defendant company contained a recital as follows:—

> Whereas the party of the first part is desirous of assigning his interest in said lands to the party of the second part.
>
> And the parties of the second part have agreed in consideration of such assignment accepted by the party of the third part, to give their personal covenant to the party of the third part to carry out and fulfill all the covenants and conditions in the said agreement by the party of the first part agreed to be done, paid or performed.
>
> And the party of the first part in consideration of the party of the third part accepting the said assignment, hath agreed that this assignment, or the acceptance thereof by the party of the third part, shall not in any way affect the rights of the party of the third part to enforce the covenants of the party of the first part in the said agreement contained against him or his representatives.

It also contains the following clause:—

> And the parties of the second part, in consideration of the party of the third part accepting this assignment, which acceptance may be without formal execution hereof by him, hereby covenant and agree to and with the

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said party of the third part . . . successors and assigns to pay the several sums of purchase money and interest in the said hereinbefore-in-part recited agreement contained, on the days and times when the same shall become due, and to do and perform all other acts and things which the party of the first part in the said agreement covenanted with the party of the third part to do.

This document was prepared by the defendant's solicitors.

Some time before the consent of the plaintiff to this assignment was obtained, Creighton, according to his evidence at the trial, where he was a witness for the defendant, saw Hart and told him that the defendant wanted him to assign his contract and wanted Hart to execute the assignment. Hart on this occasion made no definite answer. Later on the assignment was mailed to Creighton by the defendant, in order that he might secure Hart's signature to a form of consent which was endorsed on it. Creighton sent it out to Hart by messenger and Hart signed the consent.

The defendant company subsequently went into possession of the land under the assignment, and has since then been in receipt of the rents and profits.

There can be no doubt that the intention of the defendant company was to take the assignment from Creighton as collateral security only, and that was well understood and agreed to by Creighton in spite of the form of assignment used. There is no covenant of indemnity, express or implied, so that, under any circumstances, the facts of this case could not bring it within the decisions in *Maloney* v. *Campbell*, 28 Can. S.C.R. 228, or *Brough* v. *McClelland*, 18 Man. L.R. 279. In both these cases the decisions turned on the fact that there was an obligation on the part of the purchaser of mortgaged lands, or the assignee of a purchaser's interest, to indemnify the grantor, and that that obligation having been assigned to the person entitled to recover the debt, there was a direct right of action against the assignee.

I am of opinion, however, that the plaintiff is entitled to succeed for the reasons stated by the learned trial judge.

The consent of the plaintiff was essential to the validity of the assignment, and that consent was obtained by the defendant company and for its benefit. It must be assumed that the plaintiff signed the consent endorsed on the assignment on the faith of and in consideration of the terms of that assignment. As has clearly

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been pointed out, the assignment was prepared by the defendant's solicitors, as well as the consent endorsed on it, and the consent was signed by the plaintiff at the request of Creighton, acting on the instructions of the defendant.

These facts bring the case, in my opinion, well within the principle laid down in Co. Litt. (*a*) 230.b. note 1; cited by Bayley, J., in *The King* v. *Houghton-Le-Spring*, 2 B. & Ald. 375, at p. 377, 106 E.R. 403, that "a party who takes the benefit of a deed is bound by it, although he has not executed it."

Haultain, C.J.S.

See also 7 Hals. 349; *Smith* v. *Hughes*, L.R. 6 Q.B. 597 at 607; *Macdonald* v. *Law Union Insurance Co.*, L.R. 9 Q.B. 328, at 330; Leake on Contracts (6th ed.), p. 94.

For these reasons, I think that the trial judge made a proper disposition of the case and that the appeal should be dismissed with costs.

NEWLANDS, J.A.:—On October 3, 1910, one Norman Dunn sold to the respondent, Hart, the north half of section 25, in township 9, range 17, west of the second meridian, for the sum of $9,600. On January 13, 1912, the respondent Hart resold the said lands to one Milford Creighton on crop payments for $16,800. The vendor, Dunn, assigned his contract with the respondent Hart to one Archibald Bryce, who commenced proceedings under this contract (the same having fallen into arrear) and the appellant eventually purchased the interest of the said Bryce and was substituted as plaintiff in the said action, an order *nisi* in which is still outstanding. Milford Creighton, wishing to raise money, applied to the appellant for a loan, and the appellant agreed to advance $12,000 upon an hotel in Yellow Grass, the contents of the hotel, certain shares in the British Columbia Life Assurance Co. and the interest of the said Creighton in the lands above described.

Newlands, J.A.

The agreement for sale between the respondent and Milford Creighton contains the following clause:—

> It is also agreed that any sale, transfer or pledge of this contract or any interest therein or any of the premises herein described, shall not be binding on the vendor unless the vendor shall consent thereto in writing thereon.

The assignment of this contract was prepared by the solicitors for the appellant, and in this the respondent Hart is described as the third party. This assignment was absolute in form and contains the following clause:—(See judgment of Haultain, C.J.S.)

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This assignment also contains the following clause:—(Cited in judgment of Haultain, C.J.S.) This assignment was presented to the respondent by an employee of Milford Creighton for his signature, the documents having been sent to Creighton by the solicitors for the appellant. The respondent duly approved of the assignment on December 26, 1913, by endorsement on the back of the same over his signature.

Milford Creighton fell very much in arrear both under his contract with the respondent and under the mortgage with the appellant and the appellant acting under the said assignment of Creighton's agreement went into possession of the property and hired Louise Creighton, the wife of Milford Creighton, to farm the said lands. Hiring agreement dated April 5, 1916. A new agreement was entered into the following year in the same form, and the appellant is still in possession through its employee Louise Creighton.

The position taken by the respondent on the trial of this action as the basis of the appellant's liability was that under his agreement with Milford Creighton on crop payments no assignment or pledge of the contract was valid unless the same was approved by the respondent in writing. An assignment absolute in form and containing the usual covenants on the part of the assignee was presented to him by Creighton and the same was duly approved, although not executed by the appellant, and a copy left with the respondent.

The appellant has acted under its assignment and accepted the benefits it confers and on this ground the respondent submits that, although the assignment was not executed by the appellant it must, nevertheless, be bound by the agreement as a whole and assume the liabilities imposed by its terms.

The trial judge found for the plaintiffs.

The ground upon which counsel for the respondent claims that the trial judge's judgment should be supported is the principle laid down by Denman, C.J., in *Webb* v. *Spicer* (1849), 13 Ad. & E. (N.S.) 886, at 893, 116 E.R. 1502, at 1505:—

> That a man may be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assent to it, and take a benefit under it.

The same principle is laid down in 10 Hals. 401:—

> But where a person named in some deed, whether as a party thereto or

not, has, without executing the deed, accepted some benefit thereby assured to him, he is obliged to give effect to all the conditions on which the benefit was therein expressed to be conferred; and he must therefore perform or observe all covenants or stipulations on his part which are contained in the deed and on the performance or observance of which the benefit conferred was meant to be conditional.

The examples given in 10 Hals. for this proposition are cases where the party who did not execute the deed sought to enforce it and it was held that in order to do so he must perform or observe all covenants or stipulations on his part.

In *Morgan* v. *Pike*, 14 C.B. 473, 139 E.R. 195, it was held that a mortgagee who has made a loan on mortgage, but has not executed the mortgage deed (which has been executed by the mortgagor only) is bound to give effect to a proviso therein contained for the reduction of the rate of interest on punctual payment, or for allowing the loan to remain on mortgage for a certain time. See also *May* v. *Belleville*, [1905] 2 Ch. 605; *Dalton* v. *Fitzgerald*, [1897] 1 Ch. 440, [1897] 2 Ch. 86, and *Webb* v. *Spicer*, above referred to.

The principle laid down in 10 Hals. 400:—

> When an indenture is expressed to be made between several parties or a deed poll to be made by more persons than one, and some or one only of such parties or persons execute the same, it is not the deed of any person who has not executed it,

is not interfered with by these decisions.

Jenkins v. *Robertson*, 22 L.J. Ch. 874, is an authority directly in point that a party who has not executed a deed is not liable in an action of covenant. In that case Kindersley, V.C., said:—

> Robertson, who prepared and was a party to the deed, never executed it; and the question is, whether, that being an instrument not under the seal of Robertson, assuming that it amounts to a contract on his part to apply the trust-money in the manner pointed out by the deed—whether in the absence of Robertson's seal to the deed, his liability under it constitutes a specialty debt against his estate. The question in fact amounts to this—whether in such a case an action would lie at all against Robertson, and would be an action on the covenant.

Later on he says, at 877:—

> Under these circumstances, I think myself bound to determine the case upon principle, there being no sufficient authority either way, that the want of the seal of the party sought to be charged prevents it from being a specialty debt. In fact, if the argument of the plaintiff were to prevail, I do not see how it could stop short of this—that if by a deed real property were conveyed to a person as a trustee not a party to the deed, then that person misapplying the property would be bound upon specialty, though not under his seal at all, but under the seal of somebody else; that would be so monstrous

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that it never could be intended. My opinion, therefore, is, with respect to the debt due to the plaintiff, that it is only a simple contract debt.

The effect of the cases seems to be that a party to a deed who has not executed it cannot enforce the provisions of the deed by action without performing or observing all the covenants and stipulations on his part; but, on the other hand, he is not liable to an action of covenant by the other party to the deed.

Newlands, J.A.

The appeal should therefore be allowed, but with an account as ordered by the trial judge.

It was suggested on the argument that under the circumstances of this case the defendants would be estopped from denying that they had executed the assignment in question. Estoppel was not pleaded, nor do I think there was any change in the circumstances which would cause the defendants to be estopped. The plaintiff has the same remedy against Creighton as usual. The appellant should have the costs.

Lamont, J.A.

LAMONT, J.A.:—The plaintiff, under an agreement of sale, sold the north half-35-9-17, west of the 2nd, to one M. J. Creighton for $9,600. The said Creighton assigned the agreement of sale and all his interest in the land to the defendants as collateral security for an advance of $12,000. The agreement of sale contained a clause that no transfer or pledge of the agreement or any interest therein or in the premises therein described should be binding on the vendor unless he consented thereto in writing. The assignment contained a clause providing that the assignee should keep and perform all the covenants and obligations of the assignor Creighton. The defendant company, however, did not execute the assignment. Some time later, M. J. Creighton not meeting his obligations to the defendants, they took possession of said land and contracted with Louise Creighton, wife of the said M. J. Creighton, to farm it; which she did during the seasons of 1916 and 1917. The plaintiff now sues the defendants for the purchase-money which Creighton covenanted in the agreement of sale to pay.

The judge before whom the matter came gave judgment in the plaintiff's favour. His reasons for so doing he sets out as follows:—

In 7 Hals. 349, quoting Blackburn, J., in *Smith* v. *Hughes*, L.R. 6 Q.B. 597, at p. 607, it is stated that:—"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting

to the terms proposed, and the person making the offer acts upon that belief, the man thus conducting himself is bound by the contract as if he had intended to agree to the other party's terms."

And to paraphrase the language of the same judge in *Macdonald* v. *Law Union Ins. Co.*, L.R. 9 Q.B. 328, at p. 330, there can be no ground for saying that a party can accept and adopt a contract, although he has not put his hand to it, and then reject some of the terms of it. See also 10 Hals. 401.

The authorities cited appear to conclusively establish the liability of the defendant company upon the covenant contained in this assignment, notwithstanding that the agreement has not in fact been executed by the defendant company.

With deference, I am of opinion that the remarks of Lord Blackburn quoted by the trial judge have no application. The basis of the liability there set out is estoppel. A man conducting himself so that a reasonable man would think he was assenting to the terms proposed is estopped from denying that he so assented. But a party relying upon estoppel, in a case of this kind, must expressly plead it. *Haynes* v. *Wilson*, 20 D.L.R. 569, 7 S.L.R. 449.

In the pleadings in this case it is nowhere set out that the defendants were estopped from saying that they were not bound by the terms of a document which they had not executed. Even had estoppel been pleaded, I cannot see any evidence that the plaintiff relied upon any conduct on the part of the defendants, or that he in any way altered his position to his prejudice by anything done by the defendants. The plaintiff retained every remedy for enforcing the purchase-money which Creighton had agreed to pay which he had prior to his assenting to the assignment. At the trial, the plaintiff did not give evidence, although it is stated he was present. For anything that appears in the appeal book, he may have been well aware that the defendants were taking the assignment as collateral security only.

The other ground upon which the judgment is based is that a party cannot take the benefit of a contract and then refuse to be bound by all its terms, because he has omitted to execute it. This principle is stated in 10 Hals. 401, in the following language:—

> But where a person named in some deed, whether as a party thereto or not, has, without executing the deed, accepted some benefit thereby assured to him, he is obliged to give effect to all the conditions on which the benefit

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was therein expressed to be conferred; and he must therefore perform or observe all covenants or stipulations on his part which are contained in the deed and on the performance or observance of which the benefit conferred was meant to be conditional.

Under the principle here stated, a party who has not signed a deed will be held liable to observe and perform all the covenants therein contained if he takes a benefit under it and if it was intended between the parties that such benefit should be conferred only on condition that the contract would be performed. It is therefore necessary to establish, (1) that the benefit was offered conditionally, and (2) that the condition was assented to. There is in this case no evidence that the plaintiff's consent to the assignment was conditioned upon the assumption by the defendants of a personal liability; or that they ever consented to assume it. The fact that they were taking the assignment as security, in my opinion, prevents any presumption being raised that they were agreeing to become responsible for the unpaid purchase money. It is primary law that a liability *ex contractu* cannot be imposed upon a man otherwise than by his act or consent. Had the defendants been seeking the aid of the court to obtain some benefit granted to them by the assignment, the court would enforce the covenants in favour of the defendants only on condition that the defendants performed the covenants which impose obligations on them. If they were obliged to stand on the agreement to obtain a benefit, they would be compelled to abide by all the terms thereof.

This, however, is not the case here. There being no evidence that the plaintiff's consent was given on condition that the defendants would be responsible for Creighton's liability, or that the defendants ever assented thereto, the plaintiff's action must fail.

I would allow the appeal with costs. The defendants being now the registered owners of the property, and the plaintiff being indebted to them under his purchase from Dunn, an account should be taken as directed by the trial judge.

Elwood, J.A.

ELWOOD, J.A., concurred with LAMONT, J.A.

Appeal allowed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. July 5, 1918.

CRIMINAL LAW (§ II F—68)—MOTION TO QUASH CONVICTION—CONSIDERATION OF TRIAL JUDGE'S CHARGE TO JURY.

In a criminal trial where insanity is pleaded as a defence the jury should be told by the trial judge in his charge that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect or reason from disease of mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

In considering a portion of the trial judge's charge objected to, such portion must be taken and construed in conjunction with the charge as a whole and will not be a ground for quashing the conviction if it is evident that the jury could not have understood otherwise than that the prisoner was entitled to an acquittal, if they were satisfied that he did not know the nature and quality of the act he was charged with committing and that it was wrong.

2. CRIMINAL LAW (§ II A—31)—TRIAL—PROCEDURE—RIGHT OF ATTORNEY-GENERAL TO REPLY—EVIDENCE OF INSANITY—CROWN SHOULD NOT CALL WITNESSES AS TO.

Sec. 944 (3) of the Criminal Code preserves to the Attorney-General the right to reply, and whether he chooses to exercise such right or not he is not bound to sum up for the Crown at the conclusion of the evidence, before the prisoner's counsel addresses the jury.

It is not proper for the Crown to call evidence of insanity, but any evidence in possession of the Crown should be placed at the disposal of the prisoner's counsel, to be used by him if he thinks fit.

Statement.

CROWN case reserved. Motion to quash a conviction of murder against the defendant, at the Queens County Circuit Court, before Barry, J., and a jury. Conviction affirmed.

A. R. Slipp, K.C., moves to quash the conviction; *J. P. Byrne*, K.C., Attorney-General, for the Crown, *contra*.

The judgment of the court was delivered by WHITE, J., being read by HAZEN, C.J., in the absence of WHITE, J., HAZEN, C.J., and GRIMMER, J., agreeing.

White, J.

WHITE, J.:—This is a Crown case reserved. Some of the questions submitted for the determination of this court were reserved by the judge who tried the case, while others of them were, upon application of the prisoner's counsel, reserved by this court. The case as stated by the trial judge upon the questions reserved by him, is as follows:—

At the Queens County Circuit of the Supreme Court, begun on the 21st day and holden on the 21st to the 25th days of May last past, at Gagetown, in the County of Queens, Barry, J., presiding, the defendant Robert Keirstead was indicted and tried for and found guilty of having, on the twenty-second day of December last, murdered his wife, Elsie Keirstead.

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After the trial and verdict, Mr. A. R. Slipp, K.C., of counsel for the accused, applied to the court orally to reserve certain questions of law arising during the trial, and on the proceedings incidental thereto, and arising out of the direction of the judge in his charge to the jury, for the opinion of the Appeal Division of the Supreme Court. The application for a reserved case was granted, sentence of the defendant Keirstead was postponed until the questions reserved shall have been decided, and the Court was adjourned to Tuesday the 25th day of June instant.

Case stated for the opinion of the Appeal Division of the Supreme Court.

There was and is and can be no doubt that Keirstead killed his wife; and it was not disputed by his counsel at the trial.

The Crown witnesses were cross-examined by the defence, but the accused himself called no witnesses, and his counsel claimed, but was refused, the privilege of addressing the jury last. That privilege was allowed the Attorney-General, who appeared in person for the Crown.

The defence was based upon the plea of insanity, under s. 19 of the Criminal Code, which provides that:—

19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.

2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify his act or omission.

3. Everyone shall be presumed to be sane at the time of doing or omitting to do any act, until the contrary is proved.

Questions reserved.

The questions reserved for the opinion of the Appeal Division are:—

1. Having regard to the whole context of his charge, was the trial judge in error when, in directing the jury upon the subject of insanity and the *onus probandi* when a plea of insanity is pleaded, he said to them:—

"(*a*) The onus of proving this plea is, therefore, on the accused himself, and if he leaves his insanity in doubt, if he fails to prove to your entire satisfaction that he was insane, or leaves the question whether he was insane or not in doubt, then he is not entitled to the benefit of that doubt, but his defence falls to the ground.

"(*b*) The onus rests on him, and you must be satisfied that he was insane before you can give effect to his plea. If the matter be left in doubt, it will be your duty to convict him, for every man is presumed to be responsible for his acts until the contrary is clearly proved. That is the law.

"(*c*) If he does not satisfy you that he was insane at the time he killed his wife, if he leaves that question in doubt, under the law, you are bound to convict, simply because he has not discharged the onus of proof that the law casts upon him.

"(*d*) But if you acquit the prisoner, if he has been able to satisfy you that at the time he killed his wife he was insane and wholly irresponsible, or that he was labouring under specific delusions, and that he did not appreciate

the nature and quality of the act he was committing, and that he did not know that it was wrong, and on being so satisfied, you find the prisoner not guilty and acquit him, then, under the law, you are obliged to find specially whether Keirstead was insane at the time he killed his wife, and to declare whether he was acquitted by you on the ground of such insanity."

2. No witnesses having been called for the defence, was the trial judge right in refusing the claim, under s. 944 of the Criminal Code, of the prisoner's counsel to the privilege of addressing the jury last?

3. Was there error in the trial judge not requiring the Attorney-General to sum up the evidence on which he relied for conviction before the counsel for the prisoner was obliged to address the jury?

4. The Crown witnesses having been cross-examined with a view to establishing the prisoner's insanity, was the trial judge correct in stating in his charge to the jury that there was no duty cast upon the Crown to put Dr. Anglin on the stand to give evidence as to the prisoner's state of mind?

Refusal to reserve.

Counsel for the accused also applied for and was refused leave to have reserved the following points or grounds of error:—

1. The judge should have pointed out to the jury that, evidence having been adduced that the prisoner was insane it was not contradicted by the Crown.

2. Error on the part of the trial judge in not pointing out to the jury that the evidence of delusions and hallucinations was uncontradicted.

3. Misdirection.

4. Verdict against evidence.

Reasons for refusal to reserve.

I refused to reserve these several matters, being of opinion that in regard to:—

1. While on the cross-examination of the Crown witnesses evidence was elicited of certain delusions or hallucinations under which the prisoner was said to be labouring, whether or not this was evidence of insanity was a question of fact for the jury, who were directed to take these matters into consideration when deliberating upon the question of the prisoner's sanity. And I am and was by no means satisfied that it is the duty of the trial judge to point out to the jury contradictions in the evidence, or to state, when it is the fact, that any particular piece of evidence is uncontradicted. The jury were told more than once that, excepting the question of fact whether the prisoner was insane or not, there were no facts in dispute, and no contradictory evidence. This is a matter, it is thought, that would be obvious enough to any intelligent jury, without special directions, especially when it is borne in mind that the defence called no witnesses.

2. For the same reason as before I refused to reserve this point. Unless the witnesses for the prosecution prove hostile or adverse, it is not open to the Crown to call witnesses to impeach their characters or contradict them. Except by impeaching the character or questioning the veracity of the witnesses who depose to them, evidence of delusions and hallucinations is not, in the opinion of the trial judge, susceptible of contradiction.

3. This objection is put in too general a way properly to be made the subject of a reserved case. In order to take advantage of error in a judge's charge, the passage or portions objected to should be specifically pointed out.

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4. The trial judge is of the opinion that whether the verdict is against evidence or not is a question of fact and not of law; and under the statute it is only questions of law that can be made the subject of a reserved case.

In order to preserve to the prisoner any rights that he may be advised he has by reason of the trial judge's refusal to reserve the four above enumerated questions or grounds of error, in the event of the Appeal Division being of the opinion that those matters should have been reserved, this note is made of the application to reserve, and the court's refusal.

Dated this tenth day of June, A.D. 1918. (Sgd.) J. H. Barry, J.S.C.

When the case reserved by the judge came on for hearing before us, Mr. Slipp, K.C., on behalf of the prisoner, asked to have reserved certain additional questions. After some discussion, the Attorney-General consented to the reserving of the following questions in addition to those reserved by the trial judge:—

5. Should the trial judge have pointed out to the jury in his charge having stated, "that evidence had been adduced that the prisoner was insane," that such evidence was not contradicted by the Crown?

6. Was there error on the part of the trial judge in not pointing out to the jury that the evidence of delusion and hallucinations was uncontradicted?

No. 7. Misdirection.

(*a*) Was there error or misdirection at the trial in consequence of the presiding judge after omitting reference to evidence, pages 26, 23 and 33, of prisoner's delusion that his wife wanted to shoot him—to kill him—stating to the jury (at page M of his charge), as follows:—"none of the delusions with which it is alleged Keirstead is afflicted, are in my opinion such as would lead any man otherwise sane to believe in a state of things which, if it existed, would justify or excuse the crime murder"?

(*b*) Was the summing up misleading, and if so, to such an extent as to be likely to cause the jury to go wrong?

(*c*) Was there misdirection or non-direction at the trial as to the evidence of (1) Myrtle Keirstead as to the inadvertent misquotation of and omission of vital portions of her evidence, pages 26 and 33, as to the prisoner's delusion that his wife "was trying to kill him" and that "he thought she was going to shoot him"? (2) As to the inadvertent misquotation and minimizing of Dr. Kennedy's evidence during the taking of it and especially to the reference to it in the learned judge's statement (page 125 in Dr. Kennedy's evidence) as to the doctor's answer to the main question—"I think the answer will not be any good to the jury."

It was agreed between the Attorney-General and counsel for the prisoner, that the case reserved by the trial judge, including his refusal to reserve certain questions and his reasons for such refusal, together with the additional questions above set out, the judge's charge, and the evidence taken at the trial, should constitute the stated case. I will consider the questions reserved in the order in which they are stated.

Taking up the first one, and speaking more particularly with reference to clauses (a), (b) and (c) thereof, I think the trial judge

was not in error in charging as stated. In *McNaghten's* case, 10 Cl. & F. 200, at 210, 8 E.R. 718, at 722, fourteen of the fifteen judges, in answering questions 2 and 3 submitted to them by the House of Lords, said:—

We submit our opinion to be, that the jury ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Stephen, in his History of the Criminal Law of England, vol. 1., p. 153 *et seq.*, criticises somewhat adversely the answers of the judges in the *McNaghten* case, and points out that "they did not form a judgment upon definite facts proved by the evidence. They are mere answers to questions which the judges were probably under no obligation to answer, and to which the House of Lords had probably no right to require an answer as they did not arise out of any matter judicially before the House." At the same time he says: "The interest of the question as to the authority of the answers is speculative rather than practical, as there can be no doubt that the answers do express the opinion of fourteen out of the fifteen judges, and they have in fact been accepted and acted upon ever since they were given." And again he says: "It has been the general practice ever since for judges charging juries in cases in which the question of insanity arises, to use the words of the answers given by the judges on that occasion. It is a practice which I have followed myself on several occasions, nor until some binding authority is provided can a judge be expected to do otherwise, especially as the practice has now obtained since 1843."

S. 19 (3) of the Criminal Code, in enacting as it does (3) "Everyone shall be presumed to be sane at the time of committing or omitting to do any act until the contrary is proved," merely gives statutory form and effect to what was at the time of its enactment a well-established principle of the common law.

From the statement in the answers of the judges in the *McNaghten* case, that "Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes

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until the contrary be *proved to their satisfaction*," coupled with clause 3 of s. 19 of the Criminal Code, placing the onus of proving insanity upon the prisoner, it follows, I think, that the defence of insanity must be established beyond a reasonable doubt. Insanity of the prisoner could not properly be said to have been proved to the satisfaction of the jury, while the result of the evidence was to leave in their minds a reasonable doubt as to whether the prisoner was in fact insane. The words of the judges, in their answer referred to are, "that to establish a defence on the ground of insanity it must be *clearly proved*, etc."

With reference to clause (d) of No. 1 of the reserved questions, counsel for the prisoner claimed that the trial judge, by using the language set out in that clause, and particularly the words, "If he has been able to satisfy you that at the time he killed his wife he was insane and wholly irresponsible," would be very liable to lead the jury to infer that, before they could acquit the prisoner, they must be satisfied that he was so insane as to be wholly irresponsible for any of his acts.

The language complained of in clause (d) was used by the judge as he was nearing the close of his charge, and while he was explaining to the jury the form which their verdict should take in the event of their finding the prisoner insane. In an earlier portion of his charge, he had referred to the different kinds and degrees of insanity, stating that, "Among persons who are insane, or *non compos mentis*, are included idiots, lunatics, persons labouring under delirium tremens, imbeciles, persons suffering from delusions, monomaniacs and homicidal maniacs;" and I would take it, from his use of the words referred to in clause (d) "was insane and wholly irresponsible," that the judge was directing the jury as to the form of their verdict in the possible event of their finding the prisoner to have been absolutely and wholly insane, as distinguished from one who had lucid intervals, or who, being in some respects sane, suffered from insane delusions. His charge upon the question of insanity is of such length that I cannot well quote it *in extenso* here; but it is sufficient I think to say that I do not think any juryman of ordinary intelligence could fail to understand from the charge that the prisoner was entitled to be acquitted on the ground of insanity if he either failed to understand the nature and quality of the act of killing with which he was charged, or did not

know that such act was wrong. The portion of the judge's charge referred to in clause (d), and directly under consideration, must be taken and construed in conjunction with the charge as a whole; but even if we take the portion of the charge referred to in (d) as it stands, separate and apart from the rest of the charge, it will be seen that the judge was dealing with two possible contingencies, one of which would arise in case the jury should find the prisoner insane and wholly irresponsible, the other, in case the jury should reach the conclusion that the prisoner, although in some respects sane, was labouring under specific delusions, and did not appreciate the nature and quality of the act he was committing, and did not know that it was wrong. Inasmuch as it is quite clear, that if the prisoner were insane and wholly irresponsible, he could not appreciate the nature and quality of the act he was committing, and could not know that it was wrong, it seems to me quite evident that the jury could not have understood, from this passage, otherwise than that if they were satisfied the prisoner did not know the nature and quality of the act he was charged with committing, or did not know that it was wrong, he was entitled to acquittal on the ground of insanity.

The answer therefore to question 1 will be in the negative.

As to questions 2 and 3, it will be convenient, I think, to deal with them together. S. 944 (3) of the Code reads as follows:—

> 3. If no witnesses are examined for the defence the counsel for the accused, or the accused in case he is not defended by counsel, shall have the privilege of addressing the jury last, otherwise such right shall belong to the counsel for the prosecution: Provided, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any counsel acting on behalf of either of them.

I think it abundantly clear, that, under the proviso of that subsection preserving to the Attorney-General the right of reply, the judge was quite right in declining to deprive him of such right. It is claimed, however, by the prisoner's counsel that whether the Attorney-General possessed, and chose to exercise, such right of reply or not, he was bound to sum up for the Crown at the conclusion of the evidence; and that through his failure to so sum up, the accused was prejudiced so as to entitle him to either an acquittal or a new trial. I do not assent to that view. When the Attorney-General proposes to exercise the right of reply allowed to him by virtue of his office, he is not, I think, bound to address the jury

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twice after the taking of evidence is concluded. In *Reg.* v. *Toakley*, 10 Cox's Criminal Cases, 406, the prosecution was instituted by the post office authorities, for feloniously receiving a bill of exchange knowing it to have been stolen. I quote from the report:—

The prisoner called no witnesses for his defence. At the conclusion of the case, after Mr. Ribton's address for the defence, the Solicitor-General rose to reply *on the whole case*. Ribton submitted he had no right to do so, and was prepared to support his objection by a case. Mellor, J., was clearly of the opinion that the right existed. He had so ruled over and over again after objection taken.

That case is of value here because the right of reply preserved to the Attorney-General by s. 944 (3) of the Criminal Code, is analogous to, if it is not incidental with, the right of reply exercisable in England by the Attorney-General as a prerogative right of the Crown. See *The King* v. *Martin*, 9 Can. Cr. Cas. 371, and authorities there referred to.

R. v. *Cook*, 22 Can. Cr. Cas. 241, a case tried in Nova Scotia, was cited by the counsel for the prisoner. From the report it appears that:—

At the conclusion of the Crown case the defence announced it would call no witnesses. O'Hearn claimed the right to address the jury last. Jenks, K.C., referred to *R.* v. *Martin*, 9 Can. Cr. Cas. 371, 9 O.L.R. 218. Ritchie, J., ruled that the Crown would have to address the jury first, the prisoner's counsel next, and the Deputy-Attorney-General would have the right to reply. This course was adopted, Jenks, K.C., stating that he waived his right of reply.

It will be observed that this ruling was given upon a claim put forward by the prisoner's counsel to address the jury last; and it does not appear that the precise question we are here called upon to decide was raised, viz., whether the defence has the right to insist that the Attorney-General, in addition to exercising his right of reply after the defendant's counsel has addressed the jury, is also bound to address the jury before the prisoner's counsel does so.

Having regard to the facts of the present case, it is difficult to see what useful purpose could have been served by compelling the Attorney-General to sum up the evidence for the prosecution before the prisoner's counsel addressed the jury; or in what way the prisoner can have been prejudiced by the failure of the Attorney-General to so sum up, assuming that he was under no obligation to do so. It was not in dispute before us, and under the evidence could not be disputed, that the prisoner killed his wife under cir-

cumstances which render him guilty of murder, provided he has failed to establish his defence of insanity. The onus of establishing that defence is upon him.

I, therefore, think the answer to question 2 must be in the affirmative, and the answer to question 3 in the negative.

Coming now to question 4:—Dr. Anglin is Superintendent of the Provincial Hospital for the care and cure of persons suffering under mental diseases, and is admittedly an expert in the diagnosis and treatment of insanity. In the case of *Oliver Smith* (1910), 6 Crim. App. Rep. 19, heard before the Lord Chief Justice and Bickford and Avery, JJ., the Lord Chief Justice in delivering the judgment said, at p. 20:—

> The question came up 7 or 8 years ago when a practice arose of the Crown calling the prison doctor to prove insanity. All the judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in possession of the Crown should be placed at the disposal of the prisoner's counsel, to be used by him if he thought fit.

Dr. Anglin was present at the trial in this case, and could have been called, but was not called, by either the Crown or the prisoner. There is nothing from which we can draw an inference that his evidence would in any way have aided the prisoner's defence.

Question 4 must, I think, be answered in the affirmative.

I will deal with questions 5 and 6 together. The trial judge refused to reserve both of these questions, as appears from his statement of the case already given, in which he sets forth his reasons for such refusal. In the course of his charge, as reported by the stenographer, the judge used these words:—

> I may say, however shortly, that what has been said in evidence stands absolutely uncontradicted. There is no dispute as to the facts, as the counsel for the accused has himself said here. If there is any dispute as to the facts I do not recall any, except as to the defendant's insanity—that is a disputed question.

Apart from the evidence of Dr. Kennedy, the evidence by which the prisoner sought to establish his insanity consisted of the testimony of witnesses as to the conduct of the prisoner and of certain acts done by him during the period of some months next preceding the killing of his wife, and of statements made by the prisoner which the defence claims indicate that he was insane or labouring under certain insane delusions. The prisoner's counsel, upon the argument, did not claim that any attempt had

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been made at the trial on the part of the Crown to dispute or contradict the facts thus testified to; and in the charge of the judge, the conduct and acts of the prisoner, as well as the testimony of what the prisoner said at different times, relied upon as tending to prove insanity, were accepted as proved and uncontradicted. I do not think the jury could have failed to understand from the judge's charge that they were to accept the testimony of the witnesses as uncontradicted, and as true, so far as that testimony professed to state matters of fact.

Therefore questions 5 and 6 must be answered in the negative.

It remains to consider three questions—a, b and c, stated under the heading of (7)—Misdirection.

Among the delusions entertained by the prisoner, as testified to by different witnesses, particularly by his daughter Myrtle, a young girl of about 15 years of age (who I may say appears to have given her testimony in a manner which indicates an intelligence somewhat unusual at her age), was evidence that the prisoner had said during last summer that he thought his wife was working against him, and that the Williamses, who were neighbours of his, and Mike Thorne, another neighbour, were trying to take his farm from him; that some 2 or 3 times since last summer the prisoner had beaten his wife, and when starting to do so would say she was trying to kill him, and that she and the Williamses were going to shoot him; that he has said he thought his wife was going to shoot him; that he said his wife was trying to poison him, and that he said to his wife on the Friday evening before the killing: "Elsie, you poisoned me;" that his wife thereupon started crying, and he said: "Now you are getting scared, you know if you posioned me you will be hanged for it;" that on the evening before the killing of his wife, upon her refusing to kiss him, he had said she was a bad woman; that for some months prior to the killing, when he had occasion to go to the woods he took his gun with him hidden under his coat, and had his daughter Myrtle or one of his other children to accompany him; that he had smashed the letter box at the side of the road and a week or so later had cut down the post upon which it had rested; that he had cut down some of the apple-trees in the orchard and used them for fuel; that he had smashed with an axe one or more of the wheels of his driving wagon; and it was contended by the defence that

this evidence, together with other testimony of like character (for I do not profess to summarise all the evidence of that character given), proved the insanity of the prisoner; or, at least, that that testimony, coupled with the evidence of Dr. Kennedy, established the prisoner's defence of insanity.

I do not think that any one reading the charge of the judge would infer from it that he professed to state, or to summarise, all the evidence tending to shew the prisoner's insanity. He did, however, refer to the delusion the prisoner was under that the Williamses intended to shoot him, and that his wife had tried to poison him and had poisoned him. He did not, however, expressly refer to the delusion that his wife had intended to shoot him. In the judge's charge, immediately preceding that portion of it set forth in clause A under consideration, the judge said:—

Now if all these delusions were realities and existed as facts, none of them would afford any justification or excuse to the accused for killing his wife. If in other respects sane the fact that he harbored the delusion that his wife was a bad woman would afford the accused no justification or excuse for killing her for the simple reason that if she were in fact a bad woman that would be no excuse, so also if the accused harboured the delusion that his wife was slowly poisoning him or that some of his neighbours had designs upon his life. Understand that by the law of this country, before a person labouring under specific delusions but in other respects sane, can plead these delusions in extenuation for the crime of murder, the delusions must be such as would cause him to believe in a state of things which if true would justify or excuse his crime.

Then follows the portion of the passage objected to, viz.:—

And none of these delusions with which it is alleged Keirstead is afflicted are in my opinion such as would lead any man otherwise sane to believe in a state of things which if it existed would justify or excuse the crime of murder.

And then he adds:—

Persons *primâ facie* must be taken to be of sane mind until the contrary is shewn, but a person may commit a criminal act and yet not be responsible. If some controlling disease of the mind was in truth the acting power within him, which he could not resist, then Keirstead is not to be held responsible. The question is whether the prisoner was labouring under that species of insanity which satisfies you that he is quite unaware of the nature, character and consequences of the act he was committing, or in other words whether he was under the influence of a diseased mind, and was really unconscious at the time he was doing the act that it was a crime.

Q. a: I think must be answered in the negative. Q. b: Was the summing up misleading, and if so to such an extent as to be likely to cause the jury to go wrong?

In answer to that question I can only say that having read

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very carefully the judge's charge, I think the answer must be in the negative.

As to c, I have already pointed out that the judge in his charge made no reference to the delusion under which the prisoner was labouring, that he thought his wife was going to shoot him. The prisoner's counsel contends that this omission is prejudicial to the prisoner's case, because not only the nature of the delusions under which the prisoner laboured, but the number of them, is important in considering whether or not he was insane. No application was made to the judge to reserve a question upon the specific grounds set forth in c, and the counsel for the prisoner, Mr. Slipp, frankly stated that he had not at the time of applying to the judge for a reserved case, noticed that the judge had failed to refer to the prisoner's delusion that his wife intended to shoot him. As I have already said, the judge in referring to the evidence relied upon to prove the prisoner's insanity did not profess to state or summarise all of the delusions or facts relied upon to prove insanity. I might, however, point out that at the conclusion of the judge's charge, Mr. Slipp said:—

I would respectfully call your Honour's attention that in the matter of delusions you have dealt with these matters separately, and that in some extent minimizes them, taking them as separate acts, and your Honour has not dealt with these aggregate circumstances, the 6 or 7 insane acts, along with the nature of the crime.

THE COURT: I think the jury understand that. What Mr. Slipp says is quite true. You are not required to point to only one of these specified acts and upon that base your conclusion as to whether this man was or was not insane. You are to look at all the surrounding circumstances in the case taken together—I so intended it—look at everything the man did before the murder and after the murder, smashing the mail box, cutting down the apple trees, smashing the wagon, the thinking his wife was going to poison him, all these are matters to look at, in order that you may come to a right conclusion as to whether this man was insane at the time he killed his wife and did not appreciate the nature and quality of the act he did, and did not know that it was wrong.

The answer to c must, I think, be in the negative.

There remains to consider only the final question designated as No. 2 under the heading "Misdirection." The words complained of: "I think the answer will not be any good to the jury" are found in the stenographer's report of the testimony of Dr. Kennedy. The words with their context are as follows:—

THE ATTORNEY-GENERAL: I submit that the foundation has not been laid to allow this witness to give an expert opinion.

THE COURT: I do not think your objection goes to the exclusion of the question. I think it does affect its value. I think the answer to the question would not be any good to the jury. I do not think I will exclude the testimony of Dr. Kennedy. I do not feel like ruling this answer out. I will tell the jury that the expert opinion of a man who admits he is not an expert is evidence to which they can attach no great value.

Dr. Kennedy several times during the course of his examination as a witness stated that he was not an expert on the question of insanity—for example, in one place he says: "I am not an expert on this subject. I am not supposed to be skilled in the insanity proposition," and again, "As I understand delusions—I am not an expert on insanity—I believe delusions is something that a man thinks is not so." Then again he says:—

THE COURT: You have specialized in insanity? A. No. Q. Have you ever had insane people under your observation in your practice? A. Not especially with a view of curing him. Q. You have never made a specialty of the study? A. No.

The authorities render it quite clear that the jury may themselves and without the aid of any expert testimony, infer insanity of the accused from his acts, conduct or expressions as shewn by the testimony; but I think it quite clear that before a witness can be asked his opinion as to whether certain acts, conduct or expressions of the prisoner in his opinion indicate insanity, it must be shewn that he is an expert, and as Dr. Kennedy does not appear to have been an expert, I think that Dr. Kennedy's opinion in evidence upon the question of the prisoner's insanity was improperly admitted. The prisoner's counsel, however, offered the evidence, and the judge admitted it, and the judge in his charge said:—

I do not know how Dr. Kennedy's answer appealed to your reason. He frankly admits he is not an expert on the subject of insanity. He is only a common practitioner. With all deference to him, you are entitled to give his evidence just the measure of credit to which you think it is entitled, and no more.

It will be observed that q. 2 refers to "the inadvertent misquotation and minimising of Dr. Kennedy's evidence."

The judge in his charge, after referring to the evidence given by Dr. Kennedy, says:—

I asked the doctor two specific questions myself. I asked him—"At the time Keirstead killed his wife, was he or was he not, in your opinion, labouring under a disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of his act?" He said "Yes." I asked him further, "Did he or did he not know that such an act was wrong?" He answered, "I don't believe he could have or he would not have done it."

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In the stenographer's report this last question and the answer are given as follows:—

THE COURT: Did he or did he not know that such an act was wrong? I mean according to the laws of the country—according to the laws of God and man? A. Must I answer that question yes or no—I don't believe he could have under the conditions.

There is therefore a very marked and important variance between the answer of Dr. Kennedy as stated in the stenographer's notes and the answer given by him as stated by the judge in his charge. The importance of the variance between the answer given by Dr. Kennedy as the judge stated it to the jury, and the answer as reported by the stenographer is emphasised by the remarks which the judge made to the jury in reference to that answer. I quote:—

Did he, Keirstead, know that such an act was wrong? Dr. Kennedy's reason for his belief that he did not is found in his answer—"In my opinion if he knew he was doing wrong he would not have done so." With all respect to Dr. Kennedy, I think that is a great fallacy. I think he is mistaken in thinking that if a man knows a thing is wrong he will not do it. It does not strike me as a reasonable proposition. If a man robs a bank does he not know that he is doing wrong? How about a man who sets fire to his neighbour's barn? Does he not know that he is doing wrong? And yet Dr. Kennedy says that the accused in killing his wife did not know he was doing wrong, because if he had known he was doing wrong he would not have done it.

It was admitted by both sides on the argument that the stenographer's report is not a very accurate or satisfactory one, and it is quite possible—indeed I think it highly probable—that the judge, realising as he undoubtedly did the importance of the exact words used by Dr. Kennedy in his reply, would be more apt to have taken them down accurately than would the stenographer. As the case was stated on that point by consent, and without reference to the judge, we are without the benefit of anything that the judge might have set forth upon the question had the case been stated by himself; but as, by consent, the stenographer's record, as well as the judge's charge, forms part of the case stated, I would have thought that the uncertainty as to what was the real answer of Dr. Kennedy, which arises from the different words in which that answer is stated in the stenographer's notes and in the judge's charge to the jury of sufficient importance to have required us to send the case back to the judge for his report upon the matter, and possibly, of sufficient importance to require a new trial, were it not for the fact that, as I have already intimated,

the evidence of Dr. Kennedy as to his opinion of the prisoner's insanity was strictly inadmissible, not being the testimony of an expert.

As it is, I think that the prisoner's claim that he is entitled to acquittal or a new trial upon the grounds stated in clause 2, under the heading of misdirection, must fail.

I think the conviction must be affirmed.

Conviction affirmed.

NORTH COWICHAN v. HAWTHORNTHWAITE.*

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. May 10, 1917.

TAXES (§ III E—140)—ASSESSMENT ILLEGAL—ACTION FOR UNDER MUNICIPAL ACT B.C.—RESISTANCE OF ACTION—APPEAL TO COURT OF REVISION NOT NECESSARY.

If an assessment of land is illegal the person assessed is not compelled to resort to the remedy of an appeal to the Courts of Revision, but may resist an action under the Municipal Act (B.C. 1914, c. 52, s. 275) to recover the taxes.

A municipality has no power to assess lands situate in another municipality.

APPEAL by the plaintiff from the judgment of Lampman, Co.J. Affirmed. Statement.

McDiarmid, for appellant; *McMullen*, for respondent.

MACDONALD, G.J.A.:—I think this appeal should be allowed. The defendant was the purchaser under an agreement for sale between himself and the E. & N. Railway of the parcel of land described as the E. 74 acres of lot 20, Cowichan Dist. The land appears to have been so described with reference to a government survey made in 1859. The defendant was placed on the assessment roll and duly assessed for said land for the years 1913-14 and 1915. Some time in 1915, it was discovered that the old survey was inaccurate and a new survey was made pursuant to an Act of the legislature. This new survey affected the lands in question, apparently, prejudicially to the defendant, who, thereupon, agreed with the vendor for rescission of the agreement. Macdonald, C.J.A.

The action was brought to recover the taxes levied for said years. The defendant had paid some previous years' taxes.

The defendant's defence was that he was not the owner of the lands and, therefore, was not liable for the payment of the taxes. No question, apart from the question of ownership, was raised in

*This judgment was only recently released by the judges.

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the pleadings, nor in the evidence, nor in counsel's argument, notes of which appear in the case that the defendant was not assessed from year to year according to law, and the taxes levied according to law.

The material before us is very meagre indeed, but this much is clear, that the only question contested at the trial, as shewn by the evidence and the argument, was in respect of the difference between the old survey and the new, as affecting the defendant's liability to pay the taxes. I do not think it is open to the defendant to resist this action on the grounds upon which he did resist it. If he were wrongly placed on the list of tax-payers, or assessed for more land than he owned, the courts of revision were open to him. Not having contested the municipality's right, however, I do not think it is open to him to set up alleged mistakes in the assessment roll in answer to the claim made in this action. The municipality was not in any way responsible for the defendant's failure to get from his vendor what he bargained for. If liability for these taxes is the result of the vendor's breach of contract, respondent may have a remedy in that direction. I do not say he has, because that question is not before us for decision, and I need only say that the defendant's defence in this action fails.

The land, in my opinion, was not exempt from taxation under 47 Vict. c. 14, s. 22.

The suggestion has been made that part of the land assessed lies in an adjoining municipality. This was not pleaded as I think it ought to have been if it was intended to raise such an issue. It was not argued in the court below nor in this court, and the evidence does not clearly shew that any part of the land assessed lay outside of the municipal limits of the plaintiff municipality. In these circumstances, I do not think we should give effect to such a suggestion. The appeal ought to be decided, in my opinion, without reference to it, because, had it been pleaded and raised in the court below, clear evidence might have been obtained to prove the fact.

Martin, J.A.

MARTIN, J.A., dismissed the appeal.

Galliher, J.A.

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

The defendant was assessed for the lands which he held under agreement of sale during the years 1911 and 1912, and paid the taxes thereon.

Subsequent to that date, though assessed, he refused to pay taxes.

I think he was rightfully on the roll in the first instance.

In *Coquitlam* v. *Hoy* (1899), 6 B.C.R. 458, it was held that Hoy never had any interest in the lands, that he was not therefore properly on the roll, and in placing him on the roll, the assessor acted without jurisdiction.

It is the question of want of jurisdiction that runs through the cases cited by respondents and which does not obtain here that distinguishes this case from those cited.

Being properly on the roll, if assessed for too much land, he should have appealed to the Court of Revision, and not having done so, he is bound.

S. 22 of c. 14 of B.C. statutes, 1884, is construed in *The Queen* v. *Victoria Lumber Co.* (1897), 5 B.C.R. 288, a unanimous decision of the full court composed of McCreight, Walkem and Drake, JJ.

That case is directly in point and is an answer to the respondent's contention on the statute.

McPHILLIPS, J.A.:—The action was one for taxes (s. 275, c. 52 4 Geo. V.—Municipal Act, 1914—recovery of taxes by action—evidence of the debt). McPhillips, J.A

The defence being that the respondent who had been assessed never was the owner of the lands or legally liable to be assessed therefor, and that the lands were exempt from taxation by virtue of s. 22 of the Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province, passed on December 19, 1883—but this latter part was not pressed in the appeal and does not need consideration.

It would appear that there was mistake in survey as originally made. In the result, the respondent would have only been able to acquire from the Esquimalt and Nanaimo R. Co. 14 acres out of 74 acres agreed to be sold to him, as 60 acres had been previously sold. In the end, the respondent was released from the agreement of sale, and was returned the money paid with interest.

The lands agreed to be purchased by the respondent, and for which he was assessed, viz., east 74 acres of section 20 r. 6 Cowichan, as to the greater portion thereof, were really in the possession of one Loder, who had paid all his taxes, and these lands were in the Comiaken District. It is difficult from the notes of evidence

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we have before us to be very positive as to the actual facts. At best, it might possibly be said that 15 acres of the 74 acres are within the boundaries of the appellant corporation, but this was not satisfactorily proved and against the opinion of the trial judge, I can find no material upon which to hold that any of the lands assessed were within the boundaries of the appellant corporation.

Can it be said, upon these facts, that any valid assessment was ever made? The trial judge, His Honour Judge Lampman, dismissed the action and the appeal is from that judgment. In my opinion, the judge arrived at the right conclusion. In bringing an action for taxes under s. 275 of the Municipal Act, the production of the collector's roll constitutes "*primâ facie* evidence of the debt." This enactment, though, does not enable judgment to go for the amount of the taxes when there is evidence that the lands were not assessable.

In the *Municipality of the Township of London* v. *The Great Western R. Co.*, 17 U.C.Q.B., 262, Burns, J., said, when considering a section of the Municipal Act of Ontario, similar to s. 320 of the Municipal Act of British Columbia (giving validity to the revised roll) at p. 266:—

> The distinction where it is necessary to appeal and where the claim may be resisted by an action of trespass or replevin is this: if the power existed to make the assessment, then there is a jurisdiction in those doing it, and in such case the remedy is by appeal only; but if the assessment be illegal, then there is no jurisdiction to do it, and, in such case, the person resisting is not compelled to resort to the remedy of appeal, but may resist the illegal exaction.

Clearly there was no power in the appellant corporation to assess lands in the Comiaken District. The case of *Beckett* v. *Johnston*, 32 U.C.C.P. 301, has features very much like the present case. The headnote in part reads as follows:—

> Ejectment under a tax deed by the assignee of the purchaser, who was the township clerk. The sale was for the taxes alleged to be due for the years 1871 and 1872. In the assessment roll for 1871 the land was described as the "S. pt. 12, 53 acres"; and for 1872 as "S.E. pt. 12, 53 acres"; and it appeared that the land, whether taken as the south or south-east part, included portions of the lot owned respectively by F. and C., and on which they had paid their taxes; and also certain lots of a village laid out on part of 12.
>
> *Held*, that the plaintiffs' title failed; for that the assessment was illegal.
>
> *Per* Wilson, C.J., also that the evidence, set out below, shewed that the defendant had, as between himself and the municipality, paid the taxes upon his part of the lot.
>
> *Held*, also, that the defect was not cured by s. 155 of the Assessment Act of 1868, 32 Vict., c. 36, O.

Also see *City of Brantford* v. *Ontario Investment Co.*, 15 A.R. (Ont.) 605, at 607, 608; and *Blakey* v. *Smith*, 20 O.L.R. 279, at 282.

In *Coquitlam* v. *Hoy* (1899), 6 B.C.R. 458, McColl, C.J. (when considering s. 155 of R.S.B.C. 1897, c. 144, similar to s. 275 of c. 52, 4 Geo. V., 1914), said at p. 459:—

S. 154 (misprint—should be 155) gives the right of recovery of taxes by action to the municipality against the person by whom they are "payable," and makes a certified copy of so much of the roll as relates to such taxes *primâ facie* evidence of the debt; it is not as if the Act in terms made the roll itself conclusive evidence of the debt subject to any question of payment subsequently, and the copy *primâ facie* evidence of the contents of the material part of the roll. What I am asked to do is to read into the section after the word "payable" the words "as appears by the assessment roll" or some equivalent, for the purpose of creating the relationship of debtor and creditor between persons having in truth no such relationship. The position of the defendant would have been very different from what it is if he had once been properly placed upon the assessment roll, and, having parted with the property, had omitted to have his name removed, or if, having an assessable interest at the time of the assessment, the nature of his interest had merely been mistated in the roll. A person so situated cannot perhaps well complain of consequences to what he himself has contributed by his neglect.

Upon the facts of the present case, there is no sufficient evidence that any of the lands were at all assessable by the appellant corporation. *Coquitlam* v. *Hoy*, *supra*, was heard in appeal (6 B.C.R. 546) by the full court the headnote reading as follows:—

The mere fact that a person is named in the assessment roll of a municipality as the owner of certain real estate does not make him personally liable for the amount of the assessment.

Ss. 134 and 155 of the Municipal Clauses Act considered.

Quare, whether a person whose name was once properly on the assessment roll would be liable for taxes after he had parted with his interest in the property but had omitted to have his name removed.

Where an assessor exceeds his jurisdiction the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes.

The judgment of Drake, J., at pp. 548, 549, 550, is particularly applicable to the facts of the present case.

In *Toronto R. Co.* v. *Toronto Corporation*, [1904] A.C. 809, Lord Davey in delivering the judgment of their Lordships of the Privy Council, dealing with the Assessment Act for Ontario, similar legislation to that of British Columbia, and requiring consideration in this case (*i.e.*, ss. 216 and 230 Municipal Act, c. 52, 4 Geo. V., 1914), said, at pp. 814, 815:—

The decision of the Court of Appeal which is said to be *res judicata* arose

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out of a proceeding under the sections in the Assessment Act relating to the Court of Revision. By s. 62 a Revision Court of three persons is constituted, the jurisdiction of which is defined by s. 68 as follows:—

"At the time or times appointed, the Court shall meet and try all complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum."

By ss. 75 and 84 there is an appeal from the Court of Revision to the County Court Judge, or, where a person has been assessed to an amount aggregating $20,000, to a board consisting of the judges of the counties which constitute the County Court district, and from that board to the Court of Appeal. The Act provides that the appeal shall be heard by three or more Judges of the Court of Appeal; and the decision of such judges, or a majority of them, shall be final.

The appellants appealed to the Court of Revision against the assessment of 1901 on the ground, amongst others, that the property enumerated was not liable to assessment as real property. The Court of Revision dismissed the appeal, and their decision was affirmed by the County Court Judges, and subsequently by the Court of Appeal.

It appears to their Lordships that the jurisdiction of the Court of Revision, and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision, is confined to the question whether the assessment was too high or too low, and those courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

This point was not argued in the Court of Appeal, in the present case, as that court only followed its own decision in the appeal from the Revision Court in the previous year. It is, therefore, a satisfaction to their Lordships to know that their decision is in accordance with the opinions expressed by judges in the Court of Appeal for Ontario and in the Supreme Court in other cases. In *Nickle* v. *Douglas* (1875), 37 U.C.Q.B. 51, the exact point arose. The appellant had unsuccessfully appealed to the Court of Revision, and it was held, after an elaborate examination of the previous authorities in the English and Canadian courts, that that court had no jurisdiction to decide any question whether particular property was assessable, and also that the party was not estopped by having previously appealed to the Revision Court. In *London Mutual Insurance Co.* v. *City of London* (1887), 15 A.R. (Ont.) 629, the decision of the County Court Judge was treated as final, because the question was within the jurisdiction of the assessor; but Hagarty, C.J., held that, if the property had not been assessable, that would have shewn that *ab initio* the assessor and the appellate tribunals had been dealing with something beyond their jurisdiction, and their confirmation of the assessor's act would go for nothing; and Paterson, J.A., expressed himself to the same effect. In *City of London* v. *Watt & Son* (1893), 22 Can. S.C.R. 300, Strong, C.J., said:—

"I agree with the Court of Appeal in holding that s. 65 of the Ontario Assessment Act does not make the roll, as finally passed by the Court of

Revision, conclusive as regards questions of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it."

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In view of the authorities and upon the facts of the present case, it is clear that it was not established at the trial that there was any debt due by the respondent to the appellant corporation for taxes—the lands were not assessable.

It follows that, in my opinion, the appeal should be dismissed.

Appeal dismissed; court divided.

MAHER v. ARCHAMBAULT.

CAN.
S. C.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. May 7, 1918.

PARTITION (§ I—1)—SECOND ACTION BEFORE NULLITY OF FIRST DECLARED BY COURT.

A party to partition proceedings cannot bring a second action in partition as long as the nullity of the first proceedings has not been judicially established.

The action to annul should be brought against all the co-partitioners.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 25 Que. K.B. 436, reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiffs' action with costs.

F. J. Laverty, K.C., for appellants; *J. O. Lacroix*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that the appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—I will not dissent from the judgment proposed to be given by a majority of my colleagues confirming the judgment of the Court of King's Bench, Quebec, though I entertain grave and strong doubts as to its correctness.

Idington, J.

IDINGTON, J., (dissenting):—The appellants claim that their late father Edouard Trudel who was admittedly owner of a share of certain lands in the Province of Quebec died without parting with such ownership and that respondent is the owner of the remaining shares therein and seek to have a partition or sale of said lands.

The respondent claims as heir or devisee of one Desparois whose title (if any) in or to the share of the appellants' father in said lands rests entirely upon certain alleged proceedings taken for partition resulting in an alleged licitation.

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Edouard Trudel had lived and married in New York State and become insane long before said proceedings and so continued during same and for many years until his death.

Art. 1038 C.P.Q. provides that: "1038. All the co-heirs or co-proprietors must be parties in the suit for a partition."

This seems imperative. Edouard Trudel was not made a party. A consent judgment sanctioned only by those owning other shares was entered. Later on upon it being discovered, as it must have been known to those acting, if care taken, that he was entitled to the share now claimed, an irregular entry was made on the *cahier des charges* that for his share of proceeds he would be entitled to claim. There is nothing to connect deceased with this particularly unauthorised proceeding. Nor is there even the shadow of pretence for it in law, but later on, through steps taken by one or more of the parties concerned, the wife of deceased was improperly induced to accept a sum of money pretended to be proceeds of the sale and hence it is pretended the appellant and her children are bound thereby.

No curator was ever appointed for him in Quebec. By a New York Court his wife was afterwards appointed his committee.

It is proven by expert testimony that by the law of New York this gave her no authority in respect of the sale of his real estate. She could collect rents of real estate but that is as far as her authority went even in New York State.

Assuming for the moment that a foreign state where his land was could recognise her power in that respect, there was no such recognition or direction given by any one having power to give it in Quebec. Nor does it seem very clear what could have been done in that way.

I am unable, therefore, to understand how such proceedings can be held otherwise than a nullity so far as the share of the deceased was concerned.

This court, in the case of *Serling* v. *Levine*, 47 Can. S.C.R. 103; 7 D.L.R. 266, held that the minor who was sued without a tutor being named and shortly afterwards came of age, and then had acted in many ways in such a manner as to induce some of us to hold that he had waived the right to object to the want of a tutor at the initiation of the proceedings, could not complain of such absence of a tutor. Instead of defying and disregarding the court

when he came of age, he had submitted and acted in many ways that some of us thought precluded him from insisting upon such an objection.

The court above, however, overruled us, and held the whole proceedings a nullity, 19 D.L.R. 108, [1914] A.C. 659, at 662.

The acts and submissions of the defendant in that case after his majority (which if memory serves me were more than detailed in the judgment of my brother Brodeur) seem to me to have been more important in the way of overcoming the initial difficulty than anything relied upon herein as done by the committee of the insane person in the way of ratification.

In principle I cannot distinguish that case from this in regard to the question of nullity.

There are many reasons why an insane man should be more jealously protected than an infant of somewhat mature years at least. The law seems to make no distinction.

It seems idle to suggest that the proceedings are different, especially in face of the imperative language of the article I have just quoted. And in view of the fact that the first step to inquire as to in a partition suit is whether or not partition can advantageously be accomplished. See art. 698 C.C. and 1040 C.P.Q., and other articles in each of the respective sections where they appear.

It so happens in most cases all the steps thus indicated as possible are needless, for a mere glance at the circumstances so demonstrates the situation and sensible people act accordingly and proceed to licitation.

They proceeded in this instance by a consent judgment, but who consented?

The folly of disregarding the article requiring all co-heirs or co-proprietors to be made parties became apparent in this instance for the consent should never have been given because one of the parties who should have been joined therein was in an insane asylum without a curator or committee. If that had been disclosed no doubt the judgment never would have been entered.

The conduct of someone was at fault and no need for harsh words, but yet it seems quite incomprehensible without suspecting someone of at least crass negligence. To maintain such a proceeding it seems to me would be putting a premium on worse conduct in the like cases.

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Idington, J.

Having considered all the articles of the Civil Code and Code of Procedure cited to us, and many others, I do not see the necessity for elaborating the matter.

The case of *Bank of Montreal* v. *Simson*, 14 Moo. P.C. 417, 15 E.R. 363, illustrates how the law in Quebec has always looked at the interest of minors and the limited powers of tutors in regard to certain classes of property held by the minor.

Curators stand in the same position relative to any powers they may have unless when expressed otherwise.

And when we contemplate the shadow of one as it were acting by reason of an analogous appointment in a foreign state and not renominated under the law of the country where an immoveable is in question, I fail to be able to attach any importance to her acts or omissions as having any bearing upon what is really involved.

And the importance sought to be drawn herein from what was done as if judicially done, suggests I should refer the inquiring mind to the case of *Davis* v. *Kerr*, 17 Can. S.C.R. 235, at p. 244, where Taschereau, J., is reported as making some pertinent remarks which might well be applied to some things done or permitted in the proceedings in question herein.

Holding the entire proceedings a nullity so far as the share of the deceased was concerned, I need not trouble myself as to the possibility or propriety of taking another course than that taken by those instituting the proceedings.

Nor do I see any difficulty in regard to the proof of the marriage of deceased and legitimacy of the appellants. Much less has been acted upon judicially.

Indeed, I respectfully submit if the ground taken by the court below and in respondent's argument that the original record was quite regular and the adjudication therein valid and the appellants' action denying positions so groundless as these suggested, I do not see why that feature of the case and the utterly void conduct of the committee in what she did as representing the court in New York should be laboured with or given prominence as it is at every turn in both judgment and argument.

The English system relative to the insane and their property of which New York law is, as it were, the heir, does not furnish quite as much safeguarding or restriction as the French system in

force in Quebec relative to the appointment of a guardian called in the one a "committee" and in the other a "curator." The results are surprisingly alike, though possibly differing in origin and mode of appointment.

But in the last analysis the entire power of a committee of a lunatic is statutory and there is not a vestige of authority in the State of New York to maintain that which the wife of deceased was induced to assume. And it does not require much penetration to discern by whom and why she was so induced.

Inasmuch as the principle upon which a licitation sale is rendered, by art. 1054 C.P.Q., in its results analogous to the effect of a sheriff's sale, our decision in the case of *Leroux* v. *McIntosh*, 52 Can. S.C.R. 1, 26 D.L.R. 677, may be worth considering.

The appeal should be allowed with costs here and below and the judgment of the trial judge restored.

Since writing the foregoing the case has been re-argued but I see no reason for changing my opinion as the result thereof.

Anglin, J.

ANGLIN, J.:—We have heard this appeal argued twice. While careful consideration of it on each occasion has not entirely dissipated all doubt in my mind whether the conclusion of the trial judge—at all events in so far as it established the title of the plaintiffs other than Mary Maher—should not be restored for the reasons stated by him and by Mr. Justice Cross, I am not convinced that the several judgments entered in the partition proceedings, through which the defendant claims title, must not first be set aside. That relief, if sought, could not properly be granted in this action in which the parties to those proceedings are not before the court.

Although it is expressly provided by art. 1038 C.P.Q. "that all the co-heirs or co-proprietors must be parties in the suit for a partition," it is conceded that there was no representation whatever of the interest of Edouard Trudel, one of the co-heirs, in the partition proceedings until after the property had been sold and the record shews that neither he nor his foreign curatrix was made a party to them at any stage.

I am by no means satisfied that under the law of the Province of Quebec a foreign curatrix or committee of a lunatic, who, according to the law of the forum of her appointment, was not

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authorised to dispose of his real property, could, by her approval and ratification of proceedings already had for the sale of the lunatic's interest, vest it in the purchaser. If she could, I question whether the terms of the power of attorney given by her to Mr. Prefontaine would enable him to give such approval or ratification on her behalf, or to represent her in the proceedings subsequent to its date. He does not appear to have had any other authority. As a matter of fact, although Edouard Trudel's interest as a co-heir was brought to the attention of the court, as appears from the *cahier des charges*, as already stated, neither he, nor his committee or curatrix, was ever joined as a party to the proceedings.

It is only "after the observance of all the formalities above required," including the joinder of all co-heirs or co-proprietors as parties, as prescribed by art. 1038, that the adjudication, under art. 1054 C.P.Q., transfers the property. Whatever there may be in the nature of an estoppel against the plaintiff, Mary Maher, the curatrix, by reason of her receipt and retention of the moneys representing her husband's share of the proceeds of the sale does not affect her co-plaintiffs. Nor, so far as I am aware, have their rights been extinguished by the expiry of any period of prescription.

Yet, while it may be a little difficult to understand on what ground a judgment pronounced in a proceeding to which neither he, nor any person representing or in privity of estate with him was a party, should be held so far binding on the owner of an interest in property that he is obliged to have it set aside before asserting his title in the courts against a person whom he finds in possession and claiming ownership, the procedure provided for by art. 1185 C.P.Q. *et seq.* would seem to indicate that this is necessary. On this ground alone, therefore, though not without hesitation, I concur in the dismissal of this appeal.

Brodeur, J.

BRODEUR, J.:—The present action for partition is wrongly brought against the defendant Archambault. The latter, after the plaintiff, would be the possessor of a lot of land which formerly belonged to the Trudel succession and which was sold in 1893 by judicial authority in an action for partition. The plaintiff claims that this judicial sale is void because her husband, one of the heirs, was not regularly made a party to the cause.

It appears from the proceedings which led to the sale, that

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Edouard Trudel, husband of the plaintiff, had not been summoned as a party. Several years before, one of his brothers had disposed of his interest in the property as he was incapable of attending to his business and was then in an insane asylum. This all appears to have been done by his brothers in the best faith in the world and in his best interest.

The part that he owned had little value. What was done was evidently in order to avoid expense. At all events, when the bill of costs in the action for partition in 1893 was prepared, it was discovered that the sale of the rights of Edouard Trudel was a nullity and there was then inserted a clause in the conditions of sale by which the rights of Edouard Trudel to an undivided eleventh part of the property was acknowledged. Proceedings were taken by the plaintiff to have a curator to her husband appointed and to receive payment of his share of the price of sale.

The property was sold by the court. The plaintiff received the sum which represented the rights of her husband. The property passed to various purchasers, and according to the plaintiff, the defendant Archambault would now be the owner. She brought suit for partition, claiming that the first partition was a nullity. It is an elementary principle that the parties cannot bring a new action for partition, as long as the nullity of the first sale has not been judicially established. Baudry-Lacantinerie, vol. 8, No. 3513; Demolombe, vol. 15, No. 518.

Now, against whom should this action to annul be directed? Is it against the possessor of the property or against those who are parties to the partition?

This first sale constitutes a judicial contract which like other contracts is susceptible in certain cases of being annulled or of being null and void. The action to annul attacks a contract which is deemed to have received the assent of all the heirs. I consider that this action should be brought against all the co-partitioners. Duranton, vol. 7, No. 584; Demolombe, vol. 17, No. 457; Aubry & Rau, vol. 6, p. 577; Laurent, vol. 10, No. 497.

Before bringing the present action it was then the duty of the plaintiff to come before the court and to claim in presence of her co-heirs the nullity of the contract to which they had been parties in 1895 the time of the first action for partition.

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There can be raised between these co-heirs a dispute as to the accounts and the mode of partition which could destroy her rights in the immoveable in question in this case. It seems to me that the plaintiff before taking proceedings against Archambault should have proceeded against her co-heirs.

The Court of Appeal then has been right in dismissing her action. The appeal is dismissed with costs.

Appeal dismissed.

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Quebec Court of Review, Archibald, A.C.J., Martineau and Lane, JJ. June 21, 1918.

CONTRACTS (§ I E—111)—MISREPRESENTATION—OPPORTUNITY TO JUDGE—LAPSE OF TIME BEFORE BRINGING ACTION—INABILITY TO RESTORE PROPERTY PURCHASED.

Misrepresentation as to the revenue derived from a theatre is not sufficient ground for setting aside a sale thereof, where the purchaser has had an opportunity to estimate the amount and has not complained of the small revenue received for several months after taking possession. Especially where such purchaser is in such a position that he cannot restore the business to the vendor if successful in the action.

Statement.

APPEAL from a judgment of the Superior Court rendered by Panneton, J. Affirmed.

The action is in nullity of a deed of sale, of December 5, 1913, by which defendant sold to plaintiff the moving pictures business carried on by him, in Montreal, under the name of Lubin Theatre, including the lease of the property belonging to the *mis en cause*. The grounds of the nullity were false representations made by defendant as to the daily revenues of the theatre, as shewn to him by a false book of receipts. The plaintiff prays that the deed of sale be rescinded and demands the reimbursement of $900, the price of the sale; and damages to the extent of $800.

The defendant denies any false representations. He alleges that the plaintiff took possession and administered the said theatre for his own benefit several days before he bought it, and several months since, without any complaint nor protest; that if there was a diminution of the profits it was due to his maladministration.

The defendant also fyled a plea of *puis darrein continuance* alleging that since the plea, the plaintiff has sold all that he had bought from defendant to the *mis en cause*, his landlord, who is in possession thereof, and that even if he succeeds in his action in

nullity, he cannot return to defendant what he has bought from him and put him in the position he was before the sale.

The judgment appealed from is as follows:—

Considering that plaintiff had possession of the theatre a few days before he bought it, and had the opportunity of approximatively estimating its revenues; that he kept possession of the same from that time, the beginning of December, 1913, until the beginning of March, 1914, without making any complaint whatever to defendant about the small revenues he had been deriving from it compared with what defendant had represented to him to be the revenue, to wit, the sum of about $400 per week previous to the sale, which statement defendant had made to plaintiff and in which statement he persisted when examined as a witness, that the book which is missing would not prove more than defendant himself admitted, and plaintiff is not affected by the loss of said book;

Considering that the change in the character of representations given by plaintiff in said theatre may have contributed to the diminution of the attendance;

Considering that plaintiff, though disappointed from the beginning of his possession of the theatre as to the revenue of the same, seems to have accepted the situation, and has waived his right to demand the annulment of the sale by the length of time he allowed to elapse without taking any steps to be relieved from his obligations under said sale, and in fact made payments to the extent of $900 to the *mis en cause* for rent during that time, and attempted to form a company for the purpose of selling to it the said Lubin Theatre;

Considering that plaintiff was moved to take this action by the statement of witness Mack to the effect that defendant had been keeping two sets of books, one shewing more revenues than the true one, for the purpose of deceiving any intending purchaser; which statement said witness affirmed in his deposition;

Considering that this evidence can hardly be relied on as it is contradicted by defendant and the character of the witness does not appear in a favourable light;

Considering that the transfer made by plaintiff to the *mis en cause* of the whole of the property purchased by him from the defendant including the lease, in settlement of the rent due by him, precludes him from obtaining possession of the same to

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return them to defendant if the deed was annulled; therefore, that the conclusion of his action cannot be granted; the court dismissed plaintiff's action with costs.

Elliott, David & Mailhiot, for plaintiff; *Lamothe, St. Jacques & Lamothe*, for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—In the month of November, 1913, the defendant was carrying on a moving picture business in a theatre called Lubin Theatre on Seigneurs St., in the city of Montreal. At that time, the defendant was negotiating with the plaintiff for the purchase of this theatre business. The defendant did not own the building but it was owned by Joseph Sauriol and was leased by him for a period, which had at the time above stated, some 8 years to run, to a person of whom the defendant was the assignee.

In the end of November, 1913, the plaintiff, at the invitation of the defendant, attended on several occasions at the representations in the said theatre. An agreement was come to between the parties about December 1, and plaintiff took over the theatre and ran it from the 1st to the 5th of December; and on said date, the transaction which had previously been reduced to writing before a notary, by the parties, was signed by the plaintiff. It appears that the signature of the deed was purposely delayed between the parties, so as to give the plaintiff a further opportunity to see how the theatre would shew for the first 5 days under his management.

After that the theatre was run by the plaintiff up until March 12 following, namely, altogether something more than 3 months, without having made any complaint of any description to the defendant.

On the latter day, the plaintiff instituted an action to set aside the deed of sale on the ground that the defendant had made false representations as to the receipts which the said theatre was capable of producing, and as to those which it had produced while under the management of the defendant. This is the only ground which the plaintiff alleges.

The plaintiff produced, as coming from the defendant, a card which contains on the back the following words:—

Seats 505; lease 8½ years; rent $250 per month 5 years; $275 per month 4½ years; $400 per week expenses $250. Upper part rents $50; cash $2,000.

This card is apparently an answer to a letter addressed by the plaintiff to the defendant and which is as follows:—

524 St. Catherine St. West, November 17th, 1913, Dear Sir.—In reply to your ad. in the "Star", re a moving picture theatre, kindly let me have full particulars. Yours very truly, (Signed) R. Rodden.

Below the signature in pencil marks is the same information, slightly amplified, as was referred to.

The card appears to be an answer to the demand for information. Plaintiff alleges that this information was false and that he was deceived thereby, and that otherwise he would not have entered into the transaction.

The defendant denies any fraud on his part. Defendant was a man who was not able either to read or write. It appears he had in his employment for a year or more, one Mack who, at the time of the trial, had gone to Chicago. Mack was the manager of the theatre and had a salary from the defendant of $25 a week, besides a commission on receipts exceeding $300 per week.

Mack appears to have communicated to the plaintiff what is stated to be a fact, that the defendant had kept two sets of books, one a true set and the other a false set, and that this was done with the intention of being able by the production of the false set to shew higher revenues from the theatre than it really produced, and to deceive purchasers. Mack was examined by the plaintiff on a commission rogatoire, and swears to those facts or allegations, and indeed Mack's evidence is the only evidence which would go at all to support false representations on the defendant's part.

I have said that the proof establishes that the defendant was unable to keep any books or to read what a book would contain. If two sets of books were kept, they were both kept by Mack, and the defendant's attorneys suggest in their factum that if two sets of books were kept and one of them was false, the object of Mack in keeping the false set of books was not to deceive purchasers but to deceive the defendant and make him pay to Mack commissions in addition to his salary upon revenues that were never received.

Certainly these books were not shewn to plaintiff at all nor is it shewn that any books existed in which a revenue of $400 a week was represented to be received from the theatre in question.

There were 505 seats in that theatre and there were representations at least twice a day. It would seem from writings in

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the record that the greater number of the seats were sold at 10 cents, but a comparatively small proportion (about one-tenth), at 5 cents. 505 seats occupied twice would make $101, which if counted at 10 cents would make $101 a day, or over $600 a week. But supposing one-half were reckoned at 5 cents and one-half at 10 cents, it would make an average of 7½ cents, which upon 1,010 would make $70.10 a day or $420 a week. These sums shew that it was clear that the capacity of the building was sufficient to produce the revenue of $400 which plaintiff alleges was represented. The attendance at the representations, of course, would depend upon their popularity, which might either be improved or diminished by the plaintiff as compared with what they had been under the defendant.

The judge in the court below made an unfavourable comment upon the evidence of the witness Mack and that comment appears to me to be justified by the fact that if the statement made by him was true, the fraud was his own.

Now when we add to these considerations the conduct of the plaintiff in the matter, and in the light of the fact that the receipts of such a business depend entirely upon the popularity of the representations, and these again depend upon the ability of the proprietor to select artists and plays or representations which shall be pleasing to the public, we have the fact that the plaintiff, by actual attendance at several representations during the last days of November, had an opportunity of estimating the achalandage of the theatre under the management of the defendant, and in the second place, he had 5 days in the first part of December agreed upon before he signed the contract, in order to test what the theatre would produce under his own management, and in the third place, he ran the theatre after that for 3 months without making any complaint whatever. These facts seem to me absolutely inconsistent with the supposition that the plaintiff bought this business upon the faith of a warranty that it was capable of producing $400 a week.

I think the conduct of the plaintiff absolutely cuts him out of any solid foundation for his action.

There is, however, another point which is dwelt upon in the judgment, namely, after the plaintiff had taken his action, he notified not only the defendant but the *mis en cause* his landlord,

that he intended, on a given day, which was some 10 days after the action was instituted, relying upon the result of the action, to abandon the property and the sale of the effects to him, to abandon his contract with the defendant. Thereupon the *mis en cause*, the landlord, sued the plaintiff for his rent and they came to an agreement upon the judgment to be rendered, and that agreement provided that the *mis en cause* released the plaintiff from all his obligations concerning the rent due and to become due, and the plaintiff abandoned to the *mis en cause* all his rights under the contract between the plaintiff and the defendant, and thereafter the *mis en cause* becoming proprietor of all the appareil of the theatre, disposed of it to other persons.

Thereupon defendant's plea of *puis darrein continuance* on the ground that, by the action of the plaintiff, he had put it out of his power to put the defendant back in the same position as he was before the passage of the deed, in the event of the plaintiff succeeding in his action to cancel the deed between them. The plaintiff being examined upon this plea by the defendant, admitted fully that it was now out of his power to restore to the defendant the goods which had been purchased under the contract which the plaintiff is seeking to cancel.

The judge held, in my opinion, quite rightly that this act on the part of the plaintiff precluded the possibility of his success in the present action.

I believe that judgment to be completely sound and I am to confirm. *Appeal dismissed.*

SMITH v. CURRY.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Fullerton, JJ.A. July 8, 1918.

EASEMENTS (§ II A—5)—CREATION OF—BUILDING PLAN—PASSAGEWAY—PARTY WALL.

Where adjoining owners construct their buildings according to a party wall plan and one is given a passageway to his building by means of a communicating door through the party wall, a valid easement is created to the stairways and passageways necessary for the proper user of his building, which is co-extensive with the duration of the building. As a condition precedent to the relief being granted, the party seeking such relief must himself do equity by paying his share of the cost of the party wall.

[*Acton Tanning Co.* v. *Toronto Suburban R. Co.*, 40 D.L.R. 421, referred to.]

APPEAL from the judgment of Macdonald, J., 36 D.L.R. 400. Varied. Statement.

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C. P. Wilson, K.C., and *S. H. Forrest*, for appellant; *D. H. Laird*, K.C., and *E. G. Hetherington*, for respondent.

PERDUE, C.J.M.:—The plaintiff owned a lot in the town of Souris, and the defendant Curry was the owner of the adjoining lot on the west side. Each decided to erect a building on his lot, the plaintiff's to be used as a drug store on the ground floor with rooms overhead, and Curry's to be used as a hardware store on the ground floor and also with rooms overhead. In the early part of 1905 each of them engaged the same architect to prepare plans. The architect, before preparing the plans, suggested that there should be a party wall between the buildings. The parties agreed to this. The architect then prepared a preliminary plan shewing an arrangement of the stairways and passages which he recommended to the parties as being for their mutual benefit. Both parties agreed to the proposed arrangement. The architect then prepared the plans embodying his proposal, and the buildings were constructed in accordance with them. Curry was in Souris while the buildings were being erected and knew how they were laid out and constructed.

The buildings, which were erected according to the plans agreed upon, shew a door in the front of the Curry building leading to a passage and a stairway to the floor above the stores. There is no front stairway in the plaintiff's building. Access from the street to the upper floor of the plaintiff's building can only be obtained by means of the stairway in the Curry building, and by using a passageway running east from the top of the stairway to a passage running north and south along the party wall. Two doors were constructed in this party wall permitting access from one building to the other. The party wall was built by Curry but the plaintiff was to pay his share of the cost. The back entrance to, or egress from, both buildings is by a stairway in the plaintiff's building, connected with passages leading to and from the Curry building. There is no back stairway in the Curry building and no access to the rear from that building except by the back stairway of the plaintiff's building. Fireproof doors are placed in the doorways in the party wall. The buildings were completed in the early part of 1896 and since that time the stairways have been used in common by the parties and their tenants. The upstairs portion of each building is used for office or residential purposes.

The trial judge finds that shortly after the erection of the buildings the defendant Curry presented a party wall agreement for execution by the plaintiff and the defendant submitted an agreement with respect to the front entrance and passageways. The latter Curry refused to sign, giving as his reason that he did not wish to have anything against the property in case he wanted to dispose of it. The plaintiff then refused to sign the party wall agreement or to pay his share of the cost of the wall. In 1906, after the erection of the buildings, Curry transferred the land and building to himself and his co-partner and co-defendant, Mitchell, but the latter had notice of the plaintiff's rights. Matters remained in this condition until 1917 when the defendants notified the plaintiff that they proposed to close the doors in the party wall and shut off access by the plaintiff to the passages and stairway on the defendants' property.

There is no dispute as to the main facts. The manner in which the building was constructed shews beyond a doubt that there was an agreement between the owners of the buildings that the plaintiff should have access from the street to the upper floor of his building by means of the front door, stairway and passages in the Curry building and Curry should have the use of the plaintiff's back stairs and passages to his own building. Curry was satisfied with the arrangement and agreed to it. The only matter as to which there is any question is the duration of the agreement. Nothing appears to have been said as to this before or during the construction of the building. The architect says that there was no time mentioned. He goes on to say: "It was agreed that the building should be built in that way. I should have said it was for all time."

No time having been mentioned, the agreement was either at will or for the duration of the buildings. But the whole construction of the premises, with the doors in the party wall, the passages in connection with them, the placing of the stairways, etc., points in its very nature to something more than a mere temporary arrangement. Each party received a concession from the other. Both were satisfied and we cannot now enter upon a discussion as to who got the best of the bargain. The plaintiff constructed his building without a front stairway relying on the agreement that Curry would allow him the use of the front stair-

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way in the Curry building, in return for the use by Curry of the back stairway in the Smith building. To deprive him now of this right would compel him to construct a new stairway for his building, thereby necessitating material changes in the plan and construction of it and depriving him of considerable space.

It seems to me that the parties agreed upon a plan of construction of the buildings whereby each received a valuable concession and that the buildings were erected on the faith of this agreement. It was intended to be permanent in its nature and to continue as long as the buildings lasted.

This is not an action for specific performance. The agreement between the parties has, in so far as the construction of the premises is concerned, been mutually performed. The complaint is that the defendants threaten to interrupt the rights of the plaintiff in the use of the premises as agreed. If the plaintiff's rights are of a permanent character and not merely at will, the defendants' threat to close the doors in the party wall would, if carried out, be a fraud on the plaintiff, causing him serious injury.

The Statute of Frauds is raised by the defendants. But, if it applies in this case, there have been such unequivocal acts of part performance by both parties as to take it out of the statute. I need only mention the construction of the doorways through the party wall and the passages on each side connected with them and the constant ingress and egress by each of the parties over the premises of the other for so many years. This user for so great a length of time is in itself an important circumstance. See *Blachford* v. *Kirkpatrick*, 6 Beav. 232, 49 E.R. 814.

There are authorities which hold that an easement is not an "interest in land" within s. 4 of the Statute of Frauds. Thus in *Wood* v. *Lake*, cited in *Wood* v. *Leadbitter*, 13 M. & W. 838, at 848, 153 E.R. 351, at 356 n., a parol agreement that the plaintiff might stack coals on defendant's land for 7 years, which he had done for 3 years under the agreement, was held to be a license which had become irrevocable and, though an easement, not to amount to an interest in land within s. 4 of the statute. See also *Jones* v. *Flint*, 10 Ad. & E. 753, 113 E.R. 285; *Tayler* v. *Waters*, 7 Taunt. 374, 129 E.R. 150.

At common law an easement could only be conferred by deed, and a license or easement created by parol even for a valuable

consideration is revocable at will: *Hewlins* v. *Shippam*, 5 B. & C. 221, 108 E.R. 82; *Wood* v. *Leadbitter*, 13 M. & W. 838, 845, 153 E.R. 351. But if an easement is not an interest in land, an agreement for a grant of such a right need not be in writing as a contract concerning an interest in land, although the grant should be by deed.

In *McManus* v. *Cooke*, 35 Ch. D. 681, Kay, J., in an exhaustive judgment in which he reviewed the common law and equity cases bearing on the question, came to the conclusion that a verbal agreement for an easement may be enforced where there has been part performance, whether it is, or is not, within s. 4 of the Statute of Frauds. He sums up the results of the authorities as establishing the following propositions, p. 697:—

(1) The doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the Statute of Frauds, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. (2) Probably it would be more accurate to say it 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. (3) The most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement. (4) The reason for the rule is that where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute. (5) But this reason applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the court would direct to be specifically performed. (6) The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired.

In the *McManus* case, the plaintiff and defendant being the owners of adjoining houses entered into a verbal agreement that the plaintiff should pull down a party wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight with the lower end resting on the party wall. The plaintiff rebuilt the wall and erected a skylight as agreed. The defendant also erected a skylight on his side, but not a lean-to, and so shaped as to obstruct the light to the plaintiff's premises more than the lean-to skylight would have done. It was held that the effect of the agreement was to give each party an easement of light, and that the defendant had been put in possession of a larger space on his side of the wall by the erection of the thinner wall; that "the defendant having obtained all the advantages

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which this agreement was intended to give him, it would be a fraud on his part to refuse to carry out his part of the agreement, and to resist an attempt to compel him to do so by insisting on the Statute of Frauds."

McManus v. *Cooke*, *supra*, was approved by the Court of Appeal in the very late case of *Hurst* v. *Picture Theatres Limited*, [1915] 1 K.B. 1. The last case points out that owing to the fusion of law and equity *Wood* v. *Leadbitter*, *supra*, and similar decisions will no longer be followed and that equitable rights will be enforced in all the courts.

In regard to the second proposition above quoted from *McManus* v. *Cooke*, Sir Edward Fry, (Spec. Per., 5th ed., p. 298.) says:—

> It may be questioned whether this statement of the extent of the doctrine would not be made more accurate by omitting the words "for specific performance."

This would much widen the scope of the proposition.

In the very late case of *Acton Tanning Co.* v. *Toronto Suburban R. Co.*, 40 D.L.R. 421, 56 Can. S.C.R. 196, the Supreme Court of Canada, affirming the decision of the Appellate Division of the Supreme Court of Ontario, held that an oral agreement between the parties as to the right-of-way of the railway company through the lands of the Tanning Co. was binding on the latter, and that the Statute of Frauds probably did not apply, as the action was not brought on a contract for the sale of lands or any interest in or concerning them; but if the statute did apply, it was taken out of the statute by part performance on the part of the railway company.

In the case now before this court the actual construction of the two buildings shews that mutual advantages were intended to be conferred which clearly point to some agreement between them. The court is, therefore, bound to inquire what that agreement was: *Morphett* v. *Jones*, 1 Swans. 172, 36 E.R. 344; Fry, 5th ed., pp. 292-293; *McManus* v. *Cooke*, at p. 697. As I have already stated, there is no dispute in regard to the agreement, except as to its duration, and I think it was intended to continue as long as the buildings existed, or until it was varied or ended by consent of the parties. The fact that the party wall was altered in order to conform with the agreement as to the mutual use of

the stairways, appears to me to establish this. It was an agreement for valuable consideration without any time limit: *Llanelly R. Co.* v. *London & N.W.R. Co.*, 8 Ch. App. 942.

It is urged that the acts of performance on the part of the plaintiff were not sufficient to take the case out of the Statute of Frauds, if the statute applied. But the agreement was actually performed by both parties to the extent of so laying out and constructing the buildings—that the stairways could be, and were plainly intended to be used in common. Both parties entered into the use and enjoyment of the easements and continued to use them for a long period of years. Plaintiff constructed a door in the party wall opening from his property to the defendant's and used it for purposes of ingress and egress over the defendant's property. The facts, I think, establish a part performance by the plaintiff sufficient to take the case out of the Statute of Frauds, if the statute applies.

From another standpoint, there is an agreement between the parties whereby the plaintiff, for valuable consideration, obtained an easement from the defendant, equity then, as between the parties (and persons taking with notice), considers it as granted and will either decree a legal grant or restrain disturbance by injunction. See Gale on Easements, 9th ed. at p. 64; *Dalton* v. *Angus*, 6 App. Cas. 740, 765, 782; *Devonshire* v. *Eglin*, 14 Beav. 530, 51 E.R. 389.

I think that the plaintiff in the agreements tendered by him to Curry and to Mitchell and Curry overstated the duration of the easement which should be confined to the period of the existence of the defendant's building. I agree with my brother Cameron's reasons for arriving at that conclusion. The judgment should be amended in this respect.

The plaintiff must, as a condition of the relief, himself do equity. He has not yet paid his share of the cost of the party wall, and he has had the use of the money since the work was done. I think the judgment should be amended by making it a condition precedent to the relief that the plaintiff should pay to the defendant Curry the sum of $510.65, with interest thereon since February 1, 1906, at 6% per annum.

There should be no costs of the appeal.

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Cameron, J.A.

CAMERON, J.A.:—The facts and circumstances in this case are set out in the reasons for judgment of Macdonald, J. (36 D.L.R. 400), who tried the action and gave the plaintiff an injunction restraining the defendant from interfering with certain rights-of-way on the defendant's premises to which the plaintiff claims to be entitled. The defendant and the plaintiff are the owners of adjoining buildings, separated by a party wall, in the town of Souris, and the right of the plaintiff to the user of entrance, stairways and passageways enjoyed by him since the erection of the buildings in 1905 is in issue. The same architect was employed by each without the knowledge of the other to prepare the necessary plans, most of which had been lost. No written or oral agreement was made as to the easement in question and its terms must be drawn from the plans and the other acts and facts surrounding the transaction. The plans, which were adopted and acted upon, contemplated the use by each of the parties of a part of the premises of the other. Each tenement is dominant and each is servient to the other.

Obviously there was an agreement between the parties as to such mutual user of each other's premises. The difficulty lies in ascertaining the period during which the user was intended to continue and this, in the absence of any express statement, must be a matter of inference. The further question arises whether the agreement originally entered into was abrogated or abandoned.

An easement is defined as the right of one to utilise the land of another in a particular manner not involving the taking of any part of the natural produce of that land or of any part of its soil: 11 Hals. 232. It may be effectually created under circumstances which render it inequitable to deny its existence, although the proper formalities (*i.e.*, a deed as at common law) have not been in fact observed. A verbal agreement with the adjoining owner upon the faith of which the latter acts is sufficient: *Ib.* 246; *Dalton* v. *Angus*, 6 App. Cas. 740, 765, 782.

In the agreement there were, as I have indicated, mutual concessions, a fact that, by itself, argues strongly against the contention that each was using the premises of the other at the will of that other or that the arrangement was one of mutual convenience only terminable on or without notice. The user of the premises of the one party formed the consideration for the user of the

premises of the other, and this fact implies the idea of, at the least, some permanence. It is not reasonable that such an understanding, involving, in carrying it out, work, deliberation and expense, would be entered into only to be put an end to at the whim or caprice of either party.

On the other hand, I would not infer from the facts and circumstances of the case that the respective rights created by the agreement were intended to be perpetual. It was surely not a part of the agreement that those rights should subsist after the destruction by fire of either or both of the structures. The agreement contemplated that these rights should be enjoyed with respect to the buildings as they were to be constructed in conformity therewith.

Where an easement has been granted for a particular purpose in connection with a particular building, it is extinguished by a destruction of that building. 14 Cyc. 1194.

Hahn v. *Baker Lodge*, 27 Pac. 166.

So a grant of the right to use the hall or stairway of a certain building gives no interest in the soil which will survive a destruction of the building, and the right ceases whenever the building is destroyed without the fault of the owner of the servient estate. 14 Cyc. *Ib.*

Half of a lot, on which the owner had erected a double building, the only entrance to the second storey of which was by stairways upon that half lot, was sold, reserving such a right-of-way over the stairways "as should be necessary to the proper use of the second storey" of the other half of the building. It was held that the reservation did not create an interest in the soil which would survive the destruction of the building. *Shirley* v. *Crabb*, 37 N.E. 130.

We feel entirely certain that the reservation, in the form in which it is brought to us, was not intended to create an interest in the soil; and if it possessed the quality of an easement, in that it became an interest in real estate, it was only to the extent of affording the use of the stairways and hall in the building as it existed, and independently of any right to or interest in the soil. If this was the extent of the interest, it follows that the destruction of the building destroyed the right as effectually as if the interest had been in the soil, and the floods had carried away the soil; nothing would remain upon which the right could operate. A new structure would not create the right, for such right had been destroyed, and not simply suspended, as would probably have been the case if the right had attached to the land.

In *Douglas* v. *Coonley*, 84 Hun. 158, it was held the easement in the stairway in question, acquired under deed, only continued to

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exist while the building standing when the right to such easement was acquired remained, and ceased with the destruction of the building. The authority of *Heartt* v. *Kruger*, 25 N.Y. St. Rep. 686, affirmed, 121 N.Y. 386, is cited. There the owner of two adjoining lots erected a building on each with a party wall between them, one-half of which was placed on each lot. The two lots were afterwards transferred to different owners and both buildings were destroyed by fire. The defendant, the owner of one of the lots, erected a new wall on the old party wall foundation, and the plaintiff, the owner of the other lot, commenced an action of ejectment and was sustained in all the courts. In delivering the opinion of the Court of Appeals, Gray, J., remarked:—

> When the title to these two lots was severed by their conveyance to separate persons, the purchaser of each lot is presumed to have contracted in reference to the condition of the property at the time, and the openly existing arrangement of a party wall could not be changed, so long as it stood and answered its purpose. It was made a party wall upon the severance of the title by the description of the boundary line, but the whole extent of the qualification, which resulted as to each lot owner's title, was the easement which the other acquired in the wall dividing and supporting their respective buildings. Each was bound to preserve the existing order of things in that respect, and neither had any right to change the relative condition of his building to the injury of the adjoining one. The party wall of the two buildings was an open and visible condition of the ownership of the property, and, in legal contemplation, its use as such, while the buildings stood, was an element which entered into the contract of the purchaser and which charged the land with a servitude. . . . But, upon the destruction of the buildings, the tenements reverted to their original primary conditions of ownership. Their tenure was no longer qualified by the relative rights and obligations which previously existed. . . . The implied agreement that the party wall, existing at the time of the conveyances of the two lots by their common owner, should continue in its use and occupancy as such, cannot be extended so as to relate to a changed condition of things caused by the casual destruction of the wall and buildings.

In determining the life of an easement

> the nature and character of the easement, the purposes which it is intended to serve, the relations of the parties to each other, and other circumstances, may be required to be taken into account *Per* Moss, C.J.A., in *Craig* v. *Craig*, 2 A.R. (Ont.) 583, at 592.

In my judgment, therefore, the understanding between the parties contemplated that the agreement should continue during the existence of the two buildings as they were constructed. In the event of the destruction of either or both, then the agreement terminated, its object being at an end, and the parties revert to their original position.

The evidence is that the party wall between these properties was agreed to by the parties, but they never met concerning any agreement as to the construction and user of the entrance staircase, passageways and exit. It was during the preparation of the plans by the architect, after the party wall had been agreed to, that the suggestion was made by him as to these arrangements. The two agreements, the one as to the party wall and the other as to the easements, were thus wholly distinct. The plaintiff says that after the building was erected he had his solicitor prepare the document which is put in as ex. 9, dated November 16, 1905, in which the modes of entrance and passage are set forth by plan attached thereto, and by which a grant is made by each party to the other of the rights-of-way on the other's property as therein described. The plaintiff says defendant refused to sign it because it might affect the sale of his building. The defendant says this agreement was presented to him some time after the building went up, after the building was practically completed.

Upon the completion of the building, the plaintiff owed the defendant $510.65, his share of erecting the party wall. That amount was never paid by the plaintiff, though tendered before action.

Upon these facts, it was argued that whatever original agreement there may have been was by these acts abandoned. To my mind, this does not follow. If there is a verbal agreement and a document is presented for signature which embodies something more than the actual terms agreed to, a refusal to sign this is not such a repudiation of the original agreement as, if accepted, would amount to a rescission of the agreement. If the original oral agreement differs in an important particular from that set out in the document, the original agreement remains unaffected. The draft document contemplated a perpetual agreement which, as I see it, the original agreement did not, and the defendant rightly objected to sign it, and the parties went on and acted on the original agreement. The non-payment of the money due under the party wall agreement cannot annul or affect the agreement as to easements in question, as each of these agreements was altogether independent of the other. In the circumstances I can see no determination of the original agreement by the parties.

A question is raised as to the Statute of Frauds, which is pleaded as a defence. But this particular agreement was fully

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executed on both sides. The two buildings were laid out and constructed as agreed upon and each of the parties made use of the other's property to the full extent contemplated by both, and this mutual and reciprocal user continued uninterrupted for about 13 years. If ever a contract was completely performed this one was. This action is not brought to enforce performance of a contract unexecuted by the defendant.

Where an oral contract which is unenforceable by reason of the Statute of Frauds has been entirely performed, the rights of the parties are no longer affected by the statute, and it is immaterial that either party might have refused to perform.

Where oral agreements creating interests in land have been carried into effect by the acts of the parties, the rights acquired thereunder are not affected by the statute. 20 Cyc. 302-3.

The action is not brought to enforce the terms of an executory contract but to restrain the threatened interference by the defendant with rights acquired and long enjoyed by the plaintiff under an agreement which is established. In my opinion, questions arising out of the Statute of Frauds and part performance do not enter into this case.

I consider that the plaintiff has established an agreement for the use of entrance, staircase and passageway in the defendant's building, as set out in the judgment, until it is destroyed by some other act than that of the defendant, and while the plaintiff's building exists, and the judgment should be varied accordingly. The plaintiff offered to pay the defendant the sum of $510.65, and that amount is directed to be paid by him in the judgment. I would allow the defendant interest thereon as set out in the judgment of the Chief Justice.

Fullerton, J.A.

FULLERTON, J.A., concurred. *Judgment varied.*

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MERCHANTS BANK OF CANADA v. BUSH.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 10, 1918.

BANKS (§ IV C—111)—GUARANTY—ILLEGAL RATE OF INTEREST CHARGED BY BANK—RIGHTS AND LIABILITIES OF GUARANTOR.

A director of an incorporated company who has given a written guarantee to a bank that he would pay any indebtedness incurred by the company to the bank, not exceeding $3,000, is not released by the bank charging the company interest at a rate higher than that allowed by the Bank Act, without the knowledge of the company. The agreement between the bank and the company is not void because of the illegal interest charged, but the bank can only recover interest at the legal rate and the guarantor is liable for the amount which can be legally claimed not exceeding $3,000.

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Fitzpatrick, C.J.

APPEAL from a decision of the Court of Appeal for British Columbia (38 D.L.R. 499), affirming, by an equal division of the court, the judgment of Hunter, C.J., at the trial and dismissing the action of the plaintiff with costs. Reversed.

F. E. Meredith, K.C., and *D. L. McCarthy*, K.C., for appellant; *Eug. Lafleur*, K.C., and *Robert Cassidy*, K.C., for respondent.

FITZPATRICK, C.J.:—There are two points raised by the defence which fall to be decided on the present appeal; and first it is contended that on the pleadings the plaintiff—appellant—has not alleged that the principal debtor has made default. I am, however, of opinion that the allegations in the statement of claim which contain an averment that the principal debtor is indebted to the plaintiff and that payment has been duly demanded of the surety sufficiently state the claim.

It is said in the second place that the surety is not to be held liable because the bank charged the principal debtor upon advances made to him interest at the rate of 8% whereas the Bank Act provides that banks may take interest not exceeding 7% but no higher rate of interest shall be recoverable by the bank.

The point is not without difficulty, and if I have come to the conclusion that it cannot be allowed it is only upon the special circumstances of the case. For if the transaction were simply a loan of $3,000 and the bank had charged an exorbitant rate of interest there would be great force in the argument that the surety could say that he did not intend to guarantee a money-lending transaction, but was entitled to rely on the bank only charging interest at a rate which they were legally empowered to do, that is to say "not exceeding 7% and the excess beyond which at any rate they could not recover."

But that is not such a transaction as the one with which we are dealing in the present case. The surety here guarantees to the bank that the principal debtor will pay to the bank all moneys which may at any time be due to the bank from him.

Now, of course, it is open to the surety to shew that the moneys alleged to be due from the principal debtor are not recoverable by the bank, but that is not the point of the defence which is, not that there are not moneys legally due and recoverable from the principal debtor, but that because in the course of the dealings between him and the bank the latter has made a charge which it was not entitled

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to make though this be outside and beyond the sum sought to be recovered from the surety.

I do not think the transaction between the bank and the principal debtor can be called in question in this way by the surety. If he chooses to give a general undertaking to become liable for whatever may at any time be due to the bank from the debtor he must accept the consequences of their dealings which he can neither claim to control nor dispute as discharging his liability.

And the mere fact that advances and charges were made, which by statute are made not recoverable, cannot in the absence of any proof of prejudice to the surety be any ground for discharging his liability for the ultimate debt properly due.

The Interest Act provides that on any money secured by mortgage made payable on the sinking fund plan no interest whatever shall be recoverable unless the mortgage contains a statement shewing the amount of the principal money advanced and the rate of interest chargeable thereon. The fact that the bank had made an advance on such a mortgage on which no interest whatever was recoverable though the rate of interest was not excessive could not be ground for discharging the surety.

I think that the respondent must be held liable for $3,000, the amount to which his guarantee is limited, with interest at 6% as also provided, and I would therefore allow the appeal with costs.

Davies, J.

DAVIES, J.:—This action was brought by the bank against respondent Bush to recover the sum of $3,000 due upon a continuing guarantee given by him to the bank for the payment to it "of all moneys which may at any time be due to the bank from the Seafield Lumber and Shingle Co." with provision that the sureties' liability should not exceed $3,000 with interest at 6% from the time of payment being required.

The only defences set up by the defendant were that the bank had not specifically proved the debt due to it and secondly that in its dealings with the company the bank had charged interest at the rate of 8%, which was contrary to the provisions of the Bank Act.

As to the proof of the debt being due and not paid to the bank, I have only to say that I agree with the Court of Appeal in its holding that the pleadings admitted both facts, the debt being due and the company's default in not paying it. Mr. Lafleur's con-

tention was that the moment the customer paid the illegal rate of interest to the bank that fact constituted a new contract between him and the bank and discharged the guarantor. But there was not a scintilla of evidence that any payment of the illegal interest charged had been made by the company with knowledge of the illegal rate. The only evidence on the point was the admission at the trial by the bank that it had charged in its books interest at 8%, but whether to the knowledge or not of the company does not anywhere appear. In my judgment, therefore, there was no change or variation in the contract as guaranteed which could discharge the guarantor.

The excess of interest charged could not possibly in any view affect the amount of $3,000 guaranteed because the amount of the items, principal and interest, admitted as properly charged and due by the company to the bank greatly exceeded the limited amount of the respondent's guarantee.

The charging of an excessive rate of interest would only in an accounting between the bank and the guarantor have the same result as charging improperly an item of principal. In either case they would be struck out. As I have pointed out already, apart altogether from any excess of interest the balance of account due by the company to the bank exceeded largely the limit of the guarantee and the guarantor was not and could not be prejudiced by the excess of interest charged.

I would therefore allow the appeal with costs and direct judgment to be entered for the amount guaranteed, $3,000, with interest as provided in the guarantee and with costs in all the courts.

Idington, J.

IDINGTON, J.:—The respondent was a shareholder in, and director of, a corporate company known as the Seafield Lumber and Shingle Co. Limited, carrying on business in British Columbia, who, with others, gave appellant at Nanaimo, on November 17, 1914, their joint and several guarantee that said company would up to a named sum pay appellant all moneys which might at any time be due to it from said company.

The guarantee was of the usual kind taken by banks when requiring a customer to furnish some guarantor for the payment of the ultimate balance of the customer's indebtedness. In this case, the liability was limited to $3,000 and 6% per annum thereon from the time of payment being required.

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Idington, J.

The company went into liquidation in February, 1916, and then owed over $4,900 to the appellant.

This action was brought by appellant to recover from respondent the sum of $3,000 on account of said indebtedness.

The appellant had been charging the company 8% per annum on its loans.

The trial judge held that in law the respondent was thereby discharged from his guarantee.

This view was also entertained by Eberts, J., in the Court of Appeal, but no one else there ventured to support it.

Martin, J., held the appeal should be dismissed because sufficient proof had not been adduced of the indebtedness in question and declined to express any opinion upon the other point, as in that view he had taken it was immaterial. The Chief Justice and McPhillips, J., held that appellant was entitled to succeed. In the opinion of the latter, he suggests that the charging by banks of a higher rate of interest than the maximum statutory rate may be said to be matter of common knowledge. I think he is right in so assuming and especially so in regard to dealings in the western provinces. I should be much surprised to find any business man, of the standing which the admitted facts indicate respondent to have been, ignorant of such a common practice. The respondent in his examination for discovery denies that he knew what rate was being charged by appellant to the said company.

I accept his denial implicitly, for he seems to have retired from business; but he was not asked as to his knowledge of the usual rate, as he doubtless would have been, had he been able to deny all knowledge of such rates as 8% being originally required. There is not the slightest indication in the guarantee itself or in the meagre evidence we have relative to the surrounding facts and circumstances, that can entitle us to read into the documents any implication of a condition relative to the limitation of the rate of interest to be charged.

No business man signing such an instrument, in recent years, can ever have conceived that the bank could not, if it chose, exact as a condition of its making advances a higher rate than 7%.

The well-known case of *Union Bank of Canada* v. *McHugh*, 44 Can. S.C.R. 473, referred to at the trial herein, and on argument here, had been decided in this court over three years before

the guarantee in question was given. And if my memory serves me, I think cases preceding that by many years which bore the mark of dealings in what the learned trial judge referred to as killing rates had been presented for our consideration. There never was any serious doubt as to the permissive character of the provisions in the Banking Act and bankers in the zones where it was necessary to charge more than 7% deducted from the advances made accordingly, or got out of business.

The question of what could be collected on overdue amounts gave rise to a difference of opinion here and was set at rest by their Lordships in the Privy Council in the *McHugh* case, [1913] A.C. 299; 10 D.L.R. 562, before this guarantee was given.

I therefore am unable to understand why any one, signing such documents thereafter, could pretend they were entitled to read into that writing they had so signed, a something not found there.

Nor can I find any legal principle upon which a surety could claim a discharge by virtue of any such supposed implication. If we refer to the cases cited there is, on examination, nothing found to maintain such a proposition of law. If we turn to DeColyar on Guarantees to find something amongst the many means, tabulated by the author, whereby a surety may be discharged, we can find nothing to give us any hint of a suggestion upon which such a proposition can rest.

In short, there was neither fraud nor variation of the contract or the contractual relation for which the respondent stood as guarantor.

The improvidence of the principal is not a legal basis for such discharge unless it has been stipulated against and is in truth the reason for the banker shifting the burden thereof, in part at least, on to him willing to become a guarantor.

To maintain the proposition that in face of an elaborate document, framed to meet every hitherto known contingency whereby a surety might escape answering for the ultimate balance due by a principal, or the part of it he had undertaken, we must find therein an implied condition, agreed to by appellant, and broken so soon as signed and accepted.

The statement relied upon for proof of the rate of interest being eight per cent. expresses the fact that such rate "had been charged the company right along."

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Idington, J.

Is the suggestion of an implied condition under such circumstances not too absurd for acceptance?

The examination of respondent for discovery as well as the frame of the pleadings, relieves me from any discussion of the point made as the proof of indebtedness.

This appeal should be allowed with costs throughout and judgment be entered for the amount claimed with interest at 6% per annum as stated in guarantee.

Anglin, J.

ANGLIN, J.:—I agree with the view taken by the majority of the Judges of the Court of Appeal as to the sufficiency of the allegation in the plaintiff's claim of the indebtedness and default of its principal debtor and as to the effect of the absence of any specific denial thereof in the plea of the defendant.

The only defence set up is an alleged variation of the contract between the bank and its debtor in regard to the rate of interest payable by the latter, which the defendant asserts has discharged him as a surety. He contends, I incline to think with reason, that his guarantee must be presumed to have been based on a contract between the principal debtor and the bank not *ultra vires* of the latter under the Bank Act, and, therefore, importing an agreement for interest at a rate not exceeding 7%. The variation alleged is based on an admission of counsel made at the trial that the rate charged against the principal debtor in the books of the bank has been 8%.

There is no evidence of any assent by the debtor to this charge or that he was cognizant of it. No agreement to pay it would have bound him except in so far as he had actually paid it or had assented to a stated account containing items of interest charged at that rate. *McHugh* v. *Union Bank*, [1913] A.C. 299; 10 D.L.R. 562; 44 Can. S.C.R. 473. There is no proof of any such payment or account stated. Therefore no binding agreement between the principal debtor and the bank to vary the terms of the contract guaranteed has been shewn, and in order that it should effect the discharge of the surety an agreement for a variation in the terms of the contract of the principals must be legally binding. Both the debtor and the guarantor would have been entitled to have the account of the bank taken on a footing of interest at 7%—or, it may be, at 5%.

Had actual payment of interest to the bank by the primary debtor at a rate exceeding 7% been shewn to have been made

subsequently to the giving of the defendant's guarantee, it may be that he would have been discharged, unless, indeed, it should be clearly established that the guarantor's risk—the likelihood of his being called upon under the guarantee—was not thereby appreciably affected.

Solely on the ground that the defendant has failed to shew any variation in the terms of the guaranteed contract legally binding upon either the primary debtor or himself I would allow this appeal with costs here and in the Court of Appeal and would direct the entry of judgment in the plaintiff's favour for the amount claimed by it with costs of this action.

Brodeur, J.

BRODEUR, J.:—The action by the appellant is on a guarantee given by the respondent to the effect that if a certain company did not pay to the bank its indebtedness the respondent as guarantor would pay to the extent of $3,000.

The contract of guarantee provided that the liability would cover not only the capital sums advanced by the bank to that company but also all interests, costs, charges for commissions and other expenses which the bank, in the course of its business, could charge in respect of any advances or discounts made to the principal debtor.

It appears that the bank, in the course of its dealings with the customer, charged an interest of 8%, contrary to the provisions of the Bank Act which authorized an interest of 7%.

The amount representing that excess of rate could not be large, for the advances covered a short period of time, and it seems very clear that the amount due by the customer was much larger than $3,000 when the action on the guarantee was instituted, even after having deducted that excess of rate of interest.

The respondent claims that he is discharged from any liability because the bank charged 8% instead of 7% on the advances made to the principal debtor.

There is no doubt that the bank had no right to charge more than 7% and the contract between the bank and its customer as to interest is void and the bank could recover only statutory interest, as it was decided in the case of *McHugh* v. *Union Bank of Canada*, [1913] A.C. 299; 10 D.L.R. 562. The guarantor may, when he is called upon to pay the debt of the principal debtor, refuse to pay more than the statutory rate of interest. He could

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only be compelled to make good what the company owed up to the sum of $3,000.

There is no evidence that when the contract of guarantee was signed there was a contract between the bank and the company. But later on, advances were made to the latter; and if, in making those advances, some illegal thing has been done, it does not render the contract of guarantee null and void; but the advances made as a result of such an illegal thing could not be claimed from the guarantor.

It is said, however, that it was an implied part of the contract of guarantee that no larger rate of interest than 7% should be charged, and that the bank had varied that contract.

I fail to see in this contract any implied covenant as the one suggested. The parties, on the contrary, have formally stipulated as to the interest; and it is a well-settled principle of law that the courts will not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for. Beal, Legal Interpretation, p. 129.

Besides assuming that such an implied covenant would exist in this contract, the alteration would require to be substantial in order to discharge the surety. *Holme* v. *Brunskill*, 3 Q.B.D. 495.

For these reasons, the bank should succeed and its appeal should be allowed with costs. *Appeal allowed.*

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REID v. MORWICK.

Ontario Supreme Court, Appellate Division, Maclaren, Magee and Hodgins, JJ.A., Clute, J., and Ferguson, J.A. March 1, 1918.

HUSBAND AND WIFE (§ II H.—105)—BUSINESS CARRIED ON BY HUSBAND—CAPITAL SUPPLIED BY WIFE—PARTNERSHIP—EXECUTION CREDITORS OF HUSBAND—HUSBAND'S INTEREST LIABLE TO SATISFY.

Where a business has been begun and carried on by a husband in his own name on capital supplied by his wife, there being no agreement as to shares, the exertions of both helping to increase and make the business profitable, the husband has a proprietary interest in such business and he and his wife are partners in equal shares: the husband's interest is liable to satisfy his execution creditors.

Statement.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., at the trial, dismissing the action with costs.

The action was brought by an execution creditor of the defendant William Morwick against him and his wife, Mary Ann Morwick; and the issue tried was, whether or not the assets of a business carried on in the name of the defendant William Morwick was exigible under the plaintiff's execution. These assets

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were claimed by the defendant Mary Ann Morwick as her own; and the learned trial Judge sustained her claim.

Peter White, K.C., for appellant.

A. M. Lewis, for respondents.

FERGUSON, J.A.:—Appeal from the judgment of Middleton, J., dated the 26th June, 1917, dismissing the plaintiff's action with costs.

The plaintiff is an execution creditor of the defendant William Morwick. The defendant Mary Ann Morwick is the wife of her co-defendant. The issue tried was, whether or not the assets of a certain business carried on in the name of the defendant William Morwick are exigible under the plaintiff's execution, they being claimed by Mary Ann Morwick. The action was prosecuted on the basis that any claim of the defendant Mary Ann Morwick to the goods sought to be made liable in execution was dishonest. It was, however, clearly established that her money was used to purchase the plant with which the business was commenced, and in her testimony she stated that she neither gave nor lent that money to her husband; also that it was well understood that everything was hers, and not her husband's. The learned trial Judge accepted this testimony as trustworthy. The understanding deposed to does not appear to be based on any agreement, but to be simply an inference, in which the learned trial Judge agrees. His mind does not appear to have been directed to the idea that the transaction between the husband and wife might have been in the nature of a joint venture.

To my mind, the result turns on the proper inferences to be drawn from the acts of these parties, accepting the finding of the trial Judge that the evidence of the defendants as to what they severally said and did was trustworthy. In accepting this finding, but refusing to adopt as binding the understanding of either of these witnesses, or the inference of the trial Judge, I do not mean to depart from the usual practice of this Court of accepting the findings of the trial Judge as to the credibility of the witnesses.

It is common ground that the defendants, husband and wife, were, prior to 1893, engaged in the occupation of farming on a farm owned by the husband; that in 1893 they moved into Niagara Falls, Ontario, where for eight or nine years the husband worked as a carpenter and latterly as janitor of the Collegiate Institute, during which time he supported his wife and family out of his

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earnings; that, prior to moving to Niagara Falls, the wife had received a legacy, a part of which she lent to her husband, taking from him as security a second mortgage on his farm; that in 1901, the wife being of the opinion that the husband's occupation did not agree with him, and that he should have some out-door employment, they consulted together and bought a milk-route in Niagara Falls; that the purchase-money, $500, was raised by the wife, Mary Ann Morwick, pledging the second mortgage she had on her husband's farm; that the husband made the bargain for the purchase of the milk-route, and the horses, waggons, cans, and other chattels that went with it, and took delivery and possession thereof, and started to do business with these chattels in his own name; that, in the spring of 1902, the parties sold out the milk-business, and opened up, in premises rented by the husband, an ice-cream business, buying the ice-cream manufacturing utensils and the equipment from a druggist in the town, the purchase-price thereof being $500; that both the husband and wife took part in the negotiations for the purchase, but the transaction of the purchase and sale of these chattels and the taking possession thereof was carried out by the husband, William Morwick, in his own name, and from that day down to the present time, a period of 15 years, the business has been carried on by William Morwick in his own name; and that from the use of these chattels and the work and services of William Morwick, assisted to some extent by his wife, assets have accumulated, valued, in the statement rendered to the Imperial Bank in the year 1915, at about $12,500. During all these years, William Morwick, with the knowledge and consent of his wife, carried on the business and every transaction in connection therewith in his own name. The bank-account has been in his name, the signs on the business premises, on the waggons, on the stationery, and on other advertising mediums have been "William Morwick, Ice-Cream Manufacturer." The business has been extensively advertised in the local newspaper as the business of "William Morwick, Ice-Cream Manufacturer." The ledger and other books of account have been kept in the name of William Morwick. Machinery, horses, waggons, and other chattels have been purchased for the purpose of extending and increasing the business, all in the name of William Morwick. Notes were given to the bank in the name of William Morwick, and

all cheques on the bank-account were issued by him, and he issued cheques on that bank-account not only for the purposes of the business, but for his own purposes outside of this business. He dealt with the customers and creditors of the business as his own. He pledged his credit and gave his time, labour, and skill to the business, as fully and completely as he could have done, were it conceded that he was at all times the beneficial owner thereof.

From the moneys which he says his wife allowed him to take out of the business, William Morwick bought a property, 74 Simcoe street, Niagara Falls, taking the conveyance in his own name. This he did with the approval of his wife; and, with her knowledge and consent, he, in 1913, in his own name, gave to the Imperial Bank a chattel mortgage to secure an indebtedness incurred by him in raising money to buy machinery for this business, and in raising money by the discounting of his note to invest in a venture outside of the business in question.

About the year 1913, he became interested in an outside venture known as the Gordon Construction Company, and the judgment which it is sought in this action to enforce was secured on a note given in connection with that outside venture, and it was not until the plaintiff recently attempted to realise on this judgment by execution that the defendant Mary Ann Morwick asserted her ownership of the chattels and business which were in her husband's possession, and which he had been carrying on.

Down to this point I have attempted to state facts which I think are admitted by both sides. We must now deal with the evidence to ascertain just why and how the business was established, who carried it on, was the money that went into purchasing the plant and establishing the business a gift from the wife to the husband or was it a loan, or was it the placing of money in a joint venture with her husband, or was this business, as found by the trial Judge, the exclusive business of the defendant Mary Ann Morwick, in which her husband had no proprietary interest, although established and carried on by him if not entirely alone, at least working in conjunction with his wife?

In differing from an experienced trial Judge as to the proper inferences, it seems to me that I should, in deference to his opinion, quote from the evidence.

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William Morwick's examination, p. 37:—

"Q. The first business you had gone into was the milk-route? A. Yes, sir.

"Q. Who was that purchased from? A. A man by the name of Emmett.

"Q. And who negotiated the sale—that is, you had the dealings with them? A. I spoke to Mr. Emmett about it. I knew that he wanted to sell.

"Q. And who made the bargain? A. I spoke to him.

"Q. Who made the bargain? A. I made the bargain."

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"Q. How much did you give for the business? A. I gave—$600 was paid for the business.

"Q. You gave $600? A. I did not say I gave.

"Q. I understood you did? A. There was $600 given for the business.

"Q. You started to say, 'I gave,' and then you hesitated? A. Yes.

"HIS LORDSHIP: Where did you get the mony that you paid for it? A. Mrs. Morwick.

"Q. When the business was sold, was it for how much—in the spring of 1902 I think you said? A. About the same price.

"HIS LORDSHIP: You sold it for $600. What did you do with them? A. We put them into the ice-cream business.

"Q. Now who did the dealing with Frank? (Purchaser of the milk business.) A. Mrs. Morwick and myself.

"Q. What did Mrs. Morwick do—who actually fixed the price? A. I decided that it ought to be worth as much as we gave for it, for it was better when I sold it than when we bought it.

"Q. Who closed the bargain (sale of the milk-route)? A. Well, I do not know that any one of us in particular, Mrs. Morwick and I together.

"Q. Then you bought the ice-cream business from whom? A. Harry Smith.

"Q. And who did the business with Smith? A. Mrs. Morwick.

"Q. Alone? A. With my assistance.

"Q. You and she went to Smith's office? A. To see the ice-cream business.

"Q. Who was Smith? A. A druggist.

"Q. What did he have to sell? A. Machinery.

"Q. Machinery? A. Yes, tubs and packers.

"Q. So really then, it was the utensils for making ice-cream and packing it and freezing it? A. Yes.

Q. Did you buy these? A. They were boughten.

"Q. You bought them? A. Yes.

"Q. For how much? A. $500.

"Q. And did you remove them from his place? A. Yes, sir.

"Q. And took them down to where? A. To the milk-depot.

"Q. The place you had rented? A. Yes."

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"Q. Then at the time when you went into the ice-cream business, was any arrangement made by you and your wife? A. I was to operate it.

"Q. You were to operate it, what else? A. What more was there?

"Q. I beg pardon? A. What more was there to do?

"Q. That was all that was said between you and her, was it? A. No, she would buy it if I would run the business.

"Q. Beg pardon? A. She would buy it if I would run the business.

"Q. Nothing else? A. I cannot remember all that was said 15 years ago.

"Q. About your part of it—you see I cannot lead you yet—will you tell what you did, if that was the only bargain you had with her? A. The substance of it.

"Q. About the ice-cream business? A. The substance of it.

"Q. Then I take it that your remuneration for running the business was not fixed in any way? A. No, sir.

"Q. And there was no written document between you and your wife defining your position? A. No.

"Q. Or any document of any kind or any bargain other than you have told us between you and her—then when did you first open up the bank-account in connection with the ice-cream business? A. When I first started into it.

"Q. And the account was opened up in your name? A. In my name.

"Q. Why? A. Because I was to manage the business."

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"Q. I suppose, as manager of the business, you conducted it as you saw fit? A. Yes, sir.

"Q. And no set wages? A. No, just what money I needed."

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"Q. Now, from the very first—you will correct me—I understand that the business was conducted in your name? A. Yes.

"Q. And is to-day? A. Yes."

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"Q. I see that in the statement of September 1st, 1915, you gave your net worth as $12,500? A. That is what it is there.

"Q. Would that be correct? A. Pretty well inflated.

"Q. Pretty well inflated, is it? It was given to the bank for what purpose? A. To make it appear good on the books."

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"HIS LORDSHIP: It is common ground that Mr. Morwick had entire charge of the business, consulting his wife from time to time.

"Q. Had you any other way of contributing to the support of your family except out of this business? A. No, sir.

"Q. Your whole time and attention was devoted to it—now you have the books of account here—will you shew any entries of any moneys withdrawn by you at any time from the partnership? A. No, sir.

"Q. Or do they shew any entries of any moneys withdrawn by Mrs. Morwick from the partnership? A. No, sir.

"Q. Now everything that you did in connection with this business was, I understand, with your wife's consent and approval? A. Yes, sir.

Cross-examined by Mr. Lewis, counsel for the wife, p. 64:—

"Q. Now what did you get out of it (the business)? A. Well, I just got my clothing and what little money I had wanted to spend.

"Q. You never asked your wife what you were going to get out of it, did you? A. No."

Re-examined by Mr. White, the plaintiff's counsel, p. 65:—

"Q. Then just one general question. Did I understand you to say to Mr. Lewis, implying rather by your answer to him that no further capital was put into the business than the original investment, that the improvements amounting now to the costs

as shewn by your statement to the bank, that these were all met out of the profits of the business? A. Yes, sir."

Questions from the examination for discovery of Mary Ann Morwick (see the evidence at p. 14):—

"Q. And there was no agreement in writing, or anything else in writing, shewing what your husband was to get for doing the work in connection with the business? A. No.

"Q. Now, had you any verbal agreement with him about that? A. No.

"Q. How long has he carried on this business for you? A. About 14 years.

"Q. The only money you have put in since the business was started was the $800, and everything was bought out of the profits of the business? A. Yes."

Trial evidence—Mrs. Mary Ann Morwick, examined by her own counsel, Mr. Lewis:—

"Q. And then a milk-route was purchased? A. Yes.

"Q. Will you tell me why that was purchased and who suggested it? A. Well, my husband had been some time at the Collegiate working—

"Q. Yes? A. And it did not seem to agree with him, and I began to be anxious about him, and thought I would try and get some outdoor employment; and, as there was not a milk-route depot, I should say, at Niagara Falls, I thought it might be a good thing if he could manage it, and we consulted together.

"Q. Then—go ahead? A. Then we, of course together, looked around to see what could be done about it.

"Q. Yes? A. And we knew of a man by the name of Emmett who wanted to sell his route in that way, and we raised the money.

"Q. Now, will you tell me how you raised the money? A. Well, our original farm was not sold yet, and I had the second mortgage.

"Q. Yes? A. I raised the money on the second mortgage.

"Q. That is the assignment you heard spoken of this morning? A. Yes.

"Q. And that is where you got the money? A. Yes, that is where I got the money to buy the milk-route.

"Q. Now then you went on, you sold that business, didn't you? A. Sold the milk-business.

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"Q. While you were still in this rented place? A. Yes.

"Q. Then what did you do? A. Then we went into ice-cream then, stronger; I opened an ice-cream parlour after that."

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"Q. Now, did you have any arrangement at all with your husband, as to what he was to get? A. No.

"Q. What were your husband's needs, anyway, what did he draw? A. Oh, he took money to provide for himself.

"Q. Did you give or loan this money that went into this business to your husband? A. No. I did not loan money to my husband."

Being examined in reference to the purchase by her husband in his own name of a real property known as 74 Simcoe street, and not in question in this action, this witness says, at p. 75:—

"A. Well, we talked it over together, of course, and I considered it was a good investment for him.

"Q. Well, he got the money to pay for that—do you remember how it was paid, did he get it weekly from you? A. To pay into the land?

"Q. Yes? A. The rent of the house nearly pays it, and the rest he got from me.

"Q. And the rest he got from you? A. Yes."

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"Q. Then, as a matter of fact, you first started business in the ice-cream business, the original bank-account was opened in your husband's name? A. Yes.

"Q. Why? A. It was more convenient to have it that way.

"Q. So there is no reason in that—what other reason have you? A. No other reason—I did not wish to humiliate my husband by advertising to everybody that I owned everything, and he nothing, it was well understood between he and I that things were mine and not his—

"Q. And I suppose you knew, of course, there was danger of people giving credit—in other words, what you wished to do was to let the public understand that the business was your husband's? A. I did not consider the public at all. I was not thinking about that.

"Q. You must have when you spoke about not wanting to humiliate your husband? A. It was he I was thinking of, not the public.

"Q. But you did not want the public to know that you were owning all this business, because that would humiliate your husband, as I understand it, is that correct? A. Yes.

"Q. And that was one of the reasons why the business was run in his name, and the bank-account kept in his name? A. Yes.

"Q. In fact, might I say the only reason—he had no debts that you wished to protect him against? A. He had not any debts.

"Q. So that there was no other reason? A. No, I cannot say there was any other reason."

To my mind the proper inference to be drawn from the evidence of these two witnesses which I have quoted is, that the husband and wife went into a joint venture. True, the original capital of $500 was raised by the wife pledging the mortgage which she had on her husband's farm, but the businesses were established for the benefit of both of them. The primary object of the establishing of the business was to give the husband an outdoor occupation; and throughout her evidence the wife says they consulted together, they negotiated together; there was no agreement that he was to give his time and work, skill and ability, exclusively for the benefit of his wife, and it was his work, skill, and ability that made and accumulated the business and assets. There was no discussion or agreement as to who owned the business. The question never arose between the parties. The wife admits that the husband took out of the business what he needed, and she took out of the business what she needed. If this transaction had taken place between strangers, I think that the trial Judge would have concluded that it was a joint venture. The effect of the trial Judge's holding is, because the wife furnished the original capital, not for the purchase of a going concern, but for the purchase of a plant for the purpose of starting up a business which her husband was to conduct and to which he was to devote his whole time and ability, and to which he has devoted his whole time and ability for years, to deprive him and his creditors of any remuneration for his services. The only statement in the evidence against holding that there was no arrangement as to the ownership of the business, and the profits therefrom, is the statement made by the defendant Mary Ann Morwick at the end of one of her answers on p. 80: "It was well understood between he and I that things were

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mine and not his." That statement is contrary to her other statements, and is contrary to the course of conduct and dealings of these parties for a period of 14 years, and is contrary to the possession and control of the business, and is contrary to the fact that William Morwick pledged his own credit and became liable for all transactions in connection with carrying on and developing the business. To that statement of Mrs. Morwick, I apply the remarks made by the learned trial Judge to the plaintiff at p. 7 of the evidence, when the plaintiff was endeavouring to make out estoppel by shewing that, when he discounted the note sued upon, he did so on the *understanding* that William Morwick was the owner of this ice-cream business.

"HIS LORDSHIP: Understanding does not determine a law-suit. You must tell me he said something, and what they said, and not an understanding."

By the rules of common law husband and wife were regarded as one person, the legal existence of the wife during the marriage being regarded as merged into that of the husband; and the wife was incapable, with some exceptions, of acquiring or enjoying any property independently of her husband: Halsbury's Laws of England, vol. 16, p. 321, para. 634. See also Broom's Common Laws, 9th ed., p. 677.

The Married Women's Property Act, now R.S.O. 1914, ch. 149, modified the common law by enacting:—

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract . . . as if she were a *feme sole* . . ." (sec. 4, sub-sec. 2).

"Every married woman, whether married before or after the passing of this Act, shall have and hold as her separate property, and may dispose of as such, the wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on and in which her husband has no proprietary interest, or gained or acquired by her by the exercise of any literary, artistic or scientific skill" (sec. 7, sub-sec. 1).

From which I take it that the rules of the common law prevail unless it is made out affirmatively by Mary Ann Morwick: (1) that she was possessed of separate estate and thereby empowered

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to contract in reference thereto as a *feme sole*; or (2) that she was engaged in or carried on a business in which her husband had no proprietary interest. Under the first head we must inquire as to what contract she made with her husband; under the second, did she carry on a business in which her husband had no proprietary interest? On the argument counsel assumed that the rights of the parties were governed by sec. 7. I have a contrary opinion, but will first deal with the case on that assumption, and later develope the reason why I think sec. 4 governs. The husband and wife were engaged in a business carried on in his name, on his credit, and to some extent for his benefit. He was personally liable for the losses of the business, and to an indefinite extent entitled to share in its profits. He was in possession and control of the assets of the business, all of which, to my mind, raise a presumption of ownership which it was necessary for the defendant Mary Ann Morwick to explain away. It is admitted that the legal title in the trade-name, chattels, horses, goods, waggons, bank-account, was in William Morwick. Whether or not the holding of the legal title without beneficial ownership would, within the meaning of sec. 7 of the Married Women's Property Act, establish in William Morwick a "proprietary interest," depends on how we interpret the Act.

In *Cooney* v. *Sheppard* (1895), 23 A.R. 4, Osler, J.A., considered the meaning of the words "proprietary interest" as used in this section; and his opinion is stated as follows (p. 6):—

"The meaning of the expression is not defined, and although it is an unusual one, I have no reason to suppose that it is employed in any technical or limited sense. It signifies 'interest as an owner' or 'legal right or title.'"

Under that definition the husband holding the legal title would, I think, have a proprietary interest: but I prefer to rest my judgment on the opinion that the proper inference to be drawn from the evidence is, that William Morwick not only had the legal title but that he had as well a beneficial interest in the business, whether the rights be determined under sec. 7 or sec. 4.

In its facts, this case is not unlike *Laporte* v. *Cosstick* (1874), 23 W.R. 131, the head-note of which is:—

"If a husband takes such a part in his wife's business as to make himself personally liable, the business is not carried on

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separately from the husband, within the meaning of the Married Women's Property Act, 1870." Blackburn, J., in delivering judgment in the Queen's Bench, says, at p. 133:—

"It appears . . . that the husband lived in the house. He gave orders for goods; he took the house from the landlord himself, and made himself liable for the rent. It is said on behalf of the wife that he did this as her agent. He sells the furniture as his own; he writes to tradesmen in his own name, and talks of the creditors as his. The Judge (trial) says that he did all this as his wife's agent, and at her request. Still the question remains, is he liable as principal in the business? If he had been living in adultery with a woman instead of with a wife, he would have been liable as a partner. By the finding of the Judge he has, as it is, made himself liable at the request of the wife, so that the business was so carried on as to make the husband liable at the request of the wife. Still the Judge finds that there was a separate trading. But I cannot agree with this finding. . . . The husband and wife may very well live together, and yet there may be a separate trading; the husband might for this purpose be only in the position of a lodger; but where, as here, the husband takes such a part in carrying on the business as to make himself personally liable, there cannot be a separate trading."

And Lush, J., at the same page, says:—

"This quite negatives a separate trading. To say that this was a separate trading would enable a man wrongfully to evade his creditors."

True, our Act differs from the English Act there under consideration; and the question in the action at bar is not whether there was or was not a "separate trading," but whether or not the wife carried on the business and the husband had no proprietary interest therein; yet I am not prepared to say that where, as here, the husband took the transfer of the property, carried on and established the business and the goodwill in connection therewith in his own name, and became personally liable for the obligations of the business, and dealt with its customers and creditors as his own creditors and customers, and the business and assets were derived not from the wife's work or wages, but from his work, efforts and skill, working with capital furnished by her, he had no proprietary interest in that business.

Having arrived at the conclusion that the husband had this proprietary interest, we have now to ascertain the extent thereof, so that it may be made liable in execution to satisfy the claims of his personal creditors. Had this venture been entered into between strangers, their shares in the profits and losses, I think, must have been declared to be equal.

Lindley on Partnership, 8th ed., p. 410:—

"In the event of a dispute between the partners as to the amount of their shares, such dispute, if it does not turn on the construction of written documents, must be decided like any other pure question of fact; and it has been decided that if there is no evidence from which any satisfactory conclusion as to what was agreed can be drawn, the shares of all the partners will be adjudged equal.

"This is still the law, for, subject to any agreement, express or implied, between the partners, the Partnership Act, 1890, enacts as follows:—

"'24.—(1) All partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.'"

The learned author of the work from which I have just quoted, on p. 411, discusses the question why it is that the shares of the partners are, in the absence of an agreement, not fixed in proportion to their contributions to the capital, and points out that the skill, or the ability to command confidence, of one partner may exceed in value the money contribution of another, and that it would consequently be impossible to determine by capital contributions the shares of the partners in the business.

I am therefore of the opinion that, in this case, subject to the effect of the Married Women's Property Act, we should hold that the defendants were equal partners in the business in question, which on the winding-up would give to the wife a right to have her capital repaid before the other assets are divided.

The view has been expressed that, under the English Act, worded as our Act originally was, a wife possessed of separate estate may be engaged in partnership with her husband, and still be deemed, as to her interest in the business, to be carrying on that business separately, but that she could not in such a case, on

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the failure of the firm, be declared to be a bankrupt. See *In re Helsby* (1893), 63 L.J. Q.B. 261. That case was considered in *In re Simon*, [1909] 1 K.B. 201, in which the Court held that a wife could, as to her separate property, carry on a separate trading within the meaning of the Act, although the business was under the control of her husband. That case further decided that *In re Helsby* should be overruled in so far as it decided that there could not be under the English Act a declaration of bankruptcy; but I do not take it as dissenting from the proposition that the wife as to her separate property might be engaged in partnership with her husband: see Halsbury's Laws of England, vol. 22, p. 20, para. 32.

In my opinion, the effect of these authorities and the Married Women's Property Act is, that a married woman possessed of separate estate may enter into partnership with her husband, and, in respect of the business carried on with her separate property, have all the rights of a partner; on the other hand, where she has no separate estate, she may not enter into a trading partnership with her husband, because she cannot contract in reference to her personal services, except to the extent and in the manner permitted by sec. 7. Section 7 of the Act which I have quoted (*supra*) was not, I think, intended to cut down, but to extend, the power of a married woman to contract. The general purview of the Act is to enable her to contract only in reference to and so as to bind her separate estate; whereas sec. 7 is intended to extend that right so as to permit her to make use of her efforts, skill and ability, to acquire separate estate, and to enable her to do this even when she is not possessed of property, provided the employment she engages in or carries on is one in which her husband had no proprietary interest.

In the case at bar, Mrs. Morwick was possessed of separate property, in reference to which she could contract as a *feme sole*, and therefore enter into a venture with her husband and receive therefrom whatever share of the profits was agreed upon as hers notwithstanding the fact that he exercised control of the business: *In re Simon*, *supra*; from which it follows that, having, as I find, entered into such a joint venture without an express agreement as to her share, she is entitled to share equally with her husband therein.

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I would allow the appeal and declare that the defendants are equal partners in the business carried on by them in the name of William Morwick, and that the share of the said William Morwick in the said partnership business and assets is liable to satisfy the plaintiff's execution.

Magee, J.A.

MAGEE, J.A.:—I would have been inclined to come to the conclusion rather that the business carried on by the defendant husband in his own name during so many years was his and that the wife was his creditor for the moneys she had put in. The case is one, I think, in which she, doubtless honestly, is trying, after her husband has made a loss, to have effect given to her own inferences as to what ought to be the result of what took place during the long period when they did not anticipate any difficulties and had no reason for caution or to act otherwise than naturally. But, as my brother Ferguson is of opinion that it is their joint business, and the effect is probably the same as regards the plaintiff, I do not think I should differ, and therefore I agree in his conclusion.

Maclaren, J.A.

MACLAREN, J. A., agreed with MAGEE, J.A.

Hodgins, J.A.

HODGINS, J.A.:—The change in the statute which eliminated the words "separately from her husband" has been considered in *Robertson* v. *Larocque* (1889), 18 O.R. 469, by MacMahon, J., who says, at p. 474:—

"This section" (the present one) "puts it beyond question that a married woman's earnings in a trade or occupation in which her husband has no proprietary interest is made separate property by the statute."

Osler, J.A., sitting alone, in *Cooney* v. *Sheppard*, 23 A.R. 4, says, at p. 6:—

"The question no longer is whether the proceeds or profits which the husband's creditors are attempting to grasp are derived from an occupation or trade which the wife carries on separately from her husband, but whether the 'property,' whatever it may be, has been 'gained or acquired by her in an employment, trade or occupation in which she is engaged or carries on, and in which her husband has no proprietary interest.' That is the only

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limitation. The meaning of the expresssion is not defined, and although it is an unusual one, I have no reason to suppose that it is employed in any technical or limited sense. It signifies simply 'interest as an owner' or 'legal right or title.' If a married woman may be the owner or tenant of a farm, I know of nothing in the relation of husband and wife which forbids the latter, as the law now stands, from engaging in the occupation of farming and procuring her husband to manage and work the farm for her or as her agent or manager, more than any other trade or occupation which she may choose to carry on, although, no doubt, as the learned Judge below says, in what I may be permitted to characterise as a very able and careful judgment, 'the interference of the husband in the business must always be an element in determining the *bona fides* of the wife's claim.' "

I think this last quotation correctly describes the condition imposed by the statute on the acquisition of a separate estate in trade profits, i.e., the absence of proprietary interest in the husband. The wife may acquire this separate estate by engaging in a business with borrowed capital or with assets owned by others.

On the argument stress was laid upon the words "in which she is engaged or which she carries on" as requiring a sole and separate trading in fact. If this is correct, then the elimination of the word "separately" would seem to be unnecessary. The wife here was actually engaged in the business in so far as it was carried on inside the building, although outside and to the world it was carried on largely by the husband and wholly in his name. I think what she did, apart from what she owned in the business, fulfils that part of the enactment which requires the profits to be traceable to a business in which she is engaged or which she carries on.

There are undeniably in this case elements which, but for the learned trial Judge's finding, would give rise to suspicion and inquiry. But the true view of the business relations of husband and wife depends so essentially upon the trial Judge's estimate of their good faith that I would hesitate long before disregarding it when, as here, he gives them entire credence. The appellant is a judgment creditor of the husband, and seeks to render the accumulated profits of this business liable for his claim. He can take no more

than the husband's property. No claim is made by the husband to an interest in the business. The honesty of that position is the vital point in the case. If it is shewn to be untrue, then the appellant is entitled to have his execution satisfied out of what is really the husband's property, not otherwise. But, if the husband and wife are believed, then, granted that everything took place just as proved, yet there is no escape from the position that, if the appellant is entitled to take this property for his debt, the substance must be disregarded and the form preferred.

The fact that the husband, with his wife's consent, held himself out to the world as the owner of the business, that it was intended by both that he should do so, to avoid the humiliation of the contrary being known, would prevent the wife setting up her present claim if the appellant had become a creditor on the faith of that holding out. But estoppel does not give the husband a proprietary interest; it merely, and to the extent of the creditor's claim, ignores the true state of facts because it would not be just to allow them to stand in his way.

