Dominion Law Reports

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

VOL. 3

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TORONTO:

CANADA LAW BOOK CO., LIMITED

32-34 TORONTO STREET

1912

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CITY OF ST. JOHN v. GORDON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. May 7, 1912.

1. LANDLORD AND TENANT (§ III B—47)—RIGHTS AND LIABILITIES OF PARTIES—BUILDINGS AND THEIR SUPPORTS ERECTED ON DEMISED PREMISES.

A covenant in a lease of a water lot that the lessor should, at its expiration, pay the lessee the value of "buildings and erections put up for manufacturing purposes" by the latter, includes not only a building erected thereon but earth and stone used to support and stiffen a crib work foundation upon which the buildings stood, in order to prevent vibration incident to the use of machinery therein. [*Sleeth* v. *St. John*, 38 N.B.R. 542 and 39 N.B.R. 56, specially referred to.]

2. COVENANTS AND CONDITIONS (§ II A—5)—CONSTRUCTION OF—WORK PRELIMINARY TO ACTUAL USE AS FOUNDATION OF BUILDING.

Piling, capping, or woodwork, as well as the filling in thereof with earth or stone, placed by the lessee upon demised premises with intention of using it at some future time, but not in actual use as a foundation of a building at the expiration of the lease, does not fall within the terms of a covenant that the lessor should compensate the lessee, at the expiration of the lease, for "buildings and erections placed on the premises by the lessee for manufacturing purposes."

3. LANDLORD AND TENANT (§ III B—47)—SUB-STRUCTURES NECESSARY FOR BUILDINGS—LIABILITY OF LESSEE TO COMPENSATE FOR—ELECTION.

A sub-structure necessary to uphold and keep useful for manufacturing purposes the buildings and erections constructed upon them is itself an "erection" or "building" for the purpose of compensation by the landlord under the provisions of a ground lease whereby the landlord on electing not to renew is obliged to compensate the lessee for the "buildings and erections" placed by the latter on the land demised.

Statement

THE city of St. John leased to the New Brunswick Red Granite Co. certain lots on the west side of the harbour which were covered at full tide. The lessees sold out to the plaintiffs, who obtained new leases, each of which contained a covenant by the city to pay at its expiration for any buildings and erections the lessees might put up for manufacturing purposes or else renew the lease. The city expropriated a portion of the demised premises for street purposes and the Court awarded compensation to the lessees for piling and filling in of the lots to make a foundation for buildings and prevent vibration. The judgments in that case are in 38 N.B.R. 542 and 39 N.B.R. 56, *sub nom. Sleeth* v. *City of St. John*.

At the termination of the lease the city elected to pay the appraised value of buildings and erections which did not include piling and filling in. The lessees filed a bill in equity to have the award set aside. The Chief Justice of New Brunswick set it aside, allowing for those items as foundations for buildings

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and erections in existence when the lease expired. The full Court in New Brunswick enlarged this decree by allowing for all the piling and filling in. The city appealed.

J. B. M. Baxter, K.C., for appellants.
M. G. Teed, K.C., for respondents.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I would allow this appeal with costs.

Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the Supreme Court of New Brunswick upholding but varying a decree made by Chief Justice Barker sitting as a Judge in equity setting aside certain appraisements made by valuators or arbitrators selected under the provisions of certain leases made by the city of St. John (appellant) to the respondents (plaintiffs) respectively John J. Gordon and Robert Quinlan and John J. Gordon, administrator of the estate and effects of John Sleeth, of certain water lots in the city of St. John. These leases contained provisions for their renewal at their expiration at the option of the city or in case of a decision not to renew for the payment of the value of the erections and buildings on the premises when the lease expired in November, 1906, and which had not been included in the compensation awarded by McLeod, J., for a part of the leased premises which the city had expropriated a few days before the leases expired. The covenants in the leases are identical and as precisely the same questions arise in each of the cases they have been consolidated for the purpose of argument and decision.

The dispute in the case now before us arose as stated in Chief Justice Barker's judgment "over the lessee plaintiff's claim for compensation for the earth and stone deposited in the lots for the purpose as they alleged of supporting and stiffening the crib work erected as a foundation for the buildings (which they had constructed on and over the crib work) and which was necessary to prevent the vibration incident to the use of steam engines and the support of heavy weights and necessary in the carrying on of manufacturing for which the lots were by the terms of the leases to be used."

The contention on the part of the city was that this filling was in no sense either a building or erection within the meaning of those words as used in the covenant in the lease providing for compensation being made for them in the event of the city, the landlord, deciding not to renew the lease.

The learned Chief Justice found that "the arbitrators proceeded on the assumption that the filling in was no part of the erections and they therefore excluded its value, if it had any, from their consideration." He therefore set aside their valuation or appraisement and made a decree declaring that the words "erections and buildings" for which the tenants under the

leases in question were in certain events and contingencies entitled to be compensated

> did not include any piling, capping or woodwork on the said demised lots or the filling in of the same, except where such piling, capping or woodwork should on the first day of November, 1906 (the day of the expiration of the leases), be in actual use as a foundation for a building for manufacturing purposes; and that in that case the plaintiff is entitled by virtue of the said covenant to have included in the appraisement thereunder such amount as the appraisers may find to be the value on the said 1st November, 1906, of such foundation, including therein the value of any earth or other material filled in such formation which was necessary to strengthen and support the same so as to render it a safe and suitable foundation.

The Supreme Court of New Brunswick on appeal refused to accede to the limited construction of the words "erections and buildings" contended for by the city of St. John which was broadly, as re-stated in this Court, that stone or other material filled in upon the water lots was not "a building or erection" within the meaning of those words in the covenant no matter what might have been the object and purpose for which such stone or other material was so filled in and irrespective of such stone or other material being at the expiration of the lease in actual use as a foundation for a building erected over them for manufacturing purposes. The Supreme Court adopted and confirmed the decree as far as it went and substantially for the reasons given by the Chief Justice, but it went further and varied the decree, by adding words to the effect that the compensation to which the tenants were entitled should extend not only to such filling in as was in actual use as a foundation for a building actually existing for manufacturing purposes at the termination of the lease, but to such as had been placed on the lot with the intention of using it as a foundation for a building intended afterwards to be erected, and whether such intention had been carried out or not.

This variation and addition to the equity decree seems to me to go much further than the language of the covenant justifies. It opens up a wide field of speculation and in a case such as that before us where filling in may have been made for more than the one and only purpose and object for which compensation could be assessed, carries us away into the region of mist and doubt and makes it incumbent upon us to determine the issue with respect to the filling forming or not forming part of the erections and buildings upon the land when the lease expired, not upon the facts and circumstances as they then existed but upon the doubtful frame of mind of the lessee when he made the filling. I do not think the covenant providing for compensation extended beyond buildings and erections for manufacturing purposes actually existing at the time of the expiration of the lease. It did not in my judgment cover erections which not

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being in themselves made or suitable for manufacturing purposes the tenants may have had a more or less vague intention of turning into a manufacturing establishment.

Our attention has not been called to any evidence or proved facts shewing the existence of conditions to which the variation in the decree would be applicable. I do not understand that such an extended right of compensation dependent upon intention was argued before the Chief Justice in the present case or before the Supreme Court of New Brunswick in the cases decided in the expropriation proceedings before Mr. Justice McLeod, and which the respondents contend finally settled the law as to the construction of the covenant in question. I do think that, if adopted, the variation would give rise to interminable difficulties and open up a wide field of doubtful speculation. I think the true construction of the covenant should be limited to the foundation of buildings or erections for manufacturing purposes actually erected or existing at the expiration of the lease as distinguished from work done with an intention of making it part of a manufacturing building which intention was never carried into effect or which for many reasons may have changed before the expiration of the lease.

No formal rule, order, judgment or decree was, we are told, ever taken out in the applications made to the Court to instruct Mr. Justice McLeod as to what damages he should allow or disallow, and we are driven to find out what was really decided from the reasons given by the learned Judges who determined the case. There was no stated case; no issue joined, and the Court were of course only asked to construe the covenant in the lease respecting compensation in so far as it dealt with the practical facts relating to the expropriated portions of the lots as to which Mr. Justice McLeod was assessing damages. The question appears to have come before the Court three times. We have reports of two of these hearings and one is unreported. As to this latter it appears that Mr. Justice Landry and Mr. Justice McLeod, both of whom sat in the case, do not agree as to what was decided.

Mr. Justice McLeod says that in this unreported case Chief Justice Barker "explained that his previous reported judgments were intended only to cover the piling and filling in necessary for the foundations of the buildings on the lot." Mr. Justice Landry regrets that his recollection of the unreported decision is not in accordance with that of McLeod, J., but he does not say in what particular Mr. Justice McLeod's statement is at variance with his own recollection, or what his recollection as to the effect of that judgment is.

However, we have the fact that Mr. Justice McLeod assessed the damages on the basis of his understanding of the judgment and that from his award there was still another appeal to the

full Court. McLeod, J., quoted the notice of appeal given in that case, which shews that the question in controversy was whether the lessees were entitled to have the value assessed to them of the piling, stringing and capping and filling over the whole of the expropriated lot taken from the plaintiff, or only of those works under the buildings on the said portion so expropriated. No question was raised as to the right of the plaintiff extending to those portions of the piling and filling, etc., on the lot on which no buildings existed but over which buildings were intended to be erected for manufactures. This latter part does not seem to me to have been mooted or discussed by counsel and though there is some language in the reported judgments which might be interpreted as covering the variation in the decree made by the Supreme Court and now before us in this appeal, such language in view of the reported arguments of counsel and of the two questions which Barker, C.J., says in his judgment reported in 39 N.B.R. 56, at p. 59, *Sleeth* v. *City of St. John*, 39 N.B.R. 56, were before them then to be settled, must be considered merely *obiter*.

The fact that Barker, C.J., in giving his judgment in the case now under appeal adopted and followed what McLeod, J., says was his explanation of his reported judgment in *Sleeth* v. *City of St. John*, 39 N.B.R. 56, together with all the facts I have cited convince me that no judgment or decision of the Supreme Court of New Brunswick was ever given or pronounced upon the special point on which the Appeal Court of New Brunswick has varied Chief Justice Barker's decree which can be set up or pleaded as *res adjudicata* upon the point on which the judgment in appeal varies the decree of Chief Justice Barker. Even if the judgment had the effect contended for I wish to be understood as not expressing any opinion as to whether it could or could not support a plea of *res adjudicata* in this case.

The extent to which the decree as varied can be supported must therefore depend upon its merits and not upon the point having been *res adjudicata*.

For my own part, I am of the opinion that the decree as pronounced by Chief Justice Barker goes to the utmost limit of the proper construction of the covenant. For the reasons given by him in pronouncing the decree now in appeal and also for those given in his previous reported judgments in 38 N.B.R. 543 and 39 N.B.R., p. 56, *Sleeth* v. *City of St. John*, I am of opinion that decree should stand. I think he reached a fair legal conclusion as to the covenants in the leases covering and extending as well to the foundations necessary to uphold and maintain the manufacturing buildings erected on the lots and being there at the time of the expiration of the lease as to the buildings themselves. The substructure necessary to uphold and keep useful for manufacturing purposes the buildings and erections constructed upon them was as much part of the erections

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and buildings as those terms are used in the covenants of the lease as the superstructure itself. It mattered not whether that substructure was of concrete, of stone cemented with mortar, or of piles strengthened either by timber bolted to them or by stones or other filling placed for the purpose of strengthening and keeping them in place and steady so as to enable the contemplated manufacturing to be carried on. In each and every one of the cases suggested the substructure would, I think, form part of the superstructure within the meaning of the words in the covenant.

On this main point I am in full accord with the original decree and with the judgment affirming it of the Appeal Court. For the reasons given by me, however, I am unable to concur in the reasoning of Barry, J., with whom the rest of the Court concurred as to the variation made in the decree. Nor, as I have said, do I think the doctrine of *res adjudicata* can be invoked to sustain the variation of the judgment which I think cannot be sustained on its merits.

The conclusions I have reached are that the decree of the Chief Justice sitting in the Court of equity correctly declares the meaning and extent of the covenant in the leases on which the tenants are entitled to have their compensation assessed; and that the variations of that decree made by the Court *en banc* cannot be supported. That the prior judgments of the Supreme Court of New Brunswick reported in 38 and 39 vols. of the N.B. Reports, *Sleeth* v. *City of St. John*, 38 N.B.R. 542, 39 N.B.R. 56, do not, properly interpreted, conclude the questions before us so far as the variations in the decree are concerned, and cannot be set up as *res adjudicata* of the present appeal. That these variations of the decree must therefore be supported, if at all, on their merits alone and that for the reasons I have given they go beyond what I think the covenant calls for or justifies.

I would therefore allow the appeal with costs in this Court and in the Court of Appeal, leaving the costs on the cross-appeal to the Appeal Court as disposed of by that Court.

Duff, J. DUFF, J., concurred in the above opinion.

Anglin, J. ANGLIN, J., also concurred.

Idington, J. IDINGTON, J.:—The appellant leased what may be aptly called water lots with the apparent intention that they should be built upon for manufacturing purposes. At least the lessee or successor was, if not given a renewal at the expiration of the term, to be compensated for such "buildings or erections for manufacturing purposes upon the . . . demised premises" as might have been erected thereon by the lessee or those claiming under him. If the value of such buildings or erections could not be agreed upon, appraisers were to determine same.

In January, 1907, the appraisers had made their awards in the cases before us, and in the following April the city tendered the respective sums thus awarded.

It had happened that the city prior to these proceedings had appropriated some small part in order to widen a street. In determining the damages to be paid in respect of the expropriation, a question arose as to the right of the respondents there concerned, to have an allowance made for some piling and filling in between the piles upon which the buildings upon that part rested. I suspect the refusal of the money tendered herein was caused by a desire to see the result of that rather prolonged litigation relative to expropriation and by an intention if the respondent concerned therein was successful, to set up the like claim to that made therein as a ground for attacking the award of the appraisers.

In 1909, a bill in equity was filed by each lessee or successor to set aside the award in regard to his or their respective claims. I may be permitted to doubt if in the then state of the law such a proceeding was open to them as against an award good on its face and in relation to which neither the good faith nor capacity of the appraisers could be impeached, and no very palpable mistake had occurred.

It does not seem to have been desired to take that line of defence and without objection evidence was given by the appraisers of the matters they had in fact considered, and omitted to consider, in estimating the amount to be allowed.

Chief Justice Barker finding error made manifest in this way set the awards aside. From his judgment a consolidated appeal took place to the Supreme Court of New Brunswick. That Court modified the decree of Chief Justice Barker and in doing so expressed an opinion that the appraisers might have gone somewhat further than he had intimated permissible.

The city having appealed from this judgment it is now contended that the result of the litigation in the expropriation case was to create a *res judicata* governing, in some way I do not understand, the determination of this case.

Mr. Justice McLeod on a second trial of said expropriation proceedings gave judgment therein which was confirmed by the full Court and must be taken to be the final pronouncement in that litigation in respect of what seems to have been actually in question.

Sitting as an appellate Judge in this case he speaks referring to same as follows:—

> Under that judgment the damages in the case before me were assessed simply for the piling and filling in intended for and forming a part of the foundation of the buildings, and this Court, as I have said, in Hilary Term, 1909, held that that assessment was right and in accordance with the judgment reported in 39 N.B.R., page 56, [*Sleeth* v. *City of Saint John*, 39 N.B.R. 56.]

In the absence of the record which is not produced, I think this must be taken as clearly defining the limits of any question of *res judicata* that by any chance might be held here to bind anybody.

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I have not overlooked a statement of Mr. Justice McLeod in the earlier judgment in appeal indicating that some land piled and filled had not been covered by the buildings. I reconcile it with above by observing the small part of land involved, and the possibility that the piling and filling in may, though not directly under the building, have yet been useful to maintain its stability. Clearly it is in that regard that Chief Justice Barker and others treated the matter. The stability given the buildings in question seems the keynote of his judgment and of others in that case.

As I do not quarrel with Chief Justice Barker's judgment so far as it relates to the allowance of the value of the stability given to these buildings in question here by the filling in between the piles on which the buildings rest, I fail to see how I can make use of the wealth of learning the agitation of the question of *res judicata* herein has produced.

Counsel have very properly tried to make up for a defect in the record, but I do not think they can fairly be supposed to have intended going further than the facts as stated by Mr. Justice McLeod. All they designed doing was to put the record on a fair basis.

It is said by counsel for appellant that one of the cases before us involves no more than filling in between piles under buildings erected, to render them stable.

Counsel for respondent did not clearly concede this, though I suspect it is all that is in truth involved.

In regard to the other case respondent's counsel was quite clear the filling extended much further and involved much more. If so I fail to see how the *res judicata* can arise to help the plaintiff, though I can see how if given effect to, it may, if applicable, defeat him ultimately.

I am thus brought to consider the real issue in this case, and consequently the only issue we can properly pass upon in appeal.

The suit is one purely and simply to set aside the award. Such is the only express prayer of the bill and the general prayer can only extend to the things incidental thereto.

No question is raised now of Chief Justice Barker's right to set the award aside upon the evidence adduced as it was without objection; nor, admitting that evidence, can there be any question in my mind but that the award was properly set aside.

Neither directly nor incidentally to reaching such a conclusion can the question of *res judicata* have any place.

It would, for the learned Chief Justice in doing so, and for an appellate Court reviewing his work, be quite right and proper to elucidate the law relevant to the parties' rights as presented to the appraisers, and as existent at that time when they acted, in order to arrive at a proper determination as to whether or not they had discharged their duty or exceeded their powers.

In such cases the same or future appraisers being called on

to act ought to give due heed to the opinion of the Courts thus incidentally expressed.

But to introduce something in the nature of *res judicata* which had transpired a year or two after the award so affecting the rights of the parties and ask the Court to pass upon it as we are asked to do here is beyond the power of the Court unless it had power given it to direct something further to be done. All that was before the Court was the single question of whether or not the appraisers had in the state of things before them properly discharged their duty. That question answered as it is by affirming the learned Chief Justice the Court was *functus officio*.

I tried on the argument to make this point clear and if possible obtain an answer to it, but was unsuccessful.

It occurred to me that there might be some statutory provision enabling as in England and elsewhere a power of direction given a Court, so seized of a case as to set aside an award, to direct a further reference or remit the matter back to the appraisers with proper instructions.