Nor does the course of dealing under which the husband made himself liable to creditors establish the fact that he has an interest. If he were sued by a trade creditor, he would have recourse against the assets only because he as agent would have the right to compel his principal to pay the debt. This does not make the assets his assets. Liability to creditors has been said in *Laporte* v. *Cosstick*, 23 W.R. 131, to negative separate trading. So has the entire conduct of the business by the husband: *Campbell* v. *Cole* (1884), 7 O.R. 127; *Harrison* v. *Douglass*, 40 U.C.R. 410; *In re Gearing*, 4 A.R. 173. But these are not now, as I have said, the test. It is the possession in law by the husband of a proprietary interest in the business in which the wife is engaged, or which she carries on, whether she does so separately or jointly as to assets or capital with persons other than her husband.

I do not think the Court should unduly restrict the words of the present section. It is intended to enable a married woman to acquire a particular species of separate estate, that is, moneys and property derived from trading. The only condition imposed is that it shall not be derived from a business of which the husband is proprietor in whole or in part, but from one in which the wife shall either be engaged or which she carries on. As I have

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mentioned, the assets of the business or the capital may be supplied by others or by the wife herself. In that way this particular kind of separate property is produced by her exertions or her money, and should properly belong to her. The old idea that the husband owns and should own everything is quite obsolete, and ought not to be imposed again upon married women, especially at the present time, unless the Legislature itself compels that backward step.

It is unnecessary to deal with the question raised in *In re Helsby*, 63 L.J. Q.B. 261, i. e., whether the interest of a married woman in a partnership between herself and her husband is or can be separate estate; for, under our statute, the husband would have a proprietary interest in that business, and its profits would not be affected by sec. 7. To hold that the wife in this case has a half interest in the money and property derived from this business, if her husband is a partner in it, seems to be flying in the face of the statute.

Nor do I think it possible at the suit of an execution creditor to declare those to be partners who deny that relationship and whose testimony on that head has been believed.

I would dismiss the appeal.

Clute, J.

CLUTE, J.:—The plaintiff is an execution creditor, in the sum of $2,118.42 debt and $150 costs, of the defendant William Morwick. The defendant Mary Ann Morwick is the wife of her co-defendant.

The issue to be tried is whether or not a certain ice-cream plant is exigible under the plaintiff's execution. It is not disputed that the wife put in the money, $800, which, by increasing profits put into the business, bought the plant in question. The husband contributed no money whatever to the business, but gave his time.

The business commenced originally as a milk-route, purchased by the wife for $800. This money was raised upon a mortgage which she held, representing an investment of money received from her father. That the money put in the original business belonged to the wife was not disputed. The milk business was continued for a time, and merged afterwards into an ice-cream business, which was carried on upon the premises owned by the wife. An addition was built to her house for the purpose.

During all the time that the milk business and ice-cream business were carried on up to the time of seizure, they were so carried on under the name of the husband, although the wife always took an active part in the actual conduct and management of the same. There was no written agreement between husband and wife as to what he was to receive for his services, nor was any amount specified. There was no registration shewing that the business was being carried on in his name for the benefit of the wife. There was a bank-account kept in the husband's name, the wife drawing the profits from time to time from this business-account and depositing the same in her own name.

The business developed to the extent that the plant was valued at from $10,000 to $15,000. Purchases were made, as the increased business demanded, out of the profits. The husband drew, for his private use, small amounts from time to time as he needed them, with the sanction of the wife. The sign and letter-heads were in the name of the husband—in fact the whole business was carried on, so far as outward appearances were concerned, and at the bank, as if the business was that of the husband. No one would have known from appearances that the wife had an interest in the same, beyond the fact possibly that she took an active part in the conduct of the business.

The husband became liable in a transaction of his own on a note discounted at the bank, and gave as security therefor, with the permission of the wife, but in his own name, a chattel mortgage upon the plant in question. He also gave a mortgage upon some real property owned by him. The chattel mortgage was in the usual form, and the property was referred to throughout, including the affidavit, as his property. As between the husband and wife, the advances by the wife for the husband exceeded certain payments by the husband for the wife by $250—by that much he was the gainer. The plaintiff took the positions: (1) that the business was the business of the husband, notwithstanding the fact that it was her money which originally went into the business; (2) that the wife was estopped from denying that the business was that of the husband, owing to the manner in which it was conducted in his name.

The defendants contended that the husband had no proprietary interest in the business within the statute, R.S.O. 1914, ch. 149,

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sec. 7. The trial Judge points out that, when the statute that had given rise to much litigation was recently revised, care was taken to remove the difficulty that existed that had given rise to the earlier cases, and the statute as it now stands entitles her to the profits and proceeds of any business in which her husband has no proprietary interest, "and so the question I have to face in this case is the question of fact whether the husband had or has any proprietary interest in this business."

Dealing then with the question of fact, he says: "Now fortunately the case is in many respects simple, because, in the determination of the question of fact, I am glad to be able to say that I can place entire confidence in the statements of both the husband and wife. It is not a case in which I distrust their statements and seek by tests and critisicm to find out if they are making statements which are untrue or the whole story they tell is a fabrication, because I accept the story as they tell it. That relieves me from going through the facts that have been relied upon in earlier cases to determine the questions that arose under the statute. Here the money had its origin entirely on the part of the wife. She fortunately inherited money, her husband unfortunately did not. He had a farm given him by his father, but that farm was originally subject to two mortgages, and apparently she took up the second mortgage or in some way became the second mortgagee of that property. When that property came to be realised upon, there was nothing left to represent the husband's equity of redemption; her money alone was in existence when they came to start life anew at Niagara Falls."

The learned trial Judge summarises the evidence in regard to her interest in the business, but points out that she paid for the milk business by hypothecating a mortgage and raising $800, which went to pay for the milk-route business; that she had to use her money for the purpose of purchasing the ice-cream business, "so that at that time that was her business." "The question from that time on is, firstly, whether she made a gift to her husband. I do not think she did. Secondly, had the husband any proprietary interest in the business other than by gift of the wife? I do not think he had. It was intended to be the wife's business. In one sense she acted foolishly in allowing the husband

to carry on the business in his name, but the carrying on of the business in the husband's name cannot give him a proprietary interest—there must be some intention to give a proprietary interest—unless all the circumstances entitle Mr. White to rely upon estoppel and to claim that by reason of her allowing her husband to carry on a business which was hers as a matter of fact, in his name, she is precluded from shewing what the true fact is. I do not think that a case, as I have said, of his proprietary interest has been shewn. That being a question of fact, that ends that branch of the case."

He points out that in case of an estoppel it is necessary to shew not merely that there has been a holding out, but that the one who is claiming to set up estoppel is acting upon that holding out. He deals with this question from the evidence, and says: "The weakness of the plaintiff's case here is that the plaintiff has failed to satisfy me that he knew of this holding out and acted upon the faith of it."

A careful reading of the evidence fully supports, in my opinion, the finding of the learned trial Judge. The plaintiff's judgment did not arise upon a debt connected with the business in question. He is asked in respect of this, and says that he did not know Mrs. Morwick; that the original judgment was upon a note given by the husband, and that it was not in connection with the ice-cream business, nor for goods supplied in connection with that business. The plaintiff further says: "I loaned money to the Gordon Construction Company on Mr. Morwick's note." He says that Morwick was interested in the Gordon Construction Company, and he took his note with others upon which the money was advanced.

The plaintiff does not say, and there is no evidence, that the transaction had anything to do with the business, nor is there any evidence that the advance was made in consequence of any holding out of the business as the husband's; so that, in my opinion, there can be no estoppel: *Walker* v. *Hyman*, 1 A.R. 345. Blackburn, J., in *Swan* v. *North British Australasian Co.*, 2 H. & C. 175, at p. 182, as quoted in the *Walker* case, cites the rule laid down by Wilde, B., "if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and

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they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to shew that that state of facts did not exist." He adds: "This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also . . . that it must be the neglect of some duty that is owing to the person led into that belief." Burton, J.A., in the *Walker* case, referring to *Freeman* v. *Cooke* (1848), 2 Ex. 654, points out that "two things must concur: the party must so conduct himself that a reasonable man would consider it in the light of a representation, and believe that it was meant that he should act upon it; and the party for or to whom it was made must have acted on it as true." Here there was no evidence to support such findings. This is the undoubted law, and was applied in *Dominion Express Co.* v. *Maughan*, 21 O.L.R. 510, and in *Ray* v. *Gettas* (1915), 8 O.W.N. 318.

I fully agree with the learned trial Judge that there was no estoppel in this case. It is not necessary to repeat the transactions as between the husband and wife, which are fully, and, as I think, satisfactorily, dealt with by the trial Judge.

It was strongly urged by the plaintiff's counsel that, although the evidence was clear and accepted by the trial Judge that it was exclusively the wife's money that went into the business, and that it was her business that was carried on, and that the increased plant was purchased by the profits, and that she largely assisted in the actual conduct of the business, and appropriated the profits that were not required for the increase of plant and the household expenses, yet, the business being carried on by the husband, and all the facts and circumstances shewing that, the inference must nevertheless be that it was his business, and not hers, and that he had a proprietary interest therein. I do not think so. It is a question of fact and a question of intention. If the parties were expecting a case of this kind to arise, I think the fair presumption would be that they would probably prepare for it, have everything in black and white, to shew that the business was hers, and that the husband was paid a definite and fixed salary. The fact that this was not so, and that there were either no creditors or no pressing creditors during the whole period that the business was carried on,

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leads rather to the opposite conclusion, that, as between themselves, perfect confidence existed, and the public had nothing to do with the question. If this was a case as between a creditor and the husband who had purchased goods for the business upon the faith of holding out that it was his business, different considerations would arise, but there is nothing of the kind here. It is a pure question of fact, and the findings by the trial Judge are founded upon ample evidence in favour of the defendants: see *Walker* v. *Brown*, 36 O.L.R. 287, 30 D.L.R. 204.

This appeal should, in my judgment, be dismissed with costs.

Appeal allowed; HODGINS, J.A., and CLUTE, J., *dissenting.*

DESAUTELS v. MAILLOUX.

QUE.

C. R.

Quebec Court of Review, Archibald, A.C.J., Martineau and Lane, JJ. June 21, 1918.

DIVORCE AND SEPARATION (§ III B—25)—DESERTION BY HUSBAND—HUSBAND LIVING WITH ANOTHER WOMAN—ASSAULT—ALIMONY—JUDICIAL SEPARATION.

The fact that a man leaves his wife and children and lives with another woman, in a house which is manifestly disreputable, and where she has the reputation of being his wife, that he has assaulted his wife and ordered her and her children out of the house and that he has called her vile names—is sufficient ground for maintaining an action for judicial separation and for alimony.

APPEAL from the judgment of Dugas, J. Affirmed.

Statement.

Brodeur & Bérard, for plaintiff; *C. A. Archambault*, for defendant.

LANE, J.:—The plaintiff brings suit against the defendant *en séparation de corps*, accompanying it with a *saisie-conservatoire*, and claiming an alimentary allowance for herself and her two children, issue of her marriage with defendant. The children are both boys, aged three and one and a half years respectively. She is 24 years old, and he is a year older. He is a painter by trade, and worked for a certain time during their married life.

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But unfortunately he inherited at his father's death a little fortune of $7,000 to $8,000, which appears to have been the cause of the ruin of their domestic happiness, for he ceased working and developed a taste for fast women. From the period between the month of July, 1916, till about the 4th December in the same year, he used to habitually sleep elsewhere than in his own house, and appears to have been living with another woman openly, driving

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about with her at all hours in carriages and automobiles, and living with her in a house which was manifestly disreputable, and where she appears to have had the reputation of being his wife. The defendant does not appear to have concealed his relations with her, as several witnesses affirm he told them he had a "blonde."

He admitted to Me. Bilodeau, who occupied the dwelling beneath the conjugal domicile, that he was living with a woman in concubinage, and his relations with her seem to have been generally known, and to be such as to constitute a grave insult to his wife. His conduct as above set out alone would have been sufficient to justify the judgment pronouncing separation.

In addition, he appears to have assaulted his wife, to have ordered her and her children out of the house, which order she obeyed, and to have deprived her and his childern in the matter of clothing, while dissipating almost all his fortune on riotous living with another woman, if indeed there were not more than one, as his evidence might appear to indicate. Not content with not sleeping at his own home, he appears to have enlivened his occasional visits to that home by calling his wife a "*maudite vache, maudite écoeurante* and *maudite chienne*," in the presence of their servant, and according to the servant a "*maudite putain*" as well.

The proof as to the means he had, his witnesses do not appear to be very definite about. He says he has only left a revenue of some $12 a month from his fortune, so that evidently the great bulk of his capital has been squandered. But he is a painter, and it is well known that painters can earn about 40 cents an hour or $4 a day. The alimentary allowance of $35 a month for the wife and two children seems reasonable.

It might be worth noticing that the defendant met his wife's action by a simple denial of the allegations. He has devoted some proof to establish his attempt to get back and to effect a reconciliation. Very properly his wife did not agree to it. After her experience with this man, it was not to be supposed that she would care to subject herself to a repetition of his treatment.

The judgment granting the separation, granting her the care of the children and according the alimony specified and maintaining the *saisie-conservatoire*, is well founded and should not be disturbed. *Judgment accordingly.*

SMITH v. SPENCER.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Elwood, JJ.A. July 15, 1918.

CONTRACTS (§ I E—95)—SUFFICIENCY OF WRITING.

A memorandum in the following terms: "Witness that I have this day sold and agree to deliver to the Smith Grain Company at Port Arthur, Ont., 3,000 bushels wheat on or before Oct. 31, 1914, at an agreed price of 83 cents per bushel basis, 1 Northern, delivered free on board cars at Port Arthur. Government weights and grades to govern. Shipper also pays freight and dockage. I hereby acknowledge receipt of $1.00 on above contract," signed by the owner of the wheat, and witnessed by the agent of the purchaser, is a complete memorandum of the contract of sale and not merely an offer to sell. No further assent by the purchaser is required.

Parol evidence is not admissible to vary the terms which appear on the face of the contract.

Statement.

APPEAL by defendant and cross-appeal by plaintiff from the trial judgment in an action for damages for breach of contract to deliver wheat. Varied.

F. W. Turnbull, for appellant; *W. F. Dunn*, for respondent.

The judgment of the court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—The facts material to this appeal, as found by the trial judge, are as follows:—

In July, 1914, one J. R. Carey, who was an agent of the plaintiff to purchase wheat, bought from the defendant 3,000 bushels of wheat on behalf of the plaintiff and took from him the following memorandum thereof:— Aylesbury, July 18, 1914.

Witness that I have this day sold and agree to deliver to the Smith Grain Company at Port Arthur, Ont., 3,000 bushels wheat on or before Oct. 31, 1914, at an agreed price of 83 cents per bushel basis, 1 o net weight, delivered free on board cars at Port Arthur, Government weights and grades to govern. Shipper also pays freight and dockage.

I hereby acknowledge receipt of $1.00 on above contract.

Witness: J. R. CAREY. (Sgd.) H. J. SPENCER,
(Sgd.) Aylesbury, Sask.

Carey forwarded the above memorandum to the plaintiff company, who wrote the defendant as follows:— July 20, 1914.

We beg to acknowledge receipt of contract from you selling us 3,000 bushels of wheat to be delivered in Port Arthur or Fort William on or before the 31st day of October, 1914, at 83c. per bushel basis 1 Northern, delivered in terminal elevators, subject to commission and all other charges.

This grain should be delivered in Port Arthur or Fort William in time to be unloaded and the outturns back in our office before the 31st day of October, 1914.

Thanking you for this business and hoping it will prove satisfactory to you, we are,

THE SMITH GRAIN CO.,
Per , Mgr.

At the time the above agreement was entered into, the crop of the defendant—which was estimated to yield 3,000 bushels—was

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still growing. As a precaution in case the yield might not come up to the estimate, it was agreed between Carey and the defendant that, if the crop did not yield 3,000 bushels, the defendant was not to be compelled to buy wheat in order to make up the quantity stipulated for in the contract. When the wheat was threshed, the defendant had only 2,000 bushels for delivery on the contract. By collusion between the defendant and Carey, this 2,000 bushels was not delivered on the contract, but was sold at the market price, which was considerably in advance of the contract price. No wheat at all was delivered on the contract. The price of No. 1 Northern at the close of the market on October 31st was 1.16½.

The defendant contended that there was no completed contract; that the memorandum of July 18 constituted only an offer, and that the plaintiff's letter of July 20 was not an unqualified acceptance thereof, but imported therein new terms.

The trial judge held that the memorandum of July 18 was not merely an offer, but was a memorandum of the sale made, and that the plaintiff's agent had authority to buy wheat for the plaintiff, and that the defendant in the memorandum admitted that he had sold.

It was further contended that the memorandum failed to satisfy the requirements of the Statute of Frauds, in that it failed to incorporate therein an essential term of the contract, namely, the agreement that the defendant was not to be compelled to buy in order to fill the contract in case his crop did not yield 3,000 bushels.

The trial judge held, as to this latter contention, that the agreement that the defendant was not to be compelled to buy in order to fill the contract in case his crop did not yield 3,000 bushels was not a term of the contract of sale, but a collateral agreement; that the contract should be operative only to the extent of the defendant's crop, and that, as the defendant had only 2,000 bushels which he should have delivered on his contract, he allowed the plaintiff's damages for the failure to deliver the 2,000 bushels.

It was further contended by the defendant that the sum of $100, which was paid to Carey, the agent of the plaintiff, to cover margins, should be allowed the defendant. The trial judge refused to allow this credit.

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The defendant appeals from the judgment of the trial judge, and the plaintiff cross-appeals, asking to have the judgment varied by allowing damages for the failure to deliver the 3,000 bushels.

So far as the defendant's contention that there was no completed contract is concerned, the finding of the trial judge is, that Carey had authority to purchase wheat for the plaintiff, and the memorandum signed by the defendant was given as the result of negotiations between Carey and the defendant. It contains on the face of it an acknowledgment of $1 on account of the contract, and is evidence of a completed contract. It did not require any further assent on the part of the plaintiff, and, if it did require any further assent, I question very much if the letter of July 20 goes any farther than to suggest the plaintiff's interpretation of the terms of the memorandum of July 18. I am, however, of the opinion that the document of July 18 was not a mere offer to sell, but was an agreement to sell. It is clearly distinguishable from the document referred to in *Dickinson* v. *Dodds*, 2 Ch.D. 463.

So far as the contention that the memorandum failed to satisfy the requirements of the Statute of Frauds is concerned, the memorandum did contain all of the essential terms of the contract. What the defendant seeks to do is to vary or contradict one of the terms contained in the written memorandum.

In *Ford* v. *Yates*, 2 Man. & Gr. 549, 133 E.R. 866:—

In an action for the non-delivery of hops, sold under the following contract:—"Of E. Y. thirty-nine pockets Sussex hops, Springett's, five pockets Kenward's, 78s. Springett's to wait orders." *Held*, that the contract imported a sale for ready money, and that parol evidence was not admissible to show that, by the usual course of dealing between the parties, the hops were sold on a credit of six months.

At p. 560, Bosanquet, J., says:—

The doubt I have entertained in this case has been, whether the writing in question amounted to a final contract, or was merely a memorandum; and if so, whether the plaintiff was not at liberty to shew what was the meaning of the parties with respect to the time of payment for the goods. But, on further consideration, it appears to me, that the writing does, in terms, import a contract of sale for ready money. *Greaves* v. *Ashlin*, 3 Campb. 426, is a decisive authority that parol evidence is not admissible with respect to terms which appear on the face of the contract.

In *Henderson* v. *Arthur*, [1907] 1 K.B., at p. 10:—

Where, in an action by lessor against lessee for a quarter's rent upon a covenant in a lease for payment of the rent quarterly in advance, the defendant set up by way of defence that by a parol agreement made between the

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plaintiff and the defendant antecedently to the execution of the lease the plaintiff agreed to take a bill payable at three months by way of payment of each quarter's rent in advance as it became due, and that the defendant had tendered such a bill to the plaintiff in respect of the rent sued for, which plaintiff refused to take:—

Held, that evidence of such an agreement as alleged was inadmissible.

At p. 12, Collins, M.R., says:—

The defence set up by the defendant is that there was an agreement, antecedent to the lease in point of time, by which the parties agreed that, instead of payment in advance of each quarter's rent in cash, the lessor should be satisfied by the lessee's giving in respect thereof bills at three months. Assuming that there was in fact such an agreement, the question is whether it is legally available for the purpose of defeating the claim of the lessor upon the covenant. It seems to me that to admit evidence of such an agreement as being so available would be to violate one of the first principles of the law of evidence; because, in my opinion, it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject-matter.

See also *Harnor* v. *Groves*, 15 C.B. 667, 139 E.R. 587.

It seems to me that the terms which the defendant seeks to incorporate into the contract are not a collateral agreement, but an agreement which varies and contradicts the written document signed by the defendant. No essential term of the contract was omitted from the memorandum, and I am therefore of opinion that the trial judge was in error in holding that the agreement that the defendant would not be obliged to buy wheat to fill the contract, was a collateral agreement, or could, in any way, be considered as affecting the rights of the parties.

In my opinion, the appeal should be dismissed with costs, and the judgment of the trial judge varied by increasing the judgment for the plaintiff to the sum of $1,005.

So far as the $100 paid by defendant to Carey is concerned, Carey had no authority to receive this money for the plaintiff, or in any way to bind the plaintiff in respect thereof. No part of the money was apparently received by the plaintiff, and, in my opinion, the trial judge was correct in refusing to allow the defendant credit for the same. *Judgment accordingly.*

DOYLE v. CITY OF WESTMOUNT.

QUE.

C. K.

Quebec Court of Review, Archer, Greenshields and Lamothe, JJ. June 28, 1918.

NEGLIGENCE (§ I D—70)—PART OF PUBLIC THOROUGHFARE USED AS SIDEWALK—FAILURE TO KEEP IN REPAIR—NEGLIGENCE—DAMAGES.

A part of a public thoroughfare which a municipality allows the public to use as a foot-path and which is shut off by a curb from that part which is used by vehicles, is a sidewalk. The municipality is liable in damages if through negligence it allows a hole to be left in such sidewalk which causes injuries to a pedestrian.

Statement.

APPEAL from the judgment of the Superior Court, McLennan, J. Affirmed.

The plaintiff, while walking on the sidewalk in Mount Pleasant Ave., fell into a hole and sustained a fracture of her left leg. The defendant pleaded that there was no sidewalk at the place of the accident; and the plaintiff had no right to walk there; that the alleged hole was situated on the edge of a bank underneath the fence on the side of a grass plot away from the street where the plaintiff should not have passed.

The case was tried before a jury which found common fault. The damages suffered were assessed at $3,000, and $2,250 thereof were attributed to defendant.

Meigher & Coulin, for plaintiff; *Weldon & Harris*, for defendant.

Greenshields J.

GREENSHIELDS, J.:—The defendant inscribes before this court and urges three grounds upon which it seeks relief from the judgment: (1) the finding of the jury is contrary to law, inasmuch as the jury would seem by their answers, to impose upon the defendant the legal obligation of constructing a sidewalk on Mount Pleasant Ave., whereas, as a matter of law, the defendant was not bound to construct any sidewalk, and it was purely discretionary whether one should be constructed or not, and the failure to make a sidewalk was not a fault in law; (2) that the verdict of the jury is contrary to the weight of evidence; (3) that the damages are excessive.

Dealing briefly with the first. Mount Pleasant Ave. is a public thoroughfare owned by the defendant. On the southeast side there is a curb, 5 feet from the southeast side of the thoroughfare, and it runs in a uniform line throughout the length of that part of the avenue upon which the plaintiff was walking. At the northeast end and at the southwest end there is—to a certain distance—a cement sidewalk between the edge of the road and the

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curb. There is a space then where no cement has been laid. This space, in like manner, is between the curb and the side of the road: it is called by some witnesses a "dirt sidewalk;" but whether it may be called a sidewalk or not, it is a part of that thoroughfare which is shut off by the curb from being used by vehicles, by reason of the curb vehicles cannot enter upon that part of the road. The learned counsel for the defendant did not hesitate to admit at bar that if that space between the curb and the roadside had been covered by any substance, cement, stone or wood, it would have been entitled to be dignified under the name of "sidewalk" but because there was only dirt and there had been some 2 years before an attempt made to grow grass upon it, the counsel refuses to characterise it as a sidewalk. In any event, it is clear that it was used as such; that is to say, it was on the side of the road and the public walked upon it, the whole with knowledge and tacit consent of the defendant. If such was the case, I think, with safety and certainty, it should be called a "sidewalk."

Now, in this sidewalk there was a hole. The counsel asserts the hole was at the extreme southeast of this space. It is true it may have started there, but it extended northwards to at least a distance of one half the width of this space, or 2½ ft. How long it had been there it does not appear; it was a foot and a half deep, and the plaintiff fell into it; just how she did it in broad daylight is not clear, unless it is found in the suggestion of the counsel for the defendant, that she was blind in her right eye. If she were walking on the outside of this space it is possible that with the eye next to it being blind she did not see it. However, the jury assessed or penalised her to the extent of 25% of her damages because she did not take such precautions as she should. I do not suppose that she was entitled to assume that there was such a hole there. There is one thing certain, it should not have been there. For my part, it is a matter of indifference whether the space is called a sidewalk or not; it was a part of the public thoroughfare used by pedestrians; they were invited to use it, and the mere fact that the cement sidewalk at either end had not been extended to cover that space, does not, in my opinion, change the nature and destination of the space enclosed by that curb.

I should, without hesitation, rule against the defendant upon that pretension.

As to the second ground: that the verdict was against the weight of evidence. I fail to see what comfort the defendant can find in the proof made. It abundantly proved that the plaintiff broke her leg. It is abundantly proved that the hole was there, and the extent of the hole is proved; that it was dangerous the accident attests.

The jury found all this, and how can it be said that it was against the weight of evidence. Again I rule against the defendant.

As to the damages: The plaintiff was a lady 61 years of age at the time of the accident; she had been employed, apparently, during her lifetime in domestic service; she was the trusted employee—and had been for years—of a lady in Westmount; she was earning $25 a month, and, of course, her board and lodging. After the accident she was taken to the Royal Victoria Hospital, where she went under the usual treatment; her leg was broken; there were three breaks between the knee and the ankle, and pieces of the bone being completely loosened; after it was set it was put in plaster and remained in plaster until the 22nd of the following November; she was 6 days in the hospital, when she was moved to her mistress' house, and remained in bed 7 weeks; then she walked—if it can be so called—with crutches, and at the time of the trial, in April, 1917, she was still lame and walked with a cane; she paid her doctor $100; her nurse $100; the hospital $33, and some other expenses. For at least 15 months, and more, probably, she could earn no money, nor could she earn her board and lodging, but the kindness of her mistress induced her to keep the plaintiff in her house for some 4 or 5 months without charge. The only medical testimony is that of Dr. Garrow, who treated her from the start; he had known her for 12 years; he testified that, being an old person, comparatively old, she will suffer a good deal of pain for the rest of her life. Asked if she would be affected permanently in that way, he answers "yes," she will suffer if she walks far; then again, the changes in temperature will give her pain. He says, moreover, that he knows her occupation; he knows that she was very smart for her age, and he uses the term in its fullest sense; he knows the work that she had been doing for years, and he says that, since the accident, she has been unable to do anything, and cannot say whether she will be

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able to return to that occupation or not; he says, however, that probably at the end of a year, if the work was not too heavy, she might be able to return to a portion of it, but did not think she would be able to do the same kind of work, or, rather the same amount of work, and he is of opinion that her earning capacity is decreased by 50%; he testifies, moreover, that she suffered severe pain as a result of the accident. The defendant did not see fit to call in gentlemen of the medical profession.

With all this evidence before the jury, they proceeded to assess the damages. I do not say that I would have made the same assessment; but I certainly think the jury had ample evidence before them to justify them in believing that this lady would suffer a disability for the rest of her natural life; not only a disability to earn, but a disability to enjoy to the fullest extent the remainder of her life, which she was entitled to do. Her actual out-of-pocket expenses, and loss of earnings, amounted to well nigh $1,000. She gets $2,250 to compensate her for the condition brought about by the fault of the defendant, her condition being described by Dr. Garrow. I will not disturb the judgment

Appeal dismissed.

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Alberta Supreme Court, Stuart, J. July 9, 1918.

USEFUL OCCUPATION (§ I—1)—ORDER-IN-COUNCIL NO. 815—LABOUR ORGANIZATION RECOGNIZED AS NOT ILLEGAL—PAID OFFICIAL OF.

Where the only evidence before the magistrate, on a charge of violation of the provisions of order-in-council No. 815, April, 1918, as to the occupation of the accused is that he is the paid official of a labour organization, which is recognized by such order-in-council as not illegal, there can be no reasonable inference that he is not engaged in a useful occupation.

Statement.

APPLICATION by the defendant for an order quashing a conviction entered against him by Mr. Davidson, Police Magistrate of the City of Calgary.

H. F. Stow, for applicant; no one *contra*.

Stuart, J.

STUART, J.:—The conviction was for a violation of the provisions of order-in-council No. 815, of April 4, 1918, passed by His Excellency the Governor-General-in-council and published in the "Canada Gazette" of April 6, 1918. This order-in-council provides that "every male person residing in the Dominion of Canada shall be regularly engaged in some useful occupation."

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The defendant was charged with not being regularly engaged in some useful occupation. He was fined $10 and costs.

The charge was laid by a member of the provincial police of Alberta and counsel for the Attorney-General conducted the prosecution. I therefore, considered that service of the notice of motion to quash upon the Attorney-General of the province was a sufficient notice to the Crown and that it was not necessary in the circumstances to serve the Attorney-General of the Dominion, although the order-in-council is a Dominion order.

It appears that the accused was employed by a labour organization known as "The Federal Workers Union of Canada" to canvass for members and to collect fees. He was paid $20 a week for this work.

One paragraph of the preamble of the order-in-council under which the charge was laid reads as follows:—

> And whereas these regulations are not intended to affect any right of members of organized labour associations to discontinue their work in the employment in which they have been engaged when such discontinuance is occasioned by differences actually arising between the employer and the employed. The purpose is to prevent persons capable of useful work from remaining in idleness at a time when the country most urgently requires the service of all human energy available.

It is apparent from the foregoing that the maintenance of an organised labour union or association is not to be considered as in any sense violating the letter or the spirit of the law. If I mistake not a member of a labour union is a member of the Committee of the Privy Council, that is the Cabinet, which passed the order-in-council and is a member of that body just because he is a member of a labour union and held at one time a high office in labour union circles.

Now a labour union cannot be maintained, no organisation of any scope can be maintained, without officials and paid servants. The Law Society of Alberta, of which the magistrate and the prosecuting and defending counsel are members, needs to have a paid secretary. I should be surprised to hear it suggested that Mr. Adams, while doing his work, is not engaged in any useful occupation, or that the secretary of the United Farmers of Alberta or of the Canadian Manufacturers Association is liable to conviction under this law. But, it is possible, of course, that to a certain aristocracy of labour some reluctant recognition is to be

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extended by that class of the community which exercises the social privilege of "recognising" other people or other classes. If "skilled" labourers organise themselves into labour unions and, by the means of united action, succeed in getting themselves "recognised" to the extent of having representatives in cabinets and legislatures, then, of course, we must reconcile ourselves to it with a sigh. But when it comes to "unskilled" labour, to men who merely dig sewers, although we really must have sewers for the enjoyment of the refinements of our social life, or men who merely shovel coal and cut wood, although these are also necessary to our comfort, it seems, according to the tenor of the evidence in this case, that these men must work separately and alone. The "privilege" of organising is not to be extended to them, they are not to be "recognised" as entitled to act together like farmers and manufacturers (even of cement) and bricklayers, and if they attempt to organise themselves, any official whom they employ for that purpose is open to conviction under this order-in-council, if the magistrate's view of the matter is correct.

Of course, there was a great deal of irrelevant evidence admitted which was intended to raise suspicions against the accused. Hints were made of connection with other organisations which are fairly well known, as a matter of general knowledge, to be of doubtful usefulness and perhaps even of harmful tendencies or purposes. But these were hints only and should have been excluded.

If the accused had been shewn to be actually engaged in seditious propaganda he could have been dealt with under another law. But, it seems to me to be contrary to the proper administration of the law, when a man is accused of not being engaged in a useful occupation, to pass beyond the inquiry as to what he was doing and to indulge in hints, insinuations and suspicions of connection with some organisations whose nature and purposes are but vaguely understood. The witnesses, the counsel and the magistrate are probably all in the same position as myself. I really do not know the difference between the Red Guard of Russia and the Social Democratic party there and both of these, with other things of a like kind, were flung into the evidence quite irrelevantly and seemingly with some deliberate purpose.

Bosoms swelling with patriotism must not forget that even in time of war the civil courts continue to act on judicial principles, and properly so.

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The order-in-council says that the question of what is a useful occupation shall be a question of fact for the magistrate. It is not for me to speculate on the vast variety of opinion on this economic subject which may exist among the justices of the peace in Canada. The law has left it to them to decide. But the magistrate must have some evidence upon which to base his opinion. All the relevant evidence he had as to the occupation of the accused was that he was the paid official of a labour organisation and these organisations are recognised in the order-in-council itself as not illegal. I am unable to see, therefore, how any reasonable inference could be made that their paid servant is not engaged in a useful occupation.

I leave aside, therefore, the general question whether, under this order-in-council, the court is entitled to go behind the fact that a man who is doing honestly otherwise lawful work for which he is paid by his employer and, as against the employee, declare that his employer's business or occupation is not a useful one. I fear a good many clerks in offices in this city might, if that were held to be proper (though I do not need, as I say, for the purposes of this case, to declare expressly that it would be improper), be placed in a very doubtful position.

The conviction will be quashed, and as to costs I think the applicant is entitled to them as against the informant, who, I understand, is a member of the provincial police, and as against the Crown, which appeared and prosecuted. The man was arrested on the request of a manufacturer at Exshaw who asked to have him "investigated." He was "picked up" and taken by the provincial police to Calgary and the impression I get from the evidence is that a prosecution under this order-in-council was an afterthought, and that he was not arrested in the first place for an infringement of it.

The only safe path is to put all on an equality before the law. Any other course will inevitably ultimately lead to the very evils which this prosecution was evidently intended to help to avert.

Conviction quashed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Lennox, J., Ferguson, J.A., and Rose, J. February 16, 1918.

COMPANIES (§ IV D—60)—ONTARIO COMPANIES AMENDMENT ACT—CORPORATIONS CREATED BY CHARTER—RIGHTS AT COMMON LAW—ULTRA VIRES—FORFEITURE OF CHARTER.

The Ontario Companies Amendment Act (1916), 6 Geo. V. c. 35, s. 6) expressly declares that "every corporation or company . . . heretofore or hereafter created by or under any general or special Act . . . shall, unless otherwise expressly declared in the Act or instrument creating it, have and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter."

A corporation created by charter had at common law almost unlimited capacity to contract, to bind itself by contracts, to deal with its property and to do all such acts as a private person could do. Statements in the charter defining the objects of the incorporation do not take away that unlimited capacity, and even express restrictions in the charter do not take it away, but are simply treated as a declaration of the Crown's pleasure, in reference to the purposes beyond which the capacity of the corporation is not to be exercised, a breach of which declaration gives to the Crown a right to annul the charter.

[*British South Africa Co.* v. *DeBeers Consolidated Mines Limited*, [1910] 1 Ch. 354; *Diebel* v. *Stratford Improvement Co.*, 37 O.L.R. 497; *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.* (1907), 14 O.L.R. 22; *Biggerstaff* v. *Rowatts Wharf Limited*, [1896] 2 Ch. 93; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629; *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, referred to; *Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, distinguished; *Att'y-Gen'l for Canada* v. *Att'y-Gen'l for Alberta*, 26 D.L.R. 288; *Union Bank* v. *McKillop*, 24 D.L.R. 787, referred to. See annotations, 18 D.L.R. 364, 26 D.L.R. 295, 36 D.L.R. 107.]

Statement.

APPEAL by the defendants, an incorporated company, from the judgment upon the trial in favour of the plaintiff against the appellants for the recovery of $1,182.16 and costs.

The action was upon a promissory note for $1,122.60, dated the 22nd May, 1916, a renewal in part of an earlier note for $1,500, both notes being made by the three defendants, Blackmore, Burks Limited, and Menet, in favour of the plaintiff, payable one month after date. The note sued upon was signed by Blackmore and Menet; the signature purporting to be that of the defendant company was: "Burks Limited, per A. W. Burk, Mgr."

The defendants Blackmore and Menet did not appear, and judgment was entered against them by default.

The only defence originally raised by the defendants Burks Limited was, that they had no authority or power to make the note; and their appeal was based on that defence.

The letters patent incorporating Burks Limited were as follows:—

Province of Ontario.

By the Honourable
William John Hanna,
Provincial Secretary.

To all to whom these Presents shall come
Greeting:—

Whereas the Ontario Companies Act provides that, with the exceptions therein mentioned, the Lieutenant-Governor may by letters patent create and constitute bodies corporate and politic for any of the purposes to which the authority of the Legislature of Ontario extends.

And whereas by the said Act it is further provided that the Provincial Secretary may, under the seal of his office have, use, exercise, and enjoy any power, right, or authority conferred by the said Act on the Lieutenant-Governor.

And whereas by their petition in that behalf the persons herein mentioned have prayed for letters patent constituting them a body corporate and politic for the due carrying out of the undertaking hereinafter set forth.

And whereas it has been made to appear that the said persons have complied with the conditions precedent to the grant of the desired letters patent, and that the said undertaking is within the scope of the said Act.

Now therefore know ye that I, William John Hanna, Provincial Secretary, under the authority of the hereinbefore in part recited Act, do by these letters patent hereby constitute the persons hereinafter named, that is to say, Arthur Wellington Burk, barrister-at-law, Arthur Reginald Burk, steamship passenger agent, William Percy Dent, representative, and Albert Burnese and Lewis Henry Phleeger, office clerks, all of the city of Toronto, in the county of York, and Province of Ontario, and any others who have become subscribers to the memorandum of agreement of the company, and persons who thereafter become shareholders in the company, a corporation for the following purposes and objects, that is to say:—

(a) To purchase, lease, take in exchange or otherwise acquire lands or interests therein, together with any buildings or struc-

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tures that are now or may hereafter be erected thereon, and to otherwise improve, alter, and manage the said lands and buildings and to sell, lease, exchange, mortgage, or otherwise dispose of the whole or any part of the lands, buildings, or structures thereon; (*b*) To erect buildings of all kinds and to deal in lands and building material and to take and hold mortgages or agreements for any unpaid balance of the purchase-moneys on any of the lands, buildings or structures, sold, and to sell, mortgage, or pledge, or otherwise dispose of said mortgages or agreements, and generally to do all such things as are incidental or conducive to the attainment of the above objects or any of them; and (*c*) To carry on business as brokers and agents and to acquire, purchase, and take over a real estate, insurance agency, and building business now carried on by Burk & Co. at the said city of Toronto; Provided, however, that, except as to taking and holding mortgages as aforesaid, nothing in these letters patent contained shall be deemed to empower the company to make loans, whether for building purposes or not, upon lands not the property of the company, or upon lands which, though once the property of the company, have by any deed, conveyance, transfer, or alienation become the property of another; and further provided, that it shall not be lawful for the company hereby incorporated: (1) To issue, constitute, or make any withdrawable or terminating stock, fund or shares, under any name or contrivance whatsoever; or to issue, constitute, or make any stock or shares whatsoever other than the capital stock and shares which are hereinafter mentioned, and which shall be fixed, permanent, and non-withdrawable capital stock or shares; (2) To take from or levy upon any stockholder, shareholder, member, contract-holder, or person, any deposit (bearing interest or not bearing interest) or any subscription, periodical dues, assessments, or contributions, or to take subscriptions or payments or make calls upon any stock or shares (howsoever designated) other than lawful subscriptions, payments, and calls upon the said fixed, permanent, and non-withdrawable capital stock or shares; (3) To use or raise, maintain or have, a fund for making a loan or advance to a purchaser (including intending purchaser) of property, whether such loan or advance in the form of money or money's worth is paid directly to the purchaser or is paid by the company to the vendor, to be

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repaid in any form or manner by the purchaser to the company; (4) To enter into or undertake any contract whereby the benefit is or is made dependent in any manner or degree upon the collection of sums levied upon or to be received from persons holding similar contracts, or upon or from members of the company; and (5) To transact or undertake any business within the meaning of the Ontario Insurance Act, 1912, or of the Loan and Trust Corporations Act; the corporate name of the company to be Burks Limited; the capital of the company to be forty thousand dollars, divided into four hundred shares of one hundred dollars each; the head office of the company to be situate at the said city of Toronto; and the provisional directors of the company to be Arthur Wellington Burk, Arthur Reginald Burk, and William Percy Dent, hereinbefore mentioned.

Given under my hand and seal of office at the city of Toronto, in the said Province of Ontario, this fourth day of March in the year of our Lord one thousand nine hundred and fourteen.

W. J. HANNA,
Provincial Secretary.

Official Seal of Provincial Secretary

J. M. Ferguson, for appellants.
R. S. Robertson, for plaintiff, respondent.

FERGUSON, J.A.

FERGUSON, J.A.:—This is an appeal by the defendants Burks Limited from a judgment of Masten, J., pronounced at the trial on the 1st day of June, 1917, whereby he directed judgment to be entered for the amount of the plaintiff's claim and costs.

The action is on a promissory note for $1,122.60, dated the 22nd May, 1916, made by the defendants Norwood Blackmore, Burks Limited, and R. C. Menet, in favour of the plaintiff, payable one month after date at the Dominion Bank, Toronto. The defendants other than Burks Limited did not appear in the action, and judgment was entered against them by default.

The writ of summons being specially endorsed, Burks Limited filed an affidavit by Arthur Burk, raising the defence set out in the two following paragraphs taken from his affidavit:—

"(2) That the said defendants Burks Limited have a good defence to the action on its merits.

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"(3) If the said defendants Burks Limited did make the said note sued on herein, they had no authority or power to do so under their charter."

Burks Limited is a company incorporated by letters patent under the Ontario Companies Act, dated the 4th March, 1914. The objects of incorporation are to carry on a real estate business. The defence relied on is, *ultra vires*, in that the note sued on was given on account of a purchase of machinery and patent rights for the manufacture of machines for pressing clothes.

At the trial an amendment was allowed setting up misrepresentation in connection with the contract of purchase, which contract (exhibit 3) is signed by the three defendants, the company executing in the name of its president and manager and by its corporate seal.

The judgment appealed against was pronounced at the conclusion of the evidence. The learned trial Judge found the facts against the defendant company's allegation of misrepresentation, and disposed of the question of *ultra vires* by the following statement:—

> "As far as *ultra vires* is concerned, I do not think any argument would alter the view I hold. I have had occasion to study this case" (*Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, "and I have a very decided view with regard to it. Of course I am quite open to hear argument, but no argument is likely to alter the view I hold."

On the hearing of the appeal, it was stated to us that the learned Judge intended, by the foregoing statement, to express the opinion that, by reason of the decision in the *Bonanza Creek* case, the doctrine of *ultra vires* no longer applies to companies incorporated in the Province of Ontario, by letters patent; and the argument on the appeal was confined to the question of *ultra vires*.

Since the argument, I have carefully perused and considered the *Bonanza Creek* case, also an article by Victor E. Mitchell, K.C., author of "Canadian Commercial Corporations," in which he discusses the doctrine of *ultra vires* in the light of this and other recent Privy Council decisions; and I am, in view of the decision in the *Bonanza Creek* case and of the amendment to the Ontario Companies Act made in 1916, by sec. 6 of 6 Geo. V. ch. 35, of the opinion that the contract of purchase was not *ultra vires* of the

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defendant corporation. As I read the *Bonanza Creek* case, it is there decided that a company incorporated by letters patent, under the Great Seal of the Province of Ontario, derives its being, vitality, and capacity not only from or under the Ontario Companies Act, but from and by reason of the exercise, by the Lieutenant-Governor of the Province, of the prerogative right of the Crown to grant a charter of incorporation; and that, by virtue of the exercise of such prerogative, the company so incorporated is thereby created with all the capacity of a common law corporation, save only in so far as the conferring of such capacity on companies by the exercise of that prerogative right by the Lieutenant-Governor of a Province is limited by the provisions of the British North America Act, or by other express statutory provision assented to by the Crown. The subject is dealt with at p. 285 of the report of the *Bonanza Creek* case, as follows:—

> "The words 'legislation in relation to the incorporation of companies with provincial objects'" (British North America Act, sec. 92) "do not preclude the Province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the Province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the Province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted. It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities."

It is elsewhere in the judgment further pointed out that, even when a company is incorporated by statute or under an Act of

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Parliament, it is possible for the Legislature so to create the company that it shall have all the general capacity of a common law corporation. See the judgment at p. 279, where the proposition is stated as follows:—

> "Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. . . . The language may be such as to shew an intention to confer on the corporation the general capacity which the common law originally attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn, J., will be the true one."

The construction adopted by Blackburn, J., and referred to in the foregoing quotation, is that expressed by him in *Riche* v. *Ashbury Railway Carriage and Iron Co.* (1874), L.R. 9 Ex. 224, 264, as follows:—

> "I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, Does the statute creating the corporation by express provision, or by necessary implication, shew an intention in the Legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, Does the statute creating the corporation by express provision, or necessary implication, shew an intention in the Legislature to prohibit, and so avoid the making of, a contract of this particular kind?"

The question raised by Blackburn, J., as to the intention of the Legislature to confer a general capacity to contract, is in this case answered by the Act of 1916, ch. 35, sec. 6, whereby the Legislature of the Province of Ontario has expressly enacted and declared that:—

> "Every corporation or company heretofore or hereafter

created . . . (*e*) by or under any general or special Act of this Legislature, shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter."

Therefore, while the charter of the defendant company does not appear to have been issued under the Great Seal of the Province of Ontario, but to have been issued under the seal of the Provincial Secretary, yet by virtue of the foregoing express statutory provision, it is endowed with all the capacity which a corporation created by charter had at common law, and the questions arise: How can its capacity be limited? Can its capacity be limited by something contained in the charter, or must it be limited by statute? And in this case have there been any limitations put upon the capacity? These questions are partly dealt with in the judgment of Blackburn, J., above quoted; and at p. 264, as follows:—

"When we are construing a statute creating and regulating a corporation, it is right to bear in mind that, as Lord Coke says, 'It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law.' . . . 'That to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain.'"

They are also dealt with in the following statement at p. 284 of the report of the *Bonanza Creek* judgment:—

"In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires*, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not

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possess the general capacity of a natural person and the doctrine of *ultra vires* applies."

The same question is dealt with in Palmer's Company Law, 10th ed., p. 3, as follows:—

"There still, however, subsists a difference of a fundamental character between a chartered company and a company formed under a special Act or registered under the Companies Acts, and it is this: at common law a corporation created by the King's charter has power, as was determined in the *Sutton's Hospital* case (10 Rep. 13), to deal with its property, to bind itself by contracts, and to do all such acts as *an ordinary person* can do, and so complete is this corporate autonomy that it is unaffected even by a direction contained in the creating charter in limitation of the corporate powers. For the common law has always held that such a direction of the Crown—though it may give the Crown a right to annul the charter if the direction is disregarded—cannot derogate from that plenary capacity with which the common law endows the company, even though the limitation is an essential part of the so-called bargain between the Crown and the corporation. See judgment of Bowen, L.J., in *Baroness Wenlock* v. *River Dee Co.* (1883-1887), 36 Ch.D. 674, 685, and of Blackburn, J., in *Riche* v. *Ashbury Railway Carriage and Iron Co.*, L.R. 9 Ex. 224. This feature—the unrestricted corporate capacity of the chartered company—is in marked contrast to the strict delimitation by the Legislature and the Courts of the statutory or registered company to its defined objects."

These questions are also dealt with by Cotton, L.J., at p. 685 (note) of the judgment in the *Wenlock* case (*supra*), where, after quoting from the *Sutton's Hospital* case (1613), 10 Co. Rep. 1 *a*., referred to in the *Bonanza Creek* case, and by Mr. Palmer, he says:—

"At common law a corporation created by the King's charter has, *primâ facie*, and has been known to have ever since *Sutton's Hospital* case (10 Rep. 13), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would

have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute take it away is, I think, to travel on a wrong line of thought. What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had."

These authorities, I consider, establish that a corporation created by charter had at common law almost unlimited capacity

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to contract, and that statements in the charter defining the objects of incorporation do not take away that unlimited capacity, and that even express restrictions in the charter do not take it away, but are simply treated as a declaration of the Crown's pleasure in reference to the purposes beyond which the capacity of the corporation is not to be exercised, a breach of which declaration gives to the Crown a right to annul the charter.

Some of the foregoing authorities are reviewed and considered in *British South Africa Co.* v. *De Beers Consolidated Mines Limited*, [1910] 1 Ch. 354, in connection with the powers of a company incorporated by Royal charter, and the opinion is there expressed that the doctrine of *ultra vires* does not apply to such a chartered company, but that such company has all the powers of a private person, and acts done in breach of this charter, though a ground for revocation by *scire facias*, are nevertheless valid. The ground of this opinion was, that a chartered company has all the general capacity of a common law corporation.

In *Diebel* v. *Stratford Improvement Co.*, 37 O.L.R. at pp. 497, 498, Boyd, C., expressed an opinion that the amending Act 6 Geo. V. ch. 35 appears to confer complete corporate autonomy on the statutory incorporated companies and to put them on the footing of Crown-chartered companies with unrestricted corporate capacity.

The defendants Burks Limited being a company incorporated by charter, it follows from the declaration contained in the amending Act of 1916, and from these decisions, that it is a company endowed with the general capacity a corporation created by charter had at common law; and that, even if its acts and contracts are not within the objects specified in the charter, yet they are not *ultra vires*—that is, made without capacity. I have not overlooked the circumstance that the charter in the *Bonanza Creek* case appears to have been issued under the Great Seal, while the charter in this case does not appear to have been so issued; and, were it not for the amending Act of 1916, I should be obliged to consider carefully whether or not the opinion expressed by the Judicial Committee of the Privy Council in the *Bonanza Creek* case, at p. 583, that there is no difference between a charter issued under the hand and seal of the Governor-General, and a charter issued under the hand and seal of the Secretary of State

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for the Dominion, that both were an exercise of the prerogative rights of the Crown, is true in respect of charters issued under the hand and seal of the Provincial Secretary, instead of under the Great Seal of the Province, and by the hand of the Lieutenant-Governor; but I consider that the amending Act plainly extends to companies incorporated by the Province of Ontario, whether incorporated by special Act or by charter under the Ontario Companies Act; and it is not necessary to consider the foregoing question. I am also of opinion that the meaning of the expression used in the amending Act, "general capacity which the common law ordinarily attaches to corporations created by charter," and the principle that such capacity may not be limited by the charter, seem to be well established; the Province of Ontario has by express legislation attached to this company all the capacity of such a corporation; and by so doing has, in my opinion, effectually annulled all limitation that would otherwise by the words of the charter be put upon the capacity of this corporation to carry on business. For these reasons, I am of the opinion that the defence of *ultra vires* of the company fails.

At the trial and on the argument of the appeal it was mentioned, though not fully argued, that, even if the contract of purchase was *intra vires* of the company, yet it was *ultra vires* of the directors and president and general manager of the company.

It may well be that, while the defendant company might, under the circumstances I have outlined, have capacity to enter into a contract to purchase machinery for the manufacture of clothes-pressing machinery, yet the directors, as managers of the corporation, or Mr. Burk, as manager under the directors, would have no implied authority to bind the company to a contract not within the scope of the objects or purposes of the company as expressed by the words of the charter.

It will be seen, from a perusal of the quotations I have made above, that the enumeration in the charter of the objects for which the company is incorporated cannot be considered as a declaration that the company shall not do things other than those particularly set out, but that it requires at least express words of restriction in the charter, or the statute, to confine operations of the company, or even to confer upon a person aggrieved the right to apply, by *scire facias* proceedings, to cancel the charter. In this charter

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there are no words of prohibition, and I do not find any words in the statute expressly so limiting the operations of the company. In the *Riche* case the question is discussed by Blackburn, J., but he was there of the opinion that the statute under which the company was incorporated had attempted expressly to limit the operations of the company to the objects as affirmatively declared in the memorandum of association; and that, for that reason, while the company had still common law capacity to contract, yet, if it contracted outside of the express words of limitation, it required the unanimous consent of every shareholder in order to make such a contract valid, and that any dissenting shareholder could restrain the making or carrying out of such a contract.

Here the contract which is called in question is made under the seal of the corporation, is executed by delivery of the machinery, and was made by and with the president and general manager of the company, and it is not made out or found that the plaintiff acted in bad faith or had notice or knowledge that the contract was even beyond the objects of the company as expressed in the charter, and it was not beyond their capacity as expressed by the amending Act; and I am of the opinion that, because the contract is under seal, and is also a completed contract (the defendants received the goods and machinery purchased and resold), and because the president and general manager had apparent authority to execute the contract, and make the note sued on, he had, so far as this plaintiff is concerned, actual authority to do so. See *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.* (1907), 14 O.L.R. 22, 30; *Biggerstaff* v. *Rowatt's Wharf Limited*, [1896] 2 Ch. 93; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629.

For these reasons, I would dismiss the appeal with costs.

Lennox, J.

LENNOX, J.:—The Ontario Act of 1916, ch. 35, sec. 6, declares that:—

"Every corporation or company heretofore or hereafter created . . . (*e*) by or under any general or special Act of this Legislature, shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter."

There is no conflict in this case as to the distribution of legislative power between the Dominion and the Provinces under the British North America Act. In the *Bonanza Creek* case, 26 D.L.R. 273, in the judgment of the Privy Council at p. 285, it was said:—

"The words 'legislation in relation to the incorporation of companies with provincial objects'" (British North America Act, sec. 92, provision 11) "do not preclude the Province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the Province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity."

The defendant corporation was incorporated before sec. 6 above quoted was passed. The Legislature has declared that it shall apply to "every corporation heretofore" as well as "hereafter," "created . . . by or under any general or special Act of this Legislature." The defendant company was incorporated by letters patent issued under a general Act of the Legislature, that is, the Companies Act: and "the general capacity" of the company is not curtailed by anything to the contrary "expressly declared in the Act or instrument creating it." It is not contended that the Act is not *intra vires* of the Legislature; and, if it were, the judgment just quoted from determines the question. That "the general capacity which the common law ordinarily attaches to corporations created by charter" includes the powers purported to be exercised in this case, cannot be open to question at this day; and, if questioned, the ground, if I may say so with respect, is well covered by authorities discussed in the judgment of my brother Ferguson.

Whether the officers of the company who entered into the contract acted within the scope of their actual or ostensible authority from the company—as distinguished from the capacity of the company itself—was a question of fact for the learned trial Judge; and his finding upon this—necessarily involved if not declared in the judgment he pronounced—is not to be lightly disturbed, nor unless it is manifestly wrong.

The Legislature has spoken very definitely as to the capacity to contract of all corporations created by or under its Acts, general

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or special; and, although this may go far beyond legal opinion previously entertained as to the capacity of trading corporations incorporated for specific and defined purposes, and may be debatable as a matter of policy or expediency, it is my duty to endeavour to effectuate the intention of the Legislature.

I would dismiss the appeal.

Rose, J.

ROSE, J.:—The action is upon a promissory note for $1,122.60, a renewal for part of an earlier one for $1,500, bearing the names of the defendants as makers, given for the price of certain chattels and "rights" sold by the plaintiff. The "rights" seem to have been the right to call a certain clothes-pressing machine by a particular name; the chattels were the equipment for manufacturing the machine. Judgment went by default against the defendants other than Burks Limited; so that the only matters to be considered are the defences raised by that company.

At the trial, the company directed the greater part of its evidence to the defence of misrepresentation inducing the contract, and did not develope very fully the facts upon which the other defences depend; so that, the defence of misrepresentation failing at the trial, and counsel for the company abandoning, before us, all attack upon that part of Mr Justice Masten's judgment, we are left with rather meagre evidence upon which to deal with the other defences. Those defences are that the company did not make the note in question, and, under its charter, had no power to make it.

The company received, by its letters patent of incorporation, power to purchase or otherwise acquire lands, together with any buildings or structures thereon, and to improve, alter, and manage such lands and buildings and to sell, lease, exchange, or otherwise dispose of them; to erect buildings of all kinds and to deal in lands and building material; to carry on business as brokers and agents, and to acquire, purchase, and take over a certain real estate, insurance agency, and building business, theretofore carried on by Burk & Co. From its incorporation in 1914 until the time of the transactions in question, January, 1916, its business was "chiefly" transacted by Mr. A. W. Burk, as manager. The negotiations with the plaintiff (or with the plaintiff's son, who

acted for him) for the sale to the three defendants were, so far as the company was concerned, carried on by Mr. Burk; the contract of purchase is signed by him as president and manager of the company, and is sealed with the company's seal; the notes are signed in the same way. The plaintiff's son had not previously met Mr. Burk, and did not know anything about Burks Limited. The chattels sold were delivered at premises in Sheppard street, Toronto, of which Mr. Burk and the defendant Menet seemed to have control; and the business of manufacturing and selling the machine was there commenced.

By the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 23, sub-sec. (1), clauses (*a*) and (*i*), the company had, as incidental to the powers set out in the letters patent, power to carry on any business, whether manufacturing or otherwise, calculated directly or indirectly to render profitable any of its property; and to purchase machinery and plant which it might think necessary or convenient for the purposes of its business. We do not know whether or not it owned the premises in Sheppard street; if it did, and if those premises were at the time vacant, it might well have been very wise to acquire some plant, at a small price, and to carry on a manufacturing business there: to do so might "render profitable" premises which it would otherwise have been unprofitable to carry; and it is easy to suggest other reasons why the company might well have thought it "necessary or convenient for the purposes of its business" to place this small amount of plant in a building which it was authorised to improve, alter, and manage, and to sell, lease, exchange, or otherwise dispose of.

As I have said, there is no evidence that the company did or did not own the building; and it is not suggested that the plaintiff was told that it did not own it; so that, even if the plaintiff is to be assumed to have known the contents of the letters patent of incorporation, there is no evidence that he had knowledge of any facts, if there were any, which ought to have led him to suppose that the company was not, in fact, exercising, as incidental to the main purpose of its business, that power which it appeared to be exercising through its president and manager. Mr. Burk is a solicitor of this Court, and knows the difference between acting upon behalf of a company and fraudulently using the name of a company in a personal transaction. He revised the agreement

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and wrote the note, and tells us that he intended the note to be genuine and valid; but he also says: "My company had nothing to do with it. The company never got anything from it. There was another company formed, the Menet & Langton Limited;" and, upon that bald statement, we are asked to hold, in the face of the documents, that Mr. Justice Masten was in error in treating the transaction as the company's transaction: to hold, in fact, that, throughout, Mr. Burk was, in fraud of the plaintiff, simply using the name of the company in a transaction of his own; and that, although the plaintiff, in perfect good faith, relying upon what appeared to be the company's promise to pay, sold his goods to the company and delivered them to the president and manager of the company, who appeared to be acting upon the company's behalf, there really was no sale, and no promise to pay. For my part, I decline to accept the evidence as sufficient to justify such a holding. Therefore, I think the appeal fails and that it is not necessary to discuss the effect of the decision in the *Bonanza Creek* case, or of the amendment of the Ontario Companies Act by the statute 6 Geo. V. ch. 35, sec. 6. See *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.*, 14 O.L.R. 22, at p. 28.

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MEREDITH, C.J.C.P. (dissenting):—Although the amount involved in the action is not great, one of the questions involved in this appeal—if taken seriously as it must be now—is a question of much importance, and the answer to it must be one of wide-spread consequence in business affairs—if heed be given to it in the conduct of business affairs; and is one which must be answered as we are unable to agree upon a minor question, also involved in this appeal, which, otherwise, might dispose of it.

It was upon the major question that the case was dealt with, mainly, at the trial: and upon it, almost entirely, the appeal was argued here.

The judgment appealed against, standing upon this ground, causes results which, in this Province, cannot but be startling.

For instance, a company incorporated in this Province for the purpose of aiding in the propagation of the Gospel may spend all its energies and means in aiding in the propagation of infidelity, or in the manufacture or sale of cards and dice and other appliances which are commonly employed in gambling: a company incor-

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porated for mining purposes may spend its life and fortune in the laundry business; and—this case, if the facts be as the plaintiff alleges—a company incorporated to carry on a "real estate and insurance" business, may also indulge in the speculative buying of "clothes-pressing" devices.

That which has been decided in this case, with, admittedly, startling effect, is this: that a company, incorporated in this Province, to carry on a certain clearly defined business, and though, in form, in declaration, and in fact, incorporated under the statute-law of the Province, is really quite unaffected by the statutes, being incorporated also by the Crown in the exercise of one of its prerogatives, or else having the general capacity of a company so incorporated, with the result that it has "a general capacity analogous to that of a natural person" and is unrestricted in every respect.

Never, until very recent days, had any such notion been advanced, if indeed imagined, in this Province. Provincial legislation has always contained full provision for the incorporation of companies, for business purposes, in the Ontario Companies Act, now comprising 210 sections; and all such companies have always been deemed entitled to the benefit of its provisions, favourable to it, as well as subject to the onerous requirements of it. And it should be needless to say to any one of this Province: that the Ontario Companies Act contemplates and provides for incorporation for limited definite purposes only, which purposes must be set out in the application for incorporation, and which have always been and still are set out in the "charter," and to which the incorporation is expressly confined by it, as appears in the letters patent in question in this action—and that these purposes can be limited or extended only by supplementary letters patent obtained under the provisions of the Act: see sec. 16 (1) (*c*) and sec. 16 and following sections: but, as there may be others concerned, it may be worth while adding these words, which to most men may seem superfluous.

Somewhat early in the life of the Courts of this Province, it was held, in a somewhat half-hearted manner, that a corporation had not power "to make binding contracts" in any other country than that which had created it: see *Union India-Rubber Co.* v. *Hibbard* (1856), 6 U.C.C.P. 77; *Genesee Mutual Insurance Co.* v.

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Westman (1852), 8 U.C.R. 487; *Bank of Montreal* v. *Bethune* (1836), 4 U.C.R. (O.S.) 341; and *Washington County Mutual Insurance Co.* v. *Henderson* (1856), 6 U.C.C.P. 146.

But a ruling so impracticable, in those as well as in these days, and in this Province, could not but be disregarded in numberless business transactions; and, after some years, the question came up for consideration again in the Courts of this Province, when the opposite conclusion was reached, and the earlier rulings were overruled: *Howe Machine Co.* v. *Walker* (1874), 35 U.C.R. 37: since which time, until quite recently, I doubt if any one ever thought of a reversion to anything like the narrow notions given effect, to some extent, in those earlier cases. And I doubt, too, whether any ruling of Judge, Court, or Council could effect, substantially, that which is a practical necessity here, trade by provincial companies, to some extent, beyond the territorial limits of the Province of their incorporation.

And I should perhaps add, parenthetically, that, though Mr. Lindley, in his book on the Law of Companies, discredited the Courts of this Province with the earlier erroneous rulings, to which I have referred, he failed to give them credit for the correction of them in the later case: see Lindley's Law of Companies, 5th ed., p. 910.

All that being so, and more also yet to be mentioned, one may very well wonder why, and whence, all this recent intermeddling with the law relating to provincial companies, and the deplorable muddle in which, especially if the judgment in appeal stand, it has left them; and the more wonder that it should be, if the truth be, as it seems to be, that it has all arisen from a contest between the Federal and Provincial Governments respecting the revenue derived from the incorporation of companies, and carried on, substantially, to enforce the rights of the one against the other in that respect. That, if they could agree upon that incidental and comparatively trivial matter, all directly concerned could be relieved from the confusion, worry, and wrong which present conditions impose upon them. If the British North America Act, 1867, be not amended so as to make sense of its provisions respecting the incorporation of companies, very simple concurrent federal and provincial legislation should give the needed relief, for instance in permitting a provincial company to become also a Dominion

company, and *vice versâ*, by some very simple proceeding. Exact what fees you may, and divide them as you please, but give all needed capacity and power, but no more, to all companies, may well be said to the disturbers of the peace.

This governmental litigious contest seems so far to have ended thus: provincial Governments can, under legislation, or under a Crown prerogative, create companies which may acquire extra-territorial capacities: the case of the *Bonanza Creek Gold Mining Company*, [1916] 1 A.C. 566, 26 D.L.R. 273; and *Attorney-General for Canada* v. *Attorney-General for Alberta*, [1916] 1 A.C. 588, at p. 597, 26 D.L.R. 288: that Parliament has power to require a foreign company to take out a license before carrying on business even in a single Province: *Attorney-General for Canada* v. *Attorney-General for Alberta*, *supra*: and that a Provincial Legislature, by way of an Ontario enactment, may require a Dominion company to be licensed under it before carrying on business in the Province of Ontario: *Currie* v. *Harris Lithographing Co. Limited* and *Attorney-General for Ontario* v. *Harris Lithographing Co. Limited* (1917), 41 O.L.R. 475: and that provincial legislation in the Province of British Columbia, requiring that Dominion companies shall be licensed or registered, as provided in that legislation, as a condition of carrying on business in that Province, is *ultra vires*: *John Deere Plow Co. Limited* v. *Wharton*, [1915] A.C. 330, 18 D.L.R. 353: that is ended thus so far: and it is to be hoped may end altogether in a settlement out of Court of all such questions in a manner having more regard for the companies and their shareholders, and the public at large, than whither the revenue derived from the incorporation of companies shall go. The importance of bearing in mind all these things shall, I hope, become obvious when the effect of the recent provincial legislation, so much relied on by the respondent, is considered.

Coming now directly to the major question involved in this appeal: Mr. Robertson has stated the case for the respondent very fairly and comprehensively thus: "However much I might dislike it if I were a shareholder of the company, it is now the law that, though incorporated for the purpose of carrying on one kind of business only, a company may engage in any other: it has in this respect the same rights and powers as if it were a human being: that that was settled by the Judicial Committee of the

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Privy Council in the recent case of the *Bonanza Creek Gold Mining Company;* and that, if there could be any question as to that, all ground for questioning it has been removed by recent provincial legislation: the Ontario Companies Amendment Act, 1916, 6 Geo. V. ch. 35, sec. 6."

But, as to the case relied upon, it seems to me to be no authority for Mr. Robertson's contention. All that was decided in that case was: that a provincial company is capable of vitality beyond the territorial limits of the Province which created it. Much was said in that case which would be helpful to the respondent here, but for essential differences in the facts of the two cases. Much was said in that case which was not necessary for its determination, but was doubtless considered needful in considering the many questions involved in the case of *Attorney-General for Ontario* v. *Attorney-General for Canada*, which was argued with it, and is reported almost immediately after it: [1916] 1 A.C. 598, 26 D.L.R. 293. The real question involved in all that litigation seems to have been answered in little over two lines (pp. 584, 585) of the report of the case of the *Bonanza Creek Gold Mining Company:* that the provisions of the British North America Act, 1867, do not "appear"—that is, appear to the Judicial Committee—"to preclude the Province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity"—that is, "permitting operations outside the Province"—reversing the judgment of the Supreme Court of Canada, that a Province had no such power: it is difficult to understand how otherwise it could be that provincial companies could have such capacity. The governmental powers being divided between the Dominion and the Provinces, it could hardly be that either can go beyond that which is assigned to it; how can the Provincial Legislature or the Provincial Government indirectly acquire a power encroaching upon that which is assigned to the Dominion and exceeding that assigned to the Province? But the decision, as it is, leaves, I hope, the matter as it has always been supposed to be: a provincial company, in a foreign country, is, like any other alien entity, entitled to such rights as the foreign country may permit it to have, within the limits of its home-created power.

And, in that case, the letters patent were issued "by the Lieutenant-Governor of the Province of Ontario under the author-

ity of the Ontario Companies Act—R.S.O. 1897, ch. 191—*and of any other power or authority vested in him.*" The letters patent in this case are those of the Provincial Secretary, who had power to issue them, under the Ontario Companies Act only, but only "*for any of the purposes to which the authority of this Legislature extends.*" So that, if extra-territorial vitality depended on a charter from the Crown by virtue of its prerogative, this company could have had, at that time, no such vitality. This fact, like another which I have mentioned, becomes one of importance on the subject of the effect of the recent provincial legislation yet to be discussed.

And, in this case, there is also this great difference from the other: in the other case, the purpose of the incorporation was "to carry on the business of mining and exploration in all their branches," without any restriction as to place; and that was all the company did: the single contention was that there was power to do it only in the Province of the incorporation. In this case the purpose and the only purpose of the incorporation was, and was expressed to be, to deal in land and as insurance brokers only; and that which is objected to, in this action, was a transaction—if really the appellants had anything to do with it—altogether foreign to any such purpose. If in the other case the extra-territorial business had been that of, for instance, innkeeping, or farming, need it be said that very different considerations would have been applied to it?

Neither that case, nor any other, prevents the appellants setting up successfully the defence of *ultra vires*, which they have set up, and upon which they have throughout relied.

Then does the recent enactment stand in their way, in that respect? The judgment in the case of the *Bonanza Creek Gold Mining Company* was pronounced on the 24th February, 1916, in London, England, when the Provincial Legislature was in session at Toronto, in Canada; and the enactment in question was passed during that session, and assented to, at its close, on the 27th April, 1916: and so its purpose seems to me to be manifest; a rush for revenue which had been jeopardised by the judgment of the Supreme Court of Canada; and which, from the judgment of the Judicial Committee of the Privy Council, might have seemed, to those who were anxious about it, in need of some legislative propping. No need existed of any legislation for any other pur-

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pose than to give provincial companies a foundation that would carry power to exist beyond the territorial limits of the Province; doubt might well have existed on first, or indeed second, reading of the judgment of the Judicial Committee: whether companies incorporated by charter of the Provincial Secretary, or of the Lieutenant-Governor of the Province granted under the Ontario Companies Act, would have that foundation: so, in haste, "the general capacity which the common law ordinarily attaches to corporations created by charter," in so far as the Legislature had power to confer it, was conferred upon provincial companies in the manner set out in the enactment—all such companies, whether "heretofore or hereafter created." It ought to be obvious what the mischief intended to be remedied was; and what, the object of enactment: and I can find no reason, or justification, for giving it any wider effect than the accomplishment of that object.

What is contended for, by the respondent, is: that it gives to every company power as unlimited as a person has. In other words, that it repeals the Ontario Companies Act, and leaves the company just as if it had been incorporated under the Crown prerogative at common law; which, I should have thought, is manifestly erroneous. The enactment in question is the 210th section of that Act; it is part and parcel of it, and is to have effect as such, and to be interpreted so as to avoid rather than create contradiction or inconsistency: and is but one of several amendments—to the principal Act—made in this amending Act, which is intituled "The Ontario Companies Amendment Act, 1916."

It would be quite too unreasonable to contend, for instances, that no company is now subject to the prospectus clauses of the Act; to its provisions limiting liability and requiring the use of the word "limited" in the company's name—keeping books and an hundred and one other things; or that it is not entitled to any of the benefits or advantages the Act confers. The companies remain just as much as ever under its provisions, and are just as much as ever companies created by statute; the additional general capacity conferred upon them, if any, is in respect of their extra-territorial vitality. They are not companies created by the Crown. And so, if a company so created had unlimited power, this company could not have it: *Baroness Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354; and *Ashbury Railway Carriage and Iron Co.* v.

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Riche, L.R. 7 H.L. 653. In the former case even Lord Blackburn, who, following Parke, B., was a strong advocate of the wide power notion, felt obliged to say that he thought the law laid down in the latter case applies to all companies created by any statute for a particular purpose: and in the case of *Attorney-General* v. *Great Eastern R.W. Co.* (1880), 5 App. Cas. 473, the same learned Judge said (p. 481) of the same case, that it appeared to him "to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited:" though I should prefer to put it that where any body is incorporated for any particular purpose its powers are limited to such purposes, but, in such purposes, it has the legal capacity of a person; if it be created with one arm, in law, one-armed it must remain until some creating power adds another or others.

There is no escape from this: either the company is statute-restricted, that is, subject to the provisions of the Ontario Companies Act, and consequently within the rule made unquestionable by the House of Lords in the *Riche* case; or else it is wholly statute-uncontrolled, and has the capacity of a company created by the Crown under the Crown's prerogative in that respect; whatever that capacity may be. The respondent must take the latter contention or obviously fail.

And it does seem to me to be inconceivable that the Legislature meant to, and did, in an instant of time, without the consent, and without the knowledge, of company, shareholder, creditor, or any other person interested, convert numberless companies incorporated for limited particular purposes, and always before confined to such purpose, into unlimited companies with all the legal powers of a human being: an expansion and growth which would put Jack's Beanstalk quite to shame. It is incredible to me: and none the less so because it cuts off the revenue from "supplementary letters patent."

But, if there were no such limitation by reason of being statute-created, if the appellants had been created by the Crown under a charter in the words of the statutory charter which they have—the word "charter," as last used, I take from the Ontario Companies Act, sec. 3—I am quite unable to agree with Mr. Robertson that

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it would have the effect contended for by him. No case that was cited, nor any that I have ever seen, so decides. In regard to the limited purpose, if any, of its incorporation, the company has ordinarily all the capacity of a person. What need of more than that? What sense in limiting the purpose of the incorporation in words if it is to be unlimited in law? When so limited in the charter, how can it be other than that the company is so restricted; and indeed impliedly prohibited from exceeding the power thus conferred upon it? The words of the charter in question are: "Now therefore know ye that I, William John Hanna, Provincial Secretary, under the authority of the hereinbefore in part recited Act, do by these letters patent constitute the persons hereinafter named, that is to say . . . and any others who have become subscribers to the memorandum of agreement of the company, and persons who thereafter become shareholders in the company, *a corporation for the following purposes and objects*, that is to say . . ." And upon this document, and upon it alone, this company was brought into being, and exists.

The *Sutton's Hospital* case (1613), 10 Co. Rep. 1*a*., as it is commonly called, is always relied upon as the authority for such contentions as are made by the respondent in this case: but that case is no authority for such contentions: the question involved in this case did not arise, and it could not have arisen, in that case. Nor did any question at all analogous to it arise out of that case, which was one calling in question the validity of the famous Sutton Foundation. A corporation had been created by Royal charter for the purpose of giving effect to Thomas Sutton's great charity: and the question was, whether the property devoted by him to that purpose had validly passed to the corporation, which was called "the Hospital of King James founded in the Charterhouse within the County of Middlesex." The case "was argued at the bar for the plaintiff by John Walter of the Inner Temple, Yelverton of Gray's Inn, and lastly by Bacon, Solicitor-general; and for the defendant by Coventry of the Inner Temple, Hutton, Serjeant at Law, and by Hobart, Attorney-general:" and ten objections were made to the right of the corporation to retain the property for the purposes of the charity; not one of which touches in the remotest way the question involved here: and those ten objections are thus characterised by the learned author of the

"report" of the case: "Which brief report I have made of these objections, because I think them, or the greater part of them, were not worthy to be moved at the bar, nor remembered at the bench: and that this case was adjourned to the Exchequer-chamber by the Justices of the King's Bench, more for the weight of the value, than for the difficulty of the law in the case." The case, however, is dealt with at great length. The fourth of these objections was:—

"The place of every corporation ought to be certain, for without a certain place there cannot be any incorporation; but here the licence to Sutton is to found an hospital 'at or in the Charter-house;' so that he may found it in all or any part of the same house, and therefore till Sutton has founded it in certain, there is not any certainty of the place, and by consequence no corporation. To which was added, that a place by a known name is not sufficient to support the name of an incorporation, but it ought to be described by metes and bounds; and divers precedents were cited and shewed, where the sites of hospitals, priories, etc. were so particularly described."

And it is in what is, in the marginal note, called "Answer to the fourth objection," that the words always relied upon, and I may perhaps say solely relied upon, for seeking to have attributed to a "charter-company"' all the powers of a legally competent person, are found. I read them, with the whole context, so that if anything can be found in them lending any kind of aid to the respondent's contention it may be picked, and pointed, out; and, I should add, they comprise only much the lesser part of this "answer," which, in turn, is but a comparatively small part of the whole case:—

"Vide for this word *guild* or fraternity in the Book of Entries, 68. 37 E. 3. c. 5. 15 R. 2. c. 5. the statute of 1 E. 6. of Chantries. In which three things were observed: 1. How *prudens antiquitas* did always comprehend much matter in a narrow room. 2. That to the creation of an incorporation the law had not restrained itself to any prescript and incompatible words. 3. That when a corporation is duly created, all other incidents are *tacite* annexed. And for direct authority in this point in 22 E. 4. Grants 30: it is held by Brian, Chief Justice, and Choke, that corporation is sufficient without the words to implead and to be impleaded, etc. and therefore divers clauses subsequent in the charters are not of necessity, but

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only declaratory, and might well have been left out. As 1. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, etc. and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, etc. that is also declaratory, for when they are incorporated, they may make or use what seal they will. 4. To restrain them from aliening or demising but in certain form; that is an ordinance testifying the King's desire, but it is but a precept, and doth not bind in law. 5. That the survivors shall be the corporation, that is a good clause to oust doubts and questions which might arise, the number being certain. 6. If the revenues increase, that they shall be employed to increase the number of poor, etc. that is but explanatory, as appears in the case of Thetford School in the Eighth Part of my Reports, f. 131, a. 7. To be visited by the governors, etc. that is also explanatory; for in this case the poor which shall be resident in the house of the Charter-house shall not be incorporated, but certain persons in whom the possessions are vested, who shall not be resident there, but only to have the general government and ordering of the poor therein; so that this case is out of the statutes of 2 H. 5. c. 1. and 14 El. c. 5, for if no visitor had been appointed by the charter, the governors should visit; and the books in 8 E. 3. 28. and 8 Ass. 29. do not gainsay it, where it is held, that if the hospital be lay, the patron shall visit, and if spiritual, the bishop shall visit, so that every hospital is visitable; it is true, but in the case at the bar the poor of the hospital are not incorporated, and so no legal hospital. 8. To make ordinances; that is requisite for the good order and government of the poor, etc. but not to the essence of the incorporation. 9. The exemption from the ordinary is but declaratory, for being a lay incorporation he neither can nor ought to visit. 10. The licence to purchase in mortmain is necessary for the maintenance and support of the poor, etc. for without revenues they cannot live, and without a license in mortmain they cannot lawfully purchase revenues, and yet that is not of the essence of the corporation, for the corporation is perfect without it, so that by what has been said, it appears what things *in genere* are requisite to a complete body incorporate, and which are *verba operativa* in this case (which are necessary to be known in every case), in the resolution whereof it appears how necessary it is, that the law and experience should join with their hands together."

It is quite clear from all this that no such question as that raised here was even remotely involved in that case, and that the learned author was not dealing with it directly or indirectly. And, taking every word of it to be accurate—though, for one instance, Mr. Brice has found that that which is said to be "direct authority in this point," is not such, but is only the repetition of an error occurring in Fitzherbert's Abridgment—where is anything to be found in it that is anything like authority for the respondent's contention? But, if all other "incidents" are tacitly annexed to a corporation, how does that alter the nature of the corporate body? Turn an hospital into a milliner's shop? Can all other incidents of an hospital be more than all things necessary or expedient for its life as a hospital? I find myself unable to refrain from giving some expression to the thought that, if any of the very eminent men who composed the board of governors of the Hospital of King James, more commonly called the Charterhouse and Sutton's Hospital, of whom the learned author—Lord Coke—was one, had been told that in the 20th century, in the heart of the North American continent, it would be judicially considered, upon the authority of *Sutton's Hospital* case, that that board of governors might not only, under their charter, do all things incidental to the existence of the hospital, but might also carry on the trades of milliners and hair-dressers as well as those of tinkers, tailors, and candlestick-makers, and anything else that a human being could, and do all things incidental thereto, he could but have said that they proved that wondrous things might happen in those parts, in those days.

I find not a word in that case to warrant the assertion that any corporate body has all the legal capacity of a human being, or any greater capacity than that which it needs "in acting up to the end for which it was created." Mr. Brice in his book on Ultra Vires seems to me to have dealt with this subject in an accurate and satisfactory manner: Part II. chs. 4 and 5: and Part III. ch. 10, sec. 4: and in a manner quite in accord with the views of the Courts, and of business-men generally, in this Province, always.

I must continue of the opinion that it ought not to be seriously argued that a company incorporated, no matter how, for a single definite purpose, can lawfully act as a person, in no way limited, could: that, for instance, if incorporated for the purpose of carry-

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ing on the business of mining only, it could lawfully carry on the business of butchering only: and I cannot but think that any such argument would be considered ludicrous by business-men.

"The general duties of all bodies politic, considered in their corporate capacity, may, like those of 'natural persons,' be reduced to this single one, that of acting up to the end or design, whatever it be, for which they were created by their founder:" Blackstone's Comm., vol. 1, pp. 479, 480.

"A corporation is a creature of the charter that constitutes and gives it being, and prescribes bounds and limits of its operations, beyond which it cannot regularly proceed: yet there are some things incident to a corporation, which it may do without any express provision in the Act of incorporating:" Bacon's Abridgment, vol. 2, p. 260. "A chartered company is a corporation existing for the purposes for which it is created and no others. . . . The charter of a company is a law set to it and to the individuals composing it, and they have no power by any agreement among themselves to annul or legally do anything at variance with their charter:" Lindley's Law of Companies, 5th ed., p. 98. "Each member is entitled to say to the others, 'I became a member in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, or to hold me to any other terms, or to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you.' . . . This principle is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as being just:" *ib.*, p. 319. I read these statements in answer to such as were referred to by the Judge of first instance in the case of *British South Africa Co.* v. *De Beers Consolidated Mines Limited*, [1910] 1 Ch. at pp. 374-6, and which have been repeated here; and call attention to the fact that there is nothing in any of the cases referred to indicating that the charter under consideration was one limited to a single purpose: or that the power which it was said the company had was not one connected with the purpose of the incorporation: and that, when that case was considered in a Court of Appeal, that Court abstained from approving of the views of the Judge of first instance, although, if they had, it would

have been perhaps the better way of affirming the judgment in appeal, as well as that the views of Blackburn, J., expressed very fully on several occasions, upon the subject, did not receive even the damning quality of faint praise when brought prominently before the House of Lords in such cases as *Ashbury Railway Carriage and Iron Co.* v. *Riche*, *supra*.

And one turns with relief from the muddle of judicial, and law-book authors', dicta, in England, upon the subject, to the clear, consistent, and business-like manner in which the subject seems to have been dealt with in the Courts of the United States of America, of which it is said that: "Judicial decisions abound in the general statement of doctrine to the effect that corporations possess only such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted:" Cyclopædia of Law and Procedure, vol. 10, p. 1096, where it is also said that: "'A corporation,' said a great jurist in a great case, 'being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence,'" referring to the judgment of Marshall, C.J., in the case of *Dartmouth College* v. *Woodward* (1819), 4 Wheat. (U.S.) 518, at p. 636. Again: "'A corporation can make no contracts, and do no acts either within or without the State which created it, except such as are authorised by its charter:'" *ib.*, p. 1099.

And, regarding the effect of transactions beyond the scope of their corporate capacity, the rule, and the reasons for it, seem to be established with equal clearness and certainty. "Perhaps the most general statement which can be made of the doctrine of *ultra vires* is to say that a contract of a corporation which is unauthorised by, or in violation of, its charter or other governing statute, or entirely outside of the scope of the purposes of its creation, is void, in the sense of being no contract at all, because of a total want of power to enter into it; that such a contract will not be enforced by any species of action in a court of justice; that being void *ab initio* it cannot be made good by ratification, or by a succession of renewals; and that no performance on either side can give validity to the unlawful contract or form the foundation of any right of action upon it:" *ib.*, p. 1146. And: "'The reasons why a corporation is not liable upon a contract *ultra vires*, that is

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to say, beyond the powers conferred upon it by the Legislature, and varying from the object of its creation as declared in the law of its organisation, are: 1st. The interest of the public, that the corporation shall not transcend the powers granted. 2nd. The interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorised by the stockholders in subscribing for the stock. 3rd. The obligation of everyone, entering into a contract with a corporation, to take notice of the legal limits of its powers:' *per* Gray, J., in the case of *Pittsburgh &c. R. Co.* v. *Keokuk &c. Bridge Co.* (1888), in the Supreme Court of the United States of America, 131 U.S. 371:" *ib.*, p. 1147. To which I may add an observation upon the wasted energy in setting out in the charter a definite purpose of the incorporation if that is not to control in any manner its capacity; as well as regarding the pleasure it must be to a shareholder to put his money into a company incorporated for a purpose dear to his heart and find it employed only for a purpose which he detests. It is no answer to say he can sell out; it may be that he cannot; and why should he be so driven out, if he could sell? And it might be done without his knowledge.

Cases such as this have been of very common occurrence in this Province, where, invariably I think, the rulings of its Courts have been quite in accord with those of the Courts of the United States of America, to which I have referred: indeed the ground which is taken by the respondent here was never, to my knowledge, raised or suggested, before; the whole subject of the capacity of provincial companies has been in recent years twice supposed to be thoroughly threshed out: *Canadian Pacific R.W. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405; and *Bonanza Creek Gold Mining Co.* v. *The King* (1915), 50 S.C.R. 534, 21 D.L.R. 123: and so threshed out without a word being said on the point, until the last named case was heard in the Privy Council. And the last company's case which was before this Court next before this case, was one in which this point, if a valid one, should have been decisive of it, yet the point was not relied upon, or mentioned, in it; so that we have long been very neglectful of the fact, and our duty, if it be the law that companies here have such unbounded capacity as the respondent contends for.

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A reference to two out of very many cases in this Province, one in the 1st and the other in the 50th volume of the reports of the Supreme Court of Canada, upon appeals from the Courts of this Province, indicates pretty fairly that the law here has been always quite in accord with that administered in the United States of America, upon this subject, and that the omnibus capacity notion is altogether an innovation disturbing "the peace of the law," to prevent which Sir Edward Coke assures us was one of his purposes in reporting the case of *Sutton's Hospital*.

In the case of *Bickford* v. *Grand Junction R. W. Co.* (1877), 1 S.C.R. 696, the learned Judge who expressed the judgment of the Court is reported to have said—p. 733: "Had the mortgage been given for any object foreign to or inconsistent with the purposes of the incorporation, then, no doubt, it would have been *ultra vires* of the company. A familiar instance of a railway company exceeding the limits of its undertaking, is afforded by a well-known case, in which such a corporation added to its legitimate business that of a line of steamships. Had this mortgage been given in aid or furtherance of any similarly unauthorised enterprise, it would, of course, have been *ultra vires*, but it is manifest that such was not the case here and that the sole object of the corporation was to attain the end for which it had been created."

And in the case of *Union Bank of Canada* v. *McKillop and Sons Limited*, 51 S.C.R. 518, 24 D.L.R. 787, a guaranty by the defendants was unanimously held by the Supreme Court of Canada, as it had been by the provincial Courts, to have been *ultra vires* of the company, which was, apparently, incorporated in just the same manner as the Bonanza Creek Gold Mining Company was incorporated.

I can find no reason, or authority, for saying that the law of this Province is as contended for by the respondent; or for saying anything which comes nearer to it than this: that a corporation created by charter, under the Crown prerogative, has, ordinarily, the ordinary capacity of a human entity in respect of such objects as are the subject of its charter, except in so far as limited, or restrained, by competent legislation.

No help is gained by mere assertion that "it is the law now:" nor in assertions that we are here to administer, not to make, the

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law: assertions which may be dangerous; for, if they draw away our attention from the vital question, What is the law? they may lead us into the twofold error of (1) misunderstanding it, and (2) laying the blame of our mistake upon the Legislature, when we, not they, are the authors of any absurdities that may follow upon our misinterpretation of it.

I find that the transaction in question was one plainly without the purposes of the appellants' incorporation: and so one which they had no power to enter into, and that therefore the action should have been dismissed: accordingly I would allow the appeal and dismiss the action on this major ground.

And on the minor ground, too, I reach, easily, the same result. I find that the appellants never made the note sued on; that it is not their promissory note.

The facts are simple, and there is really no conflict of testimony upon any substantial point.

The plaintiff's son had been carrying on business as a provincial company under the name "The Edwards Electric Company;" the business, or part of the business, of which was the manufacture and sale of a garment makers' clothes-pressing device, under what was called the "Langton rights," though it appears that there were no patent rights in connection with it; that "Langton rights" was merely a name for the device. The son, or the company, or both, failed, and the plaintiff bought from the liquidator of the company these "rights" and such chattels as went with them. After that, the plaintiff sold these things to the defendant Menet, who is a brother-in-law and a cousin of the plaintiff's son; but Menet, too, failed, and these things were taken from him, apparently, under a chattel mortgage he had given of them; that is, taken by the father, but stored by him with his son. Menet then sought to get them back and to carry on the business again, and for that purpose negotiated with the son. Menet's scheme was another provincial company; and for that purpose he associated himself with the defendant Blackmore and with Mr. Burk, who is a solicitor, and a solicitor who had had some experience in the creation of these provincial companies. The purchase was made altogether by Menet, whom the plaintiff and his son naturally desired to aid. The new company was formed and named "Menet & Langton Limited:" and this company, not the appel-

lants, received the goods, and, for a time, carried on the business of making "Langton pressing machines." The testimony of the plaintiff's son as to this is in these words:—

"Q. How did negotiations open for the agreement that gave rise to the note in question? A. Menet came to me and told me he was going to organise a company or get some people interested with him, and he wanted to know if I would make some arrangement with him whereby they wouldn't have to pay up cash; and, when that came to me, I had a cash offer from another party, and, owing to family connections, I said, 'We will give you a chance.'"

And Mr. Burk's testimony, which is not contradicted by any one, is as follows:—

"A. My company had nothing to do with it. The company never got anything from it. There was another company formed, the Menet & Langton Limited.

"Q. Was this transferred to that company? A. It was for that purpose.

"Q. Who promoted that company? A. Menet and myself.

"Q. Was a bill of sale made? A. We never got anything from the plaintiff except some stock and machinery; never got a transfer.

"Q. You got some stock and machinery? A. Yes.

"Q. You made no documentary transfer from the purchasers here to the new company? A. Never had any to transfer.

"Q. You got certain chattel property? A. That was handed over to the company.

"Q. You made no documentary transfer? A. No.

"Q. And consideration was paid, of course? A. I got some stock personally."

The appellants had no concern in, and got nothing whatever out of, the transaction. The "Langton rights" clothes-pressing machine was a business quite foreign to the land and insurance business of the appellants; and, so far as the evidence discloses the facts, quite unknown to them. Mr. Burk, who was their manager, put their seal upon the promissory note sued upon and signed it in their name "per" himself as manager. This was entirely unauthorised by the appellants, and was done to advance his own aims and gains only. The transaction was that of the new company, which Menet was to form, and which, with Mr.

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Burk's aid, was formed, Burk being paid for all that was done by him by a gift of stock in the new company.

Nothing turns upon the onus of proof: that which is proved is all that is material now: but I may ask upon whom else than the plaintiff could the onus be, in such a case as this, upon a promissory note merely stamped with the name of the company and signed "per A. W. Burk, Mgr.?" Mr. Robertson could do nothing but take that onus upon himself, as he did, at the trial. The action is upon the promissory note only; and the defences are substantially a denial of the making of the note, and that, if made, there was no power to make it: see Bills of Exchange Act, sec. 51.

I am in favour of allowing the appeal, and of dismissing the action, on this ground also.

Appeal dismissed; MEREDITH, C.J.C.P., *dissenting.*

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EX. C.

Re INDIAN RESERVE, CITY OF SYDNEY, N.S.

Exchequer Court of Canada, Audette, J. March 16, 1916.

INDIANS (§ II—36)—REMOVAL TO NEW RESERVE—EXPEDIENCY—COMPENSATION.

The Exchequer Court, pursuant to the provisions of s. 49a of the Indian Act, will recommend the removal of Indians from their Reserve to a new site, if, in the interest of the public and the welfare of the Indians, such removal seems expedient. Under s. 2 (4) of the Act, they are to be compensated for the special loss or damage in respect of their buildings or improvements upon the Reserve.

Statement.

REFERENCE to the Exchequer Court of Canada under the authority of an order-in-council passed on April 24, 1915, pursuant to the provisions of s. 49*a* of the Indian Act, as amended by 1 & 2 Geo. V., c. 14, s. 2, for enquiry and report as to whether it was expedient, having regard to the interest of the public and of the band of Indians then resident on the Sydney (N.S.) Indian Reserve to another place outside the limits of the city of Sydney.

J. A. Gillies, K.C., appeared on behalf of the party interested in the removal of the Indians; *G. A. R. Rowlings* was appointed by the judge to represent the Indians on the hearing of the reference.

Audette, J.

AUDETTE, J., made his report to the Governor-General-in-council as follows:—

To His Royal Highness, the Governor-in-council:

The question as to whether or not it is expedient—having regard to the interest of the public and of the Indians, that the

latter should be removed from the Reserve at Sydney, and for further action under the provisions of the Act—having been referred to the Exchequer Court of Canada for inquiry and report, under both the provisions of the order-in-council of April 30, 1915, and of 1-2 George V., c. 14—the undersigned has the honour to report as follows:—

The notice, provided by s. 2 (2) of the Act, fixing the time and place for the taking of evidence and the hearing of the investigation respecting the above matter, having been published in the "Canada Gazette" and in a local newspaper at Sydney, I assigned counsel to represent and act for the Indians, who might be opposed to the proposed removal, they having previously declared their unwillingness to surrender.

The hearing of the matter was proceeded with at Sydney, on the 20th, 21st, 22nd, 23rd and 24th days of September, 1915, and upon hearing read the pleadings, and upon hearing the evidence adduced, both on behalf of the party seeking such removal, and on behalf of the Indians—and upon hearing J. A. Gillies, K.C., of counsel on behalf of the party seeking the removal, and Mr. Rowlings, on behalf of the Indians, the undersigned humbly submits the following finding:—

The Reserve in question, which is numbered 28 in the Official Schedule of Indian Reserves, is located on the eastern shore of Sydney Harbour, and was acquired by the Dominion government on April 28, 1882, under a grant from the Province of Nova Scotia, for the use of the Micmac Tribe.

It had been surveyed under direction of the federal government in 1877, and at that time contained 2 acres, 2 roods and 37 perches—the area mentioned in the provincial grant above mentioned.

When the Cape Breton Railway was built in 1887 or 1888, sixty-six hundredths of an acre of the Reserve was expropriated for the purposes of that public work, severing the land in two parcels, leaving the Reserve, already of irregular shape, with the contents of 2 acres and 12 perches, and a small piece of land on the water side of the track. This small piece of the Reserve, severed by the railway from its main part, is of no value and cannot be utilized for settlement purposes—and in the result leaves the Reserve, for practical purposes, still smaller than its apparent and real size.

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EX. C.

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Joe Christmas, the present chief, or captain, of the band on the Reserve, has lived on the Reserve back and forth since 1875. In 1887, two more Indian families arrived upon the Reserve. In 1899 there were 85 Indians on the Reserve, and on February 15, 1915, there were 23 houses and 115 Indians. At present there are between 120 and 122 Indians and 27 houses, without counting the school-house and the brick building with sanitary closets.

The present Reserve is really an adjunct of the Eskasoni Reserve, composed of 2,800 acres, and which is about 24 to 25 miles from Sydney. The Grand Chief of the Micmacs resides at Eskasoni, and there is only a sub-chief, or captain, at the Sydney Reserve. There are in the vicinity of 155 Indians at Eskasoni, who do some agricultural work. When these Eskasoni Indians come to Sydney to sell their handicrafts and products, they reside on the Sydney Reserve. There is also the Cariboo Marsh Reserve, of about 5,385 acres. The land on that Reserve is so poor that no Indians reside upon it, but as there is considerable timber upon it they use it to cut their supply for fuel and for making ties, which they sell to the Steel & Coal Co. There are also Indians residing at North Sydney and Little Bras d'Or who, like the others when they come to Sydney, put up at the Indian Reserve.

Now, this Reserve abuts on King's Road, which is one of the principal arteries of the city, a highway very much travelled and used by the public, and upon which a large number of fine residences are built. No one cares to live in the immediate vicinity of the Indians. The overwhelming weight of the evidence is to the effect that the Reserve retards and is a clog in the development of that part of the city. On this branch of the case I may say I would have come to a final decision with more satisfaction, had I heard the present mayor of the city, some representatives from the Board of Trade, and some prominent public-spirited citizens.

It is worth passing notice to mention that the two medical doctors who respectively held the position of Indian agent for this Reserve since 1899 favour the removal of the Indians, provided larger and better quarters are given them. Dr. McIntyre says, he thought the Reserve congested with 20 houses and 100 Indians, and there are now 27 houses and 122 Indians. The removal would make the property in that neighbourhood more valuable for assess-

ment purposes—and it is no doubt an anomaly to have the Indian Reserve in almost the centre of the city, or on one of its principal thoroughfares.

The racial inequalities of the Indians, as compared with the white man, check to a great extent any move towards social development, a state of affairs which, under the system now obtaining, can only grow worse every day, as the number of Indians is increasing.

I do, therefore, without hesitation, come to the conclusion, on this branch of the case, that the removal of the Indians from the Reserve is obviously in the interest of the public.

Coming to the second branch of the case, as to whether it is in the interest of the Indians to be removed to a larger place, I may say that during the trial or investigation, I had occasion, accompanied by counsel on both sides, to view and examine the Reserve in question. It was on that day quite clean and in good sanitary condition; but it is established that this condition did not always obtain.

The majority of the Indians is opposed to the removal. They find their present Reserve well located, close to the place where t ey earn their livelihood, and it suits their methods of life. They want to stay where they are, and do not wish to accept any place offered to them. However, if a better, larger and more suitable place is found it will be acceptable to some of them. This state of things carries us thus far and no further. But the Reserve is getting too small, too congested and too limited, to accommodate its increasing population, besides the fact that the sanitary conditions are unsatisfactory and can only grow worse with an increase in population in the settlement.

The brick sanitary closet in the Reserve has been closed as a result of misuse, and the several draught-houses, now in use to replace it, have proved to be very objectionable to the neighbourhood. Although provided with a number of such draught-houses, the Indians have not been always considerate and mindful of their neighbours in respect of cleanliness. They are also charged with disturbance, but that part of the evidence is meagre and not very reliable, and in that respect they may not be any worse than white men of certain classes. And while it can be said in one sense they may be undesirable neighbours in that locality, they

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could be considered as reasonably well-behaved Indians. They are healthy Indians and the Reserve is free from tuberculosis.

These Indians have abandoned the nomadic life of their ancestors, and are now employed as labourers all over the city at different works, while the women do some charring and washing.

This Reserve has become too small for the present requirements. There are too many buildings upon it, and the band of Indians has become too numerous to be located under the present conditions for sanitation on such a small area. An undesirable and objectionable congestion is the necessary result. Moreover, the band is growing, the young men are marrying and desire to settle there. And while the Reserve is too small for the Indians actually in occupation, we must not overlook that all the Indians of Cape Breton who come to Sydney reside on the Reserve during the time of their visit. And, looking to the future, made wise by looking on the past of this Reserve, it appears that the desirability of a larger Reserve, a matter of expediency now, will become imperative in the near future.

The Indians, in their own interest, should be removed to a larger place where they would be given a small plot of land to cultivate. But this removal, while it should be to a place outside of the city, to avoid a further removal in the future, must be consistent with and considerate of the interest of the Indians. They should remain as close as possible to the city, although outside its limits, to allow them to pursue the same manner of earning their livelihood by doing work in the city, where, indeed, they have become quite a factor in the labour market. They must also be kept close to their Church, because it is insisted upon, in the evidence, that their priest has a very salutary influence over them, and when the Indian loses the influence of his Church, he goes on the down grade. These Indians are labourers of all classes: bricklayers, masons, plasterers, carpenters, pick and shovel men, and some of them work on the Cape Breton Electric Tramway. They are much employed during the winter, for the removal of snow from the tramway. They also make pick handles, tubs and baskets.

The evidence establishes in the result that the removal would be in the interest of the Indians, provided they are given a better and larger Reserve in some place convenient to their church and

their work. And in doing so, to place them in the neighbourhood of the Coke Ovens district must be avoided—that locality is undesirable in many respects—and occasion for intemperance is sure to arise there.

Both the unsatisfactory condition of the present Reserve with respect to sanitation, and the advantage to be derived by the Indians from larger grounds, make it expedient to recommend their removal to a better and larger place, consistent with the relatively close proximity to their work and church.

What the Indian, on the one hand, may lose from the convenience of close neighbourhood to his place of labour, in the future perhaps made costly by the expense of a ferry or car-fare—which with that class must be reckoned—will be offset by the advantage of a larger territory for his Reserve, where he can have his little plot of ground under cultivation, giving him a vegetable garden, helping materially in support of his family.

The removal of this band of Indians from the Reserve will open to improvement at once that part of the city of Sydney, while the Indian, in the result, will not suffer anything serious, save perhaps a disadvantage in the degree of convenience in going to and from his work, and his morals can be looked after just as well upon the new Reserve. He will be able to attend his church just the same, and he will, moreover, be perhaps further away from the temptation in the way of intemperance and kept busy and interested in his Reserve by attending to his vegetable garden. Having each a small plot of land would also be an incentive to keep it in proper condition.

Having found the removal of the Indians from this Reserve expedient and advisable, it becomes my duty now, under the provisions of s. 2 (4) of the Act:

> To ascertain the amounts of compensation, if any, which should be paid respectively to individual Indians of the band for the special loss or damages which they will sustain in respect of the buildings or improvements to which they are entitled upon the lands of the Reserve.

On that branch of the case, ex. "E," testified to by 3 witnesses, establishes the value of each building upon the Reserve, with the name of the proprietor opposite the figures. This valuation, however, has been arrived at on a basis of re-instatement value. That is, it does not shew the actual market value of the buildings, taking into consideration the depreciation for wear and tear. That

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document shows what it would cost to build these, however, anew to-day.

While the Indian, the ward of the nation, should be treated as well as possible, it is quite conceivable that a great part of the old buildings could be used in the erection of the buildings on the new Reserve. The total value of the buildings, owned by the Indians on the Reserve, is placed by these three witnesses at $8,850, subject to what has just been said. This is exclusive of the value of the brick sanitary closet and the school-house.

Passing now to the question of the selection of the site for a new Reserve, it may be said that a deal of evidence has been adduced in that respect. Indeed, the selection of a site is a question not free from difficulty, and upon which a deal of evidence has been adduced. A large plan of the city has been filed, and upon it has been shewn as prospective or available sites, the places marked respectively "A," "B," "C," "D," "E," "F," "G," and "H." On that plan is also shewn the site of the present Reserve.

Besides these sites so indicated on the plan, there is also across the harbour at Westmount, almost opposite the present Reserve, a place recommended by some of the witnesses. It is entirely outside of the limits of the city, and quite accessible to the city for the most part of the year. However, in the autumn and in the spring the ice makes the crossing quite impossible at times for a period varying from one week to three weeks and perhaps more. Were it not for that last difficulty, the place would be ideal. The Murphy farm of 50 acres is there available—and there is also a large quantity of land in that neighbourhood which could easily be secured at a reasonable price. The soil is very good, the site beautiful and abutting on the harbour. If the Indians were established at Westmount on a really good farm, would it not be possible for them to keep a few horses, and when the ice on the river prevents them from coming across, they could drive to town, a distance of only 5 or 6 miles? They would be there away from the liquor shops and the undesirable foreigners settled at the Coke Ovens, where they often get liquor—always a source of trouble to them.

Of all the other sites above mentioned and referred to by the letters "A" to "H," I would only recommend in the alternative, either "A" or "E."

The "A" site lies outside of the eastern part of the city between the Grand Lake Road and the Sydney and Glace Bay R. Co.'s line; and "E," which is also outside the eastern part of the city, at the top of the Cow Bay Road.

Jos. Christmas, one of the Indians, although objecting to the removal, says if they must be removed, he would prefer the Westmount site to any other. Ben Christmas, another Indian, speaking for himself, says "E," at the top of the Cow Bay Road, would meet with his approval if they are given a little assistance in building and larger grounds. The soil there, however, seems to be of doubtful character for farming purposes.

Under all the circumstances, I would humbly recommend, as prospective alternative sites, "A" at the top of the Grand Lake Road, or "E" at the top of the Cow Bay Road, or Westmount. The prospective sites within the limits of the city should be discarded, because the same question of removal would arise again at some future date.

The price at which these prospective properties could be acquired has been estimated by some of the witnesses.

It may be said that while the present site can only be sold at public auction, Mr. Gillies, K.C., has offered to purchase it at $5,000. If the sale is made this amount may be used as an upset price. Agent Parker valued the land at $4,800—witnesses Ross and Midgley at $5,000—Rev. Father Cameron at $150 an acre—and Rev. Father McDonald, in his letter of January 8, 1914, at $12,000. The valuation of $5,000 would appear to be about fair and right.

Therefore, the undersigned has the honour to report he finds it expedient, having regard to the interest of the public and of the Indians located on the small Sydney Reserve, that the said Indians should be removed from such Reserve.

Furthermore, it is found that the compensation above set forth should be paid respectively to the individual Indians of the band for the special loss or damages sustained by them in respect of their buildings or improvements upon the Reserve, or an adjustment be made for their claims in respect thereto, and a suitable new Reserve be obtained for them before they be removed from or disturbed in the possession of the present Reserve.

The undersigned would further recommend that the Indians

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should, on their removal, be treated with great consid ion and kindness, and that such removal should be made quietly without undue haste, trouble or inconvenience, to the Indians. The site to be first selected and the compensation for their buildings or improvements adjusted on the basis above mentioned.

In witness whereof I have set my hand this 15th day of March, A.D. 1916. (Sgd.) L. A. AUDETTE, J.E.C.

SASK.

C. A.

HEFFER v. KOKATT.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

COURTS (§ II A—151)—CONTRACT TO PAY MARKET PRICE—MEANS OF ASCERTAINING—DEBT—JURISDICTION OF DISTRICT COURT.

A contract to pay whatever price is being paid at a certain place or to pay the market price for goods sold furnishes the means of ascertaining the amount due and an action for that price is an action for debt.

If the amount does not exceed $100, the action may be tried in the District Court under r. 4 of the District Court Rules (Sask.).

Statement. APPEAL by defendant from a District Court judgment in an action for the price of goods sold. Affirmed.

P. H. Gordon, for appellant; no one for respondent.

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

Newlands, J.A. NEWLANDS, J.A.:—The plaintiff sues for $84.25, being the balance owed by defendant to plaintiff on an account for hay sold by plaintiff to defendant.

The plaintiff's version of the transaction is that: "I told him he could have the hay for price in livery barn less $1.50 a ton for hauling. I charged him for 8½ tons. He said he only got 6¾."

Defendant says: "We agreed he was to have ⅓. I was not to stack it. Afterwards I agreed to stack and haul it, and pay $5 a ton. I afterwards paid in $7 so as to be sure and have enough. Afterwards found there was 6 tons and two-thirds of plaintiff's share."

The trial judge gave judgment for plaintiff for $21.30. Two objections were taken to this judgment.

1. That, as both parties swore to a contract at a certain specified price, the judge had to either find that the hay was sold at one of those prices or dismiss the action, because, under these circumstances, he could not find on a *quantum meruit*.

I cannot agree to this proposition. It being admitted the hay was sold, the judge could then find the amount and price. As the parties disagreed on both, he could decide on a *quantum meruit*.

2. The second objection was that a claim on a *quantum meruit* could not be sued on the small debt scale.

R. 4 of the District Court Rules says:—

In all claims and demands for debt whether payable in money or otherwise where the amount or balance claimed does not exceed $100 the procedure shall

be under the small debt practice.

R. 12 says:—

12. In actions where the claim or demand is a mere account or is ascertained by some instrument signed by the defendant as a merchant's account, the price of goods sold and delivered, a claim for work and services, money paid, money lent, rent, a promissory note, a bill, order, bond, covenant for the payment of money or other memorandum shewing liability for the payment of a sum certain or which can be ascertained by computation and the defendant does not appear according to the writ of summons the clerk may

enter judgment by default.

This last rule specifies most of the things that could have formerly been sued under the common counts, and I would, therefore, put the same interpretation on the word "debt" in r. 4 as the court in *Lagos* v. *Grunwaldt*, [1910] 1 K.B. 41, put on the words "debt or liquidated demand" as used in O. III. and r. 6 of the English Rules. At p. 47 Farwell, L.J., says:—

Two preliminary objections are taken. The first is that Order III., r. 6, does not apply, because this is not a debt or liquidated demand arising under a contract. It is a claim on contract for *quantum meruit*. In my opinion that is within the rule. I think the words "debt or liquidated demand" point to the old division of common law actions to be found in Bullen and Leake, 2nd ed., p. 28. The old indebitatus counts "which have from time to time been rendered more and more concise are designated with little difference of meaning by the terms indebitatus counts, money counts or common counts; the expression common counts or common indebitatus counts being often used to designate those of most frequent occurrence, viz., where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated; and the expression money counts being sometimes used to particularize those for money lent, money paid, and money received. The most appropriate name seems to be indebitatus counts." And the learned authors go on to say, "there were also formerly in use counts known as *quantum meruit* and *quantum valebat* counts, which were adopted where there was no fixed price for work done or goods sold, etc. These counts, however, have fallen into disuse, and have been superseded by the general application of the indebitatus counts." In my opinion that is the true view; everything that could be sued for under those counts comes within the description of debt or liquidated demand.

This does not conflict with the decision of this court in *Noble* v. *Lashbrook*, 40 D.L.R. 93. The decision in that case being that an action for compensation for the use and occupation of a chattel

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was no different from an action for the use and occupation of land, and as my brother Lamont, who gave the judgment of the court, says: "As the one sounds in damages for breach of an implied covenant to pay, so, in my opinion, does the other."

I am, therefore, of the opinion that an action on a *quantum meruit* or *quantum valebat* where the amount claimed is under $100 may be taken under the small debt practice.

The appeal should, therefore, be dismissed with costs.

Lamont, J.A.

LAMONT, J.A.:—This is a small debt action. The plaintiff sued for the purchase price of 8¾ tons of hay at $15 per ton, less $47 paid on account thereof. The defendant disputed both the amount and the price. In his evidence, the plaintiff testified that the price the defendant was to pay for the hay was the price at the livery barn, less $1.50 per ton allowed for hauling. The defendant testified that he received only 6⅝ tons, and that the price was to be $5 per ton. He, however, had paid $47 on account. The District Court Judge gave judgment for the plaintiff for $21.30. From this judgment the defendant appeals.

The ground of appeal is that as the trial judge did not find that there was a contract to pay $15 per ton, as set out in the statement of claim, or $5 per ton as testified by the defendant, "he was not justified in adding these two amounts together and finding that the price was the average between the two."

The short answer to this contention is, that there is nothing whatever to justify the conclusion that the trial judge arrived at his judgment by this process. Had he adopted this method, the judgment would have been for a different amount. No reasons are given for judgment and no findings of fact are made. The notes of evidence are very meagre, and there is nothing to indicate how the judge arrived at the amount of his judgment. He evidently did not accept the defendants' statement that the price was to be $5 per ton, otherwise he could not have given judgment for the plaintiff. It might also be remarked that the defendant did not believe it himself, or he would not have paid $47 on account of 6⅝ tons at $5 per ton. The trial judge must, therefore, have accepted the plaintiff's statement that the defendant was to pay the price going at the livery barn. What that price was at the time the defendant got the hay does not clearly appear in the notes, but, as judgment was given for $21.30, it is reasonable to

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Lamont, J.A.

assume that the judge found the price at the livery barn to be such as would leave a balance of that amount due to the plaintiff.

It was also contended that, where the price was not fixed, the action must be on a *quantum meruit* and that such action did not lie under the small debt procedure.

In my opinion, a contract to pay the price paid at the livery barn is a contract to pay a fixed price. It is not a contract to pay what the hay was reasonably worth, but a contract to pay a definite price whether the hay was reasonably worth it or not.

In *Paradis* v. *Hotton*, 3 W.L.R. 317, the plaintiff leased his farm to the defendant at a rental of a two-third share of the whole crop, and he sued to recover the value of 12 loads of straw, balance of rent unpaid, at $5 per load. Wetmore, J., held that this claim was not one for debt. In that case no price had been agreed upon for the straw, and it was clearly an action to recover what the straw was reasonably worth. In giving judgment, that judge said, p. 319:—

> I have come to the conclusion that, in order to constitute a debt within the meaning of the rule, there must be something ascertained of a fixed or liquidated character to start with. For instance, A. sells B. a horse at a fixed price agreed on, say, $150, to be paid for in, say, wheat, at a fixed price per bushel, or at market prices according to the bargain.

In *Noble* v. *Lashbrook*, 40 D.L.R. 93, decided by this court at its last sitting, it was held that a claim for an unspecified amount as compensation for the use of a chattel was not a claim for debt to which the small debt procedure was applicable.

In that case it was pointed out that an action for debt would lie for a sum certain, or a pecuniary demand which could readily be reduced to a certainty; that a claim could be considered certain where the terms of the contract under which it was made furnish the means of ascertaining the exact amount due.

A contract to pay whatever price was being paid at the livery barn, or to pay the market price, is, in my opinion, one which, by its terms, furnishes the means of ascertaining the amount due; and an action for that price is an action for debt.

The appeal will, therefore, be dismissed.

Appeal dismissed.

IMP.

P. C.

EGBERT v. NORTHERN CROWN BANK.

Judicial Committee of the Privy Council, Lord Buckmaster, Lord Dunedin and Lord Atkinson. July 26, 1918.

1. GUARANTY (§ II — 12)—CONTINUING — DISCHARGE OF GUARANTOR—NOTICE REQUIRED.

A clause in a guarantee that "this shall be a continuing guarantee, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee" stipulates that the guarantee is to remain in force until there is a notice given by each and all of the guarantors, the executors of any deceased co-signatory coming in his place.

2. GUARANTY (§ II—11)—CONTRACT—ILLEGAL INCREASE IN RATE OF INTEREST—GUARANTEE NOT VOID—LEGAL RATE ONLY RECOVERABLE.

An illegal increase in the rate of interest charged the principal debtor does not render the guarantee void, but a condition will be read into the contract that the interest is not to exceed the rate allowed by statute.

Statement.

APPEAL from 33 D.L.R. 367, 11 A.L.R. 1, *sub nom. Northern Crown Bank* v. *Woodcrafts*. Affirmed.

The judgment of their Lordships was delivered by

Lord Dunedin.

LORD DUNEDIN:—The respondents are a bank having a branch at Calgary, in the Province of Alberta. The appellants are the surviving signatories and the executors of one deceased signatory, whose name was Breckenridge, to a letter of guarantee executed in favour of the bank. The guarantee was given to secure the advances made and to be made to a company called Woodcrafts (Limited) of which the guarantors were directors.

The arrangement had its inception in May, 1911, when a letter of guarantee was granted to the amount of $20,000. This was superseded in December, 1911, by another for $50,000, and that again superseded on April 8, 1912, by the guarantee now in question for $75,000.

The present action is raised in respect of the guarantee, and there is no question but that there is due from the company to the bank sums which in all do not exceed $75,000. The defence is rested upon two separate points with which their Lordships will presently deal. They were both repelled by the trial judge, whose judgment was, with a variation, affirmed by the Court of Appeal.

It will be convenient first of all to set forth the material portions of the guarantee. They are as follows:—

In consideration of the Northern Crown Bank agreeing or continuing to deal with Woodcrafts (Limited), Calgary, Alberta, herein referred to as the "customer" in the way of its business as a bank, the undersigned hereby jointly and severally guarantee payment to the bank of the liabilities which

the customer has incurred, or is under or may incur or be under to the bank, whether arising from dealings between the bank and the customer or from other dealings by which the bank may become in any manner whatsoever a creditor of the customer; including in such liabilities all interest, computed with quarterly or other rests, according to the bank's usual custom, charges for commission and other expenses, and all costs, charges, and expenses which the bank may incur in enforcing or obtaining payment of any such liabilities (the joint and several liability of the undersigned hereunder being limited to the sum of $75,000, with interest at the rate of 7% per annum from the date of demand for payment of the same, which it is agreed the same shall bear).

And the undersigned agree that the bank may refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges, and otherwise deal with the customer and with other parties and securities as the bank may see fit, and may apply all moneys received from the customer or others, or from any securities upon such part of the customer's indebtedness as it may think best, without prejudice to or in any way limiting or lessening the liability of the undersigned under this guarantee.

And this shall be a continuing guarantee, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee.

The ground of defence with which it is convenient to deal first is that the guarantee was brought to an end by notice.

The facts as to this are that on one of the guarantors (Breckenridge) dying, his executors on August 7, 1913, wrote a letter revoking the guarantee. Notwithstanding this, the account with the company was kept alive, renewals being taken for acceptances then current, and fresh advances being made up to the time when the account was finally closed in the spring of 1915.

At their Lordships' bar the effect of this was pled alternatively. It was argued, first, that this notice brought the guarantee to an end as regards all of the guarantors; and second, that it brought it to an end, at least as regards Breckenridge; and in either case it was further urged that the subsequent renewals were equivalent to giving time, and that consequently either all parties or alternatively Breckenridge's executors were free of all liability.

It is not necessary to examine as to what is the law in the case of death when nothing is said in the guarantee about its continuation or not. Here there is a clause which specially deals with the question of control, and the question necessarily depends on the true construction of that clause above quoted beginning "And this shall be a continuing guarantee."

Their Lordships are of opinion that this clause stipulates that the guarantee is to remain in force until there is a notice given

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by each and all of the guarantors, the executors of any deceased co-signatory coming in his place. Such a stipulation is in accordance with the literal meaning of the words, and is in harmony with what might be expected, looking to the position of the persons who were granting the obligation. Further, if it had been sought to allow anyone to bring the guarantee to an end, either for himself or for all, nothing would have been easier than to express such an intention by such words as "all or any of the undersigned," or other appropriate expression. This disposes of the first ground of defence in both its alternatives.

The second ground of defence is this. By the Bank Act, R.S.C., 1906, c. 29, s. 91, it is made illegal for a bank to charge interest at a rate greater than 7%. The effect of that enactment was discussed and settled in the case of *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299.

In the present case, on January 22, 1913, the local manager of the bank, acting in accordance with instructions received from the head office, raised the rate of interest charged to the company from 7% to 8%, and this change was agreed to by the company. The system of dealing was this. As acceptances fell due and were not met, new acceptances were got from the company, the bank then discounting these acceptances and crediting the account with the proceeds, while debiting it with the amount of the old acceptances. After the date of the change interest on overdrafts and discount rates were all calculated at 8% instead of 7%. No intimation of this new arrangement was sent to the guarantors. They plead that in respect of this they are free.

The law as to this class of plea is well settled. *Holme* v. *Brunskill*, 3 Q.B.D. 495, may be taken, as is remarked by the trial judge, as one of the leading authorities on the subject. The judgment of Cotton, L.J., in which Thesiger, L.J., concurred, contains the following passages:—

> The cases as to discharge of a surety by an agreement made by the creditor to give time to the principal debtor are only an exemplification of the rule stated by Lord Loughborough in the case of *Rees* v. *Berrington*, 2 Ves. Jr. 540, 30 E.R. 765: "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him (the surety), who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract

guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in the *Croydon Gas Company* v. *Dickinson*, 2 C.P.D. 46, at 51.

This statement of the law was followed by Chitty, J., in *Bolton* v. *Salmon*, [1891] 2 Ch. 48, at 54, and was inferentially approved by Lord Watson in *Taylor* v. *Bank of New South Wales*, 11 A.C. 596, at 603.

The matter is tersely summed up by Quain, J., in the case of *Polak* v. *Everett*, 1 Q.B.D. 669, at p. 677: "I think the convenience and policy of the matter . . . is that the contract of the surety should not be altered without his consent."

The appellants argue that these authorities apply. They lay stress on the opening words: "In consideration of (the bank) agreeing or continuing to deal with (the company) *in the way of its business as a bank*." They say that in respect of that they were entitled to suppose that dealings with the bank would be in accordance with the law, *i.e.*, on a 7% basis; that an agreement between the bank and the company that dealings should be on an 8% basis was an alteration of the contracts, and that this alteration not having been communicated to them they were set free.

The question is not free from difficulty, but their Lordships think that the views of the Court of Appeal are right. What is guaranteed is not any one advance of $75,000, but all contractual indebtedness up to $75,000. That indebtedness may be, and in fact was, the result of a series of contracts. Each of the contracts was a contract to repay the money advanced with interest thereon. It is legitimate to read into each contract, from the guarantors' point of view, a condition that the interest should not exceed 7%. But the difficulty in the appellants' argument lies in this, that the so-called agreement to charge 8% is statutorily invalid and of no effect. Though of no effect to legalise the interest, it

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does not invalidate the contract to repay the principal. That was inferentially decided by *McHugh's* case, *supra*. Accordingly, the indebtedness in respect of the principal has not been interfered with. In so far as advances on current account are concerned, the only result of the attempted agreement is to make the interest run at 5%, which cannot constitute a violation of an implied contract that interest should not be greater than 7%. So far as the discounts are concerned, the excess is a mere voluntary payment which the debtor cannot recover, but which, in so far as they exceed 7%, do not bind the guarantors in a statement as against them of the debtor's account. This is fully given effect to by the variation made by the Court of Appeal on the judgment as originally pronounced by the trial judge. In their Lordships' opinion, therefore, the facts are not such as to make the case fall within the legal principles above laid down.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs. *Appeal dismissed.*

N. S.

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THE KING v. HALL.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. July 5, 1918.

EXTRADITION (§ I—6)—SURRENDER FOR CRIMES COVERED BY TREATY—VALIDITY OF WARRANT OF SURRENDER NOT TO BE CHALLENGED.

A prisoner having been surrendered to the Canadian Government for a crime covered by the treaty between Great Britain and the United States; the court has no power to challenge the validity or regularity of the warrant of surrender, issued by authority of the Government of the United States nor has it any right to go behind the said warrant to inquire whether the proceedings upon which it is founded are or are not regular; although it may examine the proceedings abroad to see that a surrender has not been obtained on one charge, and then another or different crime laid and prosecuted in Canada.

[See also *Re Hall*, 39 D.L.R. 551.]

Statement.

CASE reserved for the consideration of the Supreme Court *in banco* by Wallace, J., of the County Court for District No. 1, exercising jurisdiction under the provisions of the Speedy Trials Act, to determine questions raised as to the legality of the trial, conviction and imprisonment of the defendant for the offence of uttering forged paper, application having been made to the government of the United States by the Minister of Justice for the surrender of the prisoner on the charge of forgery.

W. J. O'Hearn, K.C., for the prisoner; *A. Cluney*, K.C., Crown Prosecutor, for the Crown.

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HARRIS, C.J.:—The prisoner was committed for trial for knowingly uttering a forged cheque—and he was tried and convicted by the Judge of the County Court for District No. 1, exercising jurisdiction under the Speedy Trials Act, and is now in the penitentiary serving a sentence of 2 years for his offence.

The trial judge has reserved for the consideration of this court three questions.

It appears that the prisoner, after committing the offence in question in Nova Scotia, absconded to the United States of America. The Minister of Justice of Canada, at the request of the Attorney-General for the province, thereupon made a requisition on the government of the United States for the surrender of the accused to be tried for the crime of forgery. The accused was arrested at Boston on the charge of forgery of the cheque in question and arraigned before the U.S. commissioner, and counsel for the Attorney-General for Nova Scotia subsequently abandoned the charge of forgery and substituted for it a charge for uttering the cheque knowing it to have been forged.

The commissioner committed the prisoner on this latter charge to await the action of the executive of the U.S. government and later the prisoner was surrendered to the Canadian government to be tried on the charge of uttering the forged cheque and he was conveyed to Nova Scotia under a warrant of extradition signed by the Secretary of State for the United States in which the offence was specified as uttering the forged cheque in question.

Objection was taken by the prisoner's counsel on the trial before the County Court Judge that the prisoner could not be tried for uttering the forged cheque because the Minister of Justice of Canada had by his requisition asked for the surrender of the accused for forgery of and not for uttering the cheque. The objection was overruled, the accused was tried and convicted and the case reserved raises the question as to whether the prisoner was properly tried under the circumstances stated.

In the able argument addressed to the court by Mr. O'Hearn, K.C., on behalf of the prisoner, it was urged that the prisoner having been surrendered under the treaty, all its provisions must be strictly complied with—that the requisition for extradition must ask for the surrender of the prisoner to be tried for the very same offence in respect to which he is afterwards surrendered, and

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that such a requisition was a pre-requisite to, and the foundation and basis of all the proceedings, and that the variation in this case made the proceedings irregular or void and the prisoner could not be properly tried and should have been discharged.

It is to be noted that the question is raised by the prisoner and not by the government of the United States, and it is also to be noted that the crime for which the prisoner was tried was precisely the same crime named in the warrant of extradition by the American government, and that it was one of the crimes covered by the treaty between Great Britain and the United States.

It may be—and no doubt it is—true that the Secretary of State at Washington might have declined to issue a warrant or to surrender the accused to be tried for uttering the forged cheque upon the requisition for his surrender for trial for forgery of the cheque, but the fact is that, having before him the requisition in question and the record of the proceedings before the commissioner at Boston, and knowing that the charge had been amended, he deliberately agreed as the representative of his government to the surrender of the accused and issued the warrant authorising the return of the accused to be tried for uttering the forged cheque and the Canadian government with full knowledge of the facts accepted the surrender. I think the law is correctly stated in 1 Moore on Extradition, p. 301, s. 204, that:—

> A fugitive criminal, when arraigned in the country which has obtained his surrender, may allege that the judicial or other proceedings which resulted in his extradition were irregular and not in accordance with law. . . . The method in which a foreign government may execute its laws does not concern the tribunals or the government of the country which obtains the extradition.

He cited a case of *Kelley* v *The State*, 13 Texas Appeals 158, which appears very much in point. I would also refer to the opinion of Mr. Westlake given to Mr. Lammasch as to the law of England on this question, printed as a note to 1 Moore on Extradition, pp. 234-237.

In *Hall* v. *Patterson*, 45 Fed. Rep. 352, Green, J., of the Circuit Court of the District of New Jersey, said at p. 355, that

> A warrant of extradition expresses as well the conclusion of the foreign government as to the nature of the act charged as its judgment of the advisability and the duty of surrender. The Great Seal affixed thereto imports absolute verity of the statements. . . . The warrant is the criterion as well as the measure of his peril. . . . The surrender is made only because

the act or acts alleged therein render the defendant actor liable to extradition. Now since he has been surrendered to this government he cannot here, as a matter of defence to a crime, attack the method of his surrender and thereby seek to defeat justice.

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For the reasons stated in these authorities, I think the trial judge was right in refusing to quash the charge or indictment and in refusing to discharge the prisoner from custody and that the questions asked should be answered accordingly.

Harris, C.J.

RUSSELL, J.:—I agree.

Russell, J.

LONGLEY, J.:—I agree with the Chief Justice. It appears that the requisition was made for the return of the prisoner for the offence of forgery. The matter was carefully considered by the court in the United States, and the offence disclosed amounted to a conviction of having uttered false paper. The evidence shews that the facts were all submitted to the American Secretary of State, who signed the requisition giving up Hall to the Canadian authorities on the charge of having uttered false paper. The prisoner was brought to Canada, tried and convicted of uttering false paper. I consider the action of the Secretary of State of the United States entirely in order, and it is quite beyond the power of this court to interfere with him in making such a determination. The British authorities were proposing to alter the requisition and make it for uttering instead of for forgery. By some mistake it was not done. However, the facts were before the Secretary of State, and he signed the order allowing the prisoner to be handed over to the Canadian authorities. We have no right, whatever, to interfere with this act.

Longley, J.

It might be fairly argued that the difference between forgery and uttering a forged paper is merely nominal and will constitute a good requisition in any case, but it is unnecessary to consider that at present.

DRYSDALE, J.:—This application on a case reserved is based on an attack upon the validity of the order for surrender of a fugitive from justice made by the Secretary of State for the United States of America. It seems that, at the instance of the Attorney-General for Nova Scotia, proceedings were taken in one of the States of the union against the applicant Hall, wherein Hall was charged with uttering forged paper or cheques in Halifax and the extradition of Hall sought under the Ashburton Treaty; that under such proceedings Hall was, in due course, surrendered by an

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order made by the Secretary of State at Washington, on the charge of uttering forged paper; that on such surrender he was received in Halifax and duly and regularly tried on such charge of uttering, convicted and sentenced for the same offence. It is now alleged that the Secretary of State at Washington, for want of proper material before him, improperly or illegally made the order of surrender, it being said that such officer of state had not before him a proper or definite request from the Department of Justice at Ottawa requesting surrender of the fugitive for the specific crime of uttering. This raises the question whether or not this court can look into, or review on the merits, the material before the American Secretary of State that led up to the making of the surrender order under the Great Seal. Under the treaty and the statute governing extradition, the proceedings required, before an order for surrender is made, must be before an extradition commissioner. These are certified to the Secretary of State, who is the final authority to pass upon the regularity of such proceedings, and all necessary requests through diplomatic channels. I am of opinion that when such officer passes upon the regularity of the proceedings touching the surrender of a fugitive and makes an order therein, directing surrender, it is not open to this court to review or question the validity of such surrender. This is not a case where one crime was charged and a surrender obtained on such charge, and then another or different crime laid and prosecuted here. This court can look into the proceedings abroad to see that this is not done or attempted, but it is admitted here that a charge of crime in uttering forged documents was laid against Hall in Boston, that, on such charge, proceedings were had, that he was surrendered on such charge of uttering, and duly and regularly prosecuted and tried here for uttering, and, under such circumstances, the prisoner cannot, in this court, attack the order for surrender made by the Secretary of State on any allegation that such officer did not have before him all matters requisite to the making of such order. The order is regular on its face, recites the crime charged, and directs surrender on such charge. It is a treaty crime and a trial was had in due course on such charge. The order of the Secretary of State at Washington under the Great Seal imports verity and it is idle to question it here.

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I think the reserved case ought to be quashed, and conviction affirmed. If authority is wanted for the position taken in this opinion, I would refer to Moore's admirable work on extradition where the authorities are collected and cited covering the point dealt with.

RITCHIE, E.J.:—I agree with my brother Chisholm.

CHISHOLM, J.:—It is stated in the case reserved for the opinion of this court, and I do not understand it to be disputed, that the prisoner Hall was surrendered and delivered up to the duly authorised official of the government of Great Britain by the government of the United States of America for trial for the crime of uttering forged paper, for which crime he was duly tried and convicted. For the reasons mentioned by me when an application for his discharge from custody was made before his trial, I then held, and I now hold, that the warrant of surrender issued by the Secretary of State of the United States determined once and for all what the offence was for which he was surrendered: *Re Hall*, 39 D.L.R. 551. The argument now made on behalf of the prisoner, if I understand it, is that because the demand made by the Canadian Minister of Justice for his extradition for the crime of "forgery" was not followed, after the charge was changed to "uttering" forged paper before the extradition commissioner, by another demand for his extradition for the crime substituted in the charge, the warrant of surrender was invalid or irregular and the subsequent trial and conviction were in violation of what his counsel called his treaty rights. I do not think that such a contention should be entertained.

This court has no power to challenge the validity or regularity of the warrant of surrender issued by authority of the government of the United States, nor has it any right to go behind the said warrant to inquire whether the proceedings upon which it is founded are or are not regular. It would be impertinent for us to do so as it would be for us to inquire whether Mr. Lansing was regularly appointed to the high office which he fills. As Moore tersely puts it, "the method in which a foreign government may execute its laws does not concern the tribunals or the government of the country which obtains the extradition."

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Chisholm, J.

The questions reserved for our opinion relate to and involve acts which were done, or, according to prisoner's counsel, were omitted but ought to have been done, prior to the issue of the warrant of surrender. If I am correct in holding that we cannot go behind the warrant, the questions are merely academic and do not raise any matters of law in the case. I, therefore, decline to answer them. *Conviction affirmed.*

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Judicial Committee of the Privy Council, Earl Loreburn, Lord Buckmaster and Lord Sumner. July 4, 1918.

EXPROPRIATION (§ III C—135)—BY CROWN—TOTAL OR PARTIAL ABANDONMENT—COMPENSATION—JURISDICTION OF EXCHEQUER COURT.

Under s. 23 of the Expropriation Act (R.S.C. 1906, c. 143) the Exchequer Court has jurisdiction to adjudicate upon claims arising out of a total as well as partial abandonment of the land expropriated. The claim for compensation arises on the original expropriation and is not defeated by the subsequent proceedings, even after revesting the claim for compensation still remains open for adjustment. The court in assessing the amount should take into consideration the fact of the abandonment together with all the other circumstances of the case.

The measure of the right should not be treated as something in the nature of a claim for damages for disturbing or injuriously affecting the value of the property.

Statement.

APPEAL and cross-appeal from the Supreme Court of Canada, 27 D.L.R. 262, 52 Can. S.C.R. 402. Appeal of the owners was allowed and cross-appeal by the Crown was dismissed.

P. O. Lawrence, K.C., *MacMaster*, K.C., and *Douglas Hogg*, K.C., for the owners; *Hon. F. Russell*, K.C., and *T. Mathew*, for the Crown.

The judgment of their Lordships was delivered by

Lord Buckmaster.

LORD BUCKMASTER:—The main question upon this appeal is as to the existence and extent of the right of the appellants to obtain from the Crown either compensation or damages for land originally appropriated by the Crown for purposes of public improvement, and subsequently abandoned and revested in the appellants. To this, the main subject of the controversy, is added the subsidiary question raised by cross-appeal of the Crown as to the jurisdiction of the Exchequer Court to determine the dispute. The case arises under the following circumstances:—

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The government of Canada undertook the construction of the Eastern Division of the National Transcontinental Railway from the city of Moncton, in the Province of New Brunswick, to the city of Winnipeg, in the Province of Manitoba, and, in connection with the work contemplated, made arrangements for the removal of the market in the city of Quebec known as the Champlain Market. The construction of the railway was regulated by a statute known as the National Transcontinental Railway Act, 3 Edw. VII., c. 71, which provided that it should be under the charge of certain commissioners who were created as a body corporate and referred to in the Act as "The Commissioners."

S. 13 of this statute enabled the commissioners to take possession of land for the purpose of this branch of the railway, and the relevant part of such section is in the following terms:—

S. 13. The commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

The predecessors in title of the appellants owned certain land and buildings in the city of Quebec which were situated upon the Champlain Market. Neither their title nor the devolution of interests by which the land is now vested in the present appellants need to be considered on this appeal. The phrase "the appellants" is used throughout by their Lordships to denote the true owners at the relevant and material dates. The commissioners desired to acquire the appellants' property, and on January 24, 1911, a plan and description of the lot were duly deposited in the registry office in accordance with the provisions of s. 13 of the statute already referred to, the result of such deposit being—according to the express terms of the statute—to vest the lands in the Crown, saving the lawful claim of the owners to compensation.

On October 2, 1911, the Attorney-General of Canada filed an information in the Exchequer Court of Canada offering the sum of $61,747.75 as compensation for the expropriated property, and on October 25, 1911, the appellants filed their plea accepting the amount.

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Before any further proceedings were taken to obtain payment by the appellants of the agreed amount, the Attorney-General on March 19, 1912, filed a discontinuance of this information, on July 27 of the same year the Ministry of Railways and Canals served on the appellants a notice, dated July 15, abandoning the lot, and on December 30, 1912, registered this notice in the office of the registrar of deeds.

The effect of such registration was, by virtue of a statute to which reference will be made, to revest the property in the appellants, who once more became the owners of their estate. They had, in fact, never been divested of possession, and throughout the whole period had managed and dealt with their property to the best advantage, having regard to the altered circumstances which the actual or contemplated destruction of the market involved.

The changed conditions of the surrounding property had, however, as it is alleged, materially affected the capital value of the expropriated land—a result independent of the actual act of expropriation, but consequent upon the other operations which had been undertaken. The appellants accordingly claimed that in the circumstances they were entitled to be paid the compensation originally agreed less the amount to be taken into account by reason of the value of the land when revested in them, so that as the market value of the land when revested had fallen to an extent which the appellants alleged amounted to $31,747.75, they sought to recover this sum, together with a sum of $500 for expenses, subsequently abandoned, and for this purpose filed a petition of right in the Exchequer Court of Canada. This petition was defended by the Crown on the ground that there was no jurisdiction in the Exchequer Court to hear the case, and that no claim for compensation had arisen.

The case was originally heard in the Exchequer Court by Mr. Justice Audette (15 Can. Ex. 157). He decided that there was full jurisdiction to hear the case, but dealt with it as a claim for damages "for the injurious affection of the suppliants' property as resulting from the expropriation by the Crown of the Champlain Market, or acquiring the same, and the taking down of the Butchers' Hall and failing to build there a terminal station"; and

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so regarded he allowed the sum of $3,000 for the interference that had taken place with the appellants' tenancies.

From this judgment an appeal was brought to the Supreme Court and heard by 6 judges. The Chief Justice rejected the view that the action was an action for damages resulting from the abandonment, and thought that the case should be sent back to the Exchequer Court to determine the amount to be paid to the appellants "in payment of compensation due to the land being taken, taking into account in assessing the compensation the abandonment and all other circumstances of the case."

Davies, J., accepted the view of Audette, J., as also did Idington, J. Duff, J., however, thought that there was no power to give the notice of July 15, 1912, since the statute under which it was given did not apply; but held that, if it were applicable, the claim of the appellants was well founded. Anglin, J., took the same view as the Chief Justice, and Brodeur, J., agreed with Audette, J.; with this difference of opinion, the appeal was dismissed; and from that dismissal this appeal has been brought.

The appellants' claim depends upon the meaning and true construction of s. 23 of the Expropriation Act, R.S.C. (1906), c. 143, which is in the following terms:—

23. Whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the Minister may, by writing under his hand, declare that the land or such portion thereof is not required, and is abandoned by the Crown, or that it is intended to retain only such limited estate or interest as is mentioned in such writing.

(2.) Upon such writing being registered in the office of the registrar of deeds for the county, or registration division in which the land is situate, such land declared to be abandoned shall revest in the person from whom it was taken, or in those entitled to claim under him.

(3.) In the event of a limited estate or interest therein being retained by the Crown, the land shall so revest, subject to the estate or interest so retained.

(4.) The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

It is not necessary to consider the question as to whether this statute has any application to the present case. The proceedings have been conducted on the footing that the statute applied, and

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it is on the true construction of s. 23, and not on the application of the statute, that the case has been argued before their Lordships.

The appellants contend that their claim for compensation, which admittedly arose when the land was originally appropriated by the Crown, is not taken away by the provisions which enable the land to be restored, since the operation of s. 23 is merely to provide that in determining the amount of such claim the effect of the revesting is to be brought into account.

On behalf of the Crown it is disputed that s. 23 (4) has any application to a case like the present, where the whole land taken has been restored, and it is asserted that if any claim can be maintained it is only in respect of the ownership of the property by the Crown for the limited period between January 24, 1911, and December 30, 1912, and even this cannot, it is said, be made the subject of the present proceedings.

The latter contention may conveniently be dealt with first, and is disposed of by the Exchequer Court Act, c. 140. It is there provided by s. 20 that the Exchequer Court shall have exclusive jurisdiction to hear and determine, among other matters, every claim against the Crown for property taken for any public purpose. This property was taken for a public purpose, and whatever the extent and true measure of the claim may be, it is a claim arising out of such taking of the property, and it is therefore, in their Lordships' opinion, clearly within the provisions of the statute. All the judges before whom this case has been argued are in agreement that there was jurisdiction, either under this statute or independently of its provisions, and their reasoning leaves no room for further controversy.