And of course if there existed such a power it might be competent for the Court to direct the lines upon which the appraisers should proceed and incidentally thereto to pass upon the question now raised of *res judicata* or its equivalent the law that is to be applied in future proceedings.

Counsel were unable to refer to any such power and seemed to concede that such legislation as had taken place was not in force so far as to be applicable to this case.

The Courts of common law had no power until the statutes 9 and 10 Wm. III. ch. 15, to set aside an award. Of course it might happen, when sued upon, to be held invalid by reason of what appeared on its face.

This common law jurisdiction was invoked thenceforward in cases where the submission could be made a rule of Court, which was in modern times obtained as of course by a side bar rule.

The Court of Chancery had been resorted to and exercised a jurisdiction founded, as Story puts it, on the ground of relief to be given in cases of fraud, accident or mistake.

This state of things continued until the Common Law Procedure Act, 1854, when the law took a new starting point of a growth I need not dwell upon.

The cases since are worth little as guides in this connection unless regard is had to the possible statutory foundation therefor.

If as counsel seem to admit there is no statute bearing on the question here, then the Court's duty ended when the award was set aside.

It has occurred to me that there may have arisen in New Brunswick a local practice which we ought to observe and which may justify formulating the opinion of the Court in the decree or judgment. I would not wish nor do I presume to disturb such a practice.

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But when relied upon, I cannot see how it can go or be taken further than an expression of opinion of the grounds for setting aside the award and thus, as already suggested, having that weight due to judicial opinion in such case.

In the absence of statutory authority the Court can have no power to interfere with the future of the determination of the dispute; and thus certainly no more right to entertain the question of *res judicata* which intervened after the award, than it would if a release or aught else had been put forward.

I may say I have sought to find another state of the law, for I think it to be regretted that we cannot refer this case back to the appraisers with binding instructions for their guide.

I think, therefore, Chief Justice Barker's judgment should not have been interfered with by the Court of Appeal.

If I had to pass upon the case as originally before him, I possibly would have expressed the view, that if a building had been actually in process of erection for manufacturing purposes, and had only got so far as the foundation, consisting of piling and filling in, it might be worth while, considering the uncompleted building, if good reason given to shew it was the result of a definite settled purpose merely unexpectedly broken in upon by the landlord's desire to terminate the lease.

So far as I can see there was nothing of this sort in the case; I suspect if there had been, we should have heard of it.

To go further would seem, I submit with respect, to be flying in face of the express language of the covenant.

Even what I suggest as possible in such a case may go further than the express language, but is it not implied?

In going thus far I feel I may be trespassing when we have no power to direct.

I have not overlooked the few cases where even before the Common Law Procedure Act a reference back was had at common law to complete the execution of the duty the arbitrators had assumed.

Nor have I failed to consider, though no point was made of it, the difference between appraisers and arbitrators.

The sum and substance of the matter is that where parties have chosen a private forum no one has a right to interfere in the way of managing, controlling or directing that forum, so long as it keeps within its limits as defined in the contract constituting it; and even then the Court, unless empowered otherwise by statute, can go no further than set its award aside.

I repeat that is all that was prayed for here.

The appeal should be allowed, as an interference for which there was no warrant, with costs here and in the Supreme Court of New Brunswick save as to the costs of cross-appeal therein as to which the order providing therefor should stand as to such costs.

Appeal allowed.

WILSON v. KERNER.

Ontario High Court, Teetzel, J. February 29, 1912.

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1. LANDLORD AND TENANT (§ II C—24)—LEASE—RENEWAL—PERPETUITY.

The lessee is not entitled to a renewal in perpetuity unless the language used in the covenant therefor in the lease expressly or by clear implication shews that the party intended such renewal and therefore the provision in the lease permitting the renewal "at the same rental, upon the same terms and conditions in all respects" as provided in the old lease but saying nothing as to any further renewal gives the lessee no right to have inserted in the renewal lease any provision for a further renewal.

[*The King* v. *St. Catharines Hydraulic Co.*, 43 Can. S.C.R. 595, followed; 18 Halsbury's Laws of England, 463, and Woodfall's Landlord and Tenant, 18th ed., 424, 425, specially referred to; see also Annotation to this case.]

2. CONTRACTS (§ II A—128)—INTENTION OF PARTIES—CONSTRUCTION.

The acts and conduct of the parties cannot be invoked to affect the interpretation of plain and unambiguous language used in their written contract.

[*Baynham* v. *Guy's Hospital*, 3 Ves. 294; *Iggulden* v. *May*, 9 Ves. 325, followed.]

Statement.

ACTION by the executors and the sole devisee under the will of Samuel Wilson, deceased, for the specific performance of a covenant in a lease, dated the 6th June, 1907, from the defendant to the plaintiffs' testator, in the words following: "And it is hereby further agreed by and between the parties hereto that the said lessee, his executors, administrators, and assigns, shall be entitled to a renewal of this lease for a further period of five years from the expiration of the term above demised, at the same rental and upon the same terms and conditions in all respects, if said lessee shall desire to hold the same for such extended term."

The lease expired on the 1st July, 1911; and the only dispute in carrying out the covenant for renewal and resulting in this action arose from the claim of the plaintiffs that the renewal of the lease should contain a similar covenant for renewal to that contained in the lease of the 6th June, 1907.

The action was dismissed.

Messrs *S. F. Washington*, K.C., and *W. A. H. Duff*, K.C., for the plaintiffs.

Messrs. *C. J. Holman*, K.C., and *J. M. Telford*, for the defendant.

Teetzel, J.

TEETZEL, J.:—The position of the plaintiffs is, that they are entitled to have the lease perpetually renewed, while the defendant contends that only one renewal is called for by the covenant.

The proper construction to be placed upon this form of covenant has long been settled, both in England and in Canada, to be, that the lessee is not entitled to a renewal in perpetuity, but only to one renewal, unless the language used in the coven-

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ant, expressly or by clear implication, shews that the parties intended a renewal in perpetuity. In order to establish such a construction, the intention must be unequivocally expressed; and a proviso in general terms that the renewal lease shall contain the same covenants and agreements as the lease containing the covenant for renewal has been repeatedly held not to extend to the covenant for renewal. See Woodfall, Law of Landlord and Tenant, 18th ed., pp. 424, 425, and 426, and Halsbury's laws of England, vol. 18, p. 463, where the leading cases are cited. See also *The King* v. *St. Catharines Hydraulic Co.*, 43 Can. S.C.R. 595.

Taking the language of the covenant sued on, which must be the sole guide in determining the intention of the parties, there is nothing whatever to indicate that either party intended that the defendant should be under any irrevocable obligation to renew the lease, either perpetually or as long beyond one renewal term as the plaintiffs, without any obligation on their part to accept further renewals, might choose to require it to be done.

One circumstance urged for the plaintiffs as indicating that such intention could be gathered from the covenant was the fact that in a prior lease of part of the same premises made by the defendant's husband to the plaintiffs' testator, the precaution had been taken of inserting in a similar covenant for renewal the words "except renewal." It is quite clear that this circumstance or any other act of the parties cannot be invoked to affect the interpretation of the plain and unambiguous language of the covenant: *Baynhom* v. *Guy's Hospital*, 3 Ves. 294; *Iggulden* v. *May*, 9 Ves. 325; Foa on Landlord & Tenant, 4th ed., p. 308.

The defendant before action was and she still is willing to perform the covenant according to its proper interpretation, and only refused to execute the renewal lease tendered because of the insertion of the covenant for renewal.

The action must, therefore, be dismissed with costs.

Action dismissed.

Annotation

Landlord and tenant—Renewal covenants

Annotation—Landlord and tenant (II C—24)—Lease—Covenants for renewal.

By indenture made in 1805 certain premises were leased for the lives of the lessee, his brother and his wife "and renewable forever." The lessee covenanted that on the fall of any of said lives he would, within twelve months, insert a new life and pay a renewal fine, otherwise the right of renewal of the life fallen should be forfeited, and if any question should arise it would be incumbent on the one interested in the premises to prove the person on whose death the term was made terminable to be alive, or in default such person would be presumed to be dead. In 1884, a purchaser from the assignees of the reversion entered into possession, and in 1890 an action was brought by persons claiming through

Annotation (*continued*)—**Landlord and tenant** (II C—24)—**Lease—Covenants for renewal.**

Annotation.

Landlord and tenant—Renewal covenants

the lessee to recover possession and for an account of mesne profits. On the trial a counterpart of the lease, found among the papers of the devisee of the lessor, was received in evidence, upon which was an endorsement dated in 1852, and signed by such devisee, by which a new life was inserted in place of one of the original lives and receipt of the renewal fine was acknowledged. It was held (1) that the words "renewable for ever" in the habendum, taken in conjunction with the lessee's covenant to pay a fine for inserting a new life in place of any that should fall, conferred a right to renewal in perpetuity notwithstanding there was no covenant by the lessor so to renew; (2) that the endorsement was an operative instrument, though found in possession of the owner of the reversion, or at all events it was an admission by their predecessor in title binding on the defendants and entitled the plaintiffs to a renewal for a new life so inserted; (3) that the right to further renewal was gone, exact compliance with the requirements of the lease in the payment of the fines being essential and the evidence having shown that the original lessee was dead, and the proper assumption being that his brother, the third life, who was a married man in 1805, was also dead in 1884, even if the lease itself had not provided that death would be presumed in default of proof to the contrary; and (4) that the term granted was for the joint lives of the three persons named and ceased upon the falling of any one life without renewal as provided; and the fines not having been paid on the death of the lessee and his brother there was a forfeiture which entitled the defendants to enter: *Clinch* v. *Pernette*, 24 Can. S.C.R. 385, affirming *Pernette* v. *Clinch*, 26 N.S.R. 410.

Specific performance of a lease will be refused to the lessors therein where it appears that the lease which was for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued, and it should be optional with the lessors either to pay for the same or continue the lease for a further term of like duration; that after the term expired the lessees remained in possession for some years when a new indenture was executed which containing no independent covenant for renewal recited the provisions of the original lease, and proceeded to grant a further term following declaration that the lessors had agreed to continue and extend the same for a further term of 14 years from the end of the term granted thereby at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease and that the lessees had agreed to accept the same; that after the second term expired the lessees continued in possession and paid rent for one year when they notified the lessors of their intention to abandon the premises, and that the lessors refused to accept the surrender and, after demand of further rent and tender for execution of an indenture granting a further term, brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option: *Sears* v. *City of St. John*, 1 Can. S.C. Cas. 486, 18 Can. S.C.R. 702, affirming *City of St. John* v. *Sears*, 28 N.B.R. 1. Justices Gwynne and Patterson declared that the option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and, if the second indenture was subject to

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renewal, the clause had no effect, as there were no buildings erected during the second term. Mr. Justice Gwynne was of the opinion also that the provision in the second indenture granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant; that the renewal clause was inoperative under the Statute of Frauds, which makes leases for three years and upwards, not in writing, have the effect of estates at will only and, consequently, there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors; and that assuming the renewal clause was incorporated in the second indenture, the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could the clause would operate to make the lease perpetual at the will of the lessors. To the last proposition Mr. Justice Patterson assented, though he added that it was possible to argue that, under the mutual covenant, the future relation between the parties was to depend on the option given to the lessor who might compel the tenants to hold the premises for all time at the rent stipulated for.

Where it appeared that, upon the expiration of a lease for years providing that on its termination the lessor, at his option, could renew or pay for improvements, the lessor notified the lessee that he would not renew and that he had appointed a valuator of the improvements requesting her to do the same, which she did; and the valuation was made and the amount thereof tendered to the lessee, which she refused on the ground that valuable improvements had not been appraised, and upon her refusal to give up possession when demanded the lessor brought ejectment; and by her plea to the action the lessee set up the invalid appraisement and claimed that as the lessor's option could not be exercised until a valid appraisement had been made he was not entitled to possession; and by a plea on equitable ground again set up the invalid appraisement and asked that it be set aside and the lessor ordered to specifically perform the condition in the lease for renewal and for other and further relief, the fact that the appraisement was a nullity did not defeat the action of ejectment; the acts of the lessor in giving notice of intention not to renew, demanding possession and bringing ejectment, constituted a valid exercise of his option under the lease; the lessor was entitled to possession; and section 289 of the Supreme Court Act of New Brunswick did not authorize that Court to grant relief to the lessee under her equitable plea, since such a plea to an action of ejectment must state facts which would entitle the defendant to retain possession, which the plea in this case did not do: *Porter* v. *Purdy*, 41 Can. S.C.R. 471, affirming *Purdy* v. *Porter*, 38 N.B. Rep. 465.

The covenant for renewal of a lease for a term of years is indivisible and if the lessee assigns a part of the demised premises neither he nor his assignee can enforce the covenant for renewal as to his portion; therefore, where the assignment of part of the leasehold premises included an assignment of the right to renewal of the lease for such part and the lessor executed a consent thereto he did not thereby agree that his covenant for renewal would be exercised in respect to a part only of the demised premises; and in such a case the lessee who has severed his term cannot when the

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land demised is expropriated by a railway company, obtain compensation on the basis of his right to a renewal of his lease: *Brown Milling and Elevator Co.* v. *Canadian Pacific R. Co.*, 42 Can. S.C.R. 600, affirming *Canadian Pacific R. Co.* v. *Brown Milling and Elevator Co.*, 18 O.L.R. 85.

Under a lease for 21 years of mill-races and lands containing the covenant that if the lessors did not continue the lease after its expiration they would compensate the lessees for their improvements, the lessees at the end of the 21 years were entitled to only one renewal of the term, or to compensation for improvements, but not to both, and if after the original term expired the lessees remained in possession, paying the same rental as before, for a further term of 21 years, no formal lease therefor having been executed and none demanded or tendered for execution, the rights of the lessees upon being dispossessed ten years after the expiration of the second 21 years, were the same as if the original term of 21 years had been formally continued or renewed for a further like term: *The King* v. *St. Catharines Hydraulic Co.*, 43 Can. S.C.R. 595, reversing *St. Catharines Hydraulic Co.* v. *The King*, 13 Can. Exch. R. 76. Upon the question whether the possession of the lessees for a second 21 years was in fact a renewal of the lease, Mr. Justice Idington was of the opinion that it was and that, therefore, their right to compensation was gone; but Mr. Justice Anglin, in whose opinion Mr. Justice Davies concurred, declared that the lease was probably not renewed within the meaning of the lessor's covenant, though he added, that there having been no proof of a demand for renewal and the lessees having remained in possession for the entire period for which they could have claimed a renewal, they could have no right to compensation for improvements, and that if, they ever had such a right in default of obtaining a renewal it was barred by the Statute of Limitations.

Under a lease of the ground floor of a building, assigned by the lessees to the defendants, in which the lessees covenanted that they would satisfactorily heat, at their own expense, during the term of the lease, the rooms of the upper flat of the building, the assignees in the absence of an express demise of the basement of the building, being permitted by the lessor to take possession of it and to use the furnaces there for the purpose of heating the building, and in which lease the plaintiff, the lessor, guaranteed that the heating apparatus and the plumbing of the building was in good working and proper condition, and competent for the purposes for which they were intended, the lease also containing a clause giving the lessees the right to renewal of the lease for a further term of one year, "provided always, and these presents are upon this express condition, that . . . if a breach or default shall be made in any of the covenants herein contained, by the said lessees, then the covenants herein which relate to a renewal lease for a period of one year on the expiration of this lease shall become null and void and of no effect;" and giving the lessor a right to re-enter after a breach of these covenants, the covenant to heat the upper rooms while not a covenant running with the land was in equity binding on the defendants where they took the assignment of the lease with notice thereof provided of course the heating apparatus was in good working and proper condition and competent for the purposes for which it was intended, and therefore, if the evidence shewed that the upper rooms were not satisfactorily heated by the defendants, within the meaning of the cov-

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enant, that the heating apparatus was in good working and proper condition so far as it could be, considering the system adopted, which was to some extent defective, and that the defendants did not make the best use they could reasonably have expected to make of the system, such as it was; there had been a breach of the covenant; and as there had been nothing to constitute a waiver of the breach, the right to a renewal was gone and the plaintiff was entitled to possession: *Yaukin* v. *Starland* (Alta.), 15 W.L.R. 520.

Where a lease contained a covenant to the effect that the lessee might make improvements upon the demised premises, that at the expiration of the lease or any renewal thereof the same should be valued and paid for by the lessor and then concluded as follows: "And upon such payment upon such valuation not being duly made, the party of the first part, his heirs or assigns, shall, if so required, give or renew a lease including the covenants of the present lease to the parties of the second part for a further period of five years, with the like agreement of valuation and payment for improvements as in this lease expressed and at the same yearly rent"; and on the expiration of the term a dispute arose between the lessor and lessee as to the effect of the covenant—the former claiming that it was optional with him either to renew the lease or pay for the improvements after valuation, and the lessee asserting that he was entitled to have the improvements valued and paid for by the lessor, each party being ready and willing to perform the covenant as interpreted by him, it was held (1) that the covenant was single and, therefore, that the lessor was discharged upon his shewing that he was ready and willing to renew the lease; (2) that even if there were two separate and independent covenants, one to pay the appraised value of the improvements and the other to renew, only one was to be performed and the option lay with the lessor, he being the first person called upon to act: *Ward* v. *Hall*, 34 N.B.R. 600.

Under a lease for twenty-one years fixing the rent for the first year at $106.88, for the next four years at $130 a year, for the next five years at $145 a year, and for the remaining eleven years at $178 a year, and containing a covenant by the lessor to renew for a further term of twenty-one years, "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants . . . as are contained in these presents," and providing for the appointment of arbitrators to determine the rent to be paid under the renewal lease, the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase to be based upon the rent reserved for the whole term, and not for any particular year or years of it; and might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past: *In re Geddes and Cochrane*, 3 O.L.R. 75.

Where a lease contained an agreement for renewal upon the following terms: the lessors were at liberty to elect either to take the improvements made by the lessees at a valuation or to grant a new lease for a further term at a rent to be fixed by arbitrators, one to be chosen by the lessors,

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one by lessees, and a third by the two, provided that if either party refused or neglected to appoint an arbitrator within seven days after being required in writing by the other to do so, the other might appoint a sole arbitrator, whose award should be final; and after the original term had expired, the lessors served upon the lessees a notice requiring them to appoint an arbitrator, which lessees answered by stating that they contended that the lessors had no longer any right to insist upon a renewal, and protesting against any arbitration, but at the same time naming an arbitrator, and the lessors not accepting this as an appointment of the arbitrator assumed to appoint a sole arbitrator as upon default for seven days after notice, it was held that the lessees had made a valid appointment of an arbitrator, and the lessors had no right to appoint a sole arbitrator; and that the lessees were entitled to resort to the Court to have the lessors restrained from proceeding before a sole arbitrator and to have a determination of their contention that the lessors had no right to insist upon a renewal: *Farley* v. *Sanson*, 7 O.L.R. 639 (C.A.), affirming *Farley* v. *Sanson*, 5 O.L.R. 105.

Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, "provided the said lessee . . . should desire to take a further lease of said premises," no notice or demand by the lessee is necessary, and the existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances: *Brewer* v. *Conger*, 27 Ont. App. 10.

A renewal lease is a continuation of the old lease and if rent for buildings erected by the tenant is not provided for under the first lease neither should it be under the extension in the absence of express provision, and where a lease of land, upon which there were no buildings except an old shed, contained a covenant by the lessor to grant at the expiration of the term, if requested, "another lease" to the lessee "for the further term of twenty-one years," at such rent as might be agreed on or fixed by arbitration, "such renewed lease to contain a like covenant for renewal," the rent for the renewal term should be based upon the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term: *Re Allen and Nasmith*, 27 Ont. App. 536, affirming *Re Allen and Nasmith*, 31 Ont. R. 335.

Under a covenant in a lease that if at the expiration of the term the lessee should desire a renewal, and should have given the lessors notice in writing of this desire, the lessors would renew or pay for improvements, and before the expiration of the lease the lessee gave notice of such desire, the lessors have the right to elect and the lessee must accept a renewal unless before the expiration of a term the lessors elect not to renew and, therefore, though the lessors did not notify the lessee upon his giving them before the end of the term notice of his desire for a renewal that they would renew the lease until 15 months after the expiration thereof, when they informed him that they would renew the lease at a specified rental, which, if not satisfactory, should be settled by arbitration, the lessee is not entitled to compel the lessors to pay him for the value of his improvements under the terms of the lease upon the ground that their silence and inaction for 15 months was to be taken as an election not to renew but to

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pay for improvements, and the plaintiff was bound to accept the renewal lease at such rent as might be agreed upon between the parties or fixed by arbitration in the manner provided for in the lease: *Ward* v. *City of Toronto*, 26 O.A.R. 225, affirming *Ward* v. *City of Toronto*, 29 O.R. 729.

A lessor covenanted that if the lessee, his executors, administrators, or assigns, should desire to renew (three months' notice having been given), the rent should be fixed by arbitration; that if the lessor neglected to execute a new lease upon the terms agreed on, he, his heirs and assigns, would pay for all buildings or improvements, except those erected at the date of the lease; and that if he neglected to pay within one month for such improvements, the lease should be considered to be renewed for twenty-one years at the same rent as before. The lessor devised the premises to the plaintiffs, or some of them. The lessee sublet to a third person, reserving a reversion, and subsequently assigned to the defendant, having previously, about three months before the expiration of the lease, made a claim in writing, for a renewal. The defendant notified the plaintiffs of his purchase before the end of the term, and that he was ready to arbitrate as to improvements. One of the plaintiffs replied on their behalf that the devisees would not renew, and requested the defendant to point out the improvements with a view to arbitration if necessary. No improvements of any kind had been made by the lessee prior to the sub-lease, nor by the defendant since the assignment, but all had been done by the sub-tenant during his sub-tenancy. No demand of possession was made other than that contained in the reply to the defendant's notice. It was held in ejectment that the refusal by the plaintiffs to renew discharged the defendant from all necessary precedent acts for that purpose; that this discharge entitled him to compensation for improvements, and to the constructive renewal of the lease on failure of the plaintiffs to pay for them: that the improvements to be paid for were not those made by the lessee alone, but by the sub-tenant as well, who claimed under him: and that the improvements made by the sub-tenant not having been paid for by the plaintiffs, the lease must be deemed to be renewed, which could only be done by its operating in favour of the defendant, the assignee of the lessee: *Nudell* v. *Williams*, 15 U.C.C.P. 348.

In a lease for twenty-one years ending on the 1st September, 1872, it was covenant that on the expiration thereof, the lessor should at his option, either pay within thirty days the value of the buildings, or renew for a further term of twenty-one years; such value and the rent to be determined by arbitration. On the expiration of the lease, an agreement of reference was entered into between the lessor, the lessee, and a third person, to whom the lessee had mortgaged his interest, the award to be made by which it was stipulated that, should the award not be made by that time, and the lessor should elect to pay for the buildings, he should pay the sum awarded within a week after the award, and the extension of time should be taken as a covenant in the lease. The lessor elected to pay for the buildings, but the amount awarded was not paid to the mortgagee, the person entitled to receive it, until more than a week after the award was made. The defendants were tenants under the lessee; their terms were unexpired when this action was brought, and they had paid their rents to the lessee for the quarter ending on the 1st October, 1872. On the 18th September the

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lessor leased the premises to the plaintiff, and after the lessor had paid for the buildings, the plaintiff demanded possession from the defendants, which they refused to give, and informed the plaintiff of their having paid their quarter's rent to the lessee. The plaintiff then called on the lessee, who paid to him the proportion of the rent which he had received for the period between the expiration of the lessee's lease and the 1st October. It was held (1) that the receipt of the rents by plaintiff from the lessee was no evidence of a recognition of an existing tenancy between the plaintiff and defendants, for there was no direct dealing with the tenants themselves, and the fact of the plaintiff demanding possession and being paid only a fractional part of the quarter's rent paid by the tenants to the lessee repelled the idea of any intention to recognize the defendants as his tenants, (2) that the fact of the lessor not having paid the amount awarded for the buildings within the week, did not deprive him of his right of election, and so enable the lessee to hold for a further term of twenty-one years, for the mortgagee, being the proper person to receive the amount, might extend the time for paying it; (3) that the plaintiff, therefore, was entitled to maintain ejectment against the defendants: *Roaf* v. *Garden*, 23 U.C.C.P. 59.

Under a lease containing a covenant by a lessor to grant the lessee a renewal for another term at a specified rent, if requested, the lessor could, upon the term having expired without a request from the lessee for a renewal, eject without any demand: *Dawson* v. *St. Clair*, 14 U.C.Q.B. 97.

Where a lease stipulated that at the expiration of the term the lessee might retain possession on condition that within three months a new rent should be ascertained by arbitration, and that if the lessor should desire to resume possession he might do so by giving three months' notice to that effect before the expiration of the term, and by paying the value of the improvements made by the lessee as ascertained by arbitration, and further provided that if at the expiration of the next or any subsequent term no new ground rent should be ascertained as aforesaid, or if the lessor should not resume possession then the lessee should continue in possession upon payment of the rent last ascertained to be payable; the lessee was entitled, at the expiration of the term, no notice being given by the lessor of his intention to resume and no new rent having been ascertained within the time, to a renewal for a further term at the old rent, although he had taken part in an arbitration in which an increased rental had been fixed, which arbitration was entered into by agreement of the parties after more than three months had passed since the termination of the lease: *McDonell* v. *Boulton*, 17 U.C.Q.B. 14.

Under an agreement appended to a lease and made part thereof, it was stipulated that if the lessee should get "a release" of the leased premises after the expiration of the said lease then the value of a certain barn built by the lessee on leased premises was to be allowed to apply to the rent payable during "the said release" and if there be "no release as aforesaid" the lessor was to pay for the barn; the term "release" must be construed to mean a renewal of the old lease and, therefore, a lease for the same term: *Dawson* v. *Graham*, 41 U.C.Q.B. 532.

Where a lessor covenants for a renewal of the term or in default for

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payment for improvements, the option rests with the lessor either to renew or pay for the improvements; and the lessee cannot compel specific performance of the contract to renew: *Hutchinson* v. *Boulton*, 3 Gr. 391.

Upon the expiry of a parol lease for a term certain, with an option to the lessees to renew for a fixed period, the fact that the keys of the demised premises were not delivered by the lessees to the lessor for two or three days after the expiry of the term, and that a sub-tenant of the lessees continued thereafter in possession of a portion of the premises, are not sufficient to constitute an exercise by the lessees of their option to renew, although such possession of the sub-tenant is sufficient to make the lessees liable for use and occupation, as to which the rent payable under the lease which has expired may be some evidence of the value of the premises, even if no particular contract can be inferred from the mere fact of holding over: *Lindsay* v. *Robertson*, 30 O.R. 229.

Under a renewable lease providing that renewals should be at such "increased rent" as should be determined by arbitrators, "payable in like manner and under and subject to the like covenants, provisions and agreements as are contained in these presents," and that the yearly rent should be paid for the first ten years of the term, $80 per annum, and for the remaining eleven years $100 per annum, the proper method of increasing the rent on renewal was by adding to the rent of $80 per annum for the first ten years, and to the rent of $100 per annum for the remaining eleven years of the renewal term, and the condition as to the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises: *Re Geddes and Garde*, 32 O.R. 262.

Where a lessee occupied premises under a lease for a short time which gave him an option to renew for five years more at an increased rent, on giving notice, and after he had remained in possession for three years following the termination of the first lease, paying the increased rent, but without having given notice to renew and without having received a new lease, he gave notice that he would give up possession, he was, after the term expired, a tenant at will and no tenancy for five years existed by his remaining in possession and paying the rent fixed for such tenancy: *Joseph* v. *Chouillou*, Q.R. 5 Q.B. 259, affirming 8 (Que.) S.C. 1.

Under a lease providing that if the lessee should desire a renewal for a further term and give a defined notice, containing the name of an arbitrator, the lessors, at the expense of the lessee, should execute a new lease at such increased yearly rent as might be determined by the award of three indifferent arbitrators, or a majority of them, it was held that the costs of the lease were provided for both by law and by the above clause, and must be borne by the lessee; but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference, one-half of the arbitrators' fees, for which the action was brought, and one-half of the plaintiffs' costs of the action: *Smith* v. *Fleming*, 12 O.P.R. 520, affirmed on the judgment of the trial Court, *Smith* v. *Fleming*, 12 O.P.R. 657.

A lease of land with a covenant of renewal for another term need not be registered where actual possession has gone along with the lease, and,

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therefore, though such lease is not registered, its covenant of renewal is valid as between the lessee and subsequent mortgagees of the lessor: *Latch* v. *Bright*, 16 Gr. 653.

Trustees having a beneficial life interest in lands for power of sale are entitled to grant a lease for twenty-one years with provision for renewal: *Brooke* v. *Brown*, 19 O.R. 124.

An assignee of a lease or of a part of the leased lands is entitled *pro tanto* to the benefit of a covenant for renewal: *McVean* v. *Woodell*, 2 O.S. U.C. 33.

An action for damages will lie against a municipal corporation on their covenant for renewal of a lease which it was beyond the power of the corporation to make or to renew: *Wade* v. *Town of Brantford*, 19 U.C. Q.B. 207; *Van Brocklin* v. *Town of Brantford*, 20 U.C.Q.B. 347.

Under the Ontario Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew: *Re Canadian Pacific R. Co. and the National Club*, 24 O.R. 205.

A lessee continuing in possession of the leased premises after the expiration of his term under an invalid covenant for renewal has no insurable interest in the buildings on such premises: *Shaw* v. *Phœnix Insurance Co.*, 20 U.C.C.P. 170.

For an exhaustive discussion of the law of Canada governing renewal of leases, see Bell, Landlord and Tenant, ch. 22.

The conclusion reached in *Wilson* v. *Kerner* above reported that a covenant for renewal under the same covenants as those contained in the first lease, does not include the covenant to renew and means only a second lease and not a perpetuity of leases, finds support in the following English cases: *Tritton* v. *Foote*, 2 Bro. C.C. 636; *Russell* v. *Darwin*, 2 Bro. C.C. 639, note; *Baynham* v. *Guy's Hospital*, 3 Ves. 295, 3 R.R. 96; *Moore* v. *Foley*, 6 Ves. 232, 5 R.R. 270; *Lewis* v. *Stephenson*, 67 L.J.Q.B. 296; *Swan* v. *Colclough*, Hayes & J. 807; *Davis* v. *Taylors Co.*, 3 Ridgw. P.C. 395.

Thus, a covenant in a lease that the lessor would, "from time to time renew the lease, and perfect such other assurances as the lessee, his executors, administrators and assignes should reasonably require for strengthening, confirming and suremaking the demised premises at such rents and under such covenants as in the said lease were contained," is not a covenant for perpetual renewal, but for confirming and further assuring the original lease: *Browne* v. *Tighe*, 8 Bli. (N.S.) 272, 2 Cl. & F. 396. Much stress was placed in the argument for the contention that the covenant was for perpetual renewal, upon the words "from time to time renew the lease," but the Lord Chancellor said: "Looking at the words which immediately follow, 'and perfect such other assurances,' I think it almost impossible for any man more strongly to signify his intention to be to covenant for further assurance of the existing lease."

And a covenant by the lessor to renew the lease on the same covenants, "shall not take in a covenant for the renewing this new lease, forasmuch as then lease would never be at an end:" *Hyde* v. *Skinner*, 2 P. Wms. 196.

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So, a covenant to grant a new lease "with all covenants, grants and articles," in the old lease, was held to be satisfied by the tender of a new lease for a term of the same duration containing all the covenants except the covenant for future renewal: *Iggulden* v. *May*, 7 East 237, 3 Smith 269, 8 R.R. 623, affirmed in the Exchequer Chamber, *Iggulden* v. *May*, 2 Bos. & P. (N.R.) 449. Attention should here be called to *Iggulden* v. *May*, reported in 9 Ves. 325, which was a bill for specific performance between the same parties. This case has often been confused with the other cases of the same name above reviewed and is almost always cited as supporting the same conclusion. But no final decision was ever given, the Lord Chancellor remarking that he would retain the bill for twelve months with liberty to bring the action in the King's Bench.

But a covenant in a lease for renewal forever is not obnoxious to the rule against perpetuities, and its validity for that reason alone will not be denied: *London & S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562, *per* Jessel, M.R., at p. 579; *Muller* v. *Trafford*, [1901] 1 Ch. 54; *Woodall* v. *Clifton*, [1905] 2 Ch. 257. It may be said in passing that as a justification for this rule the Courts found it necessary to consider the covenant to renew as one running with the land, thus making it, therefore, in the language of Mr. Justice Farwell in *Muller* v. *Trafford*, *supra*, "free from any taint of perpetuity, because it is annexed to the land."

Therefore, when the language used in the lease to set forth the covenants to renew, plainly bears the inference that the parties intended the same to be for perpetual renewal, effect will be given thereto.

Thus, a covenant in a lease on the part of the lessor that he would "execute one or more lease or leases, under the same rent and covenant, as are expressed in these presents and so continue the renewing of such lease or leases to the lessee or his assigns" was construed to give the right of the lessor and his assigns to renewals forever: *Furnival* v. *Crew*, 3 Atk. 85. This decision seems to have been based altogether upon the use of the words, "continue the renewing."

A covenant was held to be a covenant for perpetual renewal that the lessor would "always at any time, when and as often as the lessees" should request the same, execute a new lease in which "were to be contained and inserted the same rents, payments, reservations, covenants, articles, clauses, and agreements, as were thereinbefore mentioned and contained": *Copper Mining Co.* v. *Beach*, 13 Beav. 478.

Where a lease contained a covenant by the lessor that at the expiration of the term the lessor would, upon the application of the lessee grant "such further lease as should by the lessee, his executors, administrators or assigns be desired . . . under the same rents and covenants only as in this lease," the lessee was entitled to a lease containing a covenant to grant a further lease at the end of the new term: *Bridges* v. *Hitchock*, 5 Bro. P.C. 6. No opinion was rendered in this case, but the covenant to renew is peculiar in this, that it was to grant such new lease as the lessee should desire, so that it would appear to have been left to the lessee himself to say what interest should be granted to him, without any restriction or limitation except that no covenant should be introduced not contained in the original lease.

Annotation (*continued*)—**Landlord and tenant** (II C—24)—**Lease—Covenants for renewal.**

Annotation.

Landlord and tenant—Renewal covenants

A covenant that the lessor would execute a new lease at the same rent and subject to the same covenants, "including this present covenant," is a covenant for perpetual renewal: *Hare* v. *Burgess*, 4 Kay and J. 45, 27 L.J. Ch. 86, 3 Jur. (N.S.) 1294, 6 W.R. 144.

For a further discussion of the principles of the law in England governing the renewal of leases, see 18 Halsbury's Laws of England, sec. 845; Fawcett, Landlord and Tenant, 3rd ed. 166; Foa, Landlord and Tenant, 4th ed., 306-312; Woodfall, Landlord and Tenant, 18th ed., 424-426.

For the American cases dealing with the question whether a general provision in a lease that the renewal lease should contain all the covenants of the original, includes the covenant of renewal: see the note in 14 L.R.A. (N.S.) 829.

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March 14.

Ontario High Court, Sutherland, J., in Chambers. March 14, 1912.

1. SUMMARY CONVICTIONS (§ VII B—80)—LIQUOR LICENSE ACT—AMENDMENT OF CONVICTION.

An amendment may be made to a conviction under the Liquor License Act (Ont.) to state that the township was one in which there was, at the time, a by-law in force passed under section 141 of such Act prohibiting the sale of liquors by retail therein, and so cure the failure to mention that fact in the conviction as originally made, where the record returned to the Court by the convicting magistrates shewed that counsel for the accused at the trial admitted that such by-law was in force in that township.

2. INTOXICATING LIQUORS (§ III A—59*a*)—TELEGRAPH OPERATOR—PLACING ORDER FOR LIQUOR—LIABILITY.

Where it was shewn upon the trial of a telegraph operator for selling liquor contrary to law, that upon being asked if he had any liquor, he told his questioner that he had not, but that he could telegraph for a bottle, which he did, but signed the telegram with the name of the other party, and the bottle was sent to the latter who paid the accused therefor, the purchaser not knowing to whom to apply for the liquor and the accused taking an active part in the matter, it was sufficient to warrant the trial justice to conclude that the accused did receive an order for the liquor and that he placed it with the dealer.