The only question, therefore, is as to the construction of s. 23 of the Expropriation Act, and in particular of s-s. 4 of that section. In order to give full effect to the true value of the words in this sub-section, it is necessary to examine the essential purpose of the clause. This is to be found in the earlier sub-sections, which provide that either the whole or any part of a particular parcel of land found to be unnecessary may be abandoned by the Crown and that "such land declared to be abandoned" shall revest in the original owners. It is important to observe that in these provisions no distinction whatever is drawn between the abandon-

ment of the whole or part of any parcel of land; whichever course is taken such land revests. This consideration affords an important guide for the determination of the final sub-section. It is the fact of "such abandonment or revesting" which is to be taken into account in estimating the compensation, and, if the contention for the respondents were correct, it would be necessary to hold that "such abandonment"—which in its natural meaning, can only refer to the abandonment previously mentioned, including both the whole or part—is intended to have exclusive reference to the case where the part only is revested and not to the case where the whole is given up.

Such construction is contrary to the plain meaning of the words, but it is of course possible that subsequent passages in the same sub-section might lead to the conclusion that the general phrase was intended only to have a partial and limited application. Such indication is, according to the respondents, to be found in the last words of the sub-section, which provide that the fact of abandonment is taken into account in assessing the amount to be paid to any person "claiming compensation for the land taken." This, according to their argument, involves the conclusion that the person who claims compensation must be a person whose land has been taken and retained, as otherwise there would be no claim for land taken and no compensation to be assessed. Their Lordships are unable to accept this interpretation of the statute.

The claim for compensation arises on the original expropriation of the land. Nor is this claim defeated by the subsequent proceeding. Even after revesting, the claim for compensation still remains open for adjustment, for it has nowhere been taken away or satisfied, and in its settlement the effect of the revesting is an element to be considered.

Their Lordships are, therefore, unable to accept the view that the true measure of the appellants' right is something in the nature of a claim for damages for disturbing or injuriously affecting. In fact, so far as the particular piece of land is concerned, the Crown does not appear to have done any act upon the land itself that would either damage or injuriously affect its value. Its advisers have been enabled by virtue of the section to change their mind and give back the property which they originally took, and it is this fact which must be considered with other circumstances in determining the original amount of compensation which

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they became liable to pay. Their Lordships think, therefore, that the judgment of Fitzpatrick, C.J., was accurate in all respects, and that this case should be remitted to the Exchequer Court to determine and assess the compensation payable upon the footing that the fact that the land has been revested shall be taken into account in connection with all the other circumstances in determining the amount to be paid.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the cross-appeal should be dismissed, and that the respondent should pay the costs, both here and in the courts below.

Appeal allowed; cross-appeal dismissed.

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CANADA BONDED ATTORNEY AND LEGAL DIRECTORY Limited v. **LEONARD-PARMITER Ltd.**

CANADA BONDED ATTORNEY AND LEGAL DIRECTORY Limited v. **G. F. LEONARD.**

Ontario Supreme Court, Appellate Division, Riddell and Lennox, JJ., Ferguson, J.A., and Ross, J. February 18, April 10, 1918.

1. COMPANIES (§ IV G—137)—ONTARIO COMPANIES ACT—BY-LAW AS TO PAYMENT OF DIRECTORS—DIRECTOR ACTING AS TRAVELLING SALESMAN—REMUNERATION.

In the second action the court held that s. 92 of the Ontario Companies Act (R.S.O. 1914, c. 178), which provides that "No by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting or if passed by the directors until same has been confirmed at a general meeting," does not prohibit a director from receiving reasonable remuneration for acting in another capacity, such as travelling salesman, without a by-law authorizing such payment.

2. MASTER AND SERVANT (§ I C—10)—EMPLOYEE—MISCONDUCT—RIGHT TO PREVIOUSLY EARNED SALARY.

Misconduct on the part of an employee does not disentitle him to previously earned salary.

3. APPEAL (§ VII L 3—485)—EQUAL DIVISION OF APPELLATE COURT AS TO WHETHER EVIDENCE SUSTAINED FINDINGS OF TRIAL JUDGE.

The court was equally divided in the first action on the question whether the evidence sustained the findings of the trial judge as to whether the defendants had improperly obtained and used the plaintiffs' list of subscribers and wrongfully endeavoured to entice away plaintiffs' employees. The trial judgment granting an injunction was therefore affirmed, with some modifications as to the operation of the injunction.

Statement.

APPEALS from the judgment of Falconbridge, C.J.K.B.

The first action was brought to restrain the defendants from soliciting customers of the plaintiffs and otherwise injuring the business of the plaintiffs as publishers of a directory containing lists of lawyers etc.

The second action was brought to recover from G. F. Leonard certain moneys which he had received for the plaintiffs while in their service, which he claimed to retain as salary.

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The judgment appealed from is as follows:—

I have had an opportunity since the 1st July of going over the voluminous evidence and the 80 exhibits put in at the trial.

The cases were argued with much force and skill on both sides, and at great (I do not say unnecessary) length. That argument was taken down by the official stenographer and has been extended.

The reconsideration of the whole case has confirmed me in the opinion which I had formed at the conclusion of the argument that the plaintiffs are entitled to succeed as to all matters in controversy in both actions.

It will be sufficient to point to the argument of counsel for the plaintiffs, which I approve of as to matters both of law and of fact.

The intrinsic evidence of the lists themselves shews conclusively the use made of the plaintiffs' material in the preparation of the defendants' production; and there is satisfactory and convincing evidence of: (*a*) the improper retention by Leonard and Parmiter, or one of them, of the plaintiffs' list of subscribers; (*b*) the surreptitiously obtaining from the plaintiffs type-written lists of present subscribers and of the plaintiffs' subscribers whose contracts had been cancelled, with dates and reasons; (*c*) the soliciting by the defendants of the business of the plaintiffs' subscribers, in so doing using the lists, information, and material wrongfully and surreptitiously obtained from the plaintiffs; (*d*) the individual defendants endeavoured to entice employees away from the plaintiffs, as charged in para. 21 of the amended statement of claim.

In the first action there will be judgment for the plaintiffs in terms of the prayer of the statement of claim and of the amended statement of claim, with costs, and a reference as to damages.

As to the action against Leonard alone, I find the facts in controversy in favour of the plaintiffs both as to the contracts and as to the matter of misconduct charged in the amendment to the reply and defence to counterclaim made at the trial, which misconduct disentitles the defendant to remuneration for his services. There must be a reference of this action unless the parties on this basis can agree on figures. Costs to the plaintiffs.

Both parties to have leave to amend the pleadings in accordance with the draft put in at the trial.

J. P. MacGregor, for appellants.

A. C. McMaster and *E. H. Senior*, for plaintiffs, respondents.

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RIDDELL, J.:—Appeals, argued together, from the judgments in favour of the plaintiffs in two cases tried together by the Chief Justice of the King's Bench without a jury at Toronto.

The Canada Bonded Attorney and Legal Directory Limited (which is hereinafter called "the company") have for some time published a "List of Lawyers in Canada" whom they recommend to their customers to make mercantile collections—these lawyers they "bond" with a guarantee company, and undertake to their customers for the solvency and honesty of the lawyers they recommend. They, in the same publication, furnish a list of banks through which their customers may draw on debtors, the instructions being given to the banks that in case of non-payment the claims are to be handed to the "bonded" lawyer of the place. The company also have customers who make use of this system.

It naturally follows that only one lawyer or firm of lawyers will be "bonded" for any place, and that small places may not have a "bonded" lawyer at all; customers having claims to collect in such small places would be referred to a bonded lawyer in a near place who could attend to the matter.

Leonard, the defendant, was in the employ of the company from its inception, as a traveller, and later became also a director; he remained in this employ till the summer of 1916. The defendant Parmiter was from 1913 till the summer of 1916 also in the employ of the company.

About the 1st July, 1916, Leonard started an opposition business, and almost at once Parmiter joined him. Shortly afterwards, they formed a joint stock company (hereinafter called "the new company")—Leonard-Parmiter Limited—and began the publishing of a "Guide to Bonded Lawyers" much like that of the plaintiffs. An action was brought by the company against the two former employees and the new company for an injunction, etc. This is the first of the two actions now under appeal.

During the time Leonard was in the employ of the company, he received from and for the company considerable sums of money; these sums he claims as salary, while the company set up that he was false to his charge, and consequently is not entitled to any wages; the company also say that there is no by-law for the payment of anything to him, and that, being a director, he is not entitled to receive anything. They accordingly sue him for the moneys. This is the second of the two actions.

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Both parties desired that we should ask the learned Chief Justice as to the credibility of the defendants. I have done so; the learned Chief Justice informs me that his judgment was good a not based upon relative credibility, and that this Court is in as position as he to judge of the credit to be given to the witnesses.

It will, I think, be convenient to consider the second of the actions first. I have read the voluminous testimony and the still more voluminous exhibits; and, without setting out minutely everything, it seems to me that the material facts are these:—

Wharton, who was publishing a Legal Directory in Toronto, met Lamothe, a member of the Quebec Bar, in 1910, and they with others formed a limited partnership under the name "The Canada Bonded Attorney" to publish a bonded list; the first list appeared in 1912. About the same time, Leonard was employed as a canvasser; being dissatisfied with his remuneration, he in April, 1913, bought a quarter interest in the firm, through Lamothe, for $500. Wharton, under the name of "The Canada Legal Directory," had continued to publish the Legal Directory; the parties determined to make a joint venture of the two lists and to form a joint stock company to carry on the enterprise. This was done; the plaintiff company was incorporated on the 22nd October, 1913, with (*inter alia*) the object, "to acquire and take over as a going concern . . . the business formerly carried on under the name of 'The Canada Bonded Attorney' and also under the name of 'The Canada Legal Directory.'" It took over the business of the partnership; Leonard received $4,900 in paid-up stock for his quarter interest in the previously existing partnership, and went to Montreal to look after the business of the company at that end. After the formal proceedings of organisation, Leonard had become (November, 1913) a director and the vice-president and treasurer, Wharton the president, and Parmiter a director; Parmiter was given one share to qualify him, but later transferred that to Wharton, and got one share of preferred stock. The stock of the company was $50,000, distributed by August, 1914, thus:—

Preferred		$10,000.	
Common			
	Wharton $35,000.		
	Leonard $5,000.	$40,000.	$50,000.

(There were 13 shares of preferred stock out.)

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Leonard was the "representative at Montreal for the territory in Canada lying east of the counties of York and Simcoe;" Wharton, the president, acted as manager; and, while there was on paper a board of five directors, these two did all the business of the company, and were in all but name the company (subject to the rights given by the 13 preferred shares).

In May, 1914, a formal agreement was signed by the company, "R. A. Wharton, Mgr.," and Leonard, whereby it was provided that Leonard should, as the representative at Montreal, receive $3,000 per annum, beginning on the 1st June, 1914; $175 on the last day of each month and $1,200, "covering three months' salary and expenses over Western Ontario, June, July, and August," payable on the 30th May, 1915, or within three months thereafter —also 30 per cent. of business for the year in excess of $10,000. Leonard was empowered to collect accounts, and agreed to remit once a week. He paid his own expenses, and agreed to devote his whole time and attention to the company's business.

Admittedly there is no trouble about the year covered by this agreement, but Wharton was not quite satisfied with the results.

Leonard came to Toronto about the end of June, 1915, and it was arranged that he should finish up his eastern territory; he again (early in August) visited Toronto, and it was then arranged that he should try the West. There does not seem to have been a definite bargain as to terms, but I think there was an understanding between Wharton and Leonard, the only owners of the common stock, that each would take $200 a month, and at the end of the year divide the profits.

We find Wharton, at a meeting of the board on the 9th June, 1915, suggesting that he be paid $200 a month for the year ending on the 31st May, 1915.

The enterprise was a paying one. After paying the interest on the preferred stock, a dividend of 20 per cent. on the common stock was declared in August; and there is no reasonable ground for complaint against Leonard till after he went to the West in September, 1915; but the action is to recover from him moneys paid him by or for the company from and after the 1st June, 1915.

The first instance of alleged misconduct of Leonard was on the 2nd or 3rd June. Of the incident we have two versions: that given by Leonard (pp. 321, 322) is not really contradictory of that given

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by Parsons, for Leonard says (p. 321): "I have not any distinct recollection of just what I said to him." Parsons is quite clear; he was bookkeeper for the legal firm of S. D. & R. Leonard came in on the 2nd or 3rd June and asked for a renew[illegible] for a year of that firm's subscription to the plaintiffs. "After the renewal slip had been signed, he informed me that, together with a gentleman named Parmiter, he was going to issue a new book styled 'The Canadian Guide to Bonded Lawyers,' and asked if we would make a subscription thereto . . . the book would be up-to-date in every respect . . . he and Parmiter were leaving the company . . . to issue a new book." It may be that Parsons is mistaken in saying that the name of the new book was given; but I think we must accept this evidence in substance. The result is, that Leonard was, early in June, canvassing for an opposition book; and, while it is true that there is no difficulty in a firm of lawyers appearing in two books or a dozen, the chances are that only one will be chosen. It is not denied that, if Leonard did as he is alleged to have done, he was violating his duty to his employer. It cannot be said, I think, that in acting thus he was failing in duty in respect only of a separate and distinct part—it is true he obtained a renewal, but it was his duty to obtain that in such a way as not to prejudice its future renewal.

In the case of *Palmer* v. *Goodwin* (1862), 13 Ir. Ch. R. 171, it was argued that a land agent had faithfully collected the rents, and therefore he should not forfeit his whole remuneration; but the Lord Chancellor said (p. 173): "I cannot give my assent to the idea that the collection of rents is the whole duty of the land agent. He may very steadily and very faithfully collect and account for the rents, and yet very steadily and very completely destroy the estate."

In the present case, the defendant Leonard might very steadily and very faithfully collect and account for renewals or new business, and yet very steadily and very completely destroy the enterprise. For the month of June he should not be paid any salary at all; I think we may fairly infer that he continued on in June the work he began on the 2nd or 3rd of the month, of destroying the company's business.

But, while the rule is that, "where the agent's remuneration is to be paid for the performance of several inseparable duties, if

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the agent is unfaithful in the performamce of any one of those duties . . . it may be that he will forfeit his remuneration . . . where the several duties to be performed are separable," improper conduct "in connection with any of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties:" *per* Kennedy, J., in *Hippisley* v. *Knee Brothers*, [1905] 1 K.B. 1, at p. 9.

> "Where the transactions between a principal and his agent are severable, and in some of them the agent has been honest whilst in others he has been dishonest, he is entitled to his commission in all the instances in which he has been honest, but is not entitled to it in the instances in which he has been dishonest:" *Nitedals Taendstikfabrik* v. *Bruster*, [1906] 2 Ch. 671 (head-note).

The rule that misconduct in one part of the duty does not necessarily disentitle to remuneration has been followed in our own Courts. For example, in *City Bank* v. *Maulson* (1871), 3 Ch. Chrs. 334, at p. 341, Boyd, Master in Ordinary (afterwards Sir John Boyd, Chancellor, *præclarum nomen*), says (p. 341), in speaking of compensation to trustees: "They do not forfeit all right to compensation because they have failed in some points of their duty." See also *Gould* v. *Burritt* (1865), 11 Gr. 523; *Hoover* v. *Wilson* (1897), 24 A.R. 424; *Kennedy* v. *Pingle* (1879), 27 Gr. 305; *McClenaghan* v. *Perkins* (1902), 5 O.L.R. 129.

Falsus in uno, falsus in omnibus, is not always true. I can see no reason why Leonard is not entitled to his salary till June (subject to the legal difficulty). He cannot have disentitled himself to previously earned wages by his conduct with Parsons more than if he had died then and there; and no one could say that that would be a bar to the recovery by his personal representative of the wages previously earned.

The legal difficulty bulks large in this discussion — the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 92, provides: "No by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting, or, if passed by the directors, until the same has been confirmed at a general meeting." This was a change in 1912 by 2 Geo. V. ch. 31, sec. 90, the previous legislation having been for some time in

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terms finally appearing in the statute (1907) 7 Edw. VII. ch. 34, sec. 88: "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting." This change was made to meet the difficulty that, under the existing legislation, a company could not pass such a resolution (as is pointed out in *Beaudry* v. *Read* (1907), 10 O.W.R. 622, at p. 625, followed and approved in *Mackenzie* v. *Maple Mountain Mining Co.* (1909), 20 O.L.R. 170; see pp. 172, 173; not reversed on this point in *S.C.* (1910), 20 O.L.R. 615.)

But there is no change in the terminology "No by-law for the payment of the president or any director . . .;" and the authorities on the former law must be looked at on the point of the necessity to have a by-law before a director can be entitled to pay.

The first Ontario case to be noticed is *In re Ontario Express and Transportation Co.* (1894), 25 O.R. 587. There certain of the shareholders appointed themselves directors and elected a president, general superintendent, etc.; they passed a by-law that each director should receive $500 per annum, and the president $2,000. This was confirmed by a general meeting, and their appointment was considered to have been affirmed by legislation. At the meeting of directors, a resolution was passed fixing the salary of treasurer, general superintendent, etc.; this does not seem to have come before the general meeting.

The Master, in a winding-up, allowed the salary of the president, because it had the sanction of a by-law confirmed at a general meeting; but disallowed the others, as there was no by-law confirmed by a general meeting as to them.

Mr. Justice Rose held (pp. 589, 590): "I have not been able to come to the conclusion that such salaries would be within the proviso of sec. 12 enacting that no by-law 'for the payment of the president or any director' should be valid or acted upon until the same had been confirmed at a general meeting, for I am not of the opinion that where a director is appointed an officer of the company, he holds such appointment as director. It seems to me that the words referred to apply to the payment of money for the services of director *quâ* director, and of the services of the president as presiding officer of the board of directors, and that if a company choose to appoint a director to any salaried office, he holds such office, not as director or by virtue of his office as director,

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but by virtue of his appointment by the board or the company as the charter or by-laws may provide." He held that the officers were entitled to a *quantum meruit* for services rendered the company during the time they held office.

The next Ontario case dealing with the matter is *Birney* v. *Toronto Milk Co.* (1902), 5 O.L.R. 1. A company had been incorporated; the plaintiff, at a meeting of (provisional) directors, had been by resolution appointed manager, at a stated salary, having been previously made a director. The company never went into operation, and the plaintiff never did anything from which the company received benefit. He sued and was allowed his claim by Lount, J.; this was reversed by a Divisional Court (Street and Britton, JJ.)

Street, J., at p. 6, expressly disapproves of Mr. Justice Rose's *dictum* as above set out, and says: "In my opinion we should hold the section as requiring the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves whether under the guise of fees for their attendance at board meetings or for the performance of any other services for the company. It is not conceivable that the Legislature intended to forbid the directors from voting small sums to themselves for their attendance at board meetings, without obtaining the consent of the shareholders, and at the same time to allow them to vote large sums to themslves for doing other work, without reference at all to the shareholders. The interpretation contended for by the plaintiff would in fact render the section nugatory, for nothing would be easier than to evade it. I think the section . . . should be held wide enough to prevent a president and board of directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting of the shareholders."

Britton, J., goes on another ground, but he expresses no disapproval of the language quoted.

In that state of the law, I was called on to decide *Beaudry* v. *Read*, 10 O.W.R. 622. At a shareholders' meeting, they voted to certain directors stated amounts of the stock of the company "for services rendered to the company pending and since its incorporation." I held that the existing Act, 7 Edw. VII. ch. 34, sec. 88,

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by implication gave the power to the board of directors to pass such by-law (which, on the evidence, I held to be "remuneration to the directors for services rendered to the company"—see p. 624); and the shareholders were deprived of power to pass it. There was no necessity in that case to consider how the law would stand in a case like the present.

Then came *Benor* v. *Canadian Mail Order Co.* (1907), 10 O.W.R. 899, 1091. Benor became a director of the company, and was, by resolution of the board, elected managing director; the board also resolved that "the salary of the managing director and the secretary-treasurer until the company is in operation be fixed at $150 each per month." No confirmation was had at any general meeting. He did not subscribe for stock, but did act as director. I held that I was bound by *Birney* v. *Toronto Milk Co.* to hold, and in conformity with my own independent opinion did hold, that the plaintiff could not recover the salary of $150 per month.

Then came *Mackenzie* v. *Maple Mountain Mining Co.*, 20 O.L.R. 170, 615. A by-law was passed by the provisional directors that the president, vice-president, and directors should receive such remuneration for their services as might by resolution of the board be determined, and no further by-law or confirmation by the shareholders, other than the confirmation of this general by-law, should be necessary to provide for such remuneration. At a general meeting, this and other by-laws were confirmed by the shareholders; at a subsequent meeting of the shareholders, a resolution that a salary of $100 a month should be paid to the president was carried; and at a meeting of the directors held thereafter a motion to the same effect was carried. The president sued for $100 a month. Mr. Justice Clute dismissed the action. On appeal the King's Bench Division, in a majority decision (Falconbridge, C.J., and Sutherland, J.—Britton, J., dissenting), sustained the judgment at the trial. Britton, J. (p. 175), thought "that the statute was virtually complied with." In the Court of Appeal, Osler, J.A., held (p. 617) that the object of the section relating to payment of the directors or the president of the company for their services was that the authority or approval of the shareholders should be obtained before that was done; it was not to depend on the authority of the directors alone; and (p. 618) that "in substance all that the Act requires has been done. The

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mind of the directors has been expressed: so also has that of the shareholders, and exactly to the same purpose and with the same result." Meredith, J.A., considered (p. 621) that "the purpose of the enactment is that those who govern the company shall not have it in their power to pay themselves for their services in such government without the shareholders' sanction," and held (p. 620) that there had "been a literal as well as a substantial compliance with the terms of the enactment in question." Moss, C.J.O., Garrow and Maclaren, JJ.A., concurred without written opinion.

Re Queen City Plate Glass Co. (1910), 1 O.W.N. 863, was a case in which the president of the company claimed to retain a salary which had been paid him, *quâ* president—there had been no by-law confirmed by general meeting; and Middleton, J., held that the president was entitled neither to salary nor to compensation as on a *quantum meruit*.

In *Re Morlock and Cline Limited* (1911), 23 O.L.R. 165, a "dummy" director was employed by his company as a "commercial traveller." On the winding-up his assignee was disallowed a claim for salary as such commercial traveller. On appeal, I considered myself bound by *Birney* v. *Toronto Milk Co.* to hold that, in the absence of a by-law of the directors confirmed by a general meeting, the claim could not be sustained.

The most recent case is *Re Matthew Guy Carriage and Automobile Co.* 4 D.L.R. 764, 26 O.L.R. 377. F. M. Guy was a practical mechanic, and worked at manual labour in the company's shop, receiving a weekly wage of $15; others were in similar subordinate positions, having been hired by Matthew Guy (the original proprietor) before the incorporation of the company and the taking over of the business. These were directors; and the Master in Ordinary ordered them to repay the amounts they had received from the company as their wages. This decision was reversed by Middleton, J., who considered that the statute must be held to apply to every case in which a by-law is necessary for the payment and to cover the remuneration of all officers of the company whose appointments should properly be made by by-law, but not to cases in which the director has acted as a mere workman or clerk, and has been remunerated at a rate not exceeding the real value of the services rendered at the ordinary market price.

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It will be seen that there is no decision binding upon us, but the matter is in this Court at large; there are dicta of great weight, which must be treated with all respect.

I think that the object of the enactment is correctly expressed by Meredith, J.A. (now Chief Justice of the Common Pleas), in the *Mackenzie* case, 20 O.L.R. at p. 621, viz., "that those who govern the company shall not have it in their power to pay themselves for their services *in such government* without the shareholders' sanction."

There is no reason, however, why one who happens to be a director should not serve the company in another capacity, as servant, clerk, bookkeeper, mechanic, etc., and receive reasonable remuneration therefor. It is of course the duty of every director, a duty which he owes to his company and to the other shareholders, to see to it that he does not receive too great a remuneration for such services as he does render.

If the services are such that only a director can perform them, e.g., attending board meetings or acting in other regards as a director, he can recover compensation, payment, for such services, only by complying with the statute; but, if he is employed in a subordinate capacity and at a reasonable figure, there is no necessity for a by-law confirmed at a general meeting.

There is nothing in the evidence which indicates, much less proves, that the salary agreed upon was excessive; the work done by Leonard was not done as a director, but as a clerk or subordinate; and I see no reason why he should not be paid. This is *à fortiori* in view of the fact that the arrangement for services and payment was made by and between those who held substantially all the stock, and were, in business parlance, if not in law, "the company."

I would allow this appeal with costs, with a reference to the Master in Ordinary (unless the parties can agree on a reduction of $100 in the amount), to proceed on the basis that Leonard is entitled to wages, $200 a month, and expenses, for all the time until June, 1916—the Master in case of a reference will pass on the costs of the trial and of the reference. There should be no costs of the trial.

In the other case, more facts require to be investigated, found, and considered; in the law we have the assistance of decisions in the English Courts, which we lack in the discussion above.

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The relations between Wharton and Leonard seem to have been harmonious until January, 1916—when a "spat" took place between them, of no great significance perhaps, in itself, but indicating that there would probably have to be a separation in the not very distant future. Wharton undoubtedly was not quite satisfied thereafter with Leonard, and his letters shewed it. About this time, or perhaps a little sooner, Leonard made up his mind to sell out his stock in the company—I cannot say that there was any connection between the two facts. Leonard says he was ill and wanted to buy a house for his wife in case of his death. He offered the stock to Wharton, but Wharton declined, suggesting that it should be offered to Mr. Senior, the solicitor. He also declined; and Leonard sold all but one share (which he retained to qualify upon) to Lamothe, for $2,500, secured by notes. The stock had in August, 1915, paid a dividend of 20 per cent. In March, 1916, at a meeting of the board of directors, a salary of $6,000 per annum was given to Wharton. Leonard, finding this out, wrote on the 13th June, 1916, with his resignation of the office of vice-president and asking a salary of $5,000 a year. The resignation was accepted, and the matter of salary etc. left in the hands of the president, Wharton—it was by that time, I think, recognised that Leonard would soon leave the employ of the company. I think that Leonard had already formed a plan of a new enterprise in opposition to that of the company. Parmiter had been employed as early as July, 1913; he, with Leonard, got out the 1914 edition, and they seem to have developed, either in whole or in part, what there was of system in the office. Parmiter remained in the office, but rather early in 1916 he began talking about leaving, and suggesting that Miss McGregor, another employee, should (if and when he left) go out and work for him; but I cannot find that there was any definite intention on his part to join Leonard till some time in July—on the 16th June, he was at a directors' meeting, and was elected secretary-treasurer without salary. The 30th June saw the termination of Leonard's connection with the company, and Parmiter made up his mind to join him at the end of July; however, when, early in July (apparently the 7th), he so informed Wharton, he was invited to go at once, which he did, joining Leonard on the 8th or 9th July.

They issued a circular to the customers of the company, that,

"having resigned as vice-president and secretary-treasurer of the Canada Bonded, we will publish about September 1st the 'Canadian Guide to Bonded Lawyers.' This new collection service is the result of several years' experience, and will contain a number of new and exclusive features," etc., etc.

They formed a joint stock company for this purpose, "the new company" as I have called it—and the new company has been issuing an opposition list, carrying on an opposition business in every way.

We must, I think, approach the consideration of this case bearing in mind that Leonard, in November, 1913, received $4,900 in fully paid-up shares of the common stock of the company, "in consideration of the transfer by Wharton and himself of the goodwill and assets of Canada Bonded Attorney and Canada Legal Directory to the company" (see minute-book of date the 5th November, 1913, of both directors and shareholders, and also the evidence), Parmiter being then a director and continuing so to be till July, 1916.

The case of *Trego* v. *Hunt*, [1896] A.C. 7, decides that one who sells the goodwill of a business may indeed set up an opposition business, but he must not canvass the customers of the business he has sold—this would prevent Leonard from canvassing any customer of the former business sold to the company—Parmiter becoming associated with Leonard, any act of his in the premises would be for the benefit *pro tanto* of Leonard, and would be in substance the act of Leonard's agent; consequently, he cannot be permitted to do what Leonard could not—nor may the new company, which is aware of all the circumstances of the case and cannot (under existing circumstances) be permitted to do what Leonard could not: *Goldsoll* v. *Goldman*, [1914] 2 Ch. 603.

But this by no means exhausts the case—there are many new customers since the sale to the company in 1913, and it is desired to restrain the defendants from canvassing them. This is not covered by *Trego* v. *Hunt*; the canvassing of such new customers is not a "derogation" from Leonard's assignment of goodwill. (Farwell, J., in *Curl Brothers Limited* v. *Webster*, [1914] 1 Ch. 685, at p. 687, considers the rule against canvassing old customers "the old principle that a man cannot derogate from his own grant" —perhaps a still more familiar maxim may be invoked—"You

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cannot eat your cake and have it.") The question as to Leonard's right to canvass any customers of the old firm to which he belonged depends not on his status *quâ* vendor but *quâ* servant or agent. Of course, while he was for long a most important part of the company—in ordinary parlance—he was not the less the company's servant or agent in law—nor does his position as director and (or) vice-president help him: *Measures Brothers Limited* v. *Measures*, [1910] 1 Ch. 336. It is clear law that an agent on leaving his employment has no right to use materials obtained by him in the course of his employment against the interests of his previous employer. "Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of the agent's obligations to his principal:" *per* Lindley, L.J., in *Lamb* v. *Evans*, [1893] 1 Ch. 218, at p. 226. "The principal has . . . such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got:" *ib.*

He may, however, make use of knowledge he may have acquired (except in secret formulæ etc., as in such cases as *Amber Size and Chemical Co. Limited* v. *Menzel*, [1913] 2 Ch. 239), or any skill, manual or intellectual—he "is perfectly entitled, when he starts as a rival in business to the plaintiff, to carry it on in the same way as his principal does. He has learnt to do it, and he is entitled to the benefit of that knowledge:" *per* Lindley, L.J., in *Louis* v. *Smellie* (1895), 73 L.T.R. 226, at p. 228. "If the defendant happens to remember that there is an agent whose address he can find out from ordinary directories, he is at liberty to do it:" *ib.* The Court will not enjoin him from using that which he can obtain "by an effort of memory" (*S.C.* at p. 226, *per* Kekewich J.,), aided by books of reference etc; the form of the injunction would be "from making use of any copies or extracts from the plaintiff's books etc. or any memorandum made or obtained by the defendant when in the plaintiff's employ relating to any person named in the said books etc." He may not canvass any customer whose name he has from material obtained or retained in fraud of his employer: *S.C.*; also *Helmore* v. *Smith* (1886), 35 Ch.D. 449; but I can find no authority for the proposition that he may not as fair competition canvass those he may remember, even though he first met them when in the previous employ.

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I am satisfied, from an examination of the books and a careful perusal of the evidence, that the defendants or one of them had and used a copy of the plaintiffs' lists etc. They have or have had a good deal more in some shape of the plaintiffs' material than they admit—probably all this is no longer in existence, but I think that it did at one time exist. It is needless to dilate on the almost insuperable difficulty of proving such matters; that is notorious.

The judgment in appeal is in some respects too broad.

(2) And this Court doth further order and adjudge that the defendants do also, within the time aforesaid, deliver to the plaintiffs, or to whom they may appoint, all writings (including typewritings) in the possession of the defendants, or any or either of them, containing matter or information compiled from or obtained through the connection of the defendants Leonard and Parmiter or either of them with the plaintiff company.

This should be limited to "matter or information compiled from or obtained through" written memoranda or other documents obtained in connection with the business.

(3) And this Court doth further order and adjudge that the defendants do, within the time aforesaid, deliver to the plaintiffs, or to whom they may appoint, all contracts obtained by the defendants or any or either of them by personal canvassing or circularising or otherwise approaching the subscribers to the plaintiff company's publication known as "Canada Bonded Attorney," or lawyers or subscribers who had business connections with the plaintiffs, or were subscribers of the partnership or patrons of the business known as "Canada Bonded Attorney."

This is also too broad; such contracts as have been obtained by canvassing the customers of the business acquired by the company in 1913, and by canvassing those whose names have been obtained from written memoranda improperly obtained, are all that can be claimed.

(5) And this Court doth further order and adjudge that the defendants George A. Parmiter and George F. Leonard be and they are hereby restrained from reducing to writing or utilising or communicating to others information used in connection with and relating to the business of the plaintiff com-

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pany, obtained by the said defendants Parmiter and Leonard by virtue of their employment by and connection with the plaintiff company.

This must be limited in the same way.

As to the claim for enticing servants, I do not find that any damage has ensued; the servants did not leave the plaintiff company.

The claim is made that the defendants induced customers of the company to break their contracts. However the law may be in respect of others than agents etc. persuading persons to break their contracts—as to which see *Flood* v. *Jackson*, [1895] 2 Q.B. 21, especially at p. 37, *Lyons* v. *Wilkins*, [1896] 1 Ch. 811, at p. 816—it is admitted that for an agent to do so would be a breach of the duty he owes his former employer.

It seems to me that this has been proved against the defendants.

(7) And this Court doth further order and adjudge that the defendants and each of them, their officers, servants, agents, and employees, be and they are hereby restrained from canvassing the plaintiff company's subscribers and lawyers, and from enticing parties having contracts with the plaintiff company to break their said contracts.

This must be limited as to canvassing as hereinbefore stated—the remainder may stand.

(8) And this Court doth further order and adjudge that the defendants, and each of them, their officers, servants, agents, and employees, be and they are hereby restrained from enticing employees of the plaintiff company to break their contracts whether by leaving the plaintiff company's service or by revealing information relating to the plaintiff company's business or otherwise.

This is wholly proper—there were attempts, however unsuccessful, to entice away servants, and an injunction is proper in such a case.

(9) And this Court doth further declare that the plaintiffs are entitled to recover damages from the defendants in respect of the canvassing by the defendants and each or any of them, their officers, servants, agents, and employees, of all subscribers of the plaintiff company and lawyers having business relations with the plaintiff company, and for and in respect

of the enticing of servants and employees of the plaintiff company and other persons to break their contracts with the plaintiff company, and doth adjudge the same accordingly.

As to canvassing this must be limited as above; damages for enticing must be eliminated. I doubt very much if the company will be able to prove damages of any moment, but it may take its chances (if so advised) of being able to prove something substantial.

I think it is plain that the book "Canadian Guide to Bonded Lawyers," in its present form, is in fraud of the company's copyright, and that an injunction should go, but not quite as in the judgment appealed from.

(1) This Court doth order and adjudge that the defendants do, forthwith after service hereof, deliver up to the plaintiffs, or to whom they may appoint, all copies of the volume book and list of names known as "Canadian Guide to Bonded Lawyers," and all publications of the same and of the material contained therein in the possession, custody, power, or control of the defendants, or any of them, or of which they have power to obtain possession from subscribers thereto or from parties to whom the same have been delivered by the defendants.

"All publications . . . of the material contained therein" cannot be restrained. Very much of this material may be, probably is, perfectly innocent and justifiable. I by no means think that all the material in the book came from the company's publications or material.

(6) And this Court doth further order and adjudge that the defendants and each of them, their servants, agents, and employees, be and they are hereby restrained from publishing the volume known as "Canadian Guide to Bonded Lawyers" in violation of the plaintiffs' copyright in the publication known as "Canada Bonded Attorney."

This is too sweeping. The present edition of "Canadian Guide to Bonded Lawyers" is objectionable in that it contains matter taken from "Canada Bonded Attorney" or from lists or other papers improperly obtained or retained by Leonard or Parmiter: its further publication and the further use by the defendants of "Canada Bonded Attorney" and the said lists etc.

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must be restrained; but the defendants are not to be restrained from publishing new editions of "Canadian Guide to Bonded Lawyers" compiled from such sources as are open to them. The paragraph ought, therefore, to read somewhat as follows:—

". . . from further printing, publishing, selling, delivering, or otherwise disposing of, the volume heretofore published by them and known as 'Canadian Guide to Bonded Lawyers,' and from copying or pirating from any edition of the plaintiffs' publication known as 'Canada Bonded Attorney' and any part thereof and any copy thereof and extract therefrom and from copying from any part of the plaintiffs' said volume copied or pirated as aforesaid and the copy and manuscript from which the same was printed and every copy thereof and extract therefrom in the preparation of or for the purpose of assisting in the preparation of any future edition of the defendants' said volume."

See Seton on Decrees, 7th ed., p. 655.

(4) And this Court doth further order and adjudge that the defendants, and each of them, their officers, servants, agents, and employees, be and they are hereby restrained from publishing the volume book and list of names known as "Canadian Guide to Bonded Lawyers," and from publishing the matter therein contained, and from in any way utilising matter reduced to writing or printing, including typewriting, obtained by the defendants, or any or either of them, from the plaintiff company, or obtained by the defendants, or any or either of them, in connection with and in relation to the business of the plaintiff company, or information relating to the business of the plaintiff company obtained by the defendants Parmiter and Leonard while in the service of the plaintiff company.

This clause must be modified as already stated above—"the matter therein contained" is too broad; as is "in connection with or in relation to the business of the plaintiff company;" while much "information relating to the business of the plaintiff company obtained by the defendants . . . while in the service of the plaintiff company," they are wholly entitled to use: *Louis* v. *Smellie*, 73 L.T.R. 226, at p. 228.

(10) And this Court doth further declare that the plaintiffs are entitled to an account from the defendants of all moneys

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received by the defendants, or any or either of them, on all contracts made by them with subscribers to the volume known as "Canadian Guide to Bonded Lawyers," and of all moneys derived from business in connection with the said volume, and doth adjudge the same accordingly.

This must also be limited as indicated above.

(11) And this Court doth further order and adjudge that it be referred to the Master in Ordinary to take an account of the amount of the damages payable by the defendants to the plaintiffs, having regard to the declarations aforesaid.

This may stand; but I do not think that the plaintiff company will consider it worth the trouble and expense involved in taking this proposed reference.

The plaintiffs should have the costs of the trial; the appellants should have the costs of the motion to vary minutes (before the Chief Justice of the King's Bench) and the appeal therefrom; and, success being divided, I think there should be otherwise no costs of this appeal. Costs of the reference, if any, should be disposed of by the Master.

I venture to hope that the two companies may find some way to compose their differences and either combine or work in opposition without more than the usual friction between competing firms —the defendants have undoubtedly the right to make and publish a list, to become and remain active competitors for business, although this time I think they have strayed from the right path.

Perhaps, upon the settlement of the order, it will be found that the most convenient course is entirely to rewrite the formal judgment, having regard to the foregoing declarations as to its proper scope. If that is found to be the desirable course, it may be followed. Whether it is followed or not, the order ought not to issue until it has been considered by me or by another member of this Court.

FERGUSON, J.A., agreed with RIDDELL, J.

Ferguson, J.A.

ROSE, J.:—A perusal of the evidence does not satisfy me that the plaintiffs have proved either that Leonard, while in the plaintiffs' employ, was guilty of misconduct disentitling him to salary, or that the defendants, in preparing their book or in canvassing

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for subscribers or otherwise, used the plaintiffs' book or any list or other paper taken from the plaintiffs' office or procured by Leonard or Parmiter while in the plaintiffs' employ.

The charge that Leonard so misconducted himself that he forfeited his claim to salary really comes down to this, that, while he was in Western Canada in the first half of the year 1916 as the plaintiff company's representative, he endeavoured to divert business from the plaintiff company to himself or to himself and Parmiter or to the new company which he had then made up his mind to form. Substantially, the evidence in support of this charge is the evidence of one Parsons, a clerk in the office of a firm of solicitors practising in Lethbridge. Parsons says that on the 2nd or 3rd June Leonard, calling at the office of Parsons' employers to procure a renewal of their contract with the plaintiffs, told him that he (Leonard) and Parmiter were going to issue a new book styled "The Canadian Guide to Bonded Lawyers," and solicited a subscription. I cannot credit this statement of Parsons; it seems to me to be displaced by his cross-examination, which shews that his memory is not to be relied upon, by the evidence of one of his employers, who contradicts several of his statements as to collateral matters, and by the evidence of the printers that the name "The Canadian Guide to Bonded Lawyers" was not the name first chosen for the defendants' book when it came to be printed later on. I think the fact is, as Leonard suggests, that what Parsons was really thinking of was the circular issued by the defendants after they commenced business, which circular he had forgotten about when he came to be examined as a witness in June, 1917. If Leonard was behaving in the way suggested, it is strange that there is no evidence of other instances.

No useful purpose would be served by my making an extended analysis of the evidence in support of the charge that the defendants, in preparing their book and in attempting to build up their business, made use of the plaintiffs' printed book and written lists; it suffices to say that there is no direct evidence that either Leonard or Parmiter had such a book or list in his possession after he left the plaintiffs' service, except a copy of the book which Parmiter says he bought at a later time; that the clerks who assisted in the preparation of the defendants' book corroborate the statements of Leonard and Parmiter as to the method adopted,

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in so far as that method would be within the knowledge of the clerks; that, with the other sources of information available, there would be no great difficulty in compiling the defendants' book in the way in which Leonard and Parmiter say it was compiled; that most of the instances of so-called "common error" in the two books are explained; and that the points of similarity between the two books do not seem to me to be surprising, in view of the fact that Leonard was largely responsible for the preparation of each. Of course there are many things that seem to arouse suspicion; but to my mind it is no more than suspicion, so that the case does not fall within the class of cases of which *Exchange Telegraph Co. Limited* v. *Howard* (1906), 22 Times L.R. 375, is an example, where one cannot "assign any reasonable possibility of the defendant having made exactly the same error," etc., except that he was improperly using the plaintiff's materials.

I understood Mr. MacGregor to say that he had no objection to the injunction against enticing away the plaintiffs' servants. It is therefore unnecessary to discuss the question whether that injunction was properly granted.

Except in so far as it is founded upon findings of fact adverse to the defendants in respect of the two matters above discussed, I concur in Mr. Justice Riddell's judgment, and in respect of those matters I concur in his statement of the law applicable to the facts that he finds to be established; my finding of fact, however, would lead to the conclusion that the period for which Leonard is allowed his salary of $200 a month ought to include June, 1916, and that the injunction ought to be limited to enticing servants and to soliciting customers of the plaintiffs who were customers of the partnership whose business was transferred to the plaintiff company.

LENNOX, J., agreed with ROSE, J.

Lennox, J.

In the result, the appeal in the first action is dismissed, with a variation in the form of the judgment; costs as stated by RIDDELL, J.

In the second action, the appeal is allowed with costs; but the defendant Leonard is to be subjected to a deduction of $100 from his salary, if the parties agree upon that sum; if they do not agree,

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there is to be a reference to the Master in Ordinary, who will dispose of the costs of the reference; no costs of the trial.

Counsel spoke to the minutes of the judgment in the second action, that against G. F. Leonard, before RIDDELL, J., in Chambers.

April 10. RIDDELL, J.:—The parties not being able to agree on the judgment, I have consulted my colleagues and have gone over the matter again with care.

The judgment for the plaintiffs will be for $100 only, without a reference. As to costs, the defendant will have the costs of the appeal, and the plaintiffs will have Division Court costs of their action, with a set-off of Supreme Court costs to the defendant, as referred to in Rule 649.

The defendant will have the costs, fixed at $15, of settling the judgment.

Judgment accordingly.

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Quebec Court of Review, Archibald, A.C.J., Martineau and Lane, JJ. May 30, 1918.

1. CONTRACTS (§ I—62)—COMMERCIAL TRAVELLER—POWER TO ACCEPT ORDER—SUBMISSION TO PRINCIPAL.
In the absence of express authority a commercial traveller has no authority to accept an order on the merchant's behalf; he merely takes the order and submits it to his principal for acceptance or refusal.
2. CONTRACTS (§ IV E—365)—TO DELIVER GOODS—BREACH—MEASURE OF DAMAGES.
In an action for damages for breach of contract to deliver goods the measure of damage is the difference between the contract price and the price of similar goods in the open market at the time of the breach.

Statement.

APPEAL from a judgment of the Superior Court. Affirmed.

The action is for $999. The plaintiff avers that on November 8, 1916, the plaintiff bought from the defendant, through latters' travelling clerk, 500 sides of harness leather at 47 cents per pound. A few days after, the defendant notified the buyer that it was unable to deliver the goods; that it had only 170 sides of the leather required. The plaintiff was willing to accept them, but without prejudice to its claim for the balance of the order or for damages. The defendant having refused the delivery of the leather, and the price of the market having gone up, the plaintiff could not fulfill its orders and has suffered damages to the extent of the sum claimed.

Defendant repudiated the contract, alleging that its agent who took the order was without authority to bind the company defendant without having consulted it. It says that the company gave notice to the plaintiff that it could not accept the order nor deliver the goods, although willing to deliver the 170 sides of leather which it had in stock. Therefore, it denies any responsibility for the plaintiff's losses.

The Superior Court dismissed the action on the following grounds:—

Considering that the alleged sale of 500 sides of leather was made to plaintiff at Montreal, on November 8, 1916, by a traveller or salesman representing the defendant, upon a sample then and there submitted by him;

Considering that the plaintiff received notice from the defendant's office, in Toronto, on November 10, 1916, that the said alleged sale was not authorized and the leather would not be delivered;

Considering that the damage to which a purchaser is entitled for non-delivery of goods is the difference between the contract price and the market price of similar goods in the open market at the date of the breach or failure to deliver, *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, 80 L.J. P.C. 91; *Williams Bros.* v. *Agius Ltd*, 73 L.J.K.B. 715; and *Jamal* v. *Moolla Dawood Sons & Co.*, [1916] 1 A.C. 175.

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Considering that the leather which plaintiff claims it purchased, November 8, 1916, was a cheap grade or quality of country tanned leather and that the plaintiff has not proved that it made any purchase of a similar grade or quality of leather to take the place of the 500 sides which it claims to have purchased from the defendant;

Considering that the burden of proof was upon the plaintiff to establish by legal evidence that the market price of leather of the grade and quality of that which it claims to have purchased from the defendant was higher than the price stated in said contract on November 10, 1916, when the plaintiff received notice that the leather would not be shipped and when the breach occurred and the plaintiff has not made that proof;

Considering that as the plaintiff has not established its claim to damages, it is unnecessary for the court to deal with the question as to the validity and binding effect of alleged contract;

Considering that the plaintiff has not proved the essential allegations of its declaration; doth dismiss the plaintiff's action with costs.

Dorais & Dorais, for plaintiff.

Jacobs, Hall, Couture & Fitch, for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—The contract of sale upon which the plaintiff relies is written upon a small piece of paper evidently taken out of the orderbook of the defendant, which their traveller Phillips had in his possession. It contains the usual instructions; the first line on the left hand corner contains a blank for the number of the order, and on the right hand corner, the date November 8, 1916; the second line contains the name of the proposed purchaser; the third line has in printing on the left hand side "ship to," then the words "Montreal, P.Q." I may say the whole paper is in pencil; the fourth line has the word "at" on the left hand side and "when" near the right hand side printed. Opposite the word "at" are the indications "f.o.b. Montreal"; opposite the word "when" there is no entry. The fifth line has "how ship" printed on the left hand side and "salesman" near the right hand side, but no entries in writing; the sixth line has "terms, 2% dis., 3 months, 1st. Dec." then the rest of the document has various lines evidently intended for description of various items of goods and contains on the first of said lines, "500 sides harness" and on the next line below "18/20" (meaning 18 lbs. to 20 lbs. of weight on each side), and on the line below that "same as sample roll," then still in pencil "C. Parsons & Son, Ltd." This document was made in duplicate, one of which, namely, that which is in the record, was left with the plaintiff, the other one was sent immediately to Toronto.

The defendant answered this order by a letter dated November 9, 1916, as follows:—

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Messrs. Lamontagne Ltd.,—

We are in receipt of your order No. 11967 through our Mr. Phillips for 500 sides harness leather at 47 cents, 2% 90 days, December 1, but we regret we are unable to accept an order for this quantity. We can, however, accept your order for 170 sides at the above terms and price, and have this leather all ready for shipment. Kindly advise us by return mail if we shall ship same on. Awaiting your reply, and thanking you for your favour, we remain, C. Parsons & Son, Ltd.

On November 16, the plaintiff replied to the preceding letter, not mentioning the offer of the defendant to furnish the 170 sides, but claiming delivery of goods or an indemnity of 5 cents per pound which would be the profit that "we are making on the leather" and stating that unless their letter was complied with, they would put it in the hands of their lawyer. On November 14, the defendant replied to this letter, claiming that they had never accepted the order, and alleging that if they had accepted it, they would have made every effort to deliver it, but declining responsibility, and at the end of the letter said:—

We presume, as you have not accepted the lot offered you, you do not wish same and we have accordingly cancelled the offer.

After that, the correspondence was between the defendant and the plaintiff's lawyers and the 170 sides were mentioned, plaintiff agreeing to receive same, reserving their right to sue for damages for non-delivery of the balance.

The defendant did not comply with that proposal and the case has proceeded.

The judgment is founded solely upon the point that the plaintiff has misconceived the ground upon which damages can be claimed for breach of an order to deliver goods in such a case. The plaintiff says practically:—

I could have sold those goods and made a profit of 5c. a pound and by your non-delivery of them, I lost that profit.

The defendant says:—

You should, when notified of what you call the breach of contract on defendant's part, have gone immediately on the market and supplied yourself with goods at the market price to fill your orders, if any you had, and the quantum of damages is the difference between what the defendant agreed to furnish them for and what you were obliged to pay.

There is no suggestion in the record that goods of the quality and description of those alleged to have been sold by the defendant to the plaintiff were not on the 10th November, 1916, to be had on the market; nor is there any proof that the plaintiff did go upon the market to buy such goods nor is there any proof as to what he would

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have had to pay for them, on November 10, if he had attempted to buy them. Some 3 weeks later, the plaintiff did buy from the Laing Leather Co. 3,000 sides of harness leather at a price of 54 cents, but plaintiff himself admits that that leather was not of the description of the leather which defendant offered to sell, this latter being country tanned and of a somewhat inferior quality. Joubert, the manager of plaintiff, examined as a witness for plaintiff, states that the leather which they purchased from Laing's was a somewhat superior quality to the leather which he claims to have purchased from the defendant, but he says that the difference in value would be about 2 cents. On the other hand, defendant claims that the difference in value between the two leathers would be 10 cents a pound. There appears to be no other evidence upon this point in the case.

There is evidence in the case which I think satisfactorily shews that the price of leather was about that time stiffening and that later it did rise. It is proved in this case that June previously, the leather in question might have been bought for 30 cents a pound. The defendant in his evidence says that between November 8 and November 15, that he is not aware that there was any rise in the price of leather, at any rate, in the price of leather such as was in question in this case.

The questions to be determined are, first, was the judge right in holding that the true measure of damages is to be found in the difference between the price of contract and the market price at the date of the breach. If this position was sound, the judgment must be confirmed, for neither had the plaintiff alleged or proved any fact which could authorize a judgment upon that basis.

The second question would be whether the plaintiff has proved that he suffered any loss by reason of the failure of the defendant to deliver the goods in question. Plaintiff does not shew by any evidence that he had sold the particular goods which he claims to have bought from the defendant to any customer and being unable to deliver them lost the transaction. He does not shew that he was unable to fill any contract which he had taken for the sale of leather with anybody.

He bought as above stated 3,000 sides of leather from the Laing Leather Co. shortly after the refusal of the defendant to deliver the leather in question, and he bases his whole case upon the difference of price which he had to give for that leather.

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There has not been entire unanimity in the decisions of our courts with regard to the true principle upon which damages are to be measured in such cases. I remember, something about 20 years ago, deciding a case similar to the present one which concerned the delivery of firewood. In that case, the plaintiff claimed to have been able to sell the wood, if it had been delivered, at a certain figure, and he asked for damages, being the difference between the contract price with the vendor of the wood and the price at which he could have sold the wood. I rejected his action on the ground that he did not shew what was the market price of the wood at the time when it should have been delivered. Many other cases have come before the courts since that date in some of which this principle has been adopted and upon others some other means of ascertaining the loss to which the party was entitled have been used. There is a case of *Jamal* v *Moolla Dawood, Sons Co.*, 85 L.J.P.C. 29, [1916] 1 A.C. 175. This case appears to have come from Lower Burma to the Privy Council; the holding in this case was as follows:—

> In a contract for the sale of negotiable securities the measure of damages for breach for not accepting the shares is the difference between the contract price and the market price at the date of breach, with an obligation on the part of the vendor to diminish the damages by getting the best price he can at the date of breach.

There is another Privy Council case which comes from the Province of Quebec, the parties are *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, 80 L.J.P.C. 91. The Chicoutimi Pulp Co. had sold to the plaintiff 3,000 tons of pulpwood at a certain price, which was deliverable from September 1, to November 1, 1900, and was to be delivered f.o.b. Chicoutimi. The goods were not delivered until the month of June, 1901. The holding in the case was:—

> In cases of breach of contract, in the assessment of damages, the party complaining should so far as it can be done by money be placed in the same position as he would have been if the contract had been performed.
>
> Where the delivery of goods has been delayed, the proper damages are the difference between the full market price at the time and place at which they ought to have reached the purchaser and the rate at which they were sold when they actually reached him, that is the loss actually sustained. Where a contract provided for the delivery of goods at a place where there was no market for them, damages for non-delivery should be calculated with reference to the market at which the purchaser, as the vendor knew, intended to sell them, with allowance for the cost of carriage.

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This was an appeal from a decision of the Court of King's Bench which reversed in part the judgment of the Supreme Court. The Privy Council modified the judgment of the Court of Appeal but not with regard to the measure of damages. In this case, it appeared that the goods had been resold by the purchaser, and at p. 92, Lord Atkinson refers to the matter in the following language:

Yet so rigid, it is insisted is this formula or rule, that the re-sales must be ignored as collateral and irrelevant matters; and damages be awarded for a loss which in reality has never been sustained.

(In that the learned judge referred to the fact that purchasers had re-sold at the rate of 65 shillings per ton, whereas they were claiming damages on a basis of value of goods which should have been delivered at 42s 6d. per ton, and the judge pointed out by the rigid application of rule the plaintiff would obtain damages which he never suffered.)

On p. 93, the judge states:—

It is the general intention of law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages the difference in market prices at the respective times above mentioned is merely designed to apply this principle . . . The market value is taken because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market . . . In such a case, the price at which the purchaser might in anticipation of delivery have re-sold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter. The purchaser not having his goods should receive by way of damages enough to enable him to buy similar goods in the open market.

In my judgment, this Privy Council case is decisive of the measure of damages in the present case and as there is no satisfactory proof of the market price of goods similar to those which were bought from the defendant on November 10th, 1916, it would seem as if the judgment *a quo* would have to be confirmed.

It is true that defendant claims that he could have sold the goods if he had had them at an advance of 5 cents per pound and that might possibly be interpreted as an allegation that market price of those goods at the time was 5 cents greater than the price at which plaintiff bought from the defendant. But the word "market price" at which a retailer sells to his customer does not mean the same thing as the market price at which the retail

merchant buys from the wholesale merchant. The market price in this latter case means the price at which the retailer can go into the market and buy from other wholesalers, that is, the market price for him is the price which he would be obliged to pay to some other trader for similar goods.

There is absolutely no proof in the record as to the price at which the plaintiff in this case could have bought these goods. The difference between the price at which a retail merchant buys his goods and that at which he sells them, does not represent an accurate measure of the profit which the retail merchant makes.

There are the costs of sale and of delivery, the danger of insolvency of his purchaser, their share of the fixed expenses of the establishment, etc. It is the duty of a merchant who has bought goods and the vendor has declined to deliver, to go into the market and supply himself with other goods for the purpose of his trade, similar to those which he had bought, and his loss is the difference between the price he has to pay and the price for which he had contracted to buy. In the present instance, the only proof that the goods which the defendant agreed or is supposed to have agreed to sell to the plaintiff could not have been purchased from some other wholesale person for the same price as the defendant had offered them, is that the plaintiff had purchased leather from the Laing Leather Co. at 54 cents a pound. Plaintiff admits that this leather was worth 2 cents a pound more than the leather it was supposed to have bought from the defendant. Defendant swears that the difference in value of the two leathers would reach 10 cents a pound.

The burden of proof was on the plaintiff. I think it can scarcely be said that he had discharged that burden.

Then comes the other question, was there ever a complete sale between the plaintiff and the defendant?

No proof is made that Phillips, who represented the defendant, had any other authority than an ordinary commercial traveller, except perhaps that he wrote the words "C. Parsons & Son, Ltd." on the bottom of the order. There are no words indicating an intention by Phillips to accept the orders for his employers.

The employers on receipt of the order, immediately wrote refusing to accept, on the ground that they had not at the moment the leather in stock.

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LAMONTAGNE v. C. PARSONS & SON, LIMITED.

Archibald, A.C.J.

Joubert admits that their commercial travellers have no authority to accept any order on their behalf, but he states that that is distinctly stated on the order form.

I believe it to be in accordance with the almost universal practice of merchants that a commercial traveller takes an order and submits it to its principals for acceptance or refusal.

There is always the question of amount of goods in stock which the vendor may have. It may often happen that stock which existed when the traveller started on his round may have been sold later. There is also the question of standing of the merchant giving the order.

I believe that there is no authority for the statement that a commercial traveller has authority to bind his firm to accept an order for goods, unless some special authority is shewn.

Were it not for the writing in pencil upon the order of the name of the firm of Parsons & Son, Ltd., I think there would be absolutely no question that this contract was ever completed.

Does the writing in this instance of Parsons upon the order, constitute an acceptance by the defendant even supposing Phillips had authority to accept for them?

It is the only place on the order where the word Parsons appears. It is consistent with all the facts that the intention may have been simply to indicate the persons to whom it was given. Parsons swears that Phillips had no authority to bind the firm or to accept an order for the firm.

I am of opinion that there never was a complete contract of purchase and sale in this case.

I say then first that the ground of damages which the plaintiff has set up in his declaration is not the true measure of damages; in the second place, that there has been no proof that the plaintiff has suffered any damages at all inasmuch as it is not proved that at the time when the defendant notified the plaintiff by letter that he rejected the order, the plaintiff could not have bought the same goods from some other person; and, third, that there is no proof that any complete contract was made by the plaintiff and the defendant for the delivery of the goods in question. I am to confirm.

Appeal dismissed.

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Ex. C.

Exchequer Court of Canada, Cassels, J. June 4, 1918.

EXPROPRIATION (§ III—135)—WATER LOTS—VALUATION—RIPARIAN RIGHTS —DAMAGES—LOSS OF ACCESS—RIGHT OF WAY.

The Crown having expropriated some water lots in the outskirts of Halifax, N.S., for the purposes of Halifax Ocean Terminals, it sought by an information to have determined the amount of compensation.

Held, that in the absence of any sales of similar property in the neighbourhood from which the value of the property could be ascertained, a valuation of seven and a half cents per square foot was a fair basis of compensation, adding thereto a 10% allowance for the compulsory taking; that the owners were also entitled to damages for the depreciation of property not expropriated, occasioned by the loss of access to the water-front for boating and bathing purposes, and of a right-of-way they enjoyed over a railway, as a result of the expropriation.

Statement.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

J. A. McDonald, K.C., and *T. S. Rogers*, K.C., for plaintiff; *L. A. Lovett*, K.C., and *E. King*, for defendants.

Cassels, J.

CASSELS, J.:—This is a proceeding on behalf of His Majesty on the information of the Attorney-General of Canada against Robert A. Brenton, Minnie E. Brenton, and Edwin D. King, to have it declared that certain lands expropriated for the purposes of the Halifax Ocean Terminals be declared vested in His Majesty and that the compensation payable therefor be ascertained by this court.

The defendant, Edwin D. King, was made a defendant, as mortgagee holding a mortgage against a portion of the lands. This mortgage has been paid off, according to the statement of counsel, and he is no further interested in the present action.

The case came on for trial before me at Halifax on September 27, 1916, and subsequent days.

Counsel undertook to file a memorandum in reference to the title, and certain other material, and it is only lately that I received a memorandum signed by both counsel agreeing upon certain facts of importance in connection with the decision of one branch of the case. I shall have to refer to this later on.

The properties in question are situated in the village of Rockingham, about 4 miles from the post office in Halifax. There is not much difference of opinion as to the values of the particular properties expropriated.

The property of Robert A. Brenton, the husband, contains 19,634 sq. ft., and situate upon his property is a small bungalow.

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Ex. No. 3, filed in the action, shows the properties. The Crown have offered for this particular property the sum of $1,410, viz., at the rate of 5 cents a sq. ft. The defendant, Robert A. Brenton, claims the sum of 7½ cents a sq. ft., the difference in dollars and cents being comparatively small.

The property owned by Mrs. Brenton comprises an area of 10,527 sq. ft. On this property is situate a house and sheds. In the same way the valuation placed upon the land by the owner is 7½ cents a sq. ft., the Crown's offer being 5 cents a sq. ft.

It is difficult to arrive at an accurate valuation, on account of the absence of sales of this particular class of property in the neighbourhood.

The properties both of Robert A. Brenton, and of Mrs. Brenton extended to high water mark. In front of the property of Mrs. Robert A. Brenton is a water lot granted subsequent to Confederation. The question of the validity of the title to this water lot has not arisen in this case. The Crown in the information filed have not claimed the water lot; and, as stated by Mr. Lovett at the opening of the case, there is no claim made in this case to the water lot, the claim being based upon the riparian rights.

There is some confusion as to the number of square feet in these particular properties, but not of any material moment. The figures which I have given are the figures stated in the information and are the figures shewn by the plan.

I will deal first with the question of the value of the lands expropriated before proceeding to deal with the legal question, namely, the question of the damage which Mrs. Brenton claims by reason of the depreciation of certain lands to the west of the railway right-of-way.

Mr. Clarke, who acted for the Government in making the valuation, concedes that the value of five cents per square foot placed by him upon the lands in question, is merely an arbitrary figure arrived at without the advantage of any sales in the neighbourhood to guide him in regard to the matter. He does, however, admit that the lands in question are of greater value than the lands which were valued by him in the *Maxwell* case, 17 Can. Ex. 97, 40 D.L.R. 715, in which I had occasion to give judgment. In that case he had placed a valuation upon the land of five cents a square foot.

James E. Roy is a gentleman whose evidence impressed me as being very fair, and he is a man with good knowledge of the values of suburban properties. Mr. Clarke, referring to Mr. Roy, states as follows:—

Mr. Roy has a good knowledge of suburban properties. He has a lot of money in suburban properties. Q. You would call him competent to judge, provided he gives his evidence in a fair way?—A. Yes.

I may state that I think Mr. Roy unquestionably gave his evidence in a fair way, and I accept his statement as to values. I think in fairness to Mr. Clarke, I should state, that his evidence was also given with a desire to be fair, but I do not think he is as competent to judge as Mr. Roy in regard to this particular class of property. The difference in question between these two gentlemen was comparatively trifling.

Robert A. Brenton gave his evidence. He valued the 19,636 sq. ft. at 7½ cents per sq. ft.; and the bungalow at $250, making in all the sum of $1,722.55—and with this valuation Mr. Roy concurs—and I find that for this property the proper sum to be allowed to Mr. Brenton would be the sum of $1,722.55, to which should be added 10%.

In regard to Mrs. Brenton's property expropriated, containing 10,527 sq. ft., at 7½ cents per sq. ft., the value would be $789.52. On this property is a house and outbuilding which Robert A. Brenton values, for the house $1,200 and for the outbuilding $50. Mr. Roy valued the dwelling on this property at $1,000, and the outbuilding at $50, which amounts to $1,050. This amount being added to the sum of $789.52 would make a total of $1,839.52, which, I think, would be the fair value to be allowed to her, and in addition she should be allowed ten per cent.

This disposes of the question of values of the properties of Robert A. Brenton and of Mrs. Brenton actually expropriated.

The defendants by their defence have claimed the sum of $8,500. This sum of $8,500 includes both the sum claimed by the husband, and the sum claimed by the wife. I do not know whether or not they propose to treat their moneys which are allowed as joint property or not. In the settlement of the judgment this matter can be adjusted.

A further claim is made on behalf of Mrs. Brenton, which involves more of a legal question than a question of values. As I

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will point out, there is practically but little difference of opinion on the question of value.

It would appear that in the year 1854, what was then called the Nova Scotia Railway was constructed. This railway subsequently became a part of the Intercolonial Railway, and it was with a view of widening the right-of-way for the purpose of creating shunting yards that the properties of the Brentons have been expropriated.

In 1854, Mrs. Brenton, or her predecessors in title, owned a piece of land situate on the west side of the old Nova Scotia Railway as then constructed. They also owned the land on the western side of the main highway from Halifax to Bedford, a highway which has been in existence from time immemorial.

It would appear that when the Nova Scotia Railway expropriated the land for their right-of-way, they gave to the owners a right-of-way extending across the railway tracks. This right-of-way was used to enable the owners of the land to reach a wharf which had been constructed on the water-front in connection with the property of Mrs. Brenton expropriated by the Crown, and the other properties now owned by her. Owing to the lapse of time it has been difficult to procure accurate evidence. Mr. Davidson, who was called, shews that at all events for nearly 50 years there was the right-of-way across the railway. Apparently this right-of-way was guarded by gates and was planked during the summer months, and that the wharf was used for the purpose of shipping lumber and lime from the properties on the other side of the track. There is no contest practically in regard to this point. Mr. Rogers, K.C., who was acting for the Crown, and who has spent a considerable amount of time in considering the facts, puts it in this way at the trial:—

I say the right-of-way is from the public way down to the shore. It is separate. It is a question whether any damages could be recovered, but if so, it should be very inconsiderable.

His Lordship—Those lands on the west side are connected with the right-of-way.

Mr. Rogers—Yes, Mr. Brenton, when he bought the whole of the land, in that connection bought the right-of-way which extended from the east side of the public road across down to the railway and thence across the railway.

His Lordship—I asked the question whether the right-of-way was limited to those lots on the water side of the highway down to and across the railway, or as well to the lots on the west side of the road.

Mr. Rogers—It was purchased all at the same time.

His Lordship—I asked Mr. Lovett whether it was not a right-of-way which was confined to the lots on the other side of the highway.

Mr. Rogers—The lots are described in three different parcels.

Mr. Lovett—And the right-of-way is attached to all of them, each one of them having a right-of-way to the shore.

Mr. Rogers—I am expressing some doubt as to whether the legal situation was not somewhat different. Supposing that on that lot where Brenton lived there was held to be a right-of-way, a right to go through someone else's land to the shore; that was this case: undoubtedly that man would be entitled to recover damages; but there were three lots, and the deed says, "Together with a right-of-way from the east side of the road to the shore," as a separate parcel or easement. The owner of the land, while he owned all those three lots, of course, could use all that right-of-way. He bought it and could use it, but the question is, is that in a commercial or business sense so pertinent to this land up here that it is anything more than a nominal value to the land down there?

The lots referred to include lots both on the west side of the right-of-way taken by the Nova Scotia Railway and bounded on the west by the highway, as also the lots held and owned by the same owner on the west side of the main highway.

An agreement was filed describing the title, signed by the solicitor for the plaintiff and by the solicitor for the defendant, in the words following:—

1. The whole of the property of Mrs. Brenton, consisting of the lot between the railway right-of-way and the shore of Bedford Basin (the expropriated area), the lot between the railway right-of-way and the main road and the lot on the west of the main road, together with the adjoining lands on both sides, and together with the railway right-of-way before same was expropriated, was held as one undivided property by Thomas Davison, who procured title thereto by deeds dated 1838 and 1839, recorded in book 66, p. 50, and book 67, p. 500.

2. In June, 1854, the plans of the Nova Scotia Railway were filed in connection with the expropriation of the right-of-way.

3. In August, 1854, Thomas Davison conveyed the whole block of land to John Davison by deed recorded in book 107, p. 581. The description of the lands so conveyed makes no reference to the railway right-of-way.

4. In 1869, John Davison conveyed the lot of land between the shore and the railway right-of-way (the expropriated area), the lot of land between the railway and the main post road, and the lot of land west of the main post road, together with a right-of-way over the road from the main post road to the shore to George Roome by deed recorded in book 161, p. 644. The description in said deed is as follows:—

All those three lots and parcels of land situate on the western side of Bedford Basin, in the County of Halifax, immediately joining the south side of the property of Ephraim E. Burgess, and particularly described as follows: namely, lot number one, beginning at the western shore of Bedford Basin, at a post on the south line of Ephraim E. Burgess' property; thence to run

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westerly on said southern line or south 76 degrees west to the Provincial Railroad; thence southerly by the side of the railroad 2 chains and 80 links to a post; thence north 81 degrees and 45 minutes east to the shore of Bedford Basin at high water mark; thence northerly by the various courses of said shore to the post at the place of beginning. Second lot, above railway, east side of Bedford Basin. Third lot, on west side of road; together with a right of-way for the said George Roome, his heirs and assigns, his and their servants, tenants and agents, at all hours of the day and night, with cattle, carts and all kinds of vehicles, in, over and upon the road or passage now located at the north end of the said John Davison's house, and leading from the main post road to the wharf, situate on lot number one hereinbefore described, said road or passage to be of sufficient width for conveniently using the same for carting and trucking thereon.

5. The said George Roome was the predecessor in title of Mrs. Minnie E. Brenton, the present owner of the three lots, and said lots have always been held and owned by one owner from the time same were conveyed as one property to the said George Roome.

6. The evidence of Christopher Davison on the record shews that the right-of-way, or road, from the main post road to the sea shore on lot expropriated existed and was used in connection with this property owned by one person, that the said roadway continued to exist and be used in connection with said property down to the time of expropriation, the only difference being that gates were erected on each side of the railway right-of-way and in winter time the planks which were put between the rails in the summer months to prevent derailment were removed and replaced by the railway in the spring. The gates were maintained by the railway. Davison's recollection does not go back of 1865.

7. There is no written record that can be found with reference to the old Nova Scotia Railway proceedings after the filing of the plan referred to in par. 2 hereof.

Dated at Halifax, N.S., November 8th, 1917.

It appears there are no records obtainable in regard to the proceedings at the time the Nova Scotia Railway expropriated the lands, and all that we have is that in point of fact a right-of-way was given by the railway and was continuously used in the manner indicated. I desired to have evidence as to the dates of the erection of the houses on the lands on the west side of the highway, but have been lately informed by counsel that no such evidence can be procured.

I am of opinion that these properties being held by the same owner, that the right-of-way over the railway and the right to reach the water-front was a valuable asset, and that the expropriation of the property of Mrs. Brenton, taking away all access by this right-of-way to the waters of Bedford Basin, was a very serious injury to the property not expropriated, situate between the right-of-way and the main highway, also to the properties to the

west of the highway. The locality in question was intended as a summer resort for the citizens of Halifax, and in later years also became a winter resort. The right of access to the water-front for boating purposes and bathing purposes, etc., is a valuable right. R. A. Brenton places the depreciation upon these properties at 25 per cent. Roy corroborates this claim. Clarke, in his valuation, paid no regard to the question of the depreciation in value of these properties. He admits, however, that the cutting off of the access to the water depreciates the rest of the property. He thinks the property has depreciated from 10 to 15%, if access to the water is cut off. He is referring in his answer to the property situate between the highway and the right-of-way. He states, however, the same in regard to the lands on the west side of the highway, which, he thinks, would also be depreciated from 10 to 15%, but, as he states, it is only a guess. He agrees with Brenton and Roy that a fair value for the land on the west side of the highway, as also the land on the east side of the highway, extending to the right-of-way of the old Nova Scotia Railway, would be about 10 cents per square foot. He is unable to speak as to the value of the houses situate upon these two properties not expropriated, and I think the values placed upon them by Mr. Brenton, and corroborated by Mr. Roy, should be accepted.

I accept Mr. Roy's statement, and I would allow for the depreciation to these other properties 25%, amounting to $4,130. This would allow the defendants for the lands taken, the property of Brenton, the sum of $1,722.58, the property of Mrs. Brenton, $1,839.52, and for the depreciation of Mrs. Brenton's other lots the sum of $4,130, making in all the sum of $7,692.10.

The parties are entitled, I think, to 10% on the sums of $1,722.58 and $1,839.52, but not upon the damages occasioned by the depreciation of the properties not expropriated.

I think that if the defendants are allowed the sum of $8,100 they will be fairly compensated for the value of the lands taken, and all the damage which they have sustained, including all claims for compulsory taking and damage to the balance of the farm.

The defendants are entitled to interest and the costs of the action.

If I have fallen into any inaccuracies as to measurements, counsel will kindly communicate with the registrar.

Judgment accordingly.

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C. A.

WATSON v. GUILLAUME.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

ANIMALS (§ I—26)—OPEN WELLS ACT—NON-COMPLIANCE WITH—ANIMALS LAWFULLY AT LARGE—INJURY TO—DAMAGES.

One who has not complied with the provisions of s. 3 of the Open Wells Act (R.S.S. 1909, c. 124), providing that "no person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises," must make good the damage to the owner of animals which are lawfully at large under the Stray Animals Act, and stray onto his premises and are killed by eating grain improperly left accessible to them.

Statement.

APPEAL by defendant from a judgment awarding damages to plaintiff for horses killed. Affirmed.

W. A. Beynon, for appellant; *J. F. Hare*, for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—In this case the plaintiff and defendant are farmers living on adjoining sections of land, or rather, on sections of land separated by a road allowance. Some horses of the plaintiff went from the plaintiff's property on to the road allowance and thence on to the defendant's land. All the land in question was unfenced. On the defendant's land, there was a quantity of threshed wheat, which was accessible to stock which might come or stray upon the premises and was not kept inclosed by a lawful fence. The trial judge has found on the evidence that 3 of the plaintiff's horses ate some of the wheat in question and, as a result, that one died and the other two were injured. This finding, I think, must be accepted, although the evidence with regard to the two horses which were injured is not, in my opinion, too clear.

On the trial of the action the District Court Judge found in favour of the plaintiff, and awarded him damages to the amount of $300. The defendant now appeals, and contends that, if the horses *were* injured or killed by eating the grain, the plaintiff, being a trespasser, is not entitled to damages.

This question involves a consideration of an Act respecting Open Wells and other Things Dangerous to Stock. C. 124 of R.S.S. (1909) and the Stray Animals Act, c. 32 of the statutes of 1915. Ss. 3, 4 and 5 of the first mentioned Act are as follows:—

3. No person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stay upon such premises.

4. No proceeding to recover any penalty for violation of any of the provisions of this Act shall be taken except at the instance of a person whose stock has been killed or injured or whose stock is liable to be killed or injured by reason of the non-observance of such provisions and in any such proceeding

it shall be a sufficient defence thereto if it be shewn that such well, excavation or grain was kept inclosed by a lawful fence as defined by the Fence Act.

5. Any person violating any of the provisions of this Act shall, in addition to any civil liability, if any, be guilty of an offence and shall be liable upon summary conviction to a penalty not exceeding $25 and costs.

The Stray Animals Act enacts, in s. 4, that:—

Subject to the provisions of this Act it shall be lawful to allow animals to run at large in Saskatchewan,

but that:—

(2) Nothing in this Act contained shall derogate from, destroy, or in any wise affect the rights or remedies which a proprietor or other person has, or but for this Act would have, at common law or otherwise, for the recovery of damages for trespass committed on, or injury done to, his property by any animal whether lawfully running at large or not.

"Running at large" is defined as meaning:—

Not being under control of the owner either by being securely tethered or in direct and continuous charge of a herder or confined within any building or other enclosure or a fence whether the same be lawful or not.

The provisions of s. 4 of the Stray Animals Act make it clear, in my opinion, that the legislature contemplated that animals running at large would stray on to property other than that of their owner, and permits them to do so subject to payment by the owner of damages for trespass on or injury to the property of the owner of the land. This opinion is strengthened by a consideration of the provisions of the prescribed by-law, and the further and special power of extending the open season given to the municipal council by s. 7 of the Act. The distinction allowed to be made between animals of residents and non-residents by clause 5 of the by-law is very significant.

Under the common law it may be broadly stated that a person who keeps a dangerous thing on his land is not liable for damages caused to cattle straying on his land without his permission.

The case of *Jordin* v. *Crump*, 8 M. & W. 782, 151 E.R. 1256, is held by Collins, J., in *Ponting* v. *Noakes*, [1894] 2 Q.B. 281, at 289, as decisive on the point. See also *Deane* v. *Clayton*, 7 Taunt. 489, 129 E.R. 196.

In *Jordin* v. *Crump*, emphasis is laid on the fact that the setting of dog-spears, the dangerous thing, was a lawful act, and in *Ponting* v. *Noakes*, that the yew tree near the fence, the dangerous thing in that case, was a lawful and usual thing.

In *Tillett* v. *Ward* (1882), 10 Q.B.D. 17, at 20, Lord Coleridge, C.J., says:—

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Haultain, C. J.

We find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining a highway, the owner of the land must bear the loss. This is shewn by the judgment of Bramwell, B., in *Goodwyn* v. *Cheveley* (1859), 4 H. & N. 631.

In the same case (*Tillett* v. *Ward*) Stephens, J., in effect, states that when cattle are lawfully upon a highway and stray from there on to unfenced land adjoining the highway, the owner of the cattle is not responsible, without negligence, for any injury they may do.

In *Goodwyn* v. *Cheveley*, *supra*, it is decided that if cattle lawfully upon a highway stray from thence on to unfenced land adjoining the highway, the owner of the land has no right to distrain unless the cattle are not removed within a reasonable time after notice.

Blackburn, J., in *Fletcher* v. *Rylands*, L.R. 1 Exch. 265, at 286, observes that:—

> Those who go on the highway or have their property adjacent to it may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger.

In the present case, the horses in question were under the general law of the province lawfully on the highway. The land of the defendant adjoining the highway was not fenced, and the grain on the premises being accessible to stray animals was not a lawful thing. It was the duty of the defendant, by fencing or otherwise, to make this grain inaccessible to stock which might come or stray upon the premises. The plaintiff is one of the class for whose benefit an Act respecting Open Wells and other Things Dangerous to Stock was enacted.

In *Baldrey* v. *Fenton*, 20 D.L.R. 677, 7 S.L.R. 203, it was held that the Act respecting Open Wells imposes upon the owners of land a duty in respect of trespassing animals which prior to the passing of the Act they were not required to observe, and that, if they did not observe that duty, they would be liable for injury resulting to animals for their negligence in that respect. Most of the observations in that case with regard to the negligence of the plaintiff in permitting his animals to run at large, in breach of a by-law prohibiting animals from running at large, do not apply to the present case.

The case of *Kruse* v. *Romanowski*, 3 S.L.R. 274, was decided on the common law principle first stated above. Since that case

was decided, the statute permitting animals to run at large in Saskatchewan has been enacted.

An Alberta case, *McLean* v. *Rudd*, 1 A.L.R. 505, was decided on different facts and a different state of the statutory law to those existing here. In that case, a strong opinion was expressed by the court that the owner of unenclosed or insufficiently enclosed land would be liable for damages resulting to estrays by reason of a dangerous trap (*e.g.*, an unenclosed well) on his property. On this point see *Townsend* v. *Wathen* (1808), 9 East 277, 103 E.R. 579.

I am of opinion, therefore, that the common law rule with regard to animals has been modified by the legislation above referred to, and, in any event, the facts of this case bring it within the reason of the decisions in *Goodwyn* v. *Cheveley*, 4 H. & N. 631, and *Tillett* v. *Ward*, 10 Q.B.D. 17, cited above.

I would therefore dismiss the appeal with costs.

NEWLANDS, J.A., concurred. Newlands, J.A.

LAMONT, J.A.:—I concur in the conclusion reached by the Chief Justice, whose judgment I have had an opportunity of perusing. Lamont, J.A.

The one ground upon which we are asked to reverse the judgment given is, that, notwithstanding the provisions of the Stray Animals Act making it lawful for an animal to run at large, an animal running at large was still a trespasser if it left the highway and entered upon the land of the defendant, and, to such animal, the defendant owed only such duty as at common law he would owe to a trespasser.

I find it difficult to understand how an animal which under the law is entitled to run at large can properly be designated a trespasser when he strays from the highway on to unfenced land at the side thereof; for the right to run at large is not, in my opinion, confined to being at large on the public highway. The legislature, however, in the very section which makes it lawful for an animal to be at large, has provided that the owner of unfenced land may recover damages for "trespass committed or injury done to his property by any animal whether lawfully running at large or not." (Stray Animals Act, s. 4 (2)). This language would seem to indicate that an animal lawfully at large, as well as one not lawfully at large, may still be a trespasser. Whether or not that is

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Lamont, J.A.

so, it is not, in my opinion, necessary to decide in this appeal. Even assuming such animal to be a trespasser, the appellant must still fail by reason of the fact that in this province an owner of land does owe to an animal straying upon his land a duty which at common law he does not owe to a trespasser. That duty is set out in s. 3 of the Act respecting Open Wells and other Things Dangerous to Stock, which provides that:—

> No person shall have in store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises.

See *Baldrey* v. *Fenton*, 20 D.L.R. 677.

The obligation imposed by this section the defendant did not observe. As a result of his failure to observe it, the plaintiff's horses ate a quantity of wheat to their injury. The damage they thus sustained was due solely to the failure of the defendant to comply with the requirements of the section; he must therefore make good the loss.

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

Appeal dismissed.

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EX. C.

BOYER v. THE KING.

Exchequer Court of Canada, Audette, J. April 27, 1918.

NEGLIGENCE (§ I—49)—CANAL—OPEN BRIDGE—AUTOMOBILE—RECKLESS DRIVING.

The suppliant, in the course of a joy-ride, driving an automobile without a chauffeur's license, attempted to cross a Government canal bridge when the bridge was being opened and the gates down, after being signalled to that effect by the bridge-master, resulting in the machine and its occupants plunging into the canal.

Held, under the circumstances and evidence, the suppliant has made out no case against the Crown, and that the accident was brought about by his own negligence.

Statement.

PETITION OF RIGHT to recover damages for alleged negligence of officers and servants of the Crown.

L. Camirand, and *J. A. Thouin*, for suppliant; *J. A. Sullivan*, for respondent.

Audette, J.

AUDETTE, J.:—The suppliant brought his petition of right to recover the sum of $1,525, for alleged damages resulting from an accident which happened while he was driving an automobile, without the license of a chauffeur, in the course of a joy-ride and in the attempt to cross over the Wellington bridge, over the Lachine Canal, when the bridge was open and the gates down.

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At about 4 o'clock, on Sunday afternoon, July 15, 1917, a vessel was coming up the Lachine Canal, when the bridge-master, standing at point "A" on plan, ex. No. 1, rang a first bell, indicating the bridge was to be opened. At this bell, the bridge-tender, or gate-man, being somewhere around point "B" on the plan, put down his southern gates and the motorman got to his post, inside his small building, in the centre of the bridge, 23 ft. above the travelled part thereof. This square building has 4 windows overlooking all around.

There being no traffic on the bridge, the bridge-master gave the second bell, which carried with it the order to open the bridge. When hearing the second bell, Drolet, the man in charge of the mechanism, and placed in the small building 23 ft. above the bridge, after especially ascertaining there was no one on the bridge, started to open the bridge, which is managed by electricity.

Hanney, the bridge-master, testifies that before he gave the second bell, he ascertained there was no one on the bridge, and that the gates were down; and adds, that no one was in sight at the time the gates were put down.

However, after the second bell, and when the bridge had started to move, he says he saw an automobile, by St. Patrick St. corner, coming from Verdun toward Montreal. He then "halloed" to the gateman, on the south-eastern side, to stop the automobile, and he himself shouted once or twice. Mullin, the gateman, standing in the street, put up his hands to stop the automobile; but its occupants paid no heed to his warning, and he had to run out of the street not to be knocked down.

Coming at a rate of speed between 16 to 17 miles, according to some witnesses, and at 18 to 20 miles an hour, according to others, the automobile dashed into the gate. The radiator of this McLaughlin machine smashed the leg of the gate, raised the hand or gate, and coming to the edge of the approach, which the bridge had already left, plunged into the canal with its 5 occupants.

The support of the gate had been broken, the hand of the gate scratched, forced and strained. From that time on until the gate was repaired on the Monday, ropes were used in place of the gate, which was taken down on the Monday and repaired, as testified by the foreman of the machine shops at the Lachine Canal.

Freed from unnecessary details, these are the facts as testified

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by witnesses, who impressed me both by their demeanour and the honest manner in which they gave their evidence. This evidence is the result of the testimony of the bridge-master, the gateman, the engineer at the bridge, and also by an entirely disinterested intelligent witness, an employee of the Montreal Street Railway, who was stationed on the south-eastern end of the bridge, and who witnessed the accident.

In face of this evidence, the suppliant, who was heard as a witness, under his oath testified the gates were opened and that no signal to stop was given him. Repeating if the gate had been closed, he would not have passed, and that after getting beyond the gate the left wheel of his motor ran onto the moving bridge, where, after being suspended for a short while, they plunged into the canal, as above mentioned. The suppliant further stated he perhaps touched the gate with the top of the motor, but that he did not perceive it himself. This painfully reckless testimony is corroborated by one of the occupants of the automobile, who was asked whether he had heard the suppliant giving his testimony, and whether he approved of it, and he answered in the affirmative.

The other two occupants of the automobile, besides the child, were not heard as witnesses.

As a sequence of this testimony, the suppliant charges the officers of the Crown with negligence for leaving the gate open and for want of giving warning when the bridge was open. Is such behaviour and testimony the result of mental insolvency or of dishonesty?

However, without unqualified hesitation, I find the evidence adduced on behalf of the suppliant as most unreliable, and disbelieve it. The abuse of the sanctity of an oath was most manifest in the present case. I will leave the persons who have been guilty of such an abuse to settle the matter between their conscience and their God.

I leave the case at this point untrammelled with any further details which would only go towards establishing more clearly the result I have arrived at. The case is not proven.

The suppliant has been financially the victim of his foolhardy and reckless driving. Seemingly the case would, with greater propriety, under the circumstances, have come before this court

at the instance of the Crown for the damages caused by the suppliant.

There will be judgment dismissing the action, and with costs, in favour of the Crown. *Petition dismissed.*

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Supreme Court of Canada, Davies, Idington, Anglin and Brodeur, JJ., and Lavergne, J., ad hoc. May 7, 1918.

EXPROPRIATION (§ III C—144)—WATER LOT—COMPENSATION—POWER OF RESUMPTION IN CROWN GRANT—ELECTION—HARBOUR COMMISSIONERS—CROWN DOMAIN—PRESCRIPTION.

The Crown, by instituting expropriation proceedings in respect of a water lot, elects not to exercise a right of resumption for purposes of public improvement reserved to it in a Crown grant of such lot.

Such right being vested in the Quebec Harbour Commissioners, under (1859) 22 Vict. c. 32, notwithstanding their public character and the nature of their trust does not form part of the Crown domain.

Under art. 2242 C.C. such right was extinguished by lapse of time, it not having been exercised during the thirty years following its acquirement by the Harbour Commissioners (*per* Brodeur and Lavergne, JJ.).

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, 16 Can. Ex. 104; 34 D.L.R. 257, rendered in expropriation proceedings taken by respondent.

Lafleur, K.C., and *St. Laurent*, K.C., for appellants.

Gibsone, K.C., for the respondent His Majesty The King.

Dobell, for the respondent the Quebec Harbour Commissioners.

Davies, J.

DAVIES, J. (dissenting):—I would dismiss this appeal and confirm the judgment of the Exchequer Court with costs with a small variation arising out of an admitted error of $2,000 made by the judge in allowing twice over for the 6,335 sq. ft., being the block conveyed to the R. C. bishop.

The judgment should be reformed by deducting this $2,000.

Idington, J.

IDINGTON, J. (dissenting):—I do not see that the appellant has any reason to complain of the amount of compensation allowed and therefore would dismiss his appeal with costs.

Anglin, J.

ANGLIN, J.:—No appeal has been taken against the valuation of $20,049 placed by the Judge of the Exechequer Court upon the expropriated wharves. The parties interested have also agreed that compensation for a strip of land comprising 720 sq. ft. held by the appellants under an emphyteutic lease from the authorities of the Church of England should be determined as if the latter had no interest in it and that they and the appellants will subse-

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quently arrange amongst themselves what should be the share of the Church in whatever amount may be awarded.

For a strip of land covered by water lying between the two parts of the water lot No. 2411 owned by the appellants, comprising 6,503 sq. ft., the harbour commissioners, whose title to it is no longer in dispute, have also accepted the compensation awarded, 25 cents per sq. ft., or $1,625.75. They are satisfied with the same valuation upon 2,220 sq. ft. owned by them at the south end of lot 2415, amounting to $555. The Crown contests neither of these items.

Only two matters, therefore, form the subject of this appeal—the respective rights of the harbour commissioners and the appellants in the parallelogram, comprising 6,335 sq. ft., forming the south-east part of lot 2411, and the value of the interest of the appellants in the properties taken other than those above mentioned and of the appellants and of the harbour commissioners (if any) in the parallelogram of 6,335 sq. ft.

The question of title to this parallelogram depends upon the effect that should be given to a condition in the grant of it by the Crown to the appellants' predecessor in title, the R. C. bishop of Quebec, providing for the resumption of it by the Crown at any time for purposes of public improvement on giving twelve months' notice in writing of its intention to exercise that right and on payment of the value of any improvements made on the property, and to a statute vesting certain lands, revenues, etc., in the Quebec Harbour Commissioners. The judge treated the right of resumption as subsisting at the date of the expropriation and held that it had passed to the harbour commissioners.

There are no improvements on this water lot. Instead of itself giving notice of intention to resume possession under the condition in its grant, or having the harbour commissioners do so, the Crown saw fit to include this parcel in proceedings for expropriation. It relies upon the condition, however, as minimizing the value of the appellants' interest. The appellants on the other hand assert that by instituting expropriation proceedings in respect of this parcel the Crown elected not to exercise its right of resumption; that it should therefore be deemed to have been waived; and that it had been extinguished by prescription.

As the property affected forms part of a public harbour and

any public improvement for which the right of resumption might be exercised would be in the nature of harbour works, if that right were still vested in the Crown at the date of Confederation, it would, in my opinion, thereafter belong to the Crown in right of the Dominion. *Samson* v. *The Queen*, 2 Can. Ex. 30.

I cannot assent to the suggestion of counsel for the Crown that the commencement of expropriation proceedings may be regarded as tantamount to the giving of notice of intention to exercise the right of resumption. I accept the view of the appellants that the pendency of these proceedings was inconsistent with the exercise of that right.

But up to the moment they were begun it was competent for the Crown (or the Quebec Harbour Commissioners) unless the right of resumption had been prescribed, to have given the requisite notice and to have acquired possession on the expiry of 12 months without payment of any compensation whatever. The appellants' interest would in that view have been merely a right to retain possession for 12 months. Why the Crown did not proceed in regard to this parcel by giving this notice itself or having the harbour commissioners give it is not now material. It is incontestable that it is the value of the owner's interest immediately before the expropriation for which he is entitled to compensation. Upon all the evidence I should incline to the view that that interest, if subject to this condition of resumption, had no substantial value.

But was the right of resumption vested in the Crown or in the Quebec Harbour Commissioners? And, in either case, was it prescribed?

The trial judge has found that it passed to the commissioners under 22 Vict., c. 32, and against this finding the Crown has not appealed. The harbour commissioners, through their counsel, stated that they were willing to accept an equal division between themselves and the appellants of the $2,000 allowed as compensation for this parcel as suggested by the trial judge; and the Crown has not appealed against the amount awarded. The appellants could not hope to increase that amount if the right of resumption still existed at the date of the expropriation. Therefore, unless the condition for resumption has been extinguished by prescription, neither the amount of the compensation nor its apportionment need be further considered.

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If the right of resumption had remained vested in the Crown, I should have been inclined to regard it as a real right declared imprescriptible by art. 2213 C.C. and therefore not within art. 2215 C.C. invoked by counsel for the appellants. But a right vested in the Quebec Harbour Commissioners, notwithstanding their public character and the nature of their trust, does not "form part of the Crown domain." *Quebec Harbour Commissioners* v. *Roche*, 1 Que. S.C. 365. On the other hand, I find it difficult to understand how the appellants holding under a deed subject to the condition under consideration can claim its extinguishment by prescription. Having shewn their title under the Crown grant there is no room for the application of the law of prescription to establish an independent possessory title in them. *Labrador Co.* v. *The Queen*, [1893] A.C. 104, at 122. Moreover, a title so shewn helps to establish the defects of the possession which hinder prescription. Art. 2244 C.C. Had the condition entailed an obligation on the part of the grantee, that obligation would, perhaps, have been susceptible of negative prescription under art. 2210 C.C. by nonfulfilment of it during a period of 30 years, or during a shorter period under some other prescription provision. but I incline to think that the Crown's right of resumption did not impose any obligation upon the holder of the land. If there was anything that could properly be called an obligation contracted by the grantee and binding his successors in title it was to surrender or deliver up possession of the property. That obligation would arise, however, only when 12 months had elapsed after notice had been duly given of intention to exercise the right of resumption and the other terms of the condition, if applicable, had been complied with. Since no one may prescribe against his title (art. 2208 C.C.) unless in the sense of freeing it from an obligation (art. 2209 C.C.), the possession of the appellants under their title derived from the Crown grant implied a constant and continued acknowledgement of the terms of that grant, including the right of resumption to which it was subject. For these reasons I should, with respect for my learned brothers who are of the contrary opinion, be disposed to accept the conclusion of the trial judge that the provision for resumption was not extinguished by prescription. I am also of the opinion that, as a right held by a public authority for the purposes of a "port,"

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the right of resumption for public improvements, although it had ceased to form part of the Crown domain, should, nevertheless, be deemed imprescriptible under art. 2213 C.C.

The precarious title of the appellants to this considerable area at the south-east of lot 2411, and their lack of title to the strip already referred to as vested in the harbour commissioners lying between the two portions of the water lot in front of lot 2411 held by them and also to the 2,220 sq. ft. at the south end of lot 2415 likewise owned by the harbour commissioners, materially affect the value of the remainder of their property as a wharf site. As shewn by ex. 15 there is at low tide at the end of the existing wharf on the latter lot from 6 ft. 7ins. to 7ft. 7 ins. of water and at the end of the wharf on lot 2411 from 7 ft. 3 in. to 8 ft. 5 ins. of water. According to the evidence of the witness Leclerc a deep water wharf should have fourteen feet of water at low tide. The depth of water at the harbour commissioners' line in front of these lots appears to range from 14 to 18 and 20 ft. They seem to have been the most western properties on the north shore of the harbour on which it was thought worth while to build substantial wharves. Opposite the adjoining land to the west owned by the Lampsons, where the shore is indented by a cove, the depth of water at the harbour commissioners' line is materially less, especially along its western half. That property is therefore not at all so suitable as a site for wharves as that owned by the appellants. There also would seem to have been some question as to the title of the Lampsons to the water lot on the eastern part of their property, which probably affected the price of it. In placing a value on the appellants' property, however, the Judge of the Exchequer Court appears to have been influenced by the fact that the entire Lampson property had been acquired by the Crown at a price equal to about 20 cents a sq. ft. On the other hand, the Hearn property, which adjoins that of the appellants to the east, was valued in the Exchequer Court at $1.64 a sq. ft. and in this court at 65 cents a sq. ft., *The King* v. *Hearn*, 55 Can. S.C.R. 562, at 585. We are told by Mr. Fraser, its purchasing agent, that the Crown paid for part of the Molson property, somewhat farther east, 65 cents and for the remainder 50 cents; for the Bélanger property 70 cents and for the Allan property 95 cents. These properties are of course nearer

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to the centre of shipping activities in Quebec. In some respects, however, they resemble the appellants' property more than that acquired from the Lampsons does.

It is no doubt extremely difficult to arrive with even approximate accuracy at the value of a property such as that with which we are dealing. Taking into account all its features—its advantages as well as its disadvantages—disclosed by the evidence, its value seems to me to have been somewhat underestimated. For the area of 49,394 sq. ft. taken from the appellants (which includes the 720 sq. ft. leased from the rector and churchwardens, but not the parallelogram containing 6,225 sq. ft. for which the sum of $2,000 was allowed separately) I think an average of 45 cents a sq. ft., or $22,227.30, approximately represents its value at the date of expropriation. In arriving at this figure I have, of course, considered all the evidence and I have not lost sight either of the materially higher prices offered by the Crown in its information of 1911, afterwards withdrawn, or of the much lower prices paid by the appellants when purchasing the property in 1901. I would vary the judgment in appeal accordingly and would fix the compensation of the appellants as follows: For 49,394 sq. ft. of land, $22,227.30; for 6,335 sq. ft. (½), $1,000; for wharves $20,049; total $42,276.30.

The harbour commissioners are entitled: For strip comprising 6,503 sq. ft. at 25 cents, to $1,625.75; for 6,335 sq. ft. at S.E. end of lot 2411 (½), to $1,000; for 2,220 sq. ft. at S. of lot 2415, $555; total, $3,180.75.

Both sums bear interest from the 8th November, 1913.

Brodeur, J.

BRODEUR, J.:—The main question raised in this case is that of the value of the land expropriated and there is also a question of title for a part of this land, but practically this last question is not as important as the first.

The land forms part of lots 2411 and 2415 of the cadastre of Quebec and is expropriated for the construction of the National Transcontinental Railway. It is situated on the borders of the St. Lawrence in the harbour of Quebec and consists principally of wharves and deep water lots. There was formerly considerable business at this place but for several years the wharves have been little used, and we were obliged in the case of *The King* v. *Hearn*, 55 Can. S.C.R. 562, to examine the value of lands situate near that

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in question in the present case. One of the 10 blocks of land expropriated in the case of *Hearn* adjoined lot 2411 on the east.

By the evidence given in the *Hearn* case and that in the present case it appears that similar properties, but a little nearer to the centre of the town and belonging to the successions of Molson and of Bélanger and the Allan Co. were sold to the government. A part of the Molson succession which is nearest to the Hearn property was sold for 65 cents a foot. Relying upon this last sale, I was of opinion that we should award 65 cents in the *Hearn* expropriation.

In the present case, our attention was particularly drawn to the value of properties situated more to the west, viz., those of the Seminary of Quebec, of William Power, of A. O. Falardeau, of Frank Ross, of the Dobell succession, of the Marquis of Bassano and of the Lampson succession which were paid for at the rate of from 5 to 20 cents a foot. But these latter properties were not so well situated for the purposes of navigation as the property in question in the present case, and, moreover, that nearest to the latter was sold for the price of 20 cents a foot. It was a sale without warranty. The vendors did not appear to have a perfect title.

The Exchequer Court awarded a sum of 30 cents a foot to the appellants in the present case. I am of opinion that, considering the sales above mentioned as well as the judgment given in the *Hearn* case, the appellants would be perfectly indemnified by awarding them 45 cents a foot, which would make for the 55,729 ft. of land $25,078.05. There should be added to this the sum of $20,049 for the wharves which is the amount awarded by the court below and which I find reasonable. The latter sum is based upon the price that we awarded for the wharves in the *Hearn* case. These two sums of $25,078.05 and $20,049 form a total of $45,-127.05.

This sum corresponds very closely to that offered to and accepted by the parties in 1911. At this latter date in fact the Crown had offered the appellants in the Exchequer Court the sum of $42,597 for the 45,000 ft. of land. This sum was accepted by the expropriated parties. But, in 1912, the expropriation was discontinued and the properties reconveyed to their former owners pursuant to the provisions of the law. Later the Crown decided to expropriate them anew.

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The evidence on the record is not very precise as it differs in the value of these lands in 1911, the date of the first expropriation, and in 1913 the date of the second. But it appears that there was a slight difference.

There remains the question of the right of ownership as to the part southeast of lot No. 2411. The letters patent issued by the Crown in 1854 stipulate that Her Majesty had the power, by giving a 12 months' notice, to retake possession of these properties for public purposes on paying the owner the value of the improvements that he had made. The respondent now says that the indemnity should be granted for this piece of land saying that there was no improvement in fact and that the Crown desires to retake possession. If we were to proceed under the provisions of these letters patent to exercise this right of redemption or of retaking possession, the claim of the Crown would have much force. But it has not been deemed proper to claim under this right of retaking possession. The proceedings have been under the provisions of the Expropriation Act and it is the principles of this Act which should be applied.

This question was brought before the Exchequer Court several years ago in the case of *Samson* v. *The Queen*, 2 Can. Ex. 30, and Burbidge, J., then decided that the proceedings having been taken under the Expropriation Act, indemnity should be based upon the principles of that Act.

Further, does this right of retaking possession or of redemption still exist? If this right is still in the Crown I would probably come to the conclusion that it is yet in force and should be exercised or at least that it should be taken into consideration in determining the indemnity, art. 2213 C.C.

But this right as was decided by the Exchequer Court was transferred and conveyed to the Quebec Harbour Commissioners by the Act of 1859, 22 Vict., c. 32, and these lands, as well as the rights attached thereto, have ceased to form part of the public domain of His Majesty.

It was decided by the Exchequer Court that the right of retaking possession was transferred to the Harbour Commissioners by the Act of 1859 and the Crown did not appeal from that part of the judgment.

Is this right of retaking possession prescribed? Can the

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Harbour Commission claim a proportion of the indemnity for the value of this right?

Under art. 2242 C.C. all the rights and rights of action of which the prescription is not otherwise regulated by law is prescribed by thirty years. This right for the Harbour Commissioners to retake possession of this land came into existence for them in 1859 and they not having exercised it during the thirty years which have followed it is then extinguished by the lapse of time and is prescribed. *Quebec Harbour Commissioners* v. *Roche*, 1 Que. S.C. 365.

The indemnity awarded by the Exchequer Court to the Harbour Commissioners for the value of this right does not belong to them and the appellants are entitled to claim the entire value of this lot.

The appeal should be maintained with costs. The appellants are entitled to their indemnity in the sum of $45,127.05.

Lavergne, J.

LAVERGNE, J. *ad hoc.*—I am of opinion to maintain the appeal with costs and I concur in the notes of judgment of Brodeur, J.

Appeal allowed.

ONT.

S. C.

MILTON PRESSED BRICK Co. v. WHALLEY.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins, and Ferguson, JJ.A. March 19, 1918.

MECHANICS' LIENS (§ IV—28)—LIEN BY MATERIAL MEN—MATERIAL PLACED ON SIDEWALK—MECHANICS' LIEN ACT—MATERIAL MUST BE PLACED ON LAND—AMENDMENT OF 1918.

The general lien under s. 6 of the Mechanics and Wage Earners Lien Act (Ont.) and the special one in the nature of a vendor's lien upon the material itself, depend upon the placing upon the land to be affected of the material in question. Proximity to the land is not enough; it must be on it, so that in fact or in contemplation of law the value of the land itself is enhanced by its presence.

[Ed. Note:—By 8 Geo. V., c. 29, s. 1 (Ont.), assented to March 26th, 1918, s. 6 of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, c. 140, is amended by adding after the word "upon" in the eighteenth line thereof the words "or adjacent to."]

Statement.

AN appeal by Hepburn & Disher Limited from the judgment of the Judge of the County Court of the County of Welland in an action in which the Milton Pressed Brick Company were plaintiffs and Percy R. Whalley, George Albert Toyn, Thomas F. White, John Gardner, and T. E. Ryan were defendants.

The facts appear in the reasons for the judgment of the County Court Judge, which were as follows:—

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This is an action under the Mechanics and Wage-Earners Lien Act. By written contract, dated the 12th April, 1917, the defendants Ryan and Gardner, as contractors, agreed with the defendants Percy R. Whalley and George Albert Toyn, the owners, to do the work and furnish the materials in connection with alterations and an addition to the Arlington Hotel, Welland, required to change the building into a theatre. The work was to be done in accordance with the plans and specifications prepared by the architect, C. M. Borter. The contract price was $10,724, payable 80 per cent. monthly on the architect's certificate, the balance when the work should be completed.

The contractors proceeded with the work, but on or about the 7th June, 1917, owing to the negligent manner in which the work was carried on, the rear part of the building collapsed. According to the evidence of the defendant Whalley, there were ten rooms and a hall in the upstairs part of the building that collapsed. These rooms were furnished, and the contents were totally destroyed. Mr. Whalley estimates the value of the contents of these rooms at $100 per room, making a total of $1,000. At and before the time of the collapse, these rooms were let to roomers at $5 per week; and, owing to the collapse, the owners claim to have lost a revenue of $50 per week. The architect estimates that it would cost $6,126 to rebuild the collapsed portion of the building. Shortly after the building collapsed, the contractors, Ryan and Gardner, made an assignment to the sheriff, for the general benefit of their creditors, and they have abandoned the work. The architect says that, if a contract were now let to do the work contemplated by the original contract, it would cost the owners from $1,400 to $1,500 more than the original contract price. According to the original contract, the work was to be completed by the 1st August, 1917, and the contractors were to pay to the owners $5, as "stipulated" damages for each day's delay in completion after the time specified. The architect estimated, at the time of the trial, that it would take three months from that date to complete the work.

On the 23rd May, 1917, the architect issued a certificate to the contractors for $1,000, which amount was paid to them. Owing to the circumstances detailed above, no other payment became due or was made. The architect estimates the work done

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and materials supplied at the date of this certificate as about $1,200. The defendant Gardner puts it at from $2,100 to $2,200. Neither this nor other matters that seem to be important were gone into fully at the trial. According to the architect, the contractors did work and supplied materials after the issue of the certificate above referred to, and down to the time when they abandoned the contract, amounting to about $400. There is again here a wide difference between the architect's figures and those of the defendant Gardner; but, under all the circumstances, I think I must accept the architect's figures.

An order was made on the 7th September, 1917, giving the conduct of the action to Hepburn & Disher Limited, who claimed to be lien-holders. The action came on for trial before me on the 18th September, 1917, after notice to all parties interested.

Hepburn & Disher Limited made a sub-contract with Ryan and Gardner to furnish the steel beams and some other materials for use in the building. The price was to be $1,400; but, owing to some changes that were made, this was increased to $1,423. The materials which Hepburn & Disher Limited agreed to supply were shipped in three or more several shipments from Toronto, and the last of the materials were delivered to the contractors, as I find, on the 23rd May, 1917. These materials were unloaded from the car on that day by the contractors, and placed by them in the street in front of the building. The claim for lien was registered by Hepburn & Disher Limited on the 23rd June, 1917.

At the trial I was inclined to hold that these claimants had not registered their claim for lien within the time allowed by the Act. But I have since reached a different conclusion. After the 23rd May, and until about the 7th June, 1917, the contractors continued to work on the building, and the notes of evidence shew that during that time some of the materials furnished by Hepburn & Disher Limited were placed on the land, and incorporated in the building. Consequently the claim for lien was registered within 30 days from the furnishing or placing of the last material so furnished or placed. The evidence shews that about $750 worth of the materials furnished by Hepburn & Disher Limited went into the building, and the residue of these materials remained, at the date of the trial, on the street adjoining the land occupied by the building, where they had been placed by the contractors.

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As I understand the judgment of the Court in *Ludlam-Ainslie Lumber Co.* v. *Fallis* (1909), 19 O.L.R. 419, in order that a lien may arise in respect of materials furnished for use in a building, the materials must be placed on the land. Therefore the claim for lien of Hepburn & Disher Limited fails as to that part of it which relates to the materials left in the street. These were neither incorporated into the building, nor placed on the land, and never came under the control of the owners. I think, however, that Hepburn & Disher Limited are entitled to a lien to the extent of the materials furnished by them which actually went into the building, namely, $750.

The plaintiffs the Milton Pressed Brick Company Limited are entitled to a lien for the amount claimed by them, viz., $33.

The claim of the Sun Brick Company Limited is, as I understand, for bricks furnished to the contractors. These materials were apparently shipped from Toronto, and delivered to the contractors at Welland. None of them were incorporated in the building, nor placed on the land. These materials never came under the control of the owners, and at the time of the trial they were in the street adjacent to the land occupied by the building, where, I suppose, they were placed by the contractors. Under the circumstances, as I understand *Ludlam-Ainslie Lumber Co.* v. *Fallis*, the claim for lien fails.

Ralph Mitchell is entitled to a lien for wages, amounting to $9.

There is, of course, no evidence of increased value, and the action should be dismissed as against the defendant White, the mortgagee.

Both Hepburn & Disher Limited and the Sun Brick Company Limited at the trial referred to sec. 16, sub-sec. 2, of the Act, and claimed to be entitled to a lien under that section on the materials respectively furnished by them. I do not think that section applies in the circumstances appearing in the case in hand.

The defendants Whalley and Toyn, the owners, set up a claim for damages against the contractors, and it appears to me that they are entitled to succeed. They have lost the contents of the rooms in the part of the building which collapsed, valued at $1,000. It will cost to rebuild the collapsed part, according to the architect, $6,126. There is a loss of revenue of $50 per week; but, as to this item, there should be taken into consideration the upkeep and other

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expenses in connection with the receipt and collection of this revenue. The architect estimated that it would take 3 months to rebuild. The building collapsed on the 7th June. Some time should be allowed to let contracts and make other arrangements. I think, perhaps, it would be fair to allow $500 under this head.

Then there is to be considered the increased cost of carrying out the original contract, which, on the architect's evidence, I think I should place at $1,400.

There is also the question of damages for delay. These are fixed by the contract at $5 per day. The question whether this sum should be treated as a penalty or as liquidated damages was not gone into at the trial. No evidence was offered to shew what the actual damages caused by the delay in completion would be. The work was to have been completed by the 1st August, 1917. After the abandonment of the work by the contractors, nothing further had been done up to the time of trial. I think that a reasonable allowance to make under this head would be $600. As against the owners' claim for damages may be set off any benefit they have derived from the work done up to the abandonment of the contract, say $1,600, less the amount paid to the contractors, $1,000, viz., $600. On the basis above set forth, I assess the damages to which the owners are entitled at $9,026.

The owners contend that, under the circumstances, there is nothing justly due and owing from them to the contractors, and therefore nothing upon which the liens claimed could attach. But, following the decision of the Court of Appeal in *Rice Lewis & Son Limited* v. *George Rathbone Limited* (1913), 27 O.L.R. 630, 9 D.L.R. 114, it would appear to me that when, on the 23rd May, 1917, the architect issued a certificate for $1,000 in favour of the contractors, the owners should have deducted and retained from that payment for the benefit of lien-holders 20 per cent. of the value of the work and materials actually done, placed, or furnished, within the meaning of the Act, at that time. The value of this work and material, I find to be $1,200. The owners are therefore liable for $240 which they should have retained for the lien-holders; and, following the case above referred to, I hold that they cannot set off against this sum their claim to damages. Upon payment of this sum into Court, however, by the owners, for the benefit of the lien-holders, the liens registered should be vacated and discharged.

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Failing payment into Court of this sum within 30 days from the date of the formal judgment to be signed, the land should be sold, under the provisions of the Act.

The defendants Whalley and Toyn, the owners, are entitled to judgment against the contractors, Ryan and Gardner, for $9,026 damages.

The Sun Brick Company Limited is entitled to a personal judgment against the defendants Ryan and Gardner for the amount of its claim.

The lien-holders' rights will be worked out under the formal judgment to be settled and signed by me, in accordance with the views above set forth. The question of costs was not referred to at the trial, and I shall hear the parties as to this, upon the settlement of the formal judgment.

The "formal judgment" was as follows:—

This action coming on for trial before His Honour L.B.C. Livingstone, Judge of the County Court of the County of Welland, upon opening the matter, and it appearing that the following persons have been duly served with notice of trial herein, the Sun Brick Company Limited, James Smith, Sheriff, assignee of Ryan and Gardner, Ralph Mitchell, and the defendants, and all such persons appearing at the trial, and upon hearing the evidence adduced, and what was alleged by counsel for the plaintiffs (Hepburn & Disher Limited being named as plaintiffs with the original plaintiffs) and for the defendants and for the Sun Brick Company Limited and Ralph Mitchell.

1. This Court doth declare that the several persons mentioned in the first schedule hereto are respectively entitled to a lien under the Mechanics and Wage-Earners Lien Act upon the land described in the second schedule hereto, for the amounts set opposite their respective names in the second, third, and fourth columns of the said first schedule and the persons primarily liable for the said claims respectively are set forth in the fifth column of the said schedule.

2. This Court doth further order and adjudge that, upon the defendants Percy R. Whalley and George Albert Toyn paying into Court to the credit of this action the sum of $240 on or before the 27th day of December next, 1917, the said liens in the first schedule

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mentioned, upon the respective estates and interests in the said lands of the said defendants, be and the same are hereby vacated and discharged and the said moneys so paid into Court are to be paid out in payment of the claims of the said lien-holders.

3. But in case the said defendants Percy R. Whalley and George Albert Toyn shall make default in payment of the said moneys into Court as aforesaid, this Court doth further order and adjudge that all the estate, right, title, and interest of the said defendants Percy R. Whalley and George Albert Toyn in the said lands be sold with the approbation of the Local Master of this Court, and that the purchase-money be paid into Court to the credit of this action, and that all proper parties do join in the assignments and conveyances as the said Master shall direct.

4. And this Court doth further order and adjudge that the said purchase-money be applied in and towards payment of the claims of the said lien-holders, with subsequent interest and subsequent costs, to be computed and taxed by the said Master as the said Master shall direct.

5. And this Court doth further order and adjudge that, if the money paid into Court, or, in case of a sale, the said purchase-money, shall be insufficient to pay in full all the plaintiffs' said claims, the defendants John Gardner and T. E. Ryan do pay the plaintiffs the amount remaining due to them forthwith after the same shall have been ascertained by the said Master.

6. And this Court doth declare that the said plaintiffs Hepburn & Disher Limited have not proved any lien for the sum of $673, value of materials placed upon the street, and they are not entitled to a lien therefor; but this Court doth further order and adjudge that the said Hepburn & Disher Limited do recover against the defendants T. E. Ryan and John Gardner the sum of $673.

7. And this Court doth declare that the Sun Brick Company Limited have not proved any lien under the Mechanics and Wage-Earners Lien Act, and they are not entitled to such lien; and this Court doth order and adjudge that the claim of lien registered by the said company against the land mentioned in the said second schedule be and the same is hereby discharged and vacated; and this Court doth further order and adjudge that the said Sun Brick Company Limited recover against the defendants T. E. Ryan and John Gardner the sum of $526 and costs, which are hereby fixed at $50.

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8. This Court doth order and adjudge that Percy R. Whalley and George Albert Toyn do recover against the defendants T. L. Ryan and John Gardner the sum of $9,026 damages and costs, which are hereby fixed at $50.

9. And this Court doth further order and adjudge that this action be and the same is hereby dismissed as against the defendant Thomas F. White.

10. And this Court doth further order and adjudge that the said lien-holder Ralph Mitchell, being a wage-earner, is entitled to have his claim of $9.50 paid in full in priority to the claims of all other lien-holders.

SCHEDULE 1.

Names of lien-holders entitled to mechanics' liens.	Amount of debt and interest if any	Costs	Total	Total to be paid out of Court	Names of primary debtors.
Ralph Mitchell	9.00	.50	9.50	9.50	Ryan and Gardner
Milton Pressed Brick Company	33.00	69.45	102.45	70.82	Ryan and Gardner
Hepburn & Disher Ltd.	750.00	128.05	878.05	159.68	Ryan and Gardner
	792.00	198.00	980.00	240.00	

The following were the grounds of appeal:—

(1) That the judgment was contrary to the law, the evidence, and the weight of evidence.

(2) That the learned Judge had no power or authority, under the provisions of the Mechanics and Wage-Earners Lien Act, to enter into the question of compensation by the defendants Ryan and Gardner for such damages as were found by him to be owing to the owners.

(3) That the learned Judge had no power or legal right to declare that the plaintiffs Hepburn & Disher Limited had not proved a lien for the sum of $673, value of the materials placed upon the street, and that they were not entitled to a lien therefor on the said material.

(4) That the material mentioned in para. 6 of the judgment was material placed by the plaintiffs upon land to be used in connection with the erection of the building for the purposes enumerated in sec. 6 of the Act, within the meaning of sec. 16 (2) of the Act, and it should have been so declared, and the learned trial Judge erred in finding to the contrary.

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W. Proudfoot, K.C., for appellants.
G. H. Pettit, for respondents.

The judgment of the Court was read by HODGINS, J.A.:—This appeal cannot succeed under the present condition of the law. The Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, gives extensive protection to material-men who supply materials "to be used," but the lien so declared is upon the land and erection which it is intended to benefit. In the case of materials supplied, it is given upon the land "upon which such materials are placed or furnished to be used" (sec. 6*).

The extent of this protection is discussed in *Larkin* v. *Larkin*, 32 O.R. 80; *Ludlam-Ainslie Lumber Co.* v. *Fallis*, 19 O.L.R. 419; and *Kalbfleisch* v. *Hurley*, 34 O.L.R. 268, 25 D.L.R. 469.

But here a lien is also claimed by the appellants on their own goods. These had been sold to the contractors, who have since failed. They were delivered on the street in front of the building and land in question, but never actually reached the latter.

Mr. Proudfoot asked for whatever lien his clients were entitled to. But no case has yet decided that a lien under the Mechanics and Wage-Earners Lien Act, either on the land or on the material itself, exists by mere appropriation of goods to a contract, or on delivery to the owner or contractor, unless they are placed upon or reach the lands to be affected. The difficulties in the way of any other method of establishing a lien are many. If a contractor for half a dozen different houses buys steel or concrete by wholesale and stores it in his yard, it is in one sense delivered to be used in certain buildings. A car of lumber for a particular building may be bought in Buffalo f.o.b. there. It is intended to use it in a building and on certain land. Yet it would be impossible to give the wholesaler or the lumber merchant a lien upon the land merely because there was in his mind and that of the contractor an

*6. Unless he signs an express agreement to the contrary . . . any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing . . . of any erection, building . . . or the appurtenances . . . 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 . . . and appurtenances, and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner.

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intention to devote the material in whole or in part to the erection of a building or buildings upon certain specified land. The difficulty of any other construction of the Act than the one now stated was pointed out by Clute, J., in the *Ludlam* case (*ante*). With regard to the lien upon the materials themselves, the statute is explicit in creating it only when they have reached the land to which it is intended to attach them and from which they cannot be removed (sec. 16*) to the prejudice of any lien.

The general lien under sec. 6, and the special one in the nature of a vendor's lien upon the material itself, depend upon the same condition, i.e., the placing upon the land to be affected of the material in question. Proximity to the land is not enough; it must be on it, so that either in fact or in contemplation of law the value of the land itself is enhanced by its presence.

The damages suffered by an owner owing to non-completion, while not available to him as a set-off against claims for wages, nor to diminish the statutory percentage required to be retained by him, may be and in some cases must be gone into before the Master or Judge trying a case under the Mechanics and Wage-Earners Lien Act. To ascertain the sum justly due from the owner to the contractor necessitates an inquiry, where a case is made for it, as to the value of the work done under the contract as well as the damages suffered, and to be set off or deducted, for work undone or improperly done or for delay.

If this inquiry is proper, then the provisions of sec. 37, sub-sec. 3, of the Mechanics and Wage-Earners Lien Act seem wide enough to allow the result to be put in the judgment directed to be pronounced by the Master or Judge trying the action.

The appeal should be dismissed.

Appeal dismissed.

*16.—(1) During the continuance of a lien no part of the material affected thereby shall be removed to the prejudice of the lien.

(2) Material actually brought upon the land to be used in connection with such land for any of the purposes enumerated in section 6, shall be subject to a lien in favour of the person furnishing it until placed in the building, erection or work, and shall not be subject to execution or other process to enforce any debt other than for the purchase thereof, due by the person furnishing the same.

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Supreme Court of Canada, Davies, Idington, Anglin, Brodeur, JJ., and Lemieux, J., ad hoc. June 25, 1918.

1. COURTS (§ I A—4)—SUBSTITUTE JUDGE—JURISDICTION LIMITED TO CASES OF REGULAR JUDGE'S "ABSENCE OR INABILITY TO ACT."

A statute which enables a certain magistrate to hold the court of sessions only in case of the "absence or inability to act" of the sessions judge (R.S. Que., art. 3262 (*a*)) implies that "absence" may mean something different from "inability to act"; "absence" connotes physical non-presence from whatever cause, and it is to be presumed that the absence was due to some good and sufficient reason. The jurisdiction of the magistrate acting in substitution for the sessions judge is sufficiently established if it appears that when the trial began the sessions judge was not in the court room; such jurisdiction would not be displaced by the sessions judge casually entering the court room with no intention of intervening in a trial which had already been commenced by the magistrate in his capacity as a substitute judge, particularly where the substitution had been arranged by and took place with the concurrence of the judge himself.

[*Bingham* v. *Chabot*, 3 Dal. (U.S.) 19; *Byrne* v. *Arnold*, 24 N.B.R. 161; *R.* v. *Parkin*, 7 Q.B. 165, and *Ex parte Cormier*, 17 Can. Cr. Cas. 179, referred to.]

2. EVIDENCE (§ XI K—837)—INTENT—ABORTION—PRIOR SIMILAR OFFENCES TO NEGATIVE INNOCENT INTENT.

Where, in answer to a charge of using instruments to cause an abortion, the accused sets up in defence that the instruments were used to prevent septic poisoning in a miscarriage already begun, and he gives his own testimony to that effect, he becomes liable to be cross-examined as to alleged previous criminal acts similar to that alleged and performed in a similar manner, and, on his denial of same, to have his plea of innocent intent negatived by proof of the other similar criminal acts although these occurred two and four years previous to the offence charged. Such evidence would be admissible apart from any evidence of system, and if the defence does not develop until the defendant is in the witness box, he is to be given an opportunity of answering such rebuttal evidence by giving further evidence in sur-rebuttal.

[See Annotation on evidence of prior offences to rebut surgeon's justification in abortion charge, at end of this case.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Court of Sessions of the Peace, at Quebec.

The accused, appellant, was found guilty of abortion by the trial judge, but he prayed for a case to be reserved for the Court of King's Bench.

The questions submitted in the reserved case stated by the trial judge are as follows:—

1. That the trial and conviction are null, because the judge who tried the case had power to act only in the absence or incapacity of the Judge of Sessions,

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whereas the latter was, in fact, neither absent nor incapacitated.

2. That the trial judge erred in admitting evidence of other criminal acts of the appellant.

3. That, in any event, there was error in admitting such evidence of other criminal acts in rebuttal.

The circumstances of the case are fully stated in the judgments now reported.

Ferdinand Roy K.C., *Alleyn Taschereau K.C.* and *Paul Drouin* for the appellant.

Arthur Lachance K.C. and *Arthur Fitzpatrick* for the respondent.

Davies, J.

DAVIES J.—I concur in the reasons for judgment stated by my brother Anglin and would dismiss this appeal.

Idington, J.

IDINGTON J.—The appellant was convicted of abortion on his trial had therefor, pursuant to his election for a trial without a jury, and on the 15th May, 1917, sentenced to a term in the penitentiary.

The learned trial judge on motion of counsel for appellant decided same day or next to reserve questions of law for the Court of Appeal.

Of these we are appealed to in regard to the following:—

"A." Cette cour devait-elle admettre les témoignages de Laetitia Clouthier et de Bernadette Clouthier pour établir que l'accusé a déjà commis le crime dont on l'accuse?

"B." En supposant cette preuve légale, pouvait-elle être permise pendant l'enquête de la Couronne "in rebuttal?"

I have as result of reference to numerous decisions on which I rely specially upon *Rex* v. *Bond* (1), and *Rex* v. *Crippen* (2), come to the conclusion that the answers of the majority of the Court of Appeal to these questions are unquestionably right.

(1) [1906] 2 K.B. 389. (2) 27 Times L.R. 69, [1911] 1 K.B. 149.

In the former case the law applicable to such a case, and the limitations thereof, is so fully and ably dealt with that I need not repeat what therein is applicable. Whether such proof should in all cases be tendered in support of the case for the prosecution or only be given by way of rebuttal must depend upon the particular circumstances of each case.

If for example the appellant had refrained from tendering his own evidence, and relied upon others to establish an alibi, such evidence in rebuttal could not have been properly received, merely in way of rebuttal.

But by his going into the witness box, to prove his innocence and try to shew a case wherein accident or mistake was all that was or could be involved, he raised a question which had to be met and could be effectually so by proving his previous criminal acts which could not rest upon mere mistake or accident.

One of these took place in 1914 and the other a year or two earlier—quite enough to illuminate the whole story.

As to the collateral effects on the minds of those having to pass upon such a case, that is something counsel defending an accused have to reckon with, and be prepared for; if rendering same necessary by pursuing a hazardous course.

Often they have to take chances and do the best they can; but all that furnishes no reason for rejecting evidence when clearly admissible either in opening or in rebuttal according to the circumstances of each case.

And one guiding rule in regard thereto should ever be section 1019 of the Criminal Code which reads as follows:—

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

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challenge for the defence was improperly disallowed a new trial shall be granted. (55-56 Vict., ch. 29, sec. 746.)

I think this curative section applicable here.

The appellant, after obtaining the foregoing reservation for the Court of Appeal on the 27th of August, 1917, nearly three months and a half later, bethought himself of something else and that was to question the jurisdiction of the court that tried and convicted him.

He applied to the judge who had tried him, and, I incline to think, had with his granting his former reservation become (under the peculiar conditional jurisdiction he had for acting) *functus officio*, unless in response to the possible requirements and directions of the Court of Appeal, he had to submit questions relative to his jurisdiction.

He graciously acceded, though I most respectfully submit he might have been well advised under all the circumstances and the material submitted to him, to have refused to state any further question, unless and until the Court of Appeal under its power in section 1015 of the Criminal Code so directed.

The result would probably have been from what now appears that on this branch of the case there could have been no further appeal herein.

When or how otherwise can the convicted be limited in regard to his appellant rights?

Suppose he had a dozen objections to make and chose to submit one at a time only and revert to the trial judge when that decided to state the next, and try the experiment with each, as it is agreed there is no time limit, could he go on through his list thus?

Out of respect to the Court of Appeal I will assume in this case that they have in substance acted under sec. 1015 and of the questions thus secondarily presented there would remain the third as follows:—

3. Aviez-vous juridiction pour instruire et présider le procès expéditif de l'accusé dans les circonstances ci-dessus exposées et ce procès

n'est-il pas nul pour avoir été instruit devant un juge qui n'avait pas juridiction?

It was suggested by Mr. Fitzpatrick in argument that as the trial must be presumed to have begun with the election of the accused and his pleading to the charge and fixing a date for the continuance of it the learned trial judge whose jurisdiction is attacked and his jurisdiction that far being maintained unanimously we could not entertain this part of the appeal.

I agree there would be much force in the argument, especially when we bear in mind the possibility of an accused so acting being led by the appearance of things to assume that it was the judge who interrogated him as to his wish that would be his judge, but I fear the decision of this court in *Giroux* v. *The King* (1), puts an end to the import formerly attached to that test of arraignment and pleading and fixing a date for trial.

It seems the remaining question must therefore be answered.

I admit the possible serious consequences of such a view for unless the fact that a judge once seized of the conduct of a case is to be allowed to continue it even if his senior, whose absence is the basis of his jurisdiction, should return there may be confusion arise some day.

It is not this case that embarrasses me, but what may flow from our recognition of a dissent that only cuts a proceeding in two.

I agree with the view taken by the majority in the Court of Appeal that the learned senior judge's actual absence from the trial is enough to rest the jurisdiction of his substitute upon.

This statute enabling that to be done is not like some others which expressly or impliedly intended absence to mean an absence beyond the place of residence or jurisdiction. Upon that many decisions rest.

I may also observe that the inability of the senior

(1) 56 Can. S.C.R. 63, 39 D.L.R 190.

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judge to undertake the duty is an alternative ground for naming a substitute.

The statement of Judge Langelier that for personal reasons he did not wish to sit ought to be presumed as meaning for good reasons which in law were a valid excuse and would in the alternative suffice, although not expressed on the record.

As at present advised I should so presume, if I thought the statement in the record could be displaced by any such proof as offered.

I do not however think the record can be so displaced for our purpose by such alleged proof.

I therefore think the learned trial judge must be held to have had jurisdiction and therefore the appeal be dismissed with costs.

Anglin, J.

ANGLIN J.—Convicted by the Court of Sessions of the Peace of having unlawfully used means to procure a miscarriage upon one Alice Vachon in July, 1916, and thereupon sentenced to imprisonment for a term of five years, the appellant applied for and obtained the reservation of several questions of law under section 1014 of the Criminal Code. The questions so reserved were determined adversely to him by the Court of King's Bench—unanimously, with the exception of three, in respect of which Mr. Justice Lavergne dissented. The defendant now appeals to this court. I find his three grounds of appeal succinctly stated in the judgment of Mr. Justice Cross in these terms:—

(1) That the trial and conviction are null, because the judge who tried the case had power to act only in the absence or incapacity of the Judge of Sessions, whereas the latter was, in fact, neither absent nor incapacitated.

(2) That the learned trial judge erred in admitting evidence of other criminal acts of the appellant.

(3) That, in any event, there was error in admitting such evidence of other criminal acts in rebuttal.

(1) The appellant urges that it appears by an affidavit intituled and filed in the Court of Sessions of the

Peace, apparently made gratuitously by one Chouinard, the clerk of the court, that, although there are formal entries in the record of the trial that Judge Choquette presided in the absence of Judge Langelier, made by the direction of the former, the latter was in fact in his chambers in the court house at the time of the commencement of the trial. Affidavits filed on behalf of the Crown in the Court of King's Bench not only do not contradict the fact so deposed to, but rather support the inference that it is true. In stating the reserved case Judge Choquette has informed the court that although Judge Langelier had certainly been absent from the city of Quebec when the preliminary inquiry was held, neither he nor Judge Langelier can state whether the latter was or was not in his chambers, as alleged in the affidavits, when the trial of the accused began. He adds:—

L'eut-il été, vu sa déclaration qu'il ne pouvait siéger, j'avais d'apres ma commission juridiction pour entendre la cause.

The reserved case contains no further statement as to the presence or absence of Judge Langelier.

I am unable to accede to the contention of counsel for the Crown that the admitted absence of Judge Langelier at the time of the preliminary investigation would give Judge Choquette jurisdiction to sit upon the trial of the defendant. His trial was a new proceeding which began only after arraignment and plea at a later date then fixed for the hearing. *Giroux* v. *The King* (1); *Re Walsh* (2), at p. 17. The absence of Judge Langelier having been recorded as the ground upon which Judge Choquette acted in his stead, the right of the Crown to invoke Judge Langelier's inability to act, if that be the import of Judge Choquette's reference to "*sa déclaration qu'il ne pouvait siéger,*"

(1) 56 Can. S.C.R. 63, 39 D.L.R. 190.
(2) 23 Can. Crim Cas. 7, 16 D.L.R. 500.

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would seem at least questionable. I think the case must be dealt with on the footing that Judge Choquette's jurisdiction was dependent upon the "absence" of Judge Langelier.

Counsel for the Crown maintained that entries in the trial book conclusively established his absence and strenuously resisted their being controverted upon extraneous evidence. I question whether upon a proceeding such as this—a recourse afforded by the statute for the very purpose of determining whether the trial is open to exception upon any substantial ground that can properly be stated as a question of law—the verity of a statement in the record in regard to a mixed matter of law and fact essential to his jurisdiction made by or under the direction of a judge of a court of inferior jurisdiction, although it be a court of record, should be conclusively presumed (*Mayor of London* v. *Cox* (1); *Falkingham* v. *Victorian Railway Commissioner* (2), at pages 463-4).

But we are dealing with a stated case (sub.-sec. 6 of sec. 1014) and, except as provided for by sub.-sec. 2 of sec. 1017 and subject to the power conferred by sub-sec. 3 of the same section, I incline strongly to the view that in disposing of the questions reserved the appellate court is confined to the facts set forth in the stated case. Unless the affidavit of Chouinard, intituled and filed in the Court of Sessions should be taken to be part of the stated case, it does not disclose the presence of Judge Langelier in the court house or even in the city of Quebec at the time when the defendant's trial began. In the view I take, however, it is unnecessary to determine these points.

For the purpose of disposing of the question now under consideration I shall assume (without so deciding) that it has been established by material proper for

(1) L.R. 2 H.L. 239, at p. 262. (2) [1900] A.C. 452.

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our consideration that Judge Langelier, though not present in court, was in fact in his chambers at the court house when the trial began. The defendant and his counsel appear not to have been aware of that fact, however, until after the trial had concluded and may therefore be excused for not having taken exception before or during it to the jurisdiction of the presiding judge.

Acting under Art. 3262(*a*) of the R.S.Q. (enacted by 5 Geo. V., ch. 52, sec. 3) Judge Choquette was empowered to hold the Court of Sessions of the Peace only

> in case of the absence or inability to act of one or more of the (Judges of the Court of Sessions of the Peace).

By the Order-in-Council by which he was appointed and in his commission the judge whom he is to replace is designated as

> the Judge of the Court of Sessions of the Peace whose residence is established in the City of Quebec.

This was Judge Langelier.

The expression "absence or inability to act" should of course be given a construction at once reasonable and in harmony with the purpose of the statute. "Inability to act" may or may not involve "absence." It is usually accompanied by physical absence; and absence may be due to physical inability to be present. But, as used in the statute, "absence" clearly means something different from "inability to act." It connotes physical non-presence from whatever cause. The question is non-presence in what place or within what area? We are not concerned with the cause of absence. It must be presumed to be for some good and sufficient reason (*Engeman* v. *The State* (1)), and not to be due solely to a mere arbitrary refusal to act, since such dereliction of duty (*Klaise* v. *The State* (2)) will not be

(1) 54 N.J. Law 247, at p. 251. (2) 27 Wis. 462.

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assumed. For an instance of a statute authorising a deputy magistrate to sit upon the mere request of the magistrate appointed to hold the court see R.S.O. 1914, ch. 88, sec. 10.

It cannot have been the intention of the legislature that the jurisdiction of the replacing judge and the validity of any trial had before him should be open to question merely because it can be shewn that when it began the Judge of the Court of Sessions of the Peace was elsewhere in the city of Quebec or even in the court house itself. Many grave inconveniences and uncertainties in the administration of justice would result from such a construction of the statute. It would impose upon the replacing judge the obligation of instituting a judicial inquiry as to the whereabouts of the Judge of the Court of Sessions of the Peace before the commencement of every trial.

"Absence," as used in this statute, must, I think, be taken to mean absence from the bench, or, at the utmost, absence from the court-room in which the trial takes place. That is a fact of which the replacing judge can be personally cognisant when the trial is beginning. Beyond that his actual knowledge ordinarily cannot extend. Reason and authority would seem to concur in indicating this to be the proper construction of what must be conceded to be an ambiguous term (*Watkins* v. *Mooney* (1), at pages 652-4)

seldom used without explanatory words.

Phillips v. *Phillips* (2), at p. 172. Thus it may necessarily import prior presence. *Buchanan* v. *Rucker* (3), at p. 194; or it may mean merely

not being in a particular place at the time referred to,

without importing prior presence. *Ashbury* v. *Ellis* (4), at p. 345. It may imply constructive as well as

(1) 114 Ky. 646.
(2) 1 P. & D. 169.
(3) 9 East 192, 103 E.R. 546.
(4) [1893] A.C. 339.

actual absence. *In re Brown* (1), at p. 385. In its technical meaning and standing alone it signifies "want of appearance." *Phillips* v. *Phillips* (2). In common usage (it) simply means a state *of being away from or at a distance from, not in company with.* *Paine* v. *Drew* (3), at p. 317; and the words of a statute are to be taken in their ordinary familiar signification and import. Potter's Dwarris on Statutes, p. 193.

The reference in the order-in-council and commission to the "residence in the city of Quebec" of Judge Langelier are invoked by the appellant in support of his contention that "absence" here means absence from that city. But these words are not in the statute, and it is the statute that prescribes the conditions of the jurisdiction which it confers. The language of the commission and order-in-council cannot aid in its construction.

In *Bingham* v. *Chabot* (4), the Supreme Court of the United States was called upon to determine the meaning of the word "absent" in a statute affecting the constitution of Federal Circuit Courts. By sec. 4 of ch. 20 of the statute of the 1st session of the First Congress the Federal Circuit Courts were constituted each to consist of two Justices of the Supreme Court of the United States and the District Judge. Sec. 1 of ch. 22 of the statute of the 2nd session of the Second Congress enacted that the attendance of only one of the Justices of the Supreme Court should be sufficient and that

> when only one Judge of the Supreme Court shall attend any Circuit Court and the District Judge shall be absent * * * such Circuit Court may consist of the said Judge of the Supreme Court alone.

It appeared that the District Judge was present on the Bench but a memorandum in the margin of the record

(1) 80 Cal. 381.
(2) 1 P. & D. 169.
(3) 44 N.H. 306.
(4) 3 Dal. 19.

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stated that he "did not sit in the cause." The court said, at p. 36:—

We are perfectly clear in the opinion that, although the District Judge was on the Bench, yet, if he did not sit in the cause, he was absent in contemplation of law.

In *Engeman* v. *The State* (1), a similar question arose under a New Jersey statute of 1888 enabling the Chief Justice, or any associate Justice of the Supreme Court of the State

in case of absence, sickness or other inability, or vacancy in the office of the law or president judge of any county in this State to sit or perform the duties of his office.

Van Syckle J., delivering the judgment of the court, said, at p. 251:—

It is not necessary that the Supreme Court Justice, before he may proceed with the business in these courts shall institute a judicial inquiry to ascertain why the law judge is not in attendance. "Absence" in this Act means non-presence in the courts; when the law judge is temporarily away he must be presumed to be away by reason of some inability to attend and he is absent in the statutory sense.

In *Byrne* v. *Arnold* (2), the Supreme Court of New Brunswick passed upon the construction of the 105th section of the Canada Temperance Act, providing that

if (a) prosecution is brought before two * * * justices no other justice shall sit or take part therein unless by reason of their absence or the absence of one of them, etc.

The court was of the opinion that if the justices before whom the prosecution was begun were lawfully subpœnaed as witness, they would, although physically present in the court-room, be "absent" in contemplation of the statute so that two other justices might lawfully carry on the proceeding. Allen C.J., with whom Weldon and Fraser JJ. concurred, said at 164:

I think the word "absence" in this section does not necessarily mean actual absence from the place or room where the trial is held; but would apply to a case where the justices had, for some cause, become incapable of sitting and taking part in the proceedings. If such was the case I think they would be absent within the meaning of the Act, though not absent in fact.

(1) 54 N.J. Law 247 at 251. (2) 24 N.B. Rep. 161.

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Palmer J. adds at 167:

> When the Canada Temperance Act enacts that when a justice is absent another can act, it does not mean that such justice is not in any particular house or place but simply that he is not taking part in the hearing of the case, *i.e.*, does not form a member of the court * * * If this construction of the Act is not correct it would be in the power of a defendant to defeat any trial, and a construction that would lead to such a result, I do not think is even reasonable.

In *Ex parte Cormier* (1), the Supreme Court of New Brunswick, again called upon to construe a statute empowering another magistrate to act in the absence of the police magistrate, held that

> The absence intended is * * * not actual absence from the jurisdiction or even from the place of trial, but it includes inability to attend to the business of the court such as was proved in this case.

The attendance of the police magistrate had been required before another tribunal apparently sitting in the same building at the time of the trial.

Of course the history of the legislation or the context of the statute may indicate an intention that the word "absence" should receive a stricter construction. *Opie* v. *Clancy* (2), at pages 46-7. Compare *Manners* v. *Ribsam* (3) with *Lucas* v. *Ensign* (4), at p. 144.

While I think that the mention of inability to act of the Judge of Sessions as a distinct ground upon which the replacing judge may sit in his stead makes it clear that "absence" in the statute means actual absence and not merely constructive absence such as was held is sufficient in *Bingham* v. *Chabot* (5), and *Byrne* v. *Arnold* (6), I am of the opinion that the "absence" of Judge Langelier is sufficiently established by the admitted fact that when the trial of the appellant began he was neither on the Bench nor in the court-room where such trial was held. His subsequent presence

(1) 17 Can. Cr. Cas. 179, at 181.
(2) 27 R.I. 42.
(3) 61 N.J. Law 207, at p. 208.
(4) 4 N.Y. Leg. Obs. 142.
(5) 3 Dal. 19.
(6) 24 N.B. Rep. 161.

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would be immaterial. *Reg.* v. *Perkin* (1); *Ex parte Cormier* (2).