3. INTOXICATING LIQUORS (§ I A—8)—LIQUOR LICENSE ACT (ONT.), SECS. 95 AND 102—TIME FOR LAYING INFORMATION—AMENDMENT.

Section 95 of the Liquor License Act (Ont.) requiring all information or complaints for the prosecution of any offence under the Act to be laid within thirty days after the commission of the offence, and sec. 102 of the same Act permitting a trial magistrate to amend or alter an information under the Act and to substitute for the offence charged therein any other offence under the Act must be read together and thus read do not permit a substitution in an information charging the accused with selling liquor without a license on a certain date, of a different charge on a different date at a time more than thirty days after the alleged commission of such different and substituted offence.

[*Rex* v. *Ayer*, 14 Can. Cr. Cas. 210, 17 O.L.R. 509; *Rex* v. *Guertin*, 15 Can. Cr. Cas. 251, 19 Man. L.R. 33, specially referred to.]

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An application to quash a conviction made on the 13th January, 1912, by Justices of the Peace.

The application was allowed with costs.

J. Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

SUTHERLAND, J.:—The charge as originally laid in the information on the 27th December, 1911, was, that the accused did on the 27th November, 1911, "sell liquor without the required license." After one adjournment, the case came on for final hearing and disposition on the 8th January, 1912. On that date the information was amended so as to read that the accused "did on the 2nd day of December, 1911, canvass for or receive an order for liquor."

Three objections were taken to the conviction.

The first was, that, as made, it did not state that the offence was committed in a township in which a by-law had been passed under sec. 141 of the Liquor License Act. It appears that the conviction, when originally made and signed by the Magistrates, did not mention this fact. It also appears by a memorandum attached to the papers returned to the Court by the convicting Magistrates as the record in the matter, that "Mr. Clay admits that the local option by-law is in force in said township." Mr. Clay was counsel for the accused at the trial. Mr. Cartwright, the Deputy Attorney-General, had the conviction sent back, and thereupon the Magistrates appear to have added the following words: "Such township being one in which there was at the time a by-law in force passed under section 141 of the said Act prohibiting the sale of liquor by retail therein."

Under these circumstances, and with the admission of counsel aforesaid, I think the amendment was justified; and, if necessary, it could now be amended in the way it was.

The second objection was, that sec. 19 of the Act to Amend the Liquor License Laws, 6 Edw. VII. ch. 47, under which the amended information was framed, as amended by the Act to Amend the Liquor License Act, 9 Edw. VII. ch. 82, sec. 39, does not apply to a case such as this. The facts appear to be as follows. The accused is a telegraph operator at the village of Harrow. One Perry Lipps, having been told that he might be able to get some liquor through the accused, went to him and asked him if he had any liquor. He was told by the accused that he had not, but that he could telegraph up and get a bottle. A telegram was sent, in the presence of Lipps, by the accused, for a bottle of Imperial whisky, and it come down from Walkerville to Harrow by train, whereupon Lipps paid O'Connor $1.25 for it, and received the bottle from him. Lipps says that he went to the station to get O'Connor to telegraph for the bottle of liquor for him, and intrusted him with the money to send for it, and

that the bottle came down addressed to him, Lipps, and he took it away. He did not know the name of the liquor merchant who supplied the bottle of whisky except from the shipping bill. I am inclined to think that, upon this evidence, and apart from any disposition of this case on the further objection to the conviction, with which I will deal later, it could be sustained. The liquor was got through O'Connor, who was active in the matter. Lipps did not know to whom to send. It does not appear upon the face of the proceedings that the telegram was sent in Lipps's name. An affidavit is filed by the accused's solicitor in which the following statements appear: "I acted for the defendant, and on his cross-examination I procured from the Canadian Pacific Railway Company's office the telegraph message which the witness Perry Lipps said was sent for him and which the witness acknowledged. I asked to put it in as an exhibit, but it was refused by the Justices. Hereunto annexed, marked exhibit A., is the telegram referred to. No reference to the same appears in the proceedings before the Justices." The telegram is made an exhibit to the affidavit and reads as follows: "Harrow, 12. 2. 1911. C. J. Stogell, Walkerville, Ontario. Please send me bottle Imperial whisky first train. Perry Lipps." Counsel for the Crown objected to the admission of this affidavit; but, even if it were admitted, I do not think it carries the case much farther. O'Connor assumed to hand over the bottle and take the pay for the liquor under the circumstances in question. I think he acted in the matter more than in the mere capacity of a telegraph operator. If Lipps had come there, and, without discussion, had written out the telegram himself and handed it to the operator, that might be a different matter. I think the evidence sufficient to warrant the Justices in the conclusion that O'Connor did receive an order and place it with Stogell.

But a third objection was taken to the conviction, on the ground that, when the amendment to the information was made on the 8th January, 1912, it was too late. Section 95 of the Liquor License Act provides that "all informations or complaints for the prosecution of any offence against any of the provisions of this Act, shall be laid or made in writing (within thirty days after the commission of the offence or after the cause of action arose and not afterwards)," etc.

In this case the information was first laid on the 27th December for an alleged violation of the Act on the 27th November, 1911. The information was then amended on the 8th January, 1912, and a different and substituted charge laid for an alleged violation of the Act on the 2nd December, 1911. Section 104 provides as follows: "At any time before judgment, the Justice, Justices, or Police Magistrate may amend or alter any information, and may substitute for the offence charged therein any

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other offence against the provisions of this Act; but if it appears that the defendant has been prejudiced by such amendment, the said Justice, Justices or Police Magistrate shall thereupon adjourn the hearing of the case to some future day, unless the defendant waives such adjournment."

The contention of the accused upon this application is, that sec. 104 did not empower the Justices to amend the information in such a way as to substitute a different offence for the one originally charged, unless it were done within thirty days from the date of the commission of the offence, and in any event not so as to enable a different offence to be charged on a different and later date more than thirty days before said amendment was made. Here the amendment made on the 8th January, 1912, was long after thirty days from the time when the original offence was said to have been committed, viz., on the 27th November, 1911. It goes further, and states that the substituted offence was committed on a later date more than thirty days before the said amendment was made. There is no doubt that the offence substituted by the amendment is a different offence from that originally charged in the information.

Under these circumstances, had the Magistrates power, after the thirty days, to make the amendment in question? . . .

In the case of *Rex* v. *Ayer* (1908), 17 O.L.R. 509, 14 Can. Cr. Cas. 210, it was held that where upon the hearing of complaints upon two informations for breach of section 78 of the Liquor License Act as amended by 5 Edw. VII. (Ont.) ch. 30, sec. 1, in selling liquor to minors, the justices amended by inserting in the information the necessary allegation that the parties to whom the liquor was sold were "apparently or to the knowledge of the defendants under the age of 21 years" that under sec. 104 of the Act, the justices had power to amend notwithstanding that 30 days had elapsed from the date of the commission of the offence charged.

The headnote contains the query:—

> Whether in view of sec. 95, this would have been permissible if the amendments had substituted other and different offences for those charged in the informations?

At p. 512 (17 O.L.R.), Meredith, C.J., who delivered the judgment of the Divisional Court, is reported as follows:—

> The other power conferred by sec. 104 of substituting for the offence charged in the information, any other offence against the provisions of the Act indicates clearly, I think, that the altering or amending of a defective information by remedying the defect in it was not thought or intended to be treated as a substitution of another offence for the offence charged. In other words, that though it may be that sec. 95 would prevent the substitution of another offence by an amendment made after 30 days from the time of its commission, as to which I express no opinion, there is no such bar to the amendment of a defective in-

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formation by the adding to it of some statement necessary to constitute the offence which it did not contain.

The Court of Appeal of Manitoba in a case of *Rex* v. *Guertin* (1909), 15 Can. Cr. Cas. 251, 19 Man. L.R. 33, held as follows:—

> An information under sec. 168 of the Liquor License Act, R.S.M. 1902, ch. 101, for furnishing liquor to an interdict, discloses no offence unless it alleges that the defendant had knowledge of the interdiction, and it becomes a new information if amended by introducing such allegation. If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed on the amended information, and a conviction based upon it will be quashed on proceedings by *certiorari*.

These two judgments are not in accord. In *Rex* v. *Ayer*, 14 Can. Cr. Cas. 210, 17 O.L.R. 509, the effect of the amendment allowed was, as stated in the judgment of Meredith, C.J., at p. 512, "merely to add words necessary to describe the offence intended to be charged in the informations which were insufficiently because incompletely described in them." See also *The Queen* v. *Hawthorne*, 2 Can. Crim. Cas. 468.

I think the two sections of the Act must be read together, and, so reading them, have come to the conclusion that the amendments made to the information in the present case on the 8th January, 1912, substituting a different charge on a different date, more than thirty days after the alleged commission of such different and substituted offence, were not properly made. I think they were made too late. The original charge was apparently abandoned, and the substituted charge laid too late under the statute.

The motion will, therefore, be allowed with costs. The usual order will go for the protection of the Magistrates.

Application allowed.

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March 15.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. March 15, 1912.

1. HUSBAND AND WIFE (§ I A 2—18)—LIABILITY OF HUSBAND—LIVING SEPARATE BY AGREEMENT—AUTHORITY TO PLEDGE CREDIT OF HUSBAND.

> Where a wife is living apart from her husband, by mutual consent or in any case other than that of separation duly pronounced by the Court, she will not be presumed to have her husband's authority to pledge his credit, and no consent can be inferred on the husband's part to pay for his wife's expenses.
>
> [*Johnson* v. *Summer*, 27 L.J. Exch. 341, followed.]

2. DIVORCE AND SEPARATION (§ V A—45)—WIFE LIVING APART FROM HUSBAND—MUTUAL AGREEMENT—WHEN ENTITLED TO ALLOWANCE.

> In case the wife is living apart from her husband without a judicial separation, she is not entitled to an allowance or provision from her husband unless she be able to prove such a condition of things as would constitute the husband the guilty consort and would justify a judicial separation being granted to her.

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3. HUSBAND AND WIFE (§ I A 2—15)—CREDITORS OF WIFE—RIGHTS AGAINST HUSBAND LIVING SEPARATE UNDER AGREEMENT.

Creditors of the wife cannot urge against the husband any greater rights than the wife herself could have brought forward.

4. HUSBAND AND WIFE (§ I A 2—15)—LIABILITY OF HUSBAND—FATHER OF WIFE—DISBURSEMENTS FOR BOARD AND NECESSARIES.

The father of a woman voluntarily living away from her husband cannot recover from his son-in-law the monies he disbursed for the board and lodging, travels and medical attendance of his daughter, even though the husband knew thereof and had even visited his wife at her father's residence.

5. EXECUTORS AND ADMINISTRATORS (§ IV A 2—80)—DEBTS OF DECEDENT—PROOF—LIABILITY OF ESTATE OF DECEASED DAUGHTER TO HER FATHER WHO MAINTAINED HER.

A father who maintains his married daughter at his home is presumed to do so out of kindness and in fulfilment of a natural obligation and cannot recover from her estate or that of her husband the cost thereof, unless clear proof is adduced to the effect that in keeping his daughter he intended making money advances only.

[*Robin* v. *Robin*, 11 Rev. de Jur. 503, followed.]

Statement

THE plaintiff-respondent brought action against the defendant-appellant in his quality of curator to J. S. Evans, an interdict, and the husband of plaintiff's daughter, in order to be reimbursed from the husband's estate the sum of $7,723.43, amount expended by him, the plaintiff, on behalf of his daughter.

The action was maintained by the Superior Court, Weir, J., and judgment rendered on March 10, 1911, condemning defendant *es-quality* to pay the amount claimed.

The defendant having been authorized as curator to inscribe in appeal, did so.

The appeal was allowed, TRENHOLME and CROSS, JJ., dissenting.

The facts giving rise to this litigation are fully set forth in the notes of the judgment appealed from and which was reversed. That judgment was as follows:—

Weir, J.

WEIR, J.:—Plaintiff's daughter was married to James S. Evans in January, 1899. The consorts were separate as to property. By the marriage contract, Evans became responsible for the necessary proper clothing of his wife and her personal requisites. Evans had no employment, living on the means bequeathed to him by his father, and later on by his uncle. In March, 1900, Mrs. Evans left the matrimonial domicile at Montreal to live with her parents, in Manchester, N. H. Apparently, her husband consented to this trip, as he put her on board the train at Montreal and subsequently stayed for weeks and months with her at her parents' residence. About May, 1900, he broke up the matrimonial domicile in Montreal and does not appear to have re-established one.

At the beginning of October, 1902, when Evans was staying at plaintiff's residence, with his carriage and a pair of horses, he enquired of plaintiff as to the cost he had incurred in keeping his wife and for her travelling expenses, as well as for his own

keep while with him. The sum arrived at was $1,900, which Evans paid to plaintiff, part in cash and part by promissory notes. Soon after, while his wife was on a purchasing trip to Boston, Evans, without giving any reason or excuse, left plaintiff's house and returned to Montreal. He never returned to plaintiff's or had any communication with him. His wife continued to reside with plaintiff, and took several trips, for the benefit of her health. All the costs of her maintenance were borne by plaintiff and he now sues for the amount thereof from the month of October, 1902, to September, 1906. The sum claimed is $7,723.43.

Defendant, as curator of the said Evans, appointed in August, 1906, denies any legal obligation to plaintiff for this amount and says that any expenses which the plaintiff incurred were incurred voluntarily by him, without any request from or authorization by the said Evans and have been more than repaid to him by the said Evans. Defendant also pleads that Evans paid his wife more than sufficient for her maintenance and support, and even after the causes of interdiction of said Evans had arisen, to wit, in July, 1906, she came to Montreal and induced her husband to give her large sums of money, in one instance the sum of $3,000.

At the trial, no attempt was made by plaintiff to prove the allegations of the declaration that Mrs. Evans was forced to leave her husband through his harsh treatment of her and the defendant did not prove that Evans even protested plaintiff for keeping his wife or that she left him against his protests.

We have thus simply to ascertain whether plaintiff has proved his account or any part thereof and whether defendant is liable or not for the sum substantiated.

As to the account P-4 plaintiff gave evidence and proved the different items. He is uncontradicted. He declares that the expenditures were on the scale of what he had expended for his daughter before her marriage and to which she had been accustomed during her marriage. The trips abroad were necessitated by the state of her health. The total does not exceed the amount of $200 per month, subsequently allowed to her by the Family Council, after the interdiction of Evans and which she now enjoys.

Cross-examined, plaintiff produced a large number of receipted accounts and swears they were paid with his money. Defendant failed to substantiate his plea of payment. The cheque D-1 plaintiff testifies, was in payment of one of the promissory notes given by Evans in the settlement of October, 1902. He admits that his daughter received the cheque for $200 dated July 20, 1906, and that she also received from Evans about the same time $3,000, which she invested.

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On the whole, plaintiff's good faith and integrity are absolutely unimpugned. The question as to the liability of the defendant presents no serious difficulty. By law and by the stipulations of his marriage contract, Evans was obliged to maintain his wife according to his rank, means and condition.

After living together for a little over a year, Mrs. Evans returned home to her father and Evans gave up his residence in Montreal. It is not shewn that he ever re-established a suitable home to which his wife could return. Up to October, 1902, he stayed at plaintiff's for several months, and left there after settling with plaintiff for the cost of maintenance of his wife. He left his wife there and plaintiff continued to supply her financial needs, which it was the duty of Evans to supply. Evans was aware of this and allowed plaintiff to continue without protest the cost of maintaining his wife. By silence he gave consent. A tacit *mandat* from Evans to plaintiff resulted: see Troplong, Mandat Nos. 101, 117, 121; Ulpien L. 60 D., De reg. jur. 5 Pothier No. 182. The *mandat* is acknowledged by the allegation of the plea that plaintiff's expenses were more than repaid by Evans, and by the denial of the allegation of the declaration that plaintiff had not been paid for the items set forth in the account. Nothing could be clearer than Evans' consent to and acquiescence in plaintiff's acts.

Did plaintiff act upon the tacit *mandat* in a reasonable manner? (C.C. 1710.) Defendant does not plead that the expenses were higher than Evans could afford but he swears that at the time of the marriage of Mr. and Mrs. Evans, the net income of the former, according to his investigations, could not have been more than $230 per month, and that he was living beyond his means, having incurred in one instance an indebtedness to his uncle, from whom he subsequently inherited, of the sum of $14,000.

But there is no evidence to shew that plaintiff was aware of the state of his son-in-law's finances. He gives uncontradicted evidence that he maintained his daughter in the same manner as did Evans. In 1902, Evans was stopping at plaintiff's with a carriage and pair, which gave no indication of limited means. He paid plaintiff, at the same time, $1,900 for the maintenance of his wife for several months, including the cost of a trip to Europe, and made no demur. Plaintiff continued to maintain his daughter in a similar manner and Evans made no protest. Plaintiff paid the expenses of the member or members of his family who accompanied Mrs. Evans in her trip, and charged nothing for his own services. During the period in question, it is in evidence that Evans himself made an extensive travelling tour, accompanied by his personal physician. In 1905, Evans inherited a large fortune from his uncle, but this seems to have caused no increase in plaintiff's expenditure upon his daughter's

maintenance. On the whole, and especially in view of the delicate health of Mrs. Evans, I find no reason to doubt that plaintiff's expenditures under the tacit *mandat* were reasonable and such as would be approved by a good administrator.

The principle that "personne ne doit s'enrichir aux dépens d'autrui" is amply recognized in our civil law (see C.C. arts. 417, 419, 729, 1011, 1052, 1146, 1546, 1547, 1665 and 1801) and is applicable to the circumstances of this case.

Plaintiff does not ask for interest and so none is granted. The action is maintained with costs.

The defendant appealed from the above judgment to the Court of King's Bench (appeal side).