(2) The evidence in chief on behalf of the Crown furnished cogent proof of a miscarriage having followed the use by the defendant upon the person of Alice Vachon of instruments adapted to procure it. That it was so caused was an inference clearly open. The defendant's criminal intent was also *primâ facie* established since every man is presumed to intend the natural and probable consequences of his acts. Giving evidence on his own behalf the accused admitted having used instruments as deposed to by the chief witness for the Crown (a matter theretofore in issue on his plea of not guilty), but he denied his intent to procure a miscarriage, averring that miscarriage had in fact already begun before his intervention and that his purpose was merely to obviate septic poisoning. The defence of innocent intent was thus set up. To rebut this defence —to aid the court in determining the true intent of the accused, thus made the vital issue—the Crown maintains that evidence of the use by him of similar instruments in two other cases for the purpose of procuring miscarriage was admissible.

The objections taken by the defence to the admissibility of this evidence are that it is irrelevant to the issue, that it is unfair to the accused as tending to prove the commission by him of other crimes and that he is a person of bad character, and that it contradicts him on a collateral issue.

Answers of the accused upon purely collateral matters are no doubt conclusive. But matter that is relevant is not purely collateral. Moreover, that the evidence in question had the effect of contradicting him on such a matter would not be a good reason for excluding it if otherwise admissible.

(1) 7 Q.B. 165, 115 E.R. 450. (2) 17 Can. Cr. Cas., 179.

It no doubt tended to impeach the defendant's character. But that again does not form a ground for its exclusion if admissible for other purposes. *R.* v. *Kurasch* (1), cited by Mr. Roy himself, makes this very clear. See too *R.* v. *Thompson* (2).

The other objections are more serious and, in view of the decision of the Ontario Court of Appeal in *Rex* v. *Pollard* (3), call for careful consideration. Counsel for the Crown maintains that the evidence in question is relevant and admissible because in itself it tends to make it more probable that the intent of the accused in using instruments on Alice Vachon was criminal and not innocent and also because it established two of a number of cases in which, according to the evidence of Alice Vachon, the accused had stated to her that he had administered like treatment under similar circumstances, and is corroborative of her testimony. The passage in Alice Vachon's evidence is as follows:—

Q.—Est-ce que le médecin aessayé de vous rassurer? R.—Oui monsieur.

Q.—Qu'est-ce qu'il vous a dit? R.—Il m'a dit qu'il en traitait d'autres pour la même chose que moi et qu'il y en avait que ça prenait du temps, plus de temps que moi.

Q.—Vous en a-t-il nommé des cas? R.—Il m'a pas nommé des cas. Il m'a pas nommé les noms, mais qu'il y en avait une à Québec ici qui restait chez eux à elle et puis qu'elle était malade la même chose que moi, mais qu'elle était pas découragée.

Q.—Vous a-t-il parlé de d'autres aussi, mademoiselle? R.—Oui, il m'a dit qu'il y en avait deux ou trois qu'il soignait comme ça.

This testimony counsel for the Crown maintains affords some evidence that procuring abortion was systematic with the accused.

In *Pollard's Case* (4), basing its decision on *Rex* v. *Bond* (5), the Ontario Court of Appeal held that testimony similar to that given in the case at bar by Bernadette Cleremont nèe Cloutier and Laetitia Cloutier

(1) 25 Cox C.C. 55.
(2) [1917] 2 K.B. 630, at p. 632.
(3) 19 Ont. L.R. 96.
(4) 19 Ont. L.R. 96.
(5) [1906] 2 K.B. 389.

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had been improperly admitted in the absence of other evidence of a system of the existence of which a single prior criminal act of the same kind would not afford any proof.

In *Makin* v. *Attorney-General for New South Wales* (1), at p. 65, Lord Herschell formulated the rule in these terms, which have been accepted as authoritative in all subsequent cases:—

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or *to rebut a defence which would otherwise be open to the accused.*

This language is expressly approved of by the House of Lords in *Rex* v. *Ball* (2). In *Rex* v. *Wyatt* (3), Lord Alverstone, after citing it, quoted from the judgment of Lord Russell of Killowen C.J. in *Reg.* v. *Rhodes* (4), at p. 81, the following passage:—

> It seems to me quite clear that if the transactions with Elston and Chambers had taken place before that with Bays at a period not too remote, the evidence of Elston and Chambers would have been admissible against the prisoner.

The transactions with them were similar to that charged in the indictment. At p. 193 Lord Alverstone concludes:—

> The evidence objected to was clearly admissible as tending to establish a systematic course of conduct on the part of the accused and as negativing any accident or mistake or the existence of any reasonable or honest motive.

"These last words," says Jelf J., in *Rex.* v. *Bond* (5), at p. 412, "are equivalent to and confirm Lord

(1) [1894] A.C. 57.
(2) [1911] A.C. 47.
(3) [1904] 1 K.B. 188.
(4) [1899] 1 Q.B. 77.
(5) [1906] 2 K.B. 389.

Herschell's expression

to rebut a defence which would be otherwise open to the accused.

As Darling J. points out in the same case, at p. 409, Lord Herschell did not mean

that such evidence might be called to rebut any defence possibly open but of an intention to rely on which there was no probability whatever. Here, however, the evidence was called to overthrow a defence already set up and admitted to be the defendant's answer to the charge.

In the latest reported case that I have found, *Rex.* v. *Thompson* (1), Lord Reading C.J. said, at p. 632:—

There is no doubt as to the principles of law applicable to this case; they are well settled and in recent years have been frequently discussed and approved, and notably by the Judicial Committee of the Privy Council, in *Makin* v. *Attorney-General for New South Wales*(2), and by the House of Lords in *R.* v. *Ball*(3). The general rule is *that the evidence tendered must be relevant to the charge* for which the accused is being tried. If the evidence merely proves, or tends to prove, that the accused is of such evil character or disposition that he is likely to have committed the offence charged agains thim, it is irrelevant and is inadmissible. If *it tends to prove that the accused committed the crime charged against him it is relevant and admissible*, notwithstanding that incidentally it may also prove, or tend to prove, that the accused is a person of criminal or immoral character or disposition. *Reg.* v. *Ollis* (per Channell J.) (4); *Perkins* v. *Jeffery* (5). The difficulty lies in the application of this general rule to particular cases.

This judgment was affirmed in the House of Lords, 13 Crim. App. Cas. 61(6).

In *Rex.* v *Boyle and Merchant* (7), at p. 347, the same learned Chief Justice, discussing the admissibility against a defendant charged with demanding money with menaces of evidence of other recent transactions similar in all respects to that charged, said

We think that the ground upon which such evidence is admissible is that it is relevant to the question *of the real intent of the accused in doing the acts.* Its object is to negative such a defence as mistake or accident *or absence of criminal intent* and to prove the guilty mind which is the necessary ingredient of the offence charged. * * * In the recent case of *R.* v. *Mason* (8), this court followed the decision in *Rex.* v. *Rhodes*(9),

(1) [1917] 2 K.B. 630.
(2) [1894] A.C. 57.
(3) [1911] A.C. 47.
(4) [1900] 2 Q.B. 758, at pages 781, 782.
(5) [1915] 2 K.B. 702, at page 707.
(6) [1918] A.C. 221.
(7) [1914] 3 K.B. 339.
(8) (1914) 10 Cr. App. Rep. 169.
(9) [1899] 1 Q.B. 77.

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and came to the conclusion that the evidence of similar transactions subsequent to the charge was admissible *in order to rebut the defence set up.*

Avory J., quoting the foregoing language with approval in delivering the judgment of the Court of Criminal Appeal in *Perkins* v. *Jeffery* (1), at p. 708, preceded it with this statement:—

But it is, we think, open to doubt whether evidence is admissible to prove a "system or course of conduct" unless it is relevant to negative accident or mistake *or to prove a particular intention.*

In *Rex.* v. *Shellaker*(2), on a prosecution for unlawfully and carnally knowing a girl under 16, evidence of previous acts and conduct of the accused tending to shew that he had previously had connection with the girl was held admissible, as Isaacs C.J. said, citing *R.* v. *Ollis* (3), for the purpose of shewing intent. See too *Rex.* v. *Smith*, (4); *Rex.* v. *Francis* (5); Archbold's Criminal Pleading Evidence and Practice, 25th ed. (1918), 345 *et seq.* Roscoe's Criminal Evidence, 12th ed., p. 80.

In *Rex.* v. *Fisher* (6), Channell J., speaking for the Court of Criminal Appeal, said at p. 152:—

The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that the prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he committed the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence.

And at p. 153:

If all the cases had been frauds of a similar character shewing a systematic course of swindling by the same method, then the evidence would have been admissible.

(1) [1915] 2 K.B. 702.
(2) [1914] 1 K.B. 414.
(3) [1900] 2 Q.B. 758.
(4) (1915) 84 L.J. K.B. 2153.
(5) 30 L.T. 503.
(6) [1910] 1 K.B. 149.

The passage first quoted from the *Fisher Case* (1) is approved in *Rex* v. *Rodley* (2), at p. 472. In *Rex* v. *Ball* (3), a case of incest, the House of Lords upheld the admission of evidence of previous incestuous relations between the defendants to establish, as Lord Loreburn C. says, at p. 71, that

> the proper inference from their occupying the same bedroom and the same bed was an inference of guilt or—which is the same thing, in another way—that the defence of innocent being together as brother and sister ought to fail.

This, says Avory J. in *Rex* v. *Rodley* (2), at p. 473,

> comes within the rule previously indicated that (such) evidence is admissible to rebut a defence really in issue.

In *Reg* v. *Ollis* (4), the defendant was charged with obtaining money on three worthless cheques. To prove guilty knowledge the prosecutor on a former charge against the accused (of which he had been acquitted), based on a like use of a single worthless cheque, was called and gave evidence that he had been induced to give the accused his cheque by a false representation that another cheque taken in exchange was good. A strong court held the evidence admissible, Lord Russell of Killowen C.J. saying, at p. 76:—

> It is impossible to say that all these facts were not relevant *as shewing an intention to defraud*. The fact of the dishonour of the first cheque might, and perhaps ought to, have been capable of explanation, but it is impossible to say that it was not relevant.

Channell J., at p. 782, gives a very apt illustration of the principle as applied to a case of passing counterfeit coin.

In part the syllabus in *The People* v. *Hodge* (5), reads as follows:—

> Where defendant on trial for manslaughter in procuring an abortion, admitted the abortion, but claimed that he believed that the operation was necessary, and that he performed it without criminal intent, evidence that he had performed a similar operation on another woman

(1) [1910] 1 K.B. 149.
(2) [1913] 3 K.B. 468.
(3) [1911] A.C. 47.
(4) [1900] 2 Q.B. 758.
(5) 141 Mich. 312.

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for the purpose of producing an abortion was admissible on the issue of intent.

See too *The People* v. *Seaman* (1), at p. 357 *et seq.*

I do not cite *Reg.* v. *Dale* (2), referred to by Mr. Justice Cross, because, although very much in point, and an opinion of Charles J., whom Lord Alverstone in *Rex* v. *Thomson* (3), at p. 22, speaks of as "a great authority," it has been adversely commented upon by that learned Chief Justice at p. 396 and by Lawrence J., at p. 424, in *Rex* v. *Bond* (4), the case which probably calls for the most careful consideration.

That case involved a charge similar to that now before us. The accused had admitted to Crown witnesses that he had used instruments on the complainant but "suggested" that it was for a lawful purpose and with no criminal intent.

That was substantially his defence. The evidence of one Taylor, that he had performed a like operation upon her to procure a miscarriage, was admitted to shew criminal intent. She added, however, that the accused had told her "he had put dozens of girls right." The judgments are very carefully and, if I may be permitted to say so, as was usual with that learned judge, very accurately analysed by Osler J.A. in *Rex* v. *Pollard* (5), with the probable exception of that of A. T. Lawrence J. As Mr. Justice Osler says, at p. 99:—

> The point (in *Pollard's Case*(5) was not actually decided in the recent case of *The King* v. *Bond*(4), but it would seem from the opinions of the majority of the judges who took part in the decision that the evidence was not in the circumstances admissible. * * * In the case before us the evidence of system which carried the day against the accused in *The King* v. *Bond* (*supra*), or anything approaching it, which would let in proof of a single prior criminal act as part of a system is wanting; and therefore, in my opinion, the conviction of the prisoners cannot stand (p. 102).

The evidence of system referred to was the state-

(1) 107 Mich. 348.
(2) 16 Cox C.C. 703.
(3) [1912] 3 K.B. 19.
(4) [1906] 2 K.B. 389.
(5) 19 Ont. L.R. 96.

ment of the prisoner in the *Bond Case*(1) made to the Crown witness Taylor that, "he had put dozens of girls right." *Pollard's Case*(2), therefore, is authority for the admissibility on the issue of intent of proof of a single prior criminal act of like nature provided some proof is first given of a system of which it may form part.

Of the seven judges who heard the appeal in the *Bond Case*(1), two, Alverstone C.J. and Ridley J., thought the evidence of the prior act inadmissible apparently because the defence was not accident or mistake and the evidence of system was in their opinion insufficient.

Jelf J. and Darling J. thought the evidence admissible without reference to the statement of the accused as to his treatment of dozens of other girls, and that the fact that it was a single instance affected only its weight and not its admissibility. The reasoning of Darling J., at pp. 409-10, is very cogent. He concludes:—

> Taylor's evidence went to prove that, contrary to the defendant's allegation in defence as to his being engaged in doing a lawful act, he was doing a thing which, in his view, was apt to procure abortion, and that because it was so he had already done it with that unlawful avowed knowledge and purpose. This evidence, therefore, tends to prove that the defendant had, in repeating his former conduct, an intention different from that alleged by him in his defence, so it is not foreign to the point of it nor less relevant because it goes to prove the charge in the indictment.

Jelf J., at p. 413, says:—

> Upon the question whether there was or was not a design on the prisoner's part to procure the miscarriage of Ethel Jones evidence that on another occasion he had done the same thing with similar instruments under similar circumstances with that design upon another girl seems to me to have a definite bearing. The fact that only one other case was brought forward and that case nine months old, goes, in my mind, only to the weight, and not to the admissibility of the evidence. The subject of inquiry is the state of mind of the prisoner when he used the instruments upon Ethel Jones and the improbability that on one occasion under precisely similar circumstances he should have the design to procure a miscarriage, and on the other occasion should have

(1) [1906] 2 K.B. 389. (2) 19 Ont. L.R. 96.

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another and an innocent object would tend to shew (and that is all that is necessary) that he had the bad design in regard to Ethel Jones. Of course, if instances are multiplied, the weight of the evidence is greatly increased, and if a system is shewn it may be irresistible. But to my mind it is quite unnecessary to shew a system which is only a question of degree.

Kennedy J., if there had not been anything more, would have excluded the evidence of a single prior act done nine months before as affording no just ground of an inference of guilty intent in the case on trial. Citing *Reg.* v. *Cooper* (1), at pp. 549-50, however, he thought the statement made by the prisoner to the witness Taylor could not be excluded and amounted to proof of a course of conduct sufficient to render proof of the prior operation admissible as evidence of an act that formed part of such course of conduct and warranting an inference of a systematic pursuit of the same criminal object. A single instance of a former similar offence is in his opinion relevant without proof of system only to rebut a defence of accident or mistake.

I confess my inability to understand how evidence of a single prior similar act can be relevant to an issue of design versus accident or mistake, if it be wholly irrelevant to an issue of criminal versus innocent intent.

A. T. Lawrence J., as I read his judgment, distinctly held evidence of the former offence admissible as relevant on the issue of intent. He says, at p. 420:—

> The relevance depends upon the issues actually in contest; whenever it is in issue whether the prisoner, though he did the act alleged, did it without any intention, *i.e.*, accidentally, or without any criminal intention, *i.e.*, innocently, such evidence may be given.
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> * * * * * * * * *
>
> If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence is admissible to rebut this defence by shewing knowledge of some fact essential to guilty knowledge or by shewing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances. The number of cases and the peculiarity of the circumstances tend to shew the improbability of the innocent intention (p. 421).

(1) 3 Cox C.C. 547.

The mind of the prisoner can only be revealed by his words or by his acts. It is in many cases impossible to form a sound conclusion upon the state of his mind at a given moment, unless his words and acts under similar circumstances are subjected to investigation. It is for this reason that I think the words of Lord Herschell—"to rebut a defence which would otherwise be open to the accused"—are an essential part of the proposition of law. This idea is also expressed by Lord Alverstone C.J. in *Rex* v. *Wyatt* (1), when he says that such evidence is admissible as negativing any accident or mistake or the existence of any reasonable or honest motive.

Any statement of the law which omits this latter part of the proposition would seriously cramp the administration of justice and cannot be supported upon principle.

* * * * * * * * * *

In all cases in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstances there must be a nexus between the two sets of facts otherwise no inference can be safely deduced therefrom (p. 424).

The learned judge concluded:—

It is impossible without reversing a long series of cases to say that the evidence of Taylor was not admissible. It shewed that the illness of the prosecutrix was the result of design, and not of accident; it shewed that the prisoner's scheme or system when the indulgence of his passions had got girls into trouble was to use these instruments upon them to relieve himself from the burden of paternity; *it tended to rebut the defence he set up of an innocent operation, and to negative any reasonable or honest motive for its performance.*

It seems to me with respect, to be reasonably clear that Mr. Justice Lawrence agreed with Darling and Jelf JJ. rather than with Kennedy and Bray JJ., as Mr. Justice Osler appears to have thought.

No doubt, however, as put by Osler J.A., it was

the evidence of system which carried the day against the accused in *The King* v. *Bond*(2).

It led Kennedy and Bray JJ. to hold the evidence in question admissible thus supporting the conclusion of Darling, Jelf, and Lawrence JJ. in favour of dismissing the appeal. While the *Bond Case* (2), therefore, certainly cannot be cited as an authoritative decision for the admission of evidence of the commission by the

(1) [1904] 1 K.B. 188 at p. 193. (2) [1906] 2 K.B. 389.

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accused of another similar offence, if unaccompanied by some other similar evidence of system, to prove criminal intent where that is in issue, or to rebut a defence of innocent or lawful purpose, the reasoning of Darling, Jelf, and Lawrence JJ. seems to me unanswerable. With Jelf J. I am of the opinion that whatever objection there may be to evidence of a single other similar offence goes to its weight only and not to its admissibility. It

tends to rebut the defence (of innocent purpose) which would be otherwise open to the accused

(*Makin* v. *Attorney-General for New South Wales*(1))—

to rebut the defence set up,

(*Rex.* v. *Mason*(2))—

to rebut a defence really in issue,

(*Rex.* v. *Rodley*(3))—

to overthrow a defence already set up and admitted to be the defendant's answer to the charge

Rex. v. *Bond*(4), *per* Darling J.—

Its object is to negative the defence of absence of criminal intent (*R.* v. *Boyle and Merchant*(5)), to establish that the defence of innocent conduct should fail (*Rex.* v. *Ball*(6)), to prove a particular intention (*Perkins* v. *Jeffrey*(7)). With Lord Russell C.J. I find it impossible to say that such evidence is not relevant (*Reg.* v. *Ollis*(8)), inasmuch as it tends to make more probable the criminal intent regarding which, in view of the defence set up, it was essential that the Crown should not leave room for reasonable doubt. How far it does so is a question of degree which affects its weight not its admissibility; see the speech of Lord Atkinson in *Thompson* v. *The King*(9), at p. 72.

(1) [1894] A.C 57.
(2) (1914) 10 Cr. App. Rep. 169.
(3) [1913] 3 K.B. 468.
(4) [1906] 2 K.B. 389.
(5) [1914] 3 K.B. 339.
(6) [1911] A.C. 47.
(7) [1915] 2 K.B. 702.
(8) [1900] 2 Q.B. 758.
(9) 13 Crim. App. R. 61; [1918] A.C. 221, 229, 231.

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But while I think the evidence of the Cleremont and Cloutier women was admissible without and apart from any evidence of system, we have in the passage quoted from the testimony of Alice Vachon, an admission by the accused of his practice or system of procuring abortions quite as clear and strong as was that deposed to by the witness Taylor in the *Bond Case*(1) and deemed sufficient by Kennedy and Bray JJ. to render admissible evidence of another like offence committed by the accused. The evidence here is of two like offences in the commission of which the method pursued was so similar to that adopted in the accused's treatment of Alice Vachon that the necessary nexus is clear notwithstanding that they took place, one, two years, and the other, four or five years before.

The admissibility of the evidence could probably be upheld also on the ground that it is corroborative of the testimony of Alice Vachon that the accused had told of having treated other girls in the same manner. *Rex.* v. *Chitson* (2).

The weight of the testimony was, of course, for the consideration of the trial judge in this case, as it would have been for that of a jury had the trial been by jury. I entertain no doubt whatever that the evidence objected to was admissible.

Nor have I any doubt that the evidence was properly received in rebuttal. It was offered to meet the defence of innocent purpose put forward by the accused. While such a defence was always open, there was no probability of its being set up until the prisoner gave his testimony. It was then actually in issue. *Rex* v. *Bond* (1), at pp. 409, 420. The evidence was offered to rebut the respondent's denial of criminal intent and, according to the view stated in a very recent criminal case, could not properly have been admitted for that

(1) [1906] 2 K.B. 389. (2) [1909] 2 K.B. 945.

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purpose until that defence was definitely put forward. Avory J. in delivering the judgment of the Court of Criminal Appeal in *Perkins* v. *Jeffery* (1), said, at p. 66:

> Having regard to what was said in the House of Lords in the case of *Rex* (or Director of Public Prosecutions) v. *Christie* (2), as to the practice in a criminal case of guarding against the accused being prejudiced by evidence which though admissible would probably have a prejudicial influence on the minds of the jury out of proportion of its true evidential value, we think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake, or *absence of intention* to insult, is definitely put forward.

But as Osler J.A. said in *Rex* v. *Pollard* (3), at p. 103, in answer to the contention of the appellants that the evidence objected to, if admissible, should have formed part of the Crown's case in the first instance and that it was erroneous to admit it in reply:—

> In my view, however, the point is of no importance. If admissible at all, the evidence might, by leave of and in the discretion of the trial judge, be given at either stage of the case for the purpose of disproving honesty of motive, if that were the defence relied upon, or of rebutting a defence of accident or mistake, or to contradict the defendant on a point material to the charge, as in *The King* v. *Higgins* (4).

In *Rex* v. *Crippen* (5), the Court of Criminal Appeal held that:

> Where evidence which is relevant to the issue is tendered by the prosecution to rebut the case set up by the defence it is for the judge at the trial to determine in his discretion whether such evidence should be allowed to be given or not. Even if the judge exercised his discretion in a way different from that in which the Court of Criminal Appeal would have exercised it, that affords no ground for quashing the conviction of the prisoner. If, however, it is shewn in any case that the prosecution has done something unfair which has resulted in injustice to the prisoner the Court of Appeal may interfere.

Here the learned judge when admitting the testimony of Cleremont and Clouthier definitely informed the defendant that he would have the fullest opportunity of meeting it by calling any further evidence he might wish in sur-rebuttal and offered him an adjourn-

(1) 25 Cox C.C. 59.
(2) [1914] A.C. 545.
(3) 19 Ont. L.R. 96.
(4) 7 Can. Cr. Cas. 68.
(5) 27 Times L.R. 69, [1911] 1 K.B. 149.

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ment for that purpose, and the defendant actually gave evidence in contradiction of that given by those witnesses.

Not only was the evidence in my opinion properly admitted but every care was taken that the accused should suffer no possible injustice by its reception in rebuttal.

The appeal fails and should be dismissed.

Brodeur, J.

BRODEUR J.—I am of opinion that this appeal should be dismissed with costs. The reasons for judgment of Mr. Justice Anglin and of Mr. Justice Lemieux having been communicated to me, I concur in those reasons.

Lemieux, C.J.

LEMIEUX C.J. (*ad hoc*).—On the 15th May, 1917, Brunet, a physician, was convicted, before Judge Choquette, at Quebec, of practising abortion on the person of one Alice Vachon, and sentenced for such crime to five years in the penitentiary (303 Crim. Code).

Before passing sentence, the judge at Brunet's request reserved for the decision of the Court of King's Bench, the two following questions:—

1. Whether the presiding judge had jurisdiction to hear and determine the case;

2. Whether certain evidence adduced in rebuttal by the Crown was legal or not.

Appellant Brunet has contended, as well before the Court of King's Bench as before the present court, that Judge Choquette had no jurisdiction to hear and determine the case and that the evidence in reply put in by the Crown was illegal and prejudicial to the accused inasmuch as the trial judge had relied on such evidence to convict the appellant.

First Question.

Validity of the evidence in rebuttal or in reply adduced by the Crown.

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As stated in the record of the reserved case, it was proved by the prosecution that the accused had, on the 13th, 14th, 15th and 16th days of July, 1916, used certain surgical instruments on the person of one Alice Vachon, an unmarried female, who was pregnant at the time, for the purpose of procuring her miscarriage.

The Crown, in making its proof in chief, adduced the evidence of the girl upon whom the illegal operation had been performed as well as medical evidence of the symptoms of Alice Vachon and of the mutilated condition of the fœtus and then rested its case.

Brunet, the accused, thought proper to be examined in his own behalf and stated, as a witness, that the instruments used by him on the person of Alice Vachon were so used for a lawful purpose and without any criminal intent.

In order to repel such criminal intent which the girl's evidence would fasten on him, the following question is put to Brunet by his attorney:—

Q.—At all the visits which Alice Vachon made to you, she has sworn that you had worked in her body with certain instruments to bring about abortion, at almost every one of her visits, except in the afternoon; I ask you, is that true or not?

A.—I did not use instruments to bring about abortion, but I used instruments to produce disinfection.

In cross-examination, he was asked by the Crown if it was not true that, in 1914, he had procured the miscarriage of two females living on Bridge St., Quebec city.

Following are the questions asked him in that connection as well as his answers thereto:—

Q.—Now, did you not either procure the abortion of two young girls residing on Bridge St. in the fall of 1914? Question objected to. Question allowed. A.—It was not done, that is sure.

Q.—I put you the question whether, in the fall of 1914, you did not procure the abortion particularly of a girl residing on Bridge St.? Question objected to. Objection reserved. A.—I do not recollect that.

Q.—Will you swear that that did not happen? A.—I would have to see the person to be able to tell.

Q.—You cannot remember? A.—Why no; in 1914, I do not remember.

The Crown, in reply or in rebuttal, heard, as witnesses, two women, Laetitia Cloutier and Bernadette Clouthier, who testified that the appellant had procured the miscarriage of each of them, some few years before, by methods which resembled those described by Alice Vachon as having been applied to her.

Brunet, heard as a witness in his own behalf, expressly admits having used instruments on the person of Alice Vachon; he denies however that it was with the criminal intent of procuring abortion, but states, on the contrary, that it was for disinfection purposes.

Brunet's assertion was obviously intended to exculpate himself and to repel or disprove all evidence tending to shew that he had employed such instruments for abortive purposes.

Under such circumstances, was the Crown entitled to contradict Brunet, to rebut his affirmation and to examine, in reply, witnesses to shew that Brunet, with a criminal intent, that of causing abortion, had performed, on those very witnesses, similar practices, using instruments like those used in the case of Alice Vachon?

In this matter of evidence in reply, the rule adopted by all the English authors is that such evidence must not be confirmatory. Evidence in reply must, as a general rule, be strictly confined to rebutting the defendant's case and must not merely confirm that of the plaintiff or prosecutor.

Brunet's contention, as embodied in his testimony, that he had used certain instruments on the person of Alice Vachon not with a view to determining abortion but in order to produce disinfection, purported on his behalf the allegation of a certain fact intended to establish his good faith and dismiss any criminal intent.

Such his claim amounted to a special plea based on

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a special fact which the Crown, in the examination in chief, could not anticipate. That theory of the disinfection constituted a new fact which the Crown had the right to disprove or rebut by evidence in reply of other facts excluding good faith, that is to say, of similar practices previously performed by the accused, on other persons, for a like criminal purpose.

Such evidence was not confirmatory of the prosecutor's case, but was evidence the nature and intent of which was to rebut the defendant's case and pretensions.

Jurisprudence or at least a list of judgments are to the effect that the evidence to prove in reply or in rebuttal against the accused similar acts committed by him on other occasions is legal, when the defence of absence of intent to commit a crime is definitely put forward. It has been decided that such evidence was admissible upon three grounds: to establish design, to rebut the defence of accident, mistake or lack of criminal intent, and as shewing a systematic course of conduct.

As Lord Reading C.J. said in *Perkins* v. *Jeffery* (1):

> Such proof does not tend to shew generally that the accused had a fraudulent or dishonest mind, but to shew that he had a fraudulent or dishonest mind in the particular transaction, the subject matter of the charge, then being investigated.

In the most recent criminal law treatise entitled Outlines of Criminal Law, published by Kenny, Professor of the Laws of England, 7th ed., p. 354, we find the following doctrine expounded:—

> Nor is there, even in English law, any intrinsic objection to giving evidence of the prisoner having committed other crimes, if there be any special circumstance in the case to render those crimes legally relevant.
>
> * * * * * * * * *
>
> Whilst the fact of a prisoner having committed other similar offences is not relevant to the question whether he committed the *actus reus* of which he is accused now, yet, so soon as this *actus reus* has been fully

(1) 25 Cox Cr. Cas. 59, at p. 66.

established, evidence of those previous offences may well be relevant to the question of his state of mind in committing this act (*his mens rea*) if the defendant do actually raise that question (*Rex* v. *Rodley*) (1). Such evidence was originally admitted only in exceptional offences where a denial of *mens rea* was peculiarly easy, like embezzlement or false pretences. But now the admissibility is recognised as a general rule in no way limited to peculiar classes of crime.

And the author quotes a number of cases where decisions were rendered supporting that principle.

On that ground, we find: that the evidence in reply adduced by the Crown through the two girls Leatitia and Bernadette Clouthier was legal inasmuch as such evidence was not confirmatory of the prosecution's case, but was meant to disprove or deny the assertion made under oath by Brunet, of a new fact intended to establish his good faith; that such evidence was further legal inasmuch as it exposed or purported to expose Brunet's perverse or criminal mind in his practices or in his use of instruments on the person of the Vachon girl, to procure her abortion, by reason of the fact that, for a like criminal purpose, he had previously performed in a similar way on the Clouthier girls.

Second Question.

Had Magistrate Choquette proper jurisdiction to hear and determine the case?

Magistrate Choquette, who tried and convicted Brunet, is a Judge of the Sessions of the Peace, but his jurisdiction as such is subject to a particular condition, that is to say, he may sit only in the case of absence or inability to act of Judge Langelier, who is the regular Judge of the Sessions of the Peace, in and for the District of Quebec.

Brunet's contention is that Magistrate Choquette has heard and determined the information with which he was charged without due power or jurisdiction so to do, owing to the fact that, at the time of the trial,

(1) 9 Cr. App. R. 69, 75.

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Judge Langelier was not absent, but that, on the contrary, he was then present in his chambers, at the court house, Quebec city, and furthermore that the condition to which Magistrate Choquette's jurisdiction is subject, *i.e.*, the absence of Judge Langelier, does not appear in the record.

All the proceedings had in the Brunet case before Magistrate Choquette bear, as a head-line, the statement that Magistrate Choquette is sitting in the absence and owing to the absence of Judge Langelier.

Such declaration in the record is supposed to be true or implies a presumption *pro tantum* of truth, to wit: that Judge Langelier was juridically absent for reasons deemed valid which it is not our province to question or appreciate. Such presumption *pro tantum* could of course be nullified and superseded by a stronger presumption or by legal evidence, offered in the usual way of legal debate, in support of a plea declining the jurisdiction of the court.

No such declinatory plea was ever urged in this matter.

We read, in Broom's Legal Maxims, p. 722, that

where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is *omnia præsumuntur rite et sollenniter esse acta donec probetur in contrarium*, everything is presumed to be rightly and duly performed until the contrary is shewn. The following may be mentioned as general presumptions of law illustrating this maxim—that a man, in fact acting in a public capacity, was properly appointed and is duly authorised so to act; that the records of a court of justice have been correctly made, according to the rule, *res judicata pro veritate accipitur*; that judges and jurors do nothing causelessly and maliciously; that the decisions of a court of competent jurisdiction are well founded, and their judgments regular, etc.

The statute, when referring to the *absence* of Judge Langelier, making conditional upon such absence the jurisdiction with which Magistrate Choquette is vested, uses a word which must be construed in a broad and liberal acceptation. The word "absent" does not

mean "physically away from the district or the court house." The juridical construction of that word "absence" rather implies non-presence of the judge on the bench or in the court-room. The reasons for the judge's absence from the bench or the court-room may be numerous and may consist in relationship to either of the parties in the case, in having expressed his opinion on the matter at issue, in his feeling temporarily indisposed and in so many other reasons *ejusdem generis* as may induce the judge to abstain from attendance on the bench or in the court-room.

It is Judge Langelier himself who, in such instances, appreciates the validity of the reasons of his absence. He is not bound nor called upon to make a statement in writing as to his absence and his reasons therefor or to fyle same in the record, in order to vest Magistrate Choquette with the necessary jurisdiction.

Such absence was sufficiently established by the statement heading the proceedings in the case: "present, Hon. Judge Choquette, in the absence of Judge Langelier."

The following decision seems to conform to the spirit of the statutory enactment under discussion as well as to common sense: "Absent" as used in Acts, 1888, p. 64, authorising the Chief Justice to hold court in the absence of a law judge means non-presence in the courts. When the law judge is temporarily away, he must be presumed to be away by reason of some inability to attend, and he is absent in the statutory sense. *The State* v. *Engeman* (1), from Words and Phrases Judicially Defined, vol. 1, p. 35.

At the time when the reserved case was argued before the Court of King's Bench, the Crown fyled a sworn declaration wherein Judge Langelier stated that

(1) 23 Atl. Rep. 676; 54 N.J. Law 247.

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it was to his knowledge and with his consent that Magistrate Choquette had tried the Brunet case.

Such statement, supposing it were valid or necessary, would go to shew that Judge Langelier had agreed that the case be heard by Magistrate Choquette, because, obviously, for one reason or another deemed legitimate, he himself did not want to act. The above declaration would also preclude any supposition that Magistrate Choquette might have interfered in the case or arrogated to himself powers and jurisdiction with which he was not legally vested.

In this affair, after Brunet had been sentenced, there took place certain formalities which, unless sternly discountenanced and reproved by our courts of justice, might lead to serious mishaps of a nature to interfere with the administration of justice in criminal matters.

Two months after the sentence, a clerk in the office of the Court of Sessions of the Peace gave his affidavit wherein he stated that Judge Langelier was present in court while Brunet was being tried. That clerk had no authority to make such declaration which had and could have no legal weight or value whatever. It could not avail as against the oft-repeated statement contained in the record that Magistrate Choquette had acted in the absence of Judge Langelier.

Other affidavits were also produced either to deny or corroborate the entry made in the record anent the absence of Judge Langelier. Such affidavits were not and could not be of any consequence in the decision of the reserved case. If really Magistrate Choquette had no jurisdiction, if he usurped the functions which he then exercised, there was but one way, during the trial, to dispute his jurisdiction and that was by special plea or exception. And if such want of jurisdiction only

came to appellant's knowledge after his conviction, he could yet complain by urging the usual grounds, which he utterly failed to do.

We consequently find that Magistrate Choquette had due jurisdiction to hear and determine the case.

I am for dismissing the appeal.

Appeal dismissed.

ANNOTATION—ABORTION BY PHYSICIAN'S OPERATION—PROVING OTHER OFFENCES TO REBUT DEFENCE OF JUSTIFICATION. **Annotation.**

Odgers (Law of Evidence 1911, page 34) states the general rule to be that whenever the state of mind in which a party did an act is material, anything that party said or did in any other transaction previous or subsequent is admissible, "if it throws light on the state of his mind when he did the act in question." The rule applies both to civil and criminal cases and as to the latter it forms an exception to the rule that no evidence will be admitted of the prisoner's bad character, or of other offences alleged to have been committed by him, or of other offences of which he has been convicted, until he has been found guilty of the crime for which he is now charged.

This enables evidence of other transactions to be given where the issue is raised of guilty knowledge or malice or fraudulent intent; *R.* v. *Cooper*, 1 Q.B.D. 19; *Praed* v. *Graham*, 24 Q.B.D. 53; *R.* v. *Rhodes*, [1899] 1 Q.B. 77; but the other transactions must always be relevant to the question of guilty knowledge, intent, etc., in the case being tried. The other transactions, whether previous or subsequent, must throw light on the state of mind of the accused when he did the act charged. Much of the jurisprudence on evidence of this class has developed in the last quarter-century. One of the leading cases is *Makin* v. *Attorney-General of New South Wales*, [1894] A.C. 57, 63 L.J.P.C. 41, 17 Cox C.C. 704. Lord Herschell said in that case, [1894] A.C. 57, at page 64, that the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible *if it be relevant* to an issue before the jury, "and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or "to rebut a defence which would otherwise be open to the accused." This latter expression as interpreted in later cases does not mean that such evidence might be called to rebut any defence possibly open but of an intention to rely on which there was no probability whatever, but a defence which is actually set up and admitted to be the defendant's answer to the charge; *R.* v. *Bond*, [1906] 2 K.B. 389, at 409.

The doctrine has been applied in disproving the bona fides of a physician's prescription in a liquor law prosecution *R. v. Welford* 41 O.L.R. 359.

Annotation.

The practice in criminal cases should be to avoid putting in evidence of other acts which though strictly admissible would probably have a prejudicial influence on the minds of the jury *out of proportion of its true evidential value*, until the defence of accident, mistake or absence of criminal intent, is "definitely put forward," *R.* v. *Jeffery* (*Perkins* v. *Jeffery*), [1915] 2 K.B. 702, 25 Cox C.C. 59, 26 Cox Mag. Cas. 518, applying *R.* v. *Christie*, [1914] A.C. 545. The charge in *Perkins* v. *Jeffery* was indecent exposure with intent to insult. The case came before Lord Reading, C.J., Avory and Sankey, JJ., in the Court of Criminal Appeal. The complainant had to prove first that the respondent had exposed himself; secondly, that he had done so wilfully and not accidentally; and, thirdly, that he had done it with intent to insult. One of the questions raised was whether the accused (respondent) giving evidence on his own behalf could be asked in cross-examination if he had exposed himself to the same young woman *at the same place* (a certain park) two months previously. A second question was whether evidence was admissible on the part of the complainant that the accused had so exposed himself on the prior occasion at the same park; and a third question whether evidence was admissible on the part of the complainant that the respondent had *on other occasions* indecently exposed himself with intent to insult females *at the same place* and about the same hour.

The court held that the Criminal Evidence Act, 1898 Imp., did not exclude any question in cross-examination which may tend to criminate the accused of the offence charged, nor any evidence which is admissible to shew that he is guilty of the offence charged. Further, it was held that the question in cross-examination and the evidence of the complainant directed to shew that he had done the same thing at the same place and to the same woman were admissible and relevant to each of the issues raised for the purpose of shewing that she (the complainant) was not mistaken in her identification, that the act was done wilfully and not accidentally and that it was done with intent to insult her. But with regard to the evidence tendered of other witnesses to shew that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with the intent to insult females on other occasions at the same place, the court pointed out that the dates of the other occasions were not before them and held that unless it appeared clearly that the defence that the act was not done wilfully or with intent to insult was to be relied upon, and that the other occasions were *sufficiently approximate to the alleged offence* to shew a systematic course of conduct, the evidence should not be admitted. The court thought it open to doubt whether evidence is admissible to prove a "system or course of conduct" unless it is relevant to negative accident or mistake or to prove a particular intention, *Perkins* v. *Jeffery*, [1915] 2 K.B. 702. There must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions, which it is sought to give in evidence, to make such

evidence admissible. *R.* v. *Boyle and Merchant*, [1914] 3 K.B. 339, 347. **Annotation.**

The other acts may have such a connection (nexus) with the act charged that the criminal intent appearing from the other acts, or shewn in connection therewith, is inferentially the same in the act charged. See *R.* v. *Ollis*, [1900] 2 K.B. 758, 69 L.J.Q.B. 918, 19 Cox C.C. 554. In *Brunet* v. *The King*, *supra*, Anglin, J. (with whose opinion Davies and Brodeur, JJ., expressed concurrence) said that whatever objection there may be to evidence *of a single other similar offence* goes to its weight only and not to its admissibility. *R.* v. *Thompson*, 13 Cr. App. R. 61, 72. It is relevant if it tends to make more probable the criminal intent regarding which, *in view of the defence set up*, it was essential that the Crown should not leave room for reasonable doubt. *Brunet* v. *The King*, *supra*.

The two important questions to be considered in each case are whether there is a sufficient *nexus* between the act charged and the other acts; and are the other acts *relevant* to the question of accident, intent, or the like, raised in respect of the act charged. The *Brunet* case, *supra*, is singularly lacking in the *indicia* which might be expected in this regard so far as the opinions delivered are concerned. The charge was against a surgeon for procuring an abortion by an instrument and the defence raised admitted the use of an instrument but attempted to justify. This defence appears to have been backed up by the evidence of the surgeon himself and the opinions above reported do not shew that any expert evidence was brought forward to discredit the theory that the use of instruments would be justified under the physical conditions which the accused swore he found in the patient, *i.e.*, a miscarriage already begun. Nothing appears on the question of the surgeon's remuneration for the service performed so as to shew motive from any excessive charge. The mention by the accused to the complainant of other similar operations said to have been performed would naturally refer to the alleged justifiable conditions to which he made reference in his testimony. The other persons who were operated upon were not named in the conversation, and it would seem that by calling two persons operated upon by the accused at remote dates, the accused was at least, indirectly, called upon to affirm or deny whether they were the persons he had talked about, and to affirm or deny that the conditions to which they deposed were consistent with the physical conditions he found in their cases. Cases may arise in which the physician or surgeon, however innocent he may have been in the case in hand, may prefer to take the risk of conviction rather than disclose matters relating to his treatment of other patients. There seems to be ground for much doubt as to whether the *nexus* between the case being tried and the alleged offences of two and four years previously was made out. The case was not like one of "system" as that term is used in fraud cases. In *R.* v. *Fisher*, [1910] 1 K.B. 149, 79 L.J.K.B. 187, 22 Cox C.C. 270, a case of false pretences, it was held that the falsity of the statement there

Annotation. in question was not proved by giving evidence that in other cases the prisoner made other false statements, though it did tend to shew that the prisoner in that case was a swindler; and although there was sufficient evidence of the false pretence alleged to justify the conviction, the evidence of the other cases might have influenced the jury and the conviction was therefore set aside. The court in *R.* v. *Fisher*, *supra*, said: "There is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by shewing that he has also swindled in some other manner." Can it be said that the evidence in *Brunet's* case, *supra*, so far as disclosed in the opinions delivered, opened the way for proof of other criminal acts of a like character with other parties alleged to have been committed years before the abortion in question? The serious question which the case suggests is whether a surgeon who has admittedly performed an operation which was followed by a miscarriage can safely plead justification without having his female patients generally brought into court, whether willingly or not, to testify to operations of that character performed upon them. It can be assumed from the character of the defence that circumstances of danger to the life of the mother may justify an operation to bring on a miscarriage. See argument in *R.* v. *Bond*, [1906] 2 K.B., at 392; Culbertson on Medical Men and the Law (1913), 234, 236; *Honnard* v. *State*, 77 Ill. 483; *State* v. *Howard*, 32 Vt. 380; *Commonwealth* v. *Brown*, 121 Mass. 69.

It may also be assumed that in many cases the dangerous physical condition of the woman prior to the surgeon operating is the result of criminal attempts made by the woman herself before the surgeon is consulted. What is the surgeon's position if the prior criminal attempts have set up both a miscarriage and septic poisoning? If the woman admits the prior attempts, she is laying herself liable to prosecution and may consequently be expected to deny them although the fact may be patent to the medical man. If the latter is to be guided by the dictates of prudence and regard for possible consequences to himself, he will refer the case to a public hospital, or if that be declined by the patient, he will at least refuse to operate unless another surgeon of standing is called in to verify the fact of the dangerous condition of the patient. If, in fact, the patient's life was already in danger, very prompt action might be necessary and there might be exceptional cases in which it would not be practicable for the surgeon to surround himself with all the safeguards which prudence might dictate. He may be called upon to act speedily to save life under circumstances under which the patient is not only oblivious of the danger she already is in but refuses to believe it when told by the medical adviser. If he performs an operation and a miscarriage follows, is it relevant to the question of criminality or non-criminality that the accused had been guilty of other abortions years before? The answer to that question will depend upon the circumstances of the particular case; there must be a *nexus* or there

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can be no relevancy. In *Weed* v. *The People*, 56 N.Y. 628, the accused was indicted for procurring an abortion; a circular advertisement issued by the accused was held admissible in which he advised females who should consult him how the matter could be kept a secret and they protected from criminal punishment. This was held admissible as shewing knowledge of the character of the drugs admininstered and their probable effect and that he administered them for the purpose of procuring an abortion. So in *People* v. *Seaman* (1895), 107 Mich. 348, 363, the guilty knowledge and intent of the physician defendant were shewn by the character of the house to which the accused had directed the woman to go, it being a place of resort for abortion practices, and that accused was frequently there "and for the very purpose of performing his part in these criminal operations" (107 Mich., at 363). The admission of testimony in *People* v. *Hodge*, 141 Mich. 312, 104 N.W. 598, of an abortion performed on another person was distinguished from the denial in *People* v. *Lonsdale*, 122 Mich. 392, on the ground that the criminal intent was a necessary conclusion in the *Lonsdale* case from the act proved; but that in the *Hodge* case it was not and that such intent "depended on the truth or falsity of defendant's defense that the act was done for a legitimate purpose" (141 Mich. 314). The *Hodge* case was a prosecution for manslaughter resulting from an abortion and the defendant claimed that he believed the operation was necessary. The prosecution called a woman who swore to a similar operation upon her for the avowed purpose of procuring an abortion and this was held admissible along with proof of the defendant's request to this witness that she should get what money she could from the man responsible for her condition and give him part of it. The *Hodge* case if supportable under English jurisprudence is a border line decision.

A distinction is to be made between mere proof of prior similar crimes and proof of crimes involved in a systematic course of criminal conduct. *R.* v. *Fisher*, [1910] 1 K.B. 149, 153. An accused person should not be convicted because he had previously been guilty of other crimes of that class or designation nor because he may have denied such other crimes or misrepresented the conditions which surrounded them.

The leading English decision on an abortion charge against a physician is *R.* v. *Bond*, [1906] 2 K.B. 389. The dissenting judgment of Lord Alverstone, C.J., shews that the real point of the decision was whether the facts that the accused physician had had improper intercourse both with the girl as to whom the charge was being tried and with another girl called to testify for the prosecution and that both girls became pregnant in consequence and were operated upon by the accused, tended to shew a system or course of conduct on the part of the prisoner in cases in which he had got girls into trouble: See [1906] 2 K.B., at 395. Lord Alverstone, C.J., thought that in the particular case this ground was too dangerous and not sufficient to justify the admission of the evidence but that he was not to be considered as holding that there might not be cases in which the evidence would have been ad-

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missible on such grounds. He added: "Nor does it by any means follow that evidence will be inadmissible on the ground only that it goes to prove only one other criminal act and not one of a number. There may be other circumstances shewing the act sought to be proved to be part of a criminal practice or system of which the criminal offence charged in the indictment formed part." Kennedy, J., referred particularly to *R.* v. *Geering*, 18 L.J.M.C. 215; *R.* v. *Cotton* (1873) 12 Cox C.C. 400; *R.* v. *Roden* (1874), 12 Cox C.C. 630, and *Makin* v. *Attorney-General of New South Wales*, [1894] A.C. 57, and said:

"In all these cases it will, I think, be found that the occurrences of which evidence was admitted were occurrences connected with conduct on the part of the accused, so repeated and so closely linked in point of time as well as character with the offence for which the prisoner was on his trial, that, according to the test of justice as well as of common sense, there could be no serious challenge of its relevancy to the issue as to accident or mistake on the part of the accused in the particular case which formed the subject of the indictment."

Mr. Justice Darling laid stress upon the fact that the evidence of the prior offence was upon another woman pregnant by the accused and that the accused had then stated in effect that his design on that occasion was unlawful, [1906] 2 K.B. 410. Bray, J., found there was evidence of a system and would have rejected the evidence of the other offence or attempted offence if adduced solely to shew the knowledge of the accused (a physician) that the instruments he used were capable of being used for abortion purposes, that not being the real issue, [1906] 2 K.B., at 417. The whole question was whether the instruments were in fact used for an unlawful purpose; there was "nothing inconsistent in a doctor one day using these instruments for an unlawful purpose and in another case many months afterwards using them for a lawful purpose, unless you can shew a course of conduct and *not merely one or two isolated instances*," [1906] 2 K.B., at 418. Before admitting evidence of other offences the judge should satisfy himself that the evidence tendered will, if true, establish or tend to establish a system; a mere attempt to procure abortion in the prior case would not be enough in the opinion of Bray, J., to admit the testimony. *R.* v. *Bond*, [1906] 2 K.B. 389, at 418. Mr. Justice A. T. Lawrence in affirming the conviction laid stress upon the motive of the accused "to relieve himself from the burden of paternity" and that the evidence of the other woman tended to rebut the defence of an innocent operation "and to negative any reasonable or honest motive for its performance."

It would appear that the doctrine has been extended in the *Brunet* case beyond anything which was directly in issue in the *Bond* case.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

MASTER AND SERVANT (§ III—294)—EMERGENCY—DANGEROUS COURSES—ADOPTION OF MOST DANGEROUS—SCOPE OF EMPLOYMENT—LIABILITY OF MASTER.

If in a case of emergency an employee in the course of his employment has two courses open to him, either of which may be dangerous, and in the emergency adopts the more dangerous and is injured, this does not put him outside the scope of his employment, and he is entitled to damages under the Workmen's Compensation Act (Sask.).

Statement.

APPEAL from a District Court Judge in an action under the Workmen's Compensation Act. Affirmed.

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

F. H. Bence, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I concur in dismissing the appeal.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action under the Workmen's Compensation Act, in which the following facts were found by the District Court Judge:—

I find as a fact that this man was in the course of his employment when he went to get his lantern from the caboose and started to the yard office. While he was doing that this switching engine pulled out and stood between the man and his objective, and his problem then was to successfully negotiate this crossing. What he did was this: he waited a couple of minutes for the train to move, but as there was no movement of the train, he got up on the ladder between the cars and got across with his lantern, apparently safely on to the other side, and alighted on ice; whether the train started to move just as his foot was on the ground or immediately before or after I cannot say, but the whole thing happened so quickly that it was practically all one event, that is, the slipping and the train movement took place at the same second of time as far as I can see. The result of it was that in endeavouring to save himself he slipped and broke his wrist, and brings this action under the Workmen's Compensation Act against the company.

He further held:—

In climbing on to this train this man was doing, in point of fact, what he was accustomed to do every day—looking after his own train.

I realize the difference pointed out by the superintendent between getting on to moving cars on your own train when you have the guidance and control of it, and getting on a train when you do not have that advantage and you do not know when it is going to start; but still he had hold of the ladder and supports put there for the express purpose of enabling men to get up and travel on the cars . . . In this case the plaintiff arrived to take his train out; he had no time to spare and had to make up his mind what to do, it was a matter of urgency; there was no urgency in the *Highley* case, and there again is a distinction. Moreover, here the obstacle was interposed by the defendant: the plaintiff did not seek it: it was thrust on him.

The case of *Lancashire and Yorkshire R. Co.* v. *Highley*, [1917] A.C. 352, was relied on by the appellant as an authority

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for reversing the judgment of the trial judge. The facts in that case are stated in the head-note as follows:—

On the day of his death the deceased, with other workmen, was under orders to travel by train to a place further down the line to work there. The men arrived at a station where they had to change, and, having some time to wait for the next train, they started to cross the lines to a mess-room on the opposite side of the station where they could get hot water for their breakfast, which they had brought with them. On his way to the mess-room the deceased attempted to pass under the trucks of a standing goods train. The train moved and he was killed. The mess-room could have been reached without crossing the lines, but this way took longer, and the men for their own convenience habitually used the way across the lines. The County Court Judge found that the accident did not arise out of or in the course of the employment.

In considering this case, I would first call attention to the remark of Finlay, L.C., p. 359, that "a finding of fact in one case cannot be a safe guide as to a finding of fact in another case," and to the remarks of Lord Dunedin on p. 364:—

I should like to add that, though a decision of a court of higher or equal authority binds another court as to propositions of law, it cannot bind them as to the findings in fact. No doubt if the facts of two cases are so similar as to be practically identical the second court will hesitate long before it comes to a different conclusion. Nevertheless, the facts of two different cases cannot, *ex natura rei*, be actually identical, and it is never incumbent on a court to import the finding of fact in one case into another.

As to the question of law involved in that case, the same learned lord continues:—

As to the law on the subject of added perils, I cannot add to what was said in the case of *Plumb*, [1914] A.C. 62, as to which I would like to point out that, although it is contained in a judgment which bears my name, that was really the considered judgment of the House, and does not therefore at all rest on my individual authority. It is with insistence laid down in that judgment that the question is always whether the case falls within the words of the Act, and that "added peril" is a test only, though a very convenient test in certain circumstances. I refer particularly to the closing words of the judgment.

These words are on p. 70 of the above cited case:—

Tried by either of the two tests I have examined, the appellant in this case seems to me equally to fail. But he does fail, not because he was acting outside the sphere of his employment, nor because by his conduct he brought on himself a new and added peril, but because he has failed to shew any circumstances which could justify a finding that the accident to him arose "out of his employment."

Now, in this case, the District Court Judge found that the accident happened to the plaintiff "out of his employment." This being a question of fact, if there is any evidence to sustain this finding, this court cannot interfere with it, because, by s. 19 of the Workmen's Compensation Act, there can only be an appeal upon a question of law or a mixed question of law and fact.

In the first place, the trial judge has found that it was a matter of urgency. He had only some 5 minutes to take out his train and he had to cross the track in order to go to the yard office to get his orders.

In the *Barnes* case, [1912] A.C. 44, Lord Mersey, speaking of that case, p. 51, said:—

> It is not as if the case had been one of emergency where the boy might have had a discretion to use the perhaps speedier, although the forbidden, means of reaching his destination.

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In the short time the plaintiff had at his disposal, he had to make up his mind whether he would wait until the train moved on, cross the train as he did, or go around one end of it, and as he did not know which way the train was going to move, if it did move, the latter course was not one which would tend to expedite his work. Of the other two courses; that of waiting until the train moved past him and left the track clear for him to cross, he first waited to see if the train was going to move, and, it not moving and it being necessary for him to get to the yard office at once in order to take his train out on time, he adopted the only other course open to him at the time, that of crossing the train. There was no rule of the defendants which explicitly forbade this course, therefore, in adopting it, he was not employed doing something that he was employed not to do; he simply adopted one of the only two courses open to him—he having no time to wait longer—that of going around the train or across it, either of which might be dangerous, as he did not know when or in which direction the train was going to move.

That, in this emergency, he adopted the most dangerous and was hurt, does not, in my opinion, put him outside the scope of his employment, and I am of the opinion that there was ample evidence for the District Court Judge so finding.

That being the case, the appeal should, in my opinion, be dismissed with costs.

LAMONT, J.A., concurred with Elwood, J.A.

Lamont, J.A.

ELWOOD, J.A.:—The respective functions of the trial court and the Court of Appeal in cases coming under the Workmen's Compensation Act are discussed by Cozens-Hardy, M.R., in *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K.B. 539, at 542, where he says:—

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> I hope that I shall never depart from the fundamental rule that the County Court Judge is the tribunal to find the facts, but when, as in the

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present case, the facts are all found or admitted, then the only question which came before the County Court Judge was this: What is the true inference to be drawn from these known facts?

and in *Lancashire and Yorkshire R.* v. *Highley*, [1917] A.C. 352, at 369, Lord Atkinson says:—

No doubt it is well established, where the relevant and material facts in such a case as this are either found or not disputed, that the question of whether the accident arose out of the workman's employment is a question of law, not of fact: *Herbert* v. *Samuel Fox & Co.*, [1916] 1 A.C. 405; *Gane* v. *Norton Hill Colliery Co.*, *supra*.

It seems to me, therefore, that we are not at all bound by the conclusion of the District Court Judge, that the accident arose out of the employment.

In the case at bar, there is no evidence that the defendant company was aware of any custom of its employees crossing between cars to which was attached an engine. In fact, the uncontradicted evidence is that the company was not aware of any such practice. So that the case could not come within a number of cases where it has been held that the permission to do the very thing that caused the accident, or the knowledge of the employer that its employees were in the habit of doing acts similar to that which caused the accident bring the act within the scope of the employment.

It will be observed that Lord Atkinson says, "but he is not entitled and, therefore, he is not employed to do things which are unreasonable." If that is a test, and I must say that it appeals to me as being a reasonable one, was the act of the plaintiff unreasonable? To the knowledge of the defendant company its employees were in the habit of getting on and off moving trains. But, while it is true that the circumstances under which they so got off trains were quite different from the circumstances of the getting on and off by the plaintiff at the time of the accident, yet to my mind such practice is of some importance in considering whether or not the act of the plaintiff was unreasonable.

With, I must confess, considerable hesitation, I have come to the conclusion that the act of the plaintiff at the time was not so unreasonable as to cause the accident to be one which did not arise out of the employment.

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

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S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B., and Grimmer, J. June 21, 1918.

WILLS (§ III—70)—VARIOUS DOCUMENTS—REAL INTENTION OF TESTATOR—MILITARY WILL REVOKED BY LETTERS WRITTEN LATER NOT ADMITTED TO PROBATE.

In arriving at a conclusion as to a will of a deceased person to be gathered from various documents admitted the court must have in view the real intention of the testator and must gather it from the documents presented.

If in the series of testamentary documents the court finds one which has been wholly and completely revoked by the provisions of a succeeding will the one so revoked will not be admitted to probate because it has no part to play in the devolution of the estate.

Letters written by a soldier on active service, which furnish conclusive evidence that he considered a prior will in force, and shewing that he considered a subsequent military will which is inconsistent with it as repudiated, are sufficient to revoke such military will.

Statement.

APPEAL from the judgment and decision of the Judge of the York County Probate Court. The judgment was varied by excluding military will from probate, otherwise judgment confirmed and appeal dismissed with costs to all parties out of the estate.

J. B. Dickson, for appellant; *F. H. Peters, contra.*

Hazen, C.J.

HAZEN, C.J., agrees with McKeown, C.J., K.B.D.

McKeown, C.J. K.B.D.

MCKEOWN, C.J., K.B.D.:—This is an appeal from a decree of the Probate Court of the County of York, whereby 4 certain documents were admitted to probate as "together constituting the last will and testament" of the above named James Milford McNeil, deceased.

The first of such documents is a will bearing date April 13, 1916, and executed in conformity with the provisions of c. 130 of C.S.N.B., being the chapter concerning wills. It was executed by the testator in the city of Winnipeg on the date last aforesaid, prior to which time he had enlisted as a soldier in His Majesty's Canadian forces and was then a member of the 78th Battalion, C.E.F.

In due time the testator proceeded overseas and while in barracks in England he executed a second testamentary document, called a military will, bearing date August 9, 1916. No evidence was forthcoming as to the circumstances which led him to subscribe the last named will, but the testimony of George Parker, sergeant-major of the 24th Battery, indicates that, in all cases, soldiers about to proceed overseas are directed to fill in and execute a military will, the form for which is provided in each

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soldier's pay book. Reference will be hereafter made to its terms, but I think we should not lose sight of the fact that, as far as the evidence discloses, the military regulations seem to impose upon each soldier the burden of filling in the form of will so provided.

The remaining two documents so admitted to probate consist of a couple of letters, dated respectively November 25, 1916, and December 12, 1916, written by the deceased to his sister Ida Donnelly, who received the same in due course of mail.

In a considered judgment, the Judge of the Probate Court admitted these 4 documents to probate as together constituting the will of the deceased, and against such decision the executors under the will of April 13, 1916, have taken appeal, and are moving to set aside that part of the decree which pronounces that the two letters referred to, should be admitted to probate. The appellants claim that the will of the deceased is contained in the first two documents, namely, the will made in Winnipeg and the military will, and that the letters in question form no part of such will.

It may be well to distinguish between the provisions of the different documents so admitted to probate, in order that the contention of each party may be apparent.

It is admitted on all sides that the real estate which belonged to the testator during his lifetime, is disposed of by the first will only. So there is no contention between the parties over that part of the testator's estate. The dispute is concerned with the personal property left by deceased. Under the first will, a quarter of the same is given to his sister Ida Donnelly, and the balance thereof is divided equally between his two brothers, Scott McNeil and Charles McNeil, who are named as executors thereunder.

The second will, or as it may be termed, the military will, is so brief that it may be as well to set it out in full. It reads as follows:—

No. 147204.
Name—James Milford McNeil.
Unit—78th Batt. Winnipeg Grenadiers.

Military Will.

In the event of my death I give the whole of my property and effects to my brother, Scott McNeil, of Cross Creek, York Co., New Brunswick, Canada.

Signature—J. M. McNeil
Rank and Regiment—Pte. 78th Batt.
Date—August 9th 1916.

J. M. McNeil,
No. 147204
78th Batt.

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There is no dispute concerning the validity or effect of these two wills. The first one is executed in complete conformity with the law of this province, and the second one is effective to convey the testator's personal estate only; if these two documents were all that the court is asked to deal with, the matter would stand, I think, in this position—the bequests of personal property made by the first will to Ida Donnelly and to Charles McNeil would be cancelled by the military will, and all the personal property of the deceased would go to Scott McNeil, and his real estate descend as the first will directs. Bearing this in mind, we pass to the contents of the two letters admitted to probate dated November 25, and December 12, 1916. They were both written by the testator to his sister Ida Donnelly while in active service and actually on the battlefield. They are somewhat lengthy, but cannot be properly discussed without being set out in full. They read as follows:—

Somewhere in France.
Nov. 25th, 1916.

Dear Sister:

As we arrived back from the front line last night for a few days more rest, I received your letter with a bunch of others and was awful glad to get it. We had quite a strenuous time of it while we was there and I was lucky enough to get out again without a scratch, but I am not going to say anything about the sights or conditions. I will be looking out for all those parcels and there is a bunch on the way from Vancouver and all the way east, so I should fair pretty well for Xmas. I did not expect Anna Merrill would be sending those socks very soon, but am making out all right. And about that assigned pay. I have been to the paymaster three times and there was always some reason he could not fix it up, short of forms or something, I don't know as it makes much difference, only in case anything did happen, I wanted to be sure you got that much. I made a will before leaving Winnipeg and sent it to Scott. With what money I have in different Banks and Insurance, there is near four thousand dollars, a third of the total I left to you. The farm to Charles, the rest of the money to Scott and Charles. I have a bunch of real estate and mining stock which I left to Scott. If it could be looked after and sold at a fair price would be worth between six and ten thousand dollars, but I advised him not to spend any money on it. I am afraid I will fail in sending any Xmas presents this year as it is almost impossible to get anything and we only are paid 30 francs a month, but will send all kind of good wishes instead. I intended to write twice as much but he is calling for the mail so will close. Love to all.

Milford.

Somewhere in France.
December 12th, 1916.

Dear Sister:

As I have nothing else to do, thought I would write again to-night, and use up my green envelope. As you may notice, it is not sensered by our own

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regiment and is intended only for family maters, but I gess I have nothing special to say. But they only give out green envelopes once in a blue moon. We have had a big snow storm to-day and it is fearful sloppy. There is not much of the snow on, but lots of mud. I had a long letter from Aunt Maggie last night and a parcel a few days ago. She is well, and was at Long Lake visiting Will George's little girl that had infantile paralysis. Is some better but may always be a cripple. Thought I would speak again in this letter about my insurance, etc., as perhaps the other letter did not get through. As I said in it, with my insurance in New York Life and B of L.F and E. and money in Molsons Bank, Revelstoke; Canadian Bank of Commerce, Golden, B.C.; and Imperial Bank of Canada at Field, B.C. and a little, about $100, at the Bank of Montreal, Winnipeg, I have about $4,000. In the will I made before leaving Winnipeg and sent to Scott, I left you a quarter of the total (I believe it was a quarter). Now in the event of me being a casualty, I don't think there will be any great trouble about collecting this. Scott and Charles are the executators. I left the farm to Charles. I have considerable real estate around the Coast which I left to Scott, but told him not to spend any money on it. If I go back to the Coast and able to look after it, should be able to get a few thousand out of it in time. I have not been able to make any assignment of pay to you. Have been up to the paymaster several times, but he was always out of the necessary forms, and there is also to my credit now at army pay office about $150 which will go to Scott. We only got paid 30 francs a month here which is about $6 in real money. Except this month when we will get about $100. The rest of our pay is put to our credit; when we are in the firing line we don't need much money. And so I sent that extra money I had on me to Scott by Major Shipman when we went to England. Some time ago as he would need it to pay my Life Ins. Premium and if I need it I can draw from my account at the war office. But would like to sign some over to you as I wanted to be sure of you having a little anyway. I gess our rest is about over and expect we will soon be going to the front line again. There was a lot of talk of us getting a few days leave but gess it is not coming off. But I think after what we have been through we deserve it all right. I am now in the snipers section. Have been on machine gun and bombers and am now a sniper. Was kind of surprised was I was called for it as my eyes are none too good for that but gess I will mostly be with the scouts (going out at night cutting Fritz's barb wire and such things). I received the socks from Nellie last night and am pretty well supplied now. Am also getting some parcels, had one from Phoebe lately, so am getting quite a lot of good things to eat which is quite a change. Well, I gess I will bring this lone letter to a close. As I hear the boughlar blowing the mail call so gess will go down and see how many is for me. With best regards.

Yours as ever,

Milford.

Address as before.

Dec. 13 Received box from Cross Creek Womans Institute last night.

With these two letters above at length set out, Ida Donnelly, the addressee of both, presented to the Probate Court her claim to rank as legatee of a portion of the personal property belonging to the deceased. Her claim is that her late brother's estate

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should be divided between herself and her surviving brothers on the basis of the disposition made by the first will. The claim was presented to us on the basis of these two letters being dispositive of that portion of the personal estate to which they make reference, and that such letters form a portion of her late brother's will. By admitting these papers to probate, the court below has to some extent at least accepted or countenanced such claim.

In arriving at a conclusion as to the will of a deceased person, to be gathered from various documents admitted, the court must have in view the real intention of the testator and must gather it from the documents presented. In this particular, it assumes the functions of a court of construction, passing under its notice all the documents submitted, and gathering from them the will or wish of the testator with reference to his whole estate. If, as it frequently happens, the latest drawn testament purports to deal with only a portion of the deceased's estate, probate of a prior will is, or may be, necessary to shew how the balance of the estate is to devolve; and further—if, in such prior will, the maker's whole estate is devised or bequeathed, the subsequent will operates to cancel its predecessor as far as it is contradictory thereto. Both wills—or any number of wills—must be admitted to probate although partially inconsistent with each other, if it is found to be necessary to have recourse to them all to determine the devolution of the whole estate. If a testator should desire to do so, he may make half a dozen wills each dealing with a separate portion of his property, and they all would be entitled to probate as representing his complete will and desire with reference to his whole estate. In the instances above suggested, the court would admit all the documents to probate, because each one co-operates with the other in carrying out the maker's wishes. But if, in a series of testamentary documents, the court finds one which has been wholly and completely revoked by the provisions of a succeeding will, the former (so revoked) will not be admitted to probate because it has no part to play in the devolution of the estate—it is cancelled by the later will. In this sense, inconsistent documents will not be admitted to probate. A person's will or wish with reference to his estate must be a consistent whole. With reference to any individual legacy or number of legacies, the testator must intend either to give or withhold them. And when the court

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has arrived at a conclusion satisfactory to itself, as to just what the testator did intend, it must, I conceive, admit to probate such papers as bear out that intention so expressed and arrived at, and it also must exclude such papers, if any, as are contradictory or do not form part of the actual will of the deceased testator. Two papers, or wills, wholly contradictory cannot constitute the will of a deceased person, either one or the other must be excluded by the court.

Now in this instance the court below has put in the hands of the executors, papers, some of which are essentially contradictory. It is impossible for the executors to carry out the directions of the testator as expressed in all the documents admitted to probate. By the military will many of the legacies bequeathed under the first will are cancelled. As previously remarked, if these two documents alone were before the court, they would both be properly admitted, the one operating to convey the real estate, and the other cancelling the legacies granted to certain of the legatees under the first will, and giving the whole body of the personal estate to Scott McNeil. But when the further question of the disposition made or re-affirmed by the letters in evidence, is considered, it is apparent that considering first the letters as a whole, and then the terms of the military will, choice must be made as to which shall prevail. As between the letters on the one hand, and the military will on the other, both purport to dispose of all testator's personal property, and the executors cannot follow nor carry the directions of both, because they are wholly inconsistent and contradictory. Ida Donnelly contends for the letters. The executors stand by the military will and repudiate any testamentary validity attaching to the letters in question. As regards this issue the court must make pronouncement, and, following whichever view may seem proper, it must exclude either the letters or the military will from probate. And when the choice is made between these later documents, the real will and intention of the deceased will be consistent as to all the documents filed, for only such documents should be admitted to probate as are consistent with each other, and truly represent the testator's will.

A second will, partially inconsistent, revokes a former one to the extent to which it is so inconsistent. Consequently, the first and second wills may well be admitted to probate, reading

the provisions of the former as modified by those of the latter testament. But it is not possible to read the military will and the letters as partially inconsistent. They are wholly inconsistent; and in determining what the actual will of the testator was, either the second will or the letters must be cast aside. In the case of *Lemage* v. *Goodban*, L.R. 1 P. & D. 57, the court had under consideration inconsistent testamentary dispositions, and the judge, Sir J. P. Wilde, remarked as follows, at p. 62:—

Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction. The principle applicable is well expressed in Williams on Executors. He says, "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they all be clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only, where they are inconsistent." This passage (says the judge) "truly represents the result of the authorities."

Coming now to the question as to the real effect of the letters submitted. It is to be noted that in neither of them does the writer express himself as thereby giving to his sister the property alluded to, but he phrases it differently and expresses himself as having given it to her by his first will, which indeed is true, but he makes no reference to the fact that he took it away from her by the military will. Mr. Dickson contended with considerable force that the letters are not on their face testamentary, they do not dispose or purport to dispose of any part of the testator's estate, but are simply letters written by the testator to his sister, informing her that he has made a will and what disposition he had thereby made of his property—that the letters were not written *animo testandi;* that is to say, he does not actually and in terms give any property to his sister by the letters themselves, and therein he distinguished this case from cases cited by Mr. Peters, who relied upon *Gattward* v. *Knee*, [1902] P.D. 99; In the *Goods of Hiscock*, [1901] P.D. 78, and other cases cited therein.

In these latter cases, the direct expression of gift is contained in the letters submitted, and there is no doubt that a letter written

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in such form constitutes a valid soldier's will as to personal property. No attempt is made on either side to deny that proposition. But Mr. Dickson's point is clear; he says these letters were not written *animo testandi*, and that they are not testamentary because they do not dispose, or purport to dispose, of any of the testator's estate. From the standpoint of phraseology, the argument seems to me to be sound, but even so, in my view, it simply shifts the basis of Ida Donnelly's claim, and I think the court should give effect to these letters if in its power to do so.

The judge of the court below, in a (to me) instructive judgment has fully dealt with the question of testamentary rights of a soldier on active service. Starting with a person's rights of testamentary disposition at common law, and the method of carrying such right into effect, he has followed the subject through its various statutory restrictions to the present day, noting, however, the saving legislative clauses which have preserved special privileges to those on military service. He then goes on to say:—

> The deceased being a soldier on actual military service at the time of the making of the papers of August 9, November 25, and December 12, could dispose of his personal estate in the same manner as personal estate could have been disposed of previous to the Statute of Frauds (29 Chas. II. c. 3) of 1677.
>
> Before the Statute of Frauds, a testator could dispose of his personal estate by an unattested writing signed by the testator, and it follows that a soldier on actual military service could so dispose of his personal property to-day. As he could at any time, while of disposing mind, change any preceding testamentary disposition, it must follow, if he has the same freedom of disposition reserved to him, that he could do the same thing to-day.
>
> In *Drummond* v. *Parish*, 3 Curteis 522, at 528, Sir Herbert Jenner Fust says: "Prior to the Statute of Frauds, a will might not only be made by word of mouth, but the most solemn will might be revoked by word of mouth. A will executed in the presence of witnesses might be revoked by parol." See also *Pett* v. *Hake*, 3 Curteis 612.
>
> I don't think s. 14 of c. 160 deprives the soldier of this right. By s. 34 "will" includes "any testamentary disposition." And I think it necessarily follows that a testamentary disposition by a soldier may follow within s. 14 and revoke or modify a previously written and attested will in so far as the personal estate is concerned. As before stated, the testator in the case before me was in actual military service within the meaning of s. 5 at the time the documents were written.

I think the judge of the court below is quite right in saying that it is open to a soldier on actual military service to change any preceding testamentary disposition. And if these two letters in question can and ought to be admitted to probate, their effect is unmistakable—the military will is revoked. There are two most

instructive cases upon the admissibility of codicils or writings referring to previously executed wills. The first is reported in L.R. 1 P. 683, under the name—*In the goods of Algernon Hicks.* On the testator's death a will was found dated August 4, 1864, duly executed. Beneath the signature was written this memo:

Memo. This my last will and testament is hereby cancelled, and as yet I have made no other.

A. Hicks, August 14, 1868.

Witnesses—Ann Carter, cook; Mary Coles, housemaid.

Lord Penzance said: "The will is revoked, and you are entitled to administration, but I doubt whether it ought to include the memorandum. It seems to me to fall within the words of the statute as simply a writing declaring an intention to revoke and not entitled to probate."

In *Re Fraser* (1869), L.R. 2 P. & D. 40, the facts were that at the foot of his will the deceased wrote a memorandum to the effect—"this will was cancelled this day." And he duly executed such memorandum in the presence of two witnesses. Held that such memorandum was not a will or codicil but only a writing which could not be admitted to probate. Lord Penzance in delivering judgment said:—

This case goes further than the one referred to (*Re Hicks*). I had serious doubts in deciding that one, but I thought the memorandum in that case did, perhaps, do something more than merely revoke the will, while in this case it stops at a revocation. By s. 20 of the Wills Act, it is enacted that a will or codicil may be revoked by another will or codicil, duly executed, or by "some writing declaring an intention to revoke the same," and executed in the manner a will is theretofore required to be executed. There is a distinction, therefore, in this section between a will or a codicil and some writing. I am clearly of opinion that this memorandum is merely a writing and not a will or codicil. The deceased does nothing by it, in no way disposing of any property, he only revokes the paper to which it is attached. I must reject the motion.

These two cases were decided under the English Wills Act, similar, on the points discussed, to our own statute; and it is instructive to note that the reason Lord Penzance did not admit the paper in evidence in the *Fraser* case, was because "the deceased does nothing by it, in no way disposing of any property, but only revokes the paper to which it is attached." If, in addition to revoking the paper to which it was attached, the memorandum in question had referred to provisions of a former will as then existing, would not the paper have been admitted? The reasoning of this case seems to indicate that it would. But admittedly

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Ida Donnelly is not driven to contest the provisions of the Wills Act. The admissibility of the letters is not to be judged by that test. Let us look for a moment at the subject prior to 1867 when the English Wills Act was passed.

The case of *Brenchley* v. *Still*, reported in 2 Robertson's Reports, 162 (1850), says—

> A codicil not containing any disposition of property but simply revoking former wills is of a testamentary character and if proved is entitled to probate.

In Williams on Executors, 9th ed., at p. 164, the author discusses the question of the republication of bequests cancelled by a later will and says:—

> As to re-publication by codicil. The cases on wills made before the Wills Act shew that a codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly conformitory of it. For every codicil is, in construction of law, part of a man's will, whether it be so described in such codicil or not. And as such furnishes conclusive evidence of the testator's considering his will as then existing.

See also vol. 28 Halsbury, p. 575.

I think these letters furnish conclusive evidence that the testator considered his Winnipeg will as then completely in force, and further, I think they shew he completely repudiated the military will. I am confirmed in this conclusion by the manifest care deceased exercised to assure his sister of the terms of the first will. Both letters refer to it—the latter practically recites it. He advised her that he has made a will, and its terms are thus and so, reciting those of the Winnipeg will. Seeking, as we must, to ascertain the real intention of the testator with regard to the disposition of his estate, it seems to me that such intention is open to only one conclusion—namely, that he wished his property to go as he says in these letters—according to the terms of his Winnipeg will, and this, I think, is the proper conclusion to be drawn from all the papers which are before us. In my view the two letters were properly admitted to probate by the learned judge and their effect is to cancel the military will and to revive the personal bequests contained in the first will made by the deceased. The letters abound with references to the first will, in effect they recite. Admitting that the military will revoked the personal requests named in the first will of the testator, it is beyond question that such bequests so revoked can be subsequently revived, and I think that is the effect of the letters in this case.

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As above explained, this is an appeal by the executors who seek to exclude the letters from probate. There has been no appeal on the part of counsel representing Ida Donnelly and no motion before us to exclude the military will, but as it is open to the court to make whatever disposition of the case is right, my view of the matter is that the appeal of the executors should be dismissed, and the decree of the court below should be varied by striking therefrom the words "August 9th;" the effect of which will be to exclude the military will from probate and that the will of April 13, and the letters of November 25, and December 26, 1916, shall be taken and read together as the last will and testament of the deceased; and that the order of this court be that the several instruments of April 13, November 25, and December 12, have been sufficiently proved and be admitted to probate as constituting together the last will and testament of the said James Milford McNeil, deceased. I think the costs of all parties should be paid out of the estate.

Grimmer, J.

GRIMMER, J.:—This is an appeal from the judgment of the Judge of Probate of the County of York, by which it was decreed that the several instruments, being wills and letters of the deceased dated respectively April 13, August 9, November 25, and December 12, 1916, should be admitted to probate as together constituting the last will and testament of the said deceased.

The facts apparently are that the deceased, who was a native of the Province of New Brunswick, but had been employed in the Province of Manitoba or the Canadian West, enlisted as a soldier in the 78th Battalion of Winnipeg Grenadiers, in the Province of Manitoba, in the present war, and afterwards while fighting in France was killed on or about January 23, 1917. On April 13, 1916, in the city of Winnipeg, he made a will which was attested and executed with all the formality required by s. 4 of c. 160 of C.S.N.B. This will devised a farm in the Parish of Stanley to his brother Charles, one-fourth of his personal estate and life insurance to his sister, Ida Donnelly, the balance of his personal estate and life insurance to his brothers, Scott and Charles, and the residue of his estate to his brother Scott, and the said two brothers were named executors of the will. Before proceeding overseas this will, together with the deceased's personal effects and insurance policies were forwarded to his brother Scott,

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at Stanley. The military regulations require each soldier before leaving England for the continent, when on active service, to make his will, or to state where a will already made may be found, and for this purpose a form is prepared and entered in each soldier's pay book. After the decease of the said James M. McNeil, this form filled out in the handwriting of the deceased was found among his effects. The will so found was as follows:—

Perforated sheet for will from pay book of Reg.
No. 147204
Name—James Milford McNeil
Unit—78th Batt. Winnipeg Grenadiers.

In the event of my death I give the whole of my property and effects to my brother Scott McNeil Cross Creek, York Co., New Brunswick, Canada.

Signature—J. M. McNeil	J. M. McNeil
Rank and Regt.—Pte 78 Batt.	No. 147204
Date—Aug. 9, 1916.	78 Batt.

The executors produced the two wills before the Probate Court and proposed to prove the same as together constituting the last will and testament of the deceased. The sister, Ida Donnelly, filed a caveat, and at the hearing which took place produced two letters received by her in the ordinary course of the mail, from her brother, which letters are as follows:—(See judgment of McKeown, C.J.).

It was contended on behalf of the said Ida Donnelly that these letters should be proved with the wills as comprising the last will and testament of the deceased.

Against the judgment of the Probate Court, an appeal was taken, and motion made to set aside that part of the order or decree which held that the papers or letters bearing date November 25, and December 12, should be admitted to probate as constituting a part of the will of the testator, and for an order that judgment should be entered that the said papers executed by the said testator bearing date April 13 and August 9, 1916, only be admitted to probate as together comprising the last will of the testator, on the following grounds:—(1) That the said papers executed by the testator and bearing date November 25, 1916, and December 12, 1916, were not executed *animus testandi*. (2) That the said papers executed by the testator and bearing date November 25, 1916, and December 12, 1916, are not testamentary in that they do not dispose or purport to dispose of any of the testator's estate.

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As it appears to me the question involved and the only question of import in this matter is whether or not the letters referred to may be considered as comprising a part or portion of the last will and testament of the deceased. At common law it is very clear that a person might dispose of his goods and chattels by any documentary writing signed by himself or in his own handwriting, though it had neither his name or seal to it and was without witnesses, the validity of it depending upon the proof of the handwriting, or he might dispose of them by what was called a verbal or non-cupa ive will.

By the early English Statute, 28 Charles II. c. 3, provision was made for the protection of the estates of soldiers and sailors, among other things it being provided "that any soldier being in actual military service or any mariner or seaman being at sea may dispose of his movables, wages and personal estate as he or they might have done before the making of this Act." These provisions have always been law in this province and the same protection is provided to-day for soldiers and sailors in actual military service, etc., as was provided by the statute named, as we find that in s. 5 of c. 160 of the Consolidated Statutes, 1903, it is provided "that any soldier being in actual military service or any mariner or seaman being at sea may dispose of his personal estate as he might have done heretofore," the word "heretofore" in this respect having reference to the provisions of the early English statute, and the reservations which were made, from time to time, for soldiers in actual military service and sailors at sea in order to protect their personal effects and estate for those who might be entitled to them in case of their decease.

There can be no doubt that the will of April 13, of deceased, was properly executed within the provisions of c. 160. In fact, this is not disputed by any of the claimants, and it has never been expressly revoked, therefore, it is still in force and effective, so far, at least, as it is not affected by the provisions of the military will, so-called, and I am of the opinion that the Judge of Probate was quite correct in granting probate of that will.

The question then to be determined is what, if any, effect the letters previously referred to have in respect to the testamentary disposition of the estate of the deceased. There are very many

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cases in which letters of soldiers and sailors have been allowed to be probated as being themselves wills, and estates have passed under documents of this kind, the requirements essential for the purpose being proof of the genuineness of the writing and the testamentary capacity of the deceased at the tine of writing the same, and disposing intention. It appears from the evidence that the genuineness of the letters and the testamentary capacity of the deceased at the time of writing the same are not disputed, and the only question in respect to them, therefore, is whether or not they may be considered as testamentary documents. A reference to these letters makes it appear quite evident that the deceased was referring to the disposition to be made of his estate in the event of his death. Without referring at great length to these letters, we find in that of November 25, these words:—

and about that assigned pay I have been to the paymaster three times and there was always some reason he could not fix it up short of forms or something I don't know as it makes much difference only in case anything did happen I wanted to be sure you got that much. I made a will before leaving Winnipeg and sent it to Scott. With what money I have in banks and insurance there is near $4,000. A third of the total I left to you.

In the letter of December 12, in speaking of the amount of money he has in different banks, he says:—

In the will I made before leaving Winnipeg and sent to Scott I left you a quarter of the total. I believe I also said in the other letter a third but have just remembered it was a quarter. Now in the event of my being a casualty I don't think there will be any great trouble about collecting this.

Then, speaking of other things, he mentions that he has sent some money to his brother Scott which he says he will need to pay his life insurance premiums, and uses these words: "but would like to sign some over to you as I wanted to be sure of you having a little anyway."

In both of these letters the deceased is very clearly considering the disposition of his property in case of his death, and is stating to his sister what his intention was in respect to herself and what he supposed he had, by his will, done for her; but I have no doubt, and have no difficulty in arriving at the conclusion, that the intention of the deceased was that his sister should have, under any circumstances, one-fourth of his personal estate and insurance, and I am also of the opinion that the letters, under the authorities and under the cases, were properly considered by the Judge of Probate as forming a part of the last will and testament of the

deceased. There are numerous cases which support this position, the reasons for which are clearly and plainly reasonable and proper. In *Gattward* v. *Knee*, [1902] P. 99, it was held that a letter written by the soldier to his friend was testamentary, and that it was a soldier's will within the meaning of s. 11 of the Wills Act. The letter was as follows:—

1479 Pte. W. Knee, D Company, 2nd K.R.R. Natal, South Africa.
(For Transvaal Campane)

Dear Bill:—Just a few lines to you hoping that you are not dead yet, as I have received no answer to the last letter I sent you. I don't know whether you are waiting for me to come home or not, but there is no knowing when I will arrive, as we are just off to South Africa again for the Boer War—if war is declared at all. It is hard lines, seven years and four months' service and got to go there; but it cannot be helped. I am sending a box of things to you, which I want you to look after for me till I come home, for there are some things that I got out here; I think a lot of them. I will shew them to you when I come; they are a lot of curios and there is some things for you there; but if you have a letter to say I am killed then the lot is for you; and also, I have about £13 in the bank and £18 deferred pay, which will come to £31. You will receive the lot if I am killed in action, for I shall make out my will in your favor; so you can keep this letter in case you want it for anything, but let us hope that I arrive safe home again.

In the case of *Augustus Stanley Scott*, [1903] P. 243, a declaration made by a soldier on active service, at the instance of the military authorities, who made a note of it at the time, to the effect that in the event of his death he desired his effects to be given to one of his sisters, was held to be a valid testamentary document.

In the *Estate of Charles Edward Granville Vernon*, 33 T.L.R. 11, the facts were that an army officer when on active service executed a will in the presence of two witnesses and sent it to one of the executors named therein with a letter stating that the will was only to be produced in the event of his father and mother dying before him. He also wrote his father a letter which stated that he had made a will in the event of his father and mother dying before him, and directed that in the event of his dying first his father should, subject to certain gifts, dispose of the property as he pleased. The officer was killed in action August 15, 1915, his father and mother surviving him, and it was held that as the testator had intended his testamentary disposition to be contained in the three documents, all three should be admitted to probate.

There are numerous other cases establishing the principles described in those I have cited, and I find it very difficult to con-

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ceive, under the letters written by the deceased, that it was his intention to alter the will made in Winnipeg so as to deprive his sister of the bequest made to her, and that he was fully convinced in his own mind that he had provided for her just as was stated in that will. I am, therefore, of the opinion that the Judge of Probate of the County of York was right in holding that the letters were entitled to probate and together with the first will comprise the last will and testament of the deceased, the military will being revoked by the letters in my opinion.

This appeal will be dismissed, the costs of all parties to be paid out of the estate. *Appeal dismissed.*

DOUGLAS v. CITY OF REGINA.

SASK.
C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 16, 1918.

HIGHWAYS (§ IV A—127)—CONSTRUCTION OF SEWER—LEGISLATIVE SANCTION—NO NEGLIGENCE—CONSEQUENTIAL INJURIES—LIABILITY.

Where the legislature has authorized or sanctioned the construction of a sewer under a roadway, and the sewer has been constructed without negligence, and every precaution has been observed to prevent injury arising therefrom, the sanction of the legislature carries with it this consequence, that if damage results which is the natural consequence of constructing such sewer independently of negligence, the city is not liable.

[*Vancouver* v. *Cummings*, 2 D.L.R. 253; *Jamieson* v. *City of Edmonton*, 36 D.L.R. 465, followed.]

APPEAL from a judgment in favour of the defendant city. Affirmed.

P. M. Anderson, for appellants; *G. F. Blair*, K.C., for respondent.

The judgment of the court was delivered by

Lamont, J.A.

LAMONT, J.A.:—In this case the trial judge made the following findings:—

The facts in this case shew that in the fall of the year 1914 a sewer was laid under Pasqua St. in the City of Regina, north of Dewdney Ave., and that particularly during the spring and early summer of the year 1916, considerable trouble was experienced by the city owing to the subsidence of the soil in the trench containing the sewer. On July 29, 1916, the plaintiffs were driving from the City of Regina to their farm along Pasqua St., and between Dewdney St. and Eighth Ave. the horse that they were driving put its foot into a hole in the street which caused the horse to stumble and pitched the plaintiff Elizabeth Douglas off the wagon upon which she was riding onto the doubletrees . . .

I find that both of the plaintiffs were in the habit of continually driving up and down this street, and that they both, before the accident, knew that the street where the sewer was had subsided from time to time; and that, in consequence of the subsiding, holes appeared in the street; and that sometimes there was a crust covering a hole which would sometimes break down.

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This subsiding was caused by the natural settling of the loose earth and particularly by the effect of rain and water. A day or two before July 29, there had been considerable amount of rain.

On July 21, the defendant's workmen had used a road machine on this particular road and had levelled it up and had filled all holes.

I find that the practice of the city was to have a man inspect this particular street continuously, going over it at least every day or two; and that holes were filled up within a short time of their being discovered.

There was nothing to indicate the existence of the particular hole in which this horse got its foot prior to the horse so getting its foot therein.

There is evidence that, in some cases, holes underneath a crust would be indicated by cracks along the edge of what was the sewer. But there is no evidence at all that, in this particular case, there were any cracks or that there was anything which would indicate to the city or any of its officials the existence of any hollow where this horse got its foot in. I find on the evidence that the city took reasonable precautions to ascertain the existence of holes in the street; and I cannot see on the evidence before me that any inspection which it could have made would or should have indicated to the city the existence of this particular hole.

The evidence amply warrants the above findings; in fact, they are not seriously questioned. Counsel for the appellant, however, contends that the evidence shews that on the street along which the sewer was constructed and on which the accident happened, subsidence or holes in the surface of the roadway had, at various times, appeared ever since the sewer had been put in; that these holes were caused by reason of the settling of the earth where the excavation had been made, which settling left a hole or cavity under the surface of the street, and when the surface above the cavity was stepped upon by a horse, or weight otherwise was placed upon it, the surface earth was pressed into the cavity creating a hole in the street; that the city being aware that cavities had, from time to time, occurred along the street above the sewer, should have anticipated the formation of other cavities, and should have taken means to ascertain whether or not the particular cavity existed into which the hoof of the plaintiffs' horse plunged, and, if so, to have filled it up.

The only methods suggested for discovering the existence of the cavity was by tapping or sounding the street above the sewer, or the tearing of it up. The duty resting upon the city is defined by s. 510 of the City Act, R.S.S., 6 Geo. V., 1915, c. 16, as follows:—

510. Every public road, street, . . . shall be kept in repair by the city, and on default of the city so to keep the same in repair, the city, besides being subject to any punishment provided by law, shall be civilly responsible for all damage sustained by any person by reason of such default.

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Under this section it is the duty of the city to keep its streets in a reasonably safe condition for traffic; if it neglects to perform that duty and damage results therefrom, it will be liable.

It is not alleged that there was any negligence on the part of the city in the construction of the sewer. We start, therefore, with a sewer properly constructed under the surface of the highway. When it was constructed the city had a right to expect that, as the trench could not be refilled so as to leave the earth therein in as solid a condition as its original state, there would be some settling of the earth in the trench, and that there would likely be, here and there, a subsiding of the surface and probably the formation of cavities underneath, without any indication thereof on the surface. In 1916 it was found that this subsidence occurred at various times and places. These were repaired as soon as noticed.

Both plaintiffs testify that there was no indication that there was anything wrong with the roadway at the point in question until the horse broke through the crust. The city regularly inspected the street, and had its officials inspected it just prior to the accident they could not have discovered the defect. I cannot see, therefore, in what respect then was the city guilty of negligence.

The cavities, where they occurred, resulted from the effect of rain on a refilled trench. The earth in the trench settled, while the crust of the roadway remained intact. This is quite to be expected in the natural course of events where an excavation is made and then refilled. Where the legislature has authorised or sanctioned the construction of a sewer under a roadway, and the sewer has been constructed without negligence, and every precaution has been observed to prevent injury arising therefrom, the sanction of the legislature carries with it this consequence, that, if damage results which is the natural consequence of constructing a sewer under a roadway independently of negligence, the city is not liable. *Vaughan* v. *Taff Vale R. Co.*, 5 H. & N. 679; 21 Hals. 519.

To say that, because subsidences occurred several times in the roadway above the sewer, the city should have anticipated a further subsidence in another portion of the street—without anything to indicate the existence of the particular cavity—would be, in my opinion, to demand more than was reasonable.

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The evidence of the city engineer shews that the discovering of cavities by tapping or sounding the surface was not feasible. Had the subsidences been so frequent and numerous that the street could properly be held to be a trap for traffic, there might be some force in the contention of the plaintiffs, but the evidence is far from disclosing any such state of affairs.

Two cases were cited as establishing liability on the part of the city; the *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, 46 Can. S.C.R. 457; and *Jamieson* v. *City of Edmonton*, 36 D.L.R. 465, 54 Can. S.C.R. 443.

The principle laid down is found in the judgment of Idington, J., in the former of these cases, where his Lordship, at p. 258, says:—

> No one would think of saying that when the forces of nature have suddenly destroyed or put out of repair a road, or someone has maliciously or negligently wrought the same result, and an accident has taken place as a result thereof, that the municipality must be held as insurers and so, regardless of all opportunity to have repaired the road so destroyed, be cast in damages.
>
> It generally happens in the stating of such a case to any court, that this is its nature and the question of notice or knowledge or opportunity thereof incidentally arises.
>
> I am, despite *dicta* to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out, or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.
>
> The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to become acquainted with such possible occurrences, and if it has done so can possibly answer the presumption.

I cannot see how the principle laid down in the above quotation can assist the plaintiffs. The last paragraph above quoted shews that, while a roadway out of repair raises a presumption of a breach by the city of its statutory duty, that presumption may be rebutted by shewing that every reasonable means had been taken to keep the roadway in a safe condition for traffic. In my opinion, the city has rebutted the presumption, even if it can be said that the street was out of proper repair before the horse broke through.

The facts of the present case are almost on all fours with the facts in *Lambert* v. *Corporation of Lowestoft*, [1901] 1 K.B. 590. There a sewer had been constructed with due care and of proper materials. It was taken over by the defendant corporation. Owing to the mortar in one of the joints of the sewer having been

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carried away by rats, a cavity was formed below the surface of the road, but the existence of that cavity was not known and it could not by the exercise of reasonable care have been discovered by the defendants. The plaintiff's horse, while going along the road, broke through the crust of the road and was injured. It was held that the defendants were not liable.

I am, therefore, of opinion that the appeal should be dismissed with costs. *Appeal dismissed.*

QUE.

K. B.

JUNEAU v. BERGERON.

Quebec King's Bench, Archambeault, C.J., and Lavergne, Cross, Carroll and Pelletier, JJ. January 12, 1918.

INCOMPETENT PERSONS (§ V—25)—DEMAND FOR INTERDICTION—DEATH OF PERSON SOUGHT TO BE INTERDICTED—COSTS—REVIVAL OF ACTION AGAINST HEIRS.

A demand for interdiction for insanity, interrupted by the death of the person sought to be interdicted, cannot be revived or continued against the heirs of that person in so far as to arrive at an adjudication upon the costs.

Statement.

APPEAL from a judgment of the Superior Court for the district of Three Rivers. Reversed.

Desilets & Desilets, for appellants; *Fortunat Lord*, for respondent.

Cross, J.

CROSS, J.:—The question for decision is whether a demand for interdiction, interrupted by the death of the person sought to be interdicted for insanity, can be revived or continued against the heirs of that person in so far as to arrive at an adjudication upon the costs.

The respondent petitioned for the interdiction of François Bergeron. The petition was resisted orally. François Bergeron was interrogated by the prothonotary in the way customary in such cases. The advice of the family council was taken, and it was in favour of interdiction. The judge, instead of interdicting, dismissed the petition with costs.

The respondent inscribed in review against the order of dismissal. François Bergeron died while the matter was pending in the Court of Review. The heirs did not take up the instance, and the Court of Review sent back the record to the Superior Court so that the present action in continuance of suit could be taken.

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The Superior Court has maintained the action. By this judgment, the appellants are adjudged to take up and continue the instance in the place of François Bergeron and, upon their default so to do, the adjudication is:—

Permet au demandeur en reprise d'instance de continuer ladite instance par défaut contre lesdits défendeurs par reprise d'instance et de prendre et obtenir contre eux devant ladite Cour de revision les conclusions, quant aux frais prises contre ledit F. Bergeron, décédé.

The appellants did not plead in writing to the action, but they were heard on the merits.

In support of their appeal they say: (1) that a petition for interdiction of a person cannot be carried on after the death of that person; and, (2), that, as the petition for interdiction itself dies with the death of the person sought to be interdicted, it cannot be made to continue to exist for such a mere accessory as costs.

In support of these propositions, the appellants have cited a number of authorities, amongst which are included Dalloz, Rép., vo. Interdiction, no. 20 re Lacoste-Bourret:—*Id.*, *Per* 54, 2, 6; Demol, vol. 8, Nos. 479, 480; Chauveau sur Carré, Q. 3013 *ter*; Garsonnet, vol. 7, No. 2081.

The respondent, on the other hand, is not without authority in support of the view that, though it is true that actions of such a personal kind as those in separation of property between spouses in general fall upon the death of a party, the instance may be taken up to obtain a decision upon liability for costs incurred. He has cited, Pigeau, vol. 1, p. 342; Pothier, vol. 10, No. 236; Carré et Chauveau, vol. 3, Q. 1277, p. 22; Garsonnet, vol. 3, No. 895, p. 154; Boncenne, vol. 5, p. 234.

He has also cited our decision in *Desaulniers* v. *Desaulniers*, (1912) 18 Rev. de. Jur. 518, where we authorised the legal representatives of a deceased appellant, plaintiff in *quo warranto* proceedings, to take up the instance on the appeal.

In regard to these citations by the respondent, it may be observed that, in them, much reliance was placed by the writers upon the decision in the separation suit of la Marquise du Pont-du-Chateau whose residuary legatee was held entitled to take up the instance to recover the costs upon shewing that the action was well founded.

Counsel for the appellants, however, have replied by citing a

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further lengthy list of authorities in support of the proposition that the instance in a separation action is not to be taken up merely for the object of getting an adjudication upon costs.

And they have followed this up by reference to Pothier, 10 Pothier-Bugnet, p. 104, as shewing that the theory stated in the passage cited for the respondent has been abandoned; and, in regard to the authority of Garsonnet, they point out that the writer, in the note at vol. 3, p. 154, states that a separation suit cannot be continued after the death of the spouse, for adjudication upon the costs. Confronted by the evidence of such a conflict of opinion, one naturally hesitates to lay down a general proposition in favour of or against the conclusion contended for.

On the other hand, one can readily realise that the ashes of dead litigants ought not to be stirred by judicial investigation into subjects of a painful and perhaps disgraceful kind. if that can be avoided.

On the other hand, where it can be seen that the *enquête* was already made and the expense incurred in the lifetime of both litigants, there is reason to say that recourse to a competent court should be available to have it decided who should bear the cost of the inquiry. It may be pointed out, in respect of the reason by analogy sought to be drawn from precedents in separation actions, that the judgment in an action of that kind often carries with it important consequences as to rights of property.

In the matter now before us, I consider that we can arrive at a right conclusion by having strict regard to the legal nature of the demand in interdiction and to the purport of the proceedings of record. The matter which the respondent is setting out to have ultimately decided is one of costs. In the petition for interdiction he did not ask for costs, and yet that is the document upon which he now wishes to proceed to judgment. There is, therefore, that difficulty confronting him at the outset. He says that his petition was dismissed with costs; that he went to review, and in his factum there asked for costs and that the matter of liability for these costs ought to be decided.

But it is to be observed, firstly, that there was no issue joined or *litis contestatio* on the petition in the ordinary sense, and I, consequently, take it that dismissal of the petition for interdiction with costs meant, in effect, that the petitioner was left to pay his

own costs and expenses. If it had the effect of a ljudging any costs to the adverse party, the sum was trifling in amount.

Secondly, both in respect of the petition in first instance and of the instance in review, it is to be observed that if François Bergeron had not died, and if the petitioner had succeeded in review, the result would have been a judgment pronouncing interdiction, but not a judgment executory for costs against François Bergeron. François Bergeron would have been found *non sui juris* and such a right as the petitioner might have for costs would have had to be discussed later with a curator to be named. So much as to the procedure of record.

Now, as for the legal effect of interdiction: Its effect is to destroy in great part the legal capacity of the person in question. Its object does not go beyond having the incapable person duly protected and represented during the period of incapacity. It has no regard to any right or obligation transmissible by inheritance. The change commences and takes effect from the day of the pronouncement of the interdiction, C.C. art. 334.

It is, consequently, clear that the fiction of law which puts the heir in the place and stead of his predecessor cannot apply in the case of a proceeding so closely related to the person as in the demand for interdiction.

François Bergeron died without having been interdicted. Unlike ordinary actions at law, which call for a judgment declaratory of rights as they exist at the date of commencement of the action, interdiction only begins to take effect at the date of judgment. François Bergeron, therefore, died in full exercise of his rights. It follows that after his death no court can proceed upon the footing that he ought to have been interdicted. That being so, it results that the respondent's action has no valid ground upon which it can be supported.

The foregoing reasons should suffice to establish that the defendant's appeal should succeed, but I would add that, upon grounds of public order, the question whether a person should have been interdicted for mental deficiency or not is one which ought not to be agitated after the death of that person.

The respondent, in order to recover certain costs of a petition for interdiction and certain costs in review, in what is classed as a non-contentious matter, wishes, after the death of his father, to

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proceed to prove that the latter was *non compos mentis* before he died and should have been interdicted. I consider that the law does not sanction that, 7 Garsonnet, No. 2820.

I would maintain the appeal and dismiss the action with costs of the appeal against the respondent.

Inasmuch as the specific effect of the judgment is to oblige the appellants to take up an instance in a matter which contains specific conclusions, viz.: for interdiction of François Bergeron, I consider that the cause is appealable, notwithstanding that, in the result, only a question of costs is involved. I would apply, in that way, the distinction made in *Archbald* v. *Delisle*, 25 Can. S.C.R. 1.

Judgment: "Seeing that, by the present action, by the respondent (plaintiff) prays that the appellants, the testamentary heirs of the late François Bergeron, be adjudged to take up the instance as defendants in the place and stead of the said François Bergeron, deceased, in a certain demand pending in the Court of Review at Quebec, at the date of the death of the said François Bergeron, whereby it was prayed by the present respondent that the said late François Bergeron be interdicted by reason of insanity;

"Considering that the demand of interdiction had for its object a matter entirely limited to and directed against the person of the said François Bergeron, a matter in respect of which his heirs cannot act in his place and stead, and that in consequence there cannot be a continuance (*reprise d'instance*) of the defence to such demand for interdiction, even in respect of costs incurred therein before the death of the person sought to be interdicted;

"Considering that the alleged mental incapacity of the said François Bergeron set forth in a petition for interdiction ought not to be judicially inquired into after his death;

"Considering, therefore, that there is error in the judgment appealed from whereby the appellants have been adjudged to take up the instance in the said demand for interdiction;

"Doth maintain the appeal, doth reverse said judgment appealed from, to wit, the judgment pronounced by the Superior Court in the district of Three Rivers on January 19, 1917, and now giving the judgment which the said Superior Court ought to have pronounced, both dismiss the present action *en reprise d'instance*, and doth condemn the respondent to pay the costs of the present appeal."

Appeal allowed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Elwood, JJ.A. July 16, 1918.

HIGHWAYS (§ III—104)—TOWN ACT (SASK.)—CHANGING GRADE OF STREET—DRAINAGE DAMMED UP—NEGLIGENCE—DAMAGES.

No action will lie for doing that which the legislature has authorized, if it be done without negligence.

The fact that by altering the grade of a street under authority of the Town Act (1915 Sask. Stats., c. 19) the natural drainage was diverted would not constitute negligence, but where the raising of the grade has the effect of not only diverting the drainage but of damming it up the town is liable for negligence in not providing proper means for carrying off the accumulation.

[*Geddis* v. *Bann Reservoir* (1878), 3 App. Cas. 430, followed.]

Statement.

APPEAL by defendant and cross-appeal by plaintiff from a judgment by Lamont, J. Appeals dismissed.

W. B. Willoughby, K.C., for appellant; *C. E. Gregory*, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The facts of this case are fully stated in the judgment of the trial judge which is the subject of this appeal and cross-appeal. The evidence, in my opinion, clearly supports the following conclusions:—(1) That before the grading of the streets and the construction of the culvert and ditches in question, there was a natural flow of rain water from higher ground to the north, east and west of the plaintiff's premises. (2) That this water flowed or drained towards the point of intersection of the streets upon which the plaintiff's premises abutted and then ran towards the railway track. (3) That the defendant raised the level of these two streets from the point of intersection up to the higher ground to the north and west respectively. (4) That the defendant by the construction of ditches running south and east along these two streets respectively to the point of intersection, and by constructing a ditch which drained the high ground at the back of the plaintiff's premises, concentrated the drainage of a large area at the point of intersection. (5) That this accumulation of water would otherwise have been dispersed naturally over a large area and would have run southward to the railway track. (6) That on account of raising the level of the two streets at the point of intersection, this accumulation of water was held at that point and overflowed the plaintiff's premises, because the culvert was not sufficiently large to carry it away.

Under the authority of the Town Act, c. 19 of the statutes of 1915, the town had a right to alter the grades of the streets and to construct ditches and culverts, and is not liable for consequential damage if that power is exercised properly and without negligence.

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The mere fact that by altering the grade of a street the natural drainage was diverted would not constitute negligence. But in this case the town did more. The raising of the grade and the construction of the ditches had the effect of not only diverting the drainage, but also of concentrating it and practically damming it up at the point of intersection of the two streets. The duty of the town, therefore, was to provide proper means for carrying off the accumulation of water. The culvert constructed with that end in view was not sufficient for the purpose, and, consequently, in my opinion, it was negligently constructed and the town is liable for any resulting damage.

The general principle governing cases like the present is laid down by Lord Blackburn in the case of *Geddis* v. *Bann Reservoir* (1878), 3 App. Cas. 430, at 455-6, as follows:—

> For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

The trial judge seems to me to have properly stated the position in this case when he says:—

> In this case, there being no defined channel, there was no obligation on the part of the defendants to permit surface water to flow across their streets, and had the plaintiff's claim simply been—as in most of the cases above cited—that the defendants prevented the surface water from following its normal course, he would not, in my opinion, have been entitled to recover. That, however, is not what the plaintiff claims. His claim is that the drainage system was defective in that it was calculated to bring the surface water to the intersection and hold it there, and this constitutes negligence.

See *Kenny* v. *R.M. of St. Clements*, 15 D.L.R. 229; *Young* v. *Tucker*, 26 A.R. (Ont.) 162; *Rowe* v. *Township of Rochester*, 29 U.C.Q.B. 590, *McGarvey* v. *Strathroy*, 10 A.R. (Ont.) 631, at p. 635.

I think, therefore, that the plaintiff is entitled to the damages awarded by the trial judge for the year 1916, and would dismiss the appeal with costs.

The plaintiff has cross-appealed against that part of the judgment which dismisses his action so far as damages alleged to have been sustained in 1917 are concerned. The learned trial judge found, on somewhat contradictory evidence, that the plaintiff was guilty of negligence which materially contributed to the state

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of affairs which caused the alleged damage. I quite agree with this finding and with the reasons stated in support of it.

Apart altogether from the question of contributory negligence, the damage, if any, was caused by non-repair, and the plaintiff is barred by non-compliance with the provisions of s. 496 of the Town Act, R.S.S. 6 Geo. V., 1916, c. 19, which enacts that:—

> 496. No action shall be brought for the recovery of such damages unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the mayor or town clerk within thirty days after the happening of the injury.

It was argued before us that the letter of the 19th March, 1917, written by the plaintiff's solicitor to the town authorities, was a sufficient notice. The statement of claim in the action is dated on March 30, 1917. Particulars of damages were given later which stated that the damages claimed for the year 1917 were sustained between March 17, and April 25, 1917. The letter of March 19 states that "the damage suffered by the hotel since Mr. Eakins became lessee and for which he is responsible as such would be as follows:" and then goes on to give particulars of damages sustained from the time Eakins became lessee of the hotel on May 15, 1916. One item is for "loss of use of basement for six months." This cannot be considered "notice of the claim and of the injury complained of" as required by the Act. The letter ends by saying:—

> My instructions in this matter are as follows: If we do not receive a definite answer and a definite assurance that this matter is going to be arbitrated and settled according to the arbitration by Monday next, the 26th inst., action is going to be taken for damages against the town in the amount above specified.

The demand for arbitration would also, in my opinion, make the letter ineffective as a notice under s. 496.

The cross-appeal should therefore also be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A., concurred with Haultain, C.J.S.

Newlands, J.A.

NEWLANDS, J.A.:—This action is for negligently building a sewer so that plaintiff's premises were flooded in the spring of 1916, and for omitting to keep it in repair, causing plaintiff's premises to be again flooded in the spring of 1917.

The trial judge found that the sewer was negligently built, and assessed damages to plaintiff for the flood in 1916, but held that there was contributory negligence on the part of the plaintiff in 1917 which caused the flood in that year, and dismissed the plaintiff's claim for those damages.

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Newlands, J.A.

Both parties appeal against the above findings.

In putting in their sewerage system the defendants did not employ an engineer, so they cannot escape liability because "acting in good faith, they accept the engineer's plan and carry it out," which would be a good answer to the allegation of negligence in putting in their sewers. *Corporation of Raleigh* v. *Williams*, [1893] A.C. 540, *per* Lord Macnaghten at p. 550.

It was held by Lord Blackburn in *Geddis* v. *Bann Reservoir* (1878), 3 A.C. 430, at 456, that:—

> If by a reasonable exercise of the powers either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

The trial judge has held that defendants brought water to plaintiff's premises by their sewerage system, and did not make proper provision for carrying the same away, as they could have done, and that this was negligence which would make them liable for the damage these waters did plaintiff. I see no reason why this finding should be interfered with.

As to the cross-appeal, the plaintiff gave no notice of action as required by the statute, and, as defendants have pleaded such want of notice, the cross-appeal will have to be dismissed.

As to the fact that the trial judge heard evidence in reply which should have been part of the plaintiff's case, thereby giving defendants no chance to reply to same, the trial judge informs me that such evidence was taken by consent of the parties.

Both the appeal and cross-appeal should therefore be dismissed with costs.

Appeal and cross appeal dismissed.

B. C.

C. A.

QUESNEL FORKS GOLD MINING Co. v. WARD AND CARIBOO GOLD MINING Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. May 3, 1918.

STATUTES (§ II A—96)—CONSTRUCTION—REPUGNANCY BETWEEN—LATER ACT TO GOVERN.

Where the provisions of a general Act cannot be read consistently with and cannot be made to harmonize with the provisions of a later special Act the special Act governs.

The lapse of a company's free miners' certificate required by the Placer Mining Act, 1891 B.C., c. 26; R.S.B.C. 1897, c. 136, does not invalidate a lease granted by later special Act (1894 B.C., c. 3) which is ratified and declared binding by a subsequent special Act (B.C. 1895, c. 5).

APPEAL by defendant from judgment of Macdonald, J. Reversed.

S. S. Taylor, K.C., and *Carter*, for appellant; *H. A. Maclean*, K.C., and *Murphy*, for respondent.

MACDONALD, C.J.A., would dismiss appeal (no written reasons).

MARTIN, J.A., allowed appeal.

GALLIHER, J.A.:—The principle running through all the decided cases is that where the provisions of a general Act cannot be read consistently with and cannot be made to harmonize with the provisions of a later special Act, the special Act governs. Lord Alverstone, C.J., in delivering the judgment of the court in *Surrey Commercial Dock Co.* v. *Bermondsey Borough*, [1904] 1 K.B. 474, at 482, says:—

> It seems to us that dealing with a statutory undertaking, as to which both the rights and the obligations are imposed by statute upon a particular body, express enactment or a clear implication is necessary in order to transfer the responsibility to a body acting under a general statute.

Those words, of course, fit the particular case then under consideration, but I think I can shew by analogy that the principle therein involved is applicable to the case at bar.

The question here is as to the effect of the lapse of the company's free miners' certificate on May 31, 1912.

The general Act is that no person or joint stock company shall be recognized as having any interest in any mining property unless they have a free miners' certificate unexpired and the decisions under the general Act are that on expiry of the certificate the rights and interest of the parties cease and the land reverts to the Crown and is open for re-location.

The appellants claim under the special Act, c. 3 of 1894, B.C. statutes, and the lease granted in pursuance thereof and the Special Act, c. 5 of 1895, which sets out the said lease in the schedule thereto, and ratifies and declares it valid and binding.

The effect of this latter Act is to give to the appellants a lease, the provisions of which are confirmed and declared binding by statute.

Now, nowhere in these special Acts, nor in the lease itself, do we find any reference to a free miners' certificate or license.

The general Act, however, calls for such, as I have before noted.

The lease provides terms and conditions upon which the lessees may maintain their title and interest in the mining properties

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leased for a given period and also provides for renewal for a further period, and also what is quite important from my point of view for the manner in which the lease may become forfeited.

If the non-payment of the tax for the free miners' certificate, or the failure to keep it alive, had no other effect than, say, the imposing of a money penalty, it might be that it could be said to be not inconsistent with the provisions of the special Act, in which I include the lease, but when we find that its effect is to create a forfeiture of all rights in the mining property we come in direct conflict with the provisions of the lease of the appellants dealing with that precise question, which provisions have received statutory sanction, and enacting the method by which forfeiture is created.

I do not think we need refer to other sections of the Act for further inconsistencies—this to my mind is absolutely inconsistent and antagonistic. The lease in part reads:—

> Now this indenture witnesseth that in consideration of the rents, covenants, conditions and stipulations, hereinafter contained, and by the lessee and its assigns to be respectively paid, observed and performed the lessor doth hereby demise and lease unto the lessees . . . . to hold the said premises hereby demised, and subject as aforesaid unto and to the use of the lessees and their assigns for the term of 25 years from the date, etc.,

and then follows the "hereinafter contained" considerations as to rents covenants, conditions and stipulations.

It was suggested that while the lease would become forfeited for non-observance of the covenants it might also without inconsistency be forfeited for lack of the free miners' certificate but the lease sets out the conditions upon which it is granted and declared that the lessee shall hold, subject to those conditions, for a period certain, with option of renewal and any other conditions or circumstance which would disturb that holding would be inconsistent with the terms of the lease.

The next question is as to whether the leases have lapsed either from non-payment of rent, absolute abandonment or failure to carry on mining operations for a specified time, all as provided for in the lease itself.

I hold upon the evidence that there was no forfeiture for non-payment of rent, no notice was given pursuant to the lease, rent was tendered from time to time, sometimes refused at once, other times retained for a period and then returned; no complaint at

any time as to non-payment; no declaration of forfeiture for non-payment but the sole notation against these leases in the books of the Gold Commissioner being "forfeiture by reason of lapse of free miners' certificate."

I also hold there was no complete abandonment.

The only remaining point for consideration is: Did the lessees cease for the space of 2 years to carry on mining operations upon the premises or to do any work which would conduce to the facility of carrying on such mining operations?

There is before us evidence that from the time Ward took over the property on October 29, 1913, until May 1, 1914, some $17,000 was expended by him and further sums later, and in fact it was admitted by Mr. McLean when Ward was being examined at the trial that his clients were not relying on any default as to work after Ward took over the property.

There was a period between 1907 and May 31, 1912, when it is proven that no work other than that done by Hobson in 1908 was done upon the premises.

The defendants' answer is that in 1908 an expenditure in excess of $5,000 per annum was established and estimated by the Government of British Columbia and on January 5, 1912, the Crown represented by said government admitted that the said expenditure would lapse on June 1, 1912, and would operate quite apart from all other expenditures on the said premises as a full fulfilment of the terms of the said lease to June 1, 1912, and that the Crown thereby waived the carrying on of mining operations and the doing of work conducing to the facility of carrying on mining operations up to that date.

This arrangement is evidenced by letter September 14, 1911, and January 5, 1912, and the evidence of Mr. Tolmie, Deputy Minister of Mines, at the trial.

Can the Government of British Columbia, by any such arrangement by applying the excess expenditures in any one year to cover a period when no further work was done, waive the strict enactment in that lease?

The evidence would seem to be that they intended so to do. What is their power?

In connection with this we have first to consider, does the proviso of forfeiture make the term *ipso facto* void or voidable only upon a breach of the conditions?

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In *Davenport* v. *The Queen* (1877), 3 App. Cas. 115, Sir Montague E. Smith, who delivered the judgment of their Lordships of the Privy Council, says at p. 128:—

> In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however, clear and strong that they shall be void on breach of conditions by the lessees to mean that they are voidable only at the option of the lessors.

It was contended here that, as the lease in question was issued in pursuance of a statute and incorporated in and confirmed by a subsequent statute, this rule of construction did not apply and that the Crown had no power to waive forfeiture.

The same objection was taken in the *Davenport* case, but it was there stated, at p. 129:—

> But in many cases the language of statutes even when public interests are affected has been similarly modified.
>
> There is no doubt the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail but the intention to exclude it should be clearly established.

There is nothing in the statute ratifying the lease or in the lease itself sufficiently clear to exclude the application of this rule.

If we treat the lease as not void but voidable only at the option of the lessors I am of opinion that the Crown acting through its responsible Ministers have so treated it and by their acts have waived forfeiture. See also the case of *Att'y-Gen'l of Victoria* v. *Ettershank* (1875), L.R. 6 P.C. 354.

I would allow the appeal.

McPhillips, J.A.

McPHILLIPS, J.A.:—It must be conceded that the respondent has no position as against the appellants in respect of the placer mining ground covered by the lease validated by statute of date May 16, 1894, Cariboo Hydraulic Mining Co. Amendment Act, 1895, s. 5, reading: "and the same (referring to the lease) is hereby declared to be valid and binding;" and see as to the effect of validation—Sir Arthur Channell in *Canadian Northern Pacific R. Co.* v. *Corporation of New Westminster*, [1917] A.C. 602, at 604, 36 D.L.R. 505, at 507—"it operates as if it were a clause in an Act of the provincial legislature unless it can be held that the lease having statutory confirmation as no longer a good and subsisting demise. The trial judge has held that the lease is non-existent upon two grounds: (*a*) the failure upon the part of the respondent company to take out annual mining certificates from

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the year 1912; (*b*) that by reason of non-payment of rent the non-doing of work and abandonment the lease became forfeited and void. With great respect to the judge, I am entirely unable to accept the view at which he arrived. The appellants are in possession of the placer mining ground claimed by the respondent under leases from the Crown prior in time to those held by the respondent, and with respect to the lease validated by statute, it is, in my opinion, a statutory demise and it is not stated to be subject to the provisions of the Placer Mining Act.

The respondent, apart from all other considerations affecting title to the placer mining ground called in question in the action, was not entitled to stake any of the ground in that, at the time of the staking, the ground was not "unoccupied ground." I do not think it necessary to enter into any detail upon this point but will refer to the judgment of my brother Martin in *Deisler* v. *Spruce Creek Power Co.* (1915), 22 D.L.R. 550, 21 B.C.R. 441, where the point was fully considered. I would also refer to my reasons for judgment in the same case, wherein I was in agreement with my brother Martin upon the question of what is to be deemed "land lawfully occupied for placer mining purposes," and, upon the facts of the present case, the view there expressed would, in my opinion, be applicable. Without dealing *seriatim* with all that took place, with respect to the payments of rents, the postponement thereof, and the doing of work and the postponement thereof, it can be fairly and justly said that nothing occurred which can be said to have entitled re-entry or forfeiture, nor was there, upon the facts, abandonment within the terms of the lease; further, the 20 days' notice of default was not given, nor was there any inquiry had which would admit of the Crown declaring cancellation of the lease. Any hearing that was had could not be said to have been with relation to the terms of the statutory lease. At most all that can be said is that the leases granted to the respondent were granted upon the ground that the respondent company had failed to take out a free miners' certificate—something not called for under the terms of the lease. There can be no question that in the present case there was no inquiry which would satisfy the requirements of the law, and I will content myself upon this point by referring to *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 Can. S.C.R. 281. In that case Duff, J., elaborates the point and refers to the leading and controlling cases.

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I am, therefore, clearly of the opinion that there was no hearing of such a judicial nature as would admit of the statutory lease being declared forfeited or void and that it must be deemed to be a good and subsisting lease. The statutory lease bears date May 16, 1894, and the term of the demise was for 25 years from the date thereof. Therefore, there has been no expiry of the term by effluxion of time, and it was impossible for the respondent to obtain any valid demise from the Crown during the term of this legislative demise, unless, of course, it could be said that the lease was at an end, *i.e.*, had automatically ended—which is contended—but with deference to all contrary opinion that cannot be viewed as other idle argument.

To recapitulate—the statutory demise must be a good and subsisting demise, unless it is that the absence of the free miners' certificate can be said to be fatal, or upon the facts under the terms of the lease the same became void and of no effect consequent upon the non-payment of rent, failure to do the required work and abandonment of the premises, and that it was not a prerequisite to the avoidance of the lease that there should be any inquiry judicial in its nature. With regard to the free miners' certificate, there is nothing in the lease requiring this, and it cannot be that the lease is void because of something not called for under the terms thereof, unless we find some express provision imposing this requirement in apt language in the private Act or the general legislation (Placer Mining Act, c. 26 B.C. 1891; c. 136 R.S.B.C. 1897) is made applicable, which is not the case. The situation in the present case is that of the lessee holding placer mining ground under special statutory demise, no mention being made of the general legislation and by way of analogy I would refer to the case of *Esquimalt Water Works Company* v. *City of Victoria Corporation*, [1907] A.C. 499, 76 L.J.P.C. 75, and the present case is one of special obligations imposed upon the lessee, and, as already stated, the general legislation is not in terms, or by any necessary implication, made applicable to the statutory demise. The lease is not the ordinary or customary lease under the Placer Mining Act; it is different in terms, and with more extensive obligations. The lease was made following the authority conferred by an Act respecting the Cariboo Hydraulic Mining Co. (limited liability) assented to on April 11, 1894, which, in its preamble, in part

reads: "Consolidating the several placer mining claims and other properties now held by them into one, with a more lasting and secure title thereto," obviously removing the demise from the jeopardy that leases in general are subject to, and in particular it was enacted by ss. 3 and 4 of the Cariboo Hydraulic Mining Co. Amendment Act, 1895, as follows:—

3. *The Lieutenant-Governor-in-Council* may also, on such terms and conditions, and with such rents, reservations, and restrictions as may be deemed expedient, authorise and empower the company to construct a dam or dams across the outlets of Morehead and Boot Jack Lakes, and to execute all other necessary works for utilizing said lakes, or either of them, as reservoirs for the storage of water for use upon the mining property of the company in working the same by the hydraulic process.

4. The grants mentioned in the two preceding sections shall make due provision for the protection of the interests of all persons from being prejudicially affected by the operations of the company under said grants, or either of them, *and shall make provision whereby water not necessary for the purposes of the company may be supplied to others upon fair and equitable terms.*

And the works authorised and constructed meant the expenditure of hundreds of thousands of dollars, and, as provided in the latter part of s. 4 "shall make provision whereby water not necessary for the purposes of the company may be supplied to others upon fair and equitable terms"—a provision in the nature of creating, by private expenditure, a public utility capable of being enjoyed by others—demonstrating the particular obligation imposed upon the company, and with all this in view the judgment in the *Esquimalt Water Works Co.* case is peculiarly apposite, the headnote of that case in part reads as follows:—

Private Acts conferring special rights and imposing special obligations for special purposes are not over-ruled by general legislation the application of which might interfere with the rights granted and the obligations imposed by the private Acts.

Also see *Surrey Commercial Dock* v. *Bermondsey Corp.*, [1904] 1 K.B. 474, at 477, 483; *City & S.L.R. Co.* v. *London County Council*, [1891] 2 Q.B. 513; *London & Blackwell Ry. Co.* v. *Limehouse District Board of Works* (1856), 3 K. & J. 123, 69 E.R. 1048; *Thorpe* v. *Adams* (1871), L.R. 6 C.P. 125; *Ashton Under-Lyne Corp.* v. *Pugh*, [1898] 1 Q.B. 45; *Fitzgerald* v. *Champneys* (1861), 2 J. & H. 31, 70 E.R. 958. My opinion is, therefore, that the obligation under the Placer Mining Act of always having a free miners' certificate, arising by reason of the general legislation, was not obligatory upon the company, and avoidance of the statutory

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lease could not be effected upon this ground. It is a matter for remark, and is cogent evidence of the departure from the ordinary lease under the Placer Mining Act and indicating the special nature of the statutory demise as being outside the scope of the Act, that the statutory lease is not a lease granted in stated pursuance of the Placer Mining Act for placer mining only as all the leases, under which the respondent claims, read, but is a lease "with full liberty to take from the premises hereby demised and retain for their own use all mines and minerals therein contained including the precious metals," and with respect to other than the precious metals. There certainly is no requirement by general legislation to take out a free miners' license, and no argument is sustainable that as to the other minerals a free miners' license could be required, but as hereinbefore stated under the circumstances of the present case the free miners' certificate cannot be deemed to have been a matter of obligation, to maintain the life of the statutory lease.

Then we come to the other questions upon which it is said the statutory lease became void, *i.e.*, under the terms thereof it "shall *ipso facto* at the expiration of the times aforesaid cease and be void as if these presents had not been made," it must be conceded that save as to the contended default in not taking out the annual free miners' certificate from and after 1912—no inquiry judicial or otherwise took place—then the contention is that without judicial inquiry, under the terms of the statutory lease alone, upon the facts, by operation of law, the statutory lease became void and of no effect, entitling the granting of the leases under which the respondent claims. *Hardy Lumber Co.* v. *Pickerel River Improvement Co.*, (1898), 29 Can. S.C.R. 211, Sir Henry Strong, at pp. 214, 215, 216.

In the present case there is considerable evidence of waiver on the part of the Crown and in my opinion waiver is amply established and no judicial inquiry nor proceeding by the Attorney-General on behalf of the Crown to have a forfeiture judicially declared has taken place. Further, the Crown is not a party to the action. In *Klondyke Government Concession* v. *The King* (1908), 40 Can. S.C.R. 294, Duff, J., at p. 311, said:—

> This appeal is governed by the decision in *Bonanza Creek Hydraulic Concession* v. *The King*, 40 Can. S.C.R. 281. The material provisions of the appellants' lease are identical with those considered on that appeal; and, although, in this case, there is evidence of communications and discussions

between the Minister and the solicitor of the company before the formal declaration of forfeiture, the Minister's decision that the lessees had failed in making the expenditure required by the terms of the lease was not, I think, preceded by anything which, within the principle of that case, could be described as a hearing upon that question.

In *Davenport* v. *The Queen* (1877), 3 App. Cas. 115, 37 L.T. 727 (P.C.), it was held (see headnote at p. 727) that:—

A clause in a lease declaring that it shall be void upon a breach of conditions by the lessee must be held to mean that it is voidable only at the option of the lessor even if the condition was imposed by statute.

In the judgment as reported at p. 731 we find this language:—

Besides being made subject to the terms, conditions, penalties, and forfeitures contained in the Acts, this lease includes covenants by the lessee for the payment of the rent and observance of the clauses, conditions, and provisoes in the Acts, with a distinct covenant to cultivate one-sixth of the land within a year. There seems to their Lordships to be nothing in the form of this lease inconsistent with the Acts. The covenants afford the means of conveniently enforcing the obligations of the lessee. Does then the proviso of forfeiture in s. 8 of the Reserves Act, when read into such a lease as the present, make the term *ipso facto* void, or voidable only upon a breach of the conditions? In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however, clear and strong that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors.

It was also held that upon the facts in the *Davenport* case, there was waiver of the forfeiture—in my opinion, in the present case as already stated, there has been waiver, and even apart from waiver, there has been no exercise of the option to avoid the lease, based upon breach of conditions. A prerequisite thereto, of course, would be an inquiry judicial in its nature. All that the Crown did through the Department of Mines by its Gold Commissioner is of record in these words under date December 22, 1913: "Forfeited as a certificate of lapse of the free miners' certificate filed Barkerville, December 4, 1913," therefore, even if without judicial inquiry forfeiture could be declared of the statutory lease for breach of conditions thereof, it is plain that no forfeiture has been declared having relation to any breach of conditions in the lease. The taking out of a free miner's certificate is not one of the conditions in the lease; how then could the respondent achieve any position as against the appellants holding under the prior statutory lease still existent, unless it could, of course, be said that there was an effective forfeiture by reason of the lapse of the free miners' certificate? That point I have already dealt with, and my opinion,

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as already expressed, is, that there was no right of forfeiture for any such cause.

Therefore, in my opinion, the claimed forfeiture or lapse of the statutory lease for failure to take out a free miners' certificate was ineffective in that there was no requirement that a free miners' certificate should be held by the lessees. Then, if it can be said that the lease was voidable by the lessor, the Crown, upon a breach of conditions by the lessee, that could only be at the option of the Crown, and that option was never exercised. Further, the required 20 days' notice was never given, which was a condition precedent to re-entry for non-payment of the rent or other default, under the provisions of the statutory lease, nor was there any inquiry of a judicial nature, all of which incontrovertibly demonstrates the fallaciousness of any legal right in the respondent to the possession of the lands in question in this action the same being held by the appellants under a good and subsisting lease legalised by statute. In the result, in my opinion, the leases under which the respondent claims possession of the lands cannot prevail over the rights granted and the obligations imposed by the private Act validating the lease of May 16, 1894 (Cariboo Hydraulic Mining Co. Amendment Act, 1895, c. 5, s. 5), that is, the respondent, in my opinion, fails in establishing title to the possession of the land as against the priority of right of possession thereto existent in the appellants. Upon the whole case, therefore, I am of the opinion that the appeal should succeed, and the judgment of the trial judge be reversed and set aside, the appeal allowed and the action dismissed. *Appeal allowed.*

QUE.

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A. F. BYERS Co. Ltd. v. BARTOLUCCI.

Quebec King's Bench, Archambeault, C.J., and Cross, Carroll and Pelletier, JJ. February 28, 1918.

GUARDIAN AND WARD (§ I—2)—MINOR NOT DOMICILED OR RESIDENT IN COUNTRY—RIGHT OF COURT TO APPOINT TUTOR.

Although a minor, neither domiciled nor resident in Quebec, has a tutor appointed by the court of domicile, the court may appoint a tutor resident in the province to represent and protect the minor in a matter to be judicially determined in the Quebec courts.

Statement.

APPEAL from the judgment of the Superior Court, Lamothe, J. Affirmed.

Foster, Martin & Co., for appellant; *McGoun*, K.C., for respondents.

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CROSS, J.

CROSS, J.:—This is an action taken against the appellant by the dependents of one Giuseppe Bartolucci to recover damages arising from the death of the latter. Bartolucci died of injuries sustained while working as a labourer in the service of the appellant.

Judgment was given by the Superior Court in favour of the widow and children of Bartolucci against the appellant, a certain sum being adjudged in favour of the widow and other sums amounting together to $1,850 in favour of the 4 minor children of the deceased Bartolucci. It is against the part of the judgment which awarded this sum of $1,850 to the children that this appeal has been brought up.

The ground of the appeal is, in effect, that the 4 minor children are not legally represented in the action; in other words, that the person who assumes to sue on their behalf is not a competent plaintiff.

It appears that Giuseppe Bartolucci had been for some time working in this province as a day-labourer. He had come from Italy, where he had lived at Montebaraccio with his wife and children. The wife and children continued to live in Italy and had never been in Canada. The plaintiffs in the present action are the widow (Assunta Canestrari) suing on her own behalf and Angelo Bartolucci at Montreal, labourer "in his quality of tutor *ad hoc*" to the four children. Angelo Bartolucci was appointed by *acte* of tutorship on July 30, 1915, wherein it is recited that the court is petitioned to appoint a tutor *ad hoc*, the tutor so to be appointed to be

> authorized to take an action against A. F. Byers and Company (Limited), contractors, for damages caused to the said minors by the death of their late father while in their employ, to take all necessary proceedings relating thereto;

and it is accordingly ordered that Angelo Bartolucci be tutor *ad hoc* and be authorized

> to take all necessary legal proceedings in the name and for the said minor children, against the said contractors A. F. Byers and Company Limited . . . for all damages caused to his said pupils by the death of their said late father Giuseppe Bartolucci . . .

Counsel for the appellant say that that appointment has no warrant in law and is void. They say that a person in minority can sue only in the name of his tutor and that Angelo Bartolucci has not been appointed tutor and cannot represent the children or sue for them. They argue that a tutor *ad hoc* is one appointed in

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the case provided for in art. 269 C.C., namely, where a minor has an interest to discuss adversely with his tutor, and that there is no provision for tutorship *ad hoc* in other relations. They cite the observations to be found in the report of *Rattray* v. *Laruc*, 15 Can. S.C.R. 102.

The provisions for the appointment of tutors, made in the Code, have relation to normal conditions in the province. Thus, tutorships are dative and are conferred by the court of the domicil (art. 249 C.C.) and, in general, one tutor only is named, though there may be exceptions (art. 264 C.C.). The tutor of the domicil of the minor has the care of his person, *Ibid.*

I take it that it would be a mistaken exercise of jurisdiction for a court of this province to name a tutor to the person of a minor neither domiciled nor resident here. That does not mean that the court should not name a tutor to serve some object of a local character.

In the matter before us, notwithstanding a somewhat embarrassing averment to the contrary in the plaintiff's declaration, it is clear that the domicil of the four children of Bartolucci was and is in Italy. I take it to be proved that, by the law of Italy, the father represents his children in civil matters and administers their estates; and that in default of the father, the mother can exercise the same authority. It would follow that the mother Assunta Canestrari, in the quality thus indicated, would be a competent person to sue as plaintiff on behalf of the children.

On the other hand, if by the law of Italy she has that authority, practically the authority of a tutor to minors, there is reason why our courts should not appoint a tutor to minors who already have a tutrix, but that need not stand in the way of an appointment by the court in this province of a tutor to represent and protect the minors in a matter to be judicially determined by our courts.

The objection, relied upon in *Rattray* v. *Laruc*, *supra*, that a minor could not have a tutor *ad hoc* unless he already has a tutor, does not apply in such a case.

This action is taken to claim an asset payable in this province, and I take it to have been an appropriate and competent exercise of judicial authority for the court here to name a representative to sue on behalf of the children, without interfering with such control over the persons of the minors as may be possessed by their mother

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by the law of Italy. In the present matter, he is called a tutor *ad hoc*, but too much importance need not be attached to the name, as the purpose and object of the appointment are specifically mentioned. This view is in accord with our recent decision in *Montreal Tramways Co.* v. *McAllister*, 34 D.L.R. 565, 26 Que. K.B. 174.

In the quite recent case of *Guttman* v. *Goodman*, 26 Que. K.B. 270, a majority of us were prepared to go even farther and to maintain the right of a tutor *ad hoc*, appointed with specific mention of the purpose and object of his appointment, to take suit even though the minor was domiciled in this province and a tutor with the ordinary and general authority of a tutor could have been appointed. That was overruling the view that a minor who did not have a tutor could not have a tutor *ad hoc*.

It may be well to add that a motion was made by the plaintiffs at the trial for leave to amend by introducing an averment to the effect that the domicile of the deceased, of his widow and of the children was in Italy. That would serve to set out the true fact, notwithstanding the earlier averment of the plaintiffs themselves to the contrary. By the same motion, leave was also sought to introduce an averment to the effect that the widow was, by the law of Italy, tutrix of the children and as such had the right to join with the tutor *ad hoc* as plaintiff in the action. By the final judgment this motion was granted, and the appellant stands condemned to pay *aux demandeurs*.

The appellant complains, with some reason, of being thus condemned to pay damages claimable by the proper representative of the children, simply *aux demandeurs*, that is to say, to the tutor and to Assunta Canestrari. They point out that, though the proposed averments were allowed to be introduced by amendment into the declaration, that did not make Assunta Canestrari a plaintiff in her quality of tutrix, the writ not having been amended in that sense. It is nevertheless clear that, in this respect, the judgment cannot work injustice to the appellant, when once it is established that Angelo Bartolucci in his so-called quality of tutor *ad hoc* is a competent plaintiff. I consider that he is such a competent plaintiff.

On the whole, the appeal fails and should be dismissed.

Pelletier, J.

PELLETIER, J.:—The judgment in the present case is governed by two decisions rendered by this court last year. The first case

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is that of *McAllister* v. *Montreal Tram. Co.*, 34 D.L.R. 565. The second is *Guttman* v. *Goodman*, 26 Que. K.B. 270. In the last case there were two judges dissenting (Trenholme and Cross, JJ.) on a question which is not considered in the present case; but the court was unanimous on a question like that submitted in this case. I am of the opinion to confirm. *Appeal dismissed.*

CAN.

Ex. C.

BONNEAU v. THE KING.

Exchequer Court of Canada. Cassels, J. April 9, 1918.

OFFICERS (§ II C—85)—NEGLIGENCE—OF CUSTOMS OFFICIALS—DETENTION OF ANIMALS—LIABILITY.

The liability for wrongful seizure and detention of animals by the Crown's Customs officials being one in tort is not actionable against the Crown.

Statement.

PETITION OF RIGHT to recover damages for the illegal seizure and detention of animals by the Canadian Customs authorities.

P. F. Casgrain, for suppliant; *C. P. Plaxton*, for respondent.

Cassels, J.

CASSELS, J.:—A petition of right filed on behalf of Ernest N. Bonneau. The petition alleges that he is a cattle trader carrying on business in the Province of Quebec. He alleges that on or about June 14, 1915, a carload of animals belonging to him was seized by the Canadian Customs authorities at Farnham, in the Province of Quebec. Further, he alleges that the car containing lambs, etc., consigned to William Davies & Co., Limited, was illegally detained at Abercorn for over a week.

Par. 4 of the petition of right reads as follows:—

That the said seizure was made by the officers of the Canadian Customs Department as aforesaid illegally, maliciously and with the intent to cause your petitioner damage and annoy him in the conduct of his business, and to prevent him from delivering the said animals to William Davies & Co., to whom he had sold them, thereby causing your petitioner a loss of $640.71.

Par. 5 reads:—

That the officers of the said Customs Department acted without any reasonable grounds whatever in seizing the said animals belonging to your humble petitioner.

Par. 8 reads:—

That your humble petitioner is of opinion that the said illegal and malicious seizure made by the Customs officers was so made in the spirit of vengeance.

Par. 9 reads:—

That on account of the said malicious and illegal seizure, your humble petitioner has suffered loss and damages.

The petition then details the damages claimed.

To this petition the Crown filed a statement of defence setting up that the petition of right is insufficient and bad in law because it does not allege any cause of action against His Majesty, etc.

An application was made for an order to have the question of law determined, practically amounting to a demurrer to the petition of right.

The case came on for argument on March 27 last. Mr. P. P. Casgrain appeared in support of the petition, and Mr. C. P. Plaxton for the Crown.

On the argument I was of opinion that the case alleged was purely one of tort, and that His Majesty was not liable. Mr. Casgrain presented his case in support of the petition with great ability and ingenuity, so much so that I reserved judgment in order to consider the points raised by Mr. Casgrain and the authorities cited by him. I have, since the argument, considered the questions, and am still of opinion that the case made is one purely in tort, and under a long series of decisions, both in the Supreme Court of Canada and elsewhere, in my opinion, there is no liability attaching as against His Majesty.

The question of liability against the officer who so maliciously acted is another question. *Boyd* v. *Smith*, 4 Can. Ex. 116, may be referred to—but as the officer was not before me, the point does not arise.

I think the petition should be dismissed, and with costs.

Petition dismissed.

POLLOCK v. HOLITSKI.

Saskatchewan King's Bench, Brown, C.J. July 15, 1918.

HOMESTEAD (§ IV A—30)—EXECUTION AGAINST—MORTGAGE—PRIORITY OF ALTHOUGH SUBSEQUENTLY REGISTERED.

A homestead in Saskatchewan is free from the operation of any writ of execution, and the owner is entitled to dispose of it as he sees fit. A mortgage takes priority over an execution registered against the homestead although registered subsequently.

Statement.

ACTION to decide whether or not an execution registered against a homestead takes priority over a mortgage subsequently registered.