Argument

R. C. Smith, K.C., for appellant:—Respondent's right of action can only be based on C.C. 175 and it was incumbent on him to prove: (1) That the husband refused to receive his wife in his residence and failed to supply her with means for the necessaries of life according to his means and station; (2) that the wife pledged the husband's credit for respondent's claim. Respondent can have no greater right than the wife herself and therefore must prove her justification for not living with her husband: *Lachapelle* v. *Beaudoin* (Johnson, C.J., 1 Leg. News 581); *Sheridan* v. *Hunter* (R.J.Q. 5 S.C. 472, confirmed in Review, Loranger, DeLorimier and Pagnuelo, JJ., R.J.Q. 6 S.C. 258). Nor can expenses of trips to Europe be considered as necessaries of life, and a husband, from whom a consent was never obtained, cannot be expected to foot that bill. The presumption is that the trips were presents of the father's. The trial Judge erred in finding respondent had proved the essential allegations of his declaration as the essential point was as to whether the husband had refused to support his wife in their common domicile: see *Fisher* v. *Webster*, R.J.Q. 6 S.C. 25; *Morkill* v. *Jackson*, R.J.Q. 12 S.C. 494. The English cases are in support of appellant's contention: *Jolly* v. *Rees*, Ruling Cases, vol. 2, p. 437, affirmed by the House of Lords in *Debenham* v. *Mellon*, 2 Ruling Cases, p. 441. And also the Am. and Eng. Encyc. of Law, vol. 15, p. 883; Smith's Leading Cases, 11th ed., pp. 491, 495 and 496. Appellant also submits that plaintiff's action being one for board and lodging and expenses incidental thereto is prescribed by one year: C.C. 2262; *Gosselin* v. *Aubé*, R.J.Q. 10 S.C. 447, Review; *Lefebvre* v. *Proulx*, 6 Q.L.R. 269. And as there never was any intention to demand payment for the board or for the money expended on the various trips at the time such services were rendered and the moneys expended no action can lie: *Légaré* v. *Lafond*, R.J.Q. 34 S.C. 162, Langelier, J.

E. Languedoc, for respondent:—It is evident that Mr. Evans consented to his wife living at her father's and openly approved thereof. He was a party to the arrangement and acquiesced

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therein in many ways. He even paid Mr. Slayton for the additional expense to which he was put by having his daughter with him and contributed $1,900 for a trip to Europe; he lived there with her for months and paid his own board and the keep of his horses. He therefore didn't expect Slayton to treat him and his wife as guests. A couple of years later he left without any apparent reason and his wife had been maintained by her father ever since. Surely under such circumstances the father-in-law is entitled to recover from the husband the expenses to which he was reasonably put for the maintenance of the wife, an obligation primarily incumbent upon the husband: see on the question of mandate, *Buchanan* v. *McMillan*, 20 L.C.J. 105.

Smith, K.C., in reply.

Judgment

March 15, 1912. Judgment was delivered. TRENHOLME and CROSS, JJ., dissented; they would have modified the judgment of the Court below by decreasing the amount of same by $3,000 proven to have been contributed by the husband for the wife's maintenance after she had gone to live with her father.

The judgment of the majority was delivered by

Carroll, J.

CARROLL, J.:—Olive M. Slayton, daughter of the plaintiff, contracted marriage with James Shanks Evans, at Manchester, on January 25, 1899. The latter was interdicted for insanity on August 31, 1906, and appellant Gladstone is his curator.

In 1900 Evans' wife left the residence of her husband at Montreal and went to reside in New Hampshire, U. S. A., with her father. The latter claims from the curator to her husband the sum of $7,723.43 for board, lodging, allowance, medical attendance, travelling expenses, etc.

Plaintiff alleges that the husband is wealthy, that by the marriage contract it was agreed that the consorts should be separate as to property, and that the husband should provide for the maintenance of his wife according to his fortune and their social standing. He adds that the wife's departure was caused by the violent and ungovernable temper of the husband and by his jealousy, and that his conduct had become so unbearable that his wife, who was in delicate health, could no longer live with him.

He adds, moreover, that the disbursements made by the father were approved by the husband, who had already paid for a trip of his wife to Europe, and that the wife resided with him with her husband's consent.

Defendant answers that the disbursements made by plaintiff for his daughter were incurred by the latter of his own free will; that the husband never authorized the same and that he is not, in law, bound to pay these back.

He avers that the wife travelled against the will of her husband and refused to live with him as by law she was obliged to do, and that the amounts paid including that of $3,000 in

July, 1906, were paid voluntarily and were sufficient to cover the cost of her maintenance.

The judgment of the Court below maintained the action for the full amount.

There is no proof of record disclosing the reason of the wife's departure from the common domicile. Mrs. Evans' mother came to Montreal in the autumn of 1899, lived a few weeks at her daughter's, and then one day both mother and daughter arrived at plaintiff's residence in New Hampshire.

When examined on this subject plaintiff was most reticent and besides he was protected by a decision of the Court, closing the door against this evidence. Nevertheless he states that Mrs. Evans preferred living at his home to living at her husband's.

The wife brought forward no legitimate reason for abandoning the common domicile and plaintiff did not attempt to substantiate the allegations of his declaration in this regard.

But plaintiff falls back on the ground that the husband consented to this "*de facto*" separation and approved of his wife's expenses by paying part thereof.

It is true, as evidenced by Mrs. Slayton's testimony, that the husband accompanied his wife to the station at the time of her departure; but in the absence of any other explanation of this unexplained departure, may we not say with Baron Bramwell that from such a fact we cannot infer a consent on the husband's part to pay for everything the wife might be pleased to spend: *Biffin* v. *Bignell*, 31 L.J. Ex., p. 189: "It has been doubted whether she would have authority if she had no provision, or no adequate provision. I think such doubt is unfounded, and this case makes it necessary to say so. For, if the husband consent to the wife living apart from him on the terms that she shall not bind his credit, that consent is conditional; and if she does not perform that condition she is not living apart with his consent. This is not a technical or artificial way of viewing the case. For a husband may well say: 'I do not wish you to go, but I will not coerce you. I cannot support you apart from me; if you cannot keep yourself you must remain with me. I only consent to your going on these terms.'"

Thus it often happens, and, indeed, usually happens with people of good breeding; difficulties arising in a family of a nature to affect its honour are kept secret. With this end in view, agreements are entered into having no legal force or sanction, but to which the parties submit themselves.

For instance, a wife has a serious falling out with her husband; instead of taking the rigorous and scandalous procedure of divorce or separation—a procedure which the law authorizes but does not encourage—the consorts consent to a "*de facto*" separation, which takes place with absolute quietness, but this does not imply the undertaking on the part of the one consort

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to pay an allowance to the other, unless the innocent consort can prove that the separation was due to the guilt of the other.

To justify his contention that the husband consented to the "*de facto*" separation from his wife and to defray her expenses (including a trip to Sicily and another to Jamaica), plaintiff in the present case relies on the visits paid by the husband on two occasions, and on the payment by him of a sum of $1,900 to his wife for a trip to Europe.

It is, as a matter of fact, shewn that the husband lived at Slayton's during the winter of 1901-1902, and then during the summer and autumn of 1902. But it is also established of record that on the day previous to the marriage of his sister-in-law he left Slayton's house, never to return; and if a consent of the husband could be inferred previously to this date, none can be inferred from that day onwards, for he left without notifying anybody and for no apparent reason. In any event, his conduct shews that his stay there was no longer agreeable to him.

Then, as regards this payment of $1,900, it is true that Slayton states it was made voluntarily to him by the husband without his having claimed the same, but later on he admits he had induced his daughter to speak of this matter to her husband.

Evans is reported as stating to Slayton: "You have paid a good deal of money for my wife. I ought to pay you."

Do not these expressions imply that the husband was well disposed at that moment and consented as a matter of courtesy to reimburse his father-in-law? And does not the father's conduct imply that he claimed this sum rather as an act of grace on the husband's part?

Can we really infer from these facts an authorization to incur expenses in the future for which the husband would be responsible? Especially expenses incurred after his inexplicable departure in the autumn of 1902? And does not this case fall under the rule laid down in *Johnson* v. *Summer*, 27 L.J. Exch., p. 341: "But in all cases where the wife is living apart from the husband, it is for the plaintiff to shew facts whence an authority to pledge his credit is to be inferred."

In this case, Pollock, C.B., goes even further when he says: *Johnson* v. *Summers*, 27 L.J. Exch., p. 344:—

> Indeed, we cannot see how the wife's leaving her husband with his consent can put her in a different position from her leaving the husband without his consent; in both cases her leaving is voluntary; in neither is it his act. In one case he dissents, in another he assents, in either case the act is equally hers.

Of course, we are not concerned here with the case where the wrongful conduct of the husband compels the wife to seek another residence.

The French law is conclusive on the question at issue.

L'hypothèse est bien différente, says Laurent, quand la femme quitte le domicile conjugal. Parfois cela se fait du commun accord des époux; et il arrive que, dans ce cas, le mari s'oblige à payer une pension alimentaire à sa femme. Il est évident que la séparation volontaire des conjoints est nulle, et par suite les conventions qui l'accompagnent.

Life in common is a duty imposed by law on the consorts. Laurent adds:—

Ce devoir tient à l'ordre public, puisqu'il n'y a plus de mariage quand il n'y a plus de vie commune. Toute convention contraire à une loi d'ordre public est frappée de nullité. De là suit que la femme n'aura pas d'action contre son mari en paiement de la pension alimentaire; elle n'a qu'un moyen d'obtenir des aliments; c'est de rétablir la vie commune.

Only in the event of her husband refusing to receive her in the common domicile may she claim a provision. Colmar, July 12, 1806 (Dalloz, Vo. Mariage, No. 747); Grenoble, March 11, 1851 (Dalloz, 1853-2-62); Nimes, May 9, 1860 (Dalloz, 1860-2-219).

Several authors go further and lay it down that the provision is due only when the wife prays for separation or divorce, and for this reason: the granting of a provision to a consort who is separated "*de facto*" would encourage such separations, and would authorize indirectly voluntary separations by mutual consent although the law does not countenance even judicial separation by mutual consent.

As Laurent says:—

Il y a certes, là, un danger, et c'est aux tribunaux à le prévenir. n'accorderont de pension alimentaire que s'il est prouvé que la vie commune a cessé par la faute de l'un des époux.

Our Canadian law is the same. Article 175 C.C. obliges the consorts to live in common. This law is one of public order.

A large number of decisions have been rendered on the point in this Province. Thus, in the case of *Sansfaçon* v. *Poulin*, 13 Q.L.R. 53, we have the two following considerants applicable to the present case:—

"Considering that the defendant's right to the advantages secured to her by reason of her marriage with the plaintiff, is conditional upon the observance by her of the obligations incumbent upon her as his wife;

"Considering that the defendant . . . has not shewn that she had the slightest reason or lawful cause for leaving her husband's house, or that she was in any wise ill-treated therein, as averred in her said plea, doth hereby dismiss the said plea."

In the first volume of the Legal News at p. 581, Chief Justice Johnson, commenting on art. 175 C.C., says:—

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> She is obliged to live with her husband. . . . Therefore, unless there has been a refusal on his part to do so, she has no action. The extent of the defendant's obligation is to receive and support her at his house; and there is no refusal, it is said, and therefore no right of action.

But there is an additional reason, in my opinion, against the maintaining of this action, and it is this: Plaintiff is the wife's father, and under the circumstances disclosed, as he was a man of rather considerable wealth, the presumption must be that he did not have the intention of compelling reimbursement of his expenses, but acted, as Vazeille put it, "par un sentiment de piété et de bienfaisance."

He admits that his daughter carried on the same style of living after her marriage as before. He kept no book of expenses, and he only arrives at an approximate estimate.

In 1905 I decided a similar case at Montmagny in this sense in which the same principles were involved: see *Robin* v. *Robin*, 11 Rev. de Jur. 503. The difference between the Robin case and the present one is that the parents herein are wealthy and the action is taken during the lifetime of the parties, whereas in the former case the parents were poor and claim brought only after death.

Fuzier-Herman vo. Aliments, No. 90:—

> En ce qui concerne la séparation de fait, la jurisprudence décide que la femme qui vit loin du domicile conjugal, ne peut demander des aliments au mari, lorsqu'elle ne justifie d'aucun fait de nature à légitimer son éloignement, et que la conduite du mari est irréprochable.

Cassation, 1891-1-467:—

> Considérant que le femme n'articule ni offre de prouver aucun fait pouvant légitimer son éloignement, qu'à plus forte raison elle est mal fondée à réclamer des subsides pour vivre loin d'un homme dont la conduite est également irréprochable.

It is noteworthy in this case "qu'il est constant que son départ avait eu lieu avec l'assentiment de son mari."

Our judgment is based on the principle that the wife has brought forward no reason why she should not live with her husband and on the principle that the father did not intend having his expenses reimbursed.

For these reasons the judgment which condemned the curator is quashed and the action dismissed.

Trenholme, J. TRENHOLME, J., dissented.

Cross, J. CROSS, J., also dissented.

Appeal allowed.

CITY OF HULL v. McCONNELL.

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March 15.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. March 15, 1912.

1. TAXES (§ III F—145)—SALE—ENFORCEMENT—CONDITIONS PRECEDENT.

A forced sale by municipal bodies of a property on which there are arrears of municipal taxes is subject to the rules generally applicable to the contract of sale, and hence a sale *super non domino* and *non possidente* is absolutely null.

2. TAXES (§ III F—146*a*)—NOTICE OF SALE—FAILURE TO GIVE—LIABILITY OF MUNICIPALITY.

A municipality which proceeds to the sale of a property for taxes without giving to the interested parties whose titles are duly registered the notices required by law is liable for its wrongful act in damages.

Statement

THIS appeal was from a judgment of the Superior Court for the district of Ottawa, Champagne, J., rendered on September 15th, 1911, maintaining plaintiff's action against the corporation appellant in the sum of $500 damages.

The appeal was dismissed with costs.

Plaintiff McConnell sued the city of Hull for $6,500 damages suffered by him as a result of the illegal sale of one of his properties by the city for municipal taxes on September 30th, 1908, which was adjudicated to one St. Dupuis; the said property, with its factory, machines, etc., being worth $15,000. He alleged that the sale was made without the giving of the notices required by law, that the city and the purchaser, Dupuis, took no care of the property which became deteriorated, and that furthermore he lost the rent from these premises and his lessee, Roberts, left the factory. And finally he alleged that the aforesaid sale of this property had been declared illegal and void by a judgment of the Court of Review of June 20th, 1910, in a case brought by plaintiff against the city.

Defendant pleaded that from 1905 to 1908 one Thomas Roberts had had the continuous possession of this property and that his name only appeared on the assessment roll and at the registry office; that plaintiff never advised the city he had become owner; that the notices of sale were regularly given and the sale itself effected in virtue of the dispositions of the charter of the city of Hull; that all the proceedings were prosecuted in good faith and that plaintiff knew thereof and neglected to file opposition in due time.

Plaintiff answered that this defence could not be raised as it had already been passed up against contentions of defendant by the judgment of the Court of Review on June 20th, 1910.

The reasons for judgment in the trial Court were as follows:—

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CHAMPAGNE, J. (translated):—"Considering that the property in this cause was sold illegally by the defendant to Hormisdas Dupuis and this for the reasons mentioned in the judg-

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ment of the Court of Review in an action brought by the said Arthur McConnell against the city of Hull and Dupuis *mis-en-cause*, copy of which has been filed of record herein;

"Considering that plaintiff has proven the essential allegations of his declaration;

"Considering that the clerk of the city-defendant did not, before proceeding to the said sale, give to plaintiff, whose titles were duly registered, the special notice required by the charter of the city of Hull, to wit., secs. 351-352 of 56 Viet. ch. 52;

"Considering that a forced sale for municipal taxes is subject to the rules generally applicable to the contract of sale (C.C. 1591), and that a sale made *super non domino and non possidente* is absolutely null;

Considering, as to the quantum of damages suffered, that the said damages were not caused solely by the sale aforesaid at the instance of defendant, but that it appears from the evidence that the said Roberts, plaintiff's lessee, as he did not pay his rent, was seized by plaintiff who had part of the machinery in the said factory sold, and that the company, A. B. Williams, removed other machinery of which it claimed the ownership and that it was mainly as a result of these facts that the said Roberts had to cease from running the factory; and that, moreover, Hormidas Dupuis, the purchaser, never entered into possession of the said property, but that plaintiff has always had the same under his control;

"Considering, however, that plaintiff is entitled to a just and reasonable indemnity for the damages resulting from the said sale and for which the defendant is responsible, which indemnity the Court assesses, after hearing the evidence, at the sum of $500;

"Doth condemn defendant to pay to plaintiff the sum $500 with interest from service of the action, and costs of an action of this amount."

Argument

J. W. Ste.-Marie, for appellant:—The present case raises a question of law rather than of fact. The principle that municipalities are responsible for illegal seizures and sales is admitted. But did plaintiff really suffer any damages? Appellant cannot see how he did, as he never lost possession of his property. The basis on which the trial Judge acted in arriving at an assessment of $500 is a mystery. Appellant refers to 30 L.C. J. 292, R.J.Q. 16 S.C. 33, 9 Rev. de Jur. 224.

Arthur McConnell, for respondent:—The evidence shews that respondent was deprived of his tenant for two years, that the machinery and building depreciated in value to the extent of $6,000, while the assessment itself fell from $15,000 to $8,500, and the property could not be sold now at more than $5,500. The responsibility of the city for these damages is so apparent that had respondent taken a cross-appeal there is little doubt but his damages would be largely augmented. Respondent in

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support of the judgment *a quo* refers to *Atkin* v. *City of Montreal*, 14 Rev. Légale 696; *Brunet* v. *Shannon*, R.J.Q. 3 S.C. 226; *Mullen* v. *Wakefield*, Can. S.C.R., 24th June, 1893; Weir's Municipal Code, p. 266; *Corp. Athabaska* v. *Barlow*, 14 L.C.J. 226; *Bartley* v. *Boon*, 19 L.C.J. 10.

The unanimous judgment of the Court was delivered on March 15th, 1912, by

Trenholme, J.

TRENHOLME, J.:—This is an appeal from the district of Ottawa (Champagne, J.). Appellant was condemned to pay respondent $500 as damages for the illegal sale of plaintiff's property by the city of Hull for taxes. On September 30, 1908, the city of Hull caused a property of the respondent to be sold for municipal taxes to one Dupuis. McConnell took action to have this sale annulled and set aside as illegal, and the Superior Court by a first judgment annulled the sale; the city inscribed in Review and the judgment was confirmed. McConnell then took the present action in damages, claiming $6,500. The trial Judge awarded him $500. We do not see on what ground we could justify interfering with this judgment. Appellant for two years tied up the property of the respondent, who could do nothing with it. The amount awarded is most reasonable.

Appeal dismissed with costs.

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March 18.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Middleton, JJ. March 18, 1912.

1. PROXIMATE CAUSE (§ V—104)—INJURY TO SERVANT—USE OF VICIOUS HORSE—SCIENTER OF MASTER.

The master's negligence in furnishing for the use of his servants a horse which he knew had the vice of running away is the proximate cause of an injury received by a servant from the horse running away while he was, at his master's request, assisting a fellow servant in the delivery of the master's goods.

2. MASTER AND SERVANT (§ II A—49)—WORKMEN'S COMPENSATION FOR INJURIES ACT—COURSE OF EMPLOYMENT.

Where a delivery man in the employ of the defendants finding two fellow employees in the office at a time when he wished to make extra deliveries of his employers' goods, requested one of them to accompany him for the purpose of assisting him, and upon neither being willing, obtained permission from one of the defendants to take one of the men which he did, and on the next day, the delivery man, for the same purpose, took the other employee who was in the office the day before, though not by any special order of any one of the defendants, and after the deliveries were made, the horse they were using ran away and the employee so assisting the delivery man was injured, the injury will be held to have occurred in the "course of his employment."

Statement

APPEAL by the defendants from the judgment of the County Court of the County of Wentworth, in favour of the plaintiff, upon the findings of a jury, in an action for damages for per-

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sonal injuries sustained by the plaintiff by reason, as the plaintiff alleged, of the negligence of the defendants, in whose service the plaintiff was.

The appeal was dismissed with costs.

C. W. Bell, for the plaintiff.

T. H. Phelan, for the defendants.

BRITTON, J.:—The defendants are bakers, doing a large business in the city of Hamilton, and the plaintiff was in their employ as a delivery-man—delivering bread to customers of the defendants, and, for that purpose, using the defendants' horse and waggon.

Wentworth Young was also an employee of the defendants, engaged, with another horse and vehicle of the defendants, delivering bread to other customers, on a different route. On the 20th July, 1911, Young, having completed one round in delivering bread, had not supplied all the customers on his beat—so he returned to the defendants' place of business, and, according to the evidence of Young, what took place was as follows:—

He ran short of bread, and drove into the yard. He found that there had been bread returned; he put it in the little light waggon, which he took out instead of the heavy waggon, and he took the mare "Nellie." He did not want to overwork his horse, as there were complaints that his horse was getting thin. He had no instructions to take out the mare "Nellie," nor had he instructions not to take her. The mare stood in the stable with other horses, and was used regularly in the delivery business, but was driven by Carl Linkert, one of the defendants, or by one Whitelaw, another employee. Young had used this same mare at least on two occasions before the 20th July, and on the second occasion the mare "bolted"—that time doing no damage.

On this 20th July, the plaintiff and one Kingston, another employee of the defendants, were both at the office. Young asked one of these to go with him on the second trip. Neither responded willingly; so Young found Harry Linkert, one of the defendants, and obtained from him permission to take a driver, either Kingston or the plaintiff; and Young took Kingston. On the 21st July, the same thing happened to Young. He ran short of bread, returned to the office, changed his horse and waggon for the mare "Nellie" and a light waggon. He saw the plaintiff and said to him, "You had better come with me to-day." The plaintiff made no verbal reply, but went with Young.

Young admitted that the weight carried with the light waggon was not heavy enough to hold a horse inclined to run away, and that this light waggon had not an attachment, which the heavy waggon had, for hitching the lines around the hub—

which would assist, at least, in stopping a horse and in preventing a run-away.

Young and the plaintiff went away together, delivered the bread they carried, and on the way returning to the defendants' stables the mare bolted—ran away—and the plaintiff was seriously injured. The action is brought against his employers for damages. It is brought under the Workmen's Compensation for Injuries Act; and the claim is, that the accident happened by reason of a defect in the plant used in the business of the defendants, and that it arose from the negligence of the defendants.

The right of the plaintiff to recover need be considered only in reference to the character of the mare as defective plant, and in regard to the right to use the mare and the time and place of the accident.

The following questions were submitted to the jury by the trial Judge:—

1. Was the mare "Nellie" a dangerous horse to drive?

2. If so, did the defendants know it before this accident?

3. Was this accident due to the vice of this mare, if any?

4. Had Young the right, or had he reason to suppose he had the right, to take this mare for his short delivery?

5. Were the plaintiff and Young engaged properly in the defendants' business when the mare ran away?

6. When the plaintiff went with Young on this occasion, did he believe it was his duty as the defendants' employee to do so?

7. If so, had the defendants or either of them given him reason to think it was his duty to go?

All of these questions were answered in the affirmative, and the jury assessed the damages at $250.

This appeal by the defendants is on the grounds: (1) that, if the accident was caused by any negligence, it was the negligence of Young, a fellow employee with the plaintiff of the defendants; and (2) that, at the time of the accident, the plaintiff was not acting as a servant of the defendants. A further objection was taken at the trial, viz., that driving the mare to the place where she started to run was such a deviation from the route of Young as to prevent recovery. The objection is not taken in the notice of appeal; probably because, it being a question of fact as to where Young's duty called him, the defendants' counsel regarded it as closed by the answer of the jury to the 5th question submitted.

The defendants, in the alternative, ask for a new trial, on the ground that the answers of the jury are contrary to the evidence, and perverse, and also on the ground that the damages are excessive.

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It cannot be said that the findings were perverse; and, while the damages allowed are liberal, they are not so large as to permit interference with them.

A horse belonging to a manufacturing establishment and used for driving raw material or delivering the product or in the work of the factory may be considered part of the plant. A habit of "bolting" or running away in a horse used for driving in the delivery of bread would be a defect in a baker's horse.

There was evidence upon which the jury could find, as they have found, that the mare "Nellie" had the vice of bolting, and that the defendants knew it.

The jury have found in their answer to the 4th question that Young had the right to use this mare. There was evidence on which they could so find. Where the liability of the defendants depends upon questions of fact, and the evidence is contradictory, the findings should not be disturbed. Assuming, then, that the mare had the defect mentioned, that the defendants were aware of it, and that the mare was a part of the defendants' plant for Young's use, the negligence of the defendants was the proximate cause of the injury to the plaintiff. It may be that the defendants would not be liable to Young, if he was injured by this run-away. It may be that Young, as well as the defendants, would be liable to the plaintiff. I am not now attempting to decide either of these propositions.

If Young was negligent, his negligence may have been a concurrent cause of injury to the plaintiff. The cases decide that, "as a general rule, it may be said that negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence concurs with one or more efficient causes other than the defendant's fault—the proximate cause of the injury." "When two causes combine to produce injury, a person is not relieved from liability because he is responsible for only one of them." "Within the rule, the cause concurring with the negligence of one may be the negligent act of another."

As to the plaintiff being at the time of the accident in the employ of the defendants, in my opinion he was. He was doing the same kind of work as Kingston, to the knowledge of the defendants, had done on the day before the accident. It was the defendants' work, for their benefit, and in the regular course of their business. It was work done by the plaintiff, at the request of a fellow-employee, made before the plaintiff had left the defendants' premises. The plaintiff did not consider his work for the day finished. Upon this, as well as upon the questions of Young's right to use the mare and as to the place of the accident, the jury have passed.

In my opinion, the appeal fails, and should be dismissed with costs.

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FALCONBRIDGE, C.J.:—The case went to the jury on a charge to which no exception is now taken, the learned Judge having recalled the jury to make some further suggestions, in compliance with a request of the defendants' counsel.

In my opinion, the jury, viewing the whole of the evidence, might reasonably answer all the questions as they have done.

The appeal, in my opinion, ought to be dismissed with costs.

Falconbridge, C.J.

MIDDLETON, J., agreed in the result.

Middleton, J.

Appeal dismissed.

Re SANDWICH, WINDSOR AND AMHERSTBURG R. CO. AND CITY OF WINDSOR.

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Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. January 24, 1912.

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Jan. 24.

1. TAXES (§ I F—83)—CORPORATION CARRYING ON TWO SEPARATE BUSINESSES—EXEMPTION AS TO ONE—EFFECT ON OTHER.

An agreement between a city and a railway company which also conducted an electric lighting plant exempting from certain taxes "the tracks, right of way, wires, rolling stock, and all super-structures, and sub-structures and all the properties of the" railway company does not entitle the company to an exemption from taxes on its buildings, machinery, poles and wires used in connection with its lighting plant.

2. TAXES (§ I F—80)—CORPORATIONS—EXEMPTION—BUSINESS TAX—ASSESSMENT ACT (ONT.).

Under the Assessment Act, 4 Edw. VII. (Ont.) 1904, ch. 23, sec. 226, providing that the Act shall not affect the terms of any agreement made with a municipality, a railway company is exempt from the ordinary business tax under an agreement with the city exempting its property from all taxes other than school rates.

Statement

AN appeal by the railway company from an order or decision of the Ontario Railway and Municipal Board declaring that, upon the true construction of the agreement between the company and the city corporation, the company's buildings, machinery, etc., and the poles, wires, etc., used in connection with their lighting plant, were not exempt from assessment and taxation, and confirming the assessment of the city commissioner.

The order appealed from was varied.

Messrs. *A. H. Clarke*, K.C., and *A. R. Bartlett*, for the appellants.

Messrs. *W. M. Douglas*, K.C., and *A. St. G. Ellis*, for the respondents.

Garrow, J.A.

GARROW, J.A.:—After much puzzling over clause 9* of the agreement in question, I have arrived at the conclusion that as to the main point the order should not be disturbed.

*"9. The tracks, right of way, wires, rolling stock, and all superstructures and substructures, and all the properties of the said parties of the second part (the appellant company and the City Railway Company of Windsor Limited) not exempted by law from taxes shall, except the real estate not hereinbefore mentioned, be exempt from all taxes other than school rates until and including the 31st day of December, 1922."

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As I read that clause, it applies to exempt only the real estate therein mentioned, since it expressly excepts from its operations the real estate not "hereinbefore" mentioned. And the only real estate which is mentioned is the tracks, etc., enumerated in the beginning of the clause, which, by the statute, are to be interpreted, for the purposes of taxation, as "land."

Why so many words should have been used to express so simple a matter is not apparent. It was certainly not necessary, for instance, to refer to property already exempt by law; and, with that part of the clause out, it might very well have read affirmatively, thus: "The tracks, right of way, wires, rolling stock, and all superstructures and substructures . . . shall . . . be exempt . . .;" for that, in my opinion, is what it means and what the parties intended. This, it may be said, gives no meaning to the words, "and all the properties . . . not exempted by law;" but, unless such properties were land, or in the nature of land, they were not assessable. And, if they were land, then the exception from the operation of the agreement of the real estate" (which, of course, includes land in the statutory sense) not thereinbefore enumerated, leaves the matter just as it would have been with all these words out of the clause.

I can find no excuse in the agreement for an exemption of the electric lighting property or plant, or for exemption, in respect of it, from the ordinary business tax. But the latter tax could not, under the provision of sec. 226 of the Assessment Act, lawfully be imposed in respect of the other property, as was in effect conceded on the argument.

I would otherwise dismiss the appeal, but, under the circumstances, without costs.

Moss, C.J.O. Maclaren, J.A.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

Meredith, C.J.

MEREDITH, J.A.:—I agree with the Board in their conclusion that the words "all superstructures and sub-structures" do not include the ordinary buildings, which have been taxed. The words though quite sufficient, in their wider meaning, to include such buildings are seldom, if ever, employed instead of the more familiar, and more applicable, word, buildings: and the context makes it plainer, to me, that the words were used in a narrower sense, indicative of such things as bridges, culverts, etc.

The subjects being dealt with in the agreement were "the tracks, right-of-way, poles, wires and rolling stock" of a street railway; then follow the words in question "and all superstructures and sub-structures."

I cannot think that, to business men, in the business world, it would occur that the words in question included all sorts of buildings, wherever situated in the municipality, and for what-

ever purpose used, so long as they were the property of the company seeking to exclude them from taxation.

In my opinion that which was meant by the words in question was structures connected with the tracks, ways, poles and wires, either above or below, of the character I have mentioned and the like.

I also agree with the Board in their opinion that only that property which was the subject of that agreement—the railway—was to be exempt from taxation under its provisions; this seems to me to be also evident if the words of exemption alone were looked at "tracks, right-of-way, poles, wires, rolling stock and all superstructures and sub-structures."

The onus of relieving themselves from taxation in respect of the buildings and of the electric lighting property was upon the appellants, and, to say the least of it, that they have not done.

In these respects I would dismiss the appeal; in other respects the parties agreed as to the result during the argument; and, if they had not, in view of section 226 of the Assessment Act, there would be no excuse for not being so agreed; as it plainly excluded any right to impose a business tax in respect of the property in regard to which a fixed sum has been agreed upon: as to other property it would be applicable.

Magee, J.A.

MAGEE, J.A. (dissenting):—The authority to produce and use electricity for the purposes of its railway was given to the appellant company in 1893 by 56 Viet. ch. 97, sec. 9.

It had been incorporated in 1887 as a street railway by 35 Viet. ch. 64 (Ont.), and received its present name in 1887 by 50 Viet. ch. 80. The Act of 1893 also authorized it to sell or lease "such electricity" produced by it and not required, to any person or corporation, and gave it the power, rights and privileges conferred upon companies incorporated under the Act respecting companies, for steam-heating or for supplying electricity for light, heating or power (R.S.O. 1887, ch. 165). The last-mentioned Act authorized such companies to construct and operate works for production and distribution of electricity and to conduct the same through the streets, but only upon agreement with the municipality and (by reference to R.S.O. 1887, ch. 164, sec. 51), authorized the municipality to take stock or make loans or contribute in any manner towards advancing the objects of its incorporation.

That power of selling and distributing electricity was in almost the same words as the like power conferred by the Electric Railway Act, 1895, sec. 9, upon all companies to which that Act applies, and not wholly constructed or operated within a city, town or village or within one and a half miles thereof. Hence it was a well-known subsidiary power of companies such

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as this, and indeed one can understand that it would be almost a necessary one for economic management. Prepared as they would have to be for extraordinary demands upon their capacity their appliances must be in excess of their ordinary requirements—and opportunity for full use of such appliances would be as needful as the right of a gas company or municipality to dispose of by-products.

This company, in July, 1902, at the date of the agreement in question was, and had been for some years exercising such subsidiary power to the knowledge and indeed under agreement with the respondent city corporation. By that agreement, of July, 1902, the company and the city undertook to assist in obtaining legislation to validate it, and in the following session the Act (3 Edw. VII. ch. 112) was passed which did so. That Act recites that the provisions of the Electric Railways Act (R.S.O. 1897, ch. 209) were not applicable to this company, and that the company had petitioned for an Act empowering municipalities to give it exemption from taxes as provided by section 77 of that Act, and to confirm the agreement with the city of Windsor. Then section 1 is in almost the same words as that section 77 (except in its express reference to school taxes as to which, see Public Schools Act, 1 Edw. VII. ch. 39, sec. 77 and *Pringle* v. *Stratford*, 20 O.L.R. 276), and empowers municipalities to exempt the "company and its property within such municipality" in whole or in part from municipal assessments or taxation (other than school rates) or agree to a certain sum per annum in gross by way of commutation or composition for payment or in lieu of all or any municipal rates or assessments (other than school rates) to be imposed by such municipal corporation for a time not exceeding twenty-one years. Then section 2 made valid and binding this agreement with the city.

Thus this company was put on the same level as regards obtaining exemption from or commuting for taxes as the other electric railway companies, and by the same statute which made this previous agreement effectual, and which both parties have assisted in obtaining. It can hardly be said that in giving such powers as regards exempting the property of such companies generally, the Legislature did not intend that their property used for the subsidiary purposes, as well as that used strictly for railway purposes, might be freed from taxation or commuted for. And so with this company. It is true that would not shew that such is the effect of this agreement, but it cannot be said that such a limitation to strictly railway property was necessarily in the intent of the legislature or either of these parties. And in the case of a municipality exempting "all the property" of a company incorporated under the General Electric Railway Companies Act, it would and should require a very strong case indeed to make out that the property used in the

recognized subsidiary purposes of the company would still be liable.

Here then in July, 1902, was this appellant company well known to have these general powers and to be disposing of its surplus electricity. As appears by the recitals in this agreement, the city has made two agreements in 1893, relative to the operation of the railway and which presumably have no relation to the supply of light or power to the city or its residents. Outside of those agreements was the arrangements for the latter purpose. None of these made any reference to taxes as far as it appears. The special Acts relating to the company have not given any power to obtain exemption and the General Electric Railway Act did not apply to it in this respect. The company then proposes to extend its railways to Amherstburg, which would as the agreement states, benefit the inhabitants of Windsor, and it seeks a modification of the existing agreement, first, by extending the term of its railway franchise till December 1922, and by cancelling the clauses (whatever they were) "referring to the payment of money or taxes for franchise privileges to the corporation" and by paying certain fixed yearly sums in lieu of taxes upon its property except certain real estate. Both parties agree and put in writing what they agree upon and neither side suggests that what is put in writing is different from the intention of these two corporate bodies or their representatives. We have simply to take the agreement as we find it.

Until we come to clause 8, the new agreement deals only with railway construction, and operation, and refers to "tracks" and "rails" and "lines of railway"—and clause 10 declares that "this agreement shall be read as part of the said two agreements, all the terms of which will be binding . . . except where inconsistent with the terms of this agreement, when the terms of this agreement shall prevail." Clause 8 cancels (on completion of the railway extension) clause 5 in the agreement of April, 1893, "and all clauses in said two hereinbefore recited agreements, referring to the payment of money or taxes for franchise privileges to the corporation;" and "the following clause should be read as a part of the said agreements in substitution for said clause 5 and all clauses relating to the payment of money or taxes as before said, namely" the company to pay $500 yearly till December, 1912, and then $750 yearly till December, 1917, and then $1,000 yearly till December, 1922" which said payments shall be in lieu of all taxes or rates other than school rates upon the property hereinafter exempted from the payments of taxes." There is here no intimation of any kind that the subsequent exemption is to be less than it purports to be.

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Then clause 9 contains the exemption and reads, "The tracks, right-of-way, wires, rolling stock and all superstructures and sub-structures and all the property of the said parties of the second part (the applicant company and the City Railway Company of Windsor, Limited), not exempted by law from taxes shall except the real estate not hereinbefore mentioned, be exempt from all taxes other than school rates until and including the 31st day of December, 1922." It is evident from a perusal of the agreements, that the word "hereinbefore" can only refer to clause 9 itself.