H. E. Caldwell, for plaintiff; *H. J. Schull*, for defendants.

Brown, C.J.

BROWN, C.J.:—The question that I am asked to decide herein is, whether or not an execution registered against a homestead takes priority over a mortgage subsequently registered.

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POLLOCK v. HOLITSKI.

Brown, C.J.

Mr. Schull has kindly furnished me with a copy of a judgment (unreported) given by Haultain, C.J., in *Last West Lumber Co.* v. *Pease*, a similar case to the one at bar, and I entirely concur in the conclusions therein arrived at. I agree with the Chief Justice that the matter has virtually been decided against the execution creditor by *Northwest Thresher Co.* v. *Fredericks*, 44 Can. S.C.R. 318, and *Foss* v. *Sterling Loan*, 23 D.L.R. 540, 8 S.L.R. 289. The former decision, which was rendered in 1911, decided that our Exemptions Ordinance was intended to free and did free a homestead from the operation of any writ of execution, and that the debtor was entitled to dispose of same as he saw fit. The latter decision, which had under review s. 17 of c. 16 of the statutes of 1912-13, is to the effect that this section does not affect any lands which the sheriff could not legally seize prior to the passing of it.

The Manitoba decisions of *Frost* v. *Driver*, 10 Man. L.R. 319, and *Roberts* v. *Hartley*, 14 Man. L.R. 284, which followed on *Frost* v. *Driver*, are scarcely applicable. There the provisions for registration of judgment and for exemption of homestead were contained in the same statute, and it was a case of interpreting the statute as a whole. Our legislation on the same subject matter, though very similarly worded, is contained in entirely different statutes, and a different rule of construction naturally follows. Under our legislation, apart altogether from the decisions of *Northwest Thresher Co.* v. *Fredericks, supra*, and *Foss* v. *Sterling Loan, supra*, which seem to me to conclude the matter, I would not hesitate to hold that the provisions of s. 17 do not apply to a homestead which is specificially exempted under a separate statute.

In the result, the question submitted is decided against the three execution creditors represented by Mr. Schull.

Counsel for the plaintiff, as appears by a letter dated the 9th instant, and on file, is not desirous at present of proceeding with the action against the other defendants, but simply wishes this question which has been raised by the three named defendants decided.

These three defendants will pay all costs occasioned by their defence. *Judgment accordingly.*

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REX v. BAINBRIDGE.

Ontario Supreme Court, Appellate Division, Maclaren and Magee, JJ.A., Clute, J., Ferguson, J.A., and Rose, J. March 1, 1918.

CRIMINAL LAW (§ II A—37)—CRIMINAL CODE, S. 852—SUFFICIENCY OF INDICTMENT—SEC. 861—SEDITIOUS LIBEL.

Section 852 of the Criminal Code provides that every count of an indictment shall contain, and shall be sufficient if it contain, a statement that the accused has committed some indictable offence therein specified; but this does not mean merely naming an offence as "murder" or "theft" —the offence itself must be described with reasonable certainty. So also s. 861, which declares that no count for publishing a seditious libel shall be deemed insufficient on the ground that it does not set out the words thereof, dispenses only with the *ipsissima verba*—there must be substantial references to identify the words or locate the objectionable parts.

Statement.

APPEAL from a conviction of Hodgins, J.A., the Appellate Court having granted leave to appeal, and ordered the trial Judge to state a case.

The case stated is as follows:—

"This is a case stated by me, The Honourable Mr. Justice Hodgins, under the provisions of section 1014 of the Criminal Code, for the purpose of obtaining the opinion of the Appellate Division for Ontario on the questions of law which arose before me as hereinafter stated.

"At the sittings of assize holden at Toronto in and for the county of York, on the 29th day of October, 1917, an indictment was found by the grand jury against Isaac Bainbridge, charging that he did 'in the year of our Lord one thousand nine hundred and seventeen at the city of Toronto in the county of York publish a seditious libel contrary to the Criminal Code section 184.' Upon the trial before me on the 22nd November, 1917, objection having been taken by counsel for the said Isaac Bainbridge by way of demurrer for defects said to be apparent on the face of the indictment, I refused leave to raise the question, the said Isaac Bainbridge having some time previously thereto, to wit, on the 9th November, 1917, pleaded to the said indictment. It appearing that on the 20th November, 1917, particulars had been delivered, and that the publications therein mentioned had been before the grand jury when they had found the said indictment, and in view of section 860 of the Criminal Code, I amended the indictment

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by changing the figures '184' into '134' and by adding the following words thereafter, 'to wit the matters contained in the annexed particulars.' The trial then proceeded, and at the conclusion of the Crown's case I ruled that the said Isaac Bainbridge was not called upon for his defence except as to publications put in evidence and marked as exhibits A, B, and D, the first two of said exhibits being duplicates and the latter being a publication containing as the matter complained of and read to the jury the first two letters on page 8 thereof. The said Isaac Bainbridge gave evidence on his own behalf, and admitted the publication of exhibits A, B, and D. The case was then submitted to the jury, who returned a verdict which was entered by me upon the record as follows: 'The jury find the defendant guilty on the within indictment with regard to the publications entitled "The Price We Pay" and "The Canadian Forward" issue of 10th October, 1917, with a strong recommendation to mercy.'

"Counsel for said Isaac Bainbridge having moved under section 1007 of the Criminal Code in arrest of judgment and for a reserved case, I, on the 28th day of November, 1917, dismissed the motion, and sentenced the said Isaac Bainbridge to nine months in the common gaol, and he is now in close custody.

"And whereas a Divisional Court of the Appellate Division of the Supreme Court of Ontario on the 28th day of December, 1917, by order having directed that a case should be stated raising the following questions for the opinion of the Appellate Division:—

"Now, therefore, I, the said The Honourable Mr. Justice Hodgins, do hereby state and sign the following case in order to raise the following questions, which, in the opinion of the said Divisional Court, were proper to be considered, viz.:—

"(1) Should the demurrer to the indictment have been allowed?

"(2) Should the motion to quash the indictment have been allowed?

"(3) If the two previous questions or either of them are answered in the affirmative, does the verdict make the indictment good?

"(4) Could the amendments of the indictment which were made at the trial be rightly made without the privity of the grand jury?

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"(5) Should such amendments have been made in any case?

"(6) Was there any impropriety or defect in the proceedings at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury?

"And I make the record, papers, and exhibits at the said trial part of the stated case.

"Dated at Toronto this 16th day of January, A.D. 1918."

R. T. Harding, for the prisoner, argued that the indictment was bad on its face, and that its defects were not such as could be cured under sec. 898 of the Code, as the only amendments that could be made under that section were as to defects in matters of form, and not, as in the present case, in matters of substance. Reference was made to *Rex* v. *Thompson*, [1914] 2 K.B. 99; Russell on Crimes, 7th ed., p. 311. The indictment is bad for duplicity, in charging several offences under one count, contrary to sec. 853 (3) of the Code. The indictment before amendment did not state the details and circumstances as required by the Code, and the amendment was not in regard to matter of form, but of substance. It is not charged that the seditious libel is against any person; and, as particulars have been delivered of seven publications, in respect of which the accused has been found guilty of only two, it is impossible to know on what charge the grand jury acted. The case of *Rex* v. *Michaud*, 17 Can. Crim. Cas. 86, relied on by the Crown, is not applicable here, as the indictment covered a number of separate acts which the Crown elected to treat as one offence. The objections to the indictment are not such as are capable of being cured after verdict, under sec. 1010 of the Code.

Edward Bayly, K.C., for the Crown, argued that the indictment was not really in respect of seven separate charges, but in respect of several publications from which a seditious intent might be inferred. What was done in the way of amendment of the indictment by the trial Judge is justified under sec. 898. He referred to *R.* v. *Yee Mock*, 13 D.L.R. 220, 21 Can. Cr. Cas. 400. The accused had full notice and was in no way prejudiced by the action of the Crown. The powers given by sec. 898 cannot be cut down by reference to the forms prescribed by the Act. Section 1010 of the

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Code is a conclusive answer to the objections taken on behalf of the accused. He relied on the cases cited by HODGINS, J.A., in his judgment on the motion for a reserved case, and referred especially to *Regina* v. *Hazen*, 20 A.R. 633; *Kelly* v. *The King*, 54 Can. S.C.R. 220, 34 D.L.R. 311; *Ibrahim* v. *The King*, [1914] A.C. 599.

Harding, in reply, argued that the amendment made at the trial formed an absolutely new indictment, which could only be found by the grand jury. He referred to *Rex* v. *Law* (1909), 15 Can. Crim. Cas. 382, and to the cases on sec. 898 of the Code collected in Crankshaw's Criminal Law of Canada, 4th ed., p. 993 *et seq.*

Magee, J.A.

MAGEE, J.A.:—Case stated by Mr. Justice Hodgins pursuant to the order of the Second Divisional Court.

The indictment preferred by the grand jury on the 29th October, 1917, contained only one count, and charged that Isaac Bainbridge did in the year 1917, at the city of Toronto, "publish a seditious libel contrary to the Criminal Code section 184." That was a charge of a single libel. Section 184, however, has no bearing upon seditious or other libel, but relates to an entirely different offence, and it was, no doubt, mentioned by mistake.

The only section of the Code which makes a seditious libel punishable is sec. 134,* which was of course intended.

The accused on the 9th November, 1917, pleaded "not guilty" without making any objection.

On the 20th November, particulars were, without any previous demand therefor, delivered by the prosecution to the solicitor for the accused. They begin: "The following are the particulars in the seditious libel published by Isaac Bainbridge at Toronto in the year 1917 as charged against him in the indictment herein. That Isaac Bainbridge did in the year of our Lord one thousand nine hundred and seventeen in the city of Toronto . . . contrary to section 134 of the Criminal Code . . . publish seditious libel by publishing the following pamphlets." Then follow paragraphs 1 to 7, mentioning respectively seven pamphlets, each

*134. Every one is guilty of an indictable offence and liable to two years' imprisonment who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy.

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bearing a different title to the others, except that the seventh is not stated to have any title, and the seditious character and the purpose of publishing each is stated separately in its own paragraph, but no reference is made to any particular part or passage of any of them.

These particulars in fact set out, in so far as they did set out, seven different seditious libels.

At the opening of the trial, on the 22nd November, 1917, and before the jury was called, counsel for the accused took objection, by way of demurrer, to the indictment as too general and disclosing no offence and being insufficient and bad and not amendable, and asked also for leave, under sec. 898 of the Code, to move to quash it, and in the alternative asked that the Crown should be restricted to one of the seven pamphlets, and should elect upon which one the trial would proceed, and should specify the particular passages alleged to be seditious. Counsel for the Crown declined to restrict the prosecution to any one pamphlet or to elect as to any or to specify any part of any, and also declined to ask for any amendment of the indictment except to substitute sec. 134 for sec. 184, which was done, the accused not consenting; and subsequently, on the Crown counsel's application, a further amendment was made by adding to the indictment the words "to wit in matters contained in the annexed particulars," a copy of the particulars being annexed to the indictment.

The objections made for the defence were overruled and the applications refused.

Thus, instead of a single seditious libel being charged, as had been by the grand jury, their presentment was made to cover, and in one count, all the seven different pamphlets alleged to be seditious. The trial proceeded, and the learned trial Judge held that as to five of the seven there was not proof of publication, but he left the other two to the jury, who, as their verdict is entered upon the record, found "the defendant guilty on the within indictment with regard to the publications intituled 'The Price We Pay' and the 'Canadian Forward' issue of 10th October, 1917, with a strong recommendation to mercy."

Counsel for the defence then moved in arrest of judgment. Subsequently this motion was refused, and the defendant was sentenced.

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The questions now submitted to the Court are:—

(1) Should the demurrer to the indictment have been allowed?

(2) Should the motion to quash the indictment have been allowed?

(3) If the two previous questions or either of them are answered in the affirmative, does the verdict make the indictment good?

(4) Could the amendments of the indictment which were made at the trial be rightly made without the privity of the grand jury?

(5) Should such amendments have been made in any case?

(6) Was there any impropriety or defect in the proceedings at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury?

It should be noted that the learned trial Judge in his statement of the case says: "It appearing that on the 20th November, 1917, particulars had been delivered, and that the publications therein mentioned had been before the grand jury when they had found the said indictment, and in view of section 860 of the Criminal Code, I amended the indictment." The record, papers, and exhibits at the trial are made part of the stated case. If this is intended to include the learned Judge's charge to the jury, it would appear therefrom that the pamphlet "The Price We Pay" was published on the 24th July, 1917, and the "Canadian Forward" objected to was published on the 10th September, 1917. In the particulars the former is thus referred to: "'The Price We Pay,' a pamphlet in which assertions are made that His Majesty's Government is conducting the present war on behalf of a limited class of His Majesty's subjects and against the interests of the majority and for the purpose of persuading His Majesty's subjects to oppose His Majesty's Government in the prosecution of the present war." The other is thus mentioned: "(4) 'The Canadian Forward,' a pamphlet declaring that His Majesty's Government is actuated by motives and purposes directly contrary to religion and morality in the conduct of the present war." I do not find anywhere any suggestion that these two, or indeed any of the seven pamphlets, were connected or related so that they could be considered one libel.

The provisions of the Criminal Code as to the offence of seditious libel are secs. 132, 133, and 134. Section 132 declares that

a seditious libel is a libel expressive of a seditious intention; sec. 133 states that certain intentions in good faith shall not be deemed seditious intentions; and sec. 134 declares that every one is guilty of an indictable offence and liable to imprisonment who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy. The Code does not indicate what is a libel nor what is seditious. For that we have to go to the antecedent common law. And, excepting certain specific enactments in the Criminal Code, we must also refer to the common law for the rules and principles governing criminal pleading and procedure.

"The first general rule respecting indictments is, that they should be framed with sufficient certainty:" 1 Chitty's Criminal Law, 2nd ed., p. 169. "For this purpose the charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the defendant be put upon his trial in chief for another, without any authority:" *ib.* "These precautions are also necessary in order that the defendant may know what crime he is called upon to answer, and may be entitled to claim any right or indulgence incident . . . as well as that the jury may appear to be warranted in their conclusion . . . and that the Court may see such a definite offence on record, that they may apply the judgment, and the punishment . . . ; they are also important in order that the defendant's conviction or acquittal may insure his subsequent protection . . . : the certainty essential to the charge consists of two parts, the matter to be charged, and the manner of charging it:" *ib.*, p. 169. "The indictment must state the facts of the crime, with as much certainty as the nature of the case will admit:" *ib.*, p. 171. "The cases of an indictment for being a common scold or barrator, or for keeping a disorderly house, or a common gambling-house, may be considered as exceptions to the general rule, but they differ materially from prosecutions for offences which consist of individual acts, as the very ground of complaint in these peculiar cases consists of a series of transgressions:" *ib.*

And an indictment for a libel must set forth the libel itself: *ib.*, p. 230. In *Sacheverell's Case* (1710), 5 Har. St. Tr. 828, 15

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How. St. Tr. 466, 467, the unanimous opinion of the ten Judges was that "by the laws of England, and constant practice in all prosecutions, by indictment or information for crimes and misdemeanours, in writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information." In *Bradlaugh* v. *The Queen* (1878), 3 Q.B.D. 607 (C.A.), reversing the judgment of the Queen's Bench Division, *The Queen* v. *Bradlaugh* (1877), 2 Q.B.D. 569, it was held necessary to set out the words of an obscene libel unless there was an allegation excusing it for their unfitness. Bramwell, L.J., at p. 619, said: "Whatever reason can be given for setting out the very words in defamatory libels, is equally true in blasphemous, obscene, or seditious libels."

Now in what respect has the Criminal Code changed this law? Section 861 declares that no count for publishing a blasphemous, seditious, obscene or defamatory libel, shall be deemed insufficient on the ground that it does not set out the words thereof. But the very language used indicates that only *ipsissima verba* are waived, not the substantial references to identify the words or locate the objectionable parts.

So in sec. 855, which renders unnecessary the setting out of a document or of the words used. That section also removes objections for not naming or describing with precision any person, place, or thing. But the very preciseness of the word "precision" indicates that substantiality of description is not done away with.

Section 852 states that every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified; by sub-sec. 2, the statement may be made without any technical averments or any allegations of matter not essential to be proved; and, by sub-sec. 3, such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged. But it is evident from sub-sec. 2 that matter which is essential to be proved is not to be omitted, and from sub-sec. 3 that the accused is to have notice of the offence and not merely of the character or class of the offence; while sub-sec. 1 requires that there is to be a substantial statement of an offence which, not

the class of which, is specified, and which must be an indictable one.

To give this sub-section any meaning such as is contended for here for the prosecution, would lead to absurd conclusions. Take sec. 570, which makes an indictable offence an attempt to commit an indictable offence not before specified and punishable with specified imprisonment. So with sec. 571. So with any of the serious offences, murder, robbery, rape, theft, could it be said to be sufficient to charge that the accused committed that crime without more? But sub-sec. 4 of sec. 852 gives the interpretation of that section in the forms, which, it says, afford examples, and in which that for defamatory libel sets out with substantial particulars, specifying besides the name of the person libelled, the date, the newspaper, the article, the parts relied upon, and the sense imputed, all which would be unnecessary if the contention for the prosecution here were correct.

Section 853, however, provides that so much detail of the circumstances of the alleged offence as to afford the accused reasonable information and to identify the transaction shall be given, but that the absence or insufficiency of such details shall not vitiate the count. And, by sub-sec. 2 of sec. 855, the general provisions of secs. 852 and 853 are not to be restricted or limited by other provisions in Part XIX. as to matters therein mentioned. Granted that full effect is to be given to sec. 853; it relates only to details of circumstances, and does not dispense with the substantial circumstances which constitute the offence. Sub-section 2 of sec. 853, as to reference to a section of the Code, does not help in this case, for the mention of sec. 134 or 184 gives no more information than the indictment without it.

None of these sections dispenses with the necessity, which existed previous to the Code, of a substantial statement of facts constituting and shewing by their statement that they constitute an offence.

It follows, I think, that the count as it originally stood was insufficient and demurrable.

The statement in the case submitted that the seven pamphlets were before the grand jury in itself precludes any amendment of the indictment, for they only charged one libel, though having seven before them, and it is impossible to know which one they acted upon.

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For all that can now be told, the accused may have been found guilty by the petit jury in respect of one or two libels which had one or both been ignored by the grand jury.

It would be most unfortunate and dangerous if such a thing could happen, and, so far as one can judge, it has certainly happened as to one of the two pamphlets on which the petit jury's verdict is based. It is unfortunate that the prosecution did not adopt the course of going back to the grand jury and having the indictment put in proper shape.

As regards the motion to quash, made as it was before the jury was called, and therefore before the accused was given in charge, I think leave should have been granted.

But, the record having been amended by adding six charges to the existing one, and there being nothing to shew that the charges were ever approved by a grand jury, the motion in arrest of judgment should, in my opinion, be granted. No such radical defect should be allowed to continue in effect.

I would answer questions 1 and 2 in the affirmative; questions 3 and 4, in the negative; question 5, "Not without the privity and consent of the grand jury;" question 6, "Yes, the accused was tried upon seven libels and is convicted upon two, when the grand jury had only found a bill upon one, which is not known to be either of the two."

The prisoner should be discharged.

Maclaren, J.A.
Rose, J.

MACLAREN, J.A., and ROSE, J., agreed with MAGEE, J.A.

Clute, J.

CLUTE, J.:—Case stated by Mr. Justice Hodgins under the provisions of sec. 1014 of the Criminal Code. It arose upon the following indictment:—

"In the Supreme Court of Ontario.

"Ontario, "The King

"County of York, v.

"To Wit: "Isaac Bainbridge.

"The jurors for our Lord the King present: that Isaac Bainbridge in the year of our Lord one thousand nine hundred and seventeen at the city of Toronto in the county of York did publish a seditious libel contrary to the Criminal Code section 184."

To this the defendant pleaded "not guilty" before objection taken.

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The trial Judge amended the indictment by changing the figures 184 to 134 and by adding the words thereafter "to wit the matters contained in the annexed particulars."

Particulars were delivered as follows:—

"That Isaac Bainbridge did in the year of our Lord one thousand nine hundred and seventeen in the city of Toronto in the county of York, contrary to section 134 of the Criminal Code, being chapter 144 of the Revised Statutes of Canada, 1906, and amending Acts, publish seditious libel by publishing the following pamphlets:—

"(1) 'The World's Peace Foundation,' which pamphlet contains a speech made March 18, 1914, in the House of Commons at Westminster, by Philip Snowden, M.P., in which assertions are made that the action of His Majesty's First Lord of the Admiralty in asking for an increase in the naval estimates was made solely in the interests of an 'armament ring' and of private manufacturers rather than the public interest, and that such action was opposed to the public interest, the innuendo in publishing such pamphlet by the said Isaac Bainbridge being that the present war is being prosecuted by His Majesty's Government in opposition to the public interests, the purpose of such publication being to persuade His Majesty's subjects to oppose His Majesty's Government in the prosecution of such war.

"(3) 'The Price We Pay,' a pamphlet in which assertions are made that His Majesty's Government is conducting the present war on behalf of a limited class of His Majesty's subjects and against the interests of the majority and for the purpose of persuading His Majesty's subjects to oppose His Majesty's Government in the prosecution of the present war.

"(3) 'The Peril of Conscription,' a pamphlet containing the assertion that the present purpose of His Majesty's Government in the conduct of the present war is 'a conquest abroad and subjection of the working class democracy at home,' and inciting His Majesty's subjects to resistance against the enforcement of law in His Majesty's dominions, and more particularly against the enforcement of the Military Service Act, 1917.

"(4) 'The Canadian Forward,' a pamphlet declaring that His Majesty's Government is actuated by motives and purposes

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directly contrary to religion and morality in the conduct of the present war.

"(5) 'The Call,' an organ of international socialists, advocating 'the growth of revolutionary feeling among the masses of our own people' and inciting His Majesty's subjects to revolt against His Majesty's Government and to aid and assist persons carrying on war against His Majesty's Government and to intimidate and overawe His Majesty's Houses of Parliament in the United Kingdom and in Canada.

"(6) 'The Social Revolution,' containing statements that the present war is conducted by His Majesty's Government for purposes opposed to the interests of His Majesty's subjects in general and for the benefit of certain classes of His Majesty's subjects, and containing the innuendo that His Majesty's subjects should not longer support His Majesty's Government.

"(7) A pamphlet published for the purpose of organising His Majesty's subjects in societies for the purpose of resisting the enforcement of the law, and more particularly 'to render assistance to persons who, through adhering to certain principles, shall at any time be called or liable to be called before any civil or military tribunal created to enforce any act of compulsion;' all such publications being for the purpose of inciting His Majesty's subjects to resist His Majesty's authority."

The amendment as to the change of figures was properly made.

At the trial objection was taken by way of demurrer for defects said to be apparent on the face of the indictment. The trial Judge refused leave to raise the question, inasmuch as the accused had already pleaded to the indictment, and in view of sec. 860, which provides for the delivery of particulars. The trial proceeded, and a verdict of "guilty" was found with regard to two of the publications mentioned in the particulars, viz., "The Price We Pay" and "Canadian Forward."

Counsel for the accused applied, under sec. 1007, for a reserved case, which was refused, and the prisoner sentenced to nine months in gaol.

On application, the Divisional Court directed a case to be stated, and the following questions were prepared by the trial Judge, which in the opinion of the Divisional Court were proper to be considered:—

(1) Should the demurrer to the indictment have been allowed?

(2) Should the motion to quash the indictment have been allowed?

(3) If the two previous questions or either of them are answered in the affirmative, does the verdict make the indictment good?

(4) Could the amendments of the indictment which were made at the trial be made without the privity of the grand jury?

(5) Should such amendments have been made in any case?

(6) Was there any impropriety or defect in the proceedings at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury?

First, with reference to the indictment as found by the grand jury before the amendment was made. The real objection is that the indictment stated but did not shew that an offence had been committed, or, as was said by Bramwell, L.J., in *Bradlaugh* v. *The Queen*, 3 Q.B.D. at p. 615: ". . . as it may be put in somewhat different language, the objection was that the indictment simply averred that an offence had been committed, and did not shew how it had been committed."

While the practice existing at that time was different from that authorised by the Code, nevertheless it is still necessary, in my opinion, that the particular offence should be stated in the indictment. The Code, while it simplifies the form of the indictment, does not eliminate this necessity.

Section 852 provides that every count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified. This does not mean merely naming an offence, as "murder" or "theft," but the offence itself must be specified. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved, and may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, "or in any words *sufficient to give the accused notice of the offence with which he is charged.*" This last clause is very important. Subsection 4 of sec. 852, stating, "Form 64 affords examples of the manner of stating offences," is an essential part of sec. 852, and clearly gives an outline of the indictment, and indicates the particularity with which it should be drawn.

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Reference to this form shews that it is not enough to say that A. committed murder or theft or perjury or the like, but the offence itself must be described with reasonable certainty. The form is given (*h*) for a defamatory libel, stating that "A. published a defamatory libel on B. in a certain newspaper, called the , on the day of 190 , which libel was contained in an article headed or commencing (describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him), and which libel was written in the sense of imputing that the said B. was (as the case may be)."

When one remembers with what particularity the charge of sedition was required to be set out prior to the Code—and that practice still obtains in England (Archibald's Criminal Pleadings, 23rd ed., p. 986), and also in Canada except as modified by the Code—it becomes necessary to observe with great care to what extent the Code has changed the practice.

It will be found, I think, that, while great simplicity is introduced, the essential features of the former practice have not been changed. It is still, I think, necessary in every case, as expressly provided in the form referred to, that the indictment shall in itself reasonably identify not only the nature of the crime charged, but the act or transaction forming the basis of the crime named. This seems to me to be necessary, first in order that the accused may properly prepare for his trial, and shall be able to plead *autrefois acquit* if again charged, and that the accused may not, through mistake or otherwise, be put upon his trial on a charge which has not been passed upon by the grand jury, and that the trial Judge may know the particulars of the very act passed upon by the grand jury, and not some act which the Crown or Crown officer may say was the very act or transaction. The intervention of the grand jury between the Crown and the subject seems to me to be a protection to the subject which must be jealously guarded. It is still necessary in every case, as expressly provided in the form referred to, that the accused shall have reasonable information identifying the act for which the jury has committed him for trial. The charge in the indictment must be sufficient in itself to acquaint the accused with the particulars of the offence with which he is charged.

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Section 859 provides that the Court may, if satisfied that it is necessary for a fair trial, order that the prosecutor "furnish a particular,—

"(*a*) of what is relied on in support of any charge of perjury . . .;

"(*b*) of any false pretences or any fraud charged;

"(*c*) of any attempt or conspiracy by fraudulent means;

"(*d*) stating what passages in any book, pamphlet, newspaper or other printing or writing are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;

"(*e*) further describing any document or words the subject of a charge."

While (*d*) is confined to the publication of an obscene book etc., seditious libel may be included in (*e*).

It is thus apparent, I think, that there must be a description of the document the subject of the charge in the indictment before particulars can be given "further describing any document."

This, read in connection with sec. 852, sub-sec. 4, and the form relating to defamatory libel, indicates with clearness what is intended and required as essential in the indictment.

The indictment must contain a valid count identifying the charge. Then the Court, being seized of the nature of the charge, may, if it thinks it essential to a fair trial, order the further particulars (further describing any documents or words "the subject of the charge.")

In the case of *The King* v. *Barraclough*, [1906] 1 K.B. 201, the indictment contained an averment that the libel was "in the form of a typewritten document, purporting to be extracts from a diary kept by the said William Barraclough, which said document was entitled 'Extracts from the Diary of the Rejected One.'" It was held that, although it would have been better for the indictment to have followed the old forms, and to have averred that the tendency of the obscene matter was to corrupt the public morals, the conviction might, under the circumstances, be upheld.

It will be seen here that the offence was described by a reference to a particular document which could be identified, and the case shews that under the practice the document itself was handed to the Court for the use of the trial Judge.

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I am of the opinion that, upon the face of the indictment, there was no charge made upon which the accused could be put upon his trial.

It is pointed out in *Rex* v. *Waters* (1848), 1 Den. C.C. 356, that there is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively; the latter may be aided by the verdict, the former cannot.

I think in this case the proper course to pursue would have been, instead of amending the indictment without the privity of the grand jury, to have submitted it again to the grand jury, after amendment, for their privity or consent, or to have had a new indictment presented.

Without a true bill upon a valid indictment presented by the grand jury there is nothing upon which the trial Court can act.

It is quite clear, I think, that no authority exists by which such an amendment can be made as to constitute an offence, when no definite offence is charged in the indictment. It is not a matter of form; it is a matter of substance; and the old formula, "You are content the Court shall amend matter of form altering no matter of substance," is not an idle phrase, but indicates, in my opinion, precisely the respective duties of Court and jury.

I am of the opinion that, under sec. 860, the delivery of the particulars was an amendment of the charge, and that, in so far as it could be properly made, it was effectively made. Under that section, it was unnecessary for the trial Judge to make or endorse a formal amendment; but I am of the opinion that the form of the amendment was such that it could not be properly made either under sec. 860 or by the trial Judge. The particulars disclose matter for seven distinct counts or indictments for the first time. The particulars sufficiently indicate or shew what the charge is; or, to put it in other words, the trial Judge introduces the seven counts by the amendment, when no charge is laid in the indictment.

These charges are quite distinct, whereas the indictment refers to "a seditious libel." There is nothing to shew whether the seditious libel mentioned in the indictment had reference to any or all or which of the seven charges appearing in the particulars.

With great respect for the opinion of the learned trial Judge,

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I do not think the accused could be put upon his trial under the indictment, either as it stood before or after the amendment. The amendment was wholly nugatory; and the fact that the accused pleaded to the indictment does not, in my opinion, make any difference.

The proceedings in the present case would, under the old practice, have been by proceeding in error, but under the present practice, sec. 1014, the procedure is by a reserved case. As was said by Bramwell, L.J., in the *Bradlaugh* case (3 Q.B.D. at pp. 614, 615), "the decision which we have to pronounce is quite apart from the merits, and quite apart from the consideration whether any wrong has or has not been done."

It is of very great importance, nevertheless, that the practice should be settled as to what is necessary to constitute a valid indictment.

In my opinion the questions should be answered as follows:—

1. Should the demurrer to the indictment have been allowed? A. "Yes."

2. Should the motion to quash the indictment have been allowed? A. "Yes."

3. If the two previous questions or either of them are answered in the affirmative, does the verdict make the indictment good? A. "No."

4. Could the amendments to the indictment which were made at the trial be made without the privity of the grand jury? A. "No."

5. Should such amendments have been made in any case? A. "Yes, with the privity and consent of the grand jury."

6. Was there any impropriety or defect in the proceedings at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury? A. "Yes, in proceeding to trial upon n indictment as framed, there being no authority to make the amendments without the privity and consent of the grand jury."

Section 1007 provides that the accused may at any time before sentence move in arrest of judgment; and sub-sec. 3 provides that, if the Court decides in favour of the accused, he shall be discharged from that indictment. This motion was made, and should have been allowed, and the prisoner discharged.

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This Court should now pronounce the judgment that should have been there given, and the prisoner be discharged from that indictment. This follows, I think, from the view above indicated, that there is no indictment upon which he can be tried, and that therefore a new trial cannot be granted; but this should not preclude the Crown, if so advised, from preferring a new indictment.

Ferguson, J.A. FERGUSON, J.A., agreed with CLUTE, J.

Prisoner discharged.

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EX. C.

BONIN v. THE KING.

Exchequer Court of Canada, Audette, J. June 15, 1918.

DEATH (§ II B—10)—NEGLIGENCE—RIGHT OF ACTION—"ASCENDANT" RELATIVE—STEPMOTHER.

A stepmother is not an "ascendant" relative within the meaning of art. 1056 of the Quebec Civil Code, so as to entitle her to a right of action for the death of a stepson killed while in the discharge of his duties in a shipyard of the Crown.

Statement. PETITION OF RIGHT to recover for the death of an employee while in the service of the Crown.

Adolphe Allard and *P. J. A. Cardin*, for suppliant; *F. Lefebvre*, K.C., for respondent.

Audette, J. AUDETTE, J.:—The suppliant, by her petition of right, seeks to recover the sum of $5,000 for alleged damages arising out of Alfred Goulet's death, resulting from an accident which occurred while he was engaged in the discharge of his duties as boiler-maker in the Government shipyard at Sorel.

On August 11, 1915, Alfred Goulet was occupied with other workmen in assembling or uniting the head and the shell of a boiler. This head, which, according to the evidence, weighed, according to some witnesses, about 2,500 lbs., and to others about 4,000 lbs., was suspended on a tackle working on a traveller extending from one end of the building to the other. To the truck, working on this traveller, was attached a block, with 5 or 6 pulleys; and hanging under the block was a large hook, to which was inserted a double strap of chains terminated with hooks opening at a bent of about 45 degrees. These hooks were inserted in the head of the boiler, which was held upright by the tackle, and had thereby been brought close to the shell. All around the inside part of the head was a flange, which at the time of the accident, rested, at the bottom, on the inside, of the shell, which was lying on the ground.

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The foreman had gone inside of the shell with the object of bolting the head and the shell together, and finding that the hole in the flange did not quite coincide with the hole in the shell, he called out: "*Donnez un petit coup.*" On this, Alfred Goulet, the deceased, took a crow-bar and raised the head with it. By so doing the head slanted and its weight was released from the tackle and the hooks slipped out, the head falling upon Goulet. He died about an hour and a half after being extricated from underneath this heavy piece of metal.

According to the evidence of the witnesses heard in this case, the use of the crow-bar in the manner mentioned was very dangerous, and a manner of operating unknown to them under such circumstances, and one which never should have been resorted to. The tackle should have been used. Although Alfred Goulet is given a very good character, and is presented as a good and experienced workman, he was condemned by all hands in respect of the use of the crow-bar. This was the sort of work he was daily engaged in, and the tackle was always used to move the head of the boiler; but it is to be assumed that the victim had become so familiarized with this class of dangerous work that he did not see fit to take the precaution consistent with ordinary prudence.

Goulet having died intestate, his brothers and sisters inherited all he had at the time of his death, obviously to the exclusion of his stepmother, who is not a blood relation.

Be the facts as they may, a very serious question of law confronts the suppliant and stands in her way, preventing her from recovering. Indeed, Alfred Goulet is not the son of the suppliant. He is the son of Henri Goulet and of Marie Louise Genereux, his father's first wife, as appears by the baptism certificate filed herein as ex. No. 1.

Henri Goulet, the victim's father, married twice, and the suppliant is the second wife and a stepmother to Alfred Goulet, therefore there is no consanguinity or blood relationship between them.

Under art. 166, C.C.P.Q., children are bound to maintain their father, mother and other ascendants, who are in want. Under art. 167, sons-in-law and daughters-in-law are also obliged, in like circumstances, to maintain their father-in-law and mother-in-law, and such obligation ceases when the mother-in-law contracts a

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second marriage, and when the consort through whom the affinity existed, and all the children issue of the marriage are dead. However, the obligation towards a mother-in-law does not extend to a stepmother, who cannot be considered as an ascendant. And, as it is said by Mr. Mignault, Droit Civil Canadien, at p. 483, no maintenance is due, under the circumstances, "*a la seconde femme de mon pere (ma marâtre)*." Therefore, a stepmother is not an "ascendant" within the meaning of the Code.

The only right of action the suppliant can have, in the present case, as against the Crown—provided always the facts can be brought within the provisions of s. 20 of the Exchequer Court Act—arises under art. 1056 of the Civil Code. This article reads as follows:—

> In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death . . .

Alfred Goulet, after the accident and while alive, had a right of action under arts. 1053 and 1054 C.C. After his death, without having obtained indemnity or satisfaction, and he being unmarried, his ascendants alone had a right of action, and as his stepmother (*marâtre*) is not his ascendant, within the meaning of the Code, she has no right of action. This right of action did not form part of Alfred Goulet's estate, and can only be exercised by the blood relations mentioned in art. 1056 of the Civil Code for the torts suffered by them. See Mr. Mignault's Canadian Civil Law, vol. 5, p. 379, and the numerous cases therein cited.

Therefore, the suppliant is not entitled to any portion of the relief sought for by her petition of right, and judgment will be entered for the respondent. *Petition dismissed.*

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C. A.

Re STEWART ESTATE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

LEGACY (§ I—1)—DEVOLUTION OF ESTATES ACT (SASK.)—DESCENT OF LAND—PERSONAL ESTATE INSUFFICIENT TO PAY—LIABILITY OF REAL PROPERTY.

By the Devolution of Estates Act (R.S.S. 1909, c. 43, s. 21) land in Saskatchewan shall descend to the personal representative and be distributed as if it were personal estate; if the personal estate is insufficient to pay legacies for which no fund is provided these must be paid out of the undisposed of real property.

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RE STEWART ESTATE.

Newlands, J.A.

APPEAL from the judgment at the trial holding that undisposed of real estate was not liable for payment of legacies. Reversed.

A. E. Stewart, for appellant; *G. W. Forbes*, for respondent.

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

NEWLANDS, J.A.:—The principal ground of appeal in this case is that the trial judge held that the undisposed of real estate was not liable for the payment of legacies.

The law in this province is the same as in Ontario. By c. 43, s. 21, R.S.S. (Devolution of Estates Act), land in Saskatchewan shall descend to the personal representative and be distributed as if it were personal estate.

The Ontario Act, c. 108, R.S.O., s. 4, provides that all such property shall devolve upon and be vested in the legal personal representative and be distributed as personal property.

Boyd, C., in *Re Reddan*, 12 O.R. 781, at 782, said:—

> The effect of the Act is to abolish the distinction between real and personal property for the purposes of administration, and to devolve the whole estate upon the personal representative.

Since the passing of the Devolution of Estates Act, the diversity of interest between the heir and the personal representative is done away with and there ceases to be any heir in the sense that the land descends to him as such, and the reason for the rule that the personal estate only is liable for legacies unless the land is specially charged by the testator is done away with.

In the hands of the personal representative, the whole estate makes one fund charged with the debts, liabilities and funeral expenses of the deceased, subject only to the rule provided by the Devolution of Estates Act, s. 3, that the personal property is to be resorted to before the real property.

The executor in this case being the personal representative of the deceased, takes all his property, both real and personal, undisposed of by the will, and is to distribute it as personal estate. He has to distribute it according to the will, which provides for the payment of two legacies for which no fund is provided. If, therefore, the personal property is insufficient to pay these legacies, he must resort to the undisposed of real property, because, in his hands, it is to be disposed of as personal property after the actual personal property is exhausted.

The appeal should, therefore, be allowed. Costs to be payable out of the estate.

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Elwood, J.A.

ELWOOD, J.A.:—I concur in the result reached in this matter by my brother Newlands, and I simply wish to add a few observations.

I am of opinion that the clear intention of the will is that the specific bequests to Mrs. Dan Douglas, Arthur Edwin Stewart and Stanley Judson Stewart, are not charged with payment of the general legacies to Mary Stewart and Mrs. Thomas Melhurst. The reference in the will to "one-third balance moneys in bank," in my opinion, refers to the balance in the bank at the death of the testator.

The conclusion that these specific legacies are not charged with the payment of the general legacies is strengthened by the fact that the will does charge the specific legacies with payment of the funeral expenses, and it would seem to me that the testator, having specifically charged these legacies with something, would, at the same time, have mentioned the general legacies had he intended to charge them upon the specific legacies.

I am also of the opinion that, under our Devolution of Estates Act, real estate is liable for the payment of debts and legacies even though not specifically charged with the payment of them. See *Re Biden*, 4 W.L.R. 477; *Re Reddan*, 12 O.R. 781; *Scott* v. *Supple*, 23 O.R. 393; *Re Hopkins Estate*, 32 O.R. 315; *Lambers* v. *Montgomery*, 8 D.L.R. 699.

In my opinion, unless there is personal estate undisposed of sufficient to pay the general legacies and the costs of the administration, the real estate undisposed of should be resorted to for the payment of those items. The costs of all parties to this application should be paid out of the estate. *Appeal allowed.*

QUE.

S. C.

LEITHEAD v. DOUCET.

Quebec Superior Court, Maclennan, J. June 17, 1918.

PRINCIPAL AND AGENT (§ III—41)—CUSTOMS BROKER—REQUEST BY CLIENT TO CLEAR AND DELIVER GOODS IN CUSTOMS HOUSE—NEGLIGENCE OF CARRIER—DAMAGES.

A customs broker, who is requested by a client to clear and deliver a machine from the Customs house to the latter's building, acts as the agent of the client in procuring a carter and is not liable for such carter's negligence.

Statement.

ACTION to recover price of printing machine.

On November 5, 1917, the plaintiff requested the defendants, two customs brokers, to clear and deliver one crated printing

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machine to his premises in Montreal. While removing the machine from the cart to the building, it fell and got damaged to the extent of $150.

The plaintiff alleged that the accident was due to the defendant's fault and negligence, and sues them for that amount.

The defendants deny that they are responsible for this damage. They are customs brokers and not common carriers. They were requested by the plaintiff to deliver the machine, and, acting as their representatives, they engaged a carter to remove the machinery from the Customs house to the plaintiff's establishment. This carter was plaintiff's employee, not theirs. The Superior Court dismissed the action.

Markey, Skinner, Pugsley and *Hyde*, for plaintiff; *Busteed* and *Robertson*, for defendants.

Maclennan, J.

MACLENNAN, J.:—Considering that on or about November 1, 1917, a roller backing machine arrived in bond at the Customs examining warehouse, in Montreal, having been brought there by the American Express Co. and, on November 5, 1917, the plaintiff issued an order in writing addressed to the defendants for the removal of said machine from the Customs and its delivery to the bindery of the plaintiff in the Herald Building, Montreal, which order the defendants duly accepted;

Considering that the defendants are customs brokers and passed the necessary entry, paid the duty and express charges on said machinery for and on behalf of the plaintiff;

Considering further that the plaintiff required immediate delivery of said machinery and authorized the defendants to engage a carter to remove said machinery from the examining warehouse to the plaintiff's premises;

Considering that the defendants are not common carriers of goods, do not carry on a cartage business and have no horses or rigs for that purpose;

Considering that the defendants in engaging a carter to remove said machinery from the Customs examining warehouse to the premises of the plaintiff acted as agents for the said plaintiff;

Considering that the damages to the machinery occurred while the carter in charge thereof was unloading the same from his vehicle at the premises of the plaintiff, and was caused by the negligence of said carter;

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Considering that the plaintiff does not allege or prove that the defendants were guilty of any fault, negligence or want of reasonable care or skill in engaging said carter, and the defendants are not responsible for the fault and negligence of the said carter;

Considering that the plaintiff has not proved the material allegations of his declaration;

Doth dismiss the plaintiff's action with costs.

Action dismissed.

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C. A.

BOYD v. LARSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

NEW TRIAL (§ II—9a)—IRRELEVANT TESTIMONY—ADMISSION OF—NOT GROUND FOR NEW TRIAL UNLESS VERDICT INFLUENCED BY IT.

The fact that irrelevant testimony was admitted on the trial of an action is not alone sufficient to justify the granting of a new trial. If, however, the illegal evidence may have influenced the verdict a new trial will be ordered.

[*Tait* v. *Beggs*, [1905] 2 I.R. 525, referred to.]

Statement.

APPEAL from a judgment of Bigelow, J. Reversed.

P. H. Gordon, for appellants; no one *contra*.

Lamont, J.A.

The judgment of the court was delivered by

LAMONT, J.A.:—By an agreement of sale bearing date July 12, 1912, the plaintiffs agreed to sell to the defendant, who agreed to buy lots 39 and 40, in block 2, plan No. G. 4415, North Battleford, for $825, payable $50 cash and the balance by instalments. The defendant paid the $50. At that time he had not seen the lots. Later, in the fall of 1912, he saw the lots, and says he told the plaintiff, George Boyd, that the lots were away out and that he did not want them. Nothing more seems to have been done until the fall of 1917, when the defendant admits that one of the plaintiffs asked him to pay for the lots. The defendant did not pay, and in January of this year the plaintiffs brought this action, in which they ask for specific performance or cancellation of the agreement.

The defendant resists the action on the ground that he was induced to enter into the contract by false and fraudulent representations made by the plaintiff, George Boyd, and he counterappeals for the return of the $50 paid.

The trial came on before Bigelow, J., who found as follows:—

Among other defences the defendant set up that he was induced to enter into the contract with the plaintiffs by the plaintiffs falsely and fraudulently representing to the defendant that the town of North Battleford was built

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to within two blocks of the lots in question; that the Canadian Pacific Railway were building on the section just beyond the said lots and that the lots in question were within one-quarter of a mile of the Canadian Northern Railway station in the City of North Battleford. I find that the said representations were made by the plaintiff, George Boyd, with the intention of inducing the defendant to enter into said agreement; that the representations that the town of North Battleford was built up to within two blocks of the lots in question was true, and that the other two representations, viz., that the Canadian Pacific Railway was building on the section just beyond said lots and that said lots were within one-quarter of a mile of the C.N.R. station in the City of North Battleford, were untrue and that they were false and fraudulent. I further find that the defendant relied on such representations and was induced, thereby, to enter into said agreement. There will be judgment dismissing the plaintiffs' claim and rescinding the said agreement and judgment for the defendant in his counterclaim for $50, and interest at 8% from 12th July, 1912, with costs.

From this judgment the plaintiffs now appeal. The ground of appeal is that irrelevant testimony was admitted.

The fact to be determined was whether or not the plaintiff, George Boyd, did represent to the defendant that the lots in question were within a quarter of a mile of the station, and that the C.P.R. Co. was building on the section just beyond said lots. The plaintiff swore that he did, while George Boyd denied it.

Two witnesses, Christine Tracksell and Harry Tracksell, swore that they had purchased lots from George Boyd in the same subdivision as were the lots sold to the defendant, and each of them testified that, in making the sale, Boyd represented to them that the lots were within one-quarter of a mile of the C.N.R. station.

The evidence of these two witnesses, in my opinion, was irrelevant. Any representation which Boyd made in reference to the lots he was selling to the Tracksells is not evidence as to representations made by him, at another time and place, when selling lots to the defendant.

The fact, however, that irrelevant evidence is admitted is not alone sufficient to justify the granting of a new trial.

R. 650, in part, reads as follows:—

650. A new trial shall not be granted on the ground of . . . the improper admission or rejection of evidence . . . unless, in the opinion of the court *en banc*, some substantial wrong or miscarriage has been, thereby, occasioned in the trial.

This rule is in terms mandatory against a new trial on the ground of the improper admission of evidence, unless, in the opinion of the court, some substantial wrong or miscarriage has

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been thereby occasioned, and the onus of shewing that such evidence had no effect upon the verdict or judgment is upon the respondent.

In England it was formerly held that a new trial should not be granted for the admission of illegal evidence if there was sufficient legal evidence to support the verdict, but new trials are now granted if the illegal evidence may have influenced the verdict. 29 Cyc. 781, note.

In *Tait* v. *Beggs*, [1905] 2 I.R. 525, Walker, L.J., at p. 535, says:—

> I think, therefore, that the court must be of opinion, not by guess or speculation but by judicial inference, that the same verdict would have been returned if the evidence had not been admitted.

And in *Hodson* v. *Midland Great Western R. Co.*, 11 Ir. Rept. C.L. 109, at p. 117, Deasy, B., says:—

> They ought to be obliged to satisfy the court that the illegal evidence could have no effect upon the verdict.

The facts in dispute are the two representations which the trial judge found had been made by George Boyd to the plaintiff. Were these representations made? The defendant says they were; the plaintiff, George Boyd, says they were not. The trial judge found for the defendant. The question is, was he influenced in so doing by the evidence of the Tracksells? Their evidence was taken subject to objection. If the judge considered it admissible evidence, it, undoubtedly, would strengthen the evidence of the defendant, and tend to induce the judge to accept his testimony. On the other hand, the judge may have been totally uninfluenced by the evidence of the Tracksells, and would have given the same judgment without it. He may simply have omitted to make a note in his judgment that, although admitted subject to objection, it was, in his opinion, not evidence. This I would think probable, if I were entitled to speculate on the matter, particularly in view of the testimony of George Boyd, from which he would appear to have scarcely recommended the lots although out selling them; this is hardly in accordance with the known practice of real estate agents selling subdivision lots. But, under the authorities, I am not allowed to speculate. I must be satisfied by judicial inference that the judgment would have been the same. There is nothing in the judgment which enables me to say that the judge did not consider himself entitled to look at the evidence of the Tracksells,

or that he was not influenced thereby. Nor is there anything in the evidence or proceedings which entitles me to hold that he would have believed the defendant's version of the conversation if the Tracksells had not given evidence. I am, therefore, not able to hold as a matter of judicial inference that the judgment would have been the same in any event, no matter how strong a suspicion I may entertain in that regard. Upon the other point upon which the trial judge held in favour of the defendant, namely, on the question of title, I think the appeal should also be allowed. At the trial, judgment was reserved, but a week later the judge gave judgment in which he also held that the plaintiffs had failed to prove that the lands set out in the statement of claim were the same as those described in the agreement sued on. In their statement of claim, the lands are described as lots 39 and 40 in block 2, in the City of North Battleford, while in the agreement they are described as lots 39 and 40 in block 2, Tuxedo Park Subdivision in North Battleford. There does not seem to be much doubt but that the lots are the same. After the agreement of sale was put in the following appears in the appeal book:—

His Lordship: What else do you admit?

Mr. Simpson: Title of plaintiff and power to give title.

His Lordship: I think that is admitted.

Mr. Cruise: I admit title to the land mentioned in the statement of claim.

His Lordship: You admit the plaintiffs have title?

Mr. Cruise: We have nothing to go on with regard to that; we find they did have title.

His Lordship: That practically admits the plaintiffs' claim as far as the burden is concerned.

After holding that the plaintiff had made out a *primâ facie* case, it was not, in my opinion, open to the judge, after the trial, to reverse this finding without giving the plaintiff an opportunity to satisfy the burden which the reversal cast upon him.

The appeal, in my opinion, should be allowed with costs and a new trial ordered; the costs of the former trial to abide the event of the new trial. *Appeal allowed; new trial ordered.*

CAN.

Ex. C.

MALONE v. THE KING.

Exchequer Court of Canada, Audette, J. April 15, 1918.

TIMBER (§ I—10)—PUBLIC LAND—RAILWAY—PROVINCIAL GRANT—RIGHT OF WAY—LICENSE—ASSIGNMENT—JURISDICTION—COMPENSATION.

Where a Province has made a free grant of a right of way on its lands to a railway of the Dominion Government, it cannot subsequently, in the absence of Dominion legislation authorizing it, grant or assign to a third person any rights to the timber on such right of way.

2. The Exchequer Court has jurisdiction to entertain a claim for the cutting and removing of timber by officers and servants of the Crown while engaged in the construction of a Crown railway.

3. A licensee to cut timber has a sufficient interest in the limits covered by the license to entitle him to claim compensation for the taking of the timber by the Crown. The measure of damages is the value of the timber as a whole as it stood at the time of the taking.

Statement.

PETITION OF RIGHT to recover for the value of timber taken by the Crown.

L. S. St. Laurent, K.C., and *J. P. A. Gravel*, for suppliant.

E. Belleau, K.C., and *E. Baillargeon*, K.C., for respondent.

R. T. Heneker, K.C., for third parties.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $40,080 as representing the value of timber alleged to have been cut on his 3 timber-limits, numbers 1, 2 and 7, by the respondent's officers and servants while engaged in the construction of the National Transcontinental Railway.

However, at the conclusion of the evidence, counsel at bar for the suppliant abandoned and reduced the figures mentioned in para. 4 of the petition of right, and brought his claim down to $29,466.

The claim now stands as follows, viz.:—

(a) For timber alleged to have been cut on the right of way (in substitution of par. 4 of the petition):—

On limit No. 1.	109 acres at 7,000 ft. b.m.....	763,000
On limit No. 2.	121 acres at 8,500 ft. b.m.....	1,033,000
On limit No. 7.	121 acres at 10,000 ft. b.m.....	1,275,000
		3,071,000

(b) For timber alleged to have been cut *outside* the right of way, as alleged in par. 6 of the petition:—

On limit No. 1.	50 acres at 7,000 ft. b.m.....	350,000
On limit No. 2.	73 acres at 8,500 ft. b.m.....	620,000
On limit No. 7.	83 acres at 10,500 ft. b.m.....	870,000
		1,840,000
		4,911,000

which, at $6 per 1,000, represents the total sum of..... $29,466.00

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By an order-in-council of the Province of Quebec, bearing date November 26, 1907, a free grant was made to the Commissioners of the Transcontinental, of the right of way upon the Crown lands of the province, in the manner provided in par. (3) of art. 5132, R.S.P.Q. (1886), everywhere where their railway passes, subject, however, to art. 5164 thereof, in respect of the area which may be taken for the said right of way.

Subsequent to this free grant, namely, under the authority of an order-in-council of July 23, 1909—as the whole will appear from exhibits 5 to 10 inclusively—tenders for right to cut on timber limits of the province were asked and received, from, among others, the suppliant for limits Nos. 1, 2 and 7, and accepted by order-in-council of October 20, 1909. Some time after that date correspondence was exchanged between the officers of the Land and the Attorney-General's Departments, as to whether or not the right to cut in question should cover the timber on the right of way of the Transcontinental, and from such correspondence it appears the Assistant Attorney-General was of opinion it did, and the Minister of Lands and Forests approved of that course. This correspondence is here mentioned only as a link in the history of the different phases of the case, as by itself it is not possible to conceive it could afford any ground for recovery. See *De Galindez* v. *The King*, 15 Que. K.B. 320; affirmed on appeal to the Supreme Court of Canada, 39 Can. S.C.R. 682.

The timber licenses in question were given, as follows:—

For limit No. 1—dated August 12, 1910—for a period from October 20, 1909, to April 30, 1910.

For limit No. 2—dated August 12, 1910—for a period from October 20, 1909, to April 30, 1910.

For limit No. 7—dated October 18, 1910—for a period from May 1, 1910, to April 30, 1911.

In each of these three licenses the territory is described, "*as a territory extending one mile on either side of the National Transcontinental Railway*"—from mile number so and so to mile number so and so of the said railway.

Nothing could be plainer.

However, under indenture bearing date of February 4, 1914, between the Province of Quebec, represented by the Minister of Lands and Forests, and the suppliant, it appears—after reciting that the above timber limits had been so granted, that—

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Whereas it was the *intention* of the said the Government of the Province of Quebec to give and grant unto the said party of the second part, by the aforesaid licenses, the right to cut and remove all the timber on the right of way of the said the National Transcontinental Railway—and this whether such right of way had or had not been granted by the said the government of the Province of Quebec.

Wherefore, the said party of the first part, hereby declares that it was the intention of the said the government of the Province of Quebec to give, grant and convey unto the said party of the second part, by the above mentioned licenses, the right to cut and remove timber on the said right of way of the said the National Transcontinental Railway.

Now, therefore, these presents, and I, the said notary, witness—

That the said party of the first part declares to have given, granted and conveyed, and by these presents doth give, grant and convey unto the said party of the second part, represented as aforesaid and hereof accepting, that is to say:

All the right, title and claim of the party of the first part to the timber growing on the right of way of the said the National Transcontinental Railway, where such right of way passes through the said timber limits so granted to the said party of the second part under the aforecited licenses, or is bounded by the said timber limits so granted to the said party of the second part, and doth also assign, transfer and make over unto the said party of the second part, hereof accepting, all the rights, claims and demands of the said party of the first part to compensation for the value of any timber cut on the said right of way, and this whether such timber was cut previous to or after the above mentioned licenses were granted by the said party of the first part to the said party of the second part.

The present conveyance and transfer has been made by the said party of the first part upon the conditions hereinafter mentioned, which are hereby accepted by the said party of the second part, who hereby binds and obliges himself to implement and fulfil the same, that is to say:

CONDITIONS.

1. The present grant, conveyance and transfer is made without any warranty on the part of the said party of the first part, and at the sole risk and charges of the said party of the second part.

2. That if the said party of the second part shall cut any timber on the right of way of the said the National Transcontinental Railway, or shall recover compensation for the value of timber which has been cut on the said right of way, he shall, in either such cases, pay to the Commissioner of Lands and Forests of the Province of Quebec stumpage on the amount of timber so cut or in respect of which compensation shall have been granted to him, at the same rate of stumpage as he pays with respect to the timber cut on the remaining portion of the said timber limits.

This deed, it will be noticed, bears only upon that part of the claim in respect of the timber cut on the right of way of the National Transcontinental Railway, as distinguished from the other branch of the case in respect of the timber cut *outside* of the said right of way.

It will perhaps be more convenient to deal now with this deed

of February 4, 1914, before entering into the consideration of the licenses. It may be said as a prelude that it is difficult to conceive whether in a case of this kind, a court of justice should take into consideration the motives and intentions of contracting parties with the object of altering plain and unambiguous language of previous deeds affecting third parties. It is the duty of the court to approach all questions from a legal angle.

In the *Moisie* case, *Wyatt et al.* v. *Attorney-General P.Q.*, [1911] A.C. 489-496, it was held that when a Crown patent was in plain and unambiguous terms, the patentee could not claim additional rights, under previous or subsequent negotiations and correspondence, as enlarging the terms of the grant or even by reason of such rights having been exercised by him continuously from the date of the grant without hindrance or interference.

Freed from any subtlety, is not this an *ex post facto* declaration of this intention embodied in that deed, a self-confessed afterthought without any complexity? Does it not mean that the province, in answer to the suppliant's demand for the timber on the right of way, is willing to say, so far as it is concerned, it has no objection that the suppliant lay claim to this timber. In fact, it has no objection to go further and disclaim. The province says, we will assign to you, without covenant, at your own risk and peril, all rights we may have in such timber. Could such an assignment be enforced against the Crown, as represented by the Dominion Government?

It was held in *Powell* v. *The King*, 9 Can. Ex. 364 at 374, that

> the Crown, as represented by the Government of Canada, is not bound (by such transfer or assignment.) The only legislature in Canada that would have power in that respect to bind the Crown, as represented by the Dominion Government, would . . . be the Parliament of Canada.

As a general proposition the assignee of a claim against the Crown has no right to sue for it in his own name; and a debt due by the Federal Crown cannot be validly assigned, unless there is some Dominion legislation authorizing the same. There is no contract between the suppliant and the respondent herein. On the ground of public policy the Crown cannot be expected to seek out assignees of claims; its creditors and payees are those it sees fit to primarily and openly do business with, and it is upon this principle that garnishee process does not lie against the Crown.

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The Crown is not bound to recognize third-parties with whom it has not contracted.

The assignment contained in this 1914 deed is but the assignment of a so-called right to a claim against the Federal Crown, and nothing else. 7 Hals. 501. See also *The King* v. *Burrard Power Co., Ltd.*, 12 Can. Ex. 295, [1911] A.C. 87. It is made without covenant or warranty by the province and at the sole risk and charge of the suppliant. It is contended by counsel at bar for the Crown that this is a transfer of litigious rights.

Sir Charles Fitzpatrick, in *Olmstead* v. *The King*, 53 Can. S.C.R. 450 at 453; 30 D.L.R. 345 at 347, says:—

> The policy of the law has always been opposed to this trading of litigious rights, and such transactions are to be discouraged in every possible way . . . Whilst the assignment of a right to litigation is forbidden as between subjects, the rule must apply with greater force in the case of the Crown, since the subject has *no right to sue the Crown, but can only present a petition of right*. There being no such thing as a right to a claim to recover against the Crown, there can be no assignment of any such pretended right.

And when the

> prerogatives of the Crown are in question recourse must be had to the public law of the Empire by which alone they can be determined. *Attorney-General* v. *Black* (1828), Stuart R. 324.

Under the laws of the Province of Quebec, as set out in arts. 1582 and 1583 C.C.P.Q., a right is held to be litigious when it is uncertain and disputed, or disputable by the debtor, and between subject and subject may be sold, but may be discharged by the debtor by paying to the buyer the price and incidental expenses of the sale. And for a right to be litigious, it is necessary that the susceptible contestation of the same should bear upon the merits of the right itself. *Corporation of St. Thècle* v. *Matte*, 27 Que. K.B. 185.

However, this deed of 1914 is in absolute derogation of the order-in-council of 1907 making a free grant of the right of way, and furthermore in derogation also of the licenses themselves, because in the result, they are clearly made subject to such right of way by their own clear and unambiguous language when it declares that this right to cut timber is in "a territory extending one mile on either side of the National Transcontinental Railway." Why? The timber limit cannot be delimited before you find the right of way. And it is so much the case that it appears from the suppliant's evidence, that before describing the territory in those licenses,

a plan of the right of way was obtained from the Transcontinental, which has been used as the very basis and starting-point in fixing the territory mentioned in those licenses. This very plan, or a copy thereof, has been filed of record as ex. No. 13, and is the plan upon which the tenders were called for.

Moreover, the timber on the right of way, as the natural growth of the soil, forms part of the soil itself—it is attached to and forms part of the land. It would seem difficult to conceive that there could be a severance worked out of the free grant and that the timber, *fructus naturales*, could be severed from the land so granted.

In February, 1914, at the date this deed was executed, the Provincial Government had no right of action against the Federal Crown in respect of the timber on the right of way, which went with the land under the free grant of 1907, and therefore had nothing in that respect to assign to the suppliant who is in no better position than his assignor.

Therefore, it must be found that under the circumstances of the case nothing passed under that deed of 1914, which could afford the suppliant a right of action on any ground to recover against the Crown, in respect of the timber cut on the right of way.

I shall now pass to the consideration of the rights acquired by the suppliant under the licenses themselves. Having disposed of the deed of 1914, which appears to be the result of an afterthought, an *ex post facto* declaration, for the reasons above mentioned, I must also find that from the very description of the territory upon which timber may be cut, as appears upon each license, it is impossible to hold that the licensee thereunder ever acquired any right to the timber cut on the right of way. The right of way is in clear and unambiguous language excluded from the territory of the licenses.

The extent of the lands which may be taken, under the free grant made by the order-in-council of November 27, 1907, for the right of way of the Transcontinental, is controlled by sub-sec. 3 of s. 5132, and s. 5164 of the R.S.Q. (1888).

It appears from the evidence of Mr. Doucet, the district engineer, that in the course of the surveys to be made for locating

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the right of way, when at the origin surveyors go through the country to be crossed by the railway they have, in a way, to feel their way—go to the right or to the left, and in course of such process, trial lines are first made, which involve the cutting of trees on an area of 4 to 6 feet in width. Then, secondly, comes the *location line*—the selected line. And thirdly, there may also be a revised location line, followed by fourthly the final location.

Moreover, land is also taken for stations, double tracks, contractor's camps, engineers' camp, gravel pits, etc. We shall have to deal with each of these items or counts in respect of which claim is made by the suppliant.

The evidence in respect of these complex items is not as clear and satisfactory as it could be, and I regret to say I am under the obligation at times to arrive at a conclusion from very meagre evidence or from mere presumption, which, however, when arising from facts, are left to the discretion of the tribunal. Arts. 1238, 1242 C.C.P.Q.

The question upon which this branch of the case first presents itself is the date at which the rights of the suppliant originated under his licenses. His tender for the three limits was accepted by the order-in-council of October 20, 1909 (ex. 8). Then the licenses for limits Nos. 1 and 2 are dated as of August 12, 1910, but in the body of the licenses the right to cut is defined to be from October 20, 1909, to April 30, 1910—and counsel for the Crown contends that the licenses are good and valid only from their date, and that they cannot have any retroactive effect, and therefore are null and void. This contention is based upon s. 1310 R.S.Q. (1886), and s. 1598 R.S.Q. (1909), which reads as follows: "No license shall be so granted for a longer period than twelve months from the date thereof.

With this contention of the Crown I am unable to agree. This statutory enactment is only a limitation placed by the legislature upon the executive whereby the latter is given a restricted and controlled power to issue licenses, but for a period of 12 months and no longer. That is obviously the object of this enactment, and no other.

It would appear to make no difference whether the license be ante-dated or post-dated—the life of the license is determined by the term mentioned therein.

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While the dates for the license of timber limit No. 7 are different from those of Nos. 1 and 2, the same principle and reasoning will apply.

Therefore, before entering into the manifold and complex details of the items of the claims under this branch of the case, I hereby find that the suppliant acquired his rights to cut from the dates mentioned in the licenses, and not from the time at which the licenses were dated.

Under the evidence of the district engineer, it appears that survey lines were started in 1904, and that he took charge in 1908, when he revised the lines, made trial lines, and revised location. There was nothing final until the line was actually constructed, and there were changes even after the line had been selected and contract given. This witness remembers three changes made, on limits Nos. 1 and 2; namely, at Lake Travers, at Lake Kamitsgamack, and at Lake Menjobagus, but no area is given. In respect of the last mentioned lake, he says there was a change for 5 to 6 miles; but he cannot say whether it had been cleared before. And he adds that these three changes were made between 1909 and 1911.

For all that was done outside the right of way prior to October, 1909, it is clear the suppliant cannot recover, and a good deal was done prior to that date—as much, however, as can be ascertained in a general way from the evidence; but for all that was cut on his limits outside the right of way since October, 1909, and during the period the territory was held under his licenses he is entitled to compensation, with, however, some small exceptions.

1. Camps.—Dealing first with the question of camps, I find that the suppliant has no recourse against the Crown for the area taken by the contractors for their camps. It will be sufficient to say upon this item, that as between the Crown and the suppliant there is no privity upon this branch of the case. These camps were for the contractors' use.

2. Engineers' camps.—For the area taken for the Transcontinental Railway—engineers' camps outside the right of way—the suppliant is entitled to recover. A very small area indeed appears to have been taken for that purpose. On this branch we have the evidence of witness Malone, who says there were two camps on No. 1, covering 4 to 5 acres, and on No. 2, 6 to 10 acres were, in

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a general way, taken for that purpose. But witness Black, the engineer in charge of 6 miles of No. 1, and of the whole of No. 2, says there was no engineers' camp on his part of No. 1, and that there was one camp on No. 2 occupying about 2 acres. It is somewhat difficult to arrive at any satisfactory conclusion upon such evidence. I will allow 6 acres for the engineers' camp.

3. Ballast pits.—These were taken outside the right of way after October, 1909, and I will allow for the ballast pit on No. 1, 6 acres, and for the two ballast pits on No. 2, 17 acres, making in all 23 acres.

4. Trial lines and changes in right of way abandoned—Witness Wilfrid Adams, bush superintendent for the suppliant, says he went on limits Nos. 1 to 10 or 12 in 1909, and left in 1911. It appears he may have made a mistake as to the latter date, which should be 1912, when he was replaced by his brother Arnold. He testifies he does not recollect any trial lines on Nos. 1 and 2, and that no trial lines were run on Nos. 1, 2 and 7 while he was there.

Arnold Adams, who was in the suppliant's employ as bush superintendent from August 17, 1912, to January, 1917, says no changes were made after he went on the limits. He contends he saw in the woods what he presumed to be changes in the right of way, and also trial lines running almost any way; but he did not see anyone making these cuttings. Being asked to make an estimate of these cuttings, he reckons them on No. 1 at 50 to 75 acres; on No. 2 he says it ought to be 110 to 120 acres, and on No. 7 about the same as No. 2. During the examination of this witness he became ill and had to retire for a short period. From his demeanour in court he did not impress me as imparting anything of which he was in any manner very sure or convinced. He said that estimate was his idea, he had not measured. In the result it must be taken to be nothing else but a mere guess.

Engineer Black, who was in charge from November, 1909, until July, 1912, when the track was practically completed, with construction trains running through, testified that the right of way was begun in February, 1910, on No. 1, and in March, 1910, on No. 2. On No. 1, that part under his control, there was a change in the right of way involving seven acres. He adds that trial lines were run before December, 1909, of which he could make no estimate; but that there were three trial lines made after

December, 1909, not covered by the right of way, involving about two acres.

On No. 2, the same witness would allow 18 acres for station grounds, and approximately 10 acres for abandonment of right of way, and for trial line, 2 acres. While he cannot give the area of trial lines made before he took charge, he says there were at least two. There is no evidence to establish whether the latter would have been made before October 20, 1909.

Witness Malone says he saw trial lines on No. 2 before he purchased, and his estimate, or guess, as to what was cut after 1909 agrees with that of his employee, Arnold Adams, or Arnold Adams agrees with his employer's guess, and it is placed as follows: On No. 1, he puts it down at 50 acres. On No. 2, at 73; and on No. 7, at 83 acres.

It is very difficult under this evidence to arrive, with satisfaction, at an area that would be in any manner reliable. From these large areas mentioned by witnesses Malone and Arnold Adams, must be deducted what was done before October, 1909, and the contractors' camp. Does that estimate cover the ballast pit? Was there not fuel cut by contractors upon these limits which was afterwards sold as fuel, as disclosed by the evidence, that would be included in the larger estimate? I am unable to say. Witness Black speaks with certainty upon what he knows, but leaves out points that are not covered. His estimate would come up to about 39 acres, and if we allow say 5 acres for the two trial lines he says were made on No. 2 before he took charge, although there is nothing to shew whether they were made before October 20, 1909—and that would give us a total of 44 acres altogether, and that would also be allowing the full 18 acres for station purposes.

I may say also I am not overlooking the error made by witness Plamondon in respect of the yellow colouring on plan ex. No. 13, as explained by witness Scott.

Taking into consideration that the estimate of engineer Black does give us some reliable data so far as it goes, but does not actually cover everything in respect of this claim, and that for the reasons above mentioned, much indeed must be deducted from the guesses or estimates of witnesses Malone and Arnold Adams, I see no other manner to reconcile the evidence than to add a fair acreage to the

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engineer's estimate, as hereinafter mentioned. I am unable to reconcile these two estimates in a better manner.

On the question of jurisdiction, it will be sufficient to say that the court has jurisdiction to entertain the claim as well under sub-secs. (*a*) and (*b*) of s. 20 of the Exchequer Court Act, as under the Expropriation Act, and the National Transcontinental Railway Act, 4-5 Geo. V., c. 43, and 5 Geo. V., c. 18; also *Piggott* v. *The King*, 53 Can. S.C.R. 627, 32 D.L.R. 461; *Johnston* v. *The King*, 44 Can. S.C.R. 448; *The King* v. *Jones*, 44 Can. S.C.R. 495. The government engineers had the power to enter upon the lands in question and cut trees as part of the works necessary for the construction of the railway. See sub-secs. (*a*) and (*c*) of s. 3 of the Expropriation Act, and s. 2, c. 36, R.S.C. (1906), the Government Railway Act.

The suppliant, while not having a fee in the land upon which the timber was so cut, had an estate and interest in it, and he is entitled to compensation. He has a possessory right in the limits and a right of ownership in the timber cut thereon.

To arrive at the amount claimed, the suppliant taking the alleged area upon which the timber was cut, makes an estimate of the quantity, in board measure, which was growing upon that area and claims $6 per 1,000 ft. b.m., of that timber, after it would have passed through the mill. In that amount of $6, counsel in the course of his argument says that $3.55 would go to the provincial government for stumpage and the suppliant would receive $2.45. That reasoning is borrowed from the deed of February, 1914, under which the suppliant undertook, if he recovered, to so pay the stumpage; but that only applied to the timber cut on the right of way which is entirely disallowed, and such reasoning cannot be applied for what is cut outside of the right of way.

However, this mode of assessing the compensation cannot be accepted. I have already said, in the case of *The King* v. *New Brunswick Railway Co.*, 14 Can. Ex. 491 at 496, wherein a claim was made in respect of the passage of the Transcontinental through their limits, that the value of the estate or interest of the suppliant in such timber lands must be arrived at by looking at the property as it stood at the time of the taking by the Crown. What is sought here is to compensate the suppliant for the timber so cut, as a whole, at the time of the taking, and to arrive at the value one is

not to take each tree so felled, calculate the board measure feet that could be made out of it and the profits derived therefrom when placed on the market for sale. A somewhat crude but true illustration may be used. If through negligence, while driving an automobile, a steer were killed, the measure of damages would be the value of the steer as it stood at the time of the accident and not after it had passed through the hands of the butcher who had cut it up and retailed it by the pound.

Similar views were also expressed in the case of *The King* v. *Kendall*, 14 Can. Ex. 71 at 81, 8 D.L.R. 900, confirmed on appeal to the Supreme Court of Canada. See also *Manning* v. *Lowell*, 173 Mass. 103, and *Moulton* v. *Newburyport Water Co.*, 137 Mass. 163, 167.

The rights of the suppliant, under the first license was for October to May, and in subsequent licenses for 12 months only. He could not within the life of one license, or even two, cut the whole timber upon the limits. It is not in evidence whether he did cut immediately adjoining any part in respect of which claim is made. There would further be *areas* to be taken into consideration, such as having the whole limit destroyed by fire.

The suppliant was paying the sum of $5 a mile as a yearly ground rent. Under s. 1312 R.S.Q. (1888), the licenses vest in the holder thereof all the rights of property in all trees, timber and lumber cut within the limits within the *term thereof*, whether such trees, timber or lumber are cut by authority of the holder of such license, or by any other person, with or without his consent. And under s. 1313 the licensee has the right to seize such timber qualified as cut in trespass. But the trees, in the present case, were not cut in trespass, they were cut under statutory authority conferred upon the officers of the Crown for the purposes of the Transcontinental Railway.

I am unable to differentiate the present case from the general run of cases. The timber was cut under proper authority, *Att'y-Gen.* v. *C.P.R. Co.*, [1906] A.C. 204, and the compensation to be paid the suppliant should leave him, after the expropriation, neither richer nor poorer than he was before. The Crown is not to be penalized, but it should pay a fair and just compensation.

The suppliant's title consists in a right guaranteed for a short period, renewable only at will for a period of 12 months only.

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There is no evidence upon the record of the value of that land per acre or of the trees so cut.

As I have already said, while I cannot accept, under the evidence as presented, the estimate of 206 acres made by witnesses Malone and Adams, I also find the estimate of the engineer Black is incomplete.

Under the latter's estimate we find the following allowances were made:

For engineers' camp, 6 acres; for ballast pits, 23 acres; for trial lines and changes in the right of way, including the full area for station purposes, etc., and allowing 5 acres for the two trial lines he found when he arrived, but which he does not know whether they were made before or after October, 1909, making altogether 44 acres.

And to these 44 acres let us add, to make that allowance most generous, 50 per cent. more, making these 44 acres 66 acres, we will arrive at a total of 95 acres.

The suppliant is entitled to the fair value of the trees so cut at that date, before the railway was in operation. Most of these trees were cut, moved to the side and left there, and were not taken away.

There is not a tittle of evidence to help in arriving at a valuation upon a proper basis. Was this cutting on the trial line, on the abandoned area of the right of way, done on a poor or good part of the limits? Take the gravel pit, for instance. Gravel pits are usually, perhaps not always, under poor land where the growth is poor. In assessing the compensation regard must be had to the remoteness of the limit, the quality, quantity and species of the timber.

Two courses are now open to the court. The first would be to re-open the case and order that further evidence be adduced.

The second course left would be for the tribunal to assume the office of a jury and do what a jury would do in a case of this kind, and using common sense and taking all the surrounding circumstances into consideration, fix a lump sum which in its judgment would be considered fair and just under the circumstances.

Following the first course would involve procrastination and want of finality in adjudicating upon cases. I have already adopted the second course in the case of *Boulay* v. *The King* (May 10, 1912), and it was confirmed on appeal to the Supreme Court of Canada (November 11, 1912).

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Taking all the circumstances of the case into consideration, and adopting the second course, I will allow for all the trees so cut the sum of $1,000—this amount I find will be a fair, just and liberal compensation as between the parties.

To this amount interest should be added. I have no definite date from which such interest should run, and the question was not mentioned at trial, although claimed by the pleadings, and is allowable under s. 31 of the Exchequer Court Act. The first date of the licenses is October 20, 1909. The cutting took place subsequent to such date, on different occasions, and I will adopt as a medium or average date August 12, 1910.

Dealing now with the third-party proceedings, I find that as no part of the compensation allowed the suppliant is recoverable by the Crown from the third party, that issue shall stand dismissed with costs against the respondent.

As between the suppliant and the respondent there will be judgment in favour of the suppliant for the sum of $1,000, with interest thereon from August 12, 1912, to the date hereof, and the costs will follow the event. *Judgment for suppliant.*

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. March 25, 1918.

PARTNERSHIP (§ VI—29)—SALE OF PARTNERSHIP BUSINESS—TERMINATION OF PARTNERSHIP—ACCOUNTING—STATUTE OF LIMITATIONS—TRUST.

Where a business has been carried on by husband and wife in equal shares as partners, the sale of the business terminates the partnership. The husband is not a trustee in the full sense of that word for the wife's share of the purchase price received by him so as to preclude the Statute of Limitations from applying. Any action for a partnership account must be brought within six years from such receipt.

[*Knox* v. *Gye*, L.R. 5 H.L. 656, applied.]

APPEAL from the judgment of Britton, J., in an action to recover share of partnership property. Varied. Statement.

D. L. McCarthy, K.C., and *T. L. Monahan*, for appellants.

H. J. Scott, K.C., and *J. C. Thompson*, for respondent.

CLUTE, J.:—The plaintiffs, Mabel Faye and Gertrude Faye, sue as executors and trustees under the last will and testament of Susan Roumegous, deceased, late wife of the defendant. Clute, J.

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The statement of claim sets forth that the defendant and his wife were the owners of the Lakeview Hotel, Winchester street, Toronto, during the years 1900 to 1907, both inclusive, and that the said Susan Roumegous was entitled to a one-half interest in the profits of the said hotel business during the said years. It further charges that the defendant received all the profits of the business during those years; that a sale was made of the said business to one Willis C. Martin in September, 1907, for $25,000, $10,000 of which was paid on the 10th September, 1907, to the defendant, who did not then pay, and has not since paid, any part thereof to the said Susan Roumegous or to the plaintiffs. The plaintiffs claim interest on the balance of the purchase-money. It is further alleged that in 1905 the deceased Susan Roumegous lent to the defendant the sum of $2,200, and in August, 1914, the further sum of $500. The profits of the business were used and expended in the purchase of certain lands known as the Cooksville property, in the county of Peel. And the plaintiffs claim: (1) a half-interest in the said lands in the county of Peel, particularly described in the writ of summons; (2) or in the alternative: (a) a declaration that the plaintiffs are entitled to a one-half share of the profits of the said hotel business; (b) judgment for $5,000 and interest; (c) one-half of the interest on the balance of the purchase-money for the years 1907 to 1912 inclusive; (3) judgment for $2,200 and interest; (4) judgment for $500 and interest.

The defendant denies all the allegations in the plaintiffs' statement of claim, and avers that Susan Roumegous has no valid or enforceable claim against him; that during the lifetime of his wife he satisfied all claims, if any, which she had or made against him to the time of her death. The defendant pleads the Statute of Limitations and the Statute of Frauds as a bar to the plaintiffs' claim. The defendant further says that the plaintiffs have no agreement, or memorandum or note thereof, entitling them to any interest in the said lands in the county of Peel, and pleads the Statute of Frauds in respect thereto.

The defendant married his said wife in 1877, in Fall River, Massachusets, and shortly thereafter they came to Toronto and engaged in the restaurant business, and were prosperous from the beginning. It is said that they had but $4 capital, raised by

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pawning her jewellery, to begin with. During the whole period they both took an active part in the business. It is unnecessary to inquire whether they were partners or not prior to the purchase of the Lakeview Hotel. At the trial the agreement for purchase was not produced, and it was not established to the satisfaction of the trial Judge that the wife had any interest therein.

Upon the argument in appeal, the agreement of purchase was for the first time produced, and by consent made part of the record. It is dated the 2nd day of May, 1900, and made between O'Keefe's Brewery Company and G. J. Foy, wine-merchant, vendors, and Achille Roumegous and the said Susan E. Roumegous, his wife, the vendees. It recites that the vendors are the owners of the Lakeview Hotel, and also of the goods, chattels, household stuff, and stock of wines, liquors, cigars, etc., on the said premises, and that the license of the said hotel is the property of the vendors, though held in the name of one M. A. Harper; "and whereas the said parties of the first part" (the vendors) "have agreed to sell and the parties of the second part" (the vendees) "have agreed to buy the goods, chattels, household stuff, and effects now on said premises and to take a lease of the said hotel at a rental of $1,250 per annum for ten years, and to pay taxes on said hotel, and to take a transfer of the said license from M. A. Harper, the said parties of the second part to pay the license fee for the current year, at and for the price of $11,000, $6,000 cash, the balance to be secured by chattel mortgage for said goods and stock and license, repayable $1,000 per annum, interest at 6 per cent., this agreement to be void if the License Commissioners refuse to transfer said license, in which case the $6,000 paid is to be repaid by the said parties of the first part to the said parties of the second part. Stock of wines, liquors, cigars, ale, porter, etc., to be taken, previous to possession being taken, and to be paid for at invoice prices by the said parties of the second part in six notes, at one, two, three, four, five, and six months; all of which the said parties hereto agree for themselves and for their respective successors, administrators, and assigns, each with the other of them respectively, faithfully to do, abide by, perform, and keep."

The document is signed by all the parties thereto.

It will be seen from this agreement that what was bought was the going business, including the license and a lease of the premises,

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and the wife became, equally with the husband, liable for the payment of the purchase-money.

The business so purchased was carried on by the defendant and his wife until the 16th May, 1907, when a sale thereof was made by the defendant and his said wife to one Willis C. Martin for $25,000. The deed, which is under seal, sets forth that "the vendors agree to sell to the purchasers, and the purchasers agree to buy from the vendors, all and singular the goodwill of the Lakeview Hotel . . . together with the license to sell liquors . . . and all the goods, chattels, bar-fixtures, and furniture in the said building and the vendors' stock in trade of wines, liquors, spirits, cigars, etc., of all kinds, upon the said premises at the date of the closing of the sale, and the existing lease of the said premises to be assigned to the said purchaser, with the assent of the landlord of the said premises, at and for the price or sum of $25,000," with certain terms of payment and conditions, one clause of which is: "the sale is to include any license-fee already paid by the vendors," etc.

The form of the purchase and of the sale of this business, including as it does the goodwill, license, furniture, and stock in trade, and lease of the premises, puts it beyond all doubt, in my opinion, that the business was that of both husband and wife, and that they held and carried on the same in equal shares as partners.

An extension of time being desired by the purchaser, a further agreement was entered into between the vendors and the purchaser, dated the 11th June, 1912, which recites the agreement of purchase and the terms of payment therein, and that interest has been paid on account thereof till the 10th June, and the payment of a further sum of $5,000 on account of purchase-money on the date thereof (11th June, 1912), and that the purchaser has requested the vendors to extend the time for payment of $10,000. The agreement then provides that the payment of the $10,000 is extended to the 1st day of September, 1914, with interest from the 10th June, 1912, at 6 per cent., payable quarterly, on the first days of March, June, September, and December in each year. It further provides that the purchaser agrees with the vendors, upon their request, to give a chattel mortgage upon the license, goodwill, and stock in trade, to secure the unpaid balance of the

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purchase-money, and "this agreement shall, from the date thereof, be read and considered along with the said agreement of the 16th day of May, 1907, and treated as part thereof, and for such purpose the said agreement of the 16th May, 1907, shall be regarded as being hereby amended, and the said agreement, together with all the covenants and provisions thereof as so amended, shall be and continue to be in full force and virtue, and shall be binding upon and enure to the benefit of not only the parties hereto but to and upon their respective heirs, administrators, successors, and assigns."

There is a receipt dated the 28th August, 1914, signed by the defendant and his wife, acknowledging that they have received from the said Martin the sum of $5,000 "*re* Lakeview Hotel," and the sum of $139.93 in full of all interest to the 10th September, 1914. It is admitted that the wife received one-half of this sum and of the previous payment of $5,000, and her share of the interest.

On the 28th August, the same date, a further agreement was entered into between the vendors and the purchaser for a further extension of time. The agreement recites the agreement for purchase and the agreement for extension of time and the request to extend the time for the payment of the remaining $5,000 to the 10th September, 1916. The payment of the $5,000 covered by the said receipt is acknowledged, and the time of payment is extended to the 10th September, 1916. The terms of this extension are very similar to the former, including the agreement to give a chattel mortgage upon the license, goodwill, and stock in trade of the purchaser, and the same is to be read and considered along with the said agreement of the 16th May, 1907, and to enure to the benefit of the parties and their personal representatives.

Upon the argument, counsel for the plaintiffs was content to limit his claim to one-half of $7,500, with interest, being part of the first payment of $10,000, less a portion thereof used in the payment of the debts of the said business, and the said $5,000 with interest; the wife having received during her lifetime one-half of the two payments each of $5,000 and interest.

It was not disputed that the husband had received the $10,000, being the first payment on the purchase-money, and it further appeared from his evidence that he had expended the money re-

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ceived from the business in the purchase of the Cooksville property. It also further appeared from the defendant's evidence that he had received the $500 from his wife on the date mentioned. It was urged on behalf of the defence, however, that there was no partnership in respect of the Cooksville property, in the sense that the business of running the farm and vineyard was carried on by the defendant and never jointly as a business concern. But it was contended by Mr. McCarthy that the plaintiffs were entitled at all events to follow the assets of the partnership, and were entitled to have it declared that there was a lien thereon in favour of the partnership to the extent at least of the balance claimed by the plaintiffs for the sale of the business to Martin; or, in the alternative, to have the partnership accounts taken and the partnership assets divided.

I think it sufficiently appears from the evidence that the partnership liabilities were paid from time to time out of the profits of the business, and that the purchase-money on the sale to Martin represented the net assets of the business, less about $2,500 of liabilities, which were paid out of the first payment of $10,000.

I reach the conclusion as to the equal ownership of the wife in the business from the documents referred to and the manner in which the business was carried on. The evidence of the plaintiffs supports this view, but is not, in my opinion, necessary.

The result is that the plaintiffs are entitled to recover one-half of $7,500, unless precluded by the Statute of Limitations.

Before the Married Women's Property Act a married woman had no separate estate; could not enter into any contract binding on herself except in certain cases; and so could not have been a partner. But since that Act a married woman has power to contract, even though she has no separate estate, so as to bind any separate estate she may subsequently acquire. She can therefore now be a partner: R.S.O. 1914, ch. 149, sec. 4.

The Married Women's Property Act, 1884, 47 Vict. ch. 19, was amended in 1887 (see 50 Vict. ch. 7, sec. 22), by introducing the words now in sec. 7, sub-sec. (1), "in which her husband has no proprietary interest," and this so appears in the Revised Statutes of 1887, ch. 132, sec. 5. This amendment was not introduced to curtail the rights of a married woman, but rather to enlarge them:

Gibson v. *Le Temps Publication Co.*, 8 O.L.R. 707, 708, where it is said: "A married woman can, in all respects and for all purposes, contract with her husband, as if she were a *feme sole*, every contract made by her being deemed to be made with respect to and to bind her separate property, whether she is or is not in fact possessed of separate estate at the date of the contract:" *per* Anglin, J.; see Eversley on Domestic Relations, 3rd ed., p. 334.

The sale of the hotel to Martin was a sale of property in which the wife had an equal interest with her husband. It included their entire business and the assets. This, while not formally dissolving the partnership, put an end to the business as carried on by them. What, then, was her right to her share of the first payment? It was a joint and equal right with her husband. He received the amount; he was liable to account to her for the same. The question is, would the Statute of Limitations operate so as to preclude her from bringing an action for a partnership account after six years from such receipt? I think it would.

Upon the argument the question whether or not the husband could be regarded as a trustee for the wife of this amount, and so make the statute inoperative, was raised. This question is covered by authority. He is not a trustee for her in the full sense of that word, which would preclude the Statute of Limitations from applying: Lindley on Partnership, 7th ed., pp. 531-553. So long as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the Statute of Limitations has no application, but as soon as the partnership is dissolved or there is any exclusion of one partner by the others the case is different and the statute begins to run: *Noyes* v. *Crawley*, 10 Ch.D. 31. See also Lindley on Partnership, 7th ed., p. 553, where *Knox* v. *Gye*, L.R. 5 H.L. 656, is referred to, in which a surviving partner relied on the Statute of Limitations as a defence to a suit for an account instituted by an executor of a deceased partner, who had died more than six years before the filing of the bill. The surviving partner had, however, continued the partnership business, and had got in outstanding assets within six years. The decision of Wood, V.-C., who held that the statute was not a bar to the suit, was reversed by Lord Chelmsford on appeal, and the House of Lords affirmed Lord Chelmsford's decision. The question turned upon whether or not a partner, who had received

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money belonging to the partnership, could be regarded as a trustee within the Trustee Act: see R.S.O. 1914, ch. 75 (the Limitations Act), sec. 47, providing: "In this section 'trustee' shall include an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and shall also include a joint trustee." And (sub-sec. (2): "In an action against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee . . ."

There was no suggestion of fraud in the present case, and the question is, whether the defendant was a trustee within the exception in sub-sec. (2).

Lord Westbury in *Knox v. Gye*, L.R. 5 H.L. 656, held that there is no fiduciary relation between a surviving partner and the representatives of his deceased partner. In that case the partnership was dissolved in 1854, and the bill was filed in 1864. In that respect it differs from the present case, as more than six years had elapsed after the death of the partner. In the present case Susan Roumegous, the defendant's wife, died on the 10th September, 1916; probate was issued on the 14th February, 1917; and this action was commenced on the 9th October, 1917. Lord Westbury points out (p. 672) that the statute provides (see R.S.O. 1914, ch. 75, sec. 50, which is similar to the English Act) that " no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." He points out (p. 673) that the appellant there relied upon the claim against Hughes having been received and realised within six years before the commencement of the suit, and proceeds:—

"The question is, was that claim against Hughes, that debt due

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to the partnership, a thing comprised in the same account? An account of the partnership estate would unquestionably comprise that claim, and the statute was directed, as we all know, against the erroneous notion that an account which had been barred by the lapse of six years after the last entry in the account might be considered as opened and revived by the receipt of a subsequent sum of money more than six years after the date of the last entry. It removes that notion, provided the receipt after the six years is the receipt of an item comprised in the original account."

He points out (p. 673) that the payment was made in 1861, and that, after the right to the account was taken away by the statute previously to the receipt of such item, the subsequent receipt cannot remove the bar and restore the title to the account. He points out also (p. 675) that the representative of a deceased partner has no specific interest in, or claim upon, any particular part of the partnership assets.

"The whole property therein accrues to the surviving partner, and he is the owner thereof both at Law and in Equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership."

He then deals (p. 675) with the meaning of the word "trustee." "The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter corresponding obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner . . . but the trust is limited to the discharge of the obligation, which is liable to be barred by the lapse of time; as between the express trustee and the *cestui que trust* time will not run; but the surviving partner is not a trustee in that full and proper sense of the word."

And again (p. 676):—

"The mistaken phrase that a surviving partner is a trustee, and that therefore no time can run as between him and the representative of the deceased partner, has led to what I humbly conceive to be the error in the judgment originally given.

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"There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in Equity. . . . it is a mistake to apply the word 'trust' to the legal relation which is thereby created."

Lord Colonsay (p. 677) held that the Statute of Limitations does not apply to a suit brought by the executor of a deceased partner against the surviving partner demanding an account of the partnership concerns.

Lord Hatherley, L.C., strongly dissented, and expressed (p. 678) his surprise to hear "that there is nothing fiduciary between a surviving partner and the executors of his deceased partner."

This case was referred to in *Gordon* v. *Holland* (1913), 82 L.J.P.C. 81, decided on appeal to the Privy Council from the Court of Appeal for British Columbia; and it was there held that a partner who, improperly and without the knowledge of his partner, has sold partnership property to a *bonâ fide* purchaser for value without notice, and has afterwards repurchased it from him, stands in a fiduciary relation to his partner, and cannot take advantage of the rule which protects a purchaser with notice taking from a purchaser without notice, but is liable to account for profits made by subsequent dealings with the property.

That case also differs from the present. It will be observed that the partnership property was sold without the knowledge of the partner, and that it was bought back from the purchaser.

Lord Atkinson delivered judgment, and at pp. 87, 88, referring to *Knox* v. *Gye*, said:—

"Lord Westbury laid it down broadly that to describe a surviving partner as a trustee for the representative of a deceased partner was a misapplication of language, that there was no fiduciary relation between them, and that the right of the deceased partner's representative 'consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership.'

"The then Lord Chancellor (Lord Hatherley) dissented strongly from this doctrine, and seems to lay it down, that as all the property of a partnership vests by survivorship in a surviving partner, he, as to the share of that property to which the deceased

partner would have been entitled, stands to the representative of the deceased in the relation of a trustee.

"The point was not dealt with by the other noble Lords who took part in the hearing, and it was not necessary to rule it for the purposes of the decision of the case, which turned entirely on the section of the statute. In *Piddocke* v. *Burt*, [1894] 1 Ch. 343, Mr. Justice Chitty decided that a partner who receives assets of the partnership on behalf of himself and his co-partners does not in respect of those assets come within the words of section 4, sub-section 3, of the Debtors Act, 1869, 'as a trustee or person acting in a fiduciary capacity.' "

The *Gordon* case was distinguished from *Knox* v. *Gye* and *Piddocke* v. *Burt* because the sale of the land was from the first illegal and wrongful, and the appropriation of the proceeds was in effect a fraud against the co-partner, in order to keep the proceeds which could be gained by sales in a rapidly rising market.

In *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474 (C.A.), it was held that, although the old partnership was terminated in that case by the death of the father, the Statute of Limitations was no bar to taking the accounts before that date, the accounts having been carried on into the new partnership without interruption or settlement; and it was also there held that, if the Statute of Limitations had applied, the fact that there had been concealed fraud would have been a bar to its operation, although such fraud might have been discovered at the time by the exercise of due caution; a partner being entitled to rely on the good faith of his co-partners. *Knox* v. *Gye* was distinguished, and *Rawlins* v. *Wickham* (1858), 3 DeG. & J. 304, followed.

In *Barton* v. *North Staffordshire R. W. Co.* (1888), 38 Ch.D. 458, reference is made (at p. 463) to *Knox* v. *Gye*, *supra*, as settling the point that, after a partnership has ceased, any claim on simple contract by one former partner against the others in respect thereof is *primâ facie* subject to be barred after the expiration of six years.

"On the other hand, while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of Lord Justice Lindley is to the contrary (Lindley on Partnership, 4th ed., p. 966)."

The question then here is, what was the effect of the sale of

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the entire partnership business, including goodwill, and the receipt by the defendant of the first payments? Was not that in effect a termination of the partnership? There was no evidence whatever that the business as such was carried on in any other manner. The evidence is to the contrary. It, as a matter of fact, having been sold out entire, that business ceased to exist, except for the purpose of having its affairs wound up. In my opinion, a right of action immediately accrued to the wife for an account and to recover her share of the payment made on the sale. That being so, as I think, *Knox* v. *Gye* is in point, and the Statute of Limitations applies. See Halsbury's Laws of England, vol. 22, pp. 85, 86, para. 167, where it is said that a partnership for a fixed term or for a single adventure, is dissolved by the expiration of the term or by the completion of the adventure, as the case may be, except so far as it is deemed to continue for the purpose of winding up its affairs. In this case the partnership assets were sold out, and the liabilities appear to have all been paid out of the first payment of the purchase-money. The right of action, therefore, for one-half of the remaining portion of the first payment accrued to the wife. The partnership was determined by their act and deed. They changed their place of residence, and ceased further to engage, so far as the evidence shews, in any joint business whatever.

In *Crawshay* v. *Collins* (1808), 15 Ves. 218, Lord Eldon, L.C., laid it down (pp. 226, 227) that:—

"There may be a partnership, where, whether the parties have agreed for the determination of it at a particular period, or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership; and the consequence is, that for the purpose of making good those engagements with third persons it must continue; and then, instead of being, as it was, a general partnership, it is a general partnership; determined, except as it still subsists for the purpose only of winding up the concerns."

That covers this case. The partnership was in fact wound up, except for each partner to receive the payments that were made under the terms of sale.

Again, in *Cruikshank* v. *McVicar* (1844), 8 Beav. 106, *per* Lord Langdale, M.R., at p. 116:—

"When the partnership business is, in one sense, at an end, still you have not, therefore, put an end to the joint transactions; they must necessarily be carried on, for the purpose of winding up the concern and every thing belonging to it."

In *Noyes* v. *Crawley*, 10 Ch. D. 31, at p. 39, Malins, V.-C., treated a dissolution or a termination as the same thing with regard to the application of the Statute of Limitations.

The test seems to be, when did the right of action accrue? There can be no doubt, I take it, that the wife might have brought suit for an account or for her share of the first payment.

It is said in Halsbury's Law of England, vol. 19, p. 47, para. 71, that, while a partnership is subsisting, the statute has no application to the claim of one partner against another in respect of rights arising out of the partnership; and for this proposition are cited the cases above referred to, with one additional case, namely, *Chan Kit San* v. *Ho Fung Hang*, [1902] A.C. 257, where it was held, under a similar statute of limitations, that the statute ran from the granting of letters of administration.

The result is that the appellants fail in respect of the claim to one-half of the $7,500, part of the first payment of purchase-money.

Then with respect to the $500 said to have been lent by the wife to the husband. In dealing with this branch of the case the learned trial Judge says:—

"The defendant denies ever getting money as a loan from his wife. It cannot, it seems to me, be held that there was an admission by the defendant of a loan of $500, merely because, after an express denial, he answered a question in the following form:—'Question: 229. The $500 which you borrowed from your wife in 1914, that was the only amount which you ever borrowed from her? A. Yes.'"

The defendant's evidence is conclusive as to having borrowed the $500 from his wife.

At p. 49 of the evidence, examined by his own counsel, he says:—

"Q. Did you give her any money? A. When we went in 1914 she asked me for some money and I said, 'There is the money, take what you want.' There was $5,000 cash there, and she took $2,500, and she lent me $500 the next day because I had money to pay."

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On cross-examination, at p. 74, Mr. McCarthy, referring to the payment of $2,500 in 1912, asked:—

"Q. And she got $2,500 and you got $2,500? A. Yes.

"Q. And out of her $2,500 you borrowed $500? A. Yes.

"Q. I am wrong about that, you did not borrow $500 from her until 1914? A. Yes.

"Q. Then in 1914 you borrowed $500 from her? A. Yes.

"Q. You say you paid that back in hospital and doctors' bills? A. Yes.

"Q. You say that is the way you paid it back? A. Yes.

"Q. The cheque for interest from Mr. Martin of the 1st September, 1916, for $37.50, was endorsed by you and paid over to your bank was it? A. Yes.

Q. Now, in reference to the time that she gave you $500, how did that happen? A. Well, that was for payment on a mortgage; in two or three days I said, 'You want that money now?' She said, 'No, the money will pay doctors and so forth.'

"Q. When did she get the $500? A. In 1914 she received $2,500.

"Q. This $500 she handed to you was part of the $2,500 she got? A. Yes."

In view of this evidence, which is not contradicted in any way, it is clear, I think, that the defendant borrowed from his wife $500, which he never repaid. He says he expended the same for hospital and doctors' bills. This affords no defence to the claim—he was liable personally for expenses incurred at the hospital and for doctors' bills for his wife: Eversley on Domestic Relations, 3rd ed., p. 323; Macqueen's Rights and Liabilities of Husband and Wife, 3rd ed., pp. 95-102; Lush's Law of Husband and Wife, 3rd ed., pp. 366-386.

The evidence is also clear that the item of interest $37.50, due to the wife, was paid to the husband and deposited by him to his own account, and that the plaintiff is entitled to judgment also for that amount.

The evidence is as follows:—

"Q. Now then, her cheque, the cheque for interest, from Mr. Martin, of the 1st September, 1916, for $37.50, was endorsed by you and paid over to your bank, was it? A. Yes.

"Q. Why? That was two days before her death? A. That was one week before she died.

"Q. Two days before she died. How was that? A. I received the money.

"Q. You received her money? A. Yes, I received that money

"Q. You endorsed it and got the money? A. Yes, I received that money."

The judgment of the Court below should be set aside, and judgment entered for the plaintiffs for $537.50; and, having regard to all the circumstances of the case and the amount recovered, with County Court costs and costs of this appeal, without a set-off.

MULOCK, C.J.Ex., and SUTHERLAND and KELLY, JJ., agreed with CLUTE, J.

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RIDDELL, J.:—I have had the advantage of reading the judgment of my brother Clute, and agree in the findings of fact and the conclusions of law generally.

Riddell, J.

It seems to me clear that the husband was the trustee for the wife of her half of the proceeds of the sale of the business—not indeed an express trustee, but a constructive trustee. In such a trust, it is well decided that the Statute of Limitations runs: consequently the defendant may set up that defence.

Both from the transaction itself and from the dealing of the parties, I think it plain that the wife could claim half of each payment as it was made—the terms of payment were known to her, if not from the first—although that is most likely—at least from the time of the payment in January, 1912, and tacitly approved by her. The statute then would begin to run in favour of the defendant only on the payment of an instalment and only as to that instalment. He could not have been called upon to account for what he had not yet received.

There is yet a sum of $5,000 unpaid; and, to save further litigation, we should now make a declaration that the plaintiffs are entitled to half that sum as and when it is paid.

With that declaration, in addition to judgment for $537.50, I would allow the appeal with Supreme Court costs here and below.

Judgment as stated by CLUTE, J.; RIDDELL, J., *dissenting in part.*

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BOULTER-WAUGH Limited v. PHILLIPS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. May 17, 1918.

MORTGAGE (§ II—40)—ASSIGNMENT OF AGREEMENT TO PURCHASE—TITLE TAKEN IN OWN NAME—MORTGAGE—MORTGAGEE HAVING KNOWLEDGE OF PRIOR EQUITY—PRIORITY—CAVEAT.

If a person takes title in his own name to land which he agreed to purchase, but which prior to obtaining title he has assigned to another, he holds such title as trustee to the extent of such other interest. If another creditor, having knowledge of the trust, takes a mortgage on the property he cannot deprive the beneficial owners of their interest in the property unless they have by their conduct lost their right to priority.

A caveat not being necessary to protect the beneficial interest, which is founded on contract, the withdrawal of such caveat cannot deprive the beneficial owners of their priority.

APPEAL by the plaintiffs from a judgment of Brown, C.J.K.B. Reversed.

P. E. MacKenzie, K.C., for appellant; *F. H. Bence*, for Union Bank of Canada, respondent.

Haultain, C.J.

HAULTAIN, C.J.:—The facts of this case have been fully stated in the judgments of my brothers Newlands and Lamont. The outstanding and important facts are that the plaintiff had an equitable interest in the land in question prior in time to the equitable interest of the defendant bank, and that the bank had full knowledge and notice of that interest at the time it took its security from Phillips. Apart from the provisions of the Land Titles Act, these facts bring this case clearly within well established principles. The legal rule *nemo dat qui non habet* applies to persons entitled to equitable interests in the same property, and the purchaser or mortgagee for value of an equitable interest with notice takes subject to all other equitable interests preceding in point of time the interest he acquires. *Qui prior est tempore potior est jure.* (This is not the case of a *bonâ fide* purchaser or mortgagee who has no notice express or implied.)

By his assignment to the plaintiff the defendant Phillips became the trustee for the plaintiff. "It has long been established that to buy what you know, or ought to know, is held on trust for somebody else is 'against conscience,' or, in other words, is fraud or something equivalent to fraud." Any one who comes to the legal estate or legal ownership and comes to it with notice of the trust, is a trustee. The legal title is only a protection where the equities are equal, and where they are not equal—as in this case—he who has the best equity will be preferred. *Oliver* v. *Hinton*, [1899] 2 Ch. 264, *Walker* v. *Linom*, [1907] 2 Ch. 104 at 114, *Perham* v. *Kempster*, [1907] 1 Ch. 373.

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In this case, the bank had actual and complete knowledge of the transaction between Phillips and the plaintiff, both from Phillips himself and from Phillips' certificate of title, which was issued subject to the plaintiff's caveat and was in the possession of the bank before the mortgage was given by Phillips.

In *Grace* v. *Kuebler*, 56 Can. S.C.R. 1, 39 D.L.R. 39 at 47, Anglin, J., says:—

> Here the actual and complete notice which Grace had of the rights of the original purchasers when he advanced his money and took his security puts him in a position less favourable in the eyes of a Court of Equity than he would have held had he had merely the constructive notice which registration gives to persons whom it affects. *Underwood* v. *Lord Courtown*, 2 Sch. & Sef. 41 at 66. The equitable doctrine is that notice which gives real and actual knowledge affects the conscience of the person who receives it. An attempt by him to give to rights acquired with such notice an effect inconsistent with and destructive of prior rights of which he has had the notice is looked upon by equity as a fraud which it cannot countenance. I should require very explicit language indeed to lead me to the conclusion that the legislature in enacting the Land Titles Act intended to give to registration under it an effect which would render this wholesome equitable doctrine unenforceable.

In my opinion, the fact that the bank had full knowledge of the plaintiff's interest in the land made the plaintiff's caveat quite unnecessary so far as the bank was concerned; and the lapsing of the caveat put the bank in no better position than it was when it took the mortgage from Phillips.

I would, therefore, allow the appeal with costs. The judgment appealed from will be set aside and judgment entered for the plaintiff, as indicated in the judgment of my brother Lamont.

Newlands, J.A.

NEWLANDS, J.A. (dissenting):—The respondent Phillips purchased certain lands from J. H. Munson on an agreement of sale. This agreement of sale Phillips assigned to Boulter-Waugh & Company, Ltd., as collateral security to a debt he owed them. This company further assigned same to Scott Barlow, who, on June 5, 1913, filed a caveat against said land. On September 8, 1914, Phillips got a transfer of the land from said J. H. Munson, registered the same and had a certificate of title issued to him, subject to the caveat. On July 7, 1915, said Scott Barlow transferred all his interest to plaintiffs.

On March 19, 1915, the defendants the Union Bank of Canada filed against said land a caveat to protect a mortgage given to them by said defendant Phillips, and on March 24, 1915, registered said mortgage.

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On July 8, 1915, the registrar for the Land Registration District of Humboldt, the district in which this land was registered, gave notice to said Scott Barlow to take action on his caveat, and on October 7, 1915, the local master in chambers at Humboldt made an order that the plaintiff should within 35 days bring an action to establish what claim it had in said lands, and further provided that, if said action was not brought, the said caveat was to be vacated.

The action not having been brought the caveat was vacated.

The plaintiffs allege that it was through a mistake that they omitted to bring such action, and on December 28, 1915, they applied by motion to the local master at Humboldt to have said caveat reinstated, which application was granted, but, on appeal to the Supreme Court *en banc*, the order was reversed and the caveat vacated without prejudice to the plaintiffs' right to bring an action or to file a new caveat.

This action was then brought, and the plaintiffs seek to have it declared that they have an interest in said lands by way of lien, for the indebtedness due them by defendant Phillips, in priority to the claim of the defendants the Union Bank of Canada.

The plaintiffs, as soon as they found that they had not complied with the order of the local master to bring an action, notified the defendants the Union Bank of Canada that they were not abandoning their claim. The grounds upon which plaintiffs rest their claim to relief is, that the defendants, the Union Bank of Canada, having had knowledge of plaintiffs' claim before taking their mortgage from Phillips, cannot in equity acquire a title free from such claim.

The plaintiffs' lien upon the land, if any, arose by virtue of the assignment to them of the agreement of sale from Munson to Phillips. This agreement of sale was not put in at the trial, but I presume it would be the usual agreement of sale providing for transfer upon payment and delivery up of the same. Under it plaintiffs would have been entitled to a transfer upon payment. They, apparently, never notified Munson of their claim, otherwise than by filing a caveat, and Phillips having paid for the land, got a transfer from Munson, and, I presume, delivered up to him the agreement of sale, which would be terminated upon the receipt of the transfer which he registered, and upon which a cer-

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tificate of title was issued to him. *Re Jamieson Caveat*, 10 D.L.R. 490, 6 S.L.R. 296.

This would, it seems to me, terminate any lien the plaintiffs had upon this land; the caveat filed not giving them any greater rights than the agreement gave them. *Grace* v. *Kuebler*, 39 D.L.R. 39.

The plaintiffs not having a right in the land itself, must bring an action to enforce what claim they had. This they had an opportunity to do. Their claim, that they omitted to bring action by mistake, was dealt with on the motion to reinstate their caveat which was refused by the Supreme Court *en banc*. The only ground on which they can now succeed is, that the Union Bank of Canada took their mortgage subject to plaintiffs' interest. They claim that, if they had not filed their caveat, the knowledge which the Union Bank had of their claim was sufficient, so that they could only take their mortgage subject to the plaintiffs' claim, and the caveat being only notice, and having lapsed, the Union Bank is in no better and the plaintiffs in no worse position than if plaintiffs had never filed a caveat.

I can give no effect to this contention. The plaintiffs having filed a caveat, brought their claim under the provisions of the Land Titles Act. They were ordered, under the provisions of that Act, to bring an action to enforce that claim within 35 days, otherwise the caveat would lapse and be vacated. With the vacating of the caveat they lost their right to enforce their claim as against the defendants the Union Bank of Canada, who, in the meantime, had acquired an interest in the land.

In Australia, a caveat lapses after 3 months, unless an action is brought to enforce the caveator's claims. It has been there held that, on the lapse of a caveat, the caveator loses all his rights against the land. *Nicholls* v. *Lee*, 11 N.S.W. 122 (Cases at Law); *Clissold* v. *Bellomi*, 10 N.S.W. 187 (Cases in Equity); *Bell* v. *Beckmann*, 10 N.S.W. 251 (Cases in Equity).

Under our Land Titles Act, a caveat may remain on the register an indefinite time, but, on application of any person interested, the registrar may give the caveator notice that his caveat will lapse in thirty days unless he files an order of a judge continuing the same. S. 136, Land Titles Act. In this case, the caveator got this order continuing the caveat for 35 days, but

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providing that it should be vacated if the action was not brought within that time; and it was so vacated, the action not having been brought.

I think the vacating of the caveat cleared the registered title to the land of any claim the plaintiffs might have against it in priority to any rights that had accrued on such land by such lapse. By the decision of the Supreme Court *en banc* they were permitted to file another caveat, but were given no right of priority over the defendant the Union Bank of Canada. That right they had lost. They could file another caveat, but it would only count from the date of its filing.

Newlands, J.A.

I think, therefore, that this appeal should be dismissed with costs.

Lamont, J.A.

LAMONT, J.A.:—The facts of this case are as follows: By an agreement dated April 2, 1912, the defendant Phillips agreed to purchase lot 10, block 6, Humboldt, from J. H. Munson, the purchase money being payable by instalments. On May 2, 1913, Phillips, being indebted to Boulter-Waugh & Co., Ltd., assigned and transferred to the said company all his interest in the said agreement of sale and in the lot therein mentioned, as collateral security for his indebtedness. On the following day, the company assigned their right and interest in the lot to Scott Barlow, in trust for the company, and on June 5 Barlow filed a caveat to protect his interest in the land. In September, 1914, Phillips, having himself paid the balance of the purchase money, received from Munson a transfer of the said lot. This he caused to be registered and received a certificate of title therefor, subject to the Barlow caveat.

Phillips being also indebted to the Union Bank, gave the bank, on March 23, 1915, a mortgage for $900, which was registered the following day. At the time the bank took this mortgage, it knew that Barlow had filed a caveat against the lot. In June, 1915, the bank caused a notice under the Land Titles Act to be issued to Scott Barlow that the caveat would lapse at the end of 30 days, unless continued by order of the court. Upon application, the caveat was continued until further order, and, on October 8, a further order was made continuing the caveat for 35 days, and decreeing that, in default of the caveator taking proceedings within that time to establish his rights under the caveat, the caveat

would be vacated. In the meantime, Scott Barlow had assigned to the plaintiffs—who took over the assets of Boulter-Waugh & Co., Ltd.—all his estate, title and interest in the lot. No action was brought to establish the plaintiffs' rights under their caveat within the 35 days, and the caveat was vacated on November 19. On December 14, the plaintiffs' solicitor notified the solicitors of the bank that the plaintiffs did not abandon their claim to the lot, notwithstanding the vacating of the caveat, and they have now brought this action and ask for a declaration that they are entitled to a lien upon the lot in priority to the bank's mortgage for the amount which they had it as security. The action came on for trial before the present Chief Justice of the King's Bench, who dismissed the action. The plaintiffs now appeal.

The contention on their behalf is, that, at the time the bank took its mortgage, it was aware not only of the existence of the Barlow caveat, but also of the fact that the caveat was based upon an assignment by Phillips as collateral security of all his interest in the lot; or, to put it in another way, they knew that Phillips, although registered owner, was only a trustee for the plaintiffs, and, that being so, as against the bank or any other person who was aware that Phillips was a trustee, it was not necessary to file a caveat at all. Therefore, the vacating of the caveat did not prejudicially affect the plaintiffs' rights.

I do not think that after assigning his interest in the lot to Boulter-Waugh & Co., Phillips could, by paying the balance of the purchase money and obtaining a transfer, deprive that company, or its assignees, the plaintiffs, of their right to hold the land as security for their claim, unless he disposed of it to a *bonâ fide* purchaser for value without notice of the plaintiffs' equity. I think that, immediately Phillips became the registered owner, the plaintiffs could have obtained a declaration that he held the title as trustee for them to the extent of their claim. I do not see what defence Phillips could reasonably set up to their claim.

If a person takes in his own name the title to land which he has purchased on behalf of a principal, he holds that title as a trustee for his principal, and the court will force him to convey.

Loke Yew v. *Swettenham Rubber Co. Ltd.*, [1913] A.C. 491 at 504.

The same result, in my opinion, follows where a person takes

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title in his own name to land which he agreed to purchase, but which—prior to obtaining title—he had assigned to another. I, therefore, think Phillips held the title as trustee for the plaintiffs to the extent of their claim. Furthermore, if the bank knew when it took its mortgage that Phillips was a trustee for the plaintiffs, it would, in my opinion, be fraud on the part of the bank to attempt, by virtue of having its mortgage registered and the certificate of title being in the trustee, to deprive the beneficial owners of their interest in the property, unless the beneficial owners—by their conduct or otherwise—had lost their right to priority.

In *Grace* v. *Kuebler and Brunner*, 39 D.L.R. 39 at 48, 56 Can. S.C.R. 1 at 14, Anglin, J., says:—

> The equitable doctrine is that notice which gives real and actual knowledge affects the conscience of the person who receives it. An attempt by him to give to rights acquired with such notice an affect inconsistent with and destructive of prior rights of which he has had the notice is looked upon by equity as a fraud which it cannot countenance. I should require very explicit language indeed to lead me to the conclusion that the legislature in enacting the Land Titles Act intended to give to registration under it an effect which would render this wholesome equitable doctrine unenforceable.

Where a mortgage is taken from a registered owner known to be a trustee, the intention must be, if the parties are honest, to have the mortgage cover only such interest as the trustee can legally mortgage. If a mortgagee in such a case should seek, by means of registration under the Land Titles Act, to extend his mortgage to cover the interest of the beneficial owner also, he would be guilty of fraud. *Independent Lumber Co.* v. *Gardiner*, 3 S.L.R. 140. If, in such a case, it was the intention of the trustee and the mortgagee that the mortgage was to cover the interest of the beneficial owner, that would be collusion on their part to defraud such beneficial owner. Two questions, therefore, present themselves for determination: (1) Did the bank, when it took its mortgage, know that Phillips was a trustee for the plaintiffs to the extent of his indebtedness to them?; and (2), if so, did the plaintiffs by vacating of the caveat lose their interest in the lot?

The trial judge has found, and the correctness of his finding is not questioned, that the bank knew when it took its mortgage that Phillips' title was subject to a caveat. A memorandum of the caveat appeared on the certificate of title which the bank had in its possession. Did this constitute notice to the bank that Phillips was a trustee for the caveator?

In *Manks* v. *Whiteley*, [1912] 1 Ch. 735 at 757 and 758, Fletcher Moulton, L.J., whose dissenting judgment was subsequently upheld by the House of Lords, said:—

> Of course if a purchaser has in fact searched any portion of the register he is affected with notice of that which appears therein just in the same way as he would be affected by facts which came to his knowledge through any other channel, and if therefore he learns from the memorials in the register that deeds exist affecting the property, he is bound to take the reasonable precaution of ascertaining what those deeds contain: see *Battison* v. *Hobson*, [1896] 2 Ch. 403, and *Kettlewell* v. *Watson*, 26 Ch.D. 501.

This language seems to me to establish that the bank, having knowledge of the existence of the caveat, is charged with knowledge of all that a perusal of the caveat would have disclosed.

In the caveat filed, Barlow set out that he claimed:—

> an equitable estate or interest under and by virtue of a written agreement for sale dated April 2, 1912, from John H. Munson, as vendor, to Frank C. Phillips as purchaser, and assignment in writing, dated May 2, 1913, of his interest in said agreement and of his interest in the said land from the said Frank C. Phillips, as assignor to Boulter-Waugh Co., Limited, as assignee, and further agreement in writing dated May 3, 1913, of the said agreement and of its interest therein and in the said land by the said Boulter-Waugh Co., Limited, as assignors to me the said Scott Barlow.

The assignment by Phillips of all his interest in the lot to the plaintiffs being clearly set out, I am of opinion that the bank must be held to have known that Phillips was a trustee. In any event, the bank took its mortgage subject to whatever claim the caveat protected. If that claim was an interest in the lot as beneficial owner to the extent of Phillips' indebtedness, the bank's mortgage could only affect the interest (if any) which might remain in Phillips. The bank having knowledge that Phillips was a trustee for the plaintiffs, did the vacating of the caveat cause the plaintiffs to lose their interest in the lot?

In *Rogers Lumber Co.* v. *Smith*, 11 D.L.R. 172, 6 S.L.R. 187, the plaintiffs obtained a mortgage which, by reason of an inaccurate description, was not registrable. To protect their right, they filed a caveat against the proper land. Later on, a creditor of the mortgagor obtained judgment and issued execution against him, which execution was registered. Subsequently, the plaintiffs took a new mortgage in which the land was properly described, and, without being aware of the execution, withdrew their caveat and registered the new mortgage. It was held by the court *en banc* that, by withdrawing their caveat, the plaintiffs lost the priority they had by virtue of their original mortgage, because such with-

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drawal evidenced a clear intention on their part to abandon the first security and rely on the second.

If the voluntary withdrawal of a caveat by a caveator has the effect of depriving him of the priority which the filing of a caveat gave him, the discharging of a caveat by order of a judge, in my opinion, should and does place the caveator in the same position.

But neither the voluntary withdrawal of a caveat, nor its discharge by order of a judge, can deprive the caveator of his priority unless the filing of the caveat in the first place was necessary to give him priority. For, if he has priority, apart altogether from the caveat, it is difficult to see how the withdrawal or discharge of the caveat can affect that priority. As between Phillips and the plaintiffs, the filing of the caveat was unnecessary. As Idington, J., pointed out in *Grace* v. *Kuebler & Brunner*, 39 D.L.R. 39, a caveat is not necessary between the parties to an agreement. They are bound by their contract. At p. 44 he says:—

> But what is a caveat for? Surely it never was conceived as a something to enable the vendee to protect himself against the assertion of right on the part of the vendor. His agreement binds him and no need of it for that purpose as the appellant assignee is equally bound. It is intended solely as against others, not parties to the contract and bound by it, but who innocently might have purchased and but for its registration have acquired a right.

Phillips being bound, without any caveat being filed, to give effect to the plaintiffs' equity, the bank, who took from him with knowledge of that equity, is equally bound. 13 Hals. 83–4. Therefore, had no caveat been filed at all, the bank would have been bound to recognize Phillips' trusteeship and the plaintiffs' priority. That being so, how can the withdrawal or discharge of an unnecessary caveat affect the plaintiffs' right to hold Phillips as trustee or the bank's obligation to recognize him as such?

In *Rogers Lumber Co.* v. *Smith*, *supra*, it was necessary for the plaintiffs to file a caveat to obtain priority for their unregistered mortgage over the execution. When the execution was filed, it bound the entire beneficial interest in the land, save and except the lien of the plaintiffs. The lien being removed, the execution attached to the whole of the property. But, in order to accomplish this result, it was necessary that the interest represented by the lien should revert to and become vested in the execution debtor. It had to get back to him, and form part of his beneficial interest before the execution could attach to it and therefore become a first charge thereon. This, I think, is the foundation on which

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the judgment of Lord Justice Fletcher Moulton in *Manks* v. *Whiteley*, above referred to, is based. At p. 755, his Lordship says:—

> The appellant contended that there was a strict rule in equity (enunciated in the case of *Otter* v. *Lord Vaux*, 2. K & J. 650, 6 D.M. & G. 638) that if the owner of an estate who has mortgaged it to a first and second mortgagee pays off the mortgage debt to the first mortgagee and obtains a reconveyance, the second mortgage becomes a first charge because he cannot set up his own debt which he has paid off against his own creditor the second mortgagee. I shall examine later on the cases on which this doctrine rests, but I wish to point out in *limine* that in order that this principle may apply the mortgagor must have become *the beneficial owner of the interest of the first mortgagee*.

Applying this principle to the case before us, did the discharge of the caveat have the effect of revesting in Phillips the interest which he had assigned to Boulter-Waugh Co., Ltd.? In other words, with the discharge of the caveat, did he cease to be a trustee for the plaintiffs? I cannot see upon what principle it could so be held.

The Land Titles Act provides that instruments registered in respect of or affecting the same lands shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution. It also provides that a trustee for the purposes of the Act shall be treated as the beneficial owner. But that is for the purposes of the Act only. The *Loke Yew* case, [1913] A.C. 491, shows clearly that the courts will enforce the obligations of a trustee subject only to the rights of *bonâ fide* purchasers for value without notice.

The plain facts of this case as they appear to me, are: that the bank obtained a mortgage which covered the beneficial interest (if any) which Phillips had in the lot, and now—because it has procured a discharge of a caveat filed on behalf of the plaintiffs which need not have been filed—it seeks to make its mortgage cover an interest outstanding in the plaintiffs of which they had knowledge. This the bank cannot do. As Phillips could not get rid of his trusteeship by the discharge of the caveat, he is still trustee for plaintiffs to the extent of their claim, and the mortgage of the bank does not now and never did cover the interest held by Phillips as trustee.

The appeal, in my opinion, therefore, should be allowed with costs, the judgment below set aside and judgment entered for the

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plaintiffs with costs, declaring the plaintiffs entitled to a lien upon the lot for the amount of their claim in priority to the mortgage of the bank, and decreeing that the said lot be sold to satisfy the plaintiff's claim. If the parties do not agree as to the accounts, the matter may be referred to the local registrar.

ELWOOD, J.:—I concur in the result arrived at by my brother Lamont. I wish to add, however, that the bank having taken its mortgage and registered it at a time when the plaintiff's caveat was on the register the subsequent removal of that caveat did not affect the plaintiff's position so far as the bank is concerned.

The bank was affected by the caveat just as much after the removal as it was before the removal.

Appeal allowed.

QUE.

C. R.

GIRARD v. DUHAMEL AND C.P.R. Co.

Quebec Court of Review, Archer, Greenshields and Lamothe, JJ. June 4, 1918.

COURTS (§ I B—10)—CLAIM TO EFFECTS IN POSSESSION OF RECEIVER—ONLY COURT APPOINTING RECEIVER HAS JURISDICTION TO TRY.

A plaintiff who is asserting a claim to effects and property in the possession of a liquidator should apply by summary petition to the court of which such liquidator is an officer. No other court has any jurisdiction to try an action, suit, attachment or seizure against such liquidator in his capacity of liquidator.

Statement.

APPEAL from the Circuit Court, Allard, J. Reversed.

J. B. Nantel, for plaintiff; *Weinfield, Sperber, Ledieu* and *Fortier*, for defendant.

Greenshields, J.

GREENSHIELDS, J.:—This is a seizure in revendication of certain movable effects, of which the plaintiff claims to be the owner.

The plaintiff alleges that the defendant is the liquidator of E. N. Hebert Limited; he alleges that as such liquidator, and in that quality, the defendant illegally took possession of these effects in the district of Terrebonne, and illegally detains them there in his quality of liquidator.

The head office of the said company, E. N. Hebert, Limited, in liquidation, was in Montreal; liquidation was ordered by the Superior Court of the district of Montreal, and the liquidator was appointed by the Superior Court for the district of Montreal.

The goods in question are of an alleged value of $132.

The plaintiff sued out a writ of revendication from the Circuit Court of the district of Terrebonne, and the goods were seized.

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The defendant made a motion by way of declinatory exception, and alleges, in effect, that the company having been put in liquidation by the Superior Court of the district of Montreal, and the liquidator having been appointed by the Superior Court for the district of Montreal, and the defendant being sued in his quality of liquidator, the Circuit Court is without jurisdiction. His motion was dismissed. He seeks a reversal of that judgment.

The federal parliament had legislated a whole body of law with respect to the winding-up of companies, and has created the machinery or procedure for the enforcement of this legislation. It gives, in the Province of Quebec at least, exclusive jurisdiction to the Superior Court to order and control the liquidation of a company; it makes the liquidator an officer of the court naming him, and makes such liquidator subject to the summary orders and control of that court to the exclusion of all other courts; the economy of the law being to concentrate and control the liquidation. By art. 133 it is provided that all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon any or to any effects or property in the hands, possession or custody of the liquidator, may be obtained by an order of the court on a summary petition, and not by action, suit, attachment, seizure or other proceeding of any kind, whatsoever.

Now, if this section means anything, it means that the plaintiff, who is asserting a claim to effects and property in the possession of the liquidator, should apply by summary petition to the court of which he is an officer, in order to enforce that right, and that no other court has any jurisdiction to try an action, suit, attachment or seizure. For the purpose of the Winding-up Act, and for the purpose of this case, the Circuit Court of Terrebonne is ousted of its jurisdiction. If the plaintiff had not sued the defendant in his quality of liquidator, but personally, the matter would have been different, and I should have treated it differently.

I should maintain the declinatory exception and order the record to be transmitted to the Superior Court for the district of Montreal, and to be there dealt with. That is what the defendant asks. If the record is properly dealt with before the Superior Court for the district of Montreal, I should be inclined to think that it will meet with sudden and peremptory destruction. The judgment is reversed.

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Judgment: Considering that the plaintiff alleges that the defendant took possession of the effects sought to be revendicated, and illegally detain the same in his quality of liquidator to the company E. N. Hebert, Limited.

Seeing art. 133 of c. 144 of R.S.C. (1906), known as the Winding-up Act.

Considering that the Circuit Court for the district of Terrebonne has no jurisdiction to hear and determine the right of property in and to the effects which have been seized in the possession of the defendant in his quality of liquidator;

Considering that there was error in the judgment dismissing the motion of the defendant;

Doth cancel and annul said judgment; and proceeding to render the judgment which should have been rendered;

Doth grant the motion of the plaintiff; doth declare the Circuit Court of the district of Terrebonne without jurisdiction to hear and determine the present case; and doth order that the record be sent to the Superior Court for the district of Montreal, there to be dealt with according to law, with costs of this court against plaintiff. *Judgment accordingly.*

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PIXLEY v. BEDFORD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

DAMAGES (§ III K—206a)—ANIMALS OF DIFFERENT OWNERS TRESPASSING—NO EVIDENCE OF OTHER ANIMALS THAN DEFENDANTS' DOING DAMAGE—MEASURE OF COMPENSATION.

Where several animals belonging to different owners have at various times trespassed on plaintiff's land, but where the evidence does not establish that animals belonging to any other owner than the defendant did any damage to the plaintiff's grain, the court is justified in assessing the full amount of the damages against the defendant.

Statement.

APPEAL from a judgment of the District Court Judge of Moose Jaw. Affirmed.

H. E. Sampson, K.C., for appellants; *S. B. Lamont*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The evidence in this case, in my opinion, amply supports the finding of the trial judge. The damages claimed were all sustained on or before October 30, 1917, while the alleged settlement was made in consequence of a distraint and impounding on November 7. The evidence shews that the defendants' cattle were on the plaintiff's farm and among the sheaf

oats which were destroyed on several occasions between the 12th and 31st October, and that they were practically the only animals that could have done the damage.

Taking the lowest estimate of quantity and value given by the plaintiff and his witnesses, there are 1,200 sheaves destroyed, and they were worth 7 cts. each. That amounts to $84, and the trial judge awarded $80 damages.

The distraint made on November 7, was in connection with damage done entirely to different property, and I quite agree with the trial judge in his finding that the amount paid to the pound-keeper by the defendants had nothing to do with the subject of the present action.

The appeal, is therefore, dismissed with costs.

NEWLANDS, J.A., concurred with Lamont, J.A. Newlands, J.A.

LAMONT, J.A.:—This is an appeal from a judgment of the Judge of the District Court for the Judicial District of Moose Jaw awarding the plaintiff $80 damages for oat sheaves destroyed between October 12 and October 31, 1917, by the defendant's horses and cattle. Lamont, J.A.

Two grounds of appeal are urged: (1) that the plaintiff had informed the pound-keeper when, on November 7, he impounded certain of the defendant's animals and claimed $30 for the damage they had done, that if that amount was paid it would settle the claim for damages on which this action was founded, and (2) that other cattle had been amongst the plaintiff's oat sheaves and it was impossible to say what amount of damage had been done by the defendant's animals, and, therefore, only nominal damages should have been awarded.

The first of these grounds of appeal fails. The plaintiff denied having said anything to the pound-keeper about giving up his claim against the defendant in respect of the damage for which he now claims compensation. This the trial judge evidently believed, for he found as a fact that the defendant failed to prove that the money paid on November 7 was a settlement of the present claim.

The other contention on behalf of the defendant really comes down to this: that where damage is done by animals belonging to several owners, the plaintiff is entitled to recover nominal damages only unless he can specify exactly the amount of damage done by

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the animals of each owner respectively. I do not hold this view. In the first place, in this case, the evidence does not, in my opinion, establish that animals belonging to any owner other than the defendant did any damage to the plaintiff's grain; but, assuming that it did, I am of opinion the plaintiff is entitled to recover.

In *Broderick* v. *Forbes*, 5 D.L.R. 508, the point came up for consideration, and it was held that the plaintiff was entitled to recover. The headnote of that case in part reads as follows:—

Where several animals, belonging to different owners, have at various times trespassed upon the plaintiff's land, and the whole damage done by all of them can be ascertained, but the defendant's animal has sometimes been among those trespassing and sometimes not, and there is no proof that any particular damage was done by any particular one of the animals, the court will, nevertheless, assess the damages against the defendant as best it can.

This judgment is based upon the case of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, the headnote of which reads as follows:—

Where, by contract, a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class and is thereby deprived of all chance of obtaining the prize is a breach in respect of which he may be entitled to recover substantial, and not merely nominal, damages.

In that case, it was argued that only nominal damages should be awarded, by reason of the impossibility of assessing the loss sustained by the plaintiff with any degree of certainty or precision. In answer to that argument, Fletcher Moulton, L.J., at p. 795, said:—

I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate. It is not necessary that there should be an absolute measure of damages in each case.

In 38 Cyc. 484-5, the author says:—

Thus, where animals belonging to several owners do damage together, there being a separate trespass or wrong, each owner is generally liable separately only for the injury done by his animal. The fact that it is difficult to separate the injury done by each from that done by the others furnishes no reason for holding that one *tort-feasor* should be liable for the acts of others with whom he is not acting in concert.

One rule for arriving at the quantum of the damage which should be assessed against separate owners is found in 3 Corp. Jur. 149, which reads:—

Where crops are destroyed by trespassing cattle belonging to two parties under such circumstances that it is impossible to distinguish between the trespass of one lot of cattle and that of the other, or to determine the actual amount of damage done by either separately, the court may apportion the damage according to the number of cattle belonging to the respective parties.

and allow the owner of the crops to recover, in an action against one of the parties, only the proportion of the damages given by such apportionment.

In the present case it was admitted that the defendants' animals did some damage to the plaintiff's grain, and for that damage this action was brought. The defendants even paid money into court in respect thereto. It was, therefore, the duty of the District Court Judge to estimate, as best he could, the damage done by the plaintiff's animals. He fixed the amount at $80. In my opinion the amount is reasonable.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur JJ. June 10, 1918.

GUARANTY (§ II—10)—PURCHASER'S AGREEMENTS—AGENTS—EFFECT OF WORDS IN TELEGRAM.

In an action claiming that real restate agents engaged in the purchase of "purchasers' agreements" on behalf of the plaintiffs had guaranteed in writing payment of the balance of the purchase price under an agreement for sale reliance was placed on a telegram in the following words: "Value on title made low to reduce registration costs are getting declaration as to moneys received from Love who is good man. Agreement good and guarantee it." The court (Davies and Idington, JJ., dissenting) held that the telegram taken with the other correspondence and circumstances did not guarantee payment of the agreement but went no further than to guarantee that the agreement was a *bonâ fide* one and that the property and parties were good.

Statement.

APPEAL from the judgment of the Supreme Court of Saskatchewan, 38 D.L.R. 133, 10 S.L.R. 440, reversing the judgment of Newlands, J., at the trial and dismissing the plaintiff's action with costs. Affirmed.

Chrysler, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The action is brought on an alleged guarantee by the respondents of the payment of the balance of the purchase-price under an agreement for sale, the vendor's rights under which were acquired by the appellants.

The guarantee was contained in the telegram which reads:—"Value on title made low to reduce registration costs are getting declaration as to moneys received from Love who is good man agreement good and guarantee it."

There was a letter confirming this telegram, but I do not know that it carries the matter much further even if it was admissible in evidence, which it probably was not, since it was not received until the appellants had completed the purchase of the agreement.

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Some time prior to the transaction in question in this suit, the appellant, in reference to similar ones, had inquired of the respondents on what terms they would be prepared to guarantee the due completion of such agreements for sale. The respondents replied stating, in a general and rather vague manner, terms on which they would give a guarantee which apparently would have been for the payment of the balance of purchase money remaining due.

The matter went no further, but the trial judge interpreted the guarantee given by the respondents in this case by the light of this letter and held that the same meaning must be given to the guarantee in this case. I do not think there was any occasion for doing so, but rather the contrary, since here the respondents made no stipulation for any commission or other remuneration for themselves for giving such a guarantee. Indeed, the only consideration for their giving it which the appellants are able to suggest is "the appellant purchasing the said agreement for sale from Robert W. Love" and this seems entirely inadequate as a consideration for the respondents, who were merely agents, undertaking to guarantee the payment of the purchase money under the agreement.

I think the simple and natural construction of the guarantee is as stated in the judgment appealed from "that it did not guarantee payment of the agreement, but went no further than to guarantee that the agreement was a *bonâ fide* one, and that the property and the parties were good."

In their letter confirming the guarantee the respondents say: "in talking the matter over we decided to guarantee it, which should be sufficient for your requirements."

It appears from the correspondence that the respondents were aware that the appellants were only speculating in the purchase of these agreements for sale with borrowed money and that they had the greatest difficulty in getting the banks to advance money for the purpose. I think it is therefore probable that when they said "this should be sufficient for your requirements" they had in view that the guarantee was to satisfy the bank lending the money of the *bona fides* of the agreement in which no doubt the respondents believed.

I would dismiss the appeal with costs.

Davies, J.

DAVIES, J. (dissenting):—I am of opinion that the appeal in this case should be allowed with costs and the judgment of the trial

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judge restored. Lamont, J., who dissented in the Appeal Court, was of the same opinion on the latter point.

The question at issue between the parties is whether the proper construction of the guarantee in question of an agreement for the sale of certain lands sold by the respondents to the plaintiffs, appellants, was a guarantee of the agreement including its payment or was limited to the agreement being a *bonâ fide* one only as to property and parties.

The respondents were real estate agents carrying on business in Saskatoon, and the appellants were business men residing in Woodstock, Ont. Prior to May, 1913, the appellants had purchased from respondents a number of agreements for the sale of land and a proposition had apparently been made by the appellant plaintiffs to the defendant respondents respecting the guarantee of those agreements. On November 1, 1912, Blow, one of the plaintiffs, wrote the following letter to defendants:—

Dear Sirs:—Your letter is received and glad to hear that everything is being put in proper shape and trust that everything will end well.

And now about further business. I think agreements ranging from one thousand to three, but smaller or a little larger would not make much difference if we could prove that they were gilt-edged. About what would it be worth to guarantee them as you propose? Now, if three or four real good ones came to you and you could mail them to me in haste by registered letter I could do better by exhibiting them and attending to it and returning promptly to you if you thought wise.

(Sgd.) J. W. BLOW.

P.S.—Please give me the nature and details of the guarantee you could give and oblige.

In reply the defendants wrote on November 7, a letter in which are the following paragraphs:—

As before written to you, we will not submit anything to you that is not first class, but if you will just leave the matter in our hands, we will secure agreements for you and put through the papers without any delay. As you know, when these people bring in an agreement to sell, they want the money right away, so we could handle them in this way having the papers put through the Land Titles Office without loss of time if we knew how you wished them made out.

As to this guarantee you mention would say that we consider it worth 5 per cent., and would give you any kind of a binding agreement of that nature that you could wish. We, of course, would expect that settled at the time and we would be fully responsible for all payments so that if the party on the agreement did not come through, we would have to come through ourselves.

On April 17, 1913, defendant wired plaintiffs offering them the agreement now in controversy and plaintiffs replied expressing their willingness to purchase. The papers were sent forward to

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them through the bank at Woodstock with a draft attached for the purchase-price. After examination of the agreement and the other papers, the plaintiffs were not satisfied, and wired defendants as follows:—

Woodstock, Ont., May 10, 1913.

McCallum & Vannatter, Saskatoon, Sask.

Certificate of title value five thousand, assessment four thousand fifty Jones allowed penalty on taxes. No declarations from Love or Jones as to moneys received or paid only one lot looks dear. Please explain and guarantee holding draft, give men's standing, we are afraid being away from home caused delay.

SCHELL and BLOW.

To this telegram, plaintiffs replied:—

From Saskatoon, May 12, 1913.

To M. Schell and J. Blow,

Value on title made low to reduce registration costs, are getting declaration as to moneys received from Love who is good man, agreement good and guarantee it.

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On the same day the defendants wrote plaintiffs a letter in which they explained that the certificate of title is "no guide to the real value of the property" and that "as to the assessment from what we can learn this is figured on a 40% basis for property of this description," adding:—

However in talking the matter over we decided to guarantee it which should be sufficient for your requirements. We know MR. Love personally and know for a fact that he has considerable means and while we are not personally acquainted with Mr. Jones we are told he is good and will make payments promptly being a drug traveller.

On May 14, the plaintiffs wired defendants:—

Your telegram explaining reason low valuation on duplicate certificate and guaranteeing agreement as good came to hand on Monday afternoon and we paid draft yesterday.

Reading the correspondence and the telegram together, I cannot have any doubt that when the defendants telegraphed the plaintiffs saying, "agreement good and guarantee it," they meant what any ordinary business man would mean, that they guaranteed its payment. The letter sent by them the same day in which they say, "However in talking the matter over we decided to guarantee it which should be sufficient for your requirements," taken in conjunction with their previous letter of November 7, in which they explain what they mean by the guarantee mentioned in the plaintiff's letter they were answering was that "we would be fully responsible for all payments so that if the party on the agreement did not come through we would have to come through ourselves,"

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place the question of the meaning of the guarantee and the intention of both parties as to what it covered beyond any doubt in my mind. Defendants say what they mean by guaranteeing agreement and I cannot agree with the limited and narrow construction which the Court of Appeal placed upon it that "it went no further than to guarantee that the agreement was a *bonâ fide* one and that the property and the parties were good." Such a limited construction is right in the teeth of their letter and their telegram.

I would allow the appeal with costs.

Idington, J.

IDINGTON, J.:—The appellants and respondents had for some months prior to the transaction now in question been negotiating with each other for the purchase by the appellants of securities known as "purchasers' agreements" for the purchase of lands and the covenant for the payment of the money.

The appellants resided in or about Woodstock, in Ontario, and the respondents in Saskatoon, Saskatchewan. Several transactions of that kind had taken place during these negotiations prior to the one in question, which was an agreement for the purchase of some land in Saskatoon alleged to have been purchased by one Jones from one Love, both of Saskatoon, for the price of $12,000, on which a sum of $4,000 on account of principal was supposed to have been paid. Love made an assignment of the agreement of purchase by an instrument dated April 18, 1913, to the respondent Schell.