So here in addition to certain specific items such as tracks, poles, superstructures, etc., which might be real estate, we find exempted for these yearly payments all the accessible property of the company, except any other real estate. These words, "all the property not exempted by law" are very wide and when we find the parties making an express exception stating what is not to be covered by them, I find it difficult to get foothold for any other exception than what they have mentioned. Both parties knew that the company was producing electricity and disposing of its surplus, and distributing it to its customers, and that such was its recognized business, and that in distributing it used and would need holes and wires and appliances outside of what would be required for railway needs. And both sides agree upon fixed yearly sums, which so far as appears are not based upon, and have no relation to the operation of the railway proper. Then having used these broad words and expressed the only exceptions thereto, they go to the Legislature and obtain this Act of 1903 which as I have said certainly gives no hint of any limitation of the bargain, but puts the company in the position of obtaining like others the broadest exemptions covering all its property. So far as appears this agreement was in no sense a gift from the city. It was a bargain in which the company was to do something to benefit the inhabitants as well as pay money to the city corporation itself. I find nothing in the nature of the transaction from which to conclude that the parties did not mean exactly what they said, and no rule of law, which, in the circumstances of a specified exception and a cash payment not limited for particular properties, would enable me to construe the words in any more restricted sense—and where no rectification is sought the rules of law and equity in the construction of the agreement must be the same.

A fact not without significance is that in the previous March, 1902, section 18 of the Assessment Act had been amended by 2 Edw. VII. ch. 31, sec. 1, which enacted that the rails, ties, poles, wires, pipes, mains, conduits, sub-structures and superstructures upon the streets of the municipality belonging to companies for supplying light and power, and companies operating

street railways and electric railways and certain other companies, should be deemed "land" within the Assessment Act, and be assessed, but the plant, poles and wires used exclusively for a steam railway and not for commercial purposes, should be as theretofore exempt from taxation, and that save as aforesaid, rolling stock, plant and appliances of such companies should not be "land" and should not be assessable.

Reading the exemption clause in the agreement of July, 1902, it is difficult to believe that the parties had not that new assessment provision in mind. The use of the words "superstructures and sub-structures," and their insertion somewhat out of their natural order after "rolling stock," which is personalty, and the care in limiting the real estate to that "not hereinbefore mentioned" would all indicate to me that the Act of 1902, was in the view of the parties settling the agreement. If so, that section would have brought to their attention the different functions of this company, and warned them to exclude the lighting part of the business from the operation of the wide exemption if such was the intention.

There is also the fact that until the assessments now in question, the company has not since the agreement been required to pay on the basis now contended for by the city, though that would not disentitle the latter if the agreement were clearly in its favour.

In my opinion the exemption is not limited to the property of the company used for the purposes of the railway itself, and the appeal in that respect should be allowed.

The next question is whether the buildings and machinery fixed to the freehold on the company's lands are liable to assessment as being part of the real estate not previously mentioned, or whether they are included in the words "superstructures and sub-structures," and so expressly exempt.

As this agreement was not valid until the assent of the Legislature was obtained, and the Legislature is careful to restrict the exempting powers of municipalities, we have, I think, to consider not only what the parties meant, but also what the Legislature meant in allowing this interference with the Assessment Act. The Act, R.S.O. 1897, ch. 224, in sec. 7, declared that all property in the province shall be liable to taxation subject to certain specified exemptions; and in sec. 2 that in the Act the words "land," "real estate" and "real property" respectively, should be deemed to include buildings and all machinery or other things so fixed to any building as to form in law part of the realty. And the amended sec. 18, already referred to, declared certain property of the company on the streets to be "land" and assessable in the ward where the head office was, but save as therein the rolling stock, plant and appliances should not be land (and as amended in 1903, by 3 Edw. VII. ch.

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21, sec. 7, the rolling stock should not be assessable) and sec. 39 exempted from taxation all the personal property of a company which invested the whole or the principal part of its means in railway and tram roads or certain other works.

The only reference which I find in the Assessment Act to "superstructures" or "sub-structures," are in the amended section 18, and in sec. 32. In the latter, relating to toll roads, the word "superstructure" clearly does not include buildings. In the former the "superstructures and sub-structures," if judged only by the associated words would not include buildings, but inasmuch as they are upon the streets and public places they clearly cannot do so. Then we have to turn to the agreement itself, and here we must apply the rule *noscitur a sociis*. As already stated I decline to think the words were inspired by the amendment referred to of sec. 18, where they do not include buildings. But even if not used with reference to that section, they are in the first place very unusual words to use as including "buildings" or "machinery," the words which would first occur to the ordinary draughtsman if intended. And in the second place they are associated with words which bear no relation to buildings or machinery therein, but rather to the roadway and property away from the company's lands, and they have to bear the stamp of their companionship, especially as they are in themselves words which imply relation to something else below or above them, which here evidently are the tracks and right-of-way. In relation to railways, the words seem to have acquired in the United States, at least, a meaning which excludes the idea of either the buildings, such as these, or machinery therein. Thus in the Standard Dictionary, "superstructure" is defined as "any structure or part of a structure considered in relation to the part on which it rests: the sleepers, rails, etc., of a railway as distinguished from the roadbed." In the Century Dictionary "(3) In railway engineering the sleepers, rails, and fastenings of a railway in contradistinction to roadbed. In 37 Cyc. 510, a similar definition, and in Am. & Eng. Ency., 2nd ed., to the same effect, and adding "called also permanent way," citing Webster's Dictionary and referring to decisions.

In re Canadian Pacific R. Co. v. *Town of Macleod* (1901), 5 Terr. L.R. 192, Scott, J., held that the company's buildings were not "superstructures of the roadway," and referred to a number of authorities: see *Re Assessment Appeals*, 6 O.L.R. 187, and *Re London Street R. Co.*, 27 A.R. 83, 89.

In the Assessment Act of 1904, sec. 44, as amended in 1906, the words are thrice used in relation to railways, but manifestly not as including buildings or fixed machinery therein such as here in question.

The appeal on this question should, in my opinion, fail.

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The third question is whether the company is exempted by the agreement from a "business assessment."

This tax (except as to mercantile business), was first authorized by the Assessment Act, of 1904, 4 Edw. VII. (Ont.), ch. 23, sec. 10, sub-sec. 1, whereby "Irrespective of any assessment of land under this Act, every person occupying or using land in the municipality for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the land so occupied or used by him as follows:—

> (*i*) Every person carrying on the business of . . . an electric railway . . . or of the transmission of . . . electricity for the purpose of light, heat, or power, for a sum equal to 25 per cent. of the assessed value of the land (not being a highway, etc., or waters or private right-of-way), occupied or used by such person exclusive of the value of any machinery, plant or appliances erected or placed upon, in, over, under, or affixed to such land.

Sub-section 8 declares that "every person assessed for business assessment shall be liable for the payment of the tax thereon and the same shall not constitute a charge upon the land so occupied or used."

Section 5 made real property and income assessable. Section 11 made liable to assessment for income tax "every person not liable to business assessment under sec. 10," and not otherwise exempted. Sections 3 and 4 directed taxes to be levied "upon the whole of the assessment for real property income and business or other assessments made under that Act," and sec. 228 repealed the existing Assessment Act, of 1897, and amendments thereof under which personal property was assessable.

If legislation had stopped there, the assessment would have been changed from an assessment of property to a purely personal assessment which though calculated on the value of property, was not a charge upon it, and as the agreement here only exempted "property" and the commutation paid was only in lieu of taxes "upon the property" the company would not be exempted, although it is manifest that the business tax was really substituted for the tax on personalty and on income which under the Act of 1897, was included in "personal property."

But sec. 226 of the 1904 Act, declared that it should not affect the terms of any agreement made with a municipality . . . for commuting or otherwise relating to municipal taxation, but whenever . . . by any verbal agreement . . . the real or personal property of any person or any part thereof is exempt from municipal taxation in whole or in part . . . such fixed assessment or commutation of taxes or exemption

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shall be deemed to include any business assessment or other assessment, and any taxes thereon in respect to the property or business mentioned in such . . . assessment to which such person or the property of such person would otherwise be liable under the provisions of this Act."

The intention and effect of this section seems clearly to be to remedy the injustice which otherwise might have been done, and to put this company in the same position as if the company as well as its property had been exempted by the assessment. And in the same section, 4 Edw. VII. (Ont.) ch. 24, sec. 3, declared "rateable property" to include business assessments.

On this question the appeal should be allowed. It was conceded that the business assessment in any case was in excess, as it should not have been calculated on the value of machinery.

The last question is whether the exemption applies to the company's buildings and fixed machinery on lands not owned by it, but leased from the Canada Salt Company. As in my view they would not be exempt if they were on the company's own land, and there is nothing in evidence to take them out of the category of real estate, they are in my opinion not shewn to be entitled to exemption.

The net result of the appeal, in my opinion, is that the assessment of $4,500 on poles and wires of the lighting business and all the business assessments of $5,125, $3,125, and $1,350, should be struck out, but the other assessments should stand.

Each party should pay its own costs, in my view, as the success was divided.

Judgment

By the Court—

In the result, the order of the Board was varied in regard to the imposition of a business tax in respect of the street railway department, *i.e.*, 25 per cent. of $50,500, and affirmed in other respects.

Judgment varied.

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Ontario High Court, Middleton, J. March 5, 1912.

1. COURTS (§ A 4—165)—MATTERS OF TITLE—DISPUTED PARTNERSHIP—JURISDICTION TO ORDER INTERIM SALE.

Where a purchaser from the person holding the registered title receives notice before closing the purchase that another party claims to have a partnership interest with the vendor and that the vendor is not entitled to fix the price at which the property is to be sold because of such claimant's right to one half of the profits on the joint venture of erecting the building, the Court has jurisdiction in an action in which all the interested parties are before it, to make an interim order before the trial to carry out, with the consent of

the purchaser, the sale made to him by the person holding the registered title on sufficient of the purchase money being paid into Court or to a receiver to answer the claimant's demand should he succeed at the trial.

2. SPECIFIC PERFORMANCE (§ I E—36)—COMPLETION OF SALE—TERMS TO SECURE CLAIMANT.

An interim order may be made, in an action of specific performance brought by the vendor, in which both the purchaser and an adverse claimant are joined as defendants, allowing a sale of lands to be carried out pending the trial of the adverse claim against the vendor (notice of which is the sole objection to the purchaser closing) on proper terms to secure the claimant if he should substantiate his claim at the trial, and a vesting order may be made thereon in favour of the purchaser as to all the estate and interest in the lands of the other parties to the action.

3. COSTS (§ I—10)—DISCRETION—ABIDING EVENT OF FURTHER LITIGATION.

On the disposal of the purchaser's objection to close his purchase by a vesting order in his favour of the right and title of both the vendor, plaintiff, and of the adverse claimant made a co-defendant with the purchaser in an action for specific performance, and on security being provided by payment into Court or to a receiver to answer the claimant's demand should he substantiate it, the purchaser who was not at fault may be dismissed from the litigation and his costs ordered to be paid by the unsuccessful party on the future determination of rights between the other litigants in respect of the adverse claim.

Statement

MOTION by the plaintiff for an order allowing a sale of lands to be carried out pending trial.

The defendant Lea was a builder who had erected the house in question, the registered title to which was in the name of Miss Jennison, the plaintiff, who had supplied the money to purchase the land and to erect the building. Lea claimed that there was still a balance of $150 due to him in respect of his disbursements on building account and further claimed that the purchase of the land and the erection of the building was a joint venture of the plaintiff and himself in which after reimbursement of her advances of cash the profits on re-sale by him, when he should see fit to sell, should be equally divided between them. While Lea was holding the property for sale and negotiating with prospective purchasers, the plaintiff negotiated on her own account a sale to the defendant Copeland. It was claimed by Lea that Copeland had notice prior to this contract with the plaintiff that he, Lea, had a partnership interest with Miss Jennison in the lands. After learning of the contract the defendant Lea served the purchaser, Copeland, with formal notice to that effect and that he was a joint owner with Miss Jennison. Copeland declined to complete the purchase until Lea's adverse claim was disposed of as a charge on the lands, and also declined to postpone the completion of his purchase until an action by the plaintiff against Lea could be brought to trial. The plaintiff thereupon sued both Copeland and Lea, claiming specific performance of the contract as against Copeland, and a declaration against Lea that he had no title or interest in the lands or charge thereon and that his remedy was a personal one against the plaintiff.

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M. R. Gooderham, for the plaintiff.
J. J. Maclennan, for the defendant Copeland.
G. Gordon Plaxton, for the defendant Lea.

MIDDLETON, J.:—The title to the land is in the plaintiff. She has sold to Copeland, and Copeland is ready to complete the purchase. Lea has served a notice claiming to be a joint owner of the lands, and that a partnership exists between the plaintiff and himself. The plaintiff has advanced substantially all, if not all, the money for the purchase of the land and the building of the house. According to Lea, he has collected all money disbursed by him from the plaintiff, save $150, and she has paid the rest, some $6,000.

The house has been vacant and unsold for over a year, and the plaintiff has made a binding agreement with Copeland, and he refuses to wait the end of the litigation, because, under the agreement, he is entitled to the immediate possession of the house, and must move from his present residence. Lea's rights, if any, are capable of measurement in money, and consist of a claim to this $150 and half the difference between what the plaintiff advanced and the selling value. His outside figure is $600 or $750 in all.

Lea's claim is at best problematical. The Statute of Frauds may be an answer. See *Cody* v. *Roth*, 28 N.Z. 565. And the injury done in the event of the sale going off may be in fact irreparable, as he declines to give any security or even to undertake as to damages if the claim turns out to be unfounded.

I think there is power to order the sale to be carried out, upon proper terms to secure Lea, if he has a claim.

The terms should be: $1,000 should be paid into Court, unless the parties agree to deposit to a special account, to answer any claim he may have. If Lea has an interest in the property, the plaintiff must justify to the satisfaction of the trial Judge that the sale is at an adequate price, and must account upon the basis of the real value, and not merely upon the price realised.

Upon these terms, the lands will be vested in the purchaser for all the estate of both parties; and, if necessary, a receiver may be appointed to convey. In this case the receiver will retain the $1,000 pending the litigation.

There would not seem to be any object in the purchaser further attending the litigation; and his costs may be directed to abide the result of the litigation, i.e., to be paid by the party failing upon the issue to be tried, as to Lea's interest in the lands.

Costs in the cause as between the plaintiff and Lea.

Order accordingly.

McCABE v. McCULLOUGH.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Middleton, JJ. March 13, 1912.

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Mar. 13.

1. Reformation of instruments (§ I—2)—Mistake as to description of boundary—Evidence of Intention.

Where the conveyance of the northern portion of a lot of land, lying on the south side of a street and having for its western boundary another street crossing the first street at an angle greater than a right angle, erroneously made the southern line of the portion sold run parallel to the street the lot faced instead of a fence and the line thereof continued running at right angles to the other street, as the parties intended, thus excluding a portion of the lot intended to be conveyed, and afterwards the owner transferred the southern part of the lot by a conveyance describing its northern boundary to be the south line of the land first conveyed and the grantee in the second deed admitted that she had bought only to the fence, the first deed will be so reformed as to make the fence and its line produced the boundary line between two parcels.

[*Russell* v. *Darcy*, 6 Gr. (Ont.), 165, and *Utterson Lumber Co.* v. *Rennie*, 21 Can. S.C.R. 218, applied.]

Statement

Appeal by the defendant from the judgment of Snider, Co. C.J., in an action in the County Court of the County of Wentworth, brought to recover possession of a small triangular parcel of land.

The appeal was allowed, Britton, J., dissenting.

W. J. O'Reilly, K.C., for the plaintiff.

S. F. Washington, K.C., for the defendant.

Middleton, J.

Middleton, J.:—The Misses Doherty owned lot 65 and part of lot 64 on the south side of York street, Hamilton. Lot 65 was bounded on the east by Davenport street. These streets intersect at an obtuse angle, about five degrees greater than a right angle.

Two pairs of semi-detached houses are constructed upon the lands, fronting upon Davenport street. The boundary fence between the north pair and south pair of houses is erected approximately at right angles to Davenport street. It does not extend to the rear of the lot, but terminates at a barn upon the southerly portion of the lot, where there is a slight jog; and the northern wall of the barn has heretofore served in lieu of a fence.

On the 10th August, 1903, the Misses Doherty sold the northern pair of houses to the defendant. The conveyance describes the southern boundary of the parcel as running parallel to York street. This, of course, excludes a triangular parcel of the land, enclosed by the fence and barn.

On the 28th August, 1903, the purchaser, realising that this description was erroneous, asked for a confirmation deed, containing a correct description; and the deed of that date was executed; but, unfortunately, the description contained in it is also erroneous, as it describes the southern boundary of the

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parcel conveyed as being parallel to the southern boundary of lots 64 and 65, which was itself nearly parallel with York street.

The following year, the plaintiff purchased the two southern houses; and on the 12th April, 1904, the Misses Doherty conveyed to her the southern portion of the two lots, giving as the northern boundary of the parcel conveyed the southerly limit of the land conveyed to the defendant.

Upon the evidence it is quite clear that in both these transactions the intention was to convey up to the fence; and this was assumed to be the boundary line, each party occupying to the fence line, until the dispute giving rise to this action, which took place early in 1911.

This dispute was as to the ownership of the few inches of land lying south of the continuation of the fence and north of the barn. For the purpose of determining this dispute, a survey was made, when the mistake as to the location of the boundary was discovered.

This action is brought to recover possession of the small triangular parcel; and the defendant asks to have the conveyances rectified so that the descriptions may conform to the true boundary as she alleges, i.e., the fence line. There is now no dispute as to the plaintiff's title to the few inches north of the barn.

The learned County Court Judge has held the parties bound by the conveyances, thinking that the evidence does not establish with sufficient clearness that the bargains differ from the conveyances.

A very careful perusal of the evidence satisfies me that the bargain with reference to both parcels was a bargain to sell up to the boundary fence.

I refer to the plaintiff's evidence, where she says: "Q. What you bought was what went with the two houses? A. Yes. Q. And you supposed until a year ago that that was all right? A. It was perfectly right. Q. You took what property was within that fence? A. I found out from the surveyor that the property that side was mine too."

This was when the surveyor was called in on account of the defendant's resistance to the continuation of the fence in a straight line behind the barn, which was the only claim made by the plaintiff up to that time.

This being so, I see no difficulty in directing that the conveyance should be reformed so as to make the boundary between the two parcels the line of the boundary fence and that line produced westerly.

If I had not been able to find, upon the evidence of the plaintiff, that she only intended to purchase the land south of that fence, I would not have thought that we could grant the relief sought, as the Registry Act would have afforded an answer to

the defendant's equitable claim to reformation. See *Fraser* v. *Mutchmor*, 8 O.L.R. 613.

The cases of *Russell* v. *Davey*, 6 Gr. 165, and *Utterson Lumber Co.* v. *Rennie*, 21 Can. S.C.R. 218, justify this decision. I do not think there should be any costs either here or below.

Falconbridge, C.J., concurred.

Britton, J. (dissenting):—The facts of this case, down to the time of the dispute between the parties are clearly and correctly set out by my learned brother Middleton. With great respect I am unable to agree that—

> upon the evidence it is quite clear that in both these transactions the intention was to convey up to the fence; and this was assumed to be the boundary line, each party occupying up to the fence line, until the dispute giving rise to this action which took place early in 1911.

Up to the time of the dispute, the parties occupied not only up to the fence line, as far as that fence extended, but also up to the barn, the defendant assuming that he was entitled to all the land lying north of the barn. The dispute arose originally as to the land north of the barn, but really a dispute as to what was the true line between the parties according to their respective titles.

For the purpose of determining that dispute a survey was had. It is true that the defendant now abandons the few inches north of the barn and south of the line of fence produced westerly, but he still claims the land north of the fence and south of the true line as determined by the survey. I think the parties are bound by the survey. The survey is not in fact questioned; but the defendant asks for reformation of the conveyance to himself and also of the conveyance to the plaintiff. It is quite true that the plaintiff, at the time she purchased, may have thought that the fence was the true line, but the only way to interpret the intention of the parties, especially the intention of the plaintiff, is to say that plaintiff intended to get what the conveyance to her gave.

I see no difference between this case and those so frequently, in other days, heard in the Courts as disputed boundary cases, for example:—

A. owns the north half of the lot, No. 1,

B. owns the south half of same lot.

A conventional line was established and a fence upon that line was erected across or part way across the lot between these holdings. C., a purchaser from A. of the north half, saw the fence and knew that, as between A. and B., that was called the line. C. upon taking possession thought B. had encroached upon and was in possession of part of what was really the north half. This upon a true survey, was found to be the case. C. could recover from B., unless B. had held possession of the part of the

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north half long enough to acquire a title by prescription. I am not able to say, beyond reasonable doubt, upon the evidence of the plaintiff that she intended to purchase only the land south of the fence.

The question of intention is one of fact.

The learned County Judge has found (and for reasons given by him) as follows:—

> I am satisfied by the evidence and the witnesses that the plaintiff thought she was buying the south end of these lots and that the parcel was 70 feet from north to south on both the east and west line, although it turns out to be only about 56 feet front and rear. I do not think she had any definite idea of the point where her north boundary line touched the west boundary line of the lot. I find that she did not understand she was buying by any land mark or marks on the ground in rear, and she did not understand and had no reason to think the defendant had done so.

I agree in the main with these findings—and, for the reasons given, think the appeal should be dismissed with costs.

Appeal allowed; BRITTON, J., *dissenting.*

KELLY v. MACKLEM.

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Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. March 18, 1912.

1. COSTS (§ I—8*a*)—INTERPLEADER ISSUE—REGISTRATION IN JUDGMENT DEBTOR'S NAME OF GOODS BELONGING TO WIFE.

In an interpleader issue in respect of an automobile seized by judgment creditors on execution which was found to be the property of the debtor's wife no costs should be taxed against the creditors where the wife permitted the machine to be registered in her husband's name.

Statement

AN appeal by execution creditors from a judgment of the County Court of the County of York finding an interpleader issue, in respect of chattels seized under execution, in favour of the claimant, the wife of the execution debtor.

The appeal was dismissed without costs.

L. F. Heyd, K.C., for the execution creditors.

A. H. F. Lefroy, K.C., for the claimant.

Latchford, J.

The judgment of the Court was delivered by LATCHFORD, J.:—The judgment appealed from finds as a fact that the property seized was acquired by the claimant "in an employment, trade, or occupation in which she is engaged or which she carries on, and in which her husband has no proprietary interest" (R.S.O. 1897 ch. 163, sec. 6, sub-sec. 1), and was, therefore, her property as against the execution creditors. There is evidence by husband and wife which, if believed—and it was believed—amply supports the finding. Much of that evidence, I should, if trying

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the case, find difficulty in crediting; and I incline to the view that, had the circumstances connected with the claimant's business been more fully elicited, a different conclusion might properly have been reached. Upon the finding, however, no course is, I think, open but to dismiss the appeal.

As the execution creditors were misled by the claimant permitting the automobile which caused the injury to be registered by her husband as his own, there should be no costs.

Appeal dismissed.

Re CRAIG.

Ontario High Court, Middleton, J. March 18, 1912.

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1. WILLS (§ III G 9—160)—LEGACIES—CHARGE ON LAND—VESTING—PERSONALTY.

To free the personal estate of a testator from the charge of legacies given by his will, there must be clearly expressed an intention not only to burden the realty but to exonerate the personalty.

2. WILLS (§ III G 9—160)—LEGACIES—CHARGE ON PERSONALTY AS WELL AS REALTY.

A clause in a will making certain bequests which began with the words: "I give, devise and bequeath all real and personal estate," charges the legacies upon the personalty as well as upon the realty, where followed by a direction that such bequests shall be made a charge upon lands therein specifically described.

3. COSTS (§ I—16)—LEGACY PAYABLE OUT OF PERSONALTY—MOTION BY SPECIFIC LEGATEE—OPPOSITION BY RESIDUARY LEGATEE.

The residuary legatee should pay the costs upon the granting of an order declaring the construction of a will resulting in the legacy claimed by the mover of the order being given to him, where the residuary legatee and the executor of the estate made no reply to letters written them on behalf of the legatee requesting the payment of his legacy and on the argument of the motion his claim was strenuously resisted, though there was filed after the motion was launched a letter from a solicitor of the residuary legatee disclaiming any dispute as to the right of the legatee to his legacy.

Statement

MOTION by A. W. Craig, upon originating notice, for an order declaring the construction of the will of the late John Craig.

A. D. Armour, for the applicant.

M. C. Cameron, for Augusta B. Maclaren, the residuary legatee.

F. W. Harcourt, K.C., for the two infants.

Middleton, J.

MIDDLETON, J.:—The question arises upon the clause of the will in the words following: "I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say: To my beloved daughters Rachel Victoria Craig Mary Maud Craig Elva Florence Craig and Keitha Irene Craig I will and bequeath the sum of one hundred and fifty dollars each to be paid to them on attaining the age of twenty-one years the bequests hereinbefore made

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amounting in all to six hundred dollars I make a charge upon my land being the east half," etc.

Two of the testator's daughters, Mary Maud Craig and Rachel Victoria Craig, died under the age of twenty-one years; and, if these legacies are vested, the three surviving sisters and the surviving brother are each entitled to $75. By the will, the whole residuary estate, including the land in question, passes to the daughter Augusta; so that the question narrows itself to the three sums of $75 each claimed by the infants and J. W. Craig.

Counsel for Augusta contended that the legacies, being charged upon land and being payable on the infant attaining the age of twenty-one years, lapsed upon the death of the legatee before attaining that age. There is no doubt that this would be so if the legacy was one simply charged upon the land, and there is no doubt that, in so far as the legacy is a charge upon the land, the land cannot be resorted to; but I think the legacy here is a legacy charged upon the personalty as well as upon the land. The clause commences with the significant words "I give devise and bequeath all my real and personal estate;" and, although there is a charge upon the land, this is not sufficient to free the personalty. There must be clearly expressed, not only an intention to onerate the realty, but to exonerate the personalty. The testator must not merely indicate that the realty may be resorted to, but must clearly substitute the realty for the personalty, which is the primary fund to be resorted to for the payment of legacies.

According to the Surrogate audit, there is ample personalty. The audit shews that $535 of chattels has been handed over to Augusta, and that there remains in the hands of the executors $138.85 personalty.

I cannot refrain from expressing regret that there should be litigation over such a small amount. Among the papers filed is a letter from the solicitor for the residuary legatee Augusta, written after the motion was launched, in which it is stated: "We utterly fail to see any occasion for a motion. Neither Mrs. Craig nor the executors have ever questioned the fact that the legacies of $150 each to the four daughters of the late John Craig were vested legacies. Neither has she nor any one else ever questioned that these legacies are a charge upon the lands." The letter concludes with the statement that the applicant should be saddled with the costs of an unnecessary motion.

It appeared that more than three months before launching the motion, Mrs. Maclaren was written to by the solicitor for the applicant, the son, requesting payment of his share of the legacies, and, this letter not being replied to, some three weeks later a letter was sent to the executor, which also was not re-

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plied to; and, notwithstanding the statements in the solicitor's letter that the applicant's right had never been and was not disputed, upon the argument the applicant's right was strenuously resisted.

Under these circumstances, I see no reason why the residuary legatee should not pay the costs.

Order accordingly.

EVANS v. RAILWAY PASSENGERS ASSURANCE CO.

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Ontario Divisional Court, Falconbridge, C.J.K.B., Clute, and Sutherland, JJ. March 19, 1912.

1. INSURANCE (§ VI A—246)—ACCIDENT INSURANCE—FAILURE TO GIVE NOTICE—BAR TO RIGHT TO RECOVER.

Under a policy insuring against accident and other causes of disablement and providing that written notice of the happening of an accident or event giving rise to a claim must be given an insurer within a specified time, there can be no recovery in the absence of such notice, even though the insured was incapacitated from complying with the requirement as to notice by the event which gave rise to his claim.

[*Gamble* v. *Accident Assurance Co.*, I.R. 4 C.L. 204, specially referred to.]

2. INSURANCE (§ V B 5—235)—WAIVER—FURNISHING BLANKS—PARTICIPATION IN INVESTIGATION OF CLAIM.

No waiver of a breach of policy of insurance can arise on the part of an insurer from a fact that it sent the insured proofs of claim which were filled out by him and returned to the company where the blanks themselves expressly stipulated that by furnishing them and investigating the claim the insurer should not be held to waive a breach of any condition of the policy.

Statement

APPEAL by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings dismissing an action in that Court to recover $600 under a policy issued by the defendants insuring against disablement from accident and certain other causes.

The appeal was dismissed without costs.

M. Wright, for the plaintiff.

Shirley Denison, K.C., for the defendants.

The judgment of the Court was delivered by CLUTE, J.:—The action was brought under a policy of insurance, the plaintiff claiming $600 for disablement arising from an attack of appendicitis, and continuing for twelve weeks from the 24th November, 1909, to the 16th February, 1910.

The defendants plead that disablement from appendicitis is not within the policy, and further contend that the required notice in writing was not given by the plaintiff, for the neglect of which he is barred.

Dealing with the last objection first, the policy, clause 11, declares that "no claim shall be valid unless written notice of the happening of an injury or event which may give rise to a claim, or of any illness or disease, is given to the head office of

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the company in Toronto within ten days from the date of the happening thereof."

Verbal notice was given to the local manager within ten days from the 24th November, the date of disablement. A letter was written to the local manager at Belleville on the 27th January, 1910; but written notice to the head office was not given until the 4th February, 1910.

Mr. Wright urged that the event meant the disablement and its termination; and that, therefore, the plaintiff was entitled to ten days after he had left the hospital, which did not occur until the 16th February. The plaintiff was wholly unfit for business for a number of days after he entered the hospital, but this affords no excuse. The giving of the notice under the terms of the policy was, in my opinion, a condition precedent to the plaintiff's right to recover; and the fact that it was not given is fatal to the plaintiff's right of action.

It was argued that, even if this should be so, there was a waiver, inasmuch as blanks for the proof of claim were sent on, filled out and returned to the company; but the proof of claim itself contains this clause: "By furnishing this blank and investigating the claim, the company shall not be held to admit the validity thereof or waive the breach of any condition of the policy." This clause is a sufficient answer to the alleged waiver.

In *Gamble* v. *Accident Assurance Co.*, I.R. 4 C.L. 204, the provision of the policy there made it a condition precedent to the right to recover that a notice should be delivered at the chief office of the company in London, within seven days after the occurrence of the accident; and it was held to apply to a case where, owing to the sudden character of the accident and its resulting in instantaneous death, there was nobody capable of giving the required notice. The terms of the policy in that case were such as to negative any presumption bringing it within the class of cases in which it has been held that there was that which involved the implied condition that the destruction of the person or thing with which the contract dealt should absolve from its performance. It was argued in that case that the condition was unreasonable. Pigot, C.B., who delivered the judgment of the Court, said: "Even if it were, it would still be binding if its meaning were clear."

Taking the view I do, that the effect of the want of notice required by the policy is fatal to the plaintiff's right of action, it is unnecessary to deal with the other defence.

It may be a matter for the legislature to consider, whether, in accident policies, there should not be statutory conditions giving the Court the right to declare whether the conditions imposed are reasonable under all the circumstances.

The appeal should be dismissed, but I do not think it is a case for costs. See *Atkinson* v. *Dominion of Canada Guarantee and Accident Co.*, 16 O.L.R. 619, 632.

Appeal dismissed.

STONESS v. ANGLO-AMERICAN INSURANCE CO.

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Ontario Divisional Court, Sir John Alexander Boyd (Chancellor), Latchford and Middleton, JJ. March 20, 1912.

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Mar. 20.

1. PRINCIPAL AND AGENT (§ III—33)—INSURANCE AGENT—NEGLECT TO FURNISH SUFFICIENT INFORMATION—LIABILITY FOR NEGLIGENCE.

In an action on a fire insurance policy the defendant insurer may recover from its agent, made a third party, as damages for the latter's neglect of duty as the insurer's agent to give the insurer sufficient information of the hazardous character of the risk, resulting in too small a premium being charged, the difference between the accustomed premium which would have been charged on a proper discovery of the material facts known to the agent and the lower premium which was in fact charged upon his negligent classification of the risk.

2. COSTS (§ I—11*a*)—LIABILITY OF THIRD PARTY TO PAY BOTH PLAINTIFF AND DEFENDANT.

The Court has jurisdiction to order a third party to pay the costs of both the plaintiff and defendant.

[*Hornby* v. *Cardwell*, 8 Q.B.D. 329; *Piller* v. *Roberts*, 21 Ch. D. 198; *Edison and Swan United E. L. Co.* v. *Holland*, 41 Ch. D. 28, specially referred to.]

Statement

APPEAL by the defendants from the judgment of RIDDELL, J., *Stoness* v. *Anglo-American Insurance Co.*, 3 O.W.N. 494, 20 O.W.R. 800, in favour of the plaintiff in an action upon a fire insurance policy, and dismissing the claim of the defendants for indemnity against their former agent, made a third party.

The judgment appealed from was as follows:—

Riddell, J.

RIDDELL, J.:—The plaintiff is the owner, subject to a mortgage, of certain buildings in Westport, and on the 16th March, 1910, he leased these to certain manufacturers, etc., for a company, The Westport Manufacturing & Plating Company, Ltd. In the negotiations for the lease it was agreed that the lessees should insure the buildings for the landlord and in the formal indenture of lease they covenant "to pay insurance."

August 16th, 1910, the secretary of this company wrote to Cunningham (a solicitor in Kingston, and the agent in Kingston of the defendants) informing him of the lease and asking "particulars as to the amount, premium, etc., of insurance upon this property." C. replied the next day saying that the insurance had expired, that it had been for $2,000 and the premium $42. He added: "If you require it renewed I will be glad to attend to it for you." September 5th, the secretary writes C. again: "We want to get the property reinsured. What do we have to do?" And C. at once replied, "if you will send me cheque I will have the property insured. The rate will be $20 a thousand." December 7th, the Westport company by the same secretary wrote: "In reply to your letter of September 6th, I enclosed a cheque for $40 to cover $2,000 insurance on our plant at Westport. Please write me if this will be satisfactory." C. answers on the 13th: "I enclose herewith special form, will you

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be good enough to fill out the same. Sign it and forward it to me. I will then arrange for the insurance."

December 22nd, the secretary writes from Ottawa that he had received form, that he understood when he sent the cheque, C. "would attend to the rest of the matter and that you had handled it before and had all the data necessary. I will write to Westport and tell them to tell Mr. Stoness to see you as you say, but in the meantime is our property insured or not? . . . As you suggest it is rather a task to fill out that form, and I certainly am not going to attempt it." On the receipt of this letter C. made up his mind to insure the property without waiting for a special application and issued an interim receipt. Recognizing that Stoness was the owner of the building he made out the receipt in his name. This reads:—

> Received from J. M. Stoness the sum of $40, being a premium on an insurance against loss or damage by fire to the extent of $2,000 on buildings formerly known as Westport Foundry Company. See application No. 2368. Property described in application No. 7018 of this agency for 12 months from the 23rd day of December, 1910, at noon to the 23rd day of December, 1911, at noon. Subject to approval at the head office and to the conditions of the policies of the company. The said property is insured until the determination of the head office is notified. If the application is accepted a policy will be issued forthwith which when delivered will cancel this receipt. If the application is declined the premium will be refunded less the proportion for the time the property is insured when this receipt must be delivered up to the company.
>
> A. B. CUNNINGHAM, *Agent.*
>
> Loss, is any, payable to Clara Galbraith, mortgagee.

At the top of the receipt is printed, "If policy is not received within 30 days, the assured is required to notify the head office" —but this is not a part of the receipt itself.

As the plaintiff's mortgage was then the property of Clara Galbraith, a client of Cunningham's, and as the mortgage was then in Cunningham's vault, he placed the interim receipt with the mortgage.

On the same day C. wrote the defendants:—

> I have issued interim receipt to the Westport Manufacturing & Plating Co., Limited, for $2,000 on the property formerly insured in this company under application No. 2368. You will remember that you refused to renew the insurance about a year ago. The property has since been sold to the applicants, who are carrying on business at the plant situate in Westport. I am expecting one of the officers of the company in within the next week to make a formal application, but in order to secure the business I told them I would keep it covered in the meantime.

It will be seen