The respondent who procured this drew upon the appellants for the amount agreed upon as the price of said security, making their draft payable at Woodstock, Ontario, and accompanying the draft with the assignment and other documents relative thereto.

On May 12, 1913, by night lettergram, the appellants wired respondents as follows:—

Certificate of title value five thousand assessment four thousand fifty Jones allowed penalty on taxes. No declarations from Love or Jones as to moneys received or paid only one lot looks clear. Please explain and guarantee holding draft give men's standing we are afraid been away from home caused delay.

The respondents on the same day wired reply as follows:—

Value on title made low to reduce registration costs are getting declarations as to moneys received from Love who is good man agreement good and guarantee it.

Upon this instrument, lastly mentioned, the appellants brought an action which was instituted on September 18, 1916, claiming

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that respondents had guaranteed to them, in writing, the payment of the balance of the purchase price under the said agreement for sale. The trial judge maintained the claim, but the Court of Appeal for Saskatchewan reversed that judgment and dismissed the action. Hence this appeal, which should be determined solely by the correct construction to be placed upon the said telegram.

I think the document is very ambiguous and capable of more than one meaning. Counsel for the appellants contends that it must mean a guarantee by the respondents of the payment by Jones of the amount of the balance of purchase money of the land or by Love, his vendor, who covenanted therefor. On the other hand, counsel for the respondents contended that it could have no such meaning or any meaning beyond being an assurance that Love was a good man and the agreement in proper form and possessing the validity such an agreement should have.

I confess that from the perusal of the judgments, and listening to the argument of counsel for the appellants, I had received the impression that an interpretation and construction, midway between these extreme contentions, was more consonant with reason and better fitted to express, in truth, what the parties had in view. According to that impression I should hold that it represented Love as a man of good financial standing, the property in question good security for the money and the agreement and title passed thereby in proper legal form. In that view, if Love could be shewn to have been at the time in question of such apparent good financial standing as would answer the description and the land of the value which the agreement represented and the title perfect, there could be no recovery; and on the other hand, if it turned out that between the date of the telegram and the recovery on the action brought by appellants against Love and Jones financial disaster had overtaken one or both or the condition of the market value of the land in question had become such that the land had fallen far below the market value of that of previous years, these circumstances should not be taken into account in determining adversely to these respondents their liability. I am still inclined to think that is the correct view of the nature of the instrument sued upon and the liability thereunder.

Counsel for the appellants repudiated in argument any such construction as possible. Possibly the circumstances that had

transpired were of such a nature as to indicate that an action seeking to enforce that view would be of little avail.

I cannot accept the interpretation and construction contended for by appellants that it was distinctly intended that the respondents should, on default of those liable under the agreement and the assignment thereof, become liable to pay the balance of the purchase price of the land named in the security. The instrument being of an ambiguous character, I think that anything which had passed between the parties prior thereto, and leading up to it, as well as that concurrent therewith and the acts of the parties immediately after, may be looked at. Counsel for appellants relies, in that connection, upon a letter of November 7, 1912, from the respondents to Mr. Blow, one of the appellants, in which they further explain to him the nature of the business involved in the buying such like securities and used these words:—

> As to this guarantee you mention would say that we consider it worth 5% and would give you any kind of a binding agreement of that nature that you could wish. We, of course, would expect that settled at the time and would be fully responsible for all payments so that if the party on the agreement would not come through, we would have to come through ourselves.

These two sentences taken from the middle of a long letter are evidently an answer to a letter of Mr. Blow of November 1, in which, amongst other things, he says, speaking of such like agreements:—"About what would it be worth to guarantee them as you propose?" and then adds the following postscript:—"Please give me the nature and details of the guarantee you could give and oblige." I am very far from finding anything in that correspondence to support the appellants in their view of the transaction now in question. Indeed, I think that a letter written only 5 months before so expressly stipulating for 5% being paid at the time of the sale of such a security, as the price of the guarantee for its payment, excludes the possibility of the parties hereto having ever intended that such a guarantee was to be implied in the telegram in question.

There was no 5% paid or anything paid by way of securing an assurance of payment, and when reliance is placed upon a letter written on the same day as the telegram, but not received until after the draft had been paid, I do not think it helps.

Stress is laid upon an expression in that letter that the respondents had decided to guarantee. I do not attach the importance

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to the expression in the letter that counsel seems to think was attached to it. In short, the circumstances to be gathered from the correspondence clearly shew that appellants' difficulty and hesitation in accepting the draft was what the night lettergram indicates. The difficulty seems to have been that the certificate of title valued the property at $5,000 and the assessment only $4,050 and that Jones, the purchaser, had allowed the imposition of the penalty for non-payment of taxes. Hence the suggestion of a declaration from Love or Jones as to the moneys received or paid for what looked dear. These were the things that were to be explained and guaranteed against as well as an assurance relative to the man's standing, and pursuant thereto a declaration was got from Mr. Love verifying the price and terms of the cash payment according to the terms of purchase and also his own standing to the extent that he had not been sued for the money or it garnisheed.

It is to be observed that the parties had several transactions of a like kind between the date of the letter and the telegram in question, but in not a single instance was a 5% premium for guarantee resorted to.

I do not think, under such circumstances, that the construction, contended for by appellants, of the document sued upon can or should be maintained, and I, therefore, think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I concur in the dismissal of this appeal substantially for the reasons stated by Idington, J.

Brodeur, J.

BRODEUR, J. (dissenting):—The appellants by their action claimed from the respondents the payment of a sum of money for which they say the respondents gave a guarantee, that sum of money being originally due by Love and Jones.

The respondents claim that they did not guarantee the payment of the obligation of Love and Jones, but simply guaranteed that the agreement was *bonâ fide* and that Love and Jones were good.

The appellants succeeded before the trial judge; but the Supreme Court of Saskatchewan *en banc* by a majority dismissed their action and reversed the judgment of the trial judge.

For some time, the appellants had some business dealings with the respondents and had been purchasing some agreements for

sale of land through the respondents or from the respondents. They were purchasing the interest of the vendor in those agreements, taking assignments thereof.

In the month of April, 1913, the respondent offered for sale the agreement of Love and Jones for the sum of $7,300, and they sent a few days afterwards a draft for the purchase price as was the usual custom of dealing between the appellants and the respondents.

The appellants, after having inspected the document, were not satisfied, having found out that the certificate of title valued the property only at $5,000 and that the municipal assessment was only $4,050, and they asked from the respondents some explanation and whether they would guarantee.

The respondents answered stating that the value and title were made low in order to reduce the registration costs and they added, "Agreement good and guarantee it." They sent a confirming letter stating that having thought the matter over, they had decided to guarantee it.

I must state that in a previous correspondence exchanged between the parties, the respondents had been willing to guarantee the debts which they would sell to the appellants who were living in Ontario when those agreements of sale were made in the Province of Saskatchewan. They said, however, that a sum of 5% should be given to them for such a guarantee and they added:—"We, of course, would expect that settled at the time and we would be fully responsible for all payments so that if the party on the agreement did not come through we would have to come through ourselves."

We see by that letter the nature of the guarantee which the respondents were willing to give concerning those agreements of sale.

But, outside of that, what is the nature of the contract of guarantee?

It is an undertaking to answer for another's liability and collateral thereto. It is a collateral undertaking to pay the debt of another in case he does not pay it. It is a provision to answer for the payment of some debt or the performance of some duty in the case of the failure of some person who in the first instance is liable for such payment of performance. Bouvier, "Law Dictionary," word "Guaranty."

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It is in the nature of that contract of guarantee that the primary debtor will perform his contract and the guarantor has to answer for the consequence of the primary debtor's default. 13 Halsbury, vbo. "Guarantee," sec. 864. Anson on Contract, 10th ed., p. 73.

What was the obligation of Love and Jones in this case? It was to pay a certain sum of money when it would become due. There is no statement, no warranty in their contract that they were solvent at the time they made it or that the agreement was a *bonâ fide* document. Then, what obligation would a guarantor of their debt contract? It would be the obligation of payment when the debt would become due. As I have said, the contract of guarantee presupposes a primary debt and when a person becomes a guarantor he undertakes to carry out that obligation if the main debtor makes default.

The contract of guarantee made in this case would necessarily induce the appellants to accept the draft of the respondents because the latter were undertaking to pay the debt if Love and Jones would not pay it. If the respondents wanted to restrict the nature of their contract or wanted to give to the word "guarantee" another meaning than the one which is being naturally given, then it was their duty to specify in a clear manner that they were undertaking not to guarantee the obligation of the main debtor but the fact that the debtor was solvent and that the agreement was *bonâ fide*. As they have not done it, the word "guarantee" should be considered in its ordinary sense, which means that the respondents undertook to pay the debt of the principal debtor if the latter failed to do it.

I have come then to the conclusion that the appellants should succeed. The judgment *a quo* should be reversed with costs of this court and of the court below and the judgment of the trial judge restored.

Appeal dismissed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 1, 1918.

1. SALE (§ I B—5)—PAYMENT OF PURCHASE PRICE AGREED ON—FULL CONSIDERATION RECEIVED—AGREEMENT TO PAY AGENT PORTION OF PURCHASE PRICE—PURCHASER'S RIGHT TO REFUND.

A purchaser of goods who has paid the purchase price agreed upon and for which he has received full consideration has no further interest in such purchase price.

The refusal of the vendor to accept a portion of the purchase price which he has agreed might be charged by the agent making the sale, does not entitle the purchaser to a refund of this amount, as having been paid for a particular purpose which has failed.

2. FRAUD AND DECEIT (§ IV—17)—ACTUAL FRAUD—ABSENCE OF HONEST BELIEF IN STATEMENTS MADE—DECEPTION—REASONABLE CONCLUSIONS.

In an action for deceit the plaintiff must prove actual fraud. The essential fact to be found to constitute fraud is the absence of an honest belief in the truth of the statements made. The deception of the plaintiff through the misrepresentations of the defendant is not sufficient, however honest and reasonable his conclusions may be as to the defendants' knowledge and belief.

[*Derry* v. *Peek* (1889), 14 App. Cas. 337, followed.]

Statement.

APPEAL by plaintiff and cross-appeal from the judgment of Ives, J. Varied.

C. C. McCaul, K.C., and *G. C. Valens*, for appellants; *S. B. Woods*, K.C., for respondents.

The judgment of the court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The Great West Lumber Co., of Red Deer, through the defendants, sold a log-hauling outfit which was at their lumber camp about 40 miles west of Olds to the plaintiff, the purchase price agreed on by the plaintiff being $6,625. The money was paid into the Northern Crown Bank at Edmonton to be paid over to the Great West Lumber Co. upon delivery of the outfit and a bill-of-sale. The plaintiff went to take delivery, but found defects and encountered difficulties, in consequence of which he notified the bank not to pay over the money. Later, he accepted the goods and withdrew the notice, permitting the purchase-price to be paid over. The price which the owners had required the defendants to obtain was $5,875, upon which they agreed to pay the defendants, as compensation for their services, a commission of 5%, and they had authorized the defendants to ask from the purchasers the further sum of $750 for the defendants' own benefit. When the money was about to be paid over to the owners, the defendants, who are at Edmonton, suggested

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to the owners that only the net amount coming to them should be forwarded to them, and the remainder to which the defendants were entitled paid over to them here. By direction of the Great West Lumber Co. the $750 was not sent to them as they disclaimed any interest in it. The plaintiff then claimed the sum as his as being paid for a particular purpose which had failed. The defendants, of course, naturally claimed it as theirs, and an interpleader issue was directed.

The plaintiff also brought an action against the defendants for false and fraudulent representation, claiming damages amounting to over $14,000.

The issue and the action were tried together before Ives, J., without a jury, and he gave judgment in favour of the defendants on the issue and in favour of the plaintiff for damages, but disallowing the greater part of the damages claimed, and directing a reference to ascertain the amount of the portion allowed. The plaintiff appealed against the finding in favour of the defendants on the issue and against the limitation of the damages in the action, and the defendants have cross-appealed from the judgment against them.

It is apparent that it will be convenient to deal first with the question whether there is any liability on the part of the defendant before considering the limits of such liability.

It appears that one McPhee, who was interested in a tie contract with a railway company, was negotiating for the purchase of this log-hauling outfit. The defendants obtained authority from the owner to sell with a right to a commission. As McPhee was unable to finance the purchase they endeavoured to assist him, and not succeeding, they obtained from the owners authority to buy themselves at the price named. This was $5,000, payable half in cash and half at the end of a year. The subsequent increase to $5,875 was due to the inclusion of some sleighs not included in the first offer. The defendants did make an offer of $5,000, but not in the exact terms fixed by the owners, and just about then the owner's manager received instructions from the directors not to sell at the price named. The defendants, however, persuaded them to modify that decision, but they insisted on the full purchase-price being paid in cash. The plaintiff was first approached by Mr. Ewing, who had acted for him as solicitor, who was also

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interested with McPhee to see if he would advance the money for the purchase of the machinery. Not long after, the plaintiff and defendants came in touch, and, after considerable negotiation and several interviews, a sale to the plaintiff was arranged at the price of $6,625, and an agreement was entered into between McPhee and the plaintiff, under which they were to be joint owners, McPhee being given time to pay to the plaintiff his half share of the purchase-price, it being provided that the profits to be derived from a contract also arranged with the sub-contractors for the hauling of the ties should be applied on the purchase-price. This was in the latter part of January, 1917, and the plaintiff states that he would have been unwilling to purchase the outfit unless he would be able to make enough profit out of its use before the spring to pay the purchase-price. Before the defendants knew the plaintiff in connection with the matter McPhee had made a trip to see the outfit, taking with him an engineer and the government boiler inspector. The inspection was made and a certificate given. McPhee was satisfied with the conditions and the price, but was unable to raise the money. At his request the arrangement was made for the additional sleighs and the price of $6,625 was fixed while the negotiations with him were progressing and before the plaintiff entered them. He knew what the defendants' interest in the purchase-price was, and says that he told the plaintiff what it was during the negotiations and that he expressed satisfaction. That is, however, denied.

The defendants had no inspection of their own made, nor had any connection with any inspection beyond arranging with the boiler inspector to go with Mr. McPhee and make the inspection and give the certificate and paying his expenses and fees. The inspection certificate is dated January 8, and the money was paid into the bank by the plaintiff on January 24.

The false and fraudulent representation which it is alleged induced the contract are:—

That the defendant company had made an independent inspection of the said machine and of the said outfit and that the said steam log-hauler had only been used for a period of 4 months; that it was practically new and in first-class condition, and that a pressure of 125 lbs. steam pressure would be ample to bring the machine from its then situation—some 40 miles west of the town of Olds—over the ordinary roads to the said town of Olds,

and:—

That a pressure of 145 lbs. would be ample to operate the machine hauling a full load and to bring the said machine up to its full capacity,

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and:—

that the machine was in good working condition, ready to steam up, and capable in the condition in which it stood with the addition of a steel dome cover of drawing 80,000 ft. of lumber, and that merely by adding to it the said steel dome cover the machine would be absolutely up to the standard of a new machine, a print description and specification thereof as issued by the Phenix Manufacturing Eauclair Mill Supply Co. being shewn by the defendants to the plaintiff.

The plaintiff, corroborated in most details by his father, swore that the alleged representations were made by Edwards, an employee, and Gorman, an officer of the defendant company. As to all that was not shewn to be in substance true this evidence was flatly denied by Edwards and Gorman and they were corroborated in part by another officer of the company.

It is apparent that upon such evidence a trial judge who sees and hears the witnesses has an advantage in reaching a conclusion based on their testimony which an appeal court cannot have, and that only in rare cases would an appeal court be justified in disturbing his findings. Unfortunately, the trial judge, though giving his reasons for his judgment, at some length at the close of the trial, has not expressed, with sufficient detail and definiteness, his conclusion of fact as to everything which appears to be essential in an action of deceit, to enable us to be quite certain what his conclusions as to some facts were or whether, in fact, he really formed any conclusion as to them. He says:—

I think that the purchase had been brought about by the representations that were made by Edwards chiefly: I have come to the conclusion that not so much reliance was placed by the purchaser upon the representations made by Gorman as upon those made by Edwards, but rather that Gorman strengthened the representations made by Edwards, and I think that these representations were made in a way that led the plaintiff to believe that they were made from the knowledge of Edwards and Gorman of themselves.

And again, he says:—

I think that the representations made to him as to the condition and capacity of that machine which induced him to purchase it were at least made with reckless carelessness as to their truth.

It is to be observed that the first misrepresentation alleged is that the defendants had had an independent inspection made. If such a representation was made it would be false in the ordinary use of the word and under the circumstances its falsity must, almost necessarily, have been known to the person who made the representation and it would, therefore, be a fraudulent representation. All of the other representations, though false, might have been made quite innocently and honestly.

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After a very careful consideration of the trial judge's expressions in the last portion of each of the above quotations I can come to only one conclusion, and that is that he was not satisfied that the allegation of the first representation had been established. The guarded language used persuades me that the most that he could find in favour of the plaintiff, in that connection, was that he honestly and reasonably believed that Edwards and Gorman were speaking from their personal knowledge or rather from knowledge gained from an inspection made for them, for it is not suggested that there was any representation beyond that.

After reading the evidence, I certainly would not be disposed to find more than this as against the defendants.

While the honesty of the plaintiff's belief would be a matter which the trial judge could determine more readily than we could, I am by no means satisfied that the reasonableness could not be determined by us quite as well as by him, and if it were important I would feel called on to consider whether I could agree that such belief was reasonable.

I do not, however, consider it important for it appears to me that an action of deceit, as this is, must have much more for support than the deception of the plaintiff through the misrepresentations of the defendant, however honest and reasonable the plaintiff's conclusions as to the defendants' knowledge and belief.

Both of the views I have now expressed are in my opinion fully supported by the case of *Derry* v. *Peek* (1889), 14 App. Cas. 337. In that case, the trial judge found that the defendants had reasonable grounds for their belief. The Court of Appeal, on a consideration of the evidence, reversed him, shewing that it considered itself as competent to draw a deduction as the trial judge.

The House of Lords reversed the Court of Appeal and held that the reasonableness of the belief of the defendants in the truth of their statements was not a deciding factor in determining their liability in an action of deceit, but that to be held liable they must either state what they knew to be false or be indifferent whether what they state is false or not. Lord Bramwell said, at p. 350:—

> Cotton, L.J., says the law is "that where a man makes a statement to be acted on by others which is false, and which is known by him to be false, or is made by him recklessly, or without care, whether it is true or false, that is, without any reasonable ground for believing it to be true," he is liable to an

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action for deceit. Well, I agree to all before the "that is," and I agree to what comes after it, if it is taken as equivalent to what goes before, viz., "recklessly or without care whether it is true or false," understanding "recklessly" as explained by "without care whether it is true or false." For a man who makes a statement without care and regard for its truth or falsity commits a fraud. He is a rogue.

And on p. 351:—

Sir James Hannen says that he agrees with Cotton, L.J.'s, statement of the law and adds, "If a man takes upon himself to assert a thing to be true which he does not know to be true and has no reasonable ground to believe to be true," it is sufficient in an action of deceit. I agree if he knows he has no such reasonable ground and the knowledge is present to his mind; otherwise, with great respect, I differ.

And again at p. 352:—

As to the judgment of Lopes, L.J., I quite agree with what he says: "I know of no fraud which will support an action of deceit to which some moral delinquency does not belong." . . . I think with all respect that in all the judgments there is, I must say it, a confusion of unreasonableness of belief as evidence of dishonesty and unreasonableness of belief as of itself a ground of action.

At p. 361 Lord Herschell says:—

To make a statement careless whether it be true or false, and, therefore, without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is, nevertheless, honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the court may think that there were no sufficient grounds to warrant his belief.

And again at p. 375:—

In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds.

It is apparent, therefore, that if we treat all the representations alleged which the trial judge on conflicting testimony could have held to have been made as representations of facts rather than of opinion, and all, the falsity of which might be found from the evidence to have been found to be false, we are still left with the essential fact to be found to constitute fraud, viz., the absence of an honest belief in the representators in the truth of the statements, because, if they honestly believed them to be true, they were neither aware that they were false, nor indifferent or careless as to whether they were false. In my opinion, the trial judge has made no finding on this. His finding that they were recklessly careless as to their truth, suggests to me that he meant nothing more than that they should have taken more care to satisfy themselves that the statements were true, and that is

exactly the meaning that Cotton, L.J., attached to a similar expression in *Derry* v. *Peek*, *supra*. That finding was considered a proper subject of appeal in that case, and it is indeed an inference or deduction from the circumstances rather than a conclusion for which any special benefit is derived from the demeanour of the witnesses. Moreover, as that case decided, it is not conclusive of the case. I desire, however, to express my dissent from the conclusion even to that extent.

I find no evidence whatever to satisfy me that either Gorman or Edwards did not honestly believe what they represented to be the fact, and I think they had ample grounds to justify their belief. They had the catalogues of similar machinery. They had the report of the government inspector on this particular engine, for the complaint is limited to the engine. They had been informed that it had been used only 4 or 5 months, which the evidence at the trial showed to be the fact. They had the report of the engineer who had gone to inspect the engine for the purpose of an intending purchaser, and they had the knowledge that that prospective purchaser was entirely satisfied. So satisfied were they of the value of the machinery that when McPhee was unable to raise the purchase-price they offered to pay the full price to become the purchasers. They knew that the directors wished to withdraw the offer of sale and that the condition for allowing it to stand was that the purchase-price should all be paid in cash.

Most of the representations are statements of the capabilities of the machinery, and were based, as the plaintiff must almost certainly have known, on deductions, and not on experience of what the machinery had actually done, and would appear to be natural deductions from an honest belief in the value of the machinery justified by the knowledge they had, and almost conclusively established by their wish to become the purchasers themselves. The increase in the price after their offer to purchase would have little, if any, bearing on this, and is quite explainable as I shall subsequently indicate.

For the reasons stated, I am of the opinion that the plaintiff failed to establish the most essential ingredient to sustain his action of deceit and that he should not have had judgment for any amount. It follows that his appeal from the limitation fails and that the cross-appeal succeeds.

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The appeal from the decision on the issue as to the ownership of $750 can be disposed of in a few words.

The original price as I have pointed out was $5,000. Later McPhee wanted more sleighs and they were included in the later price. The price for those sleighs which the owners required was $875, but McPhee agreed with Gorman that, for the trouble his company took in getting this re-arrangement, $750 additional could be added to the purchase-price as an addition to their commission, and the defendants obtained the authority of the owners to do this. This was while McPhee was trying to raise the purchase-money and himself become the purchaser. When Mr. Ewing first spoke to the plaintiff the suggestion was that he should advance the money to McPhee to purchase the outfit, not that the plaintiff should himself purchase it. The negotiations with the plaintiff from the aspect of his becoming the purchaser lasted only a few days and, apparently, no price was mentioned except the one finally agreed on.

Mr. McCaul contends that the $6,625 was paid into the bank on a mandate to be paid over to the Great West Lumber Co. and that, when they declined to receive the $750, there was a resulting trust in favour of the plaintiffs, and that the bank, thereafter, held the money for him.

In form, that was perhaps what the payment was, but in substance it was the amount of the purchase-price agreed to be paid for the outfit. When the outfit was accepted full consideration had been received by the plaintiff, and it is difficult to see what further right he could have to any part of the purchase price. The defendants as against the owners were entitled to 5% on the price they asked, $5,875. They wrote to the owners and suggested that, instead of any portion of the purchase-price to which they would be entitled being sent by the bank from Edmonton to Red Deer from which it would require to be returned, only the net amount coming to the owners should be forwarded. What was done, however, was to send $5,875, leaving $750 which the owners said they did not want as they had no interest in it. If they had complied with the defendants' request and allowed the additional $293.75 to which the defendants were entitled to remain in the bank at Edmonton, I can see no reason why the defendants should not have quite as much right to it as to the $750. The matter was one simply between the defendants and their principals. As

against the plaintiff the money was that of the owners—the vendors—but as between them and the defendants it belonged to the defendants, and for the purpose of their bookkeeping they preferred not to make any note of it and authorized the defendants to receive it direct from the bank, as they had a perfect right to do.

The trial judge's decision that as between the plaintiff and the defendants the money belongs to the defendants appears to me unassailable.

In the result I would dismiss the plaintiff's appeal *in toto* with costs, and would allow the defendants' cross-appeal with costs, and direct the action to be dismissed with costs, and since the two were tried together it may be as well to add that judgment should be entered on the issue in favour of the defendants with costs.

Appeal dismissed; cross-appeal allowed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. March 25, 1918.

VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT TO PURCHASE LAND—PURCHASER'S DEFAULT—PURCHASER NOT WILLING TO CARRY OUT CONTRACT—FORMAL NOTICE OF CANCELLATION—RETURN OF PART PAYMENT.

Where the real cause of the rescission of a contract to purchase land is the purchaser's default, and such purchaser does not seek specific performance nor submit his willingness to carry out the contract, he is not entitled to a return of the part payments made, when the vendor has given formal notice of cancellation.

[*Brickles* v. *Snell*, [1916] 2 A.C. 599, 30 D.L.R. 31; *Steedman* v. *Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420, distinguished.]

Statement.

APPEAL by the defendant Willaughan, the mortgagor, in a mortgage action, from an order made by the Senior Judge of the County Court of the County of York dismissing the appeal of the defendant Willaughan from the report of a Referee finding the defendant Stephens entitled upon his mortgage security to the principal sum of $700.

The defendant Stephens had a second mortgage upon land covered by a first mortgage and a third mortgage in favour of the plaintiff. Stephens was made a defendant upon the reference, in the character of a subsequent incumbrancer.

The defendant Willaughan made the mortgage to Stephens for $700: of this $200 was advanced to Willaughan. The remaining $500 represented the down-payment upon the purchase by Wil-

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laughan from Stephens of other land; and the contention of Willaughan was, that, as the contract for the purchase of the other land had been terminated or rescinded, the mortgage to Stephens was security for $500 only.

H. T. Beck, for appellant.

Gideon Grant, for the defendant Stephens, respondent.

March 25. MULOCK, C.J. EX.:—This is an ordinary mortgage action upon two mortgages (a first and third mortgage), made by the defendant Willaughan. Before the execution of the latter mortgage, the defendant had made a second mortgage to one Stephens to secure payment of $700 and interest; and Stephens, as a subsequent incumbrancer, was added as a party defendant.

Before the Referee, Willaughan contended that $200 principal only was recoverable upon the mortgage. The Referee, however, found $700 principal owing; his finding was affirmed by the learned Senior Judge of the County Court of the County of York; and this appeal is from the Judge's decision.

The circumstances which have given rise to the dispute are as follows:—

Edgar T. Stephens, being the owner of certain lands in the township of Vaughan, in the county of York, negotiations were entered into between him and the defendant Willaughan for the sale of the lands by Stephens to Willaughan, and the parties reached a verbal understanding. The vendor required a down-payment of $500 at the time of the execution of the proposed contract. Willaughan was unable to pay this amount in cash, and further desired to borrow from Stephens $200. Accordingly it was arranged between them that Stephens should enter into a written contract with Willaughan for the sale of the land to him for $2,000, and that Willaughan should give to Stephens a mortgage on certain other lands owned by Willaughan, in respect of the down-payment of $500 and also the $200 to be advanced.

This arrangement was carried out; and, by agreement bearing date the 18th December, 1914, made between Stephens, the vendor, and Willaughan, the purchaser, Stephens agreed to sell his lands to Willaughan for $2,000, payable as follows: "$500 on or before the execution of this agreement and the balance in consecutive quarterly instalments of $25 each, together with the interest thereon from the date hereof, at the rate of 6 per cent. per annum,

on the balance of the purchase-price remaining unpaid from time to time both before and after the maturity of this agreement, on the days hereinafter mentioned, until the whole of the said purchase-money has been fully paid and satisfied, the first instalment as aforesaid to be due and payable on the 18th December, 1915, and thence on the 18th days of March, June, September, and December, until the 18th December, 1919, when the balance of the principal sum shall be paid."

This contract, amongst other stipulations, contains the following:—

"It is expressly understood and agreed that if the purchaser fails to make the payments aforesaid or any of them within the times above limited respectively, or fails to carry out in their entirety the conditions of this agreement in the manner and within the times above mentioned, the time of payment aforesaid being of the essence of this agreement, then the vendor may mail to the purchaser a notice in writing, signed by the vendor or his agent or attorney and enclosed in an envelope, post-paid and addressed to the purchaser at Toronto or delivered to the purchaser personally, to the effect that, unless such payment or payments so in arrear is or are paid, or such conditions or breach of conditions are complied with, within thirty days from the mailing thereof, this agreement shall be void; and, upon said notice being so mailed and upon the purchaser continuing such default for the space of thirty days thereafter, all rights and interests hereby created or then existing in favour of the purchaser or derived under this agreement shall forthwith cease and determine, and the lands hereby agreed to be sold shall revert to and re-vest in the vendor without any declaration of forfeiture or notice (except as hereinbefore mentioned) and without any act of re-entry or any other act by the vendor to be performed, or any suit or legal proceedings to be brought or taken, and without any right on the part of the purchaser to any reclamation or compensation for moneys paid thereon or to damages of any kind whatever."

The contract also contained the following stipulation:—

"A statutory declaration by the vendor, or his assigns for the time being, that such default has been made, and that this agreement has been declared null and void by the vendor for that or

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any other reason set forth in the preceding paragraph hereof, shall be conclusive evidence thereof and of the termination of the agreement and of all the vendor's rights hereunder."

Simultaneously with the execution of that agreement, the defendant Willaughan conveyed his lands by way of a mortgage to Stephens to secure payment of $700, with interest thereon, covenanting therein to pay the principal sum of $700 on the 18th December, 1917, and the interest yearly, and Stephens at the same time advanced to Willaughan the $200 above mentioned. Willaughan then entered into and for about one year remained in possession of the lands covered by the contract. He made no lasting or valuable improvements; all he did was to fence in a portion of the land and erect a couple of "shacks," at a cost not exceeding $100.

He then vacated possession, and has paid nothing on account of the purchase-money except the $500. The evidence shews that not only did he not keep up the payments which the contract called for, but was unable to do so.

On the 5th January, 1916, Stephens gave written notice to Willaughan that an instalment of principal, $25, together with $90 of interest on the unpaid purchase-money, had become due, and, if not paid on or before the 11th February thereafter, the agreement would, pursuant to the provisions in the same, be void; but Willaughan still remained in default.

Subsequently Stephens made the statutory declaration contemplated by the stipulation above quoted, as to the purchaser's default and declaring the agreement null and void.

One of the defendant Willaughan's contentions is, that the mortgage, to the extent of $500, is security only for $500, part of the contract price, and that, the contract having been rescinded, the mortgagee is not entitled to payment of the $500.

His other contention is, that the contract was rescinded by the vendor; and that, in consequence, he (the defendant Willaughan), being the purchaser, is entitled to re-payment of the $500 paid by the purchaser Willaughan by the giving of the mortgage in question.

As to the first contention, the mortgage, I think, was intended to extinguish the defendant's indebtedness in respect of the down-payment of $500 owing under the contract. It does not purport to be collateral security, but is given "in consideration of $700

now paid by the mortgagee to the said mortgagor," and it is not payable for three years. The mortgagor unconditionally covenants to pay the $700 at the expiration of that period. There is no pretence that the mortgage is not security for the $200 cash lent, and that sum is added to the $500, and the one total sum of $700 is treated throughout the mortgage as an actual indebtedness for money then advanced. The covenants throughout apply to the $700, their language being as applicable to the whole as to any part of the consideration-money.

Further, the parties themselves concede that the defendant, by the giving of the mortgage, had actually paid the $500; for, by another written agreement of the same date between them, and being part of the whole transaction, reference is made to the contract in question, and (referring to the contract price) it contains these words: "On which there is yet to be paid $1,500."

Thus, the parties at the time considered that the giving of the mortgage satisfied $500, part of the contract price, and to that extent reduced the vendor's lien for unpaid purchase-money.

Further, it is not open to doubt that the giving of the mortgage was intended to relieve Willaughan from the stipulation contained in the contract which required him to make a cash-payment of $500, but it cannot so operate unless it is treated as a payment, for the mortgage does not refer to the contract, and parol evidence would be inadmissible to vary the stipulation.

For these various reasons, I am of opinion that the giving of the mortgage satisfied the $500 in question. The $500, part of the consideration-money, does not represent any part of the contract price, and the mortgage must be construed as given for $700 money actually lent. Thus the rescission of the contract cannot affect the consideration mentioned in the mortgage, and the principle enunciated in *Fraser* v. *Ryan*, 24 A.R. 441, cannot apply.

As to the defendant's second contention, Mr. Beck argued that the $500 in question was a payment on the contract, and, the contract having been rescinded by the vendor, the $500 was repayable to the purchaser.

It is not the law that in all cases, upon the rescission of a contract by the vendor, the purchaser is entitled to a return of moneys paid on account of the contract. The conduct of a purchaser, as in this case, may fully justify rescission by the vendor and entitle him to retain moneys paid on account of the contract.

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Further, the conduct of the parties, after rescission, may be considered in determining whether a purchaser is entitled to relief from forfeiture of payments made on account. In support of his proposition Mr. Beck relies on *Boyd* v. *Richards*, 29 O.L.R. 119, 13 D.L.R. 865, and *Steedman* v. *Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420. Those cases do not decide that, under all circumstances, where a vendor rescinds a contract for sale of land, the purchaser is entitled to return of moneys paid on account of the purchase-money, but merely that, where a purchaser is ready and willing to carry out his contract and seeks specific performance, and where the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money, then relief from forfeiture may properly be given. In each of those cases cited by Mr. Beck, the purchaser sought specific performance, and was ready and willing on his part to carry out the contract; but that is not the present case. Here, the purchaser refused to pay the money due under the contract.

He was unable to do so, and made that fact known to the vendor's agent, and abandoned the property and the slight improvements made upon it by him. His inability to carry out the contract was in itself a repudiation of the contract (*Soper* v. *Arnold* (1889), 14 App. Cas. 429, 435), and justified the vendor in calling upon him to live up to the contract, otherwise it would be rescinded.

The purchaser continuing in default, the vendor, in the exercise of his rights under the contract, rescinded it, but the real cause of rescission was the purchaser's default. Further, the purchaser is not now seeking specific performance, nor is he ready and willing to carry out the contract, but merely insists that he is entitled to repayment of moneys paid by him under the contract, which, because of his default, has come to an end.

I am of opinion that he has no such right. Were it otherwise, a purchaser who repented of his bargain might, by repudiating his contract, bring about a state of affairs that would entitle him to a return of moneys paid under the contract. It is not the policy of the law to encourage people to repudiate their contracts.

The authorities, I think, fully support this view. *Howe* v. *Smith*, 27 Ch. D. 89, is judicially regarded as a correct exposition of the law on this subject. There the plaintiff purchased certain premises for £12,500, and paid part thereof "as a deposit and in

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part payment of the purchase-money." The contract provided that if the purchaser failed to comply with the agreement the vendor should be at liberty to re-sell the premises, and the deficiency on such second sale should be made good by the defaulter. The purchaser made default, and the vendor warned him that unless the purchase-money was paid he would re-sell. The purchaser, fearing a re-sale, brought action for specific performance. The vendor did re-sell, relying on the purchaser's delay as justifying a rescission of the contract. Mr. Justice Kay held that the plaintiff by his delay was precluded from insisting upon a completion of the contract. On appeal this decision was affirmed, the Court holding that the purchaser by his conduct had repudiated the contract, and therefore could not take advantage of his own default and recover the deposit.

In his judgment, Cotton, L.J., quotes with approval from the judgment of Lord Justice James in *Ex p. Barrell* (1875), L.R. 10 Ch. 512. The purchaser had become bankrupt, and the trustee in bankruptcy disclaimed the contract under which he sought to recover the deposit, and Lord Justice James said (p. 514): "The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refused to perform the contract, and then says, 'Give me back the deposit.' There is no ground for such a claim." Quoting these words, Cotton, L.J., proceeds (27 Ch.D. at p. 95): "The deposit . . . is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."

In order to entitle the vendor to retain the deposit there must be, according to Cotton, L.J., "acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract." And in the same case Bowen, L.J., at p. 98, says: "The purchaser

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cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong."

In *Hall* v. *Burnell*, [1911] 2 Ch. 551, the plaintiff agreed to sell and the defendant to buy certain lands, the agreement providing that the purchaser should pay the vendor's solicitors a deposit of £50, and this was done. There was no provision in the contract as to retention of the deposit by the vendor in the event of the purchaser making default, and it was held, following *Howe* v. *Smith* (*ante*), that the vendor was entitled to retain the deposit.

In *Sprague* v. *Booth*, [1909] A.C. 576, $250,000 had been paid as a deposit as security for the performance of a contract to purchase railway stock. The purchaser made default, refused to carry out the contract, and assigned his rights to the plaintiff, who brought the action to recover the deposit, and it was held, following *Howe* v. *Smith* (*ante*), that he was not entitled to relief.

Stickney v. *Keeble*, [1915] A.C. 386, was an action by a purchaser of lands to recover a deposit. The vendor was guilty of unreasonable delay in completing the purchase, and the purchaser served upon him a notice limiting the time at the expiration of which he would treat the contract as at an end. The vendor did not complete the contract within the named time; and, purporting to treat the purchaser's conduct as a repudiation of the contract, sold and conveyed the property to a third person. Thereupon the purchaser brought action to recover the deposit, and it was held that he was entitled to its return, Lord Atkinson saying (p. 411): "It would, in my view, be quite unjust to allow the respondents to retain the money deposited as a guarantee for the due performance of the very contract which they themselves, not the depositor, have failed to perform. As in *Howe* v. *Smith*, 27 Ch. D. 89, the purchaser who was in default could not get back his deposit because of his default, so here the vendors, who are in default, should not be permitted to retain the deposit since they are in default."

Brickles v. *Snell*, [1916] 2 A.C. 599, 30 D.L.R. 31, was a contract for the purchase of land. The contract provided for its completion on a named day, but the purchaser made default because of the sudden illness of his solicitor. He then brought action for specific performance, but omitted to ask for alternative

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relief, for a return of the deposit paid. Specific performance was refused because of the purchaser's default, the vendor having been able and willing on his part to carry out the contract; but Lord Atkinson, who delivered the judgment of the Judicial Committee, expressed regret that there had not been a claim for a return of the deposit. Unlike the present case, the plaintiff in *Brickles* v. *Snell* asked for specific performance.

In *Soper* v. *Arnold* (*ante*), the purchaser was unable to provide the money to complete the purchase within the time fixed by the contract, and the vendor rescinded. Thereupon the purchaser brought an action to recover his deposit, but it was dismissed, Lord Herschell saying (p. 434): "It seems to me that he (the purchaser) was in default, that the contract went off owing to his default, and that under those circumstances he cannot recover the deposit."

In the present case the rescission of the contract was caused by the default of the defendant. He is not, therefore, entitled to profit by his default by recovering the $500 in question, and this appeal should be dismissed with costs.

Clute, J.
Sutherland, J.
Kelly, J.

CLUTE, SUTHERLAND, and KELLY, JJ., agreed with MULOCK, C.J. EX.

Riddell, J

RIDDELL, J.:—The defendant Stephens was the owner of a number of lots on Yonge street, and in December, 1914, made an agreement to sell them to the defendant Willaughan for $2,000—$500 down and the remainder in instalments. In the agreement there was a provision that in case the purchaser failed to pay an instalment the vendor might cancel the agreement, the purchaser on such cancellation having no right to damages or the return of any money paid.

The purchaser did not have the necessary amount to make the down-payment, but he had the equity of redemption in certain lands mortgaged by him to the plaintiff. He borrowed a sum of $200 from the vendor, and gave a second mortgage for the sum of $700 upon the land last named, to the vendor, to cover the down-payment of $500 and the $200 borrowed.

Making default on his first mortgage, he was proceeded against on it in the County Court of the County of York; the accounts

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were referred to the Clerk, and Stephens was made a party as a subsequent incumbrancer. In the Clerk's office it was contended that Stephens could prove for the $200 only; the Clerk found against this contention, and his decision was sustained by the County Court Judge. This is an appeal from that decision.

The case has been treated, no doubt rightly, as though the purchaser had paid the $500 to the vendor (Equity looks upon that as done which should be done); and was now suing to recover it back.

It is necessary to set out more fully the facts:—

After the execution of the agreement, the purchaser went into possession of the land and built a one-room "shack," in which he lived for a year; he also seems to have moved a fence and to have ploughed the land. He says himself that he "fenced five acres and put up two shacks." He never paid any further sum on his purchase; but, several times after the lapse of the year, he said he could not keep the land and make any payments; he said "he left the place and could not make the payments."

Thereupon the vendor gave a formal notice of cancellation; the purchaser by his counsel says: "We do not want the land;" there never was any tender or offer to pay, and the purchaser does not desire to carry out his contract.

Very many cases were cited to us not unlike the present in some particulars, in which such a provision as we have in this case has been called a penalty and has been relieved against at the instance of a purchaser; but it has been relieved against in order to allow the purchaser who was willing and able to carry out his contract (except in the matter of time) to do so on proper terms. It is unnecessary to enumerate these cases—the most important and authoritative is *Kilmer* v. *British Columbia Orchard Lands Limited*, [1913] A.C. 319, 10 D.L.R. 172. I add to those cited in the argument only *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022.

The part payment might be recovered back (on proper terms) if specific performance were refused: the latest case of this kind in the Judicial Committee is *Steedman* v. *Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420; and that this is the law is indicated in *Brickles* v. *Snell*, [1916] 2 A.C. 599, at p. 604, 30 D.L.R. 31. The case of *Labelle* v. *O'Connor*, 15 O.L.R. 519, is to the same effect.

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But there is no case in which one who is unable to carry out his contract has been allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation. In the language of Kekewich, J., "that would be to enable him to do the very thing that Lord Justice Bowen said he ought not to be allowed to do, namely, take advantage of his own wrong—I mean wrong, not in the moral sense, but in the sense that he could not perform his contract:" *Soper* v. *Arnold* (1887), 35 Ch. D. 384, at p. 390.

In *Phillips* v. *Greater Ottawa Development Co.* (1916), 38 O.L.R. 315, 33 D.L.R. 259, the judgment of the majority of the Court went solely on the ground of the infancy of the purchaser, which made the contract void *ab initio*.

I would dismiss the appeal with costs.

Appeal dismissed.

SHORTEN v. THE KING.

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. May 20, 1918.

EVIDENCE (§ XII—986a)—CRIMINAL OFFENCE—STATEMENT OF CHILD TO MOTHER—THREAT OF PUNISHMENT—ADMISSIBILITY.

On an indictment for an indecent assault on a girl of 7 years of age, the answers given by the girl to questions put to her by her mother immediately on her return home after the assault, are properly admitted in corroboration of the girl's testimony. The mother's promise not to punish her if she told the whole truth is not an inducement to make the statement depriving it of being spontaneous.

Statement.

APPEAL from the judgment of the Supreme Court of Saskatchewan, rendered on a case reserved for the opinion of the court by the trial judge.

The appellant was charged with carnally knowing Olive King, a girl of 7 years of age. The evidence shewed that he met her and another girl of 5 years of age on the street and brought them into an empty home where the offence is alleged to have taken place. Both little girls made in court statements but did not give evidence under oath.

The mother of the girl gave evidence as to the answers given by her daughter when she was asked to explain the reasons of her prolonged absence; and the mother admitted having promised not to spank her if she would tell the whole truth.

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The questions for decision were whether the evidence of the girl was "corroborated by some material evidence in support thereof implicating the accused," as required by s. 1003 of the Criminal Code, and whether the statements made by her to her mother were "spontaneous."

C. J. R. Bethune, for appellant; *Harold Fisher*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that the statement of the child made to her mother immediately on her return home after the assault was properly admitted. It is true that the mother, irritated and alarmed at the prolonged absence of her daughter, was obliged to persuade her to explain the reason of that absence; but nothing that was said can be construed as questions of an inducing or intimidating character. The child understood that she was expected to explain the cause of her absence and nothing more.

There is also corroboration in other particulars, as pointed out by my brother Idington, and I have no doubt of the sufficiency of the proof of identification.

Davies, J.

DAVIES, J.:—The only doubt I entertained in this case of the admission in evidence of the young girl Olive King's statement to her mother as to what the prisoner had said and done to her arose, not from the fact that some natural and reasonable questions were put to the child by her mother which elicited the statement in question, but the fact that before making it the mother had promised not to spank her if she told the whole truth. I rather doubted whether this promise was not an inducement to make the statement, depriving it of being spontaneous.

After reading the evidence of the mother and the two late decisions of the Criminal Court of Appeal, *Rex* v. *Osborne*, [1905] 1 K.B. 551, and *Rex* v. *Norcott*, [1917] 1 K.B. 347, I am satisfied the evidence was under all the circumstances properly received. I am also satisfied that there was sufficient corroboration of the evidence of the child Olive King to convict the appellant.

The appeal should be dismissed.

Idington, J.

IDINGTON, J.:—As the majority of the Court of Appeal upheld the conviction, the only question within our jurisdiction and therefore which we can consider is what the learned dissentient judge may have expressed as his ground of dissent.

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That if I understand him aright was that there was no evidence of corroboration which, I take it, means of the story of the little girl who says she was assaulted, including, of course, the identification of the appellant as the party implicated.

I think there was sufficient evidence, apart from that of the other little girl, of corroboration to satisfy the statute. It consists of many little circumstances which I think it needless to dwell upon.

The identification of the appellant is the weakest part of the case and yet so ample that it could not have been properly withdrawn from a jury had there been one in the case.

I think as part thereof that the mother's entire story was properly admitted and considered.

I cannot agree with some of the expressions of the learned judge who gave the judgment of the court in the case of *The King* v. *Dunning*, 14 Can. Cr. Cas. 461. The question of weight to be given the evidence of those whom the law in a variety of cases requires to be corroborated varies so much that I should hesitate to attempt to define the limits thereof or what question may be put by a mother to her child. The case of *Rex* v. *Osborne*, [1905] 1 K.B. 551, illustrates the problem of admissibility but only governs so far as that case decided. Each case stands on its own bottom.

Judges must, as well as Crown officers, ever be on the alert in cases of this kind to see that there is no ground for suspecting the good faith of mothers or others in putting forward the charge. The possibility of inciting the child or other persons to make such a charge as herein must be jealously guarded against.

Once assured of that good faith I should be sorry to test the admissibility of the evidence by any requirements upon the expressions a mother may have used in order to elicit the truth.

Of course the possibility of the child being innocently as it were misled into an assent to the mother's suggestive questions must be guarded against.

That again may come back to the question of weight to be given the evidence rather than its admissibility.

I do not think such cases as this must necessarily be governed for example by the rule against accepting admissions of a prisoner when induced by some one in authority.

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The appellant's identification as the man seen with the children seems complete and is corroboration which cannot be rejected.

I should have preferred to have had related so far as admissible facts and circumstances the facts which led the police officer to arrest the accused.

The same line of thought which guided him, if founded on circumstantial evidence, might have aided the court in coming to the right conclusion as to the implicating of the accused.

It may, as experience teaches me, have been mere instinct, as it were, that guided the police officer or that he was told to get the man seen with the girls on the occasion in question.

In either such case his evidence could not furnish further facts.

I think the appeal should be dismissed.

Anglin, J.

ANGLIN, J.:—I think there was evidence in corroboration of the evidence given by the child. Two witnesses identified the accused as a man who had been seen with the child not very long before the offence was committed. (*Rex* v. *Murray*, 9 Crim. App. Cas. 248.) He was a man who had no business whatever to be with her. When confronted with the child, he said: "You never saw me before—you don't know me." This conduct aids in his identification.

The evidence of the child's statement to her mother was, in my opinion, admissible. It was made shortly after the occurrence. It was "spontaneous" in the sense indicated by Lord Reading, C.J., in *Rex* v. *Norcott*, [1917] 1 K.B. 347. Nothing more than mild persuasion led to its being made; there is nothing to indicate that it was "put into her mouth by some one else" or was not "her own unvarnished and unassisted story." The evidence was not inadmissible by reason of the fact that "questions were put to the girl to get her to tell her own story." Nor does the fact that "the circumstances indicate that but for the questioning there would probably have been no voluntary complaint" justify the exclusion of the evidence as was suggested in *Rex* v. *Osborne*, [1905] 1 K.B. 551.

I would dismiss the appeal.

Brodeur, J.

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

Appeal dismissed.

UNITED STATES OF AMERICA v. ALLISON.

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Halifax County Court, N.S., Wallace, Co.C.J. September 13, 1918.

EXTRADITION (§I—3)—INTERNATIONAL—BREAKING PAROLE—MAY BE EXTRADITED AS FUGITIVE.

A person from another country who has broken his parole in that country, where he has been convicted of obtaining money under false pretences, may be extradited as a fugitive under s. 18 of the Extradition Act, R.S.C., 1906, c. 155, although breaking parole is not an extraditable offence.

[See also *The King* v. *Hall*, 42 D.L.R. 330].

APPLICATION for a warrant for the committal of a fugitive. Granted. Statement.

The facts of the case are as follows:—

The prisoner, Frank Allison, was apprehended at Windsor, N.S., and arraigned before the Judge of the County Court for the County of Halifax sitting at the City of Halifax under a provisional warrant sworn out by Evan E. Young, U.S. Consul-General at Halifax, charging Allison with having been convicted of obtaining money under false pretences in the State of Iowa and of being unlawfully in Canada and a fugitive from the justice of the State of Iowa. The facts proved at the hearing by the defendant in extradition were as follows: Allison had been convicted in December, 1916, of obtaining money by false pretences in the County of Polke, in the State of Iowa, on September 17, 1914. He was sentenced to serve 7 years in the State Penitentiary at Fort Madison. In January, 1918, he was released under the parole system of that State, obligating himself not to leave the State of Iowa and to report monthly to the authorities. Allison left the State in March, 1918, came to Nova Scotia and joined the British Expeditionary Force stationed at Windsor.

L. H. Martell, for the prisoner; *W. J. O'Hearn*, K.C., for the United States.

WALLACE, Co.C.J.:—There is only one important point in this matter: Can a person from another country, who has broken his parole in that country, where he had been convicted of obtaining money under false pretences and subsequently paroled, be extradited? Wallace, Co.C.J.

It is contended, on behalf of the defendant, that the breaking of parole is not an extraditable offence, nor even in this country

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an indictable offence, and that the purpose of the demanding country in the present proceedings is to punish the defendant for breaking his parole.

Unquestionably, the defendant cannot be extradited merely for having broken his parole, because such an act is not covered by the extradition law. Possibly, a defendant who has broken his parole would not be considered a fugitive from justice within the popular meaning of the phrase, but the phrase is given an enlarged meaning by s. 2 (*d*) of our Extradition Act, which states that "fugitive" means a person being in Canada, who is accused or convicted of an extradition crime, committed within the jurisdiction of a foreign State.

I find that the defendant was convictedof an extradition crime, committed in the State of Iowa; namely, obtaining money under false pretences. The evidence before me is sufficient in establishing the actual conviction of the defendant, and the proof of identity is complete.

I cannot find any decision by any Canadian court directly bearing upon this question, but, in view of the foregoing facts, I have decided to grant the application on behalf of the demanding country in this case, and to issue a warrant for the committal of the fugitive. *Application granted.*

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Re BAGSHAW and O'CONNOR.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Britton, Clute, Sutherland and Kelly, JJ. March 25, 1918.

1. LANDLORD AND TENANT (§ II—30)—LEASE—SHORT FORMS ACT—TERMINATION.
A lease made in pursuance of the Short Forms of Leases Act (R.S.O., 1914, c. 116) cannot be surrendered by parol agreement.

2. LANDLORD AND TENANT (§ II D—33)—NON-PAYMENT OF RENT—RIGHT OF RE-ENTRY FORFEITURE—SUBSEQUENT PAYMENT OF RENT—EFFECT.
The right of re-entry for non-payment of rent overdue for 15 days (Short Forms of Leases Act, R.S.O., 1914, c. 116, sched. B., No. 12; Landlord and Tenant Act, R.S.O., 1914, c. 155, s. 19) is not defeated by tender or payment of the rent remaining due after the landlord became entitled to the right to forfeit.

Statement.

THE following statement of the facts is taken from the judgment of MULOCK, C.J. EX.:—

This is an appeal by Albert O'Connor, the tenant, from the order of His Honour Judge Hartman, Judge of the District Court

of the District of Temiskaming, made under sec. 77 of the Landlord and Tenant Act, being R.S.O. 1914, ch. 155, directing the issue of a writ of possession in favour of George Albert Bagshaw, the landlord, to put him in possession of the premises demised by Bagshaw to O'Connor, by lease bearing date the 16th September, 1916. By this lease, made in pursuance of the Short Forms of Leases Act, Bagshaw demised to O'Connor the premises in question for the term of five years, to be computed from the 1st November, 1916, at a monthly rental of $100, payable on the first day of each month, in advance, the first of such payments to be made on the 1st November, 1916.

The proviso in the lease for re-entry is in the following words:—

"Proviso for re-entry by the said lessor on non-payment or non-performance of covenants." (See the Short Forms of Leases Act, R.S.O. 1914, ch. 116, schedule B., No. 12.)

O'Connor entered into possession under the lease, and at his own expense made certain improvements.

In March, 1917, it was agreed between the parties that these improvements should be treated as satisfaction of the rent until the end of May, 1917, and that O'Connor should, on the 1st June, 1917, and on the first day of each month thereafter, pay rent in accordance with the terms of the lease.

On the 31st May, 1917, O'Connor wrote Bagshaw as follows:—

"Schumacher, Ont., May 31st, 1917.

"Mr. G. A. Bagshaw.

"Dear Sir:—Business has gone very bad here in the last month. All the young unmarried men has left the camp and what few has remained at the mines are staying at the McIntyre Club, also the Schumacher Club, and for the foreigners they have nearly all got homes of their own. I have not rented one room by the month in over a month now. There is nothing but strike talk going on and I guess by June 16th they all intend to come out. Dome and Hollinger will close down and for the others they will have to. I am not taking in enough money here to pay the running expenses of the house and to pay my grocery bill. Also the cess-pool has now overflown enough to raise the water 2 feet under this house and is also running into the boiler room under the store, and I did not want to put on any unnecessary expense just now until we

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see what things will do. The McIntyre are housing their men for nothing and going to feed them for 75c. per day. I know a man whom they have out trying to get them in Sudbury and Toronto. I never saw a place take such a change in such a short time. Can you come up here and see what we can do? I don't know what to suggest myself. In case a strike is pulled off, do you want me to remain here or not? Let me know what you think of the situation at once for something will have to be done. Trusting to here from you by return of mail, I am,

"Yours truly,

"Albert O'Connor."

To this letter Bagshaw sent the following reply:—

"Haileybury, Ont., June 5th, '7.

"Albert O'Connor, Esq., Schumacher, Ont.

"Dear Sir:—On my return home yesterday I found your letter of May 31st. I cannot say at this date, just when I will be able to get north. In the meantime, I have of course a general understanding of the situation as it exists in Porcupine, and I do not wish to do anything at all unfair under the circumstances. However, you plug along and do your best until I am able to get up and look the situation over. Of course you have lived in this mining country long enough to realise that these spells come once in a while, but things invariably recover, as doubtless they will in this instance, and when they do, they will probably be better than ever. I will let you know as soon as I am able when you may expect me up and you might let me know from time to time how things are going."

On the 3rd July, Bagshaw wrote O'Connor as follows:—

"Dear Sir:—I have been trying to get my affairs so arranged as to enable me to go north for some time, but have simply been unable to do so, nor do I see any immediate likelihood of being able to do so. It is, however, very plainly apparent that the situation you were suffering under, when last you wrote me, has been much improved, and I hope you are beginning to feel the benefit of it. It will surely come you know; as your past experience I am sure tells you, 'Good times' always follow bad, and all camps have their ups and downs, and when they get good again, you should do well. In the meantime, not having heard from you,

I have been giving our present situation some thought. I want to be fair all round, but I have a lot of cash invested, and taxes and insurance don't fail to go on week days and Sundays. I think, therefore, that it is about time I saw some return, and would ask you to let me hear from you enclosing your cheque for $100.00, which you may regard as payment in full of rent for the months of June and July. On August 1st, I will expect our original arrangement carried out, viz., $100.00 each month in advance."

On the 7th July, 1917, O'Connor wrote to Bagshaw as follows:—

"Dear Sir:—Your letter of recent date received and noted. Business is getting worse here instead of better. I was in hopes you could come up. I was trying to get you by 'phone last night and this morning to see if you could not take a run up to see the situation for yourself. This house is no good in this town. There is only one thing to do to save the situation, is to move it to Timmins, which can be done for an outlay of from $1,200 to $1,500. So if you could come up here I will go into all details with you and shew you where we can save ourselves. If you will not move it to Timmins, I would not give $100 rent for six months' rent and you heat and light it for me. If you can come up here do so. I may be in Haileybury in the course of a couple of weeks, and I will call and explain everything to you. Sorry things are going so badly for us both, but it can't be helped.

"Yours truly,

"Albert O'Connor."

On the 22nd July, Bagshaw, who lived at Haileybury, had an interview with O'Connor at his residence in Schumacher, when O'Connor urged the removal of the building to Timmins. This Bagshaw refused to do, and his evidence is to the effect that O'Connor agreed to give up possession on the 10th August.

The substance of O'Connor's evidence is, that he only agreed to give up possession in event of a sale. Bagshaw understood that it was an unconditional promise; and on the next day he leased the premises to one Meyers, and so notified O'Connor's wife. On the same day O'Connor learned from his wife of the lease to Meyers, and saw Bagshaw. At the trial he swore that he asked Bagshaw: " 'Are you making some negotiations with Meyers

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to rent the premises?' He says, 'I have them rented.' I says, 'I am not moving out of there on the 10th August.'" He swore that again on the 24th July he saw Bagshaw and said: "'I don't believe you have rented that place to Meyers.' He says: 'I have accepted money and gave him a receipt. I have a letter from Meyers.' I said, 'I am not going to vacate on the 10th of August.'" Then O'Connor offered his cheque for $200 in payment of the two months' rent in arrears, which Bagshaw refused to accept.

On the following day, O'Connor's solicitor tendered $201.25 in payment of the arrears and interest, which Bagshaw also declined to accept.

On the 13th August, the learned Judge, on the application of Bagshaw, under the provisions of sec. 75 of R.S.O. 1914, ch. 155, appointed in writing a time and place to inquire into and determine whether O'Connor was a tenant to Bagshaw for a term which had been determined by default in payment of rent or by agreement, and whether he held possession of the premises in question against the right of Bagshaw, and whether he wrongfully refused to go out of possession, having no right to continue in possession; and, after evidence and argument, the learned Judge made the order declaring that Bagshaw was entitled to possession, and directed the issue of a writ of possession.

Erichsen Brown, for appellant.

J. M. Ferguson, for the landlord, respondent.

The judgment of the Court was read by

Mulock, C.J.Ex.

MULOCK, C.J.Ex. (after stating the facts as above):—Two grounds are advanced in support of the contention that the term had come to an end, namely: default in payment of rent; and agreement between the parties to determine the lease.

As to the second ground, the agreement, if made, rested in parol, and therefore cannot operate as a surrender of the lease: *Johnstone* v. *Hudlestone*, 4 B. & C. 922; *Doe d. Murrell* v. *Milward*, 3 M. & W. 327. Further, O'Connor did not give up possession; thus there was no surrender by operation of law: *Coupland* v. *Maynard*, 12 East 134. Accordingly the second ground fails.

As to the first ground, O'Connor contends that his tender of the overdue rent relieved him from Bagshaw's right to forfeit the

lease. The statutory meaning of the proviso, contained in the lease, for re-entry for non-payment of rent is to the effect that, whenever any rent reserved by the lease remains unpaid for 15 days after it should have been paid, the lessor may re-enter and repossess himself of the demised premises as of his former estate (see the Short Forms of Leases Act, R.S.O. 1914, ch. 116, schedule B., No. 12); it not having been otherwise agreed, the same right is given the lessor by R.S.O. 1914, ch. 155, sec. 19.*

O'Connor made default in payment of the month's rent due on the 1st June, and on the 16th June Bagshaw became entitled to re-enter. Again, a new right accrued to him on the 16th July in respect of the month's rent due on the 1st July and remaining unpaid, and on and after the 16th July Bagshaw became entitled to elect whether he would or would not exercise his right to repossess himself of the demised premises as provided in the lease. This may be effected either by taking physical possession or by acquiring possession by means of some possessory action or proceeding. The bringing of an action in ejectment is equivalent to the ancient re-entry, and is an unequivocal exercise of the lessor's election to determine the lease: *Jones* v. *Carter* (1846), 15 M. & W. 718; *Serjeant* v. *Nash Field & Co.*, [1903] 2 K.B. 304, 310; *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360.

Possession is the only relief granted in ejectment, and the only relief that may be granted by an order made under sec. 77 of ch 155; and therefore it follows that the institution of the summary proceedings here taken under that section was an unequivocal exercise of the lessor's option to determine the lease, and that it so operated unless the tender of rent above referred to deprived Bagshaw of his right to forfeit.

The right to elect to determine the lease created by the contract in the lease is a legal one; and, unless relieved against or defeated by some act such as release, abandonment, or waiver, may be exercised until barred by the Statute of Limitations: *Matthews* v. *Smallwood*, [1910] 1 Ch. 777, 786. The tenant has not the option of depriving the landlord of this right by some act on his part, as, for example, by tender or payment of the rent remaining due after the landlord became entitled to the right to forfeit.

Green's Case (1582), 1 Cro. Eliz. 3, is in point. "The case was, a prebend let land to Green for years, rendering rent, and a re-

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entry for non-payment. The rent was demanded and was not paid, and two days after the lessor received the rent of him, and maketh him an acquittance by the name of his fermor: and if this receipt doth bar him of his re-entry, was the question. And it was clearly resolved that the bare receipt of the rent after the day was no bar, for it was a duty due to him."

In *Price* v. *Worwood* (1859), 4 H. & N. 512, ejectment was brought by the landlord against a tenant for breach of covenant to insure. After the breach the landlord accepted from a sub-tenant money on account of arrears of rent overdue by the tenant to the plaintiff. Held, *per* Martin, B. (p. 516): "A receipt of rent, to operate as a waiver of a forfeiture, must be a receipt of rent due on a day after the forfeiture was incurred. The mere receipt of the money, the rent having become due previously, is of no consequence, and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt."

In *Ward* v. *Day* (1863), 4 B. & S. 337, at pp. 352, 353, which was an action for arrears of rent and other relief, Crompton, J., says: "Waiver by receipt of rent only applies to rent accruing subsequent to the forfeiture. . . . There is no inconsistency in a man who has been given notice to determine a tenancy receiving rent due before the supposed determination of it, and consequently there is no waiver by receiving that rent." In the same case Blackburn, J., says (p. 358): "The receipt of rent accrued due before the forfeiture is no waiver." And at pp. 359, 360: "As to the supposed effect of a tender, . . . I take it that a tender has the same effect as payment. . . . Suppose there had been a distinct tender of the rent due on the 25th of December, it might have operated as payment; but payment of that sum would not have prevented the plaintiff's right to recover."

In the present case, on the 25th July a tender was made of the two months' rent due, one on the 1st June, the other on the 1st July. On the 16th June, and again on the 16th July, the landlord had a right to re-enter. Thus the tender was in respect of rent overdue prior to the forfeiture, and its acceptance would not operate as a waiver of the right of re-entry. It follows in this case that, when the rent remained overdue for fifteen days, Bagshaw was entitled to two rights: one to recover the arrears of rent, and

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the other to re-enter if he elected to exercise it. This latter right he derived in two ways, namely, from R.S.O. 1914, ch. 155, sec.19, and from the effect given by the Short Forms of Leases Act to the short form of the proviso for re-entry. Acceptance of rent is not, like distraining, an affirmance of the continuance of the relations of landlord and tenant. The two rights are not alternative but independent rights. The satisfaction of one does not satisfy the other.

When the case came before the learned Judge, it became his duty to inquire and determine whether O'Connor was tenant for a term which had been determined by default in payment of rent, and whether he held possession against the right of the landlord, and whether the tenant, having no right to continue in possession, wrongfully refused to go out of possession; and, if it appeared to the Judge that O'Connor wrongfully held against the landlord's right, then it was his duty to order a writ of possession. Beyond question the facts shew the tenancy, the determination of the lease by default in payment of rent, the holding possession against the landlord's right, the absence of any right in the tenant to retain possession, and his wrongful refusal to go out of possession. On these facts the learned Judge properly made the order complained of, the only order which, under the circumstances, he had the right to make. It was not open to him to consider whether the tenant was entitled to equitable relief from forfeiture. The scope of the inquiry is limited by sec. 75 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, to the matters enumerated in that section. If the tenant desires equitable relief, he must seek it in the manner provided by sec. 20, either by bringing an independent action or by an application to the Court in the lessor's action to enforce his rights of re-entry: *Lock* v. *Pearce*, [1893] 2 Ch. 271.

By sec. 78, an appeal lies to a Divisional Court from the order in question; and, if the Court is of opinion that the right of possession should not be determined under the provisions of that Act, it may discharge the order and leave the landlord to his remedy by action. I see no reason for thinking that Bagshaw's right of possession should not have been determined in the summary proceedings in question. His right of possession admits of no doubt, and O'Connor's conduct is open to strong disapproval. For a sinister purpose he made false statements to Bagshaw; and

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the latter, moved by them, made a voluntary and a generous offer, namely, to accept $100 in payment of the $200 overdue rent. To this offer O'Connor replied, saying; "This house is no good in this town. There is only one thing to do to save the situation, is to move it to Timmins, which can be done for an outlay of from $1,200 to $1,500. . . . If you will not move it to Timmins, I would not give $100 rent for six months' rent and you heat and light it for me. . . . Sorry things are going so badly for us both, but it can't be helped."

In consequence of this letter, Bagshaw, on the 21st July, went to Schumacher, and on the following day saw O'Connor, when they discussed the matter. At this interview O'Connor again urged the removal of the house to Timmins, stating that the house at Schumacher was absolutely useless to him; and, when Bagshaw refused to remove it, O'Connor asked Bagshaw what he would do with the place, and the latter said he would do what was best, and it was finally agreed between them that O'Connor would vacate the premises on the 10th August.

Relying on this agreement, Bagshaw demised the premises to one Meyers for a term commencing on the 10th August. O'Connor, on learning of the lease to Meyers, refused to vacate, saying that his promise to do so was conditional on Bagshaw selling, not leasing.

O'Connor on his examination admitted the falsity of some of the statements in his letters to Bagshaw, and it is apparent that he is not a credible witness. I am satisfied that he agreed to vacate the premises on the 10th August unconditionally. His repudiation of such promise is an act of bad faith, which should bar him from obtaining equitable relief from forfeiture of his lease.

I therefore see no ground for disturbing the learned Judge's order, and think this appeal should be dismissed with costs.

Appeal dismissed with costs.

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(Annotated).

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Exchequer Court of Canada, Audette, J., May 15, 1918.

PATENTS (§ II B—15)—SUBJECT MATTER—NOVELTY—INVENTION—COMBINATION—PRIOR ART—COSTS.

1. Where the patentee has merely adopted in the manufacture of his patented article old contrivances of a nature similar to those found in other articles of the same kind, and producing similar results, there is no invention to support the patent.

2. The Court, taking into consideration the conduct of a defendant leading up to the action, has a discretion to deprive him of his full costs although he succeeds in the action.

Statement.

ACTION for the infringement of a patent.

S. Casey Wood, for plaintiff; *L. A. Cannon*, K.C., for defendant.

Audette, J.

AUDETTE, J.:—The plaintiff company brings its action, against the defendant, for an alleged infringement of the Canadian patent, No. 158,542, bearing date October 27, 1914, granted to the M. W. Schloss Manufacturing Co., the assignee of the patentee, Edgar Guggenheim, which said company in turn sold and assigned it with all right, title and interest to the plaintiff company.

The grant contained in the patent is "for an alleged new and useful improvement in supporting belts."

The second paragraph of the specifications states:—

This invention relates to *belts* or *bands* to be worn around the body at the region of the waist for the purpose of sustaining and preserving the natural shape of the figure. While the device is in the form of a belt or band, it is of considerable width and therefore partakes of the nature of a waist or corset.

Proceeding further on with the specifications, to which reference will be hereafter made, we come to the claims, which are in the following language, viz., I claim:—

1. A low corset, consisting of a flat body portion whose upper and lower edges are substantially parallel and unshaped to the figure of the wearer, said body portion being elastic in a longitudinal direction and provided in the upper portion and at substantially the waist line with a zone of elastic but less yielding nature than the remainder of the body portion for the purpose set forth.

2. A low corset, consisting of a flat body portion whose upper and lower edges are substantially parallel and unshaped to the figure of the wearer, said body portion being elastic in a longitudinal direction and provided in the upper portion and at substantially the waist line with a zone of elastic but less yielding nature than the remainder of the body portion, and hose supporters attached to the body portion at points below the said less yielding zone.

The second claim is a repetition of the first, with the addition

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of the hose supporters attachment. The hose supporters are not *per se* claimed as an invention, but are claimed as part of the second combination, or as a combination between the hose supporters and the other features or elements of claim No. 1. And I may say there would have been, under the state of the prior art, no justification for claiming *per se* these hose supporters attachment. They were attached to all manner of corsets before the date of the alleged invention.

Before approaching the merits of the patent, if is well to bear in mind that the grant in the patent is for "supporting belts." The specification refers to it as "*belts* or *bands* partaking of the nature of a *waist* or *corset*, and the claims call it a "*low corset*," while at the trial it was continually referred to as a "girdle."

The patent is in itself very narrow.

By reference to the claims, specifications and drawings on the one hand, and exhibits 7 and 8 on the other, the latter being the product of the patent, it will naturally occur to a casual observer that the least that can be said is that the article purporting to be manufactured under the patent differs materially from the article that appears to be contemplated by the patent. The upper and lower edges are not parallel, but are of different lengths; the stays are not placed in a V-shape, as shewn in the drawings. It is not, as described in the specification, "a simple, straight band of considerable width, which surrounds the body and emphasizes its natural shape by reason of inherent elasticity of the band," for the obvious reason that the elastic band does not extend from one end to the other. There are two adjuncts of different material or fabric at each end whic are not elastic. The product is *conic* and not unshaped.

However, the plaintiff's expert, heard at trial, contends that the plaintiff's corsets are not manufactured as per the patent, but with mechanical equivalents as needed by the trade; that they differ in structural details, but are within the language of the specification and claims and are full equivalents, and are substantially the same.

Counsel at bar for the defendant, relying on this difference between the patent and the product, claimed to have been manufactured thereunder, contends that the patent has become null and void, under s. 38 of the Patent Act, for want of manufacturing

in Canada, within 2 years from the date of the patent, the invention covered by the patent, as no extension for so doing appears to have been given as provided by s. 39 of the Patent Act.

In the view I take of the case, it becomes unnecessary to make any pronouncement upon this point, and I will limit myself to the consideration of the validity of the patent itself, without considering the manufactured article.

Indeed, upon the enquiry as to whether or not the patent is good or bad, and as to whether the subject matter can be sustained by letters patent, regard must be had exclusively to the patent itself and not to the product of the same, or rather, as in the present case, not to the article the patentee has seen fit to produce under his patent.

Under the Canadian Patent Act, sec. 7, a patent may be granted to any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful *improvement* therein, which was *not known* or used by any other person *before his invention thereof* and which has not been *in public use* or on sale with the consent or allowance of the inventor thereof for more than one year previously to the application for the patent.

The subject matter of the letters patent must be something new, useful and involving ingenuity of invention. Nicolas, on Patent Law, pp. 1, 20. In order to support a patent the novelty must be the outcome of skilful ingenuity. Frost, p. 27. The primary test is invention and the question as to whether there has been invention is one of fact in each case.

And as was said in the *British Vacuum* case, 39 R.P.C. 209, different minds may arrive at different conclusions on the point as to whether or not there has been invention.

In the present case, however, we must enquire whether the alleged combinations imply invention and whether the result therefrom has not been anticipated. Commercial success, contrary to what was contended at trial in this case, is not a test of invention, although it may be of usefulness. Has the present patentee brought forth a new result consistent with the prior state of the art? That is what we shall have to enquire into.

Tracing the etymology of the word "corset," we find that it comes from the old French word "cors" (the Latin *corpus*), a diminutive of the word *corps* or body, the original object of which

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was the bringing out of a small waist. In the early days, among the Romans and the Greeks, long before the 14th century, when the conventional corset with stays first appeared, small bands of some fabric or another were used in their stead, and, in course of evolution, reappeared in France at the time of the French revolution; but, in 1815, what has been called all through the trial the conventional corset with stays, came back again. See Larousse, vo. Corset.

From Gwynne, J.'s, judgment in *Ball* v. *Crompton Corset Co.*, 13 Can. S.C.R. 493, we also find that as far back as 1872, corsets made of "an elastic fabric of india-rubber webbing" were then in existence.

Can we not say that corsets existed from time immemorial, and that while the devices of some of them were protected by patent, others were not and were thus given to the public and are not therefore subject to the monopoly of a patent.

I think it may be well stated and conceded that there is no new element entering into the corset covered by the patent. Low corsets were in existence long before the date of the patent. Elastic material of different degrees of resiliency was also common in the art.

Counsel for the plaintiff claims that the patent is for the *combination*, and the test of the combination is interaction. Each corset depends for its result upon the interaction of the general elasticity of the band, acting in interaction with the waist band, and that it is unshaped—the whole band being unshaped to the body of the wearer.

Therefore, the claim is for the combination.

Let us now enquire into the state of the prior art. As a starting point, we have garment exhibit "M," unprotected by patent and belonging to the public, which consists of a flat belt, a girdle waist band, comprising a flat body portion, upper and lower edges parallel of elastic material stretching longitudinally and with three zones of varying elasticity, the centre being more yielding. The difference between the plaintiff's patent and exhibit "M" practically consists in a different distribution of the resiliency of the bands, placing the less resilient at the waist, widening the band and making an opening as in the ordinary corset.

Passing to garment exhibit "L" (*corset sangle*), we find a large waist band or girdle, much higher or wider than exhibit "M"; also, with a flat body portion—waist band, 3 zones and all of

elastic material. This corset or band, as exhibits "7" and "8," manufactured by the plaintiff under the patent, is conic, being larger over the hips, narrowing at the waist, describing a small curve at the junction of the waist and top bands.

Ex. "K" is another garment in the nature of a girdle, waist band, unprotected by patent, with flat body portion, 3 zones of elastic material and a waist band of greater resistance. This exhibit would appear to be shaped to the body, retaining, however, the conic shape above mentioned.

Ex. "J" is still another garment or band, belt, girdle or corset of elastic material, and of different elasticity in the front. It is less resilient at the waist, and is much in the shape of the article manufactured under the present patent, conic-shaped and curving at the waist.

Coming now to ex. "B" (ex. "C" and "Q" being practically the same, comments on "B" will apply to them), a Claverie corset which, to all purposes, possesses all the elements of the combination covered by the plaintiff's patent, with, however, small differences, but mostly in details.

This garment (B), as well as M, L, K and J, was sold by the Claverie house here in Canada prior to the date of the alleged invention by the plaintiff.

In garment "B" we find, paraphrasing the patentee's claim, a *low corset*, which is what is claimed by the patentee. The body portion is *elastic in a longitudinal direction, and provided in the upper portion and at substantially the waist line with a zone of elastic but less yielding nature than the remainder of the body portion.* In thus describing ex. "B" I have used the language to be found in the plaintiff's claim No. 1, which is equally applicable to ex. "B."

Having purposely used the entire language of the claim, omitting, however, to be considered separately, the balance of the words, which read as follows: A flat body portion "whose upper and lower edges are substantially parallel and unshaped to the figure of the wearer." There is also all through these corsets the same peripheral tension. And the object and function of a claim in a patent is to determine the scope of the patentee's invention, *Barnett-McQueen Co.* v. *Canadian Stewart Co.*, 13 Can. Ex. 186, at 221.

Now garments, exhibits "7" and "8," the articles produced

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under the patent, are not parallel, as claimed in the patent and shewn in the drawings, and while according to the experts heard on behalf of the suppliant they are not manufactured as per the mechanism of the patent, they are equivalents as needed by the trade, differing from the patent, according to him, in structural details, but remaining within the language of the patent, being full equivalents.

Adopting this mode of reasoning to the claim in the plaintiff's patent, it is easy to find that while garment ex. "B" is not absolutely parallel, in the manner mentioned, it is "substantially parallel" within the meaning and language of the patent, differing slightly in structural details only.

Again, the claim of the plaintiff's patent describes his garment as "unshaped to the figure of the wearer." The garments, exs. "6" and "7," which he manufactures, are conic, and, therefore, not actually unshaped, but enough so, according to the plaintiff's evidence, to come within the meaning and language of the patent. Garment ex. "B," compared with a conventional corset, would be pronounced unshaped, and while it contains small curves in structural details, adopting the language of the plaintiff's expert, can it not be said that it is "substantially unshaped" and still within the language and meaning of the claim of the patent, and therefore anticipating the plaintiff's patent?

Ex. "B" has also edges of different elasticity to prevent the corset from curling.

In the result, comparing garment "B" and garments "7" and "8," would not this combination or their construction perform absolutely the same function? I cannot conceive that the principle involved in the plaintiff's patent was new at the date of the patent. After all, does not the plaintiff's article amount to a mere elastic band, of an undefined width, to be placed around the body by way of support?

All of these articles, or articles similar to the exhibits above mentioned, were on the market and being sold to the public prior to the alleged invention. I shall now approach the consideration of that part of the evidence in respect of some of the American patents, and the publications, produced at trial, in respect of these garments.

The American "Lackey" patent of 1906, ex. "A," disclosed a

"girdle" consisting of a flat body portion whose upper and lower edges are not only *substantially, but actually, parallel.* The body of the girdle is made

of some loosely woven fabric which is cut on the bias, so that it really yields to give some fulness to the girdle at the top and bottom . . permitting it to *conform to the body of the wearer.* The waist band is made of tape and is therefore *less yielding* than the rest of the girdle.

Another American patent (ex. "W"), granted in 1906 to Abadie Leotard, for a "waist band, belt and the like," was also filed at trial. The principal feature of this exhibit is that it is of elastic material of different degrees of resistance, the upper and lower edges are parallel and it is unshaped to the body of the wearer, and stretches longitudinally as in the plaintiff's patent.

Ex. "X" is an American patent granted as far back as 1884 to one Craig, and is for a "corset" made of elastic material from top to bottom, *with 3 elastic zones of different degrees of resistance.* The *waist band being less yielding* than the other portions of the corset. The language used in this patent is worth noting when reading the plaintiff's patent, and according to one expert this corset and that of the plaintiff would produce equivalent results.

Ex. "Y," an American patent, granted to one Digney in 1906, is a combination of abdominal support and hose-supporters as in claim No. 2 of the plaintiff's patent. It is a curved band or girdle comprising a plurality of zones, made of elastic webbing adapting itself to the shape of the body.

On the question of prior publication, as establishing the state of the prior art, the defendant produced a copy of "Femina," of March 15, 1912, which had been used by defendant when manufacturing his own corset, and wherein we find, at p. 27, cuts of corsets shewing great similarity with the class of corsets in this case, and which possess the characteristic elements so much relied upon by the plaintiff. The description indeed reads as follows:—

Le No. 1618, est une combinaison gainant absolument le corps qu'elle laisse souple et onduleux; en tissue caoutcheuté renforce a la taille . . . Le No. 1621 est une ceinture caoutchouteé. Cette ceinture est renforcee tout autour du haut, du bas, et de la taille, sans que son epaisseur en soit augmenteé, ce qui la rend tres resistante en lui permettant de suivre tous les mouvements du corps sans se deformer.

In 1913 witness Amyot says he also had in his possession the publication called "The Corset and Underwear Review," and at p. 33 thereof we find that among the corsets exhibited in Sep-

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tember of that year there was, as described therein, "a corset of a webbing arranged in 3 sections, the top and bottom section of elastic and the centre non-elastic."

By way of supplement reference may also be had to the Claverie catalogues and circulars, viz., in ex. "D," at p. 35; ex. "F," at pp. 18 and 19; in exs. "E," "H-a" and "H-b," at p. 2, and in ex. 10, at pp. 12 and 13. These are practically cuts and plates having the features and elements found in ex. "B" discussed above, and which in the result disclose the same or equivalent elements combined in substantially the same way and producing practically the same results as plaintiff's corset. See *Hunter* v. *Carrick*, 11 Can. S.C.R. 300.

Having already considered the state of the prior art in corsets, I must in the result come to the conclusion that all the features, functions and contrivances claimed in the combination of the present patent are also to be found in other corsets, specifically or generally. The most the patentee has done was to adopt, without invention, in the manufacture of his corset, old contrivances of a similar nature found in other corsets and producing similar results. The adaptation of old functions or contrivances to a new purpose, especially to the same class of article, would not even constitute invention. There is no subject-matter where invention is wanting. Terrell on Patents, 5th ed., p. 38. Moreover, the combination claimed in this case does not imply invention, *British United Shoe Machinery Co.* v. *Fassell & Sons*, 25 R.P.C. 632; *British United Shoe Machinery Co.* v. *Standard Rotary Machine Co.*, 35 R.P.C. 33.

The proposition that the article in question has been a commercial success, and that it can be produced cheaper than before alone would establish a patent, is to my mind unsound, as it would have the effect of enlarging the patent law by bestowing upon successful commercial adaptations a privilege confined to an invention that is new and useful. Indeed, success cannot be said to be the test to a right to the privilege of a patent, because most of the time such success is due to business energy which does not enter in the consideration of the patent laws. And, indeed, if I find no "meritorious invention" in the plaintiff's patent, I do not destroy, as claimed at trial, the plaintiff's commercial success. They can go on, as Claverie and others have done in the past, and

sell their goods, unprotected by a patent, on their merits and extend their trade in the article by business energy and capacity. See Terrell on Patents, pp. 34, 35, 88, 90; *Waterous* v. *Bishop*, 20 U.C.C.P. 29.

Eagle Lock Co. v. *Corbin Cabinet Lock Co.*, 64 F.R. 789, is authority for the proposition that:—

There is no patentable invention when the peculiar structure necessarily resulted from the fact that the patentee wanted to combine certain old elements, and a person skilled in the art would naturally group the elements in the way the patentee adopted.

It certainly cannot be said that the combination claimed by the plaintiff's patent lies so much out of the track of former use as to evolve ingenuity of invention.

As already said, the functions of the combination claimed in the plaintiff's corset are substantially to be found in the Claverie corset, ex. "B," and others; and, as all the parts going to make the plaintiff's corsets are obviously old, he can only claim in respect of the combination, as he has done; but his combination is substantially anticipated both by patented and unpatented corsets, and this combination is obviously without ingenuity of invention, without which a patent cannot be sustained.

The combination of the patentee did not, considering the state of the knowledge of prior art, disclose any new functions or discovery which could, to my mind, amount to invention. I cannot perceive any ingenuity of invention in the plaintiff's patent, considering the state of the art and knowledge at the date of the patent.

Under our patent law a patent is granted as a reward for invention, whereby restraint upon commercial freedom in respect of the use of the patented invention necessarily results; and a court cannot be too careful in insisting that it is only when the requirements of the law have been satisfied by the patentee that the public will be prevented from using common and well-known articles or devices for a common purpose.

There is no sufficient invention in merely applying well-known things, in a manner or to a purpose which is analagous to the manner or to the purpose in or to which it has been previously applied. Nicolas on Patent Law, p. 23, and cases therein cited.

In view of the prior art, I am of opinion that not only is there no contrivance or device that is new in the plaintiff's patent, but

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that there are no new features in the combination claimed, the same features having been previously obtained in other corsets.

The case of *Consolidated Car Heating Co.* v. *Came*, [1903] A.C. 509, went even so far as to decide that:—

> In an action for infringement of a patent, if the merit of the invention consists in the idea or principle which is embodied in it, and not merely in the means by which that idea or principle is carried into effect, the patentee must shew that *the idea or principle is new;* and must fail if the merit of his invention lies merely in a new combination of known features.

The present patent relies on the functions performed by the combination of old and well-known devices; but in view of the knowledge of the prior art, it must be found that such known features of such combination were by no means new. Corsets of elastic fabric of zones of different resiliency, with less resilient band at the waist, with the features of the patent, were in existence before the date of the patent and performing in their combination the functions claimed. And paraphrasing the language of Ritchie, C.J., in *Ball* v. *Crompton Corset Co.*, 13 Can. S.C.R. 475, I come to the conclusion the plaintiff's patent does not possess any element of invention, and I can, in no sense, "*find any creative work of an inventive faculty* which the patent laws are intended to encourage and reward," and as already said, the fact that the plaintiff's patent has proved successful does not necessarily establish that it is an invention entitling him to a patent. There is in that case very apposite language in respect of a patent for corsets that will apply to the present case with great propriety and where the pronouncement was against the validity of the patent. See also *Williams* v. *Nye*, 7 R.P.C. 62.

In the case of *Yates* v. *Great Western R. Co.*, 2 A.R. (Ont.) 226, it was also held that although the patented article was a most useful contrivance it could not be the subject of a patent as it was wanting in the element of invention.

The functions which the present patentee claims as new in his combination would, as well to a person of ordinary skill in the manufacture of corsets as to the unwary purchaser, appear, knowing the prior state of the art, to be old or even a case of "double use" involving no ingenuity of invention. *Potts* v. *Creaser*, 155 U.S. 597. See also *Wismer* v. *Coulthard*, 22 Can. S.C.R. 178, *Copeland-Chatterson* v. *Paquette*, 38 Can. S.C.R. 451; *Northern Shirt Co.* v. *Clark*, 38 D.L.R. 1, and cases therein cited; and *Wilson* v. *Meldrum*, Coutlée's Dig. S.C.R. 1039.

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Perhaps I should not dispose of the case without offering some short observations with respect to exs. 14 and 15, which are copies of judgments delivered by the courts of the United States upon the plaintiff's patent. Ex. No. 14 is the copy of a judgment obtained by consent of the parties and as such does not amount to more than an arrangement or compromise between the parties therein mentioned. It is hardly necessary to say that it is a class of judgment upon which no reliance can be placed with the view of using it as a determination by the court upon the validity of the patent. Then ex. No. 15 appears to be another judgment between the parties therein mentioned. Canadian courts, like the English courts, are accustomed to treat the decisions of the American courts with great respect, although they are in no manner bound by them. See *per* Halsbury, L.C. In *Re Missouri Steamship Co.* (1889), L.R. 42 Ch. D. 330; per Brett, L.J., in *The Queen* v. *Castro*, L.R. 5 Q.B.D. 516; and per Kekewich, J., in *Re De Nicols*, [1898] 1 Ch. D. 403, at 410. However, the case appears to be unreported, no reasons for judgment are available, and it is impossible to ascertain upon what ground the conclusions of this judgment were arrived at. I, therefore, fail to conceive how I could make any use of these judgments.

The defendant company, besides attacking the validity of the plaintiff's patent, denies any infringement of the same, and, moreover, alleges it has obtained Canadian patent No. 171, 276 on August 8, 1916, for manufacturing the article or corset which is now claimed by the plaintiff as an infringement of his corset. A subsequent patent is no defence to the infringement of a prior patent. *Grip Printing & Publishing Co.* v. *Butterfield*, 11 Can. S.C.R. 291. Had the plaintiff's patent been found good and valid, I would obviously, without any hesitancy, have found that the defendants had infringed. However, in the view I take of the case, consideration of the question of infringement is unnecessary, except in respect of its bearing on the allowance of costs.

Coming to the question of costs, I must say that, in view of all the circumstances of the case, I feel somewhat perplexed. As a general proposition, if an action is dismissed for want of validity of the patent, it should *primâ facie* carry with it all costs in favour of the defendant; but there may be circumstances which would abate this *primâ facie* claim and justify the exercise of discretion

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by the court to withhold full costs, *Vancouver* v. *Bliss*, 11 Ves. 463, 32 E.R. 1164.

There is nothing in the Canadian Patent Act to hamper the court in the exercise of its discretion upon the question of costs, which in this case falls within the provisions of r. 290, that has statutory force. It is, however, quite clear that there are, under the English Act, provisions dealing specifically with costs under certain circumstances, differing therefore from our Act. With this qualified observation I wish to refer to most apposite language which has fallen from the lips of some of the eminent judges on this question of costs. Bowen, L.J., in *Badische Anilin und Soda Fabric* v. *Levinstein*, 29 Ch. D. 366, at p. 419, says:—

> It seems to me that, without laying down any hard and fast line, or trying to fetter our discretion at a future period in any other case, we are acting on a sensible and sound principle, namely, the principle that parties ought not, even if right in the action, to add to the expenses of an action by fighting issues in which they are in the wrong. It may be reasonable as regards their own interest, and may help them in the conduct of the action, that they should raise issues in which in the end they are defeated; but the defendant who does so does it in his own interest, and I think he ought to do it at his own expense.

See also *Bennington* v. *Hill*, 8 R.P.C. 326.

Again, in *Dicks* v. *Yates*, 18 Ch. D. 85, Jessel, M.R., said:—

> I think that the court has a discretion to deprive a defendant of his costs though he succeeds in the action, and that it has a discretion to make him pay perhaps the greater part of the costs by giving against him the costs of issues on which he fails, or costs in respect of misconduct by him in the course of the action.

Moreover, in the consideration of the question of costs I do not think that the tribunal is exclusively confined to the abstract result of the litigation; it may also consider the defendant's conduct previous to and conducing to the action. Is it not the duty of the judge, before arriving at any pronouncement, to consider the whole circumstances of the case from beginning to end? Everything which led to the action, everything in the conduct of the parties which actually prompted and originated the proceedings should be considered.

Had I not disposed of the present case upon the question of the validity of the patent, I would have found without hesitation, as already mentioned, that the defendant's corset constituted an infringement of the plaintiff's patent.

But in the present case there is more. The defendant did not only copy that corset manufactured by the plaintiff, which he alleges

was not patentable, but he also, in 1916, applied for and obtained, from the Canadian Patent Office, a patent which is now filed of record as ex. No. 5, as alleged in his statement of defence. In the specifications of that patent, we find at 5 or 6 places the identical language which is also found in the plaintiff's patent. If the defendant was truly in earnest in believing the plaintiff's patent invalid for want of novelty or invention, how could he in earnest apply for a similar patent, taking from the plaintiff's patent the very same language and using it in his own specification? How can the defendant reconcile, with any consistency, the duality of this position?

Under all the circumstances of the case on this question of costs, I think justice will be done if the plaintiff were allowed a certain amount of costs on the question of infringement, and the defendant were given qualified general costs upon the issue of want of validity of the patent, considering the plaintiff was successful on the question of infringement; and those costs should not be as ample as in a case where no such circumstances as above mentioned had existed. And with the view of carrying out this principle, and avoiding the taxation of costs upon two issues with set-off and proceeding under the provisions of r. no. 290 of the Rules and Regulations of the Exchequer Court of Canada, I hereby direct that the defendant's costs shall be hereby fixed and allowed at the sum of $300 in lieu of taxed costs.

Therefore, the plaintiff's patent is found invalid for want of subject matter, or ingenuity of invention, and the action is dismissed with costs to the defendant fixed at the total sum of $300.

Action dismissed.

ANNOTATION

Annotation.

by RUSSEL S. SMART of the Ottawa Bar.

The question of invention, which was the principal issue in this case, is always a difficult one to determine. Some range must, in the useful arts, be allowed for the exercise of mechanical skill.

A designer or architect or engineer in the ordinary practice of his calling is required to create many new designs and it is not all of these which can rise to the dignity of invention. On the other hand, it frequently happens that a very small change will make a great difference in practice, and where this is so, it is reasonable to suppose that invention is present. In vol. 22 Halsbury, p. 138, are the following words:—

"If the result produced by such a combination is either a new article, or

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a better article, or a cheaper article than before, such combination is an invention or a manufacture within the statute and may well be the subject-matter of a patent."

On p. 135 of 22 Halsbury, will be found the following language:—

"The commercial utility of the product is often very cogent, though not conclusive evidence that there has been invention."

On p. 136 of vol. 22—following immediately after, Halsbury says:—

"The strongest evidence of this kind, however, sometimes shews that the invention, though apparently trifling, made the whole difference between commercial success and failure, and if this is so, the court is very loath to say that there is no invention. The merest 'scintilla' of invention may be sufficient to support the patent. Nor is the apparent simplicity of the invention when once it has been invented and explained, nor the fact that it was come by through an accident, a bar to the patent."

This phrase "the merest scintilla of invention" has been repeated and referred to in a number of cases. That is the proposition that a new article, a method or an article being new, the merest scintilla of invention is enough to support the patent. A number of leading cases containing *dicta* to this effect may be found at p. 34 of Frost on Patents, 3rd ed.

In determining whether invention is present in a given case, the courts have looked at the question in a variety of ways. Any court is, however, always in the position of looking at the question after the event, and at a time when it is possible to give various explanations of why it occurred.

In the very early case of *Crane* v. *Price*, 4 M. & G. 580 at 603, 134 E.R. 239 at 248, quoted at length in *Smith* v. *Goldie*, 9 Can. S.C.R. 53, Tindal, C.J. says:—

"There are numerous instances of patents which have been granted where the invention consisted in no more than the use of things already known, the acting with them in a manner already known, the producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public."

That statement was adopted by Ritchie, C.J., as a correct statement of the law in *Smith* v. *Goldie*.

Then he goes further at p. 249:—

"It is not material whether it is the result of long experiments and profound research, or whether of some sudden and lucky thought, or of mere accidental discovery."

The case of *American Wire Co.* v. *Thomson*, 5 R.P.C. 125, refers to subject matter which may be considered to be moving a little closer towards the invention which is in question here. The patent in controversy was one for a bustle made of tubular sections of braided wire, bustles were old, but the patentee had applied them to produce a very effective form of bustle. (*Thomson* v. *American Wire Co.* (1889), 6 R.P.C. 518 at 527) Lord Herschell in his judgment said:—

"It cannot be denied that both the prior patents to which I have referred afford some colour to the defendant's contention that the patentee here has done nothing more than apply a known substance in a manner and to a purpose analagous to that in and to which it had been already applied, and that the patent therefore cannot be supported. If I thought that the patentee had claimed the mere use of tubular sections of braided wire as a bustle, however

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fastened or secured, I should arrive at the conclusion that the defendant's contention was well founded, but I do not thus construe the specification. I have already stated that in my opinion it is the combination alone for which protection is sought, and that the method of fastening the ends by clamping plates is an essential part of that which is claimed. Taking this view of the patent, I think that, even with the state of knowledge which existed at the time the patent was applied for, some invention was required to produce the bustle claimed to be protected by it. All the judges in the Court of Appeal although they arrived at the same conclusion, stated that they had done so with hesitation, and expressed the opinion that but little invention was requisite, and that the case was near the border line."

In the same case, Bowen, L.J., at 124, referring to prior anticipations quotes the Lord Chancellor in *Hills* v. *Evans* (1862), 31 L.J., Ch. 457.

"The principle is this," says the Lord Chancellor, "the antecedent statement must be such" (that is, in order to avoid a subsequent patent) "that a person of ordinary knowledge of the subject would at once perceive, understand, and be able practically to apply the discovery without the necessity of making further experiments and gaining further information, before the invention can be made useful. Taking Jenkins' specification and reading it as a paper description, does it convey such information to the world as would have enabled the world without further ingenuity and experiment to let upon this bustle?"

"It cannot be rightly said, I think as a proposition of law, that the mere fact that an article is used for the first time which has not been used before, is conclusive of the question whether it required ingenuity to devise or discover it, but what is it seems to me, sound and safe, is the practical conclusion that it is a very important element in the consideration whether there has been invention or not, if you see that the thing never was done in the memory of man down to a particular point, and at the moment it is done it is a great success as regards utility, and as regards value in the market. It is not conclusive of the question of ingenuity, but it forces this reflection on one, unless there is some ingenuity in the person who brought out this article, why was it never brought out before?" (Bowen, L.J. at p. 125.)

Moulton, p. 26, Frost, pp. 36 and 99.

Mr. Justice Blackburn in *Harwood* v. *G.N.R.*, 2 B. & S. 194 at 208, said: "And we think it always must be a question of degree—a question or more or less—whether the analogy or cognateness of the purposes is so close as to prevent their being an invention in the application. Mr. Grove, in his very able argument, contended, we believe correctly enough, that if there was any real invention, though a slight one, producing a practical beneficial result, the patent was good."

In *Penn* v. *Bibby*, L.R., 2 Ch. App. 127, the invention was the use of certain wooden bearings in the shafts of screw propellers of the same type as had been used for grindstones and common water wheels. The Lord Chancellor (Lord Chelmsford) said p. 137:

" . . . It would be an extraordinary fact if an invention of this kind, so long wanted, and of such great utility, should have been lying in everybody's way who knew anything of the construction of a water wheel or a grindstone, and yet should never before have been discovered."

Annotation.

In *Strong* v. *Noble*, 6 Blatch. 447, Blatchford, J., in holding the application of tubular knit fabric to cover whip handles to be patentable, said p. 479:—

"In the present case, the points of advantage . . . are ornament, economy, and durability. It could not be told necessarily, *a priori*, without experiment, that these advantages would accompany the application of the knit fabric as a covering for the whip." Although a tubular knit fabric was old, and although a whip was old, it by no means follows that the application in the manner shewn is merely applying the knit fabric to a new use, in the sense in which, in the law of patents, the mere application of an old article to a new use is held not to be subject of a patent. Such applications are of this character, using an umbrella to ward off the rays of the sun, it having been before used to keep off the rain, eating peas with a spoon, it having been before used to eat soup with, cutting bread with a knife, it having been before used to cut meat with. To apply the principle here invoked, to avoid the first claim of the patent, would render void the mass of patents that are now granted.

"There is scarcely a patent granted that does not involve the application of an old thing to a new use, and that does not, in one sense, fail to involve anything more. But the merit consists in being the first to make the application, and the first to shew how it can be made, and the first to shew that there is utility in making it."

Lindley, M.R., in *Edison Bell Phonograph Corp. Ltd.* v. *Smith & Young*, 11 R.P.C. 389, at p. 398, said:—

"And what is it? It really comes to this, that, although the invention is new—that is that nobody has thought of it before—and although it is useful, yet, when you consider it, you come to the conclusion that it is so easy, so palpable, that everybody who thought for a moment would come to the same conclusion, or, in more homely language, hardly judicial but rather businesslike, it comes to this, it is so easy that any fool could do it. Well, I look, as I say, upon that objection, when all others have failed, generally with amused contempt. It can be made out, but hardly ever. When you find that which I have stated, it is hard to think that people would be buying and selling a thing—and that has been sometimes the whole thing—and yet the objection should be taken that it is wanting in subject matter."

In the *Puttee* case (*Fox* v. *Astrachans*), 27 R.P.C. 377, the invention was the well known puttee which is used by soldiers. It is wound around the legs in place of leggings, and the novelty in that invention was simply that the puttee was cut with a curve to fit the leg. It was maintained by the defence that, it was well known in dress making, to cut the garment to fit the figure, but in spite of that, the patent was sustained, since a new result, a beneficial result, was obtained.

A collection of Canadian authorities on the same question may be found on p. 12 of Fisher and Smart on Patents.

In *Bicknell* v. *Peterson*, 24 A.R. (Ont.) 427, the case related to the application of a "rolling contact" to an oil pump. It was held new. This was followed by *Woodward* v. *Oke*, 7 O.W.R. 881, in which it was held that an application for a swivel in a particular place was new.

Commercial success and extended use will tip the scales when the issue is in doubt but not otherwise. (*Riekmann* v. *Thierry* (1896), 14 R.P.C. 105; *Fawcett* v. *Homan* (1896), 13 R.P.C. 398; *Longbottom* v. *Shaw* (1891), 8 R.P.C.

333; *Morgan & Co.* v. *Windover & Co.* (1890), 7 R.P.C. 131.) Due consideration will always be given to the fact that a large and profitable business has been established on the patent (*Copeland-Chatterson* v. *Paquette et al.* (1906), 10 Can. Ex. 410). But as stated in the American case of *Krementz* v. *Cottle* (148 U.S. 556 at 560):— Annotation.

"The argument drawn from commercial success is not always to be relied on. Other causes, such as the enterprise of the vendors and the resort to lavish expenditures in advertising may co-operate to promote a large marketable demand. But when the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use and has displaced other devices which have previously been employed for analogous use is sufficient to turn the scale in favour of the existence of invention."

GARRETT v. CITY OF MOOSE JAW.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION (SASK.)—INJURY IN COURSE OF EMPLOYMENT—"ON, IN OR ABOUT" A FACTORY.

A stable in which machinery is installed for cutting and crushing grain for horses is a factory within the meaning of s. 2 of the Workmen's Compensation Act, Saskatchewan (1910-11, c. 9).

An employee who is injured a quarter of a mile away from such factory while engaged in employment which is not part of the factory work is not employed on or about such factory at the time of the injury.

[*Cornea* v. *National Paving and Construction Co.*, 26 D.L.R. 402, followed.]

APPEAL by plaintiff from the trial judgment in an action under the Workmen's Compensation Act. (Sask.) Affirmed.

David Campbell, for appellant; *W. A. Beynon*, for respondent.

The judgment of the court was delivered by

LAMONT, J.A.:—This is an action under the Workmen's Compensation Act. The facts are as follows:—The plaintiff was employed by the defendant city to work in and around a stable in which there was installed machinery, for cutting and crushing grain for the horses, which machinery was operated by electric power. On the day in question, the stable superintendent directed the plaintiff to take one of the horses to the harness shop to have him fitted for a collar. The plaintiff did so, and was on his way back to the stable when the horse, becoming fractious, kicked the plaintiff, breaking several of his ribs. The point at which the accident occurred was a quarter of a mile from the stable. Lamont, J.A.

Under these circumstances, is the plaintiff entitled to recover? S. 2 of the Act reads as follows:—

2. This Act shall apply only to employment by the principal on, or in or about a railway, factory, mine, quarry or engineering work; or in or about

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any building which is either being constructed or repaired or being demolished.

S. 4 in part reads:—

4. If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman his employer shall be liable to pay compensation in accordance with the provisions of this Act.

It will, therefore, be seen that, under our Act, in order to entitle a plaintiff to recover, it must appear: (1) that the employment was one to which the Act applies, and (2) that the accident arose out of and in the course of that employment.

In the present case, there is no question but that the accident arose out of and in the course of the plaintiff's employment. The question is, was his employment at the time he was injured one to which the Act applies.

It is admitted by counsel for the defendants that the stable was a factory within the meaning of the Act. The only point we have to determine, therefore, is: Was the plaintiff at the time of his injury employed "on, or in or about" a factory?

In *Wrigley* v. *Whittaker & Sons*, [1902] A.C. 299, the plaintiff's husband had been in the employ of the defendants, who were manufacturers of machinery. In their factory they forged a driving-wheel for another factory. The plaintiff's husband was sent to set up the wheel in that other factory, and, while there, a stone fell upon him and killed him. It was held by the House of Lords that the plaintiff could not recover,because the place where the accident occurred was not on, in or about the factory of the defendants.

In *Cornea* v. *National Paving & Construction Co.*, 26 D.L.R. 402, 9 S.L.R. 40, the plaintiff was employed by the defendants as a labourer, repairing pavements in the city of Regina, and was ordered to proceed from one part of the city to another to do some further repairing. While so proceeding, he was struck by a street car and injured. The evidence at the trial disclosed that, in some parts of repairing on which the plaintiff was engaged, the defendants had used a steam roller, but on other parts, where the repairs were small in extent, the roller was not used, and it was not used in the repairs to which the plaintiff was proceeding when he was injured. The court *en banc* of this province held that, under these circumstances, the plaintiff's employment was not one in or

about an engineering work, and did not, therefore, come within the protection of the Act.

The words "on, in or about" have been held to connote locality; the place, or places where the factory work is being carried on.

In *Back* v. *Dick Kerr & Co.*, [1906] A.C. 325, Lord Atkinson, at 333 and 334, says:—

Our attention has been called to authorities, including *Wrigley* v. *Whittaker*, [1902] A.C. 299, decided in this House. The view of this statute apparently taken in all these cases was that the legislature had intended to select certain fields of operation in which, owing to the nature of the work done there, danger to the workmen employed in doing it might be supposed to exist, and to confine the benefits conferred by the statute to injuries sustained in those physical areas or in close proximity to them. And accordingly these cases seem to have established that it is necessary in order to satisfy the words of s. 7, to hold that the employment in which the workman must be engaged in order to entitle him to recover must be carried on in some defined or ascertainable physical area and that at the time of the accident he must have been working "on, or in or about" that area, the word "about" being held to be equivalent at best to "in close proximity to." In *Wrigley* v. *Whittaker*, *supra*, the workman was admittedly at the time of the accident engaged in doing his employer's business, namely, erecting in the factory of a certain company a wheel forged in his employer's factory, and by his employer contracted to be put up in the factory in which it was being placed when the accident occurred. Yet the workman was held not to be entitled to compensation, though it was not questioned that if a similar accident had happened to him before the wheel left his employer's factory he would have been so entitled.

A number of English authorities were cited on behalf of the plaintiff, but, in these cases, the only questions were, did the accident arise out of or in the course of the employment. No question there arose as to the application of the Act, for, since 1906, the English Act is not restricted to certain specific employments, as is the case under our Act.

The authorities above cited shew that, as the plaintiff at the time of his injury was a quarter of a mile away from the defendants' factory, engaged in employment which was not part of the factory work, he cannot be said to have been employed on or about a factory.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

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CANADIAN PACIFIC R. Co. v. BLUNT.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 2, 1918.

REFERENCE (§ I —9)—QUESTION OF FACT—CHARACTER OF LAND—REFERENCE AS TO TITLE.

A bare question of fact regarding the character of land is not a question of title, such a question if pleaded as a defence might be specially referred to the Master for enquiry, but would not be included on a general reference as to title.

Statement. APPEAL by the defendant from an order of McCarthy, J., dismissing an appeal from an order of Mr. Clarry, Master at Calgary. Affirmed.

A. Macleod Sinclair, for appellant; *G. A. Walker*, for respondent.

The judgment of the Court was delivered by

Stuart, J. STUART, J.:—The action was a vendor's action for arrears of money due upon a sale and purchase agreement in regard to land of which the defendant was the purchaser's assignee and upon which he had by the assignment agreement become directly liable to the plaintiff. The action was begun on April 17, 1917. The defendant was served with the claim in Chicago on April 28, 1917. He made default in appearance and on June 8, 1917, the Master made the usual order fixing the amount due under the agreement and giving the defendant 4 months to remedy his default, and ordering that, in case of further default, the plaintiff should be entitled to an order for sale or determination of the agreement. The order recited that the plaintiff was shewn to be the registered owner of the land. The order also provided that the defendant could be served by registered letter addressed to a named place in Chicago. This registered letter was mailed on June 28, 1917.

On November 10, 1917, a notice of motion was sent by registered mail to the defendant at his Chicago address notifying him that on November 23, 1917, a motion would be made for an order determining the agreement, or in the alternative, directing a sale. The defendant did not appear upon this motion. The Master made an order directing the determination of the agreement, such order not to issue for 14 days, but directed the solicitor for the plaintiff to notify the defendant further by registered letter of what had been done, and that he might apply on or before December 7, 1917, for an order setting aside the order made. On Decem-

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ber 7, the defendant, for the first time, made an appearance, being represented by counsel before the Master. The matter was adjourned for a week, that is to December 14, and then counsel for the defendant stated that the defendant refused to apply for an order setting aside the order of November 23, under the liberty reserved for him, but contended that he was prepared to file an affidavit shewing that the plaintiff was not able to deliver all the land of the character contracted for. The land was under an irrigation system and there was a certain portion referred to as irrigable and there was an irrigation fee or rental per acre to be paid by the purchaser. For this reason, counsel for the defendant contended that the order complained of should not have been made. He expressly refused, however, to apply to set the order aside and to be given leave to defend. He maintained this position before McCarthy, J., and also before this court, upon the hearing of the appeal. The court made several suggestions to defendant's counsel, offering him leave to defend upon terms in different forms. These were all refused. The contention of the defendant was that the plaintiff had not shewn to the Master good title as agreed or rather that it had not shewn as it should have shewn that the proportion of irrigable land stipulated for was in fact available.

The law upon this question is clear. Such a matter is a matter of defence, and if the defendant refuses the liberty offered him to defend, then, in my opinion, he has no ground of complaint or for appeal. The undenied allegations in the statement of claim were sufficient to justify the Master's order so far as this matter was concerned.

In *McGrory* v. *Alderdale Estate Co., Ltd.*, [1918] A.C. 503, the House of Lords decided that a vendor cannot raise on a reference as to title the objection that the purchaser had notice of a certain defect. That matter, so it was held, should be raised at the hearing. So here, unless the deficiency in the proportion of irrigable land can be treated as a pure question of title (a question which is generally inquired into upon a reference, unless the matter is simple as it generally is with us and is always inquired into whether it is raised by defence or not), then it should have been raised by way of defence and the defendant was offered an opportunity to do that and refused it.

The amount fixed by the Master to be paid by the defendant

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included certain sums which were due under a clause in the agreement by which the purchaser was to pay a certain amount per acre as yearly rental for the irrigation of 79 acres of irrigable land. In my opinion, the question of whether there were or were not 79 acres of irrigable land in the land in question was a bare question of fact regarding the character of the land and was not at all a question of title. Such a question as that if pleaded as a defence no doubt might conveniently be specially referred to the Master for inquiry but certainly upon a general reference as to title it would not be included. Being a matter of defence it should be raised in a defence and the defendant refused the opportunity given him to raise it. I think the appeal should be dismissed with costs. *Appeal dismissed.*

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COOP v. ROBERT SIMPSON Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. March 25, 1918.

NEW TRIAL (§ II—8)—COLLISION—DAMAGES—ACTION FOR—NEGLIGENCE—CONTRIBUTORY—INSTRUCTIONS TO JURY.

A person injured by more than one wrong-doer may maintain an action for the whole damage done to him against any of them.

In an action for damages under the Fatal Accidents Act for the death of a person killed in a collision between a motor-truck and a motor-cycle in the side car of which deceased was a passenger, the jury should be distinctly told that unless the deceased was guilty of some default on his part amounting to contributory negligence, he was not affected by the fact that the driver of the motor-cycle was guilty of negligence that caused the accident; and should be further instructed that they might find defendants guilty of negligence if the driver of the truck was guilty of any negligence that contributed to the accident, notwithstanding the fact that they found the driver of the motor-cycle also guilty of negligence.

Statement.

APPEAL by the plaintiff (the widow of Joseph Coop) from the judgment of HODGINS, J.A., at the trial, upon the findings of a jury, dismissing, without costs, an action, under the Fatal Accidents Act, to recover damages for the death of Joseph Coop, who was killed in a collision between a motor-truck of the defendants, driven by one Wooton, and a motor-cycle, owned and driven by one Lowry, in the side-car of which the deceased was sitting when the collision occurred, upon a street in the city of Toronto. The plaintiff alleged negligence on the part of the driver of the motor-truck. New trial ordered.

W. A. Skeans, for appellant.

Peter White, K.C., and *H. S. Sprague*, for defendants.

Clute, J.

CLUTE, J.:—Appeal from the judgment of Hodgins, J.A., on the findings of a jury, dated the 23rd November, 1917.

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The plaintiff is the widow of Joseph Coop, who was killed on the 9th July, 1917, in a collision at the corner of Gould and Victoria streets, in the city of Toronto. The plaintiff was a passenger in the side-car of a motor-cycle coming north on Victoria street, driven by one Lowry.

A motor-truck of the defendants was coming west on Gould street. The collision took place at the intersection of Gould and Victoria streets, within 6 or 7 feet of the north-west corner of the intersection. The driver of the motor-truck saw the motor-cycle approaching when about 30 feet south of the south side of Gould street, and the driver of the motor-cycle saw the truck when it was about an equal distance—two lengths—to the east of Victoria street.

The motor-truck had the right of way, and the accident was undoubtedly caused by the driver of the motor-cycle disregarding this fact. The law had only recently come into force, and he swears that he was not aware of it. The motor-truck slowed down slightly on approaching Victoria street. The motor-cycle, intending to go in front of the truck, increased its speed somewhat. It is said by the driver of the motor-cycle that, seeing the truck slow down, he assumed that it was going to stop so as to enable him to pass in front of it. The driver of the truck looked towards the north, as it was his duty to do, as under the law a motor-vehicle coming from that direction would have the right of way. The motor-cycle endeavoured to cross in front of the truck, and the right wheel of its side-car struck the left fore-wheel of the truck, throwing the plaintiff's husband, Joseph Coop, from the side-car and killing him. The driver of the truck did not sound his horn. He was travelling at a speed of about 13 miles an hour, according to his own statement, and he slowed down as he approached the intersection two or three miles per hour. There is other slight evidence of a person at a distance of some 200 feet, who stated that he was driving in a "rig" at 5 miles an hour, and that the car, in his opinion, was going four times as fast as he was.

It is said by one witness that the traffic was heavy on the street at the time.

The following are the questions put and the answers thereto:—

"1. Was the death of Joseph Coop caused by reason of a motor-vehicle on a highway? A. Yes.

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"2. If so, who was the owner and who was the driver of the motor-vehicle? A. Lowry.

"3. If the defendants, the Simpson company, were the owners of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death, has the evidence given in this case satisfied you that his death was not caused by the negligence or improper conduct of the driver of their motor-vehicle? A. Yes.

"4. If not so satisfied, was the accident caused by the negligence of the driver of the defendants' motor-vehicle causing or contributing to the accident? If guilty of any negligence, state fully in what that negligence consisted? A. No.

"5. Was the driver of the motor-cycle, in the car of which Joseph Coop was riding, guilty of any negligence causing or contributing to the accident? A. Yes.

"6. If so, what was that negligence? A. Not stopping or turning out of the way.

"7. If the driver of the motor-cycle was guilty of negligence causing or contributing to the accident, could the driver of the motor-vehicle owned by the defendants, the Simpson company, after he saw or ought to have seen and apprehended the danger, have done anything which would have prevented the accident? A. No.

"8. If so, what could he have done which he neglected to do? (Not answered).

"9. What damages, if any, has the plaintiff suffered, which the defendants, the Simpson company, should pay, by reason of the negligence of their driver, if you find that he was guilty of any negligence causing the accident? (Not answered)."

It will be seen that questions 1 and 2 are given with reference to sec. 23 of the Motor Vehicles Act, and with the object of ascertaining by whom the loss and damage was caused. Section 23 has reference to the onus of proof, and declares that when loss or damage is sustained by any person by reason of a motor-vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor-vehicle shall be upon the owner or driver. It will be observed that the answers given to questions 1 and 2 do not deal with the question of negligence, either of the driver of the motor-cycle or of the truck.

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The third question also is formulated with reference to sec. 23, and apparently was intended to be answered only "if the defendants, the Simpson company, were the owners of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death;" but the jury did not find that it was the motor-truck that caused his death. They found that it was the motor-cycle, driven by Lowry. This question, therefore, under the previous finding, did not call for an answer.

The Judge points out that if they are not so satisfied, then the 4th question is asked: "Was the accident caused by the negligence of the driver of the defendants' motor-vehicle causing or contributing to the accident?" And the jury answered "No;" and, by the answers to the 5th and 6th questions, they find that the driver of the motor-cycle was guilty of negligence causing or contributing to the accident by not stopping or turning out of the way; and, by the answer to question 7, they find that the driver of the defendants' truck, after he saw or ought to have seen and apprehended the danger, could not have done anything which would have prevented the accident.

The usual question—"Was the defendant guilty of negligence that caused the accident; if so, what was the negligence?"—was not asked.

As to the 5th question, the learned trial Judge says: "I ask that because it is yet uncertain, if he was guilty of negligence, how far that would affect the plaintiff in this accident;" that is, if the driver of the motor-cycle was guilty of negligence, would the deceased, riding as a passenger, be so affected thereby as to preclude his representative from recovery? This question is referred to by counsel (p. 99 of the evidence):—

"Mr. McRuer: Now, my Lord, in that fifth question, I think if your Lordship will read it again——

"His Lordship: Yes, that refers to the motor-cycle. Now you say you want it put in as to the truck?

"Mr. McRuer: Yes, my Lord.

"His Lordship: I am asking the third question. The onus is on them.

"Mr. McRuer: Taking out the question of the Motor Vehicles Act altogether, if these defendants were partially liable for the accident, then, according to the case I have submitted to your

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Lordship, and this decision of Chief Justice Meredith, we are entitled to recover against them.

"His Lordship: I do not know why.

"Mr. McRuer: I submit that that is the law.

"His Lordship: Let me see the case of Chief Justice Meredith. There is no reason that you should not have anything found that will be useful to you. I have no objection, but the questions are long enough and involved enough now. Where do you find that this case requires it?"

The learned counsel for the plaintiff then points out that, if the jury had the impression that the plaintiff must establish that the Robert Simpson Company driver was the sole cause of the accident, it would be unfair to the plaintiff. "We ought to ask them if the negligence of the driver of the Simpson company truck, in whole or in part, caused the accident."

"Mr. White: Your Lordship could use the same expression as is used in question 5, causing or contributing to the accident, and this was the phrase used in questions 4 and 5."

It will be observed that this conversation took place after the charge to the jury, and I do not find it anywhere stated in the charge that the plaintiff was entitled to recover, notwithstanding the negligence of Lowry, unless Joseph Coop in some way himself contributed to the accident: *Mills* v. *Armstrong, The Bernina*, 13 App. Cas. 1, overruling *Thorogood* v. *Bryan* (1849), 8 C.B. 115, and *Armstrong* v. *Lancashire and Yorkshire R.W. Co.* (1875), L.R. 10 Ex. 47, in which the doctrine of identification was held to defeat the plaintiff's claim.

In *Thorogood* v. *Bryan*, Coltman, J., said (p. 130):—

"It appears to me, that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that, if any injury results from their negligence, he must be considered a party to it."

And Vaughan Williams, J., said (p. 133):—

"I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by."

Lord Herschell in *Mills* v. *Armstrong, The Bernina*, 13 App. Cas. 1, quoting these observations, says (p. 7):—

"With the utmost respect for these eminent Judges, I must

say that I am unable to comprehend this doctrine of identification upon which they lay so much stress." And, referring to the judgment of Maule, J., in the *Thorogood* case, that the passenger selects the conveyance and must take the consequence of any default on the part of the driver whom he thought fit to trust, Lord Herschell proceeds (p. 8):—

"I confess I cannot concur in this reasoning. I do not think it well-foundèd either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter?" And again (p. 9): "If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, 'I am not guilty, because but for the negligence of another person the accident would not have happened.'"

The case proceeded throughout on the assumption that the negligence of the driver of the motor-cycle might affect the plaintiff's right to recover. I think the jury should have been distinctly told that, unless the deceased was guilty of some default on his part amounting to contributory negligence, he was not affected by the fact that the driver of the motor-cycle was guilty of negligence that caused the accident; and should have been further instructed that they might find the defendants guilty of negligence if the driver of the truck was guilty of any negligence that contributed to the accident, notwithstanding the fact that they found the driver of the motor-cycle also guilty of negligence.

The driver of the motor-truck did not sound his horn. The accident happened at an intersection in the central part of the city. There is evidence (Hopkins) that the traffic was heavy at the time. It was for the jury to consider whether the rate of speed, the omission to sound the horn, and the other surrounding circumstances, were such as to constitute negligence, notwithstanding the fact that the speed of the motor-truck was less than 15 miles an hour, and their attention should, I think, have been directed to the law bearing upon this question:—

Section 11 (2) of the Motor Vehicles Act: "Notwithstanding the provisions of sub-section 1," that is, as to the rate of speed within a city, "any person who drives a motor-vehicle on a highway recklessly or negligently, or at a speed or in a manner which is danger-

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ous to the public, having regard to all the circumstances, including the nature, condition and use of the highway and the amount of traffic which actually is at the time, or which might reasonably be expected to be on the highway, shall be guilty of an offence under this Act."

The conduct so described might amount to negligence if it was a contributing cause of the accident.

These further instructions to the jury were especially called for in this case, inasmuch as David Lowry, the driver of the motor-cycle, was indicted at the same Court for criminal negligence in connection with this accident. A true bill was found, and he was convicted. It was necessary, therefore, in my opinion, to guard the mind of the jury against associating the right of the plaintiff to recover with the guilt of the driver of the motor-cycle, Lowry.

After a careful reading of the evidence, one cannot but feel that it was rather a contest between the driver of the motor-cycle and the driver of the defendants' truck, and this is supported by the questions and answers, 1, 2, 5, and 6, which all had reference to Lowry, whereas Lowry's negligence should have been eliminated when dealing with the question as to whether or not the defendants were guilty of negligence which caused or contributed to the accident. It is quite true that the answers to questions 3 and 4, eliminating the introduction, are in effect findings against the plaintiff, and so is the answer to question 7, but they are so connected with the negligence of the driver of the motor-cycle that, without further instructions to the jury, they were in danger of treating the question as one wholly between the drivers of the motor-cycle and the defendants' truck. It could not but have been common knowledge to the jury, whether upon this panel or not, that Lowry had been tried and convicted of negligence in this accident at the same Court; and, notwithstanding the very careful charge of the learned trial Judge, and with great respect, I think the trial, in its essential feature, as above indicated, was unsatisfactory, and there ought to be a new trial.

Costs of the former trial and of this appeal to be costs in the cause.

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MULOCK, C.J. EX.:—This is an appeal from the judgment of Hodgins, J.A., who, on the findings of the jury, directed judgment for the defendant company. I have had the advantage of reading the judgment of my brother Clute, and agree with his conclusions. At the same time, I desire to express my views upon certain features of the case. The facts are so fully set forth in his judgment that it is unnecessary for me to do more than summarise those to which I may refer.

As the case goes back for a new trial, I abstain from a critical examination of the evidence, but refer to it only to the extent of indicating that there was evidence which would have supported a finding by the jury of negligence on the part of the defendants. Such evidently was the view of the learned trial Judge, for he did not withdraw the case from the jury.

It appears that one Lowry was driving a motor-cycle northerly along the easterly side of Victoria street, in the city of Toronto, and one Joseph Coop was a passenger with him in the motor-cycle. As Lowry approached Gould street, which intersects Victoria street at right angles, he observed the defendants' motor-truck at a point about 30 feet easterly of Victoria street, coming westerly along Gould street, and that it slackened speed and did not sound the gong. These two circumstances led Lowry to think that the driver of the truck, observing the movement of the motor-cycle, was conceding to him the right of way; and, accordingly, he accelerated his speed in order to cross Gould street in front of the truck. The truck, however, according to Lowry's evidence, then increased its speed, and as the two vehicles approached each other they both endeavoured to avoid a collision, the motor-cycle swerving to the left and the truck to the right; nevertheless they collided, the cycle striking the side of the truck, when Coop was killed by the impact.

Lowry swore that but for the motor-truck slowing down and omitting to sound the gong he could have avoided the accident.

There is also evidence from which the jury might have found that the truck approached Victoria street at an excessive speed, and thereby caused or contributed to the accident. Lowry in his evidence admitted negligence on his part and appeared to consider himself wholly responsible for the accident; but, even if his negligence was one of the causes of the accident, if the defendants also contributed to it, they also are answerable to the plaintiff.

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As said by Lord Esher in *The Bernina* (1887), 12 P.D. 58, 83, affirmed in the House of Lords, *Mills* v. *Armstrong*, *The Bernina*, 13 App. Cas. 1:—

"The rule of law is, that a person injured by more than one wrongdoer may maintain an action for the whole damage done to him against any of them."

In the same case at p. 99, Lopes, L.J., says:—

"A passenger in an omnibus, whose injury is caused by the joint negligence of that omnibus and another, may in my opinion maintain an action, either against the owner of the omnibus in which he was carried, or the other omnibus, or both."

In *Mathews* v. *London Street Tramways Co.*, 5 Times L.R. 3, the plaintiff was a passenger in an omnibus which collided with a car of the defendant company, whereby the plaintiff was injured; and, following *The Bernina* case, it was held that as a matter of law it should have been made clear to the jury that the question for them was, "Did the negligence of the tram-car, in whole or in part, cause the accident?" And the fact that the omnibus was also negligent mattered not, and was no answer to the plaintiff's claim.

In the present case the jury was not instructed that negligence on the part of Lowry would not relieve the defendants from liability, if they by any negligence on their part had also contributed to the accident. The effect of the charge rather was that the jury must determine which party, Lowry or the defendants, was guilty of the negligence which caused the accident, whereas they should have been instructed that, if the defendants by their negligence contributed to the accident, Lowry's negligence would not relieve them from liability, and that, in their relation to the plaintiff, each by negligently contributing to the accident is a wrongdoer.

When the combined negligence of different persons causes injury to an innocent person, there are no degrees of liability, but each is liable as a principal to the person so injured.

There were also present in this case circumstances which, I think, made it specially important that the jury should not have been left in any doubt that Lowry's negligence could not excuse any negligence by the defendants which caused or contributed to the accident.

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It appears that at the Toronto assizes, held in the month of November, 1917, Lowry and Wooton, the driver of the defendants' motor-truck, were indicted for manslaughter in having caused Coop's death. The grand jury did not find a true bill against Wooton, but they did against Lowry, and on the 16th November he was tried for manslaughter and found guilty. On the 22nd November, at the same assizes, this action was tried with a jury, and three of the jurymen who were on the jury which tried Lowry were on the jury in this action.

It may be fairly assumed, I think, that the entire panel was aware that Lowry had been found guilty of manslaughter, and that no bill had been found against Wooton, and it is not improbable that these two circumstances created the impression on the minds of the jury that, as regards civil liability, Lowry alone would be liable. Inasmuch as the civil action arose out of the same occurrence as did the criminal prosecution, it would, I think, have been expedient to postpone the civil trial until a future assize. That course, however, not having been adopted, it was the more advisable that any juryman who tried Lowry should not serve on the jury in this case. The lay-mind was in great danger of assuming that the conviction of Lowry and failure to find a true bill against Wooton meant that no civil liability attached to the defendant company. Thus, at the commencement of the trial, it is probable that at least three of the jurymen were biased in the defendants' favour.

Under these circumstances, it was, I think, the more important that the jury should have been clearly instructed by the trial Judge that the criminal proceedings determined nothing in regard to the defendants' civil liability; and therefore that if, by any negligence on their part, they had contributed to the accident, they were liable, even if Lowry was negligent in a still greater degree.

For these reasons, I agree with my brother Clute that there should be a new trial.

SUTHERLAND, J., concurred.

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KELLY, J.:—I agree that there should be a new trial, and that the appeal should be allowed accordingly.

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Sufficient facts for an understanding of how and where the accident happened have been set out in the judgments of his Lordship the Chief Justice and of my brother Clute.

The question whether there was any negligence of the driver of the defendants' motor-truck which caused or contributed to the occurrence in which Coop met his death, should, in my opinion, have been put direct to the jury; or in any event they should have been plainly told that a finding (if they reached that stage) that Lowry, the driver of the motor-cycle, was guilty of negligence which caused or contributed to the accident, would not necessarily exclude negligence of the driver of the motor-truck contributing to the accident.

The jury, in their answers to the first and second questions, committed themselves to the conclusion that Coop's death was caused by reason of a motor-vehicle on the highway, of which vehicle Lowry was the owner and driver. These questions were not directly and exclusively aimed at ascertaining whose the negligence (if any) was, and it is possible that, in the absence of an express direction or of the direct question I have referred to, they may not have been aware that, if the evidence so warranted it, it was open to them to find negligence by both drivers; or they may have believed that, having found that Coop's death was caused by reason of a motor-vehicle on a highway and that Lowry was the owner and driver of that vehicle, they were precluded from a finding of any negligence by the driver of the motor-truck to which liability would attach.

Having regard to this and to Coop's position at the time—a mere passenger in a vehicle, over which, or over the driver of which, he had no control—the proper test of liability in such a case was not applied. That test is: was there negligence on the part of the driver of the vehicle which collided with that in which Coop was travelling which wholly or in part caused the accident? A question to that effect was proper to submit to the jury: *Mathews* v. *London Street Tramways Co.*, 5 Times L.R. 3.

In answering that question, had it been put to them, it would have been a proper matter for the jury's consideration whether, in the circumstances that arose, the proper course would have been for the driver of the motor-truck, in the exercise of reasonable care, to have sounded his horn, even though he had by law the

right of way over the motor-cycle. If there was any such duty resting upon him, and had he, as a precaution against accident, sounded his horn as a warning of his approach, it may have been that Coop, being so warned, could have done some act to protect himself against the impending danger. Lowry says he saw the motor-truck approaching, but there is no evidence that Coop saw it.

I agree, too, that there was grave danger that the members of the jury, or some of them at least, may not have been altogether free from impressions created by the knowledge they must have had (their duty called for their presence in Court down to the time of the trial) of the result of the criminal prosecution arising out of the same occurrence, in which Lowry was held liable.

We are unable to say whether they were affected by that result, but the danger was such that it seems to me that, for that very reason, as well, the safe course is to be found in directing a new trial.

Riddell, J.

RIDDELL, J.:—This was an action under the Fatal Accidents Act, R.S.O. 1914, ch. 151. The deceased, a man of 57 years of age, was, on the afternoon of the 9th July, about 4 o'clock, being carried north on Victoria street, Toronto, in the side-car of a motor-cycle, driven by one Lowry—a lad being seated behind the driver. On Gould street, at this time, there was a motor-truck belonging to the defendants, moving westward, under the guidance of one Wooton. At the intersection of the two streets, the motor-cycle struck the truck, the side-car wheel of the cycle striking the left front wheel of the truck; the deceased was killed in the collision.

The plaintiff, his widow, brought this action, relying upon the said Act, ch. 151—appealing also at the trial to the provisions of the Motor Vehicles Act, R.S.O. 1914, ch. 207. The action was tried before Mr. Justice Hodgins and a jury, when, on answers by the jury to questions, my learned brother dismissed the action. The plaintiff now appeals and asks for a new trial.

Some of the grounds of appeal are wholly novel in my experience, being based upon alleged facts not appearing in evidence and not verified in any way before us.

The facts are said to be that both Lowry and Wooton were

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committed for trial for the accident (I presume for manslaughter); that a true bill was found against Lowry, and he was convicted and fined, but the bill against Wooton was ignored by the grand jury—counsel for the defence in the present case having been Crown counsel. It is said that these proceedings took place at the same assizes, which was also an oyer and terminer, and that some of the jurors who convicted Lowry were on the jury in the present case.

(1) The first ground of this motion for a new trial is the presence of these jurymen. If these jurors should not have been on this jury, they were liable to a challenge *propter affectum*, either a principal challenge or to the favour. The grounds of such challenge are set out in Blackstone's Comm., Bk. III., p. 363, and Courts in England and the United States have followed the language of the Commentator with great fidelity. One of the grounds for a principal challenge *propter affectum* is, that the juror had previously been a juror in the same cause (e.g., a grand juryman who took part in finding the bill). Had this been the fact here, the juryman would be liable to be examined on a *voir dire*. But, while these jurymen had found that the negligence of Lowry had caused the death of Coop, this did not prevent them from holding that Wooton contributed to—and therefore caused—the accident. The challenge then would be a challenge to the favour, and the indifference of the jurors would be determined by triers.

Whether or not a challenge would have been successful we need not inquire—it is clear that in the ordinary case objection must be taken before the juror is sworn. If, indeed, the fact be not known at the time the juror is sworn, the objection may be taken afterwards: *State* v. *Tuller* (1867), 31 Conn. 280—see p. 294. But, if the party knows of the objection before the juror is sworn, and does not object, having exercised and depended on his own judgment, he will be considered to have waived the objection, and will not be granted a new trial on that ground: *Brown* v. *Sheppard* (1856), 13 U.C.R. 178; *Richardson* v. *Canada West Farmers' Insurance Co.* (1867), 17 U.C.C.P. 341; *Power* v. *Ruttan* (1836), 5 U.C.R. (O.S.) 132; *Shipman* v. *Bermingham* (1837), 5 U.C.R. (O.S.) 442.

If the objection to the juror appear after he is sworn, the

party may ask to have the jury discharged, or he may refuse go on further with the trial; he may then have relief in a proper case. Objection must be taken before verdict: *Doe d. Ashburnham* v. *Michael* (1851), 16 Q.B. 620. But, if he elects to go on and takes his chance before the jury, he cannot have a new trial in case the verdict goes against him: *Ham* v. *Lasher* (1862), 24 U.C.R. 533 (n.); *Widder* v. *Buffalo and Lake Huron R.W. Co.* (1865), 24 U.C.R. 520. And knowledge of counsel is in such a case knowledge of the client: *State* v. *Tuller*, 31 Conn. 280. Several American cases to the same effect are given in *Dilworth* v. *Commonwealth* (1855), 12 Gratt. (Virginia) 689, at pp. 692 *sqq.* Graham & Waterman on New Trials, vol. 2, p. 178 *sqq.*, have an elaborate dissertation on the subject, which may be consulted.

The fact that counsel's not insisting on an objection is due to deference to the trial Judge is of no significance: *Wood* v. *McPherson* (1888), 17 O.R. 163. In my experience, this excuse for not insisting on the rights of the client has in practically every case been wholly fictitious. It is the duty of counsel to insist courteously but firmly on the rights of his client, and he has no right to disregard that duty—I have found in my experience that such duty is well performed, as it should be. After the jury in the present case had been sworn, the following took place:—

"Mr. Skeans: My Lord, this case has practically been before the jury at the present assize, and a number of them, I understand, were sitting on the other case. I don't know whether that is an objection or not.

"His Lordship: I suppose you have the right to object to them. If you want to object to any of them, do so.

"Mr. White: Not now.

"Mr. Skeans: I do not want to object on that ground. Perhaps I should mention it.

"His Lordship: I am perfectly satisfied with the jury if you are.

"Mr. Skeans: I just mention it, that some of them, if not all, have had it before them and passed upon it in a criminal case, in which my learned friend was Crown prosecutor.

"His Lordship: Are you objecting?

"Mr. Skeans: I am not objecting. I leave that to your Lordship.

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"His Lordship: It is something which I have not anything to do with. The jury is selected by ballot.

"Mr. Skeans: I do not care to make an objection on that ground; I merely mention it to your Lordship."

It will be seen that counsel was asked more than once if he was objecting—in effect, was invited to object—and that he expressly said he was not objecting. The jury being sworn, the parties were entitled to have the case tried by that jury, unless there should be an objection raised. It was no part of the duty of the trial Judge to interfere with the jury except on legal grounds: had he interfered without the consent of both parties, there would have been good reason for complaint. It is not to be forgotten that the Court does not sit to do retributive justice, but justice according to law: and that the Court is not called upon to enforce any rights either party may raise, unless he asks for its enforcement. Every litigant should be allowed to claim what he wants and conduct his case as he wishes (so long as this is in accordance with law); and, in my opinion, a trial Judge has no more right, without consent, to raise an objection to a juryman which neither party wishes to take the responsibility of, than he would have to call without consent a witness whom neither party would take the responsibility of calling—as to which see *In re Enoch and Zaretzky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327 (C.A.), especially at p. 333.

I am of opinion that my learned brother acted most properly and legally: and that the plaintiff has lost any right she might have had to complain.

It looks very much as if the whole episode was a bit of by-play intended to induce the jurors to be so fair that they would (in common parlance) "lean backwards."

(2) At the close of the plaintiff's case, Mr. Skeans said he wished to have the coroner's inquest verdict put in. Mr. White stated that he had no objection. After some skirmishing, Mr. Skeans put his request thus: "I wish it produced if it is admissible;" and my learned brother said, "I am afraid I shall have to rule it is not." Taking this as an express ruling, I have no doubt that it is right. Previous verdicts even between the same parties are not evidence: *O'Connor* v. *Malone* (1839), 6 Cl. & F. 572 (see the many cases cited in the note on p. 572 of Perkins' American

edition of Clark & Finnelly, Boston, 1873): and *à fortiori* verdicts between different parties.

Then counsel took up the "indictment of the two men in this Court . . . to shew that both of these men were indicted by the Crown for negligence." It is plain, apart from the technical objection to produce an indictment, that the learned Judge was right in refusing to compel the production of the indictments.

Moreover, it is hard to see what good the plaintiff could have derived from them—they would shew that Lowry had been convicted by a jury for killing the plaintiff's husband, and that the grand jury had thought there was not evidence sufficient to put Wooton on his trial—how that would tend to establish the negligence of Wooton I fail to understand.

It is to be borne in mind that all the references to the criminal proceedings were by the plaintiff's counsel; the defendants made them no part of their case—there could be no "set-off of irregularities" to entitle the plaintiff to complain of the exclusion of evidence of these proceedings.

(3) Then some complaint is made of the form of question 1—I am not at all sure that I understand the objection, but it seems to be as follows. Questions 1 and 2 (with the answers) are as follows:—

"1. Was the death of Joseph Coop caused by reason of a motor-vehicle on a highway?" A. Yes.

"2. If so, who was the owner and who was the driver of the motor-vehicle? A. Lowry."

It is said that these questions limit the jury to find that only one motor-vehicle on a highway caused the death of Joseph Coop—the reading of the questions themselves answers this objection: it was quite open to the jury to find that both vehicles caused the death.

(4) It is contended that the learned Judge did not charge correctly or sufficiently on the question of onus, as laid down by the Motor Vehicles Act, sec. 23. No objection was taken to the charge, nor, as I think, could there be. The charge reads:—

"The third question is: 'If the defendants, the Simpson company, were the owners of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death, has the evidence given in this case satisfied

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you that his death was not caused by the negligence or improper conduct of the driver of their motor-vehicle?' The statute says that, when loss or damage is sustained by any person by reason of a motor-vehicle on a highway, the owner of that vehicle must satisfy the onus of shewing that the loss or damage did not arise through the negligence or improper conduct of himself or of the driver. You are entitled to take the whole of the evidence into consideration there; it is not the mere question whether the evidence they alone gave would be sufficient to satisfy you. You may say upon the whole case if they have satisfied you to that effect."

The form of the question is proper: I have employed it myself when sitting at *nisi prius*, and I think it fairest to the plaintiff. The chargè as to onus is accurate and clear—so much so as to satisfy counsel at the trial, whose duty it was, if he thought it defective in any way, to bring the matter to the attention of the trial Judge.

(5) Something is attempted to be made of the supposed error of the trial Judge in considering Coop identified with Lowry—the plain answer to this objection is, that my brother was endeavouring to meet every possible view of the law by having the jury determine every fact which, in any view of the law, might be relevant—all the jury had to pass upon was the fact, which had no relation to the question of law. This is what was said:—

"The next question is: 'Was the driver of the motor-cycle, in the car of which Joseph Coop was riding, guilty of any negligence causing or contributing to the accident?' I ask that because it is yet uncertain, if he was guilty of negligence, how far that would affect the plaintiff in this accident. Then I ask, 'If so, what was that negligence?'"

My learned brother did not tell the jury what the law was; and, if he did, the jury were not questioned about Coop, but about Lowry—no suggestion of identification could possibly affect the finding as to the negligence of Lowry.

(6) The case seems to have been fairly tried, and there is no reason for interfering with the findings of the jury.

The questions and answers succeeding Nos. 1 and 2 are as follows:—

"3. If the defendants, the Simpson company, were the owners

of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death, has the evidence given in this case satisfied you that his death was not caused by the negligence or improper conduct of the driver of their motor-vehicle? A. Yes.

"4. If not so satisfied, was the accident caused by the negligence of the driver of the defendants' motor-vehicle causing or contributing to the accident? If guilty of negligence, state fully in what that negligence consisted? A. No.

"5. Was the driver of the motor-cycle, in the car of which Joseph Coop was riding, guilty of any negligence causing or contributing to the accident? A. Yes.

"6. If so, what was that negligence? A. Not stopping or turning out of the way.

"7. If the driver of the motor-cycle was guilty of negligence causing or contributing to the accident, could the driver of the motor-vehicle owned by the defendants, the Simpson company, after he saw or ought to have seen and apprehended the danger, have done anything which would have prevented the accident? A. No.

"8. If so, what could he have done which he neglected to do? (Not answered).

"9. What damages, if any, has the plaintiff suffered, which the defendants, the Simpson company, should pay, by reason of the negligence of their driver, if you find that he was guilty of any negligence causing the accident? (Not answered)."

These may not all have been necessary; but the plaintiff could not be prejudiced by any of them; and, on the answers, the defendants were entitled to judgment.

I would dismiss the appeal with costs.

New trial ordered; RIDDELL, J., *dissenting.*

THE KING ex rel DUMAS v. LECLAIR.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Fullerton, JJ.A. July 8, 1918.

OFFICERS (§ II—10)—MUNICIPAL ELECTIONS ACT (MAN.)—DISQUALIFICATION—ELIGIBILITY FOR ELECTION—PETITION—QUO WARRANTO.

Section 192 (*b*) of the Manitoba Municipal Elections Act refers not only to persons who are "disqualified" under ss. 53-57 but also to persons who lack the qualifications necessary under s. 52 to make them eligible for election.

Where proceedings are taken after an election to unseat a municipal officer on the ground of want of qualification, such proceedings should be by way of petition and not of *quo warranto.*

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APPEAL from the judgment of Galt, J. dismissing an action by way of *quo warranto* against a rural municipal councillor. Affirmed.

J. B. Hugg, K.C., and *H. N. Baker*, for appellant (Dumas); *A. E. Hoskin*, K.C., for respondent.

The judgment of the court was delivered by

PERDUE, C.J.—The respondent Michael Oliver LeClair was elected as a councillor for ward 6 of the Rural Municipality of Fort Garry for the years 1918-1919. The election was held on December 4, 1917. He afterwards took the required declarations and has acted as a councillor for the above ward. No petition against the election of LeClair was presented under the Municipal Act, R.S.M. 1913, c. 133, ss. 192-205, and the time for presenting a petition had elapsed before the present proceedings were initiated. The relator, Dumas, admits that he was not an elector of ward 6 and that he had not voted and had not a right to vote at the election of LeClair, but states that he is "subject to the government of said council."

On March 25, 1918, an order was made by Macdonald, J., giving leave to the relator to issue an information in the nature of a *quo warranto* against LeClair requiring him to shew by what authority he exercised the office of councilman of the aforesaid ward 6. An information was then issued in pursuance of the above order. The only particulars of the grounds upon which the election is questioned appear in the affidavit of the relator. They are that the respondent was not eligible for election as a councillor because (1) he was not able to read the English language and write it from dictation (Mun. Act, s. 52, as amended by 6 Geo. V. c. 72, s. 1); (2) that he was not at the time of the election the owner of freehold real estate within the municipality to the value of $200 (Mun. Act, s. 52, as amended by 7 Geo. V. c. 57, s. 6). The respondent filed his defence to the information. In the second and third paragraphs of the defence, the respondent denied the jurisdiction by way of information and objected that such proceedings do not lie by reason of the provisions of the Municipal Act. On April 16, 1918, the referee in Chambers on the application of the relator made an order, under r. 466 of the King's Bench Act, directing that the questions of law raised under the second and third paragraphs of the defence should be heard and decided before a judge in court. The above questions were not accordingly argued before Galt, J., who decided that there was

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jurisdiction to maintain or prosecute the information against LeClair.

On the argument the point was raised that any objection to the jurisdiction should have been taken by moving against, or appealing from, the order of Macdonald, J. It was, however, agreed that the motion before the court should be treated as if it were an appeal from the order giving leave to issue the information, and that all subsequent proceedings should be considered as before this court to be reviewed and dealt with as to the court might seem proper, the object being to determine the question whether proceedings by way of *quo warranto* lay in this case.

S. 192 of the Municipal Act is as follows:—

192. A municipal election may be questioned by an election petition on the ground—

(*a*) that the election was wholly voided by corrupt practices or offences against s. 250 or s. 252 committed at the election; or

(*b*) that the person whose election is questioned was at the time of the election disqualified; or

(*c*) that he was not duly elected by a majority of lawful votes.

By s. 193 of the same Act—

A municipal election shall not be questioned on any of the above grounds, except by an election petition.

Such petition must be presented within twenty-one days after the day on which the election was held: s. 197.

The grounds upon which the relator claims that the election is void is want of the qualifications mentioned in s. 52 which are required to make persons eligible for election to the office. Under that section it is necessary that the candidate should be qualified as provided and should be also "not subject to any disqualification under this Act." S. 53 and following sections, under the heading "Disqualifications," mention certain persons and classes of persons who are disqualified from holding the office of councillor, and mention also certain matters which work a disqualification. The question arises whether sub-s. (*b*) of s. 192 refers not only to persons who are "disqualified" under ss. 53-57, but also to persons who lack the qualifications necessary under s. 52 to make them eligible for election. I think that the sub-section was intended to refer to both these classes of persons, namely, those who are disqualified by some circumstances, and those who fail to meet the requirements for qualification. S. 226, which is one of the sections dealing with the presentation and trial of the petition and with the judgment thereon, declares that "any person unseated on the ground of want of property qualification" shall not be a candidate

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at the election held to fill the vacancy, clearly shewing that want of property qualification is a ground for a petition. It would follow that the lack of other qualifications prescribed by the Act would also have the same effect.

It was argued for the relator that where a continuing disqualification exists proceedings by way of *quo warranto* may be invoked after the time for filing a petition has elapsed. In support of this proposition the case of *De Souza* v. *Cobden*, [1891] 1 Q.B. 687, was cited. S. 87 of the English Act (45 & 46 Vict. c. 50) contains provisions similar to those contained in our s. 192. In the case cited the defendant, a woman, was elected a member of a county council and 12 months elapsed without any steps being taken to question her election. By s. 73 of the English Act, every municipal election not called in question by petition or *quo warranto* within 12 months after the election shall be deemed a good and valid election. After the expiration of the 12 months, the defendant acted on several occasions as a member of the council. The suit was brought to recover the penalties under s. 41 of the Act, which imposes a penalty on a person who acts in office while disqualified. It was held that the defendant, being a woman, was disqualified from holding the office and was liable to the penalties for acting when disqualified, notwithstanding the provisions contained in s. 73.

I do not see how *De Souza* v. *Cobden*, *supra*, applies to the present case. This is not an action for a penalty. The intention of the proceedings is to void an election of a councillor on the ground of disqualification. The Act provides the remedy to be applied in such a case. The election may be questioned on that ground by a petition under s. 192 and subsequent sections of the Act, but by no other means (s. 193).

It was clearly the intention of the Municipal Act that when an election was questioned on any of the grounds mentioned in s. 192, the procedure should be by petition alone. Where, after election, a member of a municipal council forfeits his seat or becomes disqualified to hold his seat, proceedings to unseat him may be taken under ss. 192-249, which are made applicable for the purpose: see s. 179. There is the further circumstance that security for costs has to be furnished by the petitioner where a petition is filed (s. 198) while no security is required in *quo warranto* proceedings.

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Cases may arise which are not covered by s. 192, and in such cases leave may be granted to proceed by way of *quo warranto*: *Tod* v. *Mayer*, 1 D.L.R. 565, 22 Man. L.R. 136. But if there is a remedy by petition, then there is no remedy by *quo warranto*: *The Queen* v. *Morton*, [1892] 1 Q.B. 39; *The King* v. *Beer*, [1903] 2 K.B. 693.

For the reasons given I think that leave should not have been granted to issue the information and that the order of March 25, 1918, granting the leave, and all proceedings taken under it, should be set aside.

The relator, Dumas, should pay to the respondent, LeClair, the costs of this appeal. *Judgment accordingly.*

SMITH v. CITY OF REGINA.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Elwood, JJ.A. July 15, 1918.

NEGLIGENCE (§ II F—120)—INJURY BY COLLISION WITH STREET CAR—PLAINTIFF AND DEFENDANT BOTH RESPONSIBLE — ULTIMATE NEGLIGENCE.

A plaintiff cannot recover damages for injuries received where the responsibility for the accident has been placed upon both the plaintiff and the defendant, and the defendant could not by the exercise of reasonable care after it became aware of the danger to the plaintiff have avoided the accident.

[See annotations 40 D.L.R. 103; 1 D.L.R. 783.]

Statement.

APPEAL from Lamont, J., 34 D.L.R. 238, dismissing an action for damages for injuries sustained in a collision. Affirmed.

P. M. Anderson, for appellant; *G. F. Blair*, K.C., for respondent.

The judgment of the court was delivered by

Newlands, J.A.

NEWLANDS, J.A.:—The facts in this case are stated by the trial judge as follows:—

The plaintiff was proceeding in his automobile from west to east along 12th Ave., Regina. When he reached Albert St., where it is crossed by 12th Ave., he brought his automobile to a stop to allow a street car belonging to the defendants to pass. This car was proceeding along Albert St. from north to south. Albert St. is 90 ft. wide and has a double track for the defendants' street railway. This the plaintiff knew, and knew that cars were operated on both tracks. After the defendants' south bound car had passed, the plaintiff started his automobile across the track without looking to see if a car was approaching on the other track. On that track a north bound car was approaching, and as the front of the automobile reached the track it was struck by the north bound car. The automobile was considerably damaged and the plaintiff received a cut on his forehead.

The motorman said that he saw the plaintiff when he was about 25 ft. from 12th Ave., and that he checked the speed of the car, but that he thought the plaintiff would not attempt to cross in front of his car. He testified that it was customary for pedestrians and automobiles to come quite close to the

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track and there wait until the car would pass, and that this is what he expected the plaintiff to do. He further said that it was not until he was within about ten feet of the plaintiff that he began to be afraid of an accident, then he immediately applied the emergency brake but notwithstanding a collision occurred.

Questions were submitted to the jury, and their answers are that defendants were guilty of negligence:—

In the motorman running his car at a higher rate of speed than was really safe while passing a south bound car so near the intersection of 12th Avenue and Albert Street.

That the plaintiff was also guilty of negligence which caused or helped to cause the collision, "In not taking proper precaution in crossing the street and looking for any north bound traffic." That the motorman could not by the exercise of reasonable care after he became aware of the danger to the plaintiff have avoided the accident.

To use the language of Lord Sumner in *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, at 5, [1916] 1 A.C. 719, at 722:—

If the matter stopped there, his administrators' action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

But other questions were answered by the jury which make the case one of some difficulty to decide. They were:—

Q. At the time of the collision was the street car going at a reasonable rate of speed? A. No. Q. If not, could the street car have been stopped between the time the motorman first realized the plaintiff's danger and the time of the collision, had the car been going at a reasonable rate of speed? A. Yes.

The trial judge held that these last answers did not bring this case within the decision of the *Loach* case and gave judgment for defendants.

The law applicable to this case is well settled. To quote again from the decision of Lord Sumner in the *Loach* case, 23 D.L.R. 4, at 7:—

The consequences of the deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff* v. *Warman*, 5 C.B. N.S. 573, at 585, his contributory negligence will not disentitle him to recover "if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

This case differs from the *Loach* case in that the negligence of the plaintiff continued up to the moment of the accident, in that

he continued to drive his car until he met the street car and the accident happened. And on that ground, as well as others, this case differs from the *B.C. Electric R. Co.* v. *Loach, supra*, and the *Columbia Bithulitic Ltd.* v. *B.C. Electric R. Co.*, 37 D.L.R. 64, 55 Can. S.C.R. 1.

Other marked differences are, that the street car was only 25 ft. from the point of collision when the motorman first saw the plaintiff crossing the street; that plaintiff was not on the street railway track but only advancing towards it, and that the motorman thought that plaintiff would stop before he reached the track and allow the street car to pass.

It is contended on behalf of the plaintiff that the answers to the last two questions bring the case within the decisions of the *B.C. Electric R. Co.* v. *Loach* and the *Columbia Bithulitic Ltd.* v. *B.C. Electric R. Co.* I am, however, of the opinion that the previous answer of the jury, that the motorman, after he became aware of the danger to the plaintiff, could not, by the exercise of reasonable care, have avoided the accident, nullifies the later answers.

Though the "motorman was running his car at a higher rate of speed than was really safe while passing a south bound car so near the intersection of 12th Avenue and Albert St.," it was immediately after the passing of this south bound car that the accident took place, and therefore their further answer—after saying that the motorman could not, after becoming aware of the plaintiff's danger, by the exercise of reasonable care, have avoided the accident—that the street car could have been stopped between the time the motorman first realised the plaintiff's danger and the time of the collision had the car been going at a reasonable rate of speed, is to say, in another way, that if there had been no negligence on the part of the defendant there would have been no accident. I have no doubt that if they had been asked the further question, "Could the plaintiff have stopped his car if he had seen the street car approaching?"—and if he had been looking he would have seen it—they would have answered "Yes" to that question also. From the evidence there is no doubt the plaintiff could have stopped his car if he had seen the street car, because he had stopped and only started to cross the street after the south bound street car passed.

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If neither party had been negligent there would have been no accident. The question for the jury to decide was, who was responsible for the accident. We have the answers they gave to the questions asked them, and we have to decide from those answers upon whom the jury has placed the blame.

To again quote from the *Loach* case, at p. 11:—

> In the present case their Lordships are clearly of the opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility,

and, in this case, I am of the opinion that upon the answers which they returned, reasonably construed, the responsibility for the accident has been placed upon both the plaintiff and the defendants, and as the defendants could not by the exercise of reasonable care, after they became aware of the danger to the plaintiff, have avoided the accident, the appeal should be dismissed with costs.

Appeal dismissed.

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REX v. FOX.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Simmons and Hyndman, JJ. September 26, 1918.

STATUTES (§ II—96)—LIQUOR ACT, ALTA.—REPEAL, S. 40—EFFECT.

The repeal of s. 40 of the Liquor Act (Alta.) as it stood in 1917 and the substitution of the new s. 40 of 1918 has the effect of confining within the new section a conviction against s. 23 before the defendant can be charged with having committed a second offence.

Statement.

APPEAL from the refusal of the Chief Justice to quash a conviction for selling liquor contrary to the Liquor Act. Reversed.

R. E. McLaughlin, for the Crown; *Gordon Winkler*, for the accused.

Stuart, J.

STUART, J.:—The facts of this case are fully set forth in the judgment of Beck, J., which I have had the advantage of reading. Essentially the point seems to me to be whether, when the defendant was convicted on June 8, 1917, he can really be said to have then been made subject to a first conviction under the present s. 40 of the Act, because unless he was, then the conviction now under review clearly cannot be said to be a second one under the section. This would appear to me to be a somewhat clearer aspect from which to view the matter although of course in substance it is the same thing as enquiring whether the present conviction is a second one.

Now one thing is certainly plain, viz., that if there had been a

still antecedent conviction prior to the first one of June 8, 1917, the latter could not possibly at that time have been considered a second conviction "under this section" so as to involve imprisonment as a penalty. There not having been such antecedent conviction can that conviction then be considered a first one "under this section?"

After all it simply comes to this: Do the words "under this section" mean "under this section as it now stands" or "under this section of the Act which bears the number 40 in whatever form it may have heretofore appeared."

In *Dickenson* v. *Fletcher*, L.R. 9 C.P. 1, Brett, J., at p. 7, said:—

> Those who contend that the penalty may be inflicted must shew that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.

I think this is true of the present case with regard to the penalty of imprisonment. Even assuming that a section which imposes imprisonment for a second offence could merely as reasonably be called an identical section with one which being otherwise the same imposes only a pecuniary penalty therefor as it could be reasonably called a different section, it seems to me that this uncertainty should favour the accused.

I think there is nothing in this view inconsistent with what was said by the Chief Justice in *Rex* v. *Clarke*, 41 D.L.R. 713, in which I concurred. After a careful perusal of the provisions of the Interpretation Act referred to by Simmons, J., I am unable to conclude that they have any application to the circumstances of this case.

I cannot bring myself to consider any argument *ab inconvenienti*. The conviction is not entirely quashed. The man will be punished and it is a *malum prohibitum* only, not a *malum in se*.

When the legislature says that it *repeals* a penal section and *substitutes* therefor another one with a very material alteration in an important particular I see no reason why the court should be astute to find reasons for saying that a conviction under the repealed section was a conviction also under the substituted one when the substitution took place after that conviction. The fact that the legislature did not say what it meant is no very good reason for not holding that it meant what it said. Either the two sections are the same section or they are different ones. If they

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are the same, why the necessity for the formality and trouble of substitution? If they are different, then obviously the appellant succeeds. I think they are different sections and are not the same thing at all.

I would allow the appeal and impose a fine of $200 and, in default, imprisonment for 3 months with hard labour.

BECK, J.:—This is an appeal from the Chief Justice's order refusing to quash a conviction on *certiorari*. The appellant was convicted under the Liquor Act of unlawfully keeping intoxicating liquor for sale. The section prohibiting this is s. 23 which is merely a prohibitive enactment.

S. 40, as it stood in the original Act (c. 4, of. 1916), provided that:—

For every offence against this Act or any of the provisions thereof, for which a penalty has not been specially provided by this Act, the person committing the offence shall be liable on summary conviction to a penalty for the first offence (a fine) and for the second offence (a fine); and for any subsequent offence to imprisonment for not less than three months nor more than 6 months, without the option of a fine.

S. 40 was repealed by c. 22 of 1917 and the following section substituted:—

For every offence referred to in s. 23 of this Act or any of the provisions hereof, the person committing the offence shall be liable on summary conviction to a penalty:

For the first offence (a fine larger than the original Act imposed).

For a second offence (a fine larger than the original Act imposed).

For each subsequent offence to imprisonment for not less than 3 months nor more than 6 months, without the option of a fine; and the imprisonment, in each case, shall be with hard labour.

By the same amending Act, s. 40 (*a*) was added, providing for penalties for breaches of any other provisions of the Act than those contained in s. 23.

Again by c. 4 of 1918, s. 55 (12), s. 40 was repealed and the following was substituted:—

Any person offending against the provisions of s. 23 of this Act shall be liable upon a summary conviction to the following penalties, that is to say:

1. Upon a first conviction to (*a*) a fine of not less than $100 nor more than $200 and costs, and in default of payment thereof to imprisonment with hard labour for a period of not more than 3 months (this is the same as in the 1917 Act), or alternatively.—

2. Upon conviction for any offence committed subsequently to a first conviction *under this section*, to imprisonment with hard labour for a period of not less than 3 months nor more than 6 months and without the option of a fine.

By the same Act s. 40 (*a*) was repealed and a new section substituted. It is not necessary to quote it in full but to call attention, for the purpose of contrast with the latest s. 40, to its wording, in so far as it relates to a second and to subsequent offences. These portions read as follows:—

2. Upon conviction for any offence committed subsequently to a first conviction (in this section called a second offence) to a fine. . . .

3. Upon conviction for any offence committed subsequently to a conviction for a second offence to imprisonment with hard labour for a period . . . without the option of a fine.

The appellant had a little over a year before been convicted of an offence against s. 23. This was before the amendment of s. 40 in 1918. Being convicted of a second offence against the same section and the first conviction having been proved, the magistrate ordered his imprisonment without the option of a fine, and the question is whether he had jurisdiction to do so.

Reading ss. 23 and 40, the proper view, in my opinion, is that *the conviction is made under s. 40 for an offence against s. 23.* The expression, therefore, "under this section" in the clause numbered 2 of s. 40 substituted in 1918 is, in my opinion, perfectly correct.

The question vigorously argued before us and which has called for very serious and continued consideration upon our part is, what is the sense of these words, "under this section?"

No such expression is used in s. 40 as it stood in the Act of 1917 nor in s. 40 (*a*) as it appears in the Acts of 1917 and 1918, though the wording of these other sections provided an equally appropriate place for its insertion and s. 40 (*a*) follows immediately s. 40 in the Act of 1918. Either the words "under this section" appearing in clause 2 of s. 40 of 1918 are absolutely without meaning, carelessly, unintelligently inserted, apparently by the same hand or they were deliberately inserted for a distinctly conceived purpose and consequently for the purpose of conveying a definite meaning which it was believed would not be conveyed by the wording of the clause in their absence.

According to the recognised canons of construction of statutes it is to be presumed that every word in any enactment is intended "to have some effect or be of some use."

Ditcher v. *Denison* (1857), 11 Moore P.C. 324-337, 14 E.R. 718.

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Now to give this expression any effect or, in other words, to give the section any meaning differing from the meaning it would have if these words had not been inserted results so far as I can see in one conclusion only, namely, that these words were intended to refer to the identical s. 40 in which they appeared, namely, s. 40 of 1918 and not to s. 40 of the original Act or of the Act of 1917. The present section is literally a new section. Each of the former sections of the same number were expressly repealed. I am far from being of opinion that in such case the substituted section cannot be treated merely as an amendment. I should think that in the majority of cases where the difference between the former enactment and the substituted enactment is not substantial and certainly where it is less onerous the substituted provision ought to be treated merely as an amendment regardless of the form being that of repeal and substitution; but, in the present case, I am convinced that the words "under this section" were intended for the definite purpose of preventing this result.

No serious consequence follows from adopting the view I have expressed for it has not the effect of relieving the party convicted from any penalty at all. It releases him from the new and drastic penalty of imprisonment without the option of a fine but leaves his conviction for the last offence standing, subjecting him to liability to have a fine imposed upon him by this court in substitution for the imprisonment ordered by the magistrate; while in view of another amendment made in 1918, namely, the substitution of a new s. 62, the court cannot discharge him if it is "satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed," altering the rule of the Criminal Code, s. 1124.

In my opinion, therefore, the conviction should be amended by striking out the reference to the earlier conviction and by substituting for the penalty imposed a fine of $200, with an order that, in default of payment, the defendant be imprisoned at hard labour for a period of 3 months.

Simmons, J.

SIMMONS, J., (dissenting):—This is an appeal from the refusal of the Chief Justice to quash a conviction made against the defendant by a police magistrate for a second offence of selling liquor contrary to s. 23 of the Liquor Act. The objection to the

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conviction rests upon the claim that the repeal of s. 40 of the Act and substitution of a new section has the effect of confining within the limits of the new section a conviction against s. 23 before the defendant can be charged with having committed a second offence. In other words, the defendant had been convicted under s. 40 for an offence against s. 23 of the Liquor Act as the same stood in 1917.

In 1918, s. 40 was repealed and a new section substituted so as to augment the punishment for a second offence against s. 23. The amended section is as follows:—

Any person offending against the provisions of s. 23 of this Act shall be liable upon a summary conviction to the following penalties, that is to say:

1. Upon a first conviction to: (*a*) a fine of not less than $100 nor more than $200 and costs, and, in default of payment thereof, to imprisonment with hard labour for a period of not more than 3 months, or alternatively to—

2. Upon conviction for any offence committed subsequently to a first conviction under this section, to imprisonment with hard labour for a period of not less than 3 months nor more than 6 months, without the option of a fine.

Prior to the amendment of s. 40 in 1918, a second offence was punishable by a fine of $250 to $500, and a third offence was punishable by imprisonment without option of a fine.

S. 23 contains the prohibition and s. 40 provides the penalty for infraction of the same.

The point was raised in *Rex* v. *Clarke*, 41 D.L.R. 713, but was not determined. Harvey, C.J., said in that case, at 715:—

Whether an alteration of the punishment, which would be materially different, would be a ground for saying that there could not be a conviction of a second offence need not be considered. . . .

Stuart, J., concurred with the Chief Justice, and judgments of Beck, J., and Hyndman, J., rested upon insufficiency of evidence and did not raise this question.

It is quite clear that there is a material change in the punishment or penalty under the amendment. The effect of the repeal and substitution of a new section is discussed in Craies' Hardcastle's Statute Law, c. 5, and one maxim set out on p. 315 is that "the repeal does not affect the previous operation of any enactment so repealed," . . . . "nor affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, nor affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed."

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Ss. 42 to 52 of the Interpretation Ordinance, c. 3, Alberta, 1906, specifically cover the question raised, and it is quite obvious that the new section must contain a provision specifically abrogating the effect of these sections before effect can be given to the claim set up here. It is contended that the words "under this section" immediately after the word conviction, have this effect. I do not agree with this view. There are prohibitions in the ordinance other than those contained in s. 23 and penalties for an infraction thereof, and the words read in their natural and ordinary sense seem to convey nothing more than that the punishment or penalty must be confined to this s. 40 for offences against s. 23 and not extended to offences against prohibitions carrying a penalty for infractions thereof other than those prohibited in said s. 23.

In order to give the words the effect of eliminating a conviction under the repealed section charged as a first offence, some apt words such as "under the amended section of 1918" or "made subsequently to the passing of the amendment of 1918" must necessarily appear in the new section.

I would therefore dismiss the appeal.

Hyndman, J.

HYNDMAN, J.:—I concur in the result.

Appeal allowed.

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S. C.

ROGERS v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CO.

ROGERS. v. MERCANTILE FIRE INS. CO.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland and Kelly, JJ. March 25, 1918.

INSURANCE (§ III E—100)—CONSOLIDATION OF STOCK IN ONE BUILDING—EFFECT.

Where goods contained in two separate buildings are insured in two different companies, the consolidation of the two stocks into one stock does not effect additional insurance within the meaning of the Ontario Insurance Act, R.S.O., 1914, c. 183, s. 194 (5).

Statement.

APPEALS by defendant from two judgments of Clute, J., in actions to recover the amounts of two policies of insurance on goods destroyed by fire: Affirmed.

The judgments appealed from are as follows:

CLUTE, J.:—The actions were tried together, the evidence being largely applicable to both.

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ROGERS v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LIMITED.

ROGERS v. MERCANTILE FIRE INSURANCE CO.

These actions are in respect of loss alleged by the plaintiff to have been sustained in a fire which occurred at Sudbury on the 17th January, 1917.

The plaintiff was insured in the General Accident Fire and Life Assurance Corporation Limited, hereinafter called the "General," on the 21st July, 1914, for $1,000 on "merchandise consisting largely of china, glassware, crockery, musical instruments, stationery, and smallware, and $800 on store furniture and fixtures, useful and ornamental, including safe, cash-register, signs, awnings, tools, implements, scales, all contained in and upon the described building known as No. 33 on the west side of Elgin street in the town of Sudbury." Endorsed upon the policy and dated the 15th November, 1915, is a declaration, signed by the authorised agent of the insured, that the property insured under the policy having been removed to a store No. 628 on the west side of Durham street, in Sudbury, known as "Rogers' Fair," it is hereby declared that such property shall in future be held insured in the said store and not elsewhere, and $15.20 premium was returned.

It is stated in the body of the policy that there is a further insurance of $2,000 in the "Palatine."

The plaintiff also had insurance in the Mercantile Fire Insurance Company, herein called the "Mercantile," for $1,000 on merchandise consisting chiefly of china, glassware, crockery, musical instruments, stationery, and smallware, situated in a store-house in the rear of the south side of Beach street in the town of Sudbury, and it is stated that there is a further insurance of $1,000 in the "Palatine." There is also an endorsement authorising removal, signed by the authorised agent, dated the 13th November, 1915, of the goods insured, to the same building as the other removal provided for, on Durham street, known as "Rogers' Fair."

Both these policies were issued by Thomas N. Kilpatrick, the agent of the defendant companies at Sudbury, who had authority to issue the same in the first instance, the companies reserving the right to cancel them at any time, upon giving notice.

The policies were taken, after personal inspection by the agent, without formal application, he representing some ten companies,

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and he was authorised to place the risks as he thought proper; he also had authority to authorise removal.

The policies were in full force at the time of the fire. The plaintiff claims the amount ascertained by the adjuster representing all companies interested in the loss, including the defendants.

The plaintiff claims from the "General" $1,560.47, with interest at 5 per cent. from the 25th March, 1917, and from the "Mercantile" $855.47, with interest from the 25th March, 1917, the day the adjustment was made.

The defence offered was mainly as to the insufficiency of proofs and fraud, and that the proofs are false and fraudulent under the terms of the Insurance Act, and that there was overvaluation in claiming for total loss when in fact there was considerable salvage, and that there was not such sufficient proof of the account of the loss as the nature of the case permitted.

I was well satisfied with the truthfulness of the plaintiff, and that he was not intentionally guilty of any fraud or misdealing in respect of the fire or the loss or proofs of loss or furnishing an account as required by the statute.

It was urged as a further defence that the effect of the removal of the goods, which were in two separate buildings on different streets at the time the insurance was made, and were afterwards removed to one building, had the effect of creating what was called a "second insurance" on goods in the same building, without notice. It did not appear to me that this view was open to argument: the insurance having been placed properly upon the goods in separate buildings, the authorised removal afterwards to the one building could not make void a policy which was valid at the time the insurance was taken. There was in fact no further insurance.

It was further urged that in the proofs there was a false statement, because it was there declared that there was a total loss; whereas, in the ascertaining of the loss by the companies' adjuster and the plaintiff, the large amount of $2,400 was deducted for salvage.

What took place in that respect was this. The companies' appraiser arrived on the morning of the 20th January, and gave forms of proof to the plaintiff, who took them to his solicitor, and

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they both went to examine the goods destroyed or injured by the fire, which, according to the evidence of the plaintiff and the solicitor, they considered to be a total loss. The main floor had fallen in, and the basement had been flooded with water until it stood, it was stated, over two feet in the cellar.

The fire marshal was at the same time proceeding with an investigation as to the cause of the fire. The defendants' appraiser was waiting for the plaintiff's proofs to ascertain the loss, and no extended or thorough examination of the loss was made or could be made within the time at the plaintiff's disposal, the proofs having been handed back to the adjuster on the 22nd January.

As soon as the proofs were handed back Mr. Grant, the adjuster, and the plaintiff proceeded, as he states, to arrive at a settlement, which appears as exhibit 12, where the salvage on the stock is said to be $1,710.92 and on the fixtures $721.15. These were the amounts allowed, although on an actual sale, after a great deal of expense and work had been applied in getting the stuff ready for sale, the stock only realised about $200 after all costs had been paid, and the fixtures between $300 and $400.

I was satisfied that the salvage deducted from the plaintiff's claim was grossly overvalued in the adjustment: $200 was mentioned in the proofs as salvage of the fixtures, which was much nearer to the fact than the amount allowed by the adjuster.

Some evidence was given with the view of casting suspicion as to the cause of the fire, but this was not pressed; the only suspicion raised, so far as I could see, was by reason of the fact that the plaintiff was in the building late on the night of the fire, and was the last one to leave the building. This, however, was satisfactorily explained, I think, by the fact that the plaintiff and a bank-clerk were working in the store making up the books, which had got behind by reason of the absence of the bookkeeper.

The plaintiff had, previous to the fire, difficulty in meeting his payments, and had asked an extension of time, which was granted to him upon payment of the full indebtedness, with interest at 6 per cent., extending over a period of time. He was a young man without much experience in business, and had at the time he commenced business in Sudbury a one-third interest in a $22,000 mortgage. He had raised and put into the business by this mortgage the sum of $3,500, but made no attempt to get rid of his

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estate or anything of that kind. He transferred the balance of his interest in this mortgage, and also interest under the insurance, to his creditors, and there is sufficient of the estate, if the insurance is paid, to pay the creditors in full.

It was said by the adjuster that the plaintiff gave every assistance in his power to ascertain the amount of the loss and incident to the adjustment.

There was evidence that goods more than sufficient to replace the goods insured were subsequently bought.

Reliance was placed upon clause 5 of the statutory conditions, and it was urged that in any event not more than 60 per cent. of the loss should be allowed, having regard to the location of the goods at the time the insurance was made and the manner in which the insurance was effected.

Statutory condition 5 provides that: "If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of 60 per cent. of the loss or damage in respect of such property . . ."

The agent who had been authorised to issue the policy having inspected the goods then situated on different premises, and having regard to the fact that the removal was by the authority of the defendants, I do not think this clause has any application to the present case; and it is also clear, I think, that the latter portion of the clause, which provides that "if for any fraudulent purpose the assured does not disclose such other insurance to the company this policy shall be void," has also no application. There was no other insurance except that which was mentioned at the time the policy was taken, and there clearly was no fraud.

I am also of opinion that what was done in regard to the adjustment, and the fact that no further proofs of loss were called for, amounted to a waiver of all objections to the proofs of loss: see *Adams* v. *Glen Falls Insurance Co.* (1916), 37 O.L.R. 1, 31 D.L.R. 166; see also *Mutchmor* v. *Waterloo Mutual Fire Insurance Co.* (1902), 4 O.L.R. 606, where it was held that to a subsequent insurance for $4,000 in another company, for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary.

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In the present case the position of the defendants' agent was rather unique. He had knowledge of the whole position of matters prior to the fire and what insurance there was on the property, and, according to his evidence, was well satisfied with the *bona fides* of the plaintiff in effecting all the insurances upon the property.

I think the plaintiff should have judgments against the defendants for the amounts claimed with costs.

A. C. McMaster, for appellants.

A. J. Russell Snow, K.C., for respondent.

MULOCK, C.J. Ex.:—These are appeals from judgments of Clute, J., in two separate actions tried together. In each case the defendant company contends that the plaintiff's judgment should be reduced by the sum of $342.19. Such is the sole question involved in each appeal, and it arises as follows. The plaintiff, a merchant carrying on business in the town of Sudbury, effected fire insurance for $1,000 in the General Accident (etc.) Assurance Corporation, on a stock of merchandise contained in a building situate in the rear of the south side of Beach street in the town of Sudbury, and also effected fire insurance for another $1,000 in the Mercantile Fire Insurance Company on another stock of merchandise contained in a certain other building, being No. 33 on the south side of Elgin street. Mr. T. N. Kilpatrick was the agent in each case to receive the application and premium and to issue the policy. He had extensive powers. The companies entrusted to him policies executed in blank. He had authority to receive applications and premiums for insurance, to fill up and deliver policies, to assent to changes in insurance contracts—in fact, to do whatever the companies might do in connection with their insurance business, subject to the one qualification, that the companies might cancel any contracts made by him, but which until cancelled were to remain in full force. Each company knew of Kilpatrick's relations with the other.

On the plaintiff's application for insurance, Mr. Kilpatrick examined the stock and issued to the plaintiff the two policies in question. The two stocks were of the same kinds of merchandise, and are described by the same language in each policy. On or before the 13th November, 1915, the plaintiff moved both stocks to store No. 628 on the west side of Durham street, where they were consolidated into one stock, and he applied to Mr. Kilpatrick,

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the representative of both companies, to continue the insurance. Thereupon Mr. Kilpatrick made the following endorsements on the policies:—

"The property insured under this policy having been removed to the store etc. No. 628 on the west side of Durham street, town of Sudbury, it is hereby declared that such property shall in future be held insured in the said store and not elsewhere" etc. "Dated November 13th, 1915. T. N. Kilpatrick, Agent."

The endorsement on the "Mercantile" policy also contained the following words after the words "not elsewhere:" "Subject nevertheless to all the conditions and stipulations therein contained." Each policy is subject to the statutory condition No. 5, which reads as follows:—

"If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of 60 per cent. of the loss or damage in respect of such property," etc.

The defendants contend that the consolidation of the two stocks into one stock effected additional insurance, and that they are therefore liable only to the extent of 60 per cent. of the loss. This was the only ground of appeal urged before us. For the purposes of the defendants' argument, I will assume that the consolidation of the two stocks effected additional insurance.

The question is, have the defendant companies given their written assent to the consolidation? With knowledge of the facts, Kilpatrick, their agent, gave his written assent over his hand to the continuance of the insurance containing the statement above quoted, that "such property shall in future be held insured in the said store and not elsewhere." It thus seems to me that each company, through Kilpatrick, gave its written assent to the continuance of the insurance under the altered conditions. According to its language, each policy is an insurance on goods in the event of loss to the extent of $1,000, but now the defendants say that the assents given are to be construed as cutting down each policy from being an insurance contract to make good the loss to the extent of $1,000 to one for only 60 per cent. of the loss.

If the consolidation of the two stocks had the legal effect

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contended for by the defendants, Kilpatrick, and through him his principals, must be assumed to have known such legal effect. And when, with such knowledge, Kilpatrick, over his own hand, declares that the property insured under each policy shall be held insured in the new premises, I think the only interpretation to place upon the assent is, that each policy was to continue in force and constitute an insurance to the full extent of the loss, but not exceeding $1,000, on the consolidated stock. That the companies so interpreted it is manifest by what occurred when the policies were about to expire. That in the General Accident (etc.) company was, on the 21st July, 1916, renewed for one year. That policy covered $1,000 insurance on merchandise and $800 on fixtures; and the premium then paid was, as regards the merchandise, the amount payable for insurance to the extent of $1,000; and the receipt given over the hand of Kilpatrick, the agent, and of Thomas H. Hall, the company's manager for Canada, declares that the amount insured was $1,800, that is, $1,000 on merchandise and $800 on fixtures.

On the 14th September, 1916, the policy in the Mercantile company was renewed for one year, and the premium paid for that renewal was for an insurance to the extent of $1,000, and the company in their receipt for that premium, over the hand of Kilpatrick and the hand of Alfred Wright, their secretary, states that the sum insured was $1,000.

Each of the renewal receipts constituted a new contract, the terms of which must be determined by reference to the terms contained in the original policy, but subject to the qualification that the renewal contract is applicable to changes happening since the original contract and of which the company had notice. When those renewal receipts were issued for the amounts of insurance stated in them, the companies were each aware of the removal of the two stocks and of their consolidation, and the new contracts had reference to the new conditions and should be so construed.

For these reasons, I would dismiss these appeals with costs

RIDDELL, J.:—This is an appeal in two cases (argued together) by the defendants, insurance companies, against the judgment of Clute, J., at the trial. Riddell, J.

In the view I take of the cases, it is unnecessary to consider

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minutely the particular facts—my judgment turns wholly on the law.

By statutory condition No. 5—in sec. 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183—it is provided that:—

"If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of 60 per cent. of the loss . . .".

It is argued that the removal of the goods covered by the policy of one company so that they became covered also by the policy of the other company is to "effect . . . other insurance thereon," so as to prevent the recovery of more than 60 per cent. of the loss.

In my view, had the Legislature meant "or if the property covered by this policy hereafter be affected by other insurance," it would have said so—the best way of finding out what the Legislature means is to find out the meaning of what it says. And it has said, "if the assured . . . hereafter" (i.e., after the coming in force of the original policy of insurance) "effects any other insurance thereon." I think this means to bring about, procure, insurance non-existent at the time of the original policy, and "thereafter" in reference to its "now."

There does not seem to be any decision in our Courts on the point.

In a trial Court in the Province of Quebec, Meredith, C.J., in directing the attention of the jury to the question, "At the time of the destruction of the property insured had the plaintiff effected any insurance or insurances on the same with any other insurance companies?" made certain statements which are much relied on by the appellants: *Harris* v. *London and Lancashire Fire Insurance Co.*, 10 L.C. Jur. 268, at pp. 273, 274. The plaintiff had a stock in a St. Peter street store insured in the London and Lancashire Fire Insurance Company, and one on Nôtre Dame street insured in the Liverpool and London Insurance Company. He removed his St. Peter street stock to Nôtre Dame street, in February, 1865—thereafter, in June, 1865, he renewed his policy on the Nôtre Dame street stock, and took out another policy, in the Quebec company. The Chief Justice considered that he thereby

had effected insurance in the London and Liverpool and the Quebec company. That has no bearing on the present cases—here there was no renewal and no new policy.

In *Walton* v. *Louisiana State Marine and Fire Insurance Co.*, 2 Rob. (Supreme Court of Louisiana) 563, the exact terms of the condition do not appear—all we are furnished with is "the usual clause requiring notice to the insurers, and an endorsement on the policy, of any other insurance elsewhere on the same stock." This is not helpful.

In *Washington Insurance Co.* v. *Hayes*, 17 Ohio St. 432, the condition was: "if any other insurance has been or shall hereafter be made upon the said property not consented to in writing . . ." The Supreme Court of Ohio held that the merging of an insured stock with another stock elsewhere insured, so as to become covered by that other insurance, was fatal: and that this was "effecting other insurance."

In *Peoria Marine and Fire Insurance Co.* v. *Anapow*, 45 Ill. 86, the condition was: "if the assured had already any other insurance on the same property, or shall thereafter effect any other . . ." —and, under circumstances like the present, the Supreme Court of Illinois held the defence made out.

In New York, in *Vose* v. *Hamilton Mutual Insurance Co. in Salem*, 39 Barb. 302, the clause was: "in case any other policy of insurance has been or shall be issued covering the whole or any part of the property insured by this company . . . " The Supreme Court of New York (3rd Judicial District) held that the merger of the insured stock so as to become covered by another insurance policy was not "a case of double insurance in violation of this article," while recognising "the temptations to fraud held out by additional insurances, and of the necessity of their being known to insurance companies" (p. 304).

The wording in the New York case is not precisely the same as in our statute, while that of the cases in Ohio and Illinois is not distinguishable from ours. Consequently, if we were bound by American cases we should have to hold in favour of the companies. We are not so bound: and I prefer to give to the words of the Legislature their literal meaning, and not to stretch this meaning to cover what it is suggested may have been intended.

I would dismiss the appeals with costs.

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SUTHERLAND, J. (after stating the facts):—On the appeal to the Appellate Division, apart from a suggestion that the concurrent insurance in the Palatine company was stated in one of the policies at $2,000 and in the other at $1,000, and the possible effect of such a misstatement—which point was very feebly pressed upon the argument, no doubt having regard to the knowledge of the agent of each company by whom the policies were prepared—the defendants relied solely upon the statutory ground of attack upon the judgment, and, without quarrelling with the respective amounts claimed against them and allowed by the trial Judge, sought to reduce their liability to 60 per cent. thereof.

No English or Canadian authority was cited, apart from a Quebec case of *Harris* v. *London and Lancashire Fire Insurance Co.*, 10 L.C. Jur. 268, 273, 274. In that case Meredith, C.J., in addressing the jury, used this language (p. 273):—

"The third question is as follows: 'At the time of the destruction of the property insured had the plaintiff effected any insurance or insurances on the same with any other insurance company or companies, and to what amount or amounts, and when?' The pretension of the plaintiff is that the insurances which he effected with the other offices were upon separate and distinct stocks of goods from those insured by the defendants. This would be quite true, if we could consider the insurances in favour of the plaintiff with reference to the time when they were first granted; but, unfortunately for him, they must be viewed with reference to the time of the fire. With respect to this question, it is hardly necessary for me to tell you that the insurance granted to the plaintiff by the policy sued on, was not confined to the goods actually in his store when the policy was granted. No; the insurance was on the plaintiff's stock-in-trade. It was perfectly understood by both parties that the plaintiff would sell off his goods as fast as he could with advantage, and then replace the goods sold with other goods of the same kind. And it is plain that any goods of the description mentioned in the policy, brought upon the premises therein mentioned, so as to form part of the plaintiff's stock described in the policy, were at once covered by the insurance thereby granted. If this be true, then it follows that when the plaintiff in February, 1865, brought to his store in St. Peter street his 'stock-in-trade as jeweller and clockmaker,' which he previously

had in Nôtre Dame street, insured by a policy from the Liverpool and London office, the Nôtre Dame street stock, if I may so speak of it, became at once a part of the stock-in-trade insured by the defendants. And when, on the 6th June, 1865, the plaintiff renewed his policy on his Nôtre Dame street stock, which had become part of his stock-in-trade in his store in St. Peter street, it was then covered by two insurances; that is to say by the defendants' policy as the stock insured in St. Peter street, and by the Liverpool and London office under the renewal of the policy of the 6th June, 1863. Any difficulty as to this point is removed by the declaration in the Quebec policy: 'The sum of £1,000 is insured in the Lancashire, and that of £650 in the Liverpool.' Here we have proof of the existence of three insurances upon the same stock-in-trade at the same time. And as the policy granted by the defendants bears date in 1864, whereas the Quebec policy bears date in 1865, it is only too clear that at the time of the destruction of the property insured, the plaintiff 'had effected insurance on the same' with two other companies, namely, the London and Liverpool and the Quebec."

The defendants relied to some extent upon this case, but it is apparent that it is very different from the one at bar, because there was, after the removal, a renewal of the policy on the Nôtre Dame street stock, and there was no such thing here. But I think I may say that the defendants mainly relied upon American authorities for the principle which it was argued on their behalf should be applied.

In one of these cases, namely, *Walton* v. *Louisiana State Marine and Fire Insurance Co.*, 2 Rob. (Supreme Court of Louisiana) 563, the facts were stated by Martin, J., as follows (pp. 563, 564):—

"The plaintiffs purchased the stock in trade of Lawrence, a grocer, in the stores Nos. 28 and 29 New Levée street, which was insured in the Louisiana State Marine and Fire Insurance Company. His policy extended to his stock and consignments held in trust, contained in the store. It was transferred to the plaintiffs with the assent of the company. At that time the plaintiffs had a grocery store, and a policy in the Merchants' office, and another in the Firemen's office, each for ten thousand dollars. The terms of these policies are literally the same as that of Lawrence. All these policies contained the usual clause that notice should be

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given to the company, and be endorsed on the policy, of all insurances made with other companies on the goods insured; and that unless such a notice be given, the insured shall not be entitled to recover. Soon after the purchase the plaintiffs removed all the goods in their store to Nos. 28 and 29 New Levée street, which now contained all the goods insured by them, and by Lawrence, their vendor."

The plaintiffs having omitted to notify the defendants of the two insurances previously existing on the stock, and it having been injured by fire, in an action against the defendants it was held, "that, by consenting to the transfer of the policy to the plaintiffs, defendants became the insurers of the stock-in-trade of the former in the store to which they removed, which stock consisted of the goods originally covered by their policy, and of plaintiffs' stock in their former store; that the latter were bound to give defendants notice of the two insurances previously existing on their stock; and that, having failed to do so, they cannot recover" (head-note).

In *Washington Insurance Co.* v. *Hayes*, 17 Ohio St. 432, the policy contained this provision: "And provided further, that if any other insurance has been or shall hereafter be made upon the said property not consented to in writing herein, or if the said property shall be sold and conveyed . . . in every such case, this policy shall be null and void;" and it was held therein, "that if the property so insured was, at the time the policy was made, under a mortgage, and the policy, with the assent of the company making the same, was assigned to the mortgagee, the delivery of the possession and control of the property to the mortgagee subsequent to the date of the policy, is not such a sale as will invalidate the policy" (head-note).

Vose v. *Hamilton Mutual Insurance Co. in Salem*, 39 Barb. (N.Y.) 302, was cited on behalf of the plaintiff. In this case the facts were as follows:—

"On the 1st of May, 1852, the defendant insured the plaintiffs' stock-in-trade in a store No. 146 River street, Troy, for $2,500 for three years. The 18th article of the policy provided that 'in case any other policy of insurance has been or shall be issued covering the whole or any portion of the property insured by this company,' the policy issued by the defendant should be void, unless the company had notice thereof and gave a written consent thereto. On

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the 9th of August, 1854, the goods were, with the consent of the defendant, removed to an adjoining store, in the same building, known as No. 148. At that time the insured had a stock of goods of the same description, in No. 148, which had been insured for $2,500 by another company, January 12, 1852, for five years. The defendant gave no consent to such prior insurance, and had no knowledge of it." It was held "that this was not a case of double insurance, in violation of the 18th article of the policy" (head-note).

In the first of these American cases, the language of the clause in the policy which was in question is not given, the statement being merely that the policy contained the usual clause, and we cannot therefore get much assistance from it; in the second, the language in the policy is somewhat similar to that contained in the policies in question; and in the *Vose* case the language is not identical. We are, of course, not bound to follow any of these cases.

What we are called upon to do is so to construe the words that, if there is nothing, and there does not appear to be anything, to modify or alter or qualify the language used, the words be given their natural and ordinary meaning. Doing so, I am unable to see that what was done in connection with the policies in question can be construed to mean the "effecting" of another insurance.

I agree with the view expressed by the trial Judge, and would therefore dismiss the appeals, with costs.

Kelly, J.

KELLY, J. (after stating the facts and setting out parts of the testimony given by the agent Kilpatrick and the Canadian manager of the company, Hall, at the trial):—On cross-examination, Mr. Hall said that Kilpatrick was furnished with printed forms of consent to additional insurance, which he could sign if he chose, and the company would be bound.

Kilpatrick also says that each of the three companies (the two defendant companies and the Palatine company) was aware of his agency for the other companies.

Kilpatrick seems to have been fully aware of all that took place at the time of the removal. He was the person actively interested and engaged in the matter for the defendants; and not only had he full knowledge of the removal to which he gave his written consent, but he was also aware of the condition of the two stocks at the time

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of the removal and the manner of their treatment when they were brought into the Durham street store; for he expressly says that the plaintiff consolidated the two, and then he assented on behalf of the companies to the removals; but he does not seem to have advised his principals that the stocks had been consolidated.

In my opinion, the extensive powers possessed by this agent and the complete knowledge he had, not only of the removal of the two stocks, but, as he himself says, of their consolidation when they were removed, is of the highest importance in determining whether or not at this stage the defendants should be relieved from payment of the loss in excess of 60 per cent. Whether or not the consolidation operated so as to "effect" other insurance on the goods or any of them is not, in my judgment, under the present circumstances, the sole element determining the liability. The agent, possessing the very extensive powers which he did possess, was fully cognizant of the whole situation, and the knowledge he thus had must, it seems to me, be taken to be knowledge of his principals as well. Unless relieved therefrom because of the lack of written notice of a matter of which he was then well-informed, his duty was to have acquainted his principals with the situation; his failure to do so should not operate to the prejudice of the plaintiff, or relieve the defendants in respect of a matter of which they were, through their recognised representative, fully aware. His knowledge was acquired at the time of the removal, not casually, but in the course of his dealings for the defendants with the insurances. Having that knowledge, they continued the insurance until the fire occurred, making no objection in the meantime.

In my opinion, the circumstances are such that the appellants are not entitled to succeed. In stating this conclusion I do not in any way ignore or minimise the binding effect of the statutory condition referred to in a case where it applies; but the unusual facts on which the present cases rest distinguish them from cases wherein that condition is applicable.

Appeals dismissed with costs.

TRUDEL v. THE KING.

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Ex. C.

Exchequer Court of Canada, Audette, J. May 27, 1918.

CONTRACTS—(§ IV—372)—HIRE—BUILDING CONTRACT—WORKING DAYS—DELAY—DAMAGES—ADMISSION—ERROR—COSTS.

Where dredges or machinery are hired from the Crown by the day, only working days can be charged for. The Crown, by failing to deliver a tug, as required by the terms of the lease, cannot recover the rent therefor, but is not liable for damages to the lessee, more or less remote, by reason of delays in work occasioned thereby.

2. An offer or statement of settlement based on error is not binding and cannot operate as a judicial admission under the Quebec Civil Code.

3. The Crown cannot be held for delays occasioned by it in the performance of a building contract, where by the terms of the contract it was relieved from liability in any such event. The Court, under s. 48 of the Exchequer Court Act, is bound to decide in accordance with the stipulations of the contract.

4. Where a party does not succeed on all the issues of an action, the Court has a discretion to deprive him of the costs.

5. The right of action having arisen in the Province of Quebec, interest upon the amount due under the contract was allowed from the date of the deposit of the petition of right with the Secretary of State.

Statement

PETITION OF RIGHT to recover a balance due upon a contract and for damages occasioned in the performance thereof.

Pierre D'Auteuil, K.C., and *R. Langlais*, for suppliant.

E. Belleau, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $17,056.90 for an alleged balance due upon contracts, and for damages resulting from suspension of the works or delays in the execution of the same.

The case, as presented, is composed of two distinct issues. One is in connection with works done at Matane, and the other with respect to works done at Cap a l'Aigle.

MATANE CONTRACT.

The works, at Matane, consisted of the construction and completion of a breakwater on the east side of the mouth of the River Matane, at Matane, in the County of Rimouski, P.Q. The works were duly executed, under a contract, between the suppliant and the Crown, and finally accepted by the latter. There were also, in connection with this contract, extras to the amount of $8,000, which the Crown has duly recognized and paid.

The total amount of the contract was for the admitted sum of $55,021, together with the sum of $8,000 for the extras, which amounted in all to the sum of $63,021.

The Crown has so far paid the suppliant in satisfaction of the contract the sum of $39,810, and for the extras $8,000 = $47,810, leaving uncovered or in dispute the sum of $15,211.

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The suppliant, under his contract, as required by clause 3 thereof, had to provide for all kinds of labour, machinery and other plant, etc. He, therefore, hired from the Crown, as he might have done from anyone else, at the rate of $236 per day, the use of the dredge "Progress," 2 scows and a tug, to remove the sand and prepare the foundation for the breakwater to be by him erected. The lease for such plant and machinery reads as follows:—

Montmagny, Que., le 22 juin, 1912.

Je soussigne, Napoleon Trudel, entrepreneur pour la construction d'un brise-lames a Matane, m'engage per les presentes a payer au Departement des Travaux Publics du Canada, la somme de deux cent trente six piastres ($236) par jour pour l'usage de la drague "Progress," de deux chalands et d'un remorqueur, pour enlever le sable et preparer la fondation du dit brise-lames.

Le temps du loyer de la dite drague & C., devra commencer a compter au moment de son depart du quai de Rimouski jusqu'a son retour au meme quai.

Le Departement devra fournir tout ce qui est necessaire au bon fonctionnement de la drague et de ses accessoires durant toute la duree des travaux.

Signe a Montmagny, ce vingt deuxieme jour de juin, 1911. "Temoin: *Louis* v. *Gadbois*. Signe: Nap. Trudel, Entrepreneur."

On June 29, 1911, the dredge and scows, in tow of the tugs "Evelyn" and "Wetherbee," left Rimouski at 7 a.m., and arrived at Matane at 5 p.m. It being found the tug "Wetherbee" was drawing too much water to enter the River Matane, and finding no haven, she returned at once to Rimouski, although she had been assigned to serve the dredge. The dredge remained without any tug to serve her, and her first work, after setting up her spuds and general installation, consisted in casting over. The Crown having failed to supply a tug, as bound to do under the lease, Trudel, the suppliant, hired, at his own cost and expense, first the "Shelby" and then the "Victoria."

The dredge was engaged in Trudel's work, at Matane, up to August 25th inclusively, when she finished dredging for the suppliant. She was then for a while engaged on some other government work at Matane, with which the suppliant has nothing to do, and finally was towed up to Rimouski.

The controversy with respect to the dredge is as to the number of days she was engaged working, and the rate at which the suppliant should pay, having regard to the fact that the Crown has failed to supply a tug, as called for by the lease.

Under the uncontroverted evidence adduced by the suppliant, it appears that when dredges or machinery of any kind are so hired by the day, that only the working days are to be reckoned exclusive of the Sundays. Moreover, this dredge was hired by the suppliant, as I have already said, under the provisions of clause 3; but, under clause 35 of the same contract, the suppliant is absolutely forbidden to carry on any work whatever on Sundays. Were the dredge hired by the month, it is apparent that the full rent should be exacted; but it is otherwise under the custom of trade established by the evidence, when the hire is by the day—in that case only working days should be charged.

We have in June 2 days, in July 31 days, and in August 25 days, to which should be added another day, 1 day, which must be allowed to tow the dredge back to Rimouski, as provided by the lease, making in all 59 days. From the 59 days should be deducted the Sundays and Dominion Day (July 1), when the machinery was not used. There were 8 Sundays within the period, and July 1, a red-letter day, when no work was done—in all, 9 days, leaving 50 days.

On those 50 days we have 2 days only in which the Crown supplied the tug—that is, the day the dredge was taken from Rimouski to Matane, and the return day—two days at $236	$472.00
Now, it has been established by the evidence at trial that the value of the tug per day represented about $50 in the $236 a day, the Crown having failed to supply a tug for 48 days, the lessee, the suppliant, should only pay $236, less $50.	
$186 for these remaining 48 days at $186	$8,928.00
	$9,400.00

It is clearly spread upon the record by the evidence that the suppliant had to hire—outside of his lease—the necessary tugs to replace the one the Crown was bound to supply and which it failed to do.

The first obligation of a lessor, under art. 1612 C.C., is to deliver to the lessee the thing leased. The Crown did not deliver the tug, and cannot recover the rent therefor.

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The suppliant claims damages in the delay of execution of his contract which would have been occasioned by the want of tugs. These damages are more or less remote and not of a tangible nature, and have not been clearly established. The suppliant, in the course of the excavation made by the dredge, was allowed to *cast over*, to remove sand with shovels drawn by horses, and in addition thereto in the result paid much less than $50 a day for the tug's service—having the advantage, with respect to one of the tugs, to pay only so much per hour when needed, being thereby freed from the obligation to pay for that part of the day when the tide was low and when the tug could not be used—and these small tugs gave better service at Matane than larger ones, according to witness Murphy. Moreover, the Crown, in the course of the negotiations of settlement, finally abandoned the claim for overtime. If the suppliant actually suffered any of the damages claimed, a very doubtful matter, they are more than amply set off by the full allowance of $50 per day for the tug, coupled with the circumstances above mentioned.

It will be noticed that considerable delays have elapsed since the termination of the works in question, and it appears that negotiations of a protracted nature were kept on until legal proceedings were instituted. In the course of these negotiations it appears in some of the letters and statements submitted to the respondent by the suppliant, that he, at one time, was willing to settle upon his paying $11,800. From these offers of settlement, counsel-at-bar for the Crown contends that the suppliant is bound by such offer, which he terms under art. 1244 C.C. an extra-judicial admission. He further contends that art. 1245, under which a judicial admission can be revoked through an error of fact, does not apply to an extra-judicial admission. There may be some authority for such a contention, but the preponderance of the jurisprudence is against it. Mr. Mignault, Droit Civil, p. 125, vol. 6, contends that such revocation applies to both in case of error. Indeed, if this admission has been based upon an error of fact, he has made a mistake, an error, and it is the duty of such party to declare he was in error when he made such admission, instead of persisting in a contention which he has discovered to be false. In any case, if there was an error, there was no admission: *Non fatetur qui errat.*

It cannot be contended that the Crown can say it has been led into error by such an admission; because if the suppliant omitted to deduct a certain amount for the tugs the Crown had failed to supply, the Crown was well aware of this fact it had not supplied the tugs.

I find that the suppliant is not bound, under the circumstances of the case, by any such statement or offer made in error, against himself, in the course of his endeavour to arrive at a settlement—a statement or offer which the Crown never clinched by an acceptance.

I therefore find, as above mentioned, that the suppliant performed works, including extras, for an amount of $63,021; that he has been paid on account thereof by the Crown the sum of $47,810, leaving uncovered and in dispute the sum of $15,211; that the suppliant owes the Crown, in respect of the lease of the dredge, etc., the sum of $9,400, leaving due him by the Crown the sum of $5,811 which he is entitled to recover.

Under s. 48 of the Exchequer Court Act, the court is denied the power to allow any interest upon this balance, but, following the cases of *St. Louis* v. *The Queen*, 25 Can. S.C.R. 649 at 665, and *Lainé* v. *The Queen*, 5 Can. Ex. 103, this being a case where the right of action has arisen in the Province of Quebec, interest will be allowed upon the sum of $5,811, from the date the petition of right was left with the Secretary of State, as provided by s. 4 of the Petition of Right Act, namely, from May 8, 1916, to the date hereof.

CAP-A-L'AIGLE CONTRACT.

On December 26, 1916, the suppliant entered into a contract with the Crown for the construction of an extension to the wharf at Cap-a-l'Aigle, as provided by the contract filed herein as ex. No. 10.

The question arising under this contract, freed and segregated from the numerous branches of money claims made by way of damages alleged to have been occasioned by delays, resolves itself, in the result, in the question as to whether or not the suppliant can, under his contract, make such a claim for which the Crown would be liable.

In the course of the preliminary work for the execution of this contract, and after the foundation for the extension of the wharf

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had been duly staked, a diver was sent to the bottom to ascertain the condition of the bottom of the river, and having then reported verbally to the government engineer, the latter took upon himself to suspend the execution of the work—having, I presume (because he was not heard as witness), some doubt as to whether the nature of the material at the bottom could be built upon in the manner required by the contract.

Indeed, it was not unreasonable to verify the nature of the foundation, but what is claimed as unreasonable and is the source of all the trouble on this issue, is the alleged unreasonableness of the delay of such suspension, and especially so in view of the fact it was found the engineer should have gone on, and did finally go on, building upon the foundation or bottom as described by the diver at the time of the suspension.

As flowing from that suspension in the execution of the works, the completion of the enterprise was carried over to the following year. Now, the question to be determined is whether under the terms of the contract and s. 48 of the Exchequer Court Act the suppliant is entitled to recover $9,333 claimed in that respect—a claim embodying all manner of damages—some of the most remote class or kind.

The contract entered into by the suppliant is one substantially identical in terms to those commonly in use in undertakings of this sort, whereby the contractor is, if the literal terms of the contract be adhered to, handed over, bound hand and foot, to the other party of the contract, or to the engineer of the other party, and is absolutely without any recourse or remedy. *Bush* v. *Whitehaven Trustees*, Hudson on Contracts, 4th ed., vol. 2, 124.

It is unnecessary to review the several clauses of the contract into which the suppliant entered with his eyes open. He must be held to them notwithstanding that they might appear oppressive. *Modus et conventio vincunt legem.* The law to govern as between the parties herein is to be found within the four corners of the contract. The form of agreement and the convention of parties overrule the law. Broom's Legal Maxims, 8th ed., p. 537. The suppliant cannot reject the terms of his contract and claim the damages flowing from delays, in view of clause 44, which reads as follows:—

The contractor shall not have, nor make any claim or demand, nor bring

any action or suit or petition against His Majesty for any damages which he may sustain by reason of any delay or delays from whatever cause arising in the progress of the work.

Clause 15 of the contract also relieves the Crown from any liability in respect of any loss or damage whatsoever which may at any time happen to the "*materials, articles and things*" required for the contract. This clause is casually mentioned because the contractor has set up a claim in that respect. (See also clauses 11 and 49.)

Under the provisions of s. 48 of the Exchequer Court Act, the court is bound to decide in accordance with the stipulations of a contract in writing and it must be found that, under clause 44 of the contract, whether the suspension of the works occasioning the delays was rightly or wrongly done, the suppliant is out of court—as the delays alleged to have given rise to the claim are such as are covered by this clause 44.

In arriving at the present conclusion, I am also following a similar decision of this court and of the Supreme Court of Canada in the case of *Mayes* v. *The Queen*, 2 Can. Ex. 403, 23 Can. S.C.R. 456. There is also a long catena of cases upon this class of contract consecrating the same principle, but it is unnecessary to mention them. It is also unnecessary to either consider or decide other questions raised at Bar. The case of *Mayes* v. *The Queen*, *supra*, is a direct answer to most of them.

Coming to the question of costs, it is well to bear in mind that while the suppliant succeeds on one issue, the respondent succeeds on the other. Each issue covered a distinct claim arising out of two separate contracts, and if there is any difference between the actual time engaged on one issue as compared with the other, I would say, besides being for a larger amount, the issue upon which the Crown succeeds is the heavier one and upon which pleadings and evidence were more lengthy.

It seems to me (says Bowen, L.J., in *Badische Anilin und Soda Fabrik* v. *Levinstein*, 29 Ch.D. 366 at 419)—

That, without laying down any hard and fast line, or trying to fetter our discretion at a future period in any other case, we are acting on a sensible and sound principle, namely, the principle that parties ought not, even if right in the action, to add to the expenses of an action by fighting issues in which they are in the wrong. It may be very reasonable as regards their own interest, and may help them in the conduct of the action, that they should raise issues in which in the end they are defeated; but the defendant

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who does so does it in his own interest, and I think he ought to do it at his own expense.

See also *Bennington* v. *Hill*, 8 R.P.C. 326.

Again, in *Dicks* v. *Yates*, 18 Ch.D. 76 at 85, Jessel, M.R., said:—

I think that the court has a discretion to deprive a defendant of his costs though he succeeds in the action, and that it has a discretion to make him pay perhaps the greater part of the costs by giving against him the costs of issues on which he fails.

Under the circumstances of the case there will be no costs upon either of the issues, each party paying his own costs.

Therefore, there will be judgment entitling the suppliant to recover from the respondent the sum of $5,811, with interest thereon from May 8, 1916, to the date hereof, and without costs.

Judgment for suppliant.

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BEATTY v. MANSFIELD.

Quebec Superior Court, Maclennan, J. January 8, 1918.

FRAUD AND DECEIT (§ II—7)—NAME OF FORMER EMPLOYER WRONGFULLY DISPLAYED ON BUSINESS SIGN.

A former employee, who commences business for himself, has no right to use a sign which is calculated to deceive the public into believing that the business of his former employer is being carried on in the premises.

Statement.

ACTION to restrain defendant from making use of plaintiff's name on his sign.

The plaintiff, Daniel Beatty, carried on business as a watchmaker and jeweller at 137 St. Peter St. during the last 25 years, in his own name, which was prominently on the window and door of the shop. The defendant had been in his employ for 4 years as a watch repairer. When the plaintiff gave up the premises, he moved his stock in trade across the street to a shop occupied by his successor, Z. Rill, and in whose business he is still interested. The premises at 137 St. Peter St., when the plaintiff moved out, were taken by a firm of jewellers doing business under the name of "Crescent Jewellers, Reg." The defendant, in about November, 1916, rented a portion of the premises from Crescent Jewellers, Reg., and established himself there as a watch-repairer, and in February, 1917, he put on one of the windows, "H. Mansfield, Watchmaker & Jeweller, late with D. Beatty, Waltham Watches," and on the door, "H. Mansfield, late with D. Beatty."

Plaintiff's action is for an order to compel the defendant to

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remove the name "D. Beatty" from the defendant's sign on the window and door.

The defendant pleads that the only purpose in using the words "late with D. Beatty" was to let his clients and followers know that he was the "Mansfield" who formerly was employed with the plaintiff. The Superior Court maintained the plaintiff's actions.

Claxton, Harvey and Kerr, for plaintiff; *Bercovitch, Lafontaine and Gordon*, for defendant.

Maclennan, J.

MACLENNAN, J.:—The right of a person who has been in the employ of a firm of good reputation and sets up business for himself, to communicate that information to the public, is subject under English law to the condition that it is done in such manner as not to deceive the public. Under the French law, which more closely resembles our own, the right of a former employee to use the name of his old employer in advertising his own business is not permitted only under very exceptional circumstances. See *Pouillet*, Marques des Fabriques, 542, 543. The plaintiff's action is based upon C.C., art. 1053, and the real questions in dispute are, whether the mode in which the name of "D. Beatty" is used is calculated to lead the public to suppose that the business of the plaintiff is carried on in the premises and whether the conduct of the defendant is calculated to mislead the casual passer-by, the incautious, the unwary, the heedless persons who do not regard things with that accuracy which others observe: *Glenny* v. *Smith*, 2 Dr. & Sm. 476, 62 E.R. 701; *Hookham* v. *Pottage*, L.R. 8 Ch. 91. It was the duty of the defendant to avoid anything calculated to deceive. Fraud is not necessary to entitle the plaintiff to succeed, it is sufficient, if the sign is calculated to deceive the unwary passer-by. Plaintiff's name as watchmaker and jeweller had been on the window for 25 years, and when the defendant set up in business there it was as a watch-repairer only, but he put on the window "Watchmaker & Jeweller." He was no jeweller and the jewellery business conducted in the shop did not belong to him, but to the Crescent Jewellers, Reg., whose sign appeared on the other window of the premises. The words "D. Beatty" are in the same size as the defendant's name and the words "late with" immediately above the plaintiff's name are in small letters. There is no justification for the defendant advertising himself as a jeweller. It looks like a dishonest attempt to imitate the sign which the plain-

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tiff used when he carried on that business in these premises. In England and United States, it is laid down that any artifice or device in the arrangement of printing of the names, such as the use of different size of type calculated to deceive the public, will be enjoined as unfair competition, 28 A. & E. Ency. of Law, 2nd ed., 434. The same principle is applicable under C.C., art 1053. Here we have the use of the word "Jeweller." The evidence shews that two persons at least were misled by the use of the plaintiff's name and went into the shop believing the plaintiff's business was still carried on there. The reason sworn to by defendant, that he used the plaintiff's name in order to let the public know that the plaintiff was not there cannot be accepted. It is proved that it had the contrary effect. The plaintiff is, therefore, entitled to an injunction and the defendant will be ordered to remove the plaintiff's name from the window and door with costs.

Judgment: "Considering the plaintiff had carried on business for upwards of 25 years as watchmaker and jeweller, at 137 St. Peter St., Montreal, until the spring, 1916, when he removed his stock in trade across the street to the premises of Z. Rill, his successor, and in whose business he is still interested;

Considering that the defendant, who is a watch-repairer, who had been at one time in the plaintiff's employ, started business for himself in said premises about November, 1916, and, without the plaintiff's permission, put up a sign on his window and door in February, 1917, to the effect that he had been "late with D. Beatty;"

Considering that the arrangement of said sign and the use of different sizes of type, was calculated to deceive the public and lead them to believe that the plaintiff's business was still being carried on in said premises;

Considering the evidence shews two persons were misled by said sign;

Considering the plaintiff is justified in complaining of the unauthorised use of his name by the defendant; doth maintain the plaintiff's action and doth condemn and order the defendant to remove the name "D. Beatty" from window and door at 137 St. Peter St., Montreal, within 5 days from the service of a copy of this judgment, with costs. *Judgment accordingly.*

Re POULIN AND VILLAGE OF L'ORIGNAL.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. March 25, 1918.

MUNICIPAL CORPORATIONS (§ II E—152)—MONEY BY-LAW—CONSENT OF ELECTORS—PUBLICATION IN NEWSPAPER—MUNICIPAL ACT (R.S.O. 1914, c. 192, s. 263.)

The provisions of s. 263 of the Municipal Act, R.S.O. 1914, c. 192, are imperative and failure to publish a by-law, which requires the assent of the electors, in the village if there is a newspaper published there is a disregard of the principles of the Act and the defect or irregularity is not cured by the saving provisions of s. 150.

Statement.

AN appeal by B. R. Poulin from the order of MEREDITH, C.J.C.P., 42 O.L.R. 6, dismissing an application to quash a money by-law. Reversed.

Mulock, C.J.Ex.

MULOCK, C.J.Ex.:—This is an appeal from the judgment of Meredith, C.J.C.P., dismissing an application to quash a money by-law of the Municipal Corporation of the Village of L'Orignal, on the grounds (1) of want of publication and (2) of want of power in the council to pass the by-law.

The by-law, before its final passing by the council, required the assent of the electors, and sec. 263, sub-sec. (5), of the Municipal Act enacts that such a proposed by-law "shall be published once a week for three successive weeks," and sec. 2(*o*) defines "published" and "publication" thus: "'Published' shall mean published in a newspaper in the municipality to which what is published relates, or which it affects, or if there is no newspaper published in the municipality, in a newspaper published in an adjacent or neighbouring municipality; and 'publication' shall have a corresponding meaning."

The proposed by-law related to the construction of public works within the corporate limits of the Village of L'Orignal, and the raising of money by the taxation of electors in that municipality wherewith to pay for these proposed works. Thus the subject-matter related to the respondent municipality. There was a newspaper published in the municipality; and, under these circumstances, the statute required that the by-law be published in that municipality. This was not done, but, instead, it was published in another municipality.

Under these circumstances, such publication was a nullity as regards compliance with the statutory requirements; and therefore, as regards the question now under consideration, it has to be

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determined as if the council could legally pass a money by-law without any previous publication thereof.

The learned Chief Justice of the Common Pleas was of opinion that such non-compliance with the requirement of the statute was an irregularity which might be cured under the provisions of sec. 150.* The curative provisions of that section apply only where the election is "conducted in accordance with the principles laid down" in the Act.

I am of opinion that the statutory duty to publish is imperative, and that failure to do so is a disregard of the principles of the Act.

In *Re Mace and County of Frontenac*, 42 U.C.R. 70, a county by-law under the Canada Temperance Act of 1864 was successfully attacked because of non-publication in accordance with the statutory requirements, which in that case were similar to those present here; and Armour, J., at p. 88, observed that "'due publication' is an essential pre-requisite to the passing of the by-law."

In *Cartwright* v. *Town of Napanee*, 11 O.L.R. 69, a motion was made to quash a money by-law because of its not having been published the number of times required by the statute, and Meredith, J., being of opinion that the curative provisions of the statute applied, refused to quash it. The applicant appealed, but before the appeal was argued the Legislature validated the by-law, enacting however that such legislation was not to affect the costs of the then pending appeal, but that the Court might deal with them as if the validating Act had not been passed; and the Court of Appeal awarded costs to the appellants, observing: "The appellants were quite within their rights in objecting when and as they did to the . . . municipality . . . assuming to act upon a by-law which was passed without due regard to the provisions of the statute:" *Re Cartwright and Town of Napanee*, 8 O.W.R. 65, 67.

In *In re Rickey and Township of Marlborough*, 14 O.L.R. 587, 594, a local option by-law was attacked. The then Municipal Act, 3 Edw. VII. ch. 19, sec. 338, required that "the day . . . fixed for taking the votes shall not be less than three nor more than five weeks after the first publication of the proposed by-law." The voting was held after publication for two but before publication for three weeks; and Teetzel, J., delivering the judgment of the Divisional Court, said: "I am of opinion that a publication for

*Sec. 150 is by sec. 274 made applicable to voting on a by-law.

only two, when the statute requires three, successive weeks, is not such an irregularity as sec. 204 (the curative section) contemplates."

With respect, I find myself unable to agree with the view of the learned Chief Justice of the Common Pleas, and think the by-law should be quashed.

This conclusion being reached on the first ground, it is not necessary to deal with the second.

The appellant is entitled to costs of the motion and of this appeal.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J.Ex. Clute, J. Sutherland, J.

RIDDELL, J.:—In the view I take of the case, it is not necessary to say more of the contents of the by-law than that it is a by-law requiring the assent of the electors, under sec. 263 of the Municipal Act. Riddell, J.

The Act, by sec. 263 (5), provides that, before such a by-law is voted upon, "a copy of the proposed by-law . . . shall be published once a week for three successive weeks . . .;" unless there is no newspaper published in the municipality, sec. 2 (*o*) of the Act makes this mean "published in a newspaper in the municipality." In the present case, as there was and is a newspaper published in L'Orignal, the statute must be construed as though it read "a copy of the proposed by-law . . . shall be published once a week for three successive weeks in a newspaper published in L'Orignal."

This was not done: but for some reason, not apparent on the material before us, a copy was printed in a newspaper at Hawkesbury, some miles away. This is clearly not a compliance with the statute: it is not "publication" at all: sec. 2 (*o*).

The sole question then is whether sec. 150 saves the by-law—I think it does not.

I agree with what is said by Mr. Justice Middleton in *Rex ex rel. Yates* v. *Lawrence*, 22 D.L.R. 599. "It is not easy to define matters that come within the scope of sec. 150, nor do I think that it would be wise to attempt to do so." I am not sure that the section "does not entitle the Court to disregard the violation of an express provision of the statute," as there have been many instances where the Court has in effect

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done that. But, if the section ever does entitle the Court to disregard the violation of an express provision of the statute, it can only be when it appears that the election was conducted in accordance with the principles laid down in the Act, as indeed the section itself says.

To my mind, one of the principles laid down in the Act is, that the electors in a municipality in which there is a newspaper, will receive notice through that newspaper (or one of them if there are more than one) when any by-law is to be voted upon. If a publication in Hawkesbury were sufficient, it is hard to see why publication in an Ottawa or a Toronto paper would not answer. Speaking from common knowledge, it is certain that a voter in a small town or village is much more likely to take in a city newspaper than a local paper published in a neighbouring and probably rival town or village. (Every one who has ever lived in such a municipality knows the truth of this statement.) Moreover, there are often ratepayers and electors who would be materially affected from a financial point of view by such by-laws who do not reside the year round in the municipality. It would be intolerable to cast upon these the burden of taking or at least reading all the newspapers in all the neighbouring towns and villages, at the peril of having heavy taxation upon their property, without their being able to vote and use their influence against it.

The cases of *Re Begg and Township of Dunwich*, 21 O.L.R. 94 (in which, p. 99, I consider myself bound by *In re Salter and Township of Beckwith*), and *In re Salter and Township of Beckwith*, 4 O.L.R. 51, were decided on a different wording in the statute, and are not now applicable. If anything said in either is opposed to the present determination, it is not to be followed. It is not necessary to cite the previous cases, most of which will be found in Meredith & Wilkinson's Canadian Municipal Manual, pp. 167-170.

I would allow the appeal with costs throughout—and do not pass upon the other question raised.

Kelly, J.

KELLY, J.:—I agree in the conclusion of his Lordship the Chief Justice and my brother Riddell, that this appeal must be allowed and that non-publication in a newspaper published in the municipality to which the proposed by-law relates or which it affects,

is more than an irregularity curable by the provisions of sec. 150 of the Municipal Act (R.S.O. 1914, ch. 192).

I take it to be so that where there is a newspaper published in the municipality to which what is published relates (or which it affects) it is imperative that publication shall be in that newspaper (or in one of such newspapers if more than one), and it is not optional to publish it in a newspaper in an adjoining or neighbouring municipality.

There was in this instance a newspaper published in the municipality in question; non-publication in it is fatal to the respondent's case.

The appellant is entitled to his costs of the appeal and of the motion to quash. *Appeal allowed.*

THÉBERGE v. DUMESNIL.

Quebec Court of Review, Archibald, A.C.J., Letellier, and Lane, JJ. June 5, 1918.

ARBITRATION (§ II—12) — NOTARY—INSTRUCTIONS BY ARBITRATORS — NEGLIGENCE—DAMAGES.

A notary who has been given instructions by arbitrators to receive their award and signify it to the parties within the delay in which the signification has to be made, and who negligently neglects to do so, is responsible for resulting damages.

Statement.

APPEAL from the judgment of Fortin, J. Reversed.

Handfield & Handfield, for plaintiff; *Beaubien & Lamarche*, for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—The judgment maintained the position taken up by the defendant from every point of view. The first *considérant* of the judgment holds that the defendant had never received a mandate for the signification of the award. This *considérant* was based upon what the judge held to be the illegality of the verbal evidence which was adduced at the trial to establish the instructions given to the notary to signify the award.

Indeed, if this evidence could be held to be legal, there would be no doubt that the notary had been urgently instructed to signify the award immediately. These witnesses who established this fact were examined without objection on the defendant's part, but after their examination was closed, the defendant moved to be allowed to put in the record his objections to that evidence as being unwarranted.

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The mandate in question not being provable by parol evidence the defendant was personally examined and the judge held that his examination did not afford any *commencement de preuve par écrit*.

Without discussing the question as to whether the mandate in question could be proved by verbal evidence or even whether it required any proof at all, had then the defendant been employed by the arbitrators for the purpose of rendering their award? I would say that the defendant, in his evidence, admits, first, that he put a charge in his books of $100 in respect to his services in connection with the award in question. Of this $100, $50 was his fee, and the other $50 was to go to an unnamed person, that he did signify the award on the 16th April and that no special charge was made in his books for the signification. That the $50 received by him was intended to cover the receiving of the award and its signification. That arrangements had, from the beginning, been made with him in relation to that question of fees. That the notary knew that the award was not complete without signification, and that in another case previously the question of necessity of signification within the delay had been raised in connection with an award received by him.

It strikes me that this admission is not only a commencement of proof in writing, but is complete proof that the engagement of the notary was to receive the award and to make signification of it.

I am, therefore, of opinion that this *considérant* of the judgment is unfounded.

The next *considérant* of the judgment is that the judgment rendered by the Superior Court, quashing the award, cannot be opposed to the defendant who was not a party to the case, and in connection with that the third *considérant*, that there is no disposition of the railway law which exacted the signification of the arbitrators' award, and that, therefore, it was not in reality the want of signification which caused the plaintiff's damages.

I would be disposed to admit that the defendant could not be bound by the judgment in question, seeing he was not a party to the case, but I feel disposed to differ from the conclusions to which the honourable judge arrived as to the necessity of signification.

The award of the arbitrators is in reality a judgment and must

be published, in my opinion, like any other judgment. The Railway Act provides that the delays for appeal to the Superior Court from the award are to run from the date of signification.

I think it is plain that until the award is signified, the duty of the arbitrators has not been completed and that duty must be completed within the delay fixed by the arbitrators for rendering the award, because after that delay they are no longer arbitrators and have no power.

S. 209 of the Railway Act (c. 37 R.S.C.) is as follows:—

Quand la sentence arbitrale porte l'indemnité à plus de $600, toute partie à l'arbitrage peut, sous un mois aprés avoir reçu de l'un des arbitres, ou de l'arbitre unique, selon le cas, avis écrit du prononcé de la sentence arbitrale, en interjeter appel sur toute question de droit ou de fait à une cour supérieure.

It seems to me that necessarily implies a written notice from one or more of the arbitrators. Naturally that must be before the arbitrators become *functi officio*. S. 152 of the Railway Act of 1888 contains the following words:—

Et il ne sera pas nécessaire de signifier d'avis à aucune des parties, mais elles seront suffisamment notifiées par la remise de l'avis à l'arbitre qu'elles auront nommé ou dont elles auront demandé la nomination.

S. 197 of the Railway Act presently in force, which corresponds to said s. 152 of the Act of 1888, does not contain the words just above cited. These words provide that the written notice required might be given to the arbitrators themselves and each party was sufficiently notified by notice to the arbitrators who were supposed to represent them.

The omission of these words from the section presently in force must be taken as equivalent to an abolition of the provision that notice to the arbitrators was sufficient notice to the parties who represent them.

Neither one of these sections, however, sets up the ground that no notice is requisite, and it would indeed be curious if a deed passed with notary, which may not come to the knowledge of the parties, is to be considered a final judgment promulgated.

I am fully of opinion that the notice was necessary and that it required to be served before April 10, and the defendant admits that he knew that. But he says that he did not know what was the delay within which the signification had to be made. That excuse does not seem to me to be of any force. He had previously been engaged on more than one occasion in such matters and he

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does not deny that he knew the law with regard to it. He knew that the arbitrators would become *functi officio* at a certain date fixed by them and that the notice had to be served previous to that date.

Besides that, as he received the award on March 31, he might have signified it the next day or following day. In not doing so he was guilty of delay in the performance of his duty.

A notary who undertakes to do a thing promptly when instructed, if he does not do so, must bear the consequences.

With regard to the *considérant* of the judgment that the notary had not been paid for his services, that seems to be unfounded.

The notary had made a special arrangement with regard to his fees, and it would seem as if that arrangement was considerably more than what he would have been entitled to under the notarial tariff. It would seem also as if he had made an arrangement with somebody unnamed to get an additional $50 for him. The notary was entitled to refuse to give his services, unless he was paid, undoubtedly, but he received instructions and made arrangements for payment and entered his account in his books. He cannot escape upon that plea.

With regard to the claim of the plaintiff in addition to the difference between the amount he actually received and the amount he would have received if the award had been maintained, I hold that the plaintiff is not entitled to recover from the notary the cost of litigation which he was obliged to pay, seeing that he might have brought the notary into the case and did not do so.

I, therefore, would reverse the judgment and maintain the plaintiff's action for the amount of $4,337.36.

Judgment in review:—Considering that the issues in this cause relate to a claim by the plaintiff against the defendant on substantially the following grounds: The Lachine, Jacques Cartier & Maisonneuve R. Co. desired to expropriate a property belonging to the plaintiff and offered therefor a sum of $1,196.64; the plaintiff refused the offer and arbitrators were appointed by the parties according to law, and said arbitrators, after various extensions, finally fixed April 10, 1913, to render their award. On March 31, 1913, said arbitrators instructed the defendant, as notary, to receive their award and said notary did receive it. By the award, the sum of $5,534 was awarded to the plaintiff in place of $1,196.64

offered by the railway company. The defendant did not signify the award upon the parties until April 16, 1913, six days after the time fixed by the arbitrators for rendering the award. The railway company attacked the award before the courts on the ground of failure to signify it upon the parties before April 10, 1913. The court maintained the contestation of the railway company and cancelled the award, and, thereupon, by law, plaintiff was obliged to accept the sum offered by the company, namely, $1,196.64 as full compensation, in place of receiving the said sum of $5,534, which they would have done if the defendant had signified the award as he was bound by law to do, and as he was instructed to do, previous to the time when the arbitrators became *functi officio*. The judgment dismissed the plaintiff's action on several grounds set out therein;

Considering that there is error in the said judgment in holding that the defendant was not obliged by his office to signify the said award upon the parties, and in holding that it was not proved that the notary has been instructed by the arbitrators to signify the award upon the parties, and in holding that the signification of the award upon the parties was not necessary to its validity, and consequently in holding that the non-signification of the award was not the ground of the plaintiff's loss;

Considering that it has been proved that the notary was instructed by the arbitrators to signify the award upon the parties promptly after its reception by him, and promised to do so and was paid for doing so, the notary having entered in his books a single charge for the reception and signification of the award;

Considering that it is the duty of a notary to take all legal steps so that the acts received by him may be valid and effective in the interest of the parties;

Considering that the plaintiff has established by legal proof that by reason of the failure of the notary to perform his duty in signifying the award, the plaintiff lost the difference between the sum offered by the railway company and the amount awarded by the arbitrators, namely, the sum of $4,337.36;

Considering, however, that the plaintiff was not entitled to include in his claim against the defendant, any costs incurred by him for legal expenses, inasmuch as he did not make the defendant

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a party to his proceedings; doth reverse the judgment of the Superior Court and proceeding to render the judgment which that court ought to have rendered; doth condemn the defendant to pay the plaintiff the said sum of $4,337.36, and costs with interest thereon from April 10, 1913, and costs both in the Superior Court and in the Court of Review.

Appeal allowed.

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UNGER v. HETTLER LUMBER Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ., and Ferguson, J.A. March 25, 1918.

CONTRACTS (§ II D—194)—LUMBER CAMP—HIRING OF SERVICES OF MEDICAL PRACTITIONER—ORAL—COMPLIANCE WITH PUBLIC HEALTH ACT.
The employment under an oral contract of a duly qualified practitioner to look after the employees in a lumber camp is a sufficient compliance with Regulation 4 of s. 118 of the Public Health Act (R.S.O. 1914, c. 218).

Statement.

AN appeal by the defendants from the judgment of the Judge of the District Court of the District of Nipissing, in favour of the plaintiff, for $144 and costs, in an action for the recovery of money expended by the plaintiff in connection with the illness (typhoid fever) of his son, said to have been contracted by the son while in the service of the defendants in a lumber-camp.

R. C. H. Cassels, for appellants.
R. T. Harding, for respondent, the plaintiff.

Mulock, C.J.Ex.

MULOCK, C.J. Ex.:—This is an appeal by the defendant company from the judgment of His Honour the Judge of the District Court of the District of Nipissing, in favour of the plaintiff, for $144 expenses incurred by him in providing medical care and attendance for his son when suffering from typhoid fever contracted whilst in the defendant company's service.

The defendant company are employers of labour in their lumber-camp, in the unorganised district of Nipissing. About the 2nd September, 1915, Ernest Unger, a young man under the age of 21 years, and son of the plaintiff, entered their service at their camp and continued in their employment until the 15th October, 1915, on which day he left on account of illness, returning to his father's home. The plaintiff at once summoned a medical

man, and, on his advice, placed his son in hospital under the care of Dr. Brandon, who on the 21st October found him suffering from typhoid fever, and the judgment in question is in respect of the expenses which the plaintiff incurred in thus providing his son with hospital and medical services.

The plaintiff contends that, by virtue of the Public Health Act, R.S.O. 1914, ch. 218, and the regulations made thereunder by the Provincial Board of Health, he is entitled to recover those expenses from the defendant company.

Section 118 (1) (*d*) enacts that the Board of Health may make regulations "for providing for the employment of duly qualified medical practitioners by employers of labour in lumbering camps," etc.; and sub-sec. (4) declares that: "If default is made in complying with any of the regulations the Board may direct that what is omitted to be done shall be done at the expense of the person, firm or corporation in default, and if the default is the failure to employ a duly qualified medical practitioner, as provided by clause (*d*) of sub-section 1, the employing person, firm or corporation shall be liable to pay the reasonable expenses incurred by any employee for medical attendance and medicines, and for his maintenance during his illness."

Regulations No. 3 and 4 of the Board, made under the authority of sec. 118, are as follows:—

Regulation (3): "Every employer of labour on any work other than a lumber-camp shall contract with one or more duly qualified physicians for the medical and surgical care of his employees; and may deduct from the pay due any employee a sum not exceeding $1 per month, which shall be paid to the physician or physicians so contracted with, without rebate or deduction, and every such physician shall supply medical attendance and medicine to the employees."

Regulation (4): "Every employer of labour in a lumber-camp may contract with one or more duly qualified physicians in the manner hereinbefore provided, and in that case may proceed in the manner authorised by the said regulations, and every physician so contracted with shall possess the powers and perform the duties set out in the next preceding regulation, but every such employer who does not contract for the medical attendance of his employees

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shall be responsible for the medical care and maintenance of each and every employee taken ill while in his employ, and shall incur a like responsibility for each and every case of sickness which developes in an employee after quitting his service or after being discharged from his employ when, in the opinion of the Provincial Board, the origin of such sickness is traceable to the period of such employment," etc.

Regulation No. 5 requires employers of labour on all works in unorganised districts to "transmit, at the time of the making of the contract, a copy of the same to the Secretary of the Provincial Board of Health, and notice of any subsequent change made in their physicians, or of changes in the contracts between the two contracting parties."

On the 28th August, 1914, the defendant company entered into a written contract with Dr. McKee, a duly qualified physician, whereby the latter agreed to furnish surgical and medical attendance to the men employed by the company at their camp, during the season 1914-1915, and to provide hospital accommodation for hospital cases at Cache Bay, North Bay, or Sudbury. The company's operations ended in or about the month of May, 1915, and the contract then also terminated.

Prior to Ernest Unger entering the service of the defendant company, the latter made a verbal contract with Dr. McKee for the coming season, being of the same tenor as the expired written one; and, in pursuance of such verbal contract, Dr. McKee entered upon his duties as contracting physician, visiting the camp on many occasions, beginning on the 24th August, 1915, and continuing until after Ernest Unger had left the company's service.

The plaintiff's counsel contended that a verbal contract did not fulfill the requirements of the regulations.

By regulation (4), the employer "may contract . . . in the manner hereinbefore provided." This has reference to regulation No. (3), but that regulation does not require a written contract, nor is there anything in regulation No. 4 calling for a written contract. Regulation 5 contemplates a written contract merely for the purpose of the Board of Health; but, *quoad* employees, a contract, whether verbal or written, meets the requirements of regulation No. 4.

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I am therefore of the opinion that the company had contracted within the meaning of regulation No. 4, and therefore they are not responsible either to Ernest Unger or to his father for Ernest's medical care and maintenance during his illness.

This conclusion having been reached, it is not necessary to determine whether in any event the father could maintain this action.

As to the question of costs, the defendant company in their statement of defence allege that Ernest Unger was dismissed for theft, and that he left their employ in apparent good health and without complaining of being unwell. The evidence shews that he was ill before leaving; and there is, in my mind, no doubt that the typhoid fever which subsequently developed had its origin whilst he was in the service of the defendant company. The statement that Ernest Unger was dismissed for theft was irrelevant to the issue, and no evidence whatever was offered in support of it, and the conclusion is that the charge was baseless. In fairness to the man charged, the defendant company should at the trial have publicly withdrawn it and asked that it be expunged from their statement of defence. They not having done so, I think we should on this appeal order that the charge be expunged from the statement of defence as scandalous, and because of its baseless nature the defendant company should be deprived of any costs here or below.

Being of the opinion that the plaintiff has no cause of action, the appeal should be allowed and the action dismissed, without costs.

Clute, J. Sutherland, J.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. EX.

Riddell, J.

RIDDELL, J.:—This is an action brought under the provisions of R.S.O. 1914, ch. 218.

Ernest Unger, being the infant son of the plaintiff, engaged with the defendants at their lumber-camp, about 17 miles from Field. It is admitted (though I should have had great difficulty in so finding on the evidence) that he contracted typhoid fever at the defendants' camp. He, feeling sick, left the defendants' employ on the 8th or 9th October, 1915, and some eight or nine days thereafter arrived at the plaintiff's home, plainly suffering

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from typhoid. He was taken to the hospital at North Bay, where he recovered, and is now on active service abroad. The plaintiff, his father, sued the defendants for the amount of the hospital bill, and recovered judgment for $144 in the District Court of the District of Nipissing. The defendants now appeal.

The whole cause of action is based on sec. 118 (4) of the statute R.S.O. 1914, ch. 218. By sec. 118 the Provincial Board of Health is authorised to make regulations, (1) (*d*): "For providing for the employment of duly qualified medical practitioners by employers of labour in lumbering camps . . . and for the erection of permanent or temporary hospitals for the accommodation of persons . . . employed." Sub-section (4) provides: "If default is made in complying with any of the regulations . . . and if the default is the failure to employ a duly qualified medical practitioner, as provided for by clause (*d*) of sub-section (1), the employing person, firm or corporation shall be liable to pay the reasonable expenses incurred by any employee for medical expenses and medicines, and for his maintenance during his illness."

The Provincial Board of Health made regulations, amongst other things, as follows:—

"1. Every employer of labour on any work in any lumbering, mining, construction or other camp, saw-mill and other industry situate in any portion of the unorganised districts without municipal organisation, shall, upon the establishment of each and every camp and work, forthwith notify the Provincial Board of Health of the establishment of the same . . .

"2. Every employer of labour on any such work shall contract with a duly qualified physician for the sanitary supervision of camps, dwellings, or works, and such physician shall inspect the same at least once a month or oftener if, in the opinion of the Chief Officer of Health, the health conditions of the Province require it, and shall forthwith report in writing to the Provincial Board . . ."

"4. Every employer of labour in a lumber-camp may contract with one or more duly qualified physicians in the manner hereinbefore provided, and in that case may proceed in the manner authorised by the said regulations, and every physician so contracted with shall possess the powers and perform the duties set out in the next preceding regulation, but every such employer

who does not contract for the medical attendance of his employees shall be responsible for the medical care and maintenance of each and every employee taken ill while in his employ . . .

"5. Employers of labour on all works in the unorganised districts without municipal organisation, shall transmit, at the time of the making of the contract, a copy of the same to the Secretary of the Provincial Board of Health, and notice of any subsequent change made in their physicians, or of changes in the contracts between the two contracting parties . . ."

The defendants did employ Dr. McKee, a duly qualified physician, and entered into a written contract with him, on the 29th August, 1914, for one year; a copy of this contract was sent to the Provincial Board. When the year expired, the defendant and the doctor not being certain what the Compensation Board (that year instituted) would do in respect of camp-work, agreed that the employment of the doctor should continue under the agreement of August, 1914, until they found out what the Compensation Board would do. The doctor went on as usual; and there is no pretence that he did not visit the camp at proper intervals or that he in any wise failed to perform his duties.

On the 30th October, 1915, a new contract was signed, and a copy sent to the Board. It was during the time before this day, and while the doctor was working under the verbal extension of the former contract, that the infection took place.

The whole ground of action is this: the regulations have the force of law; they provide for a copy of the doctor's contract being sent to the Board, therefore a written contract alone will answer the requirements; accordingly, unless the doctor is working under a written contract, there is a "failure to employ a duly qualified medical practitioner, as provided by clause (*d*) of sub-section (1)," and the defendants are liable.

I think the argument cannot succeed. Clause (*d*) gives the Board power to make regulations "for providing for the employment of duly qualified medical practitioners;" and the Board (in the second extract above) made a regulation that the employer should contract with a duly qualified physician for sanitary inspection of the camp, and (in the third) gave power to the employer to contract for the medical care of the employee.

In certain localities the Board requires a copy of the contract

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to be sent in; but that has nothing to do with the employment; it merely offers a convenient, speedy, and certain method of proving that the employment has taken place. The requirements authorised by clause (*d*) are exhausted by the previous regulations, and that of a copy of the contract is not within the purview of the clause.

Had the defendants failed to carry out the regulations requiring or authorising the employment of a physician, sub-sec. (4) would or might apply, but not if they simply had an oral and not a written contract.

I think the action cannot succeed; the appeal should be allowed and the action dismissed; but, for the reasons mentioned by the Chief Justice, without costs.

If sub-sec. 4 were held to apply, there might be other difficulties in the plaintiff's way—e.g., his right to sue etc.; but, in the view I take of the case, it is not necessary to consider these.

Ferguson, J.A.

FERGUSON, J.A., agreed with RIDDELL, J. *Appeal allowed.*

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MILLS v. SHERWOOD STORES Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

MASTER AND SERVANT (§ V—340)—DEATH OF BOY—FATHER PARTIALLY DEPENDENT ON EARNINGS—BASIS OF COMPENSATION—MAXIMUM AMOUNT.

The compensation awarded for the death of a fifteen year old boy, who lived at home with his father and mother and on whose earnings the father is partially dependent for the support of his family, should be the maximum amount allowed by the Workmen's Compensation Act (1910-11 Sask., c. 9, s. 15).

APPEAL from the judgment of a Dist. Judge in an action under the Workmen's Compensation Act for damages for the death of a 15 year old boy. Appeal allowed, amount of compensation increased.

P. M. Anderson, for appellant; *G. H. Barr*, K.C., for respondent.

Haultain, C.J.S.

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

Newlands, J.A.

NEWLANDS, J.A.:—In assessing the damages for the plaintiff under the Workmen's Compensation Act, the District Court Judge deducted from the amount paid in by the deceased to the family fund an amount to cover his board and lodging, clothing, etc.

I do not think that he has assessed the damages on a right principle. The boy who was killed was 15 years old. He lived with his father, the plaintiff. He paid all his wages, which, with the extra he made selling papers, amounted to $30 per month,

over to his mother, and it was used for the ordinary living expenses of the family.

In *Main Colliery Co.* v. *Davies*, [1900] A.C. 358, Halsbury, L.C., at p. 361, says:—

> The whole family were dependent upon the wages. Whose wages? Partly this boy's wages. It is said that this boy was under no obligation to support his brothers and sisters. No one denies that; but it appears to be forgotten that the obligation is upon the head of the family. He is by law bound to support the family, and he would be punished by law if he did not support them. Therefore, the burden being upon the father of the family, the father of the family in his turn obtains from the wages of those who are being maintained by him a partial contribution to the general fund. Why is not the father in the discharge of that burden partly dependent upon the earnings which he receives from his children? I am not able to answer that question. It appears to me that he must be relying or dependent—call it what you please—for the means by which he discharges his legal obligation upon the funds supplied to him, or partly supplied to him, by the children who earn those funds.

From the above language of the Lord Chancellor, I take it that his opinion is that, the burden being on the father to provide for his family, any contribution by a member of the family to the fund which supports the family renders the father, to that extent, dependent upon the earnings of the member of the family making the contribution. He further went on to say:—

> I observe that in this case Rigby, L.J., says that he should have found exactly as the County Court Judge has found; so should I. I entirely concur with that. Whether I should have found the exact amount is a different question; but I should have thought that the course pursued was the proper course to pursue, and I hope that is the course that will be pursued.

Now in that case the County Court judge pursued the same course as the District Court Judge did in this case, *i.e.*, he found that the parents were in part dependent upon the son's earnings, and after taking into consideration the amount necessary for the boy's keep and clothing awarded £23 8s.

This, however, is not the course that should have been pursued in this case, because the English Act differs from ours in the amount of compensation allowed where the dependency is only partial.

In England, where the parties are wholly dependent and death results from the accident, the compensation is fixed by his wages for the preceding 3 years or the sum of £150, but not exceeding in any case £300, but where the dependency is only partial such sum, not exceeding in any case the sum payable under the fore-

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ing provisions which may be agreed upon or determined by arbitration to be reasonable and proportionate to the injury to the said defendants. See schedule 1, Workmen's Compensation Act, 1897 (Imp.).

Under our Act, the amount of the compensation recoverable shall not exceed either such sum as is found to be equivalent to the estimated earnings during the 3 years preceding the injury of a person in the same grade employed during those 3 years in a like employment or the sum of $1,800, whichever is larger, but shall not exceed in any case the sum of $2,000: s. 15, Workmen's Compensation Act (1910-11, Sask.).

The difference between the two Acts in the case of a partial dependency is, in England, the compensation is to be proportionate to the injury to the dependants, while here there is no difference between that and partial dependency. Where the compensation is proportionate to the injury to the dependents, it is necessary to take into consideration the actual amount received from the deceased, which would be after deducting the expense of his keep, but where the compensation is a definite amount, or, rather, not to exceed a definite amount without any such qualification, the compensation should, where death occurs, be the maximum amount, which would in this case be $1,800, which is the amount suggested by my brother Elwood when this case was previously before the court.

Lamont, J.A.

LAMONT, J.A.:—In my opinion this appeal should be allowed. The evidence established that the wages of the deceased boy were $30 per month, all of which he gave to his parents, and that it cost $12 to maintain him. The difference was the extent to which the father was dependent upon the boy's earnings. The District Court Judge considered that $12 was too small an amount to allow for maintenance, so he placed it at $17.50 per month. There was, in my opinion, nothing in the evidence to justify placing the cost of maintenance at this amount. Both father and mother testified that the boy's food and clothes cost, as nearly as they could arrive at it, about $12 per month. This, of course, did not include compensation to the mother for many little things which she did for her boy, but $12 per month was the cash outlay for his maintenance. The testimony of these two witnesses was the only evidence on the point, and I do not think it was open to the trial

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judge, in face of the evidence, to increase the amount to $17.50. The total compensation was fixed at $900. This sum was arrived at by taking $150 per year as the difference between the total wages and the cost of maintenance and awarding that sum for 6 years. This was divided equally between father and mother.

The actual difference between the wages and cost of maintenance was $216 per year, instead of $150, on the basis of calculation adopted by the judge. The plaintiff was entitled to recover $1,296.

It was argued that, as the injury resulted in death, the plaintiff was entitled to the $1,800 fixed by the statute. I am not prepared to lay that down as a rule. The object of the Act was to provide compensation. I can imagine cases in which an award of $1,800 would be more than compensation. For example, take the case of a boy who was contributing to the family purse only $2 or $3 per month, or small sums at irregular intervals. In such a case $1,800 would far more than compensate the father for the pecuniary loss resulting from the death of the boy.

I am, however, of opinion that had I been fixing the compensation in a case like the present, where the deceased was a steady, ambitious boy, earning $30 per month and likely to earn more, and handing all he earned to his mother, I would not have considered the maximum fixed by the statute as more than fair compensation. Under the Act, however, it is the District Court Judge who is charged with the duty of fixing the compensation.

The appeal should be allowed with costs, and the compensation raised to $1,296. This will be apportioned as directed by the trial judge.

Appeal allowed.

ROBINSON v. LONDON LIFE INSURANCE Co.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ., and Ferguson, J.A. March 25, 1918.

INSURANCE (§ VI B—275)—CONTRACT—COMPLETION OF—TENDER OF POLICY—ACCEPTANCE BY INSURED.

A contract of insurance is complete only when the company has tendered a policy which has been accepted by the assured.

[*Sharkey* v. *Yorkshire Insurance Co.*, 28 D.L.R. 191, affirmed 32 D.L.R. 711, referred to.]

Statement.

AN appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, in favour of the plaintiff, the widow of J. E. Robinson, deceased, for the recovery of $1,000, the

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amount of an alleged insurance by the defendants on the life of the deceased.

The defendants denied that there was any insurance contract with the deceased subsisting at the time of his death or at any time.

J. M. McEvoy and *E. Jeffery*, for appellants.

C. W. Bell and *T. B. McQuesten*, for respondent.

Mulock, C.J.Ex.

MULOCK, C.J. Ex.:—This is an appeal from the judgment of Falconbridge, C.J.K.B., in favour of the plaintiff for $1,000 and costs.

The plaintiff is the widow of J. E. Robinson, and brought this action to recover the amount claimed to be due her by virtue of an alleged life insurance contract in her favour, made by the defendant company with the said Robinson.

There is no material dispute as to the following facts and circumstances.

The defendants are a life insurance company, having their head office at the city of London, and one J. D. Calvert was their local agent at the town of Preston to receive applications for insurance and insurance premiums and to procure medical examination of applicants for insurance therein.

On the 3rd February, 1917, Robinson made a written application to Calvert, at Preston, for insurance on his life for $1,000, and paid to him at the time, in cash, the sum of $5, and delivered to him his promissory note for $3.62, payable on the 20th February, 1917, making together the sum of $8.62, the estimated amount of the first quarter's premium, and Calvert gave to Robinson a receipt for the money in the following words and figures:—

"The London Life Insurance Company,
"Head Office, London, Ont.
"February 3rd, 1917.

"Interim Receipt.

"Received from Mr. J. E. Robinson $5.00, which is a payment on account of first year's premium on insurance of $1,000.00 for which application has this day been made in the above named company. No obligation is incurred by said company by reason of this payment unless said application is accepted and a policy granted.

"J. D. Calvert,
"Agent."

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Then follows a foot-note in the following words: "Unless you receive your policy or money is returned within 60 days from the date of this receipt, please notify the company, giving the name of agent, the amount paid, and the date when paid."

At this time, Robinson was engaged as a furnace-man at certain steel works, and Calvert explained to him that the company might regard his occupation as hazardous, and in consequence require payment of a larger premium, and Robinson fully understood that he might be required to pay a larger premium.

Robinson resided some distance from Preston, and was anxious to undergo medical examination before going home. The company's medical examiner at Preston being absent, the examination was made by another physician, appointed for such purpose by Calvert. On the same day, Calvert forwarded the application, the $5, and the note, to the company, enclosed in his letter worded as follows:—

"Preston, February 3rd, 1917.

"The London Life Insurance Co.,

"London, Ont.

"Dear Sirs:

"I am forwarding application for $1,000 from Mr. J. E. Robinson, of Hamilton, together with $5.00 and note for $3.62. I may say that I have taken it upon myself to have the examination made by Dr. Hogg, of Preston. Mr. Robinson was visiting Preston and had to return to Hamilton shortly after he signed the application. Our Dr. Oakes was out of town and not expected back until 7.30. Dr. Buchanan, of Galt, was also out and I could not get an idea as to the time he would get back. As the applicant lives out of Hamilton on rural route, he said he would prefer examination made whilst in Preston, with the result that Dr. Hogg is the examiner. I trust this is satisfactory, seeing that Mr. Robinson did not make the request to have a special doctor.

"Yours truly,

"J. D. Calvert."

On the 6th February, the company sent the application with the following letter to A. J. Arnold, of Kitchener, their district agent:—

"Dear Sir: *Re James E. Robinson.*

"We are returning this application, as the occupation calls for

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an extra premium of $3.00, if this man is working on a blast furnace. For information we would refer you to p. 347 of your manual. Kindly have the necessary changes made and initialled by the applicant.

"Yours truly,

"H. R. Laurie,

"Asst. Actuary."

Arnold evidently communicated the tenor of this letter to Calvert, for on the 8th February, 1917, he wrote to Robinson as follows:—

"J. E. Robinson, Esq., Hamilton, Ont.

"Dear Sir: I have been notified by the company that the nature of your occupation calls for an extra premium of 75c. per quarter, 13 weeks. I am forwarding the application which you signed, for your initials, as the quarterly payment will be $9.37, instead of $8.62. You will notice the alterations I have made and if you will kindly put your initials 'J.E.R.' between the crosses we need not have another application signed. The balance of first quarterly payment will be $4.37 due 20th inst. as per your note, which also requires your initials 'J.E.R.' I shall be glad to have the note and application returned in enclosed envelope at your earliest convenience. Trusting you will find this satisfactory, we remain,

"Yours truly,

"J. D. Calvert."

It does not appear when the medical officer's report was sent to the company, but at the trial it came from the company's custody, and had stamped thereon the words: "Received main office, February 10th, 1917. Answered."

On the 24th February, Mrs. Robinson, the plaintiff, at her husband's request, came to Calvert's office at Preston, bringing and delivering to Calvert the original application and note, with the changes initialled as suggested by Calvert. She then paid to Calvert $4.37, the amount of the amended note, which Calvert then delivered up to her, and at the same time he gave her a receipt for the $4.37, worded as follows:—

"Preston, February 24th, 1917.

"Received from Mrs. Robinson the sum of $4.37, being balance of quarterly premium for application for $1,000 insurance from London Life Ins. Co. "J. D. Calvert."

On the same day, the 24th February, Calvert sent the amended application, together with the $4.37, to the company, accompanied by a letter in the following words:—

"Preston, February 24th, 1917.

"The London Life Insurance Co.

"Dear Sirs: I forward herewith application from Mr. Robinson. The premium alteration has been initialled, which I trust is in order. Please find order for $4.37, being balance of first quarter's premium.

"Yours truly,

"J. D. Calvert.

"P.S. I have returned the note to Mr. Robinson for balance paid."

At the trial Mrs. Robinson testified that at the interview of the 24th February, Calvert assured her that the application had been passed, and that the receipt was as good as a policy. Calvert denies having so spoken. His version is: "I said to Mrs. Robinson, 'The application appears to be in order, and if the company accepts the life and the policy is issued, I will see that it is delivered immediately.'"

Calvert had only at that interview received the altered or new application, and it was still in his hands. It had not been passed, and it is improbable that he gave Mrs. Robinson any such assurance. Even if he did, it was contrary to the facts and was unauthorised, and Calvert could not on behalf of the company make an insurance contract on Robinson's life.

On Sunday the 25th February, Robinson died. On the fo lowing day, the company received the amended application and the $4.37, and certain clerks in the company's employment then proceeded as a matter of routine to prepare the policy. On the 27th February, Calvert received a telegram from Mrs. Robinson informing him of her husband's death, and on the same day he wrote the company informing them of the death.

This letter was received by the company on the 28th February. Up to this time the proposed policy had not been signed or sealed by the company or any of its officers, and one of the clerks who had been engaged in the preparation of the policy, on learning of Robinson's death, destroyed the intended policy. Subsequently the premium which had been paid was returned by cheque to Mrs. Robinson, who then consulted her solicitors. They then returned

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the cheque to the company, who sent it back to the solicitors, and they, without prejudice, retained it, and commenced this action.

The defence is, that no contract had been entered into between the company and Robinson, and that is the question now to be determined. If there was no contract before Robinson's death, nothing that happened thereafter could create one, for a contract cannot be made with a dead man.

The plaintiff contends that, when Robinson delivered his first application and paid the $5, it was understood that, upon accepting the application, the company might charge an additional sum on account of the premium; that, on receipt of the application, the company's officials notified their agent that the application had been accepted, provided that Robinson paid a quarterly premium of $9.37 instead of $8.62; that the agent so notified Robinson and requested payment of the additional sum; that, on the 24th February, Robinson complied with such request; and that thereupon the contract arose.

There is no evidence to support any of these contentions. According to the evidence, there was no understanding on the part of the company that on accepting the application it might charge an additional sum, or that the company's officials, on receipt of the application, notified the agent that it had been accepted, either conditionally or otherwise, or that the agent notified Robinson of any such alleged acceptance or demanded payment of the additional amount. Even if Calvert, on receipt of the first application and first payment, had given to Mrs. Robinson the alleged assurance, it would have been of no avail, for he was an agent of limited authority, simply to receive applications and premiums. According to the company's by-laws, the manager, assistant-manager, and acting manager are the only officers empowered to bind the company by an insurance contract, and they can do so only after the application has been approved by the medical referee. In this case it was not approved by that officer until the 27th February. Until then no one had power to bind the company by an insurance contract; and, Robinson having died two days previous to such approval, it was impossible for a contract to have existed.

The true interpretation to place upon the occurrences is, I think, as follows:—

On receipt of the application, Calvert informed Robinson that

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his occupation, being of a hazardous nature, might call for an increased premium; that, when the application reached the company's office, it first went to the actuarial office, and, it there being discovered that the amount of premium mentioned in the application was not in accordance with the company's tariff of rates, the assistant actuary sent the application to the district agent, calling his attention to the tariff. That officer apparently communicated the information to Calvert, and he made the necessary changes in the application and in the promissory note, and sent them to Robinson. The latter, agreeing to the increased rate, initialled the changes and returned the altered application and note by his wife to Calvert. The first application was a proposal for insurance at a certain rate. This the company in effect refused to accept. What subsequently happened may be regarded as a counter-proposal, and the amended application became in fact a new application or proposal, and was not accepted by the company prior to Robinson's death.

I therefore am of opinion that there never was any insurance contract between the company and Robinson.

My learned brother Riddell in his judgment in this case observes that in *Sharkey* v. *Yorkshire Insurance Co.*, 37 O.L.R. 344, 28 D.L.R. 191, affirmed in the Supreme Court, 54 S.C.R. 92, 32 D.L.R. 711, it was pointed out that the ordinary application for insurance is not a tender which will become a contract, but a request to the company to offer a policy; that, if the company tender a policy on such request, the proposed assured may decline to accept it. "If the assured accept the policy tendered, then and only then the contract is complete:" 37 O.L.R. at p. 352: see the cases cited. The Supreme Court affirmed the judgment of the Appellate Division, but none of the Judges appear to have expressed any opinion in regard to the proposition above quoted.

The Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 2 (14), declares that "'Contract of insurance' shall mean and include any policy, certificate, interim receipt, or renewal receipt, or writing evidencing the contract, or any contract or agreement sealed, written or oral, the subject-matter of which is insurance." A policy is evidence of a contract, but is not itself the contract. The contract may be by parol, in which case there is no policy to submit to the applicant for acceptance or refusal. The application

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is an offer, and may be accepted, as was, I think, correctly observed by my brother Ferguson, during the argument, by any sufficient corporate act, not necessarily the granting of a policy.

Further, by sec. 155 of the Act, the contract of insurance, if posted or committed to any one for delivery to the assured, is deemed evidence of the contract.

The plaintiff has, in my opinion, failed to shew that an insurance contract on the life of her husband was in force at the time of his death, and the judgment in her favour should be set aside and this action dismissed with costs here and below.

Clute, J.
Sutherland, J.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. Ex.

Riddell, J.

RIDDELL, J.:—The defendants are a life insurance company, whose agent obtained from J. E. Robinson, the (now deceased) husband of the plaintiff, an application for a policy on his life for $1,000, payable to her. The chronology is important, and I here set it out:—

On the 3rd February, 1917, Saturday, the deceased went to Preston, and there signed an application for a policy on his life for $1,000, 20 yearly payments, without profits. Being informed that the quarterly premium was $8.62, he paid the company's agent $5, receiving therefor a receipt for "$5.00, which is a payment on account of first year's premium on insurance of $1,000.00 for which application has this day been made in the above named company. No obligation is incurred by said company by reason of the payment unless said application is accepted and a policy granted" (exhibit 1). He also gave a note for $3.62 for the balance (exhibit 4).

Robinson also on the same day submitted to a medical examination at Preston (exhibit 9), but this was not sent on.

On the 4th February, the agent at Preston mailed the application, the $5, and the promissory note, but not the medical examination, to the head office at London, Ontario, and it was there received on the 5th February, Monday.

On the 6th February, on the application being examined by the clerks in the head office, and the occupation of Robinson (as foreman on a blast furnace) appearing hazardous, the application and note were returned to the Preston agent, and his attention called

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to the facts. He was asked, "Kindly have the necessary changes made and initialled by the applicant."

On the 8th February, the Preston agent wrote the applicant, telling him the facts and asking him to initial the alterations the agent had made in the application and note (which papers the agent enclosed to him).

On the 10th February, the medical examination reached the head office.

Two weeks later, i.e., on the 24th February, the applicant sent his wife, the present plaintiff, to the office of the Preston agent, with the application and note properly initialled. She, however, paid the amount of the note, $4.37, in cash, and was given a receipt: "Received from Mrs. Robinson the sum of $4.37, being balance of quarterly premium for application for $1,000 insurance from London Life Ins. Co." She was assured by the agent that a policy would issue, and (apparently) that the receipt was as good as a policy. On the same day the agent sent the amended application with the $4.37 to the head office, returning the note to Robinson.

On the 25th February, Robinson died, apparently from the fumes of a coal-stove.

On the 26th February, the amended application and $4.37 were received at the head office and examined by the clerks.

On the 27th February, the medical report was taken to the medical referee and approved. The policy was actually written and put on the list for mailing the following day, but it was not signed or sealed.

On the same day, the widow notified the Preston agent of the death, and the agent wrote the head office.

On the 28th February, the information reached the head office.

No further steps were taken toward completing the policy, and the paper which would have become a policy, if completed, was destroyed. The agent was notified that the policy had not issued, and a cheque for $9.37 was sent to the widow. She did not cash the cheque, but kept it; at length, on the 16th April, she consulted her solicitor, who made a claim on the company (enclosing the cheque). The company repudiated liability, and re-enclosed the cheque, which was produced by the plaintiff at the trial, never having been cashed or endorsed.

An action was brought, which was tried by the Chief Justice

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of the King's Bench, without a jury, at Hamilton, resulting in a judgment for the plaintiff for the amount of her claim with costs.

The defendants now appeal.

The recent cases do not seem to have been brought to the attention of the learned Chief Justice. They seem to me conclusive against the plaintiff's claim.

In *Sharkey* v. *Yorkshire Insurance Co.*, 37 O.L.R. 344, 28 D.L.R. 191 (affirmed in the Supreme Court, 54 S.C.R. 92, 32 D.L.R. 711), it was pointed out that the ordinary application for insurance is not a tender which will become a contract, but a request to the company to offer a policy; that, if the company tender a policy on such request, the proposed assured may decline to accept it. "If the assured accept the policy tendered, then and only then the contract is complete" (37 O.L.R. at p. 352). See the cases cited.

Of course, the application or other document may stipulate for any other method of acceptance. For example, in *North American Life Assurance Co.* v. *Elson* (1903), 33 S.C.R. 383, there was a stipulation "that the issue and delivery of a policy in the usual form should be the only acceptance thereof" (see Printed Cases in the Supreme Court of Canada in the general Library, Osgoode Hall, vol. 238 (1903), at p. 49 of the case), and it was held for this reason that the policy became effective when it was mailed to the assured: 33 S.C.R. at p. 392.

There is no such provision here, nor is there, as in that case, an application for a policy in "the company's usual form."

The fact that the applicant in his application answers in the affirmative the question, "If a policy is written by the company do you agree to accept and pay for the same on presentation?" does not matter. It was decided, and properly decided, in the Queen's Bench Division, about 20 years ago, that such a promise cannot be ordered to be specifically performed, the only recourse for the company being to sue in damages.

No policy having been accepted by the assured, or any one representing him, I think the defendants are not liable.

But this is a much stronger case for the defendants than the *Sharkey* case. Here there was no actual issue of a policy at all.

A policy must, to bind a company, be made either by a corporate act or by some agent duly authorised thereto. Of course, I am not here speaking of special cases of estoppel and the like.

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Here there is no pretence that there was any corporate act, and the only persons authorised to "accept any applications for insurance" are "the manager, assistant-manager, or acting manager for the company;" and it is not contended that any of these had any knowledge of or acted on the application.

A still further ground of defence is, that not even any of these could act unless the application "be first approved by the company's medical referee" (exhibit 13). The medical referee never saw the application until after the applicant was dead.

I would allow the appeal with costs here and below, if demanded.

Ferguson, J.A.

FERGUSON, J.A.:—Being of opinion that it is not necessary to the decision of the case at Bar to consider the effect of the opinions in *Sharkey* v. *Yorkshire Insurance Co.*, I agree in the result.

Appeal allowed.

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Quebec Court of Review, Fortin, Greenshields and Lamothe, JJ. January 5, 1918.

1. CONTRACTS (§ I D—62)—CERTAIN INTERPRETATION—AGREEMENT TO—THREATS—VITIATION.

Forcing a contractor to sign a letter consenting to a certain interpretation being given to a contract, on the threat that if it is not signed all further payments to him will be stopped, which would cause the financial ruin of the contractor, is sufficient to vitiate the consent thus given.

2. CONTRACTS (§ IV A—321)—EXTRA WORK—AGREEMENT—WORK DONE WITHOUT PROTEST—ACCEPTANCE OF PAYMENT AT CONTRACT PRICE—RECOVERY.

A contractor who has agreed to do any work ordered by the owner, "notwithstanding to what extent such increase or diminution of quantities may be carried during the performance of the work," cannot charge any additional price, if he has done the work without protest, and has accepted payment at the contract price without objection.

Statement.

APPEAL from the judgment of the Superior Court, Maclennan, J., which is modified.

This case is composed of nearly all questions of facts and of disputed accounts. The facts in connection with this summary are as follows:—By a contract of December 29, 1916, Georges W. F. Nicholson and his associates undertook to do certain work for the defendant in the construction of head wall, spillway abutments, in connection with the hydraulic development of the defendant's works at St. Timothée. The partnership was dissolved, and the contract continued by Nicholson. Several other

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contracts for different works to the same end were given by defendant to said Nicholson. The plaintiffs are the joint curators to the latter's estate.

On March 30, 1914, they instituted an action against the defendant for $178,426.56 for works done under the contracts for extras, labour and for interest. By an incidental demand, they claim another sum of $72,691.08 extra cost for work, insurance, etc.

The defendant pleaded, in substance, amongst several defences: (*a*) as to the measurement of part of the work, the defendant says that according to a letter, signed on January 24, 1911, by the contractor, it was agreed that payment for the forebay enbankment would be calculated on a certain basis different than that upon which the plaintiff's claim is founded; (*b*) the defendant, in the contract, had stated that the quantities of materials and work required to be done was only approximatively described; and the contractor agreed to make no claim for damages or increased unit compensation in consequence of any increase or diminution of quantities. Therefore, he has no right to demand additional price for the increased work done during the winter; and, moreover, the contractor has performed the labour without protest, making no claim for extras and accepting payment at the unit or contract price without complaining; (*c*) in the contract, the whole work was to be completed in a specified delay under a fixed penalty. The contractor having failed to terminate his contract within this delay, he is liable in penalties.

In answer, especially to the above points in the defendant's plea, the plaintiff says that if the work was not completed in time, it was wholly due to the fault of the defendant; and, moreover, that the work was done under the supervision of its engineers, who have acquiesced in the schedule of progress of the work, never complained as to time, and that the company never pretended that it was entitled to exact any penalty. As to the letter of January 24, 1911, the contractor was forced to sign it under undue coercion, violence and fear on the part of the defendant who threatened him to suspend his payments, which would have forced him into liquidation.

The defendant made a cross-demand in which, amongst several other demands, it claims to be entitled to $11,250 for the aforesaid penalties.

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The Superior Court, in an elaborate judgment, maintained the action for $175,332.45, and dismissed the cross-demand.

The Court of Review modified the first judgment on the principal action; and affirmed the dismissal of the cross-demand.

Brown, Montgomery & McMichael, for plaintiff.

Foster, Martin & Co., for defendant.

GREENSHIELDS, J. (after having disposed of the first question of fact). Difference between measurements in embankments and in excavation, $36,913.72:—The court is of opinion that the plaintiffs have maintained their pretension with respect to this item, and that by the contract and by the proof made measurement was to be in excavation and not in embankment, as contended for by the defendant. Moreover, it does appear that there never was an accurate measurement in embankment, and the defendant's engineers testify that it is impossible to make an accurate measurement in embankment.

With the pretension of the defendant that the contractor freely accepted that interpretation of the contract, the court is unable to agree: it is of opinion that he did not do so. The contractor's signature to the letter invoked by the defendant was obtained by Robert, its manager, on the threat by him, that if the letter was not signed, all further payments to the contractor would be stopped; resulting in the financial ruin of the contractor, and this to the knowledge of Robert when the threat was made.

This threat, in the opinion of the court, is sufficient to vitiate the consent thus given to the contractor: Arts. 995, 998, C.C.

The judgment allowing the item is maintained.

(The judge examined three other questions of fact.)

The whole of the winter work claim ($63,181.40). Upon this item the plaintiffs assert that in consequence of the increased quantity of work ordered by the defendant, the contractor was obliged to do in winter what was contemplated to be done in summer, and the item represents the extra cost of the work in addition to the contract price.

The defendant answers that by clause 26 of the contract, the contractor was obliged to do and perform any work ordered by the defendant, and agreed to make no claim for damages or increased unit compensation in consequence of such increase or diminution of quantities:—

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Notwithstanding to what extent such increase or diminution of quantities may be carried during the performance of the work.

Moreover, the contractor performed the work without protest and without making any claim, and accepted payment at the unit or contract price without objection. The defendant further pretends that the claim is in the nature of damages, and the contractor cannot claim damages under clause 33 of the contract, without complying with the conditions of the clause as to notice, etc., which the contractor failed to do.

The court finds the defendant's pretension is well founded in fact and in law, and the claim as made by the contractor cannot be allowed and the amount is deducted.

(Examinations of seven other questions of fact.)

Considering that by the judgment this day rendered the sum of $53,360.37 has been granted to the Nova Scotia Construction Co., Ltd., as the transferees of the contractor, and the said sum must be deducted from the said sum of $99,491.41, and the present plaintiffs are therefore entitled to a judgment for the sum of $49,111.10;

Considering there was error in the judgment *a quo* in respect to the items by the present judgment now allowed; doth cancel and annul the *dispositif* of the said judgment; and proceeding to render the judgment which should have been rendered:

Doth maintain the plaintiff's principal action and the two incidental demands, and doth condemn the defendant to pay to the plaintiffs the sum of $49,111.10, with interest from October 10, 1911, and costs in the Superior Court; but doth condemn the plaintiffs to pay the costs of this court.

Proceeding to adjudicate upon the cross-demand made by the defendant;

Considering it is established that the major part of the delay in the completion of the said contract was due to the defendant and the other contractors on the work, for which the present contractor was not responsible;

Considering, moreover, from the proof, it is impossible to determine what part of the delay, if any, was due to the contractor;

Considering, moreover, that the defendant company never made claim to any penalties, and never complained of any delay, and made progress payments without asserting any right of deduction on the ground of penalties; accepted the work upon its comple-

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tion, and relieved the contractor from his indemnity bond, and by its conduct generally effectively waived any right to claim penalties;

Considering there was no error in the judgment dismissing the cross-demand of the defendant;

Doth dismiss the defendant's inscription, and doth confirm the judgment *a quo*, with costs in both courts. *Judgment accordingly.*

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DE LAVAL DAIRY SUPPLY Co. v. NICHOL.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

CHATTEL MORTGAGE (§ IV—45)—TO SECURE THE PURCHASE PRICE OF SUPPLIES—CHATTEL MORTGAGE ACT (SASK.)—PRIORITIES.

Section 17 of the Chattel Mortgage Act, R.S.S. 1909, c. 144, as amended by 1916 stats., c. 37, s. 22, authorizes a chattel mortgage to be given on growing crops to secure the purchase price of food and supplies; but such mortgage does not take priority over a prior execution.

APPEAL from the judgment of a Dist. Judge barring the claim of the claimant in an interpleader issue. Affirmed.

P. M. Anderson, for appellant; *F. H. Bence*, for respondent.

The judgment of the Court was delivered by

ELWOOD, J.A.:—On or about September 10, 1915, a writ of execution issued out of the Judicial District of Battleford commanding the sheriff of that Judicial District to levy of the goods of A. E. Lawless certain moneys. On or about July 6, 1916, the said Lawless executed to the claimant a chattel mortgage upon the crops growing or to be grown on certain lands. This chattel mortgage was registered on July 24, 1916, and was given by virtue of s. 17 of the Chattel Mortgage Act, as amended by s. 22 (6) of c. 37 of the statutes of Saskatchewan of the year 1916. Subsequently to registering of said mortgage, said sheriff, under said execution and other executions, seized the crops covered by said mortgage. The claimant claimed the same, and, an interpleader issue having been taken, the District Court Judge barred the claim of the claimant, and from that judgment this appeal has been taken. Elwood, J.A.

A number of questions were raised, but, in view of the conclusion I have come to, it is unnecessary that I should deal with them all.

It was contended by the claimant that, by virtue of the above section of the Chattel Mortgage Act, priority was given to the claimant. I am of the opinion that that contention is not well taken. If it were not for the above amendment, passed in the year 1916, the claimant could not have taken, under the circum-

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stances, a chattel mortgage on the growing crops. That amendment gave him the right to take the chattel mortgage, but did not give him any priority. In this respect he was different from one taking a chattel mortgage as security for the purchase price of seed grain. In the latter case, priority is given to the mortgagee. In the case at bar, no such priority is given.

It was contended further, that the execution did not attach until the crops were severed. I am of the opinion that this contention is also incorrect.

In *Evans* v. *Roberts*, 5 B. & C. 829, 108 E.R. 309, it was held that growing crops, *fructus industrialis*, go to the executor and not to the heir, and may be taken in execution under a *fi. fa.* by which the sheriff is commanded to levy a debt on the goods and chattels of the defendant. See also 14 Hals. 45, and *Roberts* v. *Gray*, 17 W.L.R. 277, at 279.

I am, therefore, of the opinion that the crops were properly bound by the execution in question, and that the appeal should be dismissed with costs. *Appeal dismissed.*

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Quebec King's Bench, Archambeault, C.J., Lavergne, Cross and Carroll, JJ. April 6, 1918.

1. INSURANCE (§ VI D—365)—CARGO—LOSS OF—PAYMENT BY COMPANY—OBLIGATION OF INSURED TO ACCOUNT TO COMPANY—RIGHT OF INSURED TO MAINTAIN ACTION AGAINST WRONGDOER.

The owner of a cargo lost in transit who has received from an insurance company the full value of the cargo, covered by the insurance policy, has a sufficient interest to maintain an action against the person whose negligence caused the loss, such owner being under obligation to account to the insurance company for whatever can be recovered from the wrongdoer.

2. CARRIERS (§ III C—390)—SEAWORTHY VESSEL—LOSS OF CARGO—FAULT OF NAVIGATION—LIABILITY OF OWNER OF VESSEL—WATER CARRIAGE ACT.

The owner of a seaworthy freight vessel is not liable under the Water Carriage Act (R.S.C. 1906, c. 113, s. 964) for loss of cargo due to the fault of navigation on the part of the captain of the tug towing such vessel.

Statement.

APPEAL from the judgment of the Superior Court, Coderre, J. Affirmed.

On October 21, 1913, Alex. McFee delivered to the Montreal Transportation Co. 40,000 bushels of wheat, at Fort William, to be carried to Montreal. The wheat was loaded on the barge

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"Cornwall" in tow of the tug "Emerson," the two vessels belonging to the Montreal Transportation Co. While both were proceeding down the Cornwall Canal the bow of the barge was run into the north bank of the canal. She was towed further down but sank, and her cargo of wheat was lost.

The appellant took an action for the value of the wheat, to wit, for a sum of $31,675.97, on the ground that the accident was due to the respondent's negligence, consisting, in substance, in unseaworthiness of the barge "Cornwall," want of skill on the part of those in charge of the barge and tug, and insufficient equipping of these latter.

The respondent contesting denies that the "Cornwall" and the "Emerson" were unseaworthy and improperly manned, equipped and supplied, and that there was any negligence on their part. It avers: (*a*) that the barge took a sudden and accidental sheer which could not be checked in time to prevent her bow stranding upon the canal bank and thus exposing her whole length to the current which swung her stern with great force against the opposite bank; that she began to leak from the shock of stranding and the strain due to the weight of her cargo and the pressure of the current; (*b*) that, in any event, the respondent cannot be responsible for more than $38.92 per ton of tonnage of the barge; (*c*) that the appellant has no right of action as it had received full payment of the value of the wheat from an insurance company.

The Superior Court dismissed the action and this judgment was affirmed in appeal.

Lafleur, McDougall, McFarlane & Pope, for appellant; *McLennan, Howard & Aylmer*, for respondent.

CROSS, J. CROSS, J.:—By the judgment now before us, the action was dismissed on the ground that the obligation in favour of the appellant had been extinguished by the payment made by the insurers, that the plaintiff was without interest to sue and that the insurers could not sue in the appellant's name.

Having taken that view, the Judge of the Superior Court found it unnecessary to express an opinion on the other issues, and it is appropriate that the defence of lack of interest to sue should be considered here also in the first place.

After the loss, the appellant sent in its claim to the Insurance Company of North America, on November 7, 1913, for $34,000

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under a marine insurance contract. The company gave its cheque for the $34,000, and took the appellant's receipt worded as follows:

Montreal, November 7, 1913.—Received from the Insurance Company of North America per Robert Hampson & Son (Limited), agents, $34,000 advanced as a loan on account of loss on 40,000 bushels wheat ex. S.S. "Rosemont" shipped per barge "Cornwall," Kingston to Montreal, October, 1913.—$34,000—Signed, ALEX. McFEE Co. (Limited), per pro. A. GEO. BURTON.

Counsel for the respondent says that this recital of receipt "as a loan" is a subterfuge, that there was no loan; and that the appellant's claim was settled and extinguished. In my opinion, the facts do not go so far as to establish that contention in its entirety. The appellant could receive the insurance money and still not receive it in extinction of its right to exercise recourse against a person whose negligence caused the loss. I consider that this payment by the insurer was made in pursuance of an understanding between the appellant and the insurer that they would help each other to claim from the respondent. The appellant was under obligation on being paid by the insurer to cede to the latter its right and recourse against the respondent, if called upon to do so. The matter has been arranged by letting the appellant have the benefit of the insurance money in the meantime while the suit is taken in the appellant's name as owner of the wheat. In those circumstances the appellant has an interest to sue. But it may be opportune to consider the matter on the footing contended for by the respondent, namely, that the insurance money was paid as an out-and-out settlement of the claim which the appellant had against the insurer.

In view of the fact that the wheat was being carried under bills of lading issued at Fort William, in Ontario, and that the loss also happened in Ontario, it might have been well if we had had the advantage of having had proof of the law of that province touching the right of an insured who has been paid to maintain an action against a person to blame for the loss, notwithstanding receipt of the insurance money. Such proof has not been made.

How does our law speak on the question? The respondent relies upon the decision of this court in *Archambault* v. *Lamère*, (1882), 26 L.C.J. 236. That case is authority for saying that an hypothecary creditor who has secured himself by having taken, in his own name, insurance on the hypothecated property, and who has been paid upon a fire-loss by the insurer, cannot again

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recover the same part of his claim from this debtor. That conclusion would seem inevitable in the case there decided. The insurance was in security of payment of a contract debt. The creditor could not pretend to collect from his debtor on the ground that he was under obligation to pay over the money to somebody else. Nor was the question of blame or responsibility for the fire-loss in question.

The importance of that decision, from the point of view of the present appellant, lies in the reasoning of Dorion, C.J., and in the citations from the text writers there given, from which it would appear that an insured person whose claim for fire-loss had been paid by the insurer is in the position of a creditor whose claim has been extinguished by payment and who consequently cannot recover indemnity from the wrongdoer who caused the loss.

One has good reason to hesitate to criticise any opinion of the Chief Justice who gave judgment in that case, but I must venture to say that a confusion of ideas is involved in the reasoning in that case.

No doubt a person whose claim has been extinguished by payment cannot recover the amount of the same claim from another person. That would be double satisfaction. Here the appellant has received the insurance money in satisfaction of the loss insured against. The insurance claim is satisfied. But the insurer has the right to obtain a transfer of such rights as the insured creditor could exercise against the wrongdoer. It is not a double satisfaction of the same obligation, if the insured party is under obligation to account to another person, the insurer, for whatever he can recover from the wrongdoer. Dalloz, Supplement, Rép. Verbis Assurances terrestres, No. 225. An accurate view of the distinction to be drawn can be found in the work of De Lalande, Assurance contre l'incendie, to which the Chief Justice had referred us.

The result might be different if the plaintiff had subrogated the insurer in all his recourse against the wrongdoer (or if the law had operated such subrogation as in the case stated by Boudousquié cited by the Chief Justice). Instead of a subrogation, what the insurer in the present case is entitled to is a "transfer of rights," art. 2584, C.C., and it has not yet received such a transfer.

If I insure myself against loss of my watch and, having lost it, receive payment of the value of it from the insurer and the watch

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is afterwards discovered, it is still my watch, and I can recover it. If I discover that a wrongdoer has destroyed it, I can sue him for the damages sustained.

The Chief Justice, to whose judgment in *Archambault* v. *Lamère* I have referred, gave judgment two years later in *Moffatt* v. *Burland*, 28 L.C.J. 214, a case in which Moffatt asserted a right to contest Burland's claim to certain machinery.

Moffatt was merely an assignee by private deed from Gebhart & Co., for the benefit of the creditors of the latter, and had no personal interest in the machinery. This court maintained Moffatt's right to contest. The decision is notable because of the elaborate reasoning of the Chief Justice and for his lengthy review of authorities which demonstrated the conclusion that the rule "*Nul ne plaide par procureur, si ce n'est le Roi*" had been reduced to a simple question of form in France and "in point of fact it was only applied to a mere agent, *nudus minister*." It is true that the decision in that particular case was reversed on a further appeal in Canada (11 Can. S.C.R. 76), but at a later date their Lordships of the Judicial Committee in *Porteous* v. *Reynar*, 13 App. Cas. 120, adopted and expressed full approval of the reasoning of Sir Antoine Dorion in *Moffatt* v. *Burland*, and it should now be regarded as settled law.

In these circumstances, I would say that the appellant has an interest to maintain the action, being much more than a mere *nudus minister* and I would, therefore, overrule the ground of defence upon which this action has been dismissed. The majority of us are of this opinion.

II. Ground of action alleging unseaworthiness and incompetence.

The material facts are the following: The respondent was owner of the "Cornwall" and the tug "Emerson" which had the "Cornwall" in tow. The "Cornwall" was an oak-frame wooden barge about 175 ft. long and 35 ft. wide. She had been in service 23 years.

On October 30, 1913, she was being towed down the Cornwall canal by the "Emerson" and, laden as she was, was drawing 11 ft. of water.

At about a mile below Dickenson's Landing, she took a "sheer" to the right. This was corrected by appropriate steering of tug

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and barge and by acceleration of speed but she next took a "sheer" to the left and this time the efforts to bring her back into her course failed. Her front grounded on the left bank of the canal and either just before or just after she took the ground (there is testimony in both senses) the left side tow-rope broke. Thereupon the stern of the "Cornwall" swung over to the other or south side of the canal, against the canal bank, thus damming the canal to 11 feet down from the surface of the water and leaving a space of only 5 ft. under the keel through which the canal water had to pass. The thrust of the stern against the south bank broke away the botten cap of the rudder, shoved the rudder post out of position and split open the rudder casing so that the water began to flow into the barge. This mishap occurred about 8 o'clock in the evening. Pumps were set at work to keep down the water which was leaking in and were kept at work till the next morning. Meantime the "Emerson" and another tug were used to try to pull the barge off the banks, but without success. In the forenoon the opening or cracks at the stern were more or less stopped up and the leakage into the barge was got under control. Later in the same forenoon, the current in the canal was stopped or reduced by cutting off water at the lock above, whereupon, by pulling of a tug at the upper side and the pushing of the "Emerson" at the lower side, the barge was gotten afloat. She at once began to leak badly and it was decided to beach her. She could not be floated upon any level bottom and was run up against the canal bank. Ropes were tied to two posts in the bank, but the vessel in settling put such strain on the ropes that the posts were pulled out. The stern swung out and the barge sank, the stern being some feet under water and part of the front deck, including two or more of the hatches, being out of the water. While settling in this way the barge was observed to "kink" or bend at a point a little to the rear of the fore-mast. Next day, the swelling of the wheat hoisted the deck, the beams coming away from the upright or shelf at one side.

It is clear that the aggravated leaky condition which manifested itself when the barge was refloated consisted in opening of the butts and seams, and that it was an effect of some or all of following causes, namely, shock of the barge running at four miles an hour being stopped by running into the left bank, strain thrown

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upon the upper side of the body of the barge when the stern struck against the south bank, strain caused by the canal water being penned back by the barge and strain by the pulling and pushing of the tugs.

In addition to these causes, the witness McMaster speaks of a strain attributable to the weight of water inside the barge, but it is not explained why the water inside should cause any strain if at the same level as the water outside.

It is said for the appellant that the "Cornwall" was unseaworthy and that the respondent failed to exercise due diligence to make her seaworthy, or to have her properly manned, equipped and supplied, and consequently cannot have the protection of s. 6 of the Water Carriage of Goods Act, 9-10 Edw. VII. c. 61 (Can.). That enactment would have relieved the respondent from responsibility from loss or damages, resulting from faults in navigation or in the management of the barge or from latent defect, if it could shew that it had exercised the diligence above mentioned.

The wreck of the "Cornwall" was inspected by Surveyor Clift, Ritchie and Wescott, in November, 1913. These men certified that, in their opinion, the vessel when she took on the wheat was not in a fit condition to carry dry and perishable cargo. In particular, they reported that in about two-thirds of her length the found the beam end rotten; that wedges had been inserted at the wood ends because of the spaces being too wide to have been caulked, and that the stern and aprons were rotten, and apparently would not hold fastening. They further certified that though these facts were observed only on the part above water and though much the greater part of the barge was then under water, they inferred from the general condition that the same defects existed in the submerged part.

Another survey was made on April 20 following by the same men and Messrs. Hall and Richard, the level of the water, on that day, having been let down about 4½ ft. so that more of the wreck was visible. In the report they found again that the barge, when she received her load, was not in a fit condition for dry and perishable cargo. It is certified that the breast hooks and apron (behind the stem) were rotten, that the wood-ends were rotten and that the beams were, almost without exception, rotten or decayed. Sample pieces were cut off and deposited in anticipation of litigation.

Both of these surveys were made *ex parte* at the appellant's instance, but the respondent's superintendent, Robert Fraser, was present at the second of them. He objected that the pieces cut off as samples were not being fairly taken. Of the above named surveyors, Clift and Richard were the only ones who gave testimony at the trial, though there were other witnesses who testified respecting unseaworthiness in a sense favourable to the appellant's pretensions.

On the part of the respondent testimony was given by Richard Fitzgerald, John Donnelly, Willie Menard and George Bourret, besides the respondent's own officers. The witness Fitzgerald was in the service of what is called "Great Lakes Register" as inspector of vessels. Vessels are so inspected as to be classified for insurance purposes. He made about 140 inspections yearly.

He had often inspected the "Cornwall" and, for the year 1913, his report put her rating at 90 or 91½. His testimony is to the effect that she was in good condition. A vessel classed below 90 is not regarded as suitable for carriage of grain or dry perishable goods. This witness and others testified that the presence of slight rot on oak beams or on the apron would not render a vessel unseaworthy. He also said that a sound vessel lodged at each end on the side of a canal and loaded would suffer by straining, especially if there is a strong current in the canal.

Experienced officers in respondent's service have given testimoney to frequency of inspections of their 30 odd barges and other vessels, and particulars of outlay for keeping up the "Cornwall" for the period of the years 1909 to 1913 have been of record. These represent outlay in 1909 of $717.46; 1910 of $804.11; 1911 of $757.89; 1912 of $1,345.01; 1912-1913 of $572.26.

In looking at the particulars one can infer that the expenditures made were mainly for what might be called ordinary up-keep and not items representing work on the timbers or frame of the barge or such as would affect her strength. The one item of the latter kind which I find is the renewal of part of the stem in 1912.

Upon this question of seaworthiness it is evident that we are confronted with a conflict of testimony in a matter which should, if practicable, have been decided by men of skill in shipping matters, and one which judges must approach with diffidence.

I feel myself influenced by the fact that this action is being

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prosecuted solely in the interest of the underwriters; that it is for the information and benefit of underwriters that vessels are classified in the Great Lakes Register; and that the "Cornwall" was put in a class which was that of vessels fit to carry grain, even if she was set at the foot of the class.

It is true that a vessel owner who would content himself with such an inspection as that made in this instance for the Great Lakes Register as such an inspection may be expected generally to be made by the inspector of such a body, would not be exercising due diligence to have the vessel seaworthy, but the respondent in this case can reasonably invoke against the underwriter the classification of its vessel made by the underwriters' organisation as something which goes a considerable way to make proof of seaworthiness.

In the present case there is, in addition, proof of frequent inspection by men in the respondent's service whose competency has not been called in question, and proof that overhauling and repairs were done yearly or oftener. Moreover, the nature of the mishap, and the circumstances which attended it, suffice to account for the result which supervened, and I consider that they go far to shew that the "Cornwall" was not the rotten craft which she would appear to have been, judging by the testimony of the witnesses for the appellant. No particular part of this barge is shewn to have failed or given way which in the case of a sound vessel would have held good. I consider that the butts and seams which opened up and let in the water opened because of the strain on the barge and not because of decay or unsoundness. I consider that it has not been proved that the "Emerson" and the "Cornwall," or either of them, were not properly manned, equipped and supplied, but I take the weight of evidence to have shewn that the respondent exercised due diligence to have them made seaworthy.

In my opinion, the damage is due to fault of navigation on the part of the captain of the "Emerson" who ought to have prevented such a great "sheer" as took place or to have checked it before the barge took the ground. That being so, the respondent stands relieved of responsibility by the effect of s. 6 of the Water Carriage of Goods Act.

I would dismiss the appeal for the reason above set out instead

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of that given in the judgment of the Superior Court. I may add that we are unanimous in the opinion that the respondent must succeed on the issue of exercise of diligence to make the barge and tug seaworthy.

Considering that the respondent (defendant) exercised due diligence to make its barge "Cornwall" and its tug "Emerson" in all respects seaworthy and properly manned, equipped and supplied for the voyage in question, and for the carrying of the appellant's wheat thereon;

Considering that the grounding of the said barge, and the resulting total loss of the appellant's wheat, resulted from fault in the navigation and management of the tug which had the said barge in tow and of the barge;

Considering, for the reason aforesaid (and without adopting the reasons set forth in the judgment appealed from), that there is no error in the adjudication (*dispositif*) made by the said judgment, to wit, the judgment pronounced by the Superior Court in the District of Montreal, on June 30, 1916;

Doth dismiss the appeal and confirm the said adjudication (*dispositif*) with costs in the Superior Court and in appeal against the appellant and in favour of the respondent.

Cross, J.

CARROLL, J., concurs, but considers that the grounds set forth in the judgment of the Superior Court are also well founded.

Carroll, J.

Appeal dismissed.

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New Brunswick Supreme Court, Hazen, C.J., White and Grimmer, JJ. September 20, 1918.

JURY (§ I B—10)—RIGHT TO TRIAL BY JURY—CONSENT OF PARTIES TO TRIAL WITHOUT—NOTICE OF TRIAL WITH—WHILE ORDER UNRESCINDED.

Under the New Brunswick rules of practice, the right is preserved to both parties to a jury for the trial of the issues in any action in the King's Bench Division except in the case covered by Order 30, R. 4, where the matter to be determined is likely to require "prolonged examination of documents or accounts or any scientific investigation."

The judge should not, save with the consent of both parties, direct trial without jury except in the case covered by R. 4, but when such order has been made, neither party can obtain a jury by simply giving notice under R. 5(1) while such order remains in force and unrescinded.

Statement.

APPEAL from a judgment of Crocket, J., entering a verdict for defendants, after failure of the jury to agree on the questions submitted to them at the trial. Affirmed.

H. A. Powell, K.C., and *J. F. H. Teed*, for plaintiffs, support

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appeal; *F. R. Taylor*, K.C., and *E. P. Raymond*, for different defendants, *contra*.

The judgment of the Court was delivered by

WHITE, J.:—In this action the plaintiff seeks to recover a commission upon the sale of certain real estate situated in the City of St. John and known as Foster's Corner, or, in the alternative, compensation for work and labour done by him and moneys paid in negotiating and endeavouring to effect the sale.

The cause was tried before Crocket, J., at the St. John Circuit on the 14th, 15th and 17th days of January, 1918, with the result that the jury, after having been out 2 hours, failed to agree and were discharged. Subsequently, on February 11 last, the defendants served notice that they would move for Crocket, J., to enter a verdict for the defendants. They did so move, pursuant to notice, and on March 6, 1918, the judge delivered a written judgment directing a verdict to be entered for the defendants. This is an appeal by the plaintiff from that judgment. The judge states in the judgment appealed from that he had

> concluded that the verdict should be entered for the defendants for the reason that there was no evidence upon which it could reasonably have been found that the plaintiff was generally employed by any of the defendants to find a buyer for the property, upon the sale of which he claimed commission or compensation, so as to create any liability to pay him for his services.

A careful reading of the evidence has satisfied me that the judge was right in this conclusion. Inasmuch as the judge in the judgment appealed from has summarised, as I think correctly, the evidence in the case, I do not see that any useful purpose will be served by my attempting to restate or review the evidence at greater length or in more detail than the judge has already done. It is sufficient to say that I agree with the judge not only in the conclusion at which he has arrived, but in the reasons upon which he bases such conclusion.

On behalf of the defendants a contention is made which rests upon facts which do not appear from the stenographer's transcript but are referred to in the factum filed by counsel for the defendant George L. Foster and Mrs. Harding, representing the estate of the late Mary E. Coy, and which were stated on the argument before this court and are, I understand, not in dispute. These facts are that by the summons for directions the plaintiff asked for a trial by judge without jury, and that the order for directions made thereon directed that the issue should be tried by a judge

without a jury; that the plaintiff did not, at any time, apply to have the order for directions varied so as to permit trial by jury, but while the order as originally made stood unrescinded gave the defendants notice under rule 5 (1) of O. 36, requiring that the issues be tried by a jury, and served a like notice upon the sheriff; that when the case was called for trial it was claimed on behalf of the defendants, or some of them, that the plaintiff was not entitled to trial with a jury by virtue of the notice given by him under said rule 5 (1), because the original order for directions providing for a trial by judge without jury was still in force and unrescinded. The judge declined to accede to this contention, but while ordering a jury trial stated that he was not exercising any discretion in the matter, but was simply according the plaintiff a right that he had no power to deprive him of. Based upon these facts, the defendants upon argument before us contended that inasmuch as the judge should have tried the cause in the first instance without a jury, it followed that, in deciding whether the judgment ultimately given by the judge directing a verdict for the defendants should stand, or not, the test to be applied is whether there is sufficient evidence to support his finding and not whether the evidence is such as would have supported a finding by the jury in favour of the plaintiff. As I have reached the conclusion arrived at by the trial judge that there is no evidence upon which it could reasonably have been found that the plaintiff was entitled to recover, it is not essential that I should discuss the question as to the plaintiff's right to have the case tried by a jury, under the circumstances stated; but, as the question raised touches an important point of practice upon which I believe the profession would like to have some governing pronouncement by the court, I have decided to express my view in regard to it.

O. 30, r. 2, requires that:—

> Upon the hearing of the summons the court or a judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to the following matters: pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and *mode of trial*. Such order shall be in the form No. 9, appendix K, with such variations as circumstances may require.

The words "mode of trial" in this rule, giving them their ordinary and natural signification, would include the determination

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as to whether the issues involved in the case should be tried by judge and jury or by judge alone, and that such is the meaning these words are intended to bear is put beyond question by the form No. 9 referred to in the rule.

R. 4 requires that:—

> On the hearing of the summons, any party to whom the summons is addressed shall, so far as is practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire.

R. 6 provides that:—

> Any application by any party, which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the costs of the party applying, unless the court or a judge shall be of opinion that the application could not properly have been made at the hearing of the original summons.

Reading these 3 rules together, it is, I think, manifest that they are designed to provide that so far as practicable the question as to whether the cause shall be tried by a judge and jury or by a judge alone shall be determined on the hearing of the summons for directions.

But these rules, so far as they affect the question whether the mode of trial shall be with or without a jury, must be read and construed in connection with the provisions of O. 36. R. 5 (1) of that Order provides that:—

> In any other cause or matter other than those mentioned in rules 3 and 4, if any of the parties desire the issues of fact to be tried or damages to be assessed or enquired of by a jury, or a special jury, he shall, at least 10 days before the sittings or court at which the action is to be tried, serve on the opposite party a notice in writing to the effect following, that is to say:—"The plaintiff (or one or more of them, or the defendant, or one or more of them, as the case may be) requires that the issues in this cause be tried (or the damages assessed) by a jury (or special jury)" and shall also serve a like notice on the sheriff at least 10 days before such sittings or court, and a copy of the notice shall be attached to the copy of the pleadings in the action for the use of the judge.

I think the intention and effect of that rule is to give both parties—or to speak more accurately, having regard to the state of the law when this rule came into force—to preserve to both parties the right to a jury for the trial of the issues in any action in the King's Bench Division, except in the case covered by r. 4. Possibly I should include in the exception, along with case covered by r. 4, those covered by r. 7, although I find it difficult to imagine any case which has been properly brought in the King's Bench Division to which r. 7 would be applied.

Such being the effect of r. 5 (1) it follows that, in any case, in

making the order for directions in the King's Bench Division, the judge should not, save with the consent of both parties, direct trial by judge without jury except in the case covered by r. 4, that is to say, where the matter to be determined is likely to require "prolonged examination of documents or accounts or any scientific or local investigation" which could not, in the judge's opinion, conveniently be made with a jury. The form for the Order (K 9) given in the rules, shews that it was not contemplated by the makers of the rule that the order should state, upon its face, the grounds upon which any of its several directions are made. When, therefore, the order directs a trial by judge alone, without reserving to the parties the right to obtain a jury under the provisions of r. 5, it must be taken to imply either that the judge made the order because he thought the case to be one falling under r. 4, or that the order was made by consent of all parties. If such order were made under r. 4, then it is clear from the express terms of r. 5 (1) that while the order remained in force neither party could obtain a jury in the mode provided, by merely giving notice in the mode provided by the last mentioned rule. Neither, I think, can any party avail himself of the provisions of r. 5 when the order for directions providing for a trial without jury was made by consent, so long as such order stands unrescinded. It is, I think, unreasonable to suppose that the rule in question was intended to authorise any party to entirely disregard or ignore the order of a judge directing trial without jury, while the same remains unrescinded and in force.

The provisions of O. 36 of the English Judicature Act vary so widely in important respects from those of our O. 36 dealing with the same subject matter, that there is little light upon the question I am now considering to be obtained from the English rules or decisions based thereon. But a reference to r. 6 of O. 36 of the English rules shews that, where either party desires a jury not provided for by the order for directions, he may, in certain cases, secure it by applying for an order therefor. The application for such order not only affords any opposing party the opportunity to shew cause, if any, why such order should not be made (as for example that the case is one falling under the English r. 5, which corresponds with our r. 4), but such order when obtained would rescind or override any directions to the contrary embodied in the original order for directions. I therefore, think that the jury

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notice given by the plaintiff in this cause was irregularly given and could have been set aside upon application by any of the defendants. But, in view of the fact that no such application was made prior to the trial, by any of the defendants, and that the case was in fact tried with a jury by direction of the trial judge, even though, as already stated, the judge gave such direction in the belief, which I think to have been an erroneous one, that he had no discretion in the matter, I would not have thought that any verdict rendered by the jury should have been set aside merely because of such irregularity. Now, however, that the jury failed to agree, and the judge has himself found upon the issues in dispute, I think that, in considering whether his findings shall be sustained or not, the case should be dealt with in the same way as if no jury had been asked for or ordered. I think this appeal should be dismissed with costs. *Appeal dismissed.*

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Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Clute, Sutherland and Kelly, JJ. March 25, 1918.

LIBEL AND SLANDER (§ II B—15)—SLANDER OF YOUNG GIRL IMPUTING UNCHASTITY—NO SPECIAL DAMAGE PROVED—NOMINAL ONLY AWARDED—REPETITION—REMOTENESS.

In an action for slander imputing unchastity to a young girl, only nominal damages can be recovered where no special damage has been proved (Libel and Slander Act, R.S.O. 1914, c. 71, s. 19 (1)).

Special damage from repetition of the slander for which the defendant is not responsible is too remote.

[Review of authorities.]

Statement.

APPEAL by the defendant Alexander Sterling from the judgment of the Senior Judge of the County Court of the County of Huron, upon the verdict of a jury, in favour of the plaintiff as against the appellant for the recovery of $500 damages and taxed costs, in an action for slander. Reversed.

C. Garrow, for appellant; *L. E. Dancey*, for respondent.

Clute, J.

CLUTE, J.:—Appeal from the judgment of the Senior Judge of the County Court of the County of Huron, pronounced on the 14th September, 1917, upon the verdict and findings of the jury, for the plaintiff for $500.

The action is for a slander imputing to the infant plaintiff unchastity, "meaning thereby that the said plaintiff was a girl of unchaste character." The defendant, besides denying that he had spoken the words, also denied the innuendo. During the trial the plaintiff was allowed to amend by pleading special damage.

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The Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 19, subsec. (1), provides that in an action for slander for defamatory words spoken of a woman imputing unchastity, it shall not be necessary to allege or prove that special damage resulted to the plaintiff from the utterance of such words, and the plaintiff may recover nominal damages without averment or proof of special damage. No special damage was proven in this case; and, in the absence of such averment and proof, only nominal damages can be recovered: *Whitling* v. *Fleming*, 16 O.L.R. 263.

The words in the statement of claim, as proven, raised an implication that a criminal offence had been committed, but not necessarily that the plaintiff was a party to the crime, nor was it alleged in the pleading or innuendo that a crime had been committed. After verdict, where the proof is sufficient to connect the plaintiff with a charge imputing a crime, proof of special damage is not necessary; but in the present case the plaintiff cannot avail herself of the imputation of a crime with which she is not charged.

The portion of the slander imputing a crime is that "Walters had paid Dr. —— $300 to get her (meaning the plaintiff) all right." There was no allegation that anything was done in pursuance of this payment to the doctor.

It was strongly argued by Mr. Dancey that the effect of the slander was that she became ill from the effects of it; but, if illness was caused by reason of the slander, it was by repetition thereof, for which the defendant was not responsible. A husband cannot maintain an action for the loss of his wife's services caused by illness or mental depression from defamatory words not actionable *per se* being spoken of her: Odgers on Libel and Slander, 5th ed. (Can. notes), p. 382. Special damage must be strictly proved at the trial where the words are not actionable *per se*. The plaintiff will be confined to the special damage alleged, but the present right of action, without special damage, is limited to nominal damages. It is, therefore, still necessary in an action like the present, where special damage is claimed, that it should be strictly proven: *Allsop* v. *Allsop*, 5 H. & N. 534, affirmed in *Lynch* v. *Knight*, 9 H.L.C. 577.

In the last case it is said that the loss by the wife of maintenance by the husband, occasioned by slander uttered by a third person, may be the subject of a claim for damages, but such loss

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cannot be presumed to have so arisen: it must be distinctly averred.

In *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, these cases are considered by Wright, J., who sustained a verdict for £100 because of injury to a married woman by being told (as a joke) that her husband had met with a serious accident whereby both his legs were broken. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock, which rendered her ill. It will be noticed that the wife suffered the shock from the statement having been made to her personally by the defendant.

It was further urged by the plaintiff's counsel that there was sufficient evidence of loss of hospitality to support the claim for special damage; and in *Davies* v. *Solomon*, L.R. 7 Q.B. 112, it was held that the loss of hospitality of friends was the reasonable and natural consequence of the slander, and a loss to the wife herself for benefits which her husband was not bound to bestow upon her, and that such loss of hospitality was special damage which would support an action by husband and wife.

In the present case the evidence put forward to support the claim of loss of hospitality does not go far enough. It was to the effect that the plaintiff "could not go to the Smiths, friends of ours, on account of this scandal." It did not allege that her friends would not receive her or that she lost their hospitality by reason of the slander. For all that appears, it may have been her own diffidence in visiting her friends, and not their refusal to receive her, that caused the loss of such hospitality. Indeed this is the most natural implication from the evidence. It falls short of that definite proof necessary to support a claim for special damage. A person is responsible only for the utterance by himself of a slander, and not for its repetition, and special damage from such repetition is too remote. Each publication is a distinct tort, and every person repeating it becomes an independent slanderer, and he alone is responsible for his unlawful act: Odgers on Libel and Slander, 5th ed. (Can. notes), p. 177. The learned author points out (at p. 178) two apparent exceptions to this rule:—

"(1) Where, by communicating a slander to A., the defendant puts A. under a moral obligation to repeat it to some other person immediately concerned; here, if the defendant knew the relation in which A. stood to this other person, he will be taken to have contemplated this result when he spoke to A. In fact, here A.'s

repetition is the natural and necessary consequence of the defendant's communication to A. (See the judgment of Lopes, L.J., in *Speight* v. *Gosnay* (1891), 60 L.J. Q.B. 231.)

"(2) Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so; here the defendant is liable for all the consequences of A.'s repetition of the slander; for A. thus becomes the agent of the defendant."

This passage was cited with approval by the Court in *Whitney* v. *Moignard* (1890), 24 Q.B.D. 630, at p. 631.

In the *Speight* case the imputation of unchastity was uttered in the presence of the plaintiff's mother, who repeated it to the plaintiff, who repeated it to the man to whom she was engaged to be married. There was no evidence that the defendant authorised or intended the repetition. Held, an action of slander could not be maintained.

In *Derry* v. *Handley* (1867), 16 L.T.R. 263, H. told W. that the plaintiff, his wife's dressmaker, was a woman of immoral character. W. naturally informed his wife, and she ceased to employ the plaintiff. Held, that the plaintiff's loss of Mrs. W.'s custom was the natural and necessary consequence of the defendant's communication to W.

In the present case it does not appear that the plaintiff was present when the slander was uttered, nor was it uttered in the presence of her father or mother or other person immediately concerned and under moral obligation to repeat it, so that her illness, if caused, as it probably was, from hearing the slander by repetition, is not brought within the exception so as to make the defendant responsible for special damage, even admitting that the special damage of sickness was of such a nature as to entitle her to recover, under the authority of *Wilkinson* v. *Downton*, *supra*.

In the *Whitney* case, a paragraph in the statement of claim in an action for a libel published in a newspaper stated that the defendant knew that the words published would be, and the same in effect were, repeated and published in other editions of the same newspaper. Held, that evidence of the facts stated in this paragraph would be admissible at the trial, and therefore the paragraph was properly pleaded and ought not to be struck out. Huddleston, B., quotes the language given by Odgers on Libel and Slander, above quoted, and says: "It seems to me that the proposition

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cannot be better put than that, and the view there taken is entirely in accordance with the view of the law expressed in the judgments of the Law Lords in *Lynch* v. *Knight*, 9 H.L.C. 577, and with the dictum of Littledale, J., in *Rex* v. *Moore* (1832), 3 B. & Ad. 184, where he said: 'If the experience of mankind must lead any one to expect the result, he' (the defendant) 'will be answerable for it' (3 B. & Ad. at p. 188). In the ordinary course it can be shewn by evidence that a defendant has published a libel which he knows must necessarily be widely circulated. If the facts stated in this paragraph are admissible in evidence, then the case comes within the decision in *Millington* v. *Loring* (1880), 6 Q.B.D. 190." And Williams, J., said: "I think the plaintiffs can shew by evidence that the diffusion of the libel was likely to be large, and that evidence will be admissible to shew the circumstances under which the defendant must have contemplated that the libel was likely to be widely diffused."

The slander in the present case was so gross and outrageous, published as it was at a large gathering of neighbours at a threshing, that one feels anxious to support the verdict, if possible, upon any just ground. But, after a careful consideration of the evidence, I am unable to say that the illness of the plaintiff was the natural result of the slander or intended as a result of the words spoken by the defendant. There is not a tittle of evidence to justify in the slightest degree the outrageous conduct of the defendant, in attacking, without a shadow of a cause, the plaintiff's moral character. While the damages must be reduced to nominal damages, $1, that is sufficient to rehabilitate the plaintiff in the good opinion of the public. The plaintiff is entitled to her full costs without set-off in the Court below; but, under the circumstances, the defendant is not entitled to the costs of appeal.

Mulock, C.J.Ex. Sutherland, J.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed with CLUTE, J.

Kelly, J.

KELLY, J.:—Not without some reluctance do I find myself bound to agree with the conclusion of my brother Clute, that, on the evidence, the appellant is liable for nominal damages only. He should pay the costs of the Court below without set-off, but should not have any costs of the appeal.

The language complained of and sworn to by a number of

witnesses, whom the jury believed, was inconceivably vulgar and disgusting, and elicited the jury's emphatic condemnation when rendering their verdict.

The result of the decision will, however, vindicate the character of the plaintiff, and, it is hoped, convince the appellant that he is not at liberty to cast aspersions on the good name of any one with impunity.

Appeal allowed.

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Saskatchewan King's Bench, Taylor, J. September 27, 1918.

DIVORCE AND SEPARATION (§ II—5)—COURT OF KING'S BENCH, SASK.—NO JURISDICTION TO GRANT DIVORCE À VINCULO MATRIMONII.

The Court of King's Bench in Saskatchewan has no jurisdiction to grant a divorce *à vinculo matrimonii*. The Act of 49 Vict. (Dom. 1886, c. 50) creating the Supreme Court of the North-West Territories did not confer such jurisdiction on that court; the argument that it did so is at variance with the enactment of s. 20 c. 17 of the Dominion enactment of 1894 conferring on the Legislative Assembly power to confer on the Territorial courts jurisdiction in matters of alimony, also with the King's Bench Act, 1915, which by special enactment conferred on that court jurisdiction in actions of Crim. Con.

[Review of authorities and legislation; *Walker* v. *Walker*, 39 D.L.R. 731; *Board* v. *Board*, 41 D.L.R. 286, not followed.]

Statement.

APPLICATION for a divorce. Refused on the ground of lack of jurisdiction.

E. B. Jonah, for petitioner; *H. E. Sampson*, K.C., as *amicus curiæ* on instructions from Attorney-General.

Taylor, J.

TAYLOR, J.:—The petitioner has, following the procedure in force in England, applied to this court for a divorce *à vinculo matrimonii* from his wife, Jean Catherine Fletcher. He is a soldier returned from active service overseas. The parties were married in 1911, and their domicil is in Saskatchewan. During the petitioner's absence overseas the respondent was undoubtedly guilty of such misconduct as would, according to the law of England, either as in 1870 or now, entitle him to succeed in his application. The misconduct has continued, and she is evidently living with the co-respondent as his wife, having, in a most callous way, entirely overlooked her duty to the petitioner and their children, as well as used his moneys, provided for her and the children's maintenance, to the advancement of the co-respondent.

Feeling that, in justice, the petitioner is entitled to have the

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marriage dissolved, it is with regret that I have arrived at the opinion that this His Majesty's Court of King's Bench in this province has never had conferred upon it jurisdiction to grant the prayer of his just petition, and that I must dismiss it, and tell him that, unless an Appellate Court can see the matter differently, he must, to obtain justice, advertise his wife's infidelity extensively, in accordance with parliamentary rules, and apply to the Parliament of Canada for a private Bill granting relief, and advance his claim to a body, some members of whom, differing from the petitioner in religious belief and holding the view that marriage is a sacrament dissoluble only by ecclesiastical authority, cannot, according to their conscientious belief, support his application. But these considerations must not lead me to exercise jurisdiction, unless it appear that the proper legislative authority has so enacted.

It is argued that divorce jurisdiction was, by the Parliament of Canada, conferred upon the court created in 1886, known as the Supreme Court of the North-West Territories, and, as it plainly appears that this court has all the powers, jurisdiction and authority possessed and granted to that court, that the jurisdiction still exists. The question depends on the construction to be placed upon s. 48 of the North-West Territories Act, 1886, to which I shall more particularly refer later.

It is essential, before we proceed to construe that statute, that we place ourselves, as far as possible, in the position of the law-maker at that date, that we may fully understand just what was intended, and if jurisdiction to grant divorce was in the mind of the law-maker, how, and in what terms, we would expect to find the intention expressed at that time.

The advisability of conferring on the courts power to dissolve the marriage tie has ever been a controversial question. As stated in Macqueen on Husband and Wife, 4th ed., 163:—

> In the Catholic ages marriage was considered a sacrament. Consequently, no human authority could rescind it, unless, perhaps, the Pope, as God's vicegerent upon earth, had the power of dissolution—a power which he but rarely, if ever, exercised.

Protestant peoples, taking a more modern view, still have always regarded marriage as more than a contract. "It is a religious as well as a natural and civil contract." "It is a status, the conditions of which are regulated for and not by those who

enter it." Eversley, 3rd ed., pp. 2 *et seq.* The canonical law of the Roman Catholic Church evidently still opposes the granting of an absolute divorce entitling the parties to re-marry. It is said of two eminent judges of that faith that they could not conscientiously exercise the jurisdiction if it were conferred on them. Another, Beck, J., in *Board* v. *Board*, 41 D.L.R. 286, expresses the opinion that no such conscientious objection should exist. I am advised that in the Canadian Senate the practice of the Roman Catholic Senators is either not to vote at all on, or to vote against, any Bill granting a divorce. Any open attempt in Canada to legislate in favour of divorce laws has heretofore evidently been met with overwhelming opposition. Gemmill on Divorce, pp. 22-24.

In England the advocates of a divorce law in 1857 passed through parliament the resolution as the preamble to 20 and 21 Vict. (Imp.) c. 85 reads:—

> That it is expedient to amend the law relating to divorce, and to constitute a Court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage,

and this enactment took from any ecclesiastical court or person in England any jurisdiction over causes matrimonial and vested it in Her Majesty, to be exercised in her name in a Court of Record to be called "The Court for Divorce and Matrimonial Causes." It provided, s. 27, that "it shall be lawful for any husband (or wife) to present a petition to the said court praying that his marriage may be dissolved," and declaring the grounds (differentiating between husband and wife) for dissolution. Provision was also made for trial by the verdict of a common or special jury, s. 36; the parties might re-marry, but no clergyman in holy orders of the United Church of England and Ireland could be compelled to solemnise the marriage, s. 57. Generally the law-maker endeavoured by legislation to fully cover the questions in a most comprehensive enactment. Notwithstanding this, amendments came quickly. That in 1858 (21 & 22 Vict. (Imp.) c. 108) made provision as to the wife's property, costs, etc.; in 1859 (22 & 23 Vict. (Imp.) c. 61) as to the power of the court with respect to the custody, maintenance and education of children, and over marriage settlements; in 1860 (23 & 24 Vict. (Imp.) c. 144) to amend the procedure and powers of the court, and provide for decree *nisi* in the first instance, and for the intervention of the Queen's Proctor

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for collusion. See also 29 & 30 Vict. (Imp.) c. 32; 31 & 32 Vict. (Imp.) c. 77 (providing for an appeal to the House of Lords), and 32 & 33 Vict. (Imp.) c. 68, all prior to July 15, 1870. Since 1870 and prior to 1886 other important amendments were made. See 36 & 37 Vict. (Imp.) c. 31 (1873), extending the rights of the Queen's Proctor to intervene; 41 & 42 Vict. (Imp.) c. 19 (1878) as to costs of intervention; 44 & 45 Vict. (Imp.) c. 68 (1881), ss. 9-10, as to appeals, and doing away with an appeal where the divorce was granted.

In 1873 by 36 & 37 Vict. c. 65 (Imperial Judicature Act) the Court for Divorce and Matrimonial Causes was merged in the Probate, Divorce and Admiralty Division of the High Court of Justice in England, and the jurisdiction in England is now exercised in that Division.

Most of the territory comprised in this province was included in the grant by Royal Charter to the Governor and Company of Adventurers of England, trading into Hudson's Bay, made by Charles II. of England. I say "most" because the grant appears to be confined to the lands, the waters of which drain into Hudson's Bay. This company, as "Lords of the Land," created a Governor and Council of Assiniboia, having jurisdiction over, and legislative functions—according to the evidence of Sir George Simpson before the Select Committee of the House of Commons in 1857—in the territory, "fifty miles by the compass round the Red River Settlement," According to Recorder Johnstone, who was charged with the administration of justice in the District of Assiniboia, the boundaries were much wider and indefinite. This council appears to have enacted on January 7, 1864 (amending art. 53 of the Code of April 11, 1862) that

> The proceedings of the General Court shall be regulated by the laws of England, not only of the date of Her Majesty's accession, so far as they may apply to the Colony, but also by all such laws of England of subsequent date as may be applicable to the same; in other words, the proceedings of the General Court shall be regulated by the existing laws of England for the time being, in so far as the same are known to the Court and to the condition of the Colony.

Long prior to Confederation, the Imperial Parliament had also legislated for the administration of justice and introduction of law into the territory then known as Rupert's Land. It is necessary for my present purpose to notice these but briefly. 1 & 2 George

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IV. (Imp.) c. 66, conferred upon the Courts of Upper and Lower Canada a limited jurisdiction in civil and criminal matters arising in the Territories "to be tried in the same manner and subject to the same consequences in all respects" as if in Upper Canada, except as to claims in respect of land which "shall be decided according to the laws of that part of the United Kingdom called England, and shall not be subject to or affected by any Local Acts, Statutes or Laws of the Legislature of Upper Canada." See also 22 & 23 Vict. (Imp.) c. 26.

In the Rupert's Land Act, 1868 (Imp. Stat.) 31 & 32 Vict. c. 105, enabling Her Majesty to accept a surrender of the Hudson's Bay Company's charter on terms, the jurisdiction of the then existing courts and all officers was continued. By various enactments of the Federal Parliament of Canada "all the laws in force in Rupert's Land and the North-Western Territory, at the time of their admission into the Union, remained in force until altered by the Parliament of Canada," or (as amended later) by the Lieutenant-Governor and the Legislative Council, and all public officers and functionaries retained office, 32 & 33 Vict. (Dom.) c. 3. See also the Dominion Enactments 1873, 36 Vict. c. 5, 34, 35; 1875, 38 Vict. c. 49; 1876, 39 Vict. c. 22; 1877, 40 Vict. c. 7; 1880, 43 Vict. c. 25; 1882, 45 Vict. c. 28; 1884, 47 Vict. c. 23; 1885, 48 & 49 Vict. c. 51; 1886, 49 Vict. c. 25; R.S.C., 1886, c. 50; 1891, 54 & 55 Vict. c. 22; 1894, 57 & 58 Vict. (see s. 20) c. 17; 1897, 60 Vict. c. 28; 1898, 61 Vict. c. 5; 1900, 63 & 64 Vict. c. 44; 1903, 3 Edw. VII. c. 40; 1905, 4 & 5 Edw. VII. c. 27 (see s. 8); R.S.C. 1906, c. 20.

The enactment in 1873, 36 Vict. (Dom.) c. 5, provided for the appointment of a Lieutenant-Governor and Council; 36 Vict. (Dom.) c. 34 conferred on this body power to legislate to a limited extent, and made the Acts of the Parliament of Canada, set out in the schedule, mostly relating to the criminal law, applicable to the Territories. 36 Vict. (Dom.) c. 35 made provision for the appointment of stipendiary magistrates with criminal jurisdiction and constituted the North-West Mounted Police.

C. 49 of 38 Vict. (Dom.), 1875, was an Act to amend and consolidate the laws respecting the North-West Territories. By s. 6:

All the laws and ordinances now in force in the North-West Territories and not repealed by or inconsistent with this Act shall remain in force until

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it is otherwise ordered by the Parliament of Canada, by the Governor-in-Council, or by the Lieutenant-Governor and Council under the authority of this Act.

The law-making field of the Lieutenant-Governor and Council was widened, provisions respecting the descent of real estate, the conveyance of land, making of wills, as to the separate estate of married women and registration of deeds were passed. As to courts, by s. 59:

> A court or courts of civil and criminal jurisdiction shall be held in the said Territories, and in every judicial district thereof, when formed, under such names, at such periods and at such places as the Lieutenant-Governor may from time to time order.

The stipendiary magistrate presided, s. 64. By s. 64:

> The Chief Justice or any judge of the Court of Queen's Bench of the Province of Manitoba, with any one of the stipendiary magistrates as an associate, shall have power and authority to hold a court under s. 59,

and "every such court shall be a Court of Record," s. 64 (4). An appeal lay to the Court of Queen's Bench of Manitoba.

43 Vict. (Dom.) c. 25 (1880) again amended and consolidated the several Acts relating to the North-West Territories. S. 5 of 38 Vict. c. 49 (1875) quoted *supra* is re-enacted in s. 8. A legislative assembly or council is constituted. The criminal jurisdiction of the stipendiary magistrates is continued. The existing provisions for establishments of courts were brought into alignment with the Ordinances of the North-West Territories creating the District Court, but no new jurisdiction was conferred.

The amendments between 1880 and 1886 do not bear on the matters now being discussed.

The Lieutenant-Governor and Council of the North-West Territories, as soon as legislative functions were bestowed on them, proceeded to establish courts. Ordinance No. 4 in 1878 created Courts of Record styled District Courts, presided over by the resident stipendiary magistrate. These courts had jurisdiction over all matters of civil law and equity, all matters of wills and intestacy (and by subsequent amendment over estates of infants and of insane persons), and possessed such powers in relation to local jurisdiction as in the Province of Ontario were vested in and distributed among the several courts of law and equity and the Surrogate Courts. The laws of evidence and principles governing the administration of justice in Ontario were "to obtain in the courts." No. 3 of 1884 amended and consolidated the several ordinances to that date and continued the District Court.

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With this legislation it would appear inevitable that doubt existed as to what law was in force in the Territories. In *The Queen* v. *Connor*, 1 Terr. L.R. 4 (June 29, 1885), counsel for an accused sought to quash a criminal conviction for want of an indictment by a grand jury or a coroner's inquest, and, as put by Taylor, J., at p. 13:

> The question comes up whether in the circumstances of the North-West Territories that common law right can be considered as in force there.
>
> In the Commentaries on the Laws of England by Broom & Hadley, it is said at p. 119:—
>
> Generally speaking, if an uninhabited country be discovered and occupied by English subjects, all English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with many and great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the conditions of an infant colony.
>
> There can be no doubt that at the time of its occupation by English subjects the country now known as the North-West Territories would fall within the description of an uninhabited country.
>
> For many years there was no court established there. There was no Court of Oyer and Terminer and General Gaol Delivery as incident to the proceedings in which a grand jury can be considered proper and necessary. There was no municipal organisation. There is none such as yet.

The decision was that the common law right had been abolished by Dominion enactments.

The Full Court in Manitoba, in *Canadian Bank of Commerce* v. *Adamson*, 1 Man. L.R. 3, decided in 1883 that the provisions of Rupert's Land Act, 1868, and the Ordinance of the Council of Assiniboia, an Imperial statute, 18 & 19 Vict. c. 67 (Bills of Exchange Act), was in force in Manitoba. But in *Sinclair* v. *Mulligan*, 3 Man. L.R. 481, and 5 Man. L.R. 17, Killam, J., in 1886, and the court *en banc* in 1887, held that the laws of England, as they existed at the date of the charter of the Hudson's Bay Co., so far as applicable, formed the body of laws in force in the Territories up to the Assiniboia Ordinance of 1862, which was limited to regulating proceedings of the courts. *Keating* v. *Moises*, 2 Man. L.R. 47, to the contrary, was not followed.

The Imperial statute to which I have referred, conferring jurisdiction on the courts of Upper Canada, and adopting its laws as the rule for decision, is not noticed in the decision.

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It can be reasonably inferred that this doubt was amongst the reasons for enacting the Ordinance of the North-West Territories, No. 26 of 1884, providing that:—

In all matters of controversy relative to property and civil rights in the Territories, the laws of England, as they stood on July 15, 1870, are hereby declared to have been in force since such date, and shall govern and form the rule for decision of the same in the Territories, except in so far as the same have been since such date, or may be hereafter repealed, altered, varied, modified or affected by any Act of the Imperial Parliament, made directly applicable to the North-West Territories, or the Parliament of Canada, or by Ordinance of the Lieutenant-Governor-in-Council.

For a brief period, the name of the District Court was changed to the High Court of Justice. See Ordinance 5 of 1885.

Then came the legislation of the Parliament of Canada, upon which the petitioner bases his argument in this action. This is 49 Vict. (Dom.), 1886, c. 25, s. 14. This legislation created the Supreme Court of the North-West Territories, and by s. 14 it was enacted that:—

The court shall, within the Territories, and for the administration of the laws for the time being in force within the Territories, possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction; and shall have, use and exercise all the rights incidents and privileges of a court of record and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the fifteenth day of July, one thousand eight hundred and seventy, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law, or by the Court of Chancery, or by the Court of Probate in England, and may and shall hold pleas in all and all manner of actions, causes and suits as well criminal as civil, real, personal and mixed, and may and shall proceed in such actions, causes and suits by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same, and may and shall hear and determine all issues of law and may and shall also hear and (with or without a jury as provided by law) determine all issues of fact that may be joined in any such action, cause or suit, and judgment thereon give and execution thereof award in as full and as ample a manner as might at the said date be done in Her Majesty's Court of Queen's Bench, Common Bench, or in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods) by the Court of Exchequer or by the Court of Chancery or by the Court of Probate in England.

The enactments of the Parliament of Canada were extended to the Territories by s. 2, which provided:—

Every Act of the Parliament of Canada, except in so far as otherwise provided in any such Act, and except in so far as the same is, by its terms, applicable only to one or more of the Provinces of Canada, or in so far as any such Act is, for any reason, inapplicable to the Territories, shall apply to and be in force in the Territories.

S. 3 enacts:—

Subject to the provisions of the next preceding section the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or may not hereafter be, repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any Ordinance of the Lieutenant-Governor in Council.

In the revision of 1886 the legislation of 49 Vict. is repeated, and the provisions of 43 Vict. c. 25, s. 8, which I quoted above in reference to continuing existing laws in force, was re-enacted in s. 12. This provision is reconcilable with s. 3 only by treating s. 3 as declaratory legislation.

In the amendment of 1891, 54 & 55 Vict. (Dom.), c. 22, by s. 7, a single judge had conferred upon him all the powers of the court in proceedings by way of *certiorari*. In 1894, by 57 & 58 Vict. c. 17, s. 20, it was enacted:—

For the removal of doubts it is hereby declared that subject to the provisions of the North-West Territories Act, the Legislative Assembly has and shall have power to confer on Territorial Courts jurisdiction in matters of alimony.

Before turning to the legislation creating the Province of Saskatchewan and the courts therein, it should be noted that in the North-West Territories Amendment Act, 1905, 4 & 5 Edw. VII., p. 27, defining the new boundaries of the Territories and disestablishing the Supreme Court of the North-West Territories in the Territories, provision was made (see s. 8) that the Governor-in-Council might appoint such number of persons as stipendiary magistrates, from time to time, as might be deemed expedient, who should have and exercise the powers and functions vested in a judge of the said court. So that it would apparently follow that if, as argued, a Judge of the Supreme Court of the North-West Territories had power and authority to grant divorce the effect of this section is to confer a like jurisdiction on a stipendiary magistrate in the North-West Territories as they now stand.

The Saskatchewan Act, 1905, 4 & 5 Edw. VII. (Dom.), c. 42, continued the Supreme Court of the North-West Territories and its jurisdiction in Saskatchewan, and that court exercised jurisdiction until the Judicature Act of the Province of Saskatchewan, c. 8, 1907, was, by proclamation under the Act, brought into force.

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The Judicature Act (Sask. statutes, 1907, c. 8) in place and stead of the North-West Territories, constituted and established in and for the Province of Saskatchewan a superior court of record, as well in civil as in criminal cases, styled the Supreme Court of Saskatchewan. The jurisdiction of this court was conferred in s. 14:—

The Supreme Court of Saskatchewan in addition to any other jurisdiction, rights, powers, incidents, privileges and authorities which immediately prior to the coming into force of this Act were vested in or capable of being exercised within the province by the Supreme Court of the North-West Territories shall possess the jurisdiction which in England prior to the Supreme Court of Judicature Act, 1873, was vested in or capable of being exercised by:—

(*a*) The High Court of Chancery as a common law court as well as a court of equity including the jurisdiction of the master of the rolls as a judge or master of the Court of Chancery and any jurisdiction exercised by him in relation to the Court of Chancery as a common law court;

(*b*) The Court of Queen's Bench;

(*c*) The Court of Common Pleas at Westminster;

(*d*) The Court of Exchequer as a court of revenue as well as a common law court;

(*e*) The Court of Probate;

(*f*) The courts created by commissions of assize of oyer and terminer and of gaol delivery or any of such commissions;

(2) The jurisdiction aforesaid shall include:—

(*a*) The jurisdiction which at the commencement of this Act was vested in or capable of being exercised by all or any one or more of the judges of the Supreme Court of the North-West Territories.

(*b*) The jurisdiction which in England prior to the passing of the Supreme Court of Judicature Act, 1873, was vested in or capable of being exercised by all or any one or more of the judges of the courts above mentioned.

The Supreme Court of Saskatchewan was abolished under the provisions of the King's Bench Act, 1915, c. 10 (Sask.), and the sections requiring consideration are :—

12. The court shall be a court of original jurisdiction, and shall in addition to any other jurisdiction, rights, powers, incidents, privileges and authorities which have hitherto been vested in or capable of being exercised within the province by the Supreme Court of Saskatchewan, possess the jurisdiction which in England, prior to the Supreme Court of Judicature Act, 1873, was vested in and capable of being exercised by:—

(*a*) A High Court of Chancery as a common law court as well as a court of equity, including the jurisdiction of the master of the rolls as a judge or master of the Court of Chancery and any jurisdiction exercised by him in relation to the Court of Chancery as a common law court;

(*b*) The Court of Queen's Bench;

(*c*) The Court of Common pleas at Westminster;

(*d*) The Court of Exchequer as a court of revenue as well as a common law court;

(*e*) The Court of Probate;

(*f*) The courts created by commissions of assize, of oyer and terminer and of gaol delivery, or any of such commissions;

(2) The jurisdiction aforesaid shall include:—

(*a*) The jurisdiction which has hitherto been vested in or capable of being exercised by all or any one or more of the judges of the Supreme Court of Saskatchewan;

(*b*) The jurisdiction which in England, prior to the passing of the Supreme Court of Judicature Act, 1873, was vested in, or capable of being exercised by, all or any one or more of the judges of the courts above mentioned sitting in court or chambers or elsewhere, when acting as judge in pursuance of any statute, law or custom; and all powers given to any such court or to any such judges or judge by any statute; and also all ministerial power, duties and authorities incident to any and every part of the jurisdiction so conferred (and) 14: Whenever by any law, statute or custom, hitherto in force in Saskatchewan, any jurisdiction, duty, power or authority, whether incident to the administration of justice or not, was conferred or imposed upon the Judges of the Supreme Court of Saskatchewan, or upon any one of them, such jurisdiction, duty, power and authority shall, unless special provision be made to the contrary, be deemed to be conferred and imposed upon the judges of the court, and the same shall be exercised by them in as full and ample a manner as they were hitherto exercised within Saskatchewan by the said Judges of the Supreme Court of Saskatchewan.

Jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, etc., is conferred by s. 21, in consequence no doubt of the decision of Wetmore, C.J., in *Marson* v. *Coulter*, 3 S.L.R. 485. S. 22 provided:—

> The court shall have jurisdiction to entertain an action for criminal conversation. The law applicable to such actions shall be as the same was in England . . . and the practice shall be the same as in other actions in the court, so far as it is applicable.

If the contention of counsel for the petitioner is correct, that the effect of these various enactments was to confer upon the Supreme Court of the North-West Territories in 1886 jurisdiction to grant divorce, it is first to be noted that it is surprising that such jurisdiction was not exercised; and more surprising still that the Parliament of Canada would by private Bill grant divorce to person domiciled in this province, which, while not illegal, would be a most unseemly thing to do considering the constitutional practice that once jurisdiction is conferred upon the court, Parliament does not undertake to decide matters so referred to the courts.

Further, I think it can be said that the statute has never, until the decision in *Board* v. *Board*, 41 D.L.R. 286, by the Appellate Division in Alberta, Harvey, C.J., dissenting, been construed as conferring upon the Supreme Court of the North-West Territories

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the jurisdiction conferred by the Matrimonial Causes Act upon the court created by it.

The only decisions that I am able to find are those of Wetmore, C.J. In 1895, in *Harris* v. *Harris*, 3 T.L.R. 289, he held that the court had no jurisdiction to grant alimony, as in 1870; that was a jurisdiction exclusively exercised by the Court for Divorce and Matrimonial Causes, and at p. 291, "no such jurisdiction should be exercised unless it was expressly given," and he points out that no Canadian court had, under similar legislation, assumed to exercise the jurisdiction conferred on the Court for Divorce and Matrimonial Causes.

In 1900, in *Hardie* v. *Hardie*, 7 T.L.R. 13, the same judge held that the Supreme Court of the North-West Territories had jurisdiction to entertain a suit for a declaration that a marriage is void *ab initio* (in that case on the ground that it was bigamous). The judgment expressly affirms *Harris* v. *Harris*, *supra*, and distinguishes it.

In 1910 in *Marson* v. *Coulter*, 3 S.L.R. 485, at 489, in which it is evident that he again carefully considered the matter, he distinctly holds that the jurisdiction conferred upon the Court of Divorce and Matrimonial Causes was not conferred upon the Supreme Court of the North-West Territories. At p. 488 he says:—

> The effect of ss. 59 and 33 of the Matrimonial Causes Act was to take away the jurisdiction of the common law courts, that is, the Courts of Queen's Bench, Common Pleas and Exchequer, in actions for criminal conversation, and to vest the right to give a remedy in such cases to the Court for Divorce and Matrimonial Causes. Therefore, such common law courts had no jurisdiction to entertain actions for criminal conversation in 1886, when the Supreme Court of the North-West Territories was created, or ever since, *and the jurisdiction of the Court of Divorce and Matrimonial Causes was not conferred either upon the Supreme Court of the North-West Territories or the Saskatchewan Supreme Court.*

As I have pointed out, the legislature of this province accepted the decision in *Marson* v. *Coulter*, *supra*, and in the King's Bench Act of 1915 conferred jurisdiction in actions of Crim. Con. by special enactment. The argument that it was intended by the Act of 1886 to confer jurisdiction in divorce, seems to me to be entirely at variance with the enactment of s. 20 of the Dominion enactment of 1894, which I have quoted, conferring upon the legislative assembly power to confer on the Territorial courts

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jurisdiction in matters of alimony; for if the jurisdiction conferred upon the Court of Divorce and Matrimonial Causes was given to the Supreme Court of the North-West Territories, there would be no necessity for any legislation conferring jurisdiction in alimony.

But these are not the arguments which weigh most strongly with me. I have shewn the gradual growth of the legislation before and after 1870, relating to the granting of divorce in England. Is it conceivable that any law-making body intending to introduce divorce laws and to create a divorce court in any part of Canada, would do so in the manner in which it is here argued and indeed held in *Board* v. *Board*, 41 D.L.R. 286, the Dominion Parliament has done in the enactment of 1886? Parliament, if so minded, would not have left this controversial question to an inference from the general terms of the statutes, the true and full effect whereof would (adopting this construction), be disguised in the redundant enumeration of some of the courts. This class of legislation, that is, legislation conferring jurisdiction, is one in which we uniformly find careful and explicit draughting; and when parliament enacts divorce legislation and a divorce court is created, I apprehend the intent will be stated, as it should be, in clear, unmistakable language, and the subject will be dealt with comprehensively, making it plain and clear under what circumstances, with what procedure and under what safeguards the jurisdiction should be exercised. The language used in s. 14 of the Act of 1886, and subsequent enactments, is not the language in which, nor is it the way in which, at that time, jurisdiction to grant divorce would have been conferred.

I might hesitate to disagree with the decision of the Appellate Courts in Alberta in *Board* v. *Board*, *supra*, and in Manitoba in *Walker* v. *Walker*, 39 D.L.R. 731, and place my opinion in opposition to the decisions of those courts, were it not that Wetmore, C.J., who, so long a member of the Supreme Court of the North-West Territories, was most familiar with all this legislation, arrived at the conclusion which I have reached in the decisions to which I have referred.

Until within the last few years, the argument of the petitioner has never apparently, from the reports of decided cases, been advanced in any of the courts. The statute of 1886 received, when enacted, a construction which did not suggest that parlia-

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ment had granted, to any court, the jurisdiction of the special court created by the Imperial enactment in question. Dominion and provincial legislation has, as I have pointed out, proceeded upon this accepted construction.

In British Columbia, a construction of somewhat similarly worded legislation was accepted contrary to the views I have expressed, and the provincial court assumed jurisdiction to grant and granted many divorces. After the lapse of many years the Judicial Committee in *Watts* v. *Watts*, [1908] A.C. 573, at 579, affirmed the jurisdiction. The decision is upon an analogous statute, but it is not a decision on the statute now under consideration, and it does not appear to me that the *ratio decidendi* is apposite.

My decision is that I have no jurisdiction to entertain the petition, and so deciding, it is unnecessary to determine whether the divorce law of England was introduced into and made a part of the law of the Territories by the enactment of 1886. *Watts* v. *Watts*, *supra*, would be an authority for so holding, but it may well be that the expression "laws of England relating to civil and criminal matters" was not, under the circumstances, intended to cover the whole field, and should be confined to those matters about which the doubt had previously arisen, the Act having been passed to settle the date of reference rather than to introduce a new code of laws. The petition is dismissed. *Petition dismissed.*

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SHEPARD and MERCHANTS BANK OF CANADA v. GLENS FALLS INS. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. July 15, 1918.

INSURANCE (§ VI H—425)—PROOFS OF LOSS—RELIEF AGAINST STRICT COMPLIANCE IN FURNISHING—SASKATCHEWAN—INSURANCE ACT—DELAY IN BRINGING ACTION.

S. 86 of the Saskatchewan Insurance Act permits relief to be granted from strict compliance with a condition in the policy requiring proof of loss to be furnished as soon as practicable after the loss has occurred. The granting of such relief does not relieve against another clause in the policy providing that a certain time shall elapse after completion of the proofs before the loss becomes payable, or before action can be brought to recover the amount of the policy, notwithstanding that such delay would bar the action, as not being brought within one year after the loss or damage occurred.

APPEAL by defendants from the trial judgment in an action on a fire insurance policy. Reversed.

P. E. MacKenzie, K.C., for appellants; *J. A. Allan*, K.C., for respondents.

HAULTAIN, C.J., concurred with Elwood, J.A.

LAMONT, J.A. (dissenting):—These two actions were by consent of the parties tried together. The plaintiff Shepard was the owner of a certain hotel at Margo, which he purchased from one Charters, and upon which he had given Charters a mortgage for $13,271. Charters being indebted to the plaintiff bank assigned to it the mortgage. The insurance on the hotel having expired, the bank on September, 1914, placed new insurance on the hotel with the defendant companies through F. C. Lowes & Co., the agents at Edmonton of both companies. The policies were issued in the name of the plaintiff Shepard, with loss, if any, payable to the bank.

On the night of April 1, 1915, the hotel was completely destroyed by fire. The defendant companies were notified of the loss and they sent an adjuster to investigate the same. The adjuster took from Shepard a statement in writing that nothing done by the adjusters in the course of their investigation should be deemed a breach of the terms or conditions contained in the policies. The circumstances surrounding the fire raised a suspicion that it was of incendiary origin; investigations were made, and finally the matter was referred to A. E. Fisher, government superintendent of insurance, for further investigation. The matter was long drawn out. The defendant companies, when asked for settlement, gave as a reason for delay that the investigations had not been completed. Not being able to get anything definite from the defendant companies, the plaintiffs, in January, 1916, placed the matter in the hands of their solicitors. It was then learned that no proofs of loss had been forwarded to either company. On February 29 formal proofs of loss were forwarded, without prejudice, to the rights of the plaintiffs. On March 22, 1916, these actions were commenced.

The action was tried by my brother Newlands, who held that the proofs of loss were not given according to the terms of the policies, but, as it was through a mistake that the plaintiffs did not perform this condition, they should be relieved from the consequences of such non-performance under s. 2 of the Fire Insurance Policies Act. He, therefore, gave judgment for the plaintiffs in each case. From these judgments the companies now appeal.

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The chief arguments on behalf of the companies are: (1) that the circumstances were not such as to entitle the plaintiffs to relief under said s. 2 (now s. 86 of the Insurance Act, 1915); (2) in any event, the action was prematurely brought.

In my opinion, the trial judge was right in attributing to mistake the failure of the plaintiffs to put in proofs of loss as required by condition 13.

S. 86 of the Saskatchewan Insurance Act is as follows:—

86. Where, by reason of necessity, accident or mistake, any condition of a contract of insurance on property in Saskatchewan as to the proof to be given to the insurer after the occurrence of the event insured against, has not been strictly complied with; . . . or where, for any other reason, it is held to be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such condition, no objection to the sufficiency of such statement of proof or amended or supplemental statement of proof, as the case may be, shall be allowed as a defence by the insurer or a discharge of his liability on such contract of insurance wherever entered into.

In *Robins* v. *Victoria Mutual Ins. Co.*, 6 A.R. (Ont.), 427, at 450, Cameron, J., said:—

The statute is silent as to the kind of mistake that will excuse this breach of the conditions, and the word must be construed according to its usually accepted meaning, and a mistake, according to the Imperial Dictionary, is an error in opinion or judgment, misconception, a slip, a fault, an error, which will cover the reason of the plaintiff's neglect; and, assuming that the agent Scroggie, as stated by the plaintiff, and his statement is uncontradicted, had really been under the impression that the plaintiff did not quite want him to prepare the proofs, and in consequence had not done so—this would also have been such a mistake as would relieve the plaintiff from a strict compliance with the condition.

In that case Scroggie was the agent of the company through whom the insurance had been effected.

In the case at bar, Sutherland, the Edmonton manager of the plaintiff bank, after the fire took place went to F. C. Lowes & Co., the agents for both defendants, through whom the policies had been placed on the hotel by the bank, and notified them of the loss and asked them to wire the companies, which Lowes & Co. agreed to do. Sutherland then asked if there was anything further for him to do, and was told that there was not. Lowes & Co. notified both companies of the total loss of the hotel. The closing paragraph of their letter in each case reads as follows:—

If there is any further information or particulars you require we shall be pleased to secure the same on receipt of your advice.

Nothing was asked for by either company.

Taking all the circumstances and the correspondence into consideration it seems to me to be reasonably clear that Shepard left the matter in the hands of the bank, as it had effected the insurance, and that Sutherland was led to believe by the defendants' agents that nothing more was necessary on his part, with the result that proofs of loss were not sent in as required by the policies. I am, therefore, of opinion that the trial judge was right in granting relief under the above section against the imperfect performance of condition 13, which requires proof of loss to be made "as soon as practicable after loss."

The main contention, however, on part of the appellants was, that the action had been brought prematurely.

Statutory conditions 17 and 22 read as follows:—

17. The loss shall not be payable until sixty days (in the case of the Glens Falls Insurance Company policy thirty days)—after completion of the proofs of loss, unless otherwise provided for by the contract of insurance.

22. Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs.

The fire having occurred on April 1, 1915, and formal proofs of loss not having been forwarded until February 29, 1916, and these not having been received by the companies until some time in March, the plaintiffs were obliged to bring their action before the expiration of the sixty (or thirty) days after proof of loss was completed or be in the position of having their claim absolutely barred. The question to be determined is: Is the action of the plaintiffs barred and their claim under the policies forfeited because they failed to complete the proofs of loss within 10 months from the date of fire in the one case and eleven months from such date in the other, or can they, under s. 86, above mentioned, be relieved from the consequences of their failure, and, if so, should they, under the circumstances, be relieved?

The defence here set up, that the action has been brought prematurely, involving, if effect is given to it, the forfeiture of the insurance, is the result or consequence of an imperfect compliance on the part of the plaintiffs with condition 13, which requires proofs of loss to be furnished as soon as practicable after the loss has occurred. Had the plaintiffs complied with this condition and then brought the action at the time they did, this

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defence would not have been available to the defendants. It would, therefore, seem to me to follow that, where the insured did not comply with the requirements of the condition, but the court, on the ground of mistake, relieved him from the consequences of his non-compliance, such relief should carry with it relief against every defence that is founded on his non-compliance with the condition. But, in any event, in my opinion, the last part of s. 86 would apply so as to enable a court or judge to disallow its defence if it appeared inequitable; "that the insurance should be deemed void or forfeited by reason of imperfect compliance with such condition . . ."

In *Forest* v. *Home Ins. Co.*, 8 D.L.R. 764, 5 A.L.R. 223, the plaintiff's house was burned on November 12, 1909. Notice was given to the defendant company through Mr. Mays, the agent of the company through whom the insurance had been effected. Blank forms for proofs of loss were sent to the insured, and the matter was placed in the hands of a Mr. Lilly for adjustment. About March 26, 1910, the proofs of loss were sent by the plaintiff's solicitors to Mr. Mays, who forwarded them to Mr. Lilly. In April, Lilly wrote the solicitors that the certificate forwarded did not comply with the certificate called for by the policy. (The statutory conditions in Alberta appear to be the same as our own.) In answer, the solicitors wrote saying that if the policy was not paid within two days they would issue a writ. The writ, however, was not then issued. Nothing seems to have been done until October 29, 1910—two weeks before the expiration of one year after the fire—when a writ was issued. On November 2, a certificate intended to meet the requirements of Mr. Lilly's letter was left at Mr. Mays' office. The action was dismissed, and the plaintiff appealed. In giving judgment in appeal, Harvey, C.J., said at p. 766:—

> Even if the forms supplied did not amount to a request, I find myself unable to consider Mr. Lilly's letter as anything other than an unequivocal request for a certificate that would comply with the condition. The plaintiff at once refused to comply with this request, and it was not complied with, if at all, until at or after the commencement of this action.
>
> The 17th statutory condition provides that the loss shall not be payable until 60 days after completion of the proofs of loss, and the 22nd condition provides that action must be brought within one year after the loss. The combined result of these two conditions is, that an insured, to protect himself, must complete his proofs of loss within ten months after the loss occurs,

which, as a general condition, appears not unreasonable, though in certain cases it might work a hardship. In such cases, however, there is ample protection in s. 2 of the Act (c. 16 of 1903 and 1st sess.), which provides: (Here was quoted s. 2 of the Fire Insurance Policies Act—see s. 86 above).

This section appears to give ample protection for all reasonable cases of defective proof, but does not provide for cases in which the insured deliberately refuses to give the proof which it is his duty to furnish.

This certificate is for the purpose of enabling the company to form an opinion as to whether the fire was accidental or not. In the present case it appears that it would have been important, inasmuch as the defence alleges incendiarism.

No reason why the certificate was not furnished is given, other than the letter of the plaintiff's solicitors refusing to give it, and threatening suit.

This does not, in my opinion, raise any equity in the plaintiff's favour for relief under s. 2; and I think the action was properly dismissed, and the appeal should be dismissed with costs.

The judgment does not say what defences were set up to the plaintiff's action, but I take it from the way in which the Chief Justice referred to the 17th statutory condition that that condition had been set up. In that case, the court affirmed the judgment dismissing the action, because the circumstances did not raise an equity in the plaintiff's favour which would justify the granting of relief, but, from the language used, I think it a fair inference that, had the circumstances justified the granting of relief, the insurance would not have been deemed forfeited by reason of statutory condition 17. I am, therefore, of opinion that this defence—based as it is upon the fact that there was an imperfect compliance by the plaintiffs with the requirements of the condition—may be relieved against under s. 86, above quoted.

Of course, if the plaintiffs had had time, after they caused their proofs of loss to be delivered to the defendants, to permit 60 days (in the case of the defendants the Glens Falls Insurance Co. 30 days) to elapse and still bring their action before their claim was barred by condition 22, it was their duty to do so, but here if 30 days had been allowed to elapse after the defendant companies received the proofs of loss the claims under the policies would have been barred, for Mr. Henderson, general agent of the Glen Falls Co., testified that he received the formal proofs of loss in March.

The court having power to relieve the circumstances, in my opinion, justify relief being granted. I, therefore, think that my brother Newlands was right in refusing to give effect to this defence. The appeal should be dismissed with costs.

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ELWOOD, J.A.:—The plaintiff Shepard was the owner of an hotel at Margo, in the Province of Saskatchewan, which he had purchased from one Charters, to whom he had given a mortgage upon the property. Charters being indebted to the plaintiff bank, assigned the mortgage to the bank through its Edmonton branch. The insurance upon the property having expired, the bank placed new insurance with the defendant companies. The policies issued by the defendants were issued in the name of the plaintiff Shepard, with loss, if any, payable to the bank. On the night of April 1, 1915, the hotel was completely destroyed by fire. On April 5, 1915, the manager of the plaintiff bank at Edmonton verbally reported the fire to the agents of the defendant companies at Edmonton. The defendant companies sent adjusters to investigate the loss. The circumstances attending the fire were considered to be of a suspicious character, and the companies refused payment pending adjustment and further investigation. On April 8, 1915, the plaintiff Shepard signed an agreement with the adjusters, which, *inter alia*, contained the following:—

> It is hereby stipulated and agreed that no act, step or measure taken, or that may be taken or any demand that has been or may be hereafter made by the said Patterson and Waugh or by any representative of the said insurany company . . . or compliance by the assured, or of any other person with such demands, shall be claimed or deemed to be a waiver upon the part of said insurance companies of any of the terms or conditions of their policies, or of any of the rights of the said companies thereunder, which might otherwise be asserted, excepting such terms or conditions as have been or may be distinctly waived in writing by the general agent . . or manager. of the said company. . . .

There was considerable correspondence between the defendant companies and the bank, with reference to payment of the insurance, extending over a number of months. In or about October, 1915, the claim was placed in the hands of the Edmonton solicitors for the bank, who, on February 29, 1916, furnished a formal notice of loss and proofs of loss made out by the plaintiff Shepard.

Actions on the policies were commenced on March 22, 1916. In the Glens Falls policy, statutory conditions Nos. 13 and 17 are as follows:—

> 13. Any person entitled to make a claim under this policy is to observe the following directions:
>
> (a) He is, forthwith, after loss, to give notice in writing to the company.
>
> (b) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration, declaring:

1. That the said account is just and true.

2. When and how the fire originated, so far as the declarant knows or believes;

3. That the fire was not caused through his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurance;

5. All liens and incumbrances on the subject of insurance;

6. The place where the property insured, if movable, was deposited at the time of the fire.

(d) He is, in support of his claim, if required and if practicable, to produce books of account, and furnish invoices and other vouchers, to furnish copies of the written portions of all policies, and to exhibit for examination all that remains of the property which was covered by the policy.

(e) He is to produce, if required, a certificate under the hand of a government agent, magistrate, notary public, commissioner for taking affidavits, or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferer, stating that he has examined the circumstances attending the fire, loss or damage alleged and that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss or damage on the subject assured to the amount certified.

17. The loss shall not be payable until thirty days after completion of the proofs of loss, unless otherwise provided for by the contract of insurance.

These conditions are the same in the British Dominions policy, except that in the latter policy statutory condition No. 17 provides that the loss shall not be payable before 60 days after completion of proofs, unless otherwise provided for by the contract of insurance.

The trial judge found that the notice and proofs of loss were not given according to the terms of the policy, but relieved the plaintiffs under s. 2 of the Fire Insurance Policy Act (R.S.S. c. 80). That section is as follows:—

Where, by reason of necessity, accident or mistake, the condition of any contract of fire insurance on property in Saskatchewan as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with or where after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of such contract the company through its agent or otherwise objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective and so from time to time or where for any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions no

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objection to the sufficiency of such statement or proof or amended or supplemental statement or proof, as the case may be, shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the first day of January, 1904.

He found that the action was brought less than 30 days after the formal notice and proofs were given, and concludes his judgment as follows:—

These were not given "forthwith" nor "as soon afterwards as practicable," and were therefore not a compliance with the terms of the policy, and, as I cannot accept them as such, they cannot be used to fix the time when the action should be brought.

I therefore give judgment for plaintiffs for the amount of claim with costs.

From this judgment the defendants have appealed.

It was contended by the respondents that the defendants, by investigating the origin of the fire and by placing the matter in the hands of adjusters and by their correspondence with the plaintiff bank, are estopped from requiring formal notice and proof of loss; that the position of the plaintiffs is as though all notice and proof of loss had been dispensed with.

I cannot find anything in the correspondence dispensing with proofs of loss. It will be observed that, at the very commencement of the investigation, the adjusters took from the plaintiff Shepard the stipulation above set forth and which, in express terms, provides that "no act, step or measure taken" or to be taken shall be claimed or deemed to be a waiver on the part of the insurance companies of any of the terms or conditions of their policies or of their rights thereunder.

On June 29, 1915, the Glens Falls Co. wrote to the defendant bank a letter referring to their policy, which contains the following:—

The policy contract will give all the information necessary to indicate to the assured what procedure to take in order to present a claim thereunder.

At this time, the bank had both policies in its possession, and must be taken to have been aware of the conditions of the policies; in fact, the bank manager at Edmonton, in his evidence at the trial, says that he assumed that proofs of loss had been filed. Apart, therefore, from what he should have learned from the policies, he was actually aware of the necessity of proofs of loss, and he merely assumed that proofs had been filed. It was, in my opinion, through no fault of the defendant companies that he came to the conclusion that proofs had been filed.

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There was no repudiation by the defendant companies of liability, as in *Morrow* v. *Lancashire Insurance Co.*, 26 A.R. (Ont.) 173.

The circumstances surrounding the matter went no farther than to justify the trial judge in relieving the plaintiffs from the consequences of strict compliance in the matter of notice and furnishing proofs.

Notice of loss was not given "forthwith," after the loss. Proofs of loss were not delivered "as soon afterwards as practicable." They were, however, eventually given, and the plaintiffs were relieved from strict compliance in point of time under the above quoted s. 2 of the Act.

The notice and proofs were, however, not given until February 29, 1916, and as the action was commenced on March 22, 1916, 30 days, in the case of one policy, and 60 days in the case of the other policy did not elapse after completion of the proofs of loss before commencement of action.

This is a condition which, in a number of cases, it has been held must be observed. See *Mutual Fire Insurance Co.* v. *Frey*, 5 Can. S.C.R. 82; *Anderson* v. *Saugeen Mutual Fire Assce. Co.*, 18 O.R. 355; *Forest* v. *Home Ins. Co.*, 8 D.L.R. 764.

In consequence of the conclusion that I have come to, it is unnecessary that I should consider other points in connection with the case raised by the appellants.

In my opinion, the appeal should be allowed with costs, and the plaintiffs' action dismissed with costs. *Appeal allowed.*

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

QUE.
C. R.

JOHANSEN v. WINDSOR HOTEL Co.

Quebec Court of Review, Archer, Greenshields and Lamothe, JJ. May 22, 1918.

MASTER AND SERVANT (§ II A—60)—*Safety as to place and appliances—Risk of employment—Negligence of servant—Liability.*]—Appeal by plaintiff from the judgment of the Superior Court in an action claiming $3,000 for damages for injuries caused by falling out of a window he was cleaning. Reversed.

ARCHER, J.:—Had the safety appliances referred to in the regulations been supplied to plaintiff, it can safely be said the accident would not have happened. It is to protect the employees in such cases that these regulations were enacted. I am of opinion that the company defendant was bound to supply such safety appliances and give the necessary instructions to its employees. True, plaintiff answered the notice calling for an expert window cleaner. The evidence shews he had 6 months' experience as such. Knowing the danger of this kind of work, he should have asked the company to supply him with safety appliances. In doing the work as he did he took a certain risk, and in this way he, too, was negligent. The accident was due to the common fault of both plaintiff and defendant.

In the circumstances, judgment must be given awarding plaintiff one-half the amount he claimed in his demand, with costs.

Judgment accordingly.

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T. C.

O'SULLIVAN v. CANADIAN KLONDYKE MINING Co.

Yukon Territorial Court, Macaulay, J. August 28, 1918.

COSTS (§ I—14)—*Security for—Foreign permanent residence—Temporary residence in district for purpose of enforcing claim—R. 526 (Sask.)—Practice.*]—Application on behalf of defendants, other than defendant Canadian Klondyke Mining Co., Ltd., for an order for security for costs. Granted.

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F. T. Congdon, K.C., for motion; *J. P. Smith, contra.*

MACAULAY, J.:—This is an application, under r. 526 of the Judicature Act, on behalf of the defendants other than the defendant Canadian Klondyke Mining Co., Ltd., for an order for security for costs for the said defendants and each of them, except as aforesaid, and staying all further proceedings, except as against the defendant Canadian Klondyke Mining Co., Ltd., in the meantime, and directing that in default of such security being given the action be dismissed as against said defendants, except said defendant company, and each of them, with costs.

R. 526 provides as follows:—

When the plaintiff in an action resides out of the territory and in any other case where, by the practice and procedure in England, a defendant is entitled to security for costs, the defendant, or one of the defendants, if more than one, may, on affidavit of himself or his agent alleging that the defendant has a good defence on the merits to the action, apply for an order requiring the plaintiff within three months (or such other or further time as the court or judge deems right) from the service of the order, to give security for the defendant's costs and staying all further proceedings in the meantime, and directing that, in default of such security being given, the action be dismissed with costs, unless the court or judge, on special application for that purpose, otherwise orders.

In reply to the application the plaintiff files an affidavit stating that his permanent place of residence is San Francisco, in the State of California, United States of America; that he is temporarily resident in Dawson, Yukon Territory; that he came to said Territory and to said Dawson for the purpose of enforcing his claim in this action, and that it is his intention to remain here for some time for said purpose, although he does not intend to remain any longer than his solicitor advises him it will be necessary to remain for the purpose of this action.

Counsel for plaintiff argued that upon a proper construction being placed on r. 526 it meant that defendant is entitled to security for costs when the plaintiff resides out of the territory, and that the words: "and in any other case where, by the practice and procedure in England" defendant is entitled to security for costs, must be restricted to mean the cases referred to in O. 65, r. 6—Annual Practice, 1918, p. 227, *et seq.*, viz., (*a*) residence abroad; (*b*) misdescription of plaintiff's residence; (*c*) nominal plaintiff; (*d*), (*e*), (*f*), (*g*), (*h*), etc., and that r. 6-A, which provides that a plaintiff, ordinarily resident out of the jurisdiction, may be ordered

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to give security for costs, though he may be temporarily resident within the jurisdiction, should be excluded from consideration as our rule was not intended to cover such a case, and as by the law of England prior to the Judicature Act a foreigner usually resident abroad who is temporarily resident in England for the purpose of enforcing a claim for action could not be called upon to give security for costs under the practice that prevailed in England at the time and as laid down in *Redondo* v. *Chaytor*, 4 Q.B.D. 453, and other cases referred to therein, this application should be dismissed. The case of *Rutledge* v. *The United States Savings and Loan Co.*, 37 Can. S.C.R. 546, was also cited; also *Bowcher* v. *Clark*, 6 W.L.R. 433.

I am unable to adopt the views of counsel as submitted on the argument and am of opinion that upon a proper construction of said r. 526 a defendant is entitled to security for costs when the plaintiff in an action resides out of the territory and in any other case where by the practice and procedure in England a defendant is entitled to security for costs, including, as provided by r. 6-A, a plaintiff ordinarily resident out of the jurisdiction, though he may be temporarily resident within the jurisdiction, as in the case before me. S. 15 of the Judicature Act of the Yukon Territory, p. 418 of the Consolidated Ordinances of the Yukon Territory, 1914, provides as follows:—

> Subject to the provisions of this Ordinance and the Rules of Court, the practice and procedure existing in the Supreme Court of Judicature in England on the 1st day of January, 1898, shall, as nearly as possible, be followed in all causes, matters and proceedings.

It is admitted that r. 6-A, O. 65, was a part of the practice and procedure existing in the Supreme Court of Judicature in England on January 1, 1898. This rule was passed for the purpose of amending the law affecting plaintiffs ordinarily resident out of the jurisdiction but temporarily resident within the jurisdiction for the purpose of prosecuting their claims in court who were not obliged to give security for costs. The judges in the case of *Redondo* v. *Chaytor*, above cited, in delivering their judgments in upholding the then settled rule that in cases as just mentioned no security for costs was required, expressed the opinion that the rule ought to be different, and it was altered as provided in r. 6-A, O. 65, on the introduction into England of the judicature system.

R. 526 of the Yukon Territory Judicature Ordinance, in my

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opinion, was intended to be broad enough, and is broad enough, to cover all cases where, by the practice and procedure in England, a defendant is entitled to security for costs, and the provisions contained in s. 15 of the said Yukon Judicature Act makes it doubly certain that the practice and procedure existing in the Supreme Court of Judicature in England should be followed in this case.

Objection was taken by counsel for plaintiff that the affidavit of Harold Gordon Blankman, one of the defendants in this action in person, and manager of the Canadian Klondyke Mining Co., Ltd., filed in support of this motion, was insufficient for the purpose of obtaining an order as asked, as in his personal capacity he did not allege in his said affidavit that he had a good defence on the merits, and that in his capacity of receiver and manager of the Canadian Klondyke Mining Co., Ltd., he states that he is advised and believes that he has a good defence to the action without giving the grounds of his information and belief. Both objections, I think, are fatal. R. 526 provides that he must allege in his affidavit that he has a good defence on the merits, and where an affidavit is made, upon information and belief, the rules of court require that the deponent should state the grounds of his information and belief. See *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 20 Ch. D. 501, at 508, judgment of Jessel, M.R. He has not complied with the rules in either respect and his application for security as defendant in person and as such receiver and manager will be dismissed with costs. The same thing applies to the defendant the Granville Mining Co., Ltd. The affidavit of Frederick Peck Burrall, filed on behalf of this company, is based on information and belief, and does not state the grounds of his information and belief, and the motion for security will not be allowed on behalf of the Granville Mining Co., Ltd. The affidavit of the said Burrall filed as aforesaid does allege a good defence on the merits in his personal capacity as defendant, and the order will go, in this instance, for security as asked, with the usual order for costs, namely, costs in the cause.

The other defendants may renew their motion for security upon proper material being filed. *Application granted.*

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VAN DORN v. FELGER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Scott and Beck, JJ. October 8, 1918.

HUSBAND AND WIFE (§ III A—143)—*Hiring for service—Husband leaving employment—Wife refusing to leave—Receiving and harbouring—Loss of society and services—Damages.*]—Appeal from the judgment at the trial, in an action for damages for receiving and harbouring plaintiff's wife. Affirmed.

C. F. Harris, for appellant; *W. Gray*, for respondent.

The judgment of the court was delivered by

STUART, J.:—The defendant, a farmer, hired the plaintiff and his wife to work for him, the former in the fields, the latter as housekeeper, for the period from April 1, 1917, to December 31, 1917. The husband and wife were to get the proceeds of the crop grown on 22 acres of land as remuneration. About July 15, the plaintiff left the employ of the defendant, but his wife refused to go with him and stayed on as housekeeper. Towards the end of December the plaintiff sued the defendant for damages for

wrongfully and with knowledge of the premises and against the will of the plaintiff receiving and harbouring and detaining Ann Van Dorn the wife of the plaintiff, whereby the plaintiff lost the society and services of his said wife.

At the opening of the trial plaintiff's counsel moved for leave to amend the claim by adding this count:—

In the alternative, the plaintiff says that the defendant has alienated from him the said plaintiff the affections of the plaintiff's wife in consequence of which the plaintiff has lost the society and services of his said wife and has thereby suffered damage.

This amendment, though objected to, was allowed and the trial proceeded. At the close of the case, the trial judge dismissed the claim added by amendment and reserved judgment on the original count. Subsequently, he gave judgment for the plaintiff for $750 damages and costs, and the defendant now appeals.

The plaintiff, who could not speak very good English, gave the following account of his reason for leaving the defendant's employ:—

Q. Why didn't you continue on. A. Well, Mr. Felger he told me I have to get out of there and I have to go then. Q. Why did he tell you you have to go out? A. Well, he got something to do with my wife and him was keep my wife there you know and that for him was put me out. Q. How did it come about that you and Felger had any difficulty about you not finishing the contract? A. No, nothing at all. Q. Why didn't you stay there?

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A. Well, Mr. Felger he was talking to my wife, laughing to my wife, take my wife all round the country and the girl there, 10 years, come to me in the field. Q. Did you ever say anything to Felger about this? A. Yes, I don't know exactly the day and I told him then I says Mr. Felger I don't like you to look so much behind my wife, don't keep my wife and he says nothing.

He also stated that he had complained six or seven times, that Felger had said he would not talk to him; that his wife had changed her bedroom and refused to sleep with him any more, that she didn't talk to him. "I was same as dead, nobody talk to me." He said that once the defendant came home from Magrath and came in right to his (plaintiff's) bedroom and said "Well, you'll have to get out of here," that he himself said: "That's all right, Mr. Felger, I go to-morrow morning," that next morning he asked defendant if he was going to pay him for the time he had been working and that defendant said "No, you get nothing," and that he, plaintiff, had asked his wife to go along with him and she said "No, I stay here"; that defendant said: "I give you time to noon to get off my place," and that he left because he had to. He also said that he had once asked Felger if his work was satisfactory and that Felger had said that it was, that Felger often had been taking his wife out driving and had never asked him to go along. Upon cross-examination he was asked what he had to complain of Felger about, and he answered, "What for she stay sitting on the verandah at nights till 11 and 12 o'clock with Felger there sometimes and I say to my wife let's go to bed and she said lots of time and laughing and talking with Felger." He admitted that on most of the occasions on which Felger had taken the wife out driving there was a third person along, sometimes a child, but asserted that three or four times they had gone alone.

He also stated that on several occasions subsequent to his leaving, he had endeavoured to talk to the defendant about his wife, but that the defendant would not talk to him. The defendant admitted this, giving as a reason that he had no reason to talk to the plaintiff. He repeatedly said that he could see no reason for talking to the plaintiff, "I had nothing to do with his wife, he could tell her to come along."

The defendant's account of the cause of the plaintiff's departure was this:—

Well, really I don't know, the only thing I think—things looked pretty dry and that there wouldn't be much of a crop because he asked me once if

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there ain't any crop I won't get nothing either. I didn't fire him. He says well, I am going to leave. I was in my room reading and went along for half an hour and there was an awful row outside, and I says, now you have got to live in peace here, I don't want any row and then he spoke right up and says I am going to leave, and I says, if you leave you won't get anything, no wages unless you fulfil your contract, and he says, furthermore, you can keep that money, you can keep it. The next morning he wanted to know what about it; I says as long as you don't want to work you had better get out of here by noon.

One explanation given by the defendant for not letting plaintiff talk to him afterwards was that he had left the place when he, defendant, didn't want him to leave.

After leaving, the plaintiff came back for his furniture and the defendant wouldn't let him stay over night at his place. He said: "Well, I had no room and I didn't care to have him there because I thought there would be another row."

On several occasions the plaintiff tried to get the wife to go with him to Lethbridge, where he had a house, but she refused. There were four or five children and the plaintiff had taken them all away with him but had, after the wife's pleading, allowed the youngest daughter, 5 or 6 years old, to return to her mother. The defendant had a daughter 16 or 17 years old who had been living with him all the time, and in the fall a female school-teacher had come and boarded with the defendant.

The wife, in her evidence, took the side of the defendant, denied all improprieties, accused the plaintiff of ill-usage and quarrelling, said she stayed of her own accord in order to earn one-half the crop on the 22 acres, that defendant had always said she could go if she wanted to, but that she did not want to, and would not live with the plaintiff any more.

Lena Van Dorn, a daughter of the plaintiff, 16 years of age, who had been living with her father after the separation, stated that she was at Felger's when her father came for his furniture and that she had heard Felger tell her mother that she was crazy to go and talk to the father. Both Felger and the mother positively denied this.

There was trouble about getting the furniture, and a second visit was made by the plaintiff for this purpose when he brought a policeman, one Meiklejohn, who testified that he had tried to get the wife to go away with her husband but that she had said

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she would not, that she would kill herself before she lived with him.

The wife's story of cruelty and quarrelling was denied entirely by the plaintiff, although he admitted that there had been some trouble some years before. The defendant and the wife stated that defendant had given her, in all, some $315 as her share of the proceeds of the crop from the 22 acres, but the most of this was paid late in December, after this action was begun. The wife stayed on with the defendant after December and until the trial. She said she was working for wages and that she had stayed because she did not want to have to return to give evidence from Vancouver, where she had intended to go to live with relatives.

The trial judge in his reasons for judgment used the following language:—

> The impression made upon my mind during the trial by the evidence has been strengthened by my subsequent consideration of it. I think that the defendant was directly responsible for the act of the plaintiff in quitting his employment when he did, and that the refusal of his wife to go with him then, or upon any of the subsequent occasions upon which he tried to induce her to do so was largely due to the active encouragement which the defendant gave her to stay where she was. I do not credit at all the statement that her determination to stay there was due in part to her anxiety to perform her contract with the defendant, and thus earn her share of the proceeds of the crop that was to have been the plaintiff's reward for his and her work. I think that the contract was with the plaintiff alone, though his wife was to do her part in its performance, and that it was an entire contract which was completely put an end to when the defendant rendered, as he did, the plaintiff's performance of it impossible. I do not pay any attention to the subsequent settlement between the plaintiff's wife and the defendant for her services under the contract, for it bears the ear-marks of having been brought about under the exigencies of the occasion and with an eye to this litigation which had then been commenced. Neither do I think that she has proved her claim of abusive treatment on the plaintiff's part. There had, at an earlier stage in their married life, been friction between them, but my opinion is that when they moved to the defendant's place they were living in comparative harmony. I can find nothing in the evidence to justify me in finding that his treatment of her during their residence at the defendant's place was in any sense cruel. Although upon the evidence before me I have acquitted the defendant of any impropriety in his relations with this woman, I think that he might have done more than he did to allay the suspicions which the plaintiff had of him, instead of deliberately feeding the flames of his jealousy as I am rather disposed to think that he did. I think that, but for him, the plaintiff would have stayed on and finished his contract. I think that, but for him, the plaintiff's wife would have gone with him when he left. I think that, but for him, she would have yielded to one of the many attempts which he made to get her to leave the defendant's home and come to his. I think that, through him, he has

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been deprived of the comfort of his wife's society, and of her care in the management of his house and family.

At first blush, it would appear as if, in this case, the matter of legal liability for harbouring was very much complicated by contractual rights and obligations which are generally absent in cases of this nature. No doubt there was a contract between the husband and wife on one hand and the defendant on the other. For myself, I should prefer to call it a joint contract rather than an "entire" one because I doubt if the husband had power, without the wife's assent, to bind her to keep house for a third party. By statute, she had contractual capacity herself and was entitled personally to her wages.

But be all this as it may, it seems to me that, owing to what occurred, the matter of contractual rights is not so very important after all. The trial judge does not specifically find that the plaintiff was wrongfully dismissed, and it is to be observed that the plaintiff made no claim for damages for wrongful dismissal. If he had considered that the defendant had really dismissed him, it is altogether likely that we should have had a claim for damages upon that ground, especially when an action was begun on another ground. The meaning I attach to the trial judge's finding that the defendant had rendered the plaintiff's performance of his contract impossible is that he made the conditions such that it was impossible for the plaintiff to stay—that is, not physically impossible, but morally impossible and with due self-respect, and that the plaintiff was justified in leaving.

Then, also, I think any legal obligation on the part of the wife to stay (which I am strongly inclined to think did not exist for the reason that once the husband was justified in leaving, she also was so justified, owing to the joint or entire contract) is really unimportant because the defendant insisted in his evidence that he had frequently told her that she was at liberty to go if she wanted to do so. The effect of this is, I think, that the defendant cannot shelter himself behind any legal obligation on the part of the wife to stay on as his housekeeper.

As between the husband and the wife, I think that, at least, when once the husband became justified in leaving, he was entitled to ask his wife to come with him. It may be that owing to her present separate contractual capacity she might in this case have

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been strictly entitled to say: "I am bound by my contract" or at least "I want to fulfil my part of it and so get my remuneration," and it may be that this would justify her in temporarily disregarding her matrimonial duty to her husband (which still, I think, exists though it may be now unenforceable by legal process. *The Queen* v. *Jackson*, [1891] 1 Q.B. 671). But nevertheless, as against third parties, the husband was, in my opinion, still entitled to demand that they refrain from exercising improper influences over the wife out of improper motives to induce her to remain living apart from him.

For a time, I thought there was some inconsistency in the two decisions made by the trial judge. He dismissed the claim for alienating affections and yet, in giving judgment against the defendant for harbouring, he said that he did not credit at all the statement that her determination to stay there was due in part to her anxiety to perform her contract with the defendant and thus earn her share of the proceeds of the crop. He said that, but for the defendant, the wife would have returned, and yet it was not due to mere business or financial influence. Surely then, it must have been due to the defendant's influence upon her feelings towards her husband, that is, to an alienation of her affections. But in another passage the trial judge speaks of having acquitted the defendant "of any impropriety in his relations with this woman." My interpretation of his judgment is, therefore, that at the close of the case he merely decided that acts of immorality had not been proven and that, although strictly there might be alienation of affections without such acts, yet this could be dealt with under the original count of harbouring, as in fact he did really deal with it.

There is not a great deal of authority to be found upon the law applicable to the case. The leading English case, as old as 1745, is *Winsmore* v. *Greenbank*, Willes, p. 577. Only two other cases are cited by Halsbury, *Berthon* v. *Cartwright* (1796), 2 Esp. 480, and *Philp* v. *Squire* (1791), Peake 114. These cases and a large number of American authorities are reviewed by Falconbridge, J., in *Metcalf* v. *Roberts*, 23 O.R. 130, at 132.

The subject is also discussed by Middleton, J., in *Bannister* v. *Thompson*, 15 D.L.R. 733, 29 O.L.R. 562, where the distinction

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between the action for crim. con. and that for enticing is explained. In the former, adultery must be proven. Short of adultery, there may, however, be (1) illegal alienation of affections, (2) illegal enticing away, (3) illegal harbouring. As suggested by Wetmore, C.J., in *Marson* v. *Coulter*, 3 S.L.R. 485, the two latter are possibly causes of action distinct from each other; or, as suggested by Middleton, J., in *Bannister* v. *Thompson*, *supra*, they may be merely alternative descriptions of the same wrong. But it appears to me immaterial whether we distinguish separate causes of action in this way or not. As Middleton, J., said in the case cited above, at p. 735:—

> I think . . . that the law recognizes the right of the husband to recover damages against a defendant for any misconduct which deprives the plaintiff of the love, service and society of his wife . . . commonly called *consortium*.

Even if love be dead, the husband is still entitled to ask that no third party shall, by wrongful conduct, deprive him of the service and society of his wife, even if these be merely conventionally enjoyed. The absence of all affection in the wife will, of course, be material in reaching a decision as to whether there was really any enticing or as to what the real motive or reason for the harbouring was, but it is by no means fatal to the plaintiff's case. At any rate, the trial judge here found that the plaintiff and his wife had lived together with comparative harmony until they came to the defendant's place.

Wetmore, C.J., in *Marson* v. *Coulter*, *ubi supra*, and McKay, J., in *Homewood* v. *Beaton*, [1917] 1 W.W.R. 1309, decided that the refusal to allow a husband (whose wife has left him without sufficient justification) to visit the house where the wife is staying is sufficient evidence of wrongful harbouring on the part of the owner of the house. Some features of those cases were similar to the facts here, although, in other respects, they were different.

We have here a finding of fact by the trial judge that the plaintiff was justified in leaving the defendant's employ. I think there was evidence to support that finding, and unless it is clearly wrong we ought not to interfere with it. I do not think that we can say that it is clearly wrong. That being so, I think the plaintiff was entitled to ask that no third party, at any rate, should wrongfully induce his wife to fail to follow him. The find-

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ings of fact by the trial judge amount to this, that the wife was not justified in separating from her husband. The mere fact that the separation consisted in his going and her staying, instead of the usual case of her going and his staying, seems to me to be immaterial. The trial judge has found that there was nothing in the conduct of the husband to justify her in refusing to live with him and I think there was ample evidence, if believed, to support that finding. He also found that her refusal to follow her husband was not even partly due to her desire to get her share of the crop. It is with regard to this finding of fact that I have had the most difficulty, but, on the whole, I think the trial judge, who saw all the witnesses, including the parties to the action, was able to appreciate the true situation much better than we are from a mere perusal of the evidence, and I think we ought not to interfere with that finding of fact either. The trial judge finds also that it was merely owing to the influences of the defendant that she continued to live with him and away from her husband. That is the interpretation which I put upon his words. It is true that he does not specify particular acts of the defendant by which this influence was exerted, but it seems to me to be clear that he meant that the general attitude and conduct of the defendant was such as to induce the wife to stay. I also think that the judge found that there were improper motives in the defendant. He says he is rather disposed to think that the defendant "deliberately" fed the flames of the plaintiff's jealousy. In any case, when once it is found that the defendant was to blame for the plaintiff's leaving, that means, in my opinion, that he had no longer any right to expect the wife to stay, because it was certainly an underlying condition of the original arrangement that the relationship of husband and wife and the incidents of that relationship should not be disturbed. A perusal of the evidence of the defendant himself is sufficient to convince me that he was utterly regardless of the sanctity, and even of the proprieties, of that relationship. His entirely callous refusal even to have any conversation with the husband of the woman who was his own housekeeper and living under his roof, and his inability, even at the trial, to see anything wrong in such an attitude, his refusal to allow the husband to stay at his place overnight when he came back for his furniture (which comes very near the facts of the two

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Saskatchewan cases), his telling the wife she was crazy to talk to her husband at all (a statement by Lena Van Dorn, which we must assume that the trial judge believed, although the wife and the defendant denied it)—all this, in my opinion, shews that the defendant thought very lightly of the marriage relationship of the plaintiff and his wife, and adds much to the significance of the plaintiff's story of what he saw in the actions of his wife and the defendant.

I, therefore, think the trial judge had before him sufficient evidence to justify the inference which I think he made that the defendant kept the plaintiff's wife at his place wrongfully and from improper motives.

This is, I think, sufficient to establish legal liability and the appeal therefore should be dismissed with costs.

Appeal dismissed.

CANADIAN BANK OF COMMERCE v. WON FOO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. September 24, 1918.

CHEQUES (§ IV—22)—*Authority to endorse—Restricted—Bona fide holders—Rights of parties.*]—Appeal by the defendant from the judgment of His Honour Judge Jackson. Reversed.

C. F. Harris, for appellant; *A. E. Dunlop*, for respondent.

The judgment of the court was delivered by

BECK, J.:—This is an appeal by the defendant from the judgment of His Honour Judge Jackson.

The City Cartage Company of Lethbridge was a partnership composed of two brothers Van Horne. A man named Lee was book-keeper for the firm and seems to have been largely in charge of the business office of the firm, his duties covering the receiving of moneys owing to the firm and the depositing of them to the firm's account in the Standard Bank. Walter Van Horne, one of the partners, gave evidence; he said that, for the last year and a half, his brother Charles took the most active part in the business. Charles did not give evidence. A rubber stamp with the words: "City Cartage Co. per....." was in use in the office of the firm. There seems to be no doubt that Lee had authority to use this stamp and add his own signature or initials to it for purposes within the range of his duties.

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Lee received, in the course of business, three cheques payable to the firm: 1. Cheque of A. D. Cunning on the Standard Bank for $9.75 dated 28th March, 1917; 2. Cheque of New Barnes Coal Co. on the Canadian Bank of Commerce for $20 dated 25th May, 1917; 3. Cheque of Deputy Minister of Public Works, Canada, on the Bank of Montreal for $297.00 dated 30th May, 1917.

Lee endorsed each of these cheques by stamping them on the back with the rubber stamp adding his own name or initials and on three separate occasions went to the defendant and, giving some reason why he wanted the cheques cashed—to pay wages, for instance, got the defendant to cash the cheques. The defendant promptly, apparently in each case the next day, deposited the cheques to his own account in the Canadian Bank of Commerce, first having himself endorsed them.

Walter Van Horne, the member of the firm who gave evidence, but who said that it was his brother Charles who took the chief interest in the business, gave evidence as follows:—

Q. Had he (Lee) any authority from the Cartage Co. or any member of the firm at any time to cash its cheques? A. No; not to my knowledge. Q. Well, you would know would you not? A. Why, certainly; we had a stamp for deposit only and that's all that was ever used. We never dreamt of anything like this being done. Q. Outside of his authority to utilise that stamp he had no authority to deal with your cheques? A. None whatever.

What I understand this to mean is, not that there was another stamp of firm's name with the words "for deposit only," but that Lee had no authority to use the stamp, which he did actually use in the endorsement of the three cheques, except for the purpose of their deposit to the firm's account. The cheques, shewing how they were in fact endorsed, had been produced on examinations before the trial and were before the court at the time when the evidence which I have quoted was given. Under these circumstances, if reference was intended to another stamp, surely point would have been made of the use of the wrong stamp for the purpose of the endorsement.

Considerable discussion was directed to the bearing of ss. 49 and 50 of the Bills of Exchange Act upon the case in hand; but it seems to me that neither of these sections affect the case.

The expression in s. 49 is "where a *signature* on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or *unauthorized* signature is wholly

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inoperative, etc." That section and s. 50 carry on the use of the expression "*unauthorized* signature." That is a signature "placed thereon without the authority of the person whose signature it purports to be."

The signature of the firm in this case "per A. J. Lee" was not unauthorized. What was unauthorized, putting the evidence at its best for the plaintiff, was the improper use of the properly endorsed instruments by doing otherwise than depositing them by virtue of the proper endorsement to the firm's credit in their current account with the Standard Bank. The section of the Act which calls for consideration is, it seems to me, s. 51 which reads:

> A signature by procuration operates as notice that the agent has but a limited authority to sign and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority.

If the authority of Lee in this case depended upon a written document the decision could be arrived at without much difficulty. The production of the document would have settled the limits of the authority. If the document authorized endorsement generally, the principal would be bound, notwithstanding the motive of the agent or the subsequent mis-use of the proceeds; but if the document were to contain a restriction upon the authority to endorse limiting it to endorsement for deposit only undoubtedly the agent's endorsement would not bind the principal whether in fact the endorsee examined the document of authority or not. *Hambro* v. *Burnand*, [1904] 2 K.B. 10.

The difficulty in the present case arises from the fact that, so far as appears, the authority, whatever it was, given by the firm to Lee was not by writing. Furthermore, it is not shewn that it was given expressly in words or only impliedly by conduct. From the evidence I have quoted, I infer, rather, that the alleged restriction rested merely on a natural supposition on the part of the firm that Lee, as their book-keeper in whom they presumably had confidence, would act honestly.

The witness says: that Lee had "not to my knowledge" any authority to cash cheques payable to the firm: We never dreamt of anything like this being done."

The case then seems to be close to the border line between the case of an agent, with authority to endorse generally, misappropriating his principal's money received by virtue of the endorsement,

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and the case of an agent, expressly or impliedly but distinctly restricted in his authority to a specific purpose, exceeding the limits of his authority in the very act of receiving the money and so throwing the loss on the person from whom he receives the money rather than his principal. On the whole, I think the correct view is that the authority to endorse being established the burden of shewing with reasonable clearness the restrictions on that authority lay upon those setting them up, in this case the plaintiff bank, and that it has not satisfied that burden.

I would, therefore, allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

BERGER v. CLAVEL.

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. 1917.

WILLS (§ III—78)—*In French—Ambiguity—Admission of extrinsic evidence to prove intention.*]—Appeal from a decision of the Court of Review at Montreal, 51 Que. S.C. 165, *sub nom Germain* v. *Clavel*, affirming the judgment of Martineau, J., at the trial, and maintaining the action with costs.

This was an action to define the rights of one Germain, plaintiff, under the testament of the late Charles Berger. The will was drawn in French, and the bequest in question was of an immovable property described in the following words, "mon immeuble portant les numeros civiques 1178 à 1186 inclusivement de la rue St. Denis, coin Mont Royal, avec dependances." It appears that, on that property on Mont Royal avenue, there were two stores in course of erection at the time when the will was made. The plaintiff contends that the bequest is of all the testator's property at the place mentioned, and the defendant, respondent, submitted that the portion of the property dealt with is limited to those houses which, at the time the will was made, bore the civic numbers therein mentioned. Both the courts below held that in view of the doubt which exists as to what constitutes the subject-matter of the legacy, extrinsic evidence was admissible to prove what the intention of the testator was, as imperfectly expressed by the notary who drew the will.

On appeal to the Supreme Court of Canada, after hearing coun-

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sel on behalf of both parties, the court reserved judgment and, on a subsequent day, allowed the appeal with costs, Fitzpatrick, C.J., and Anglin, J., dissenting; Davies, J., though thinking there was sufficient ambiguity in the language of the devise to admit extrinsic evidence, was of the opinion that this appeal should be allowed on the questions of fact. *Appeal allowed.*

Lafleur, K.C., and *St. Germain*, K.C., for appellant.

Atwater, K.C., and *J. A. Bernard*, for respondent.

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CANADIAN NORTHERN R. Co. v. OUSELEY, CHISHOLM AND THOMSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

ARBITRATION (§ II—11.)—*Railway across land—Damages—Compensation of arbitrators—Expropriation Act (Sask.).*]—Appeal by the defendants Ouseley and Chisholm from a judgment of Brown, C.J., for the return of certain moneys which the plaintiffs were obliged to pay defendants as arbitrators in an arbitration between the plaintiff company and one Green. Affirmed.

W. F. Dunn, for appellants Ouseley and Chisholm.

J. N. Fish, K.C., for respondent.

W. B. Willoughby, K.C., for defendant Thomson.

HAULTAIN, C.J., and NEWLANDS, J.A., concurred with ELWOOD, J.A.

LAMONT, J.A. (dissenting):—The plaintiff company ran its line of railway across the south-east quarter of section 29 and the east half of sections 20-16-26-W. 2nd, the property of Green, and being unable to arrange with him the compensation or damages in respect thereof, the three defendants were appointed arbitrators. When the award was ready, the arbitrators notified the plaintiffs that they had fixed the sum of $6,750, as the amount of their fees in connection with the arbitration. Being desirous of appealing against the award, the plaintiffs paid the fees in order to obtain it, but did so under protest, and they brought this action for a return of $4,650, being all the money paid to the defendants over and above $25 per day for 28 days, which the plaintiffs claim would be a fair remuneration for the services of the arbitrators.

At the trial, witnesses were called on behalf of the plaintiffs

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who testified that, in their opinion, $50 a day would be a fair allowance for each arbitrator, and this the trial judge allowed them for a period of 30 days, but gave judgment against all of the arbitrators for the difference between the sum thus allowed and the sum they had charged the plaintiff company. From this judgment, two of the arbitrators, Ouseley and Chisholm, have appealed; and the plaintiffs have cross-appealed, contending that the amount awarded is still too large.

At the hearing, the appeal of the arbitrators was dismissed, and decision on the cross-appeal was reserved. In my opinion, the cross-appeal should be allowed, and the compensation awarded reduced. It is true that, at the trial, witnesses called by the plaintiffs considered $50 a day a fair and reasonable allowance. These witnesses, necessarily, could only express their opinions, and they were in no better position—if indeed, so good—as the judge himself to proffer an opinion as to what would be a fair remuneration. The trial judge gave effect to the opinions thus expressed.

In my view, there is an opinion expressed on the pages of the statute book which the court should accept in preference to that of any witness. I refer to ss. 370 and 371 of the City Act, 6 Geo. V., 1915, c. 16, dealing with the expropriation of land by a city. They are as follows:—

370. Where the compensation or damages have not been agreed upon, the amount thereof shall be determined by the award of an arbitrator appointed by a Judge of the Supreme Court upon motion made to him by either party.

371. The judge making such appointment may prescribe the fees to be paid to the arbitrator:

(2) In the absence of an order or direction of the judge, the fees to be paid to the arbitrator shall be as follows:

For every meeting where the arbitration is not proceeded with, but an enlargement or postponement is made at the request of either party, $5;

For every day's sitting, to consist of not less than six hours, $30;

For every sitting not extending to six hours (fractional parts of hours being excluded) where the arbitration is actually proceeded with, for each hour occupied, $5.

(3) In addition to the above fees, a Judge of the Supreme Court may, on the application of the arbitrator, allow to the arbitrator a fair and reasonable sum for his care, pains and trouble and his time expended in considering the evidence, examining legal authorities and drawing up his award, as well as in taking a view of the ground where such view has been found necessary or has been asked for by the parties.

Determining the compensation to be paid for land expropriated by a city is work of exactly the same character as determining the compensation to be paid by a railway company for lands expropri-

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ated by it. The latter is not one whit more difficult than the former. The legislature has declared what would be a fair compensation in the one case, and, in my opinion, the court should take the sum there fixed as the measure of compensation to be adopted in the other. To be compelled to pay $6,750, or even $4,500 arbitrators' fees—in addition to all the other costs of arbitration—to have determined the amount of compensation a railway company must pay for running its railway across three quarter-sections of land is, in my opinion, unreasonable. I think that the object of the Arbitration Act was to enable such matters to be determined at reasonable expense.

In his judgment the trial judge says:—

> Take the evidence of the witness Mr. Rosevear, who gets a salary of apparently $3,000 a year as the manager of a lumber company—I think it is—in this city. We find that he charges $2,000 for some 25 days when he sits upon an arbitration board—$75 a day—and tries to justify it. In his ordinary work he gets something in the neighbourhood of $10 a day. When he sits on an arbitration board he is worth $75 a day. I cannot for the life of me understand by what process of reasoning a man can arrive at such a result; I cannot understand how his services can be so highly valued.

I am in precisely the same position as the trial judge. On the evidence submitted to him by the plaintiffs themselves he felt compelled to allow $50 per day. In my opinion, it was open to him to be guided by the amount fixed by the legislature in a similar case, notwithstanding the evidence of these witnesses, called by the plaintiffs. I think it is the duty of the court to accept the opinion which the legislature has expressed in the sections of the Act above quoted.

Furthermore, I do not think anything like 30 days was necessary for taking of evidence, but I think the plaintiffs are precluded by their statement of claim and by what took place at the trial from contending that the time alleged was excessive.

I think, therefore, that $30 per day for 30 days, with an additional allowance of $100 for "trouble and time expended on considering the evidence, examining legal authorities and drawing up the award," making $1,000 in all, would be ample remuneration for each arbitrator.

It was pointed out that, unless a liberal allowance was made for this class of work, desirable men might refuse to act. An allowance of $1,000 for thirty days' work will, in my opinion, secure the services of suitable men to act as arbitrators.

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Counsel for the plaintiffs contended that the judgment should be against the defendants jointly. In my opinion, it is right as it stands. The arbitrators were acting individually, and although the cheque with which the plaintiffs paid the fees was one cheque for the full amount payable to the 3 arbitrators, the plaintiffs must be deemed to have simply adopted that procedure as a method of paying the arbitrators separately.

I would allow the cross-appeal with costs, and increase the amount of the judgment against each of the defendants to $1,250.

ELWOOD, J.A.:—This is an appeal by the defendants Ousley and Chisholm from the judgment of Brown, C.J., allowing to the defendants, *inter alia*, $50 a day for 30 days occupied by the defendants as arbitrators in and about a certain arbitration in which the plaintiff was obliged to pay certain costs, and giving judgment for the plaintiff for certain fees which the defendants compelled plaintiff to pay before delivery of the award made by such arbitrators.

It was contended by the appellants that the trial judge should have allowed $75 instead of $50 a day. I am of the opinion that there was ample evidence to justify the learned trial judge in coming to the conclusion that $50 a day was a fair and reasonable amount amount to allow, and, that being so, I am of the opinion that the appeal should be dismissed with costs.

The plaintiff cross-appealed, claiming: (1) that the trial judge was in error in holding that the defendants were entitled to a maximum allowance for 30 full days employed in hearing and determining the matters referred to them as arbitrators, and (2) that the trial judge erred in limiting the sum to be recovered from each defendant to $750, and should have given judgment against all 3 defendants jointly for the full amount of the judgment against the several defendants.

So far as the first contention of the plaintiff is concerned, it appears by the appeal book that one Daniel Langfield was called by the plaintiff to give evidence as to the length of time that the arbitration took. Objection was taken on behalf of the defendants, and there was an admission by counsel for the plaintiff which to my mind precludes the plaintiff from contending that the defendants were not entitled to be paid for 30 days.

Apart from that admission, it seems to me that the plaintiff's

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pleadings admit 28 days, which would be exclusive of 2 days allowed for preparing the award, and the reporter's memorandum of time—included in the plaintiff's factum—shews an estimated time of parts of 27 days.

It was stated, on the argument before us, that in addition to these days, there were 5 days consumed in the argument, and there were 2 days allowed for preparing the arbitration, making in all 34 parts of days. I am, therefore, of the opinion that the plaintiff must fail on his cross-appeal on this ground.

So far as the other ground is concerned, one of the arbitrators was appointed on the nomination of the present plaintiff, and one other on the nomination of the other party to the arbitration.

When the present plaintiff paid the arbitration fees to the arbitrators, it is quite true that it was by a cheque made payable to the arbitrators jointly, but that, in my opinion, was only as a matter of convenience. The plaintiff must have been aware that the defendants were not, an any sense, partners, and that the fees payable to them were payable to them separately, and that the cheque simply represented the total of the amounts that the 3 arbitrators were severally entitled to.

Under these circumstances, I do not think that the plaintiff was entitled to joint judgment, and that the trial judge was correct in giving judgment against each defendant for the sum which he received in excess of what he was entitled to.

The result will be that the appeal and cross-appeal should both be dismissed with costs. *Appeal and cross-appeal dismissed.*

GOOSE LAKE GRAIN & LUMBER Co. v. WILSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

NEW TRIAL (§ II—9a)—*Agreement for sale of land and building—Refusal of trial judge to allow certain evidence—Errors.*]—Appeal from the trial judgment in an action to enforce an agreement of sale. New trial ordered.

[See also *Goose Lake Grain Co.* v. *Wilson*, 40 D.L.R. 271.]

P. H. Gordon, for appellant; *J. F. Frame*, K.C., for respondent.

The judgment of the court was delivered by

ELWOOD J.A.:—This action practically amounts to an action

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for specific performance of an agreement for the purchase price of land and a building, under the following agreement of sale:—

26 April, 1917.

I hereby agree to purchase from the Goose Lake Grain & Lumber Co., Limited, the property and lots known as the Temperance Hotel in the Village of Harris, more particularly described as lots 4 and 5, block 3, plan G. 52, on the following basis:—

For the lots I agree to pay the sum of five hundred dollars ($500) in cash upon delivery to me of the transfer of the said lots together with clear certificate of title, the said payment to be made within not less than thirty days.

The amount payable for the building is to be arrived at in the following manner: The Goose Lake Grain & Lumber Co., Limited, will appoint Mr. W. W. Smith and I will appoint Mr. D. McFadden, who together will inventory the amount of material in the building, making due allowance for waste and lap. The price at which the various items will be extended is to be the wholesale price list which was in effect on January 1, 1912. The amount found to be due according to the above computation will be paid by me to the Goose Lake Grain & Lumber Co., Limited, within thirty days after the inventory is taken and estended.

(Sgd.) W. W. SMITH, (Sgd.) H. E. WILSON
Witness.

In connection with my agreement to purchase from the Goose Lake Grain & Lumber Co., Limited, the property and lots known as the Temperance Hotel, Harris, Saskatchewan, and in consideration of Mr. Smith and Mr. McFadden making up an inventory of the materials in the said premises here in Saskatoon to-day, I hereby agree to pay for any materials which an actual inspection of the building by Mr. Smith and Mr. McFadden may shew to have been omitted from the inventory made up this afternoon, and I agree to pay for the said excess materials at the same price as in the inventory made this afternoon.

(Sgd.) W. W. SMITH, (Sgd.) H. E. WILSON.
Witness.

The plaintiff duly appointed W. W. Smith and the defendant appointed D. McFadden to inventory the amount of material in the building and extend the price thereof; and on April 27, 1917, said Smith and McFadden reported the result of their investigations to the plaintiff and defendant by the following document:—

April 27th, 1917

In connection with the agreement for the purchase of lots 4 and 5, Block 3, Harris (of which this is a copy), Mr. McFadden and Mr. W. W. Smith have inventoried the building known as the Temperance Hotel at Harris, and found materials of the value of $1,608.65, which amount we consider a fair price, as figured on the January 1st, 1912, price list.

(Sgd.) W.W. NOYES, (Sgd.) W. W. SMITH.
Witness. D. MCFADDEN.

On the 28th or 29th of May, 1917, one William W. Smith, as agent for the plaintiff, demanded payment from the defendant

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and tendered him a transfer of the land in question, duly executed by the plaintiff. The defendant replied that he did not have the money and he did not intend to pay. This conversation was denied by defendant, but the trial judge found that it took place.

The plaintiff did not become the registered owner of the land in question until June 5, 1917. Then the title was subject to a mechanic's lien for $21, which was lapsed by notice mailed on August 4, 1917. Action was commenced on May 30, 1917. The plaintiff at the trial was ready and able to give title, and the trial judge gave judgment for the plaintiff, and from that judgment this appeal has been taken.

The appellant contends that the plaintiff cannot succeed because, before commencing the action, a transfer of the lots together with clear certificate of title was not delivered to or tendered to him.

I am of the opinion that such a tender was waived by the refusal of the defendant, on the 28th or 29th of May referred to above, to pay the plaintiff.

It was further contended that plaintiff, at the commencement of the action, had not a clear title to the land in question and had not the right to call for the production of a clear, unencumbered title to the land. At the trial, one William Wallace Smith testified that the plaintiff was in a position to give title on the 28th or 29th of May. That evidence was not objected to, and I quite appreciate that is not the way to prove title. It was, however, accompanied by production of a certificate of title, dated June 5, 1917, shewing the land to be in the plaintiff's name, subject only to the above referred to mechanic's lien. One could almost assume from the fact of the certificate of title being dated June 5, that on May 30 the plaintiff must have had a title, or the means of compelling a title. However, I am of opinion that the above referred to evidence by Smith having been received without objection, and having been accompanied by the production of the certificate of title, the defendant should not now be permitted to contend that there was no evidence at the trial that the plaintiff had a good title at the commencement of the action.

When the defence was filed, the plaintiff had a good title, subject, of course, to the mechanic's lien. That lien, however,

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is a matter that could easily have been removed and the existence of it should not defeat the plaintiff's claim.

The whole question of the obligation to make title of a vendor in an action for specific performance is dealt with by this court in *Smith* v. *Crawford*, 40 D.L.R. 224.

It was further contended that the trial judge erred in refusing to permit the defendant to give evidence shewing that the inventory taken by Smith and McFadden was not according to the wholesale price list which was in effect on January 1, 1912.

I am of opinion that this objection is well taken, and that the effect of the trial judge's refusal was to preclude the defendant from going into the 1912 price list as I am of opinion he had a right to do. In my opinion, it was open to him to have produced in court the various items from which the total of $1,680.65 was arrived at, and to shew that the amounts which went to make up that sum were not arrived at from using the 1912 price list.

I am, therefore, of the opinion that there should be a new trial of the action, and that the appellant should have the costs of this appeal. *New trial ordered.*

BEAVER LUMBER Co. v. QUEBEC BANK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

MECHANICS' LIENS (§ III—10)—*Executions—Second mechanic's lien—Priorities.*]—Appeal from an order made by a District Judge, directing that certain moneys in court be handed over to the sheriff for distribution among the execution creditors.

W. H. McEwen, for Quebec Bank, appellants; *P. H. Gordon*, for execution creditors, respondents.

The judgment of the Court was delivered by

LAMONT, J.A.:—It appears that, in 1915, the defendant Miller was the registered owner of certain lands. The abstract of title shewed the following encumbrances against his title: (1) A mechanic's lien in favour of the plaintiffs; (2) executions in favour of the Quebec Bank amounting in all to $1,649.55; (3) a second mechanic's lien in favour of R. Hart. Then followed a number of executions for varying amounts. The plaintiffs took proceedings under their first mechanic's lien and obtained judgment

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against Miller and an order for the sale of the property to satisfy their lien. The property was sold, the plaintiffs received the amount of their lien and costs and paid into court the surplus purchase money, amounting to $545.20. Subsequently the bank made an application for an order directing (1) payment out of the moneys in court to the solicitors of the bank; (2) that the bank be allowed to tax against the defendant Miller its costs of this action; and (3) for such further or other order as might seem just. In giving his reasons for the order which he made, the judge pointed out that at the trial of the mechanic's lien action, the plaintiffs expressly abandoned any claim they might have under the second mechanic's lien which they had filed, and it was admitted that the mechanic's lien in favour of R. Hart had been declared invalid. Under these circumstances the judge dismissed the bank's application with costs, but directed that the moneys in court be handed over to the sheriff for distribution among the creditors whose executions appeared on the record. From that order the bank now appeals.

Two arguments are advanced on its behalf: (1) that the bank was entitled to priority because the other mechanics' liens intervened between the executions of the bank and the executions filed on behalf of the other creditors; and (2) that, as the judge made an order for the distribution of the moneys in court on the bank's application, no costs should have been given against the bank.

The first contention is clearly untenable. The plaintiffs having abandoned any claim under their second mechanic's lien, and the Hart lien having been held invalid, the moneys resulting from the sale of the property belonged to the execution creditors after the plaintiffs' claim was satisfied, those executions being the only remaining encumbrances against the land.

S. 3 of the Creditors' Relief Act provides that, subject to the provisions of the Act, there shall be no priority among creditors by executions from the Supreme Court or from a District Court.

In *Thompson* v. *Bergland*, 3 S.L.R. 470, Wetmore, C.J., held that this provision governed the distribution among creditors of the surplus purchase money paid into court by a mortgagee on the sale of the mortgaged premises under his mortgage. In my opinion, it applies equally where the land is sold to satisfy a mechanic's lien and there is a suprlus paid into court and a number

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of creditors having executions registered against the owner who held title when the order for sale was made.

The only other point to which reference need be made is as to the form of the order and the costs which were ordered to be paid by the bank to the other execution creditors.

S. 8 of the Creditors' Relief Act reads as follows:—

8. Where there is in any court a fund belonging to an execution debtor, and to which he is entitled, the same or a sufficient part thereof to pay the executions in the sheriff's hands may on application of the sheriff or any party interested be paid over to the sheriff and the same shall be deemed to be money levied under the execution within meaning of this Act.

In *Dawson* v. *Moffatt*, 11 O.R. 484, which was decided prior to the passing of the section of the Ontario Act similar to our s. 8, it was held that moneys in court, the property of the execution debtor, should be distributed in accordance with the provisions of the Creditors' Relief Act. In that case it was referred to the Master to make the distribution. After the enactment of the section corresponding to our s. 8, the form of the proper order to be made came up for discussion in *Re Bokstal*, 17 P.R. (Ont.) 201. In that case, the surplus proceeds of a mortgage sale had been paid into court by the mortgagees and claimed by several execution creditors of the mortgagor, whose executions were in the hands of the sheriff at the time of the sale. It was held by Meredith, C.J., that, as the section directed that moneys in court belonging to an execution debtor might be paid over to the sheriff on application by him or some party interested, the proper order to make was that the fund be paid to the sheriff to be distributed in accordance with the provisions of the Creditors' Relief Act.

In *Thompson* v. *Bergland*, above referred to, Wetmore, C.J., himself directed a *pro rata* distribution among certain execution creditors. Executions which had been filed after the mortgage sale took place were barred from participation in the fund.

It is, I think, clear that only those execution creditors whose executions attached to the land while it was the property of the execution debtor are entitled to share in the proceeds of that land. An execution against goods only of the debtor, or an execution against his lands filed after the land had been sold, would have no claim upon the land, and could not share in the distribution.

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Under s. 8, above quoted, moneys in court, the property of the execution debtor, when handed over to the sheriff for distribution, are deemed to be moneys levied under execution. But, by s. 3 of the Act, moneys levied under execution by a sheriff are to be held by him for 2 months and then distributed ratably, not only among the execution creditors who had writs in his hands at the date of the levy, but also among execution creditors who shall have delivered executions to him within the said two months.

It would, therefore, appear to me that the order made in this case, that the sheriff be "directed to distribute the moneys *pari passu* among the execution creditors appearing on the record," is not one which the court is entitled to make. If the moneys are paid over to the sheriff for distribution, he must distribute them in accordance with the provisions of the Act; that is, among all creditors having executions in his hands before the expiration of 2 months from the date of the levy. I am, therefore, of opinion that, as the court was limiting the distribution to those creditors whose executions were recorded on the abstract of the registrar of Land Titles, the order should have been that these creditors share ratably in the fund.

As to costs. In all the cases above cited, the costs of the application of all execution creditors who were entitled to share in the fund were directed to be paid out of the fund. I see no reason why the same rule should not apply here.

The appeal should, therefore, be allowed, and the order varied so as to read that the costs of the application of all execution creditors parties thereto, who are entitled to share in the fund, be paid out of the fund, and that the balance be distributed ratably among the execution creditors whose executions were filed in the Land Titles Office prior to the sale of the land. The appellants are entitled to their costs of appeal.

Appeal allowed.

RINK v. MILOS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

VENDOR AND PURCHASER (§ I E—25)—*Lease of land—Right of lessor to sell—Assignment by lessor—Sale of land—Sale abortive—Termination of lease—Rights of lessor.*]—Appeal by defendant from

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the trial judgment in an action for damages for failure to summer fallow in accordance with the terms of a lease. Allowed.

George C. Speers, for appellant; *J. W. Hill*, for respondent.

The judgment of the court was delivered by

LAMONT, J.A.:—In March, 1914, one Tom McRadu leased a quarter-section of land to the defendant for 5 years. One of the terms of the lease was that the defendant, in addition to the rent, would pay taxes levied against the land. Another was, that the defendant in 1917 would, at his own expense, summer fallow 50 acres. The lease also contained the following clause:—

> The said lessor shall have the right to sell the said land at any time provided the said lessor pays the said lessee at the rate of two and one-half ($2.50) dollars per acre for each and every acre plowed; and for each and every acre in shape ready for crop four ($4.00) dollars per acre, and in case the land is seeded, then the said lessee shall have the right for his share of the crop as above described for that year, and the lessor can sell and assign only his share of the crop, viz:—One-third of the crop over that year.

In December, 1914, McRadu assigned to the plaintiff all his rights under the lease, and transferred to her the title to the land. The defendant, while not living on the farm, continued in possession thereof until the spring of 1917. On April 7, 1917, Cornelius Rink, acting as agent for his wife, the plaintiff herein, negotiated a sale of the land to one Naomi Daborn at $18 per acre, with a cash payment of $300. The agreement of sale was drawn up and executed by Mrs. Daborn. She did not have $300 for the first payment, but she agreed to give and Rink agreed to take a chattel mortgage on her stock for that amount. This mortgage recited that Mrs. Daborn was indebted to the plaintiff in the sum of $300, and that, in consideration of the mortgage, the time for payment of said debt was extended until November 1, 1917.

The plaintiff did not give evidence at the trial, but her husband said she never signed the agreement of sale. After the agreement was signed by Mrs. Daborn, her son entered on the land and ploughed 7 acres. Mrs. Daborn swears that Cornelius Rink told her she could take possession when the agreement was signed. This he denies. After 7 acres had been ploughed by Mrs. Daborn's son, some trouble arose between Mrs. Daborn and Rink, and Mrs. Daborn said she did not want to have anything more to do with the place. On May 5, 1917, the plaintiff, through her husband and agent, wrote to John Schmidt, asking him if he

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would be willing to rent the farm. This proposition not being taken up, the plaintiff called upon the defendant to perform his covenant in reference to the summer fallowing 50 acres, as provided in the lease. The defendant refused, and the plaintiff has brought this action for damages for failure to summer fallow and for $39, arrears of taxes. The defendant paid into court the arrears of taxes, and disputed the plaintiff's right to recover damages for breach of covenant to summer fallow. The District Court Judge gave judgment for $39 taxes, and $150 damages. The defendant now appeals.

From the evidence of Cornelius Rink, it is evident that he was the general agent of his wife. In giving his testimony, he said: "I am the husband of the plaintiff and act as her agent." This was no way denied or qualified by the plaintiff. The statement, unqualified as it is, indicates that Rink was the general agent of his wife, so far at least as this farm was concerned, and I have no doubt that was the fact. Being her agent, he was clothed with authority not only to find a purchaser, but, also, to make a sale. He sold to Mrs. Daborn and took her security.

In *Beck* v. *Duncan*, 8 D.L.R. 648, 12 D.L.R. 762, 6 S.L.R. 353, Mrs. Duncan, who was the owner of the land, testified that her husband did her business for her and that she was satisfied with what he did in reference to the farm, and that, so far as she was concerned, he dealt with the farm as his own, but, she said, she did not give him authority to sell, and that when she was asked to sell she refused. The trial judge accepted this statement and found as a fact that she had not authorized her husband to sell. In the Supreme Court of Canada, this judgment was upheld, but a perusal of the judgments given leaves no doubt that, had it not been for the express finding of fact on the part of the trial judge, it would have been held that, in that case, the wife had authorized her husband to sell the property. Rink having the authority of his wife to sell and having sold to Mrs. Daborn, the agreement of sale against her could have been enforced by the plaintiff, had she so desired.

That Rink authorized Mrs. Daborn to take possession of the farm, must, I think, be taken to be established. She asserts that he did, while he denies it. He, however, admits that he destroyed the agreement of sale, which, without doubt, would have shewn

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whether or not she was entitled to possession from the time she executed the document. Rink says, "I destroyed the agreement of sale. I thought the deal was off. The chattel mortgage was mislaid, and only found this week."

If Rink considered the deal off, it seems strange to me that he would not destroy all the papers in connection with it when destroying some of them. The fact that he destroyed the agreement of sale, in my opinion, makes applicable, as against him, the maxim "*omnia praesumuntur contra spoliatorem.*" Taylor on Evidence, vol. 1, p. 117. See also Newlands, J., in *Lindsay* v. *Davidson*, 4 S.L.R. 415, at 420.

The plaintiff's agent having sold the farm and put the purchaser in possession to the knowledge of the defendant, he was justified in concluding that the plaintiff had exercised the right to sell given her under the lease, and that his lease was, therefore, at an end.

The fact that the plaintiff allowed Mrs. Daborn to subsequently withdraw from her agreement to purchase cannot affect the defendant's right or reinstate a lease which had been determined. The plaintiff, in my opinion, was, therefore, not entitled to damages, but only to the taxes.

The appeal should be allowed with costs, and the judgment below reduced to $39. As the defendant paid $39 into court, the plaintiff is entitled to the costs of the action up to the date of payment in, and the defendant the costs subsequent thereto.

Appeal allowed.

HERMAN AND LAWSON v. BLAIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

VENDOR AND PURCHASER (§ 1 C—10)—*Inability to furnish title.*]—Appeal from the trial judgment in an action on an agreement for sale of land. Affirmed.

C. M. Johnston, for appellant; no one *contra*.

The judgment of the court was delivered by

ELWOOD, J.A.:—This is an action for specific performance of an agreement for the sale of land. The only defences set up are that the taxes were not paid by the plaintiffs, but were paid by the

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registered owners, and that the plaintiffs are not the registered owners of the lands and are not in a position to give title.

The agreement that is sued upon is set forth in full in the statement of claim, and in it is the following:—

> The said purchaser accepts the title of the said vendor and the said vendor, his heirs, executors, administrators or assigns (as the case may be), shall not be bound to furnish any abstract of title, nor to produce any title deeds nor other evidences of title whatsoever nor to answer any requisitions on title.

At the trial certain witnesses were called on behalf of the plaintiffs, *inter alia* one Hollinrake, who swore that he was a barrister; that his firm were the solicitors for the registered owners of the land in question; that he had the collection of moneys under an agreement between the registered owners and the plaintiffs. An exhibit was put in setting forth the particulars of an agreement of sale between two parties of the same name as the plaintiff Lawson and the deceased Talmage Lawson, the registered owners of the one part and also of the same name as of the other part, and shewing how much money remained unpaid under that agreement. The said Hollinrake further stated that title to the land could be obtained upon payment of that amount by the plaintiffs, and that his clients were prepared to deliver title if they received that amount.

The defendant tendered no evidence, and the trial judge reserved judgment. Before giving any judgment, the plaintiffs applied to him for leave to give further evidence proving the plaintiffs' title.

In giving his judgment, the trial judge stated that he was of the opinion that he could not, at that stage, receive further evidence. He, however, stated that he decided to adopt the course followed by Lamont, J., in *Douglas* v. *Burlie*, 23 D.L.R. 895, and that, as the plaintiff might have been able to make title but simply omitted to have the necessary evidence at the trial, he ordered a reference to the local registrar as to the ability of the plaintiffs to make title, with liberty to the parties to apply for such judgment as the reference might disclose they are respectively entitled to, and it is from this order or judgment that the defendant appeals.

It is contended on behalf of the appellant that the trial judge had no power, under the circumstances, to order a reference. A

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number of cases were cited in support of this contention, but none of which, in my opinion, bear out the contention of the appellant. In fact, in one of the cases is a statement which, to my mind, is very much in favour of the action of the trial judge.

In *Graves* v. *Mason*, 11 A.L.R. 179, at 182, Stuart, J., is reported, as follows:—

> No doubt, in a proper case, a trial judge may in his discretion call for further evidence before adjudicating between the parties.

In *Wright* v. *Wilcox*, 9 C.B. 650, at 657, 137 E.R. 1047, at 1050, Wilde, C.J., is reported as follows:—

> The objection is not to the admissibility of the evidence, but to the stage of the cause at which it was offered. Were that objection to prevail, there might often be a failure of justice. The time at which evidence is to be received must be in the discretion of the judge; the exercise of that discretion being subject to the review of the court. In this case I cannot see that the admission of the evidence has led to any injustice.

See also the remarks of Maule, J., Cresswell, J., and Talfourd, J., in the same case. See also *Budd* v. *Davison*, 29 W.R. 192; *Douglas* v. *Burlie*, *supra*.

Without expressing any opinion as to whether or not the plaintiffs in the case at bar have *shewn* a good title, I am of the opinion that the trial judge was within his powers in proceeding as he did. He had not adjudicated upon the matter, he was still seized of it, and, in my opinion, he might, in his discretion, have received further evidence. And I am of the opinion that he could equally direct a reference to the local registrar instead of actually taking the evidence himself. The proceedings before the local registrar will have to come before the trial judge for confirmation, and, upon those proceedings coming before him, judgment in the action will be pronounced.

There is no suggestion that such a reference could lead to any injustice, and, under the circumstances of this case, I am of the opinion that the action of the trial judge was a discretion wisely exercised. I would dismiss the appeal with costs.

Appeal dismissed.

POOTMANS v. REGINA GRAIN Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

BROKERS (§ I—1) — *Sale of grain — Margins — Cheque to cover — Return of money deposited.*] — Appeal from the judg-

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ment at the trial in an action for the return of certain money deposited with the defendants as security for the due delivery of grain sold. Affirmed.

W. H. McEwen, for appellant; *E. B. Jonah*, for respondent.

HAULTAIN, C.J., concurred with Elwood, J.A.

NEWLANDS, J.A., concurred with Lamont, J.A.

LAMONT, J.A.:—The plaintiff sues the defendants for the return of certain money deposited with the defendants as security for the due delivery by the plaintiff of 4,000 bushels of wheat, which the defendants, as the plaintiff's agents, in April, 1917, sold for and on behalf of the plaintiff, to be delivered on or before October 31 of the same year.

The receipt of the money is admitted. The defendants resist payment on the ground that in selling the wheat for the plaintiff on the Winnipeg Grain Exchange, where it was contemplated by both parties that it should be sold, the defendants were obliged—under the rules of the Grain Exchange—to become the vendors and were personally liable for the delivery of the grain, and that, as the wheat advanced in price beyond the price for which it was sold, they were obliged to forward money to protect the margin; that in May, 1917, the market advanced so rapidly that the moneys deposited by the plaintiff were practically exhausted on margins, and that the defendants were obliged to buy in 4,000 bushels at the advanced price to deliver in satisfaction of the grain the plaintiff had agreed to deliver.

The plaintiff's reply to this is, that the defendants knew that he was growing on his farms the wheat to fill the contract; that he had informed the defendants that he had money in the bank to margin the wheat sold up to $4 per bushel; and, further, that on May 12 it was agreed between himself and the defendants that he would leave a cheque for $1,000 at his town house, which the defendants could call for in case they required more money. The trial judge accepted this evidence of the plaintiff.

The case must, therefore, be dealt with on the footing of any agreement between the parties that, if the defendants required more money for margins, they were to call at the plaintiff's house for the cheque. On Saturday, May 13, the market continued to advance, and the defendants, without calling at the plaintiff's town residence for the cheque which had been left there, purchased

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on the plaintiff's account 4,000 bushels of wheat. This action they attempt to justify by saying that the plaintiff's margins had been exhausted. In view of the agreement found to exist between the parties, they are not justified in so doing.

It was argued that the money would not have been available to the defendants had they called at the plaintiff's residence for the cheque, because the cheque which he left was dated May 15. Had the defendants called for the cheque and objected to the date, no doubt it would have been altered or a new cheque issued; in any event, if the defendants needed more money they had agreed to call for it and failed to do so. Until they called at the plaintiff's house and were unable to get a further advance they were not justified in buying wheat on the plaintiff's account.

The appeal should therefore be dismissed with costs.

ELWOOD, J.A.:—I think the fair conclusion to be drawn from the evidence in this case is, that, at the time the defendant closed out its transactions with the plaintiff, and in view of the panicky state of the market on the Winnipeg Grain Exchange, the defendant did not have—apart from the $1,000 cheque which I shall afterwards refer to—sufficient of the plaintiff's money in its possession to protect itself with reasonable safety for any further margins that it might be called upon to put up, in case the market went higher. That, in fact, is practically, to my mind, the result of the findings of the trial judge, and I am of the opinion that were it not for the $1,000 cheque, which the plaintiff left at his city residence, the defendant would have been justified in closing out the transactions.

On conflicting evidence, the trial judge has found that the $1,000 cheque was at the plaintiff's residence when the transactions were closed out, and has accepted the evidence of the plaintiff with regard to that cheque.

The plaintiff's evidence as on this point, in part, is:—

> I said, "Before I will go back to the farm I will leave a cheque here, and if you will require more money in case of emergency you can get it here."

When the plaintiff said the word "here," he had reference to the plaintiff's town house, and it must have been so intended. If the defendant had inquired at the plaintiff's town house, it would have found that there was a cheque for $1,000. It is quite true that it was a cheque dated on May 15, and the transaction

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was closed out on May 12, but, in view of all of the circumstances, I am of the opinion that the fact that the cheque was dated May 15 does not prejudice the plaintiff's position. Evidence was given as to why it was dated May 15, and it was because, on account of the probability of the market being closed until that date, it would not be required until then, and, as a matter of fact, it would not have been required. At any rate, it seems to me that the defendant should have inquired for the cheque, and if it was not satisfied with it on account of its being dated on the 15th, objection could have been made then, and in all probability a cheque dated the 12th could have been obtained.

I think, therefore, that under the circumstances the defendant's action in the matter was unreasonable, and the appeal, therefore, in my opinion, should be dismissed with costs.

Appeal dismissed.

BLACK HILL THRESHING SYNDICATE v. COLE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

PARTNERSHIP (§ V—21)—*Action in name of partnership by one member without consent of others—Validity—Accounting.*]—Appeal from the trial judgment in an action brought in name of partnership by one member without consent of the other members.

W. G. Ross, for appellant; *H. F. Thomson*, for respondent.

The judgment of the court was delivered by

HAULTAIN, C.J.:—This is an action brought in the name of a syndicate or partnership against the defendant, who is also a member of the syndicate.

On the trial of the case, the trial judge dismissed the action on the ground that it was brought in the name of the partnership by one of the members, without the authority of the other members. This is clearly wrong. A partner may sue in the name of himself and co-partners without their consent.

Whitehead v. *Hughes*, 2 Cr. & M. 318, 149 E.R. 782. *Court* v. *Berlin*, [1897], 2 Q.B. 396, R. 50. Lindley on Partnership (6th ed.) 276.

The trial judge has found that the defendant owes the plaintiff $100, but has made no finding as to the defendant's counter-

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claim, except that, if he had not otherwise disposed of the case, he would have found the defendant entitled to $5 per day for the time he worked in 1916 and 1917. As this will amount to considerably more than the amount claimed by the plaintiff, the defendant should be allowed a set-off to that extent, but he cannot have any judgment for the balance, but must look to a settlement for that by the firm if it continues in existence, or on a winding-up of the partnership affairs.

Under all the circumstances, I do not think that there should be any costs to either party, either in appeal or in the court below.

Judgment accordingly.

GEARHART v. QUAKER OATS Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

BROKERS (§ I—1)—*Instructions to sell at certain price—Sale at lower price—Liability.*]—Appeal from the trial judgment in an action to recover the price of grain wrongfully sold.

T. D. Brown, K. C., for appellant; *C. M. Johnston*, for respondent.

HAULTAIN, C.J.S., and NEWLANDS, J.A., concurred with ELWOOD, J.A.

LAMONT, J.A.:—The evidence shews that the instructions of the plaintiff were to sell at $2.95 per bushel. It also in my opinion shews, not very satisfactorily I admit, but yet sufficiently, that the defendants sold at $2.64 per bushel. I think, therefore, that the plaintiff is entitled to judgment for the loss he sustained through the failure of the defendants to carry out his instructions.

ELWOOD, J.A.:—In my opinion the trial judge, in coming to a conclusion as to the contract entered into between the plaintiff and the defendant, misapprehended the effect of the evidence given by the plaintiff. In part that evidence is as follows:—

Q. Just tell us what transpired between you? A. Well, I came in with the car, and I got a report from Delisle of the close of the market, of $2,95. When I heard the report it looked pretty good to me, and so I got into the car and went right over to Birdview to sell some wheat. Q. You came into Dowler the agent of the defendant company at the elevator at Birdview? A. Yes. Q. What transpired between you and Dowler? A. When I got into the elevator Mr. Dowler was working on a car, and of course he came out into the elevator and I says to him, "The close of the market of wheat is

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$2.95; I think I will sell two cars at that and I think I will hold the other and see if I can't reach the three dollar mark."

And again:—

Q. So that your definite instructions to Dowler were to sell the two cars of wheat at $2.95 a bushel? A. Yes.

Apparently the trial judge thought that the answer to the second last question did not contain the words "at that" after "I think I will sell two cars." Those words, which were overlooked, quite alter the meaning of the evidence, and I think, therefore, the appeal should be allowed.

At the trial some evidence was given as to the difference in the market price of wheat at Port Arthur and wheat in transit. On the date in question there was, apparently, a difference of about 31 cents. The evidence is not at all clear as to whether the plaintiff's wheat was sold on the basis of $2.95 at Port Arthur with 31 cents off because in transit, or whether it was sold at $2.64 at Port Arthur with 31 cents off because in transit. Neither was there any evidence to shew what was the effect of giving instructions to sell at $2.95; that is, was there any course of dealing or custom which would authorize any deduction from the $2.95 because of being in transit? To my mind; the evidence leaves the whole matter very much abroad, and in such a very unsatisfactory condition that I think there should be a new trial.

In my opinion the respondent should pay the costs of this appeal. *Appeal allowed.*

CITY OF REGINA v. ARMOUR AND McCARTHY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

DAMAGES (§ III L—255)—*Compensation for injurious affection.*]—Further judgment by Newlands, J., on the attention of the court being drawn to the fact that the building which had been on the property at the time the subway was built had been burned down, that McCarthy had collected the insurance and rebuilt; the case is reported in 38 D.L.R. at p. 336.

G. F. Blair, K. C., for City of Regina; *E. B. Jonah*, for McCarthy.

The judgment of Court was delivered by

NEWLANDS, J.A.:—In this matter, Mr. Blair, for the City, called the attention of the court to the fact that the arbitrator in

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assessing the damages to the McCarthy property had included in his award the building upon the property, and had allowed 40 per cent. depreciation for damage to the same by the subway. That the evidence shewed that the building which had been upon this property at the time the subway was commenced had been destroyed by fire some 3 months after the commencement of that work; that McCarthy had collected the insurance and had rebuilt.

This matter was not dealt with in our previous judgment through an oversight.

As the building which is now upon the property was built after the commencement of the subway, it cannot be said to be injured by that work, so McCarthy would not be entitled to any damages on that account. Neither can the rebuilding be considered as a repair of an existing building, as urged by Mr. Jonah, because after the fire it could not be used for any purpose, and was not such a building as could be damaged by the building of the subway.

The building was damaged by fire, for which McCarthy was paid by the insurance company, not by the subway.

There should, therefore, be deducted from the award to McCarthy the sum of $6,484, the amount allowed for damage to the building. *Judgment varied.*

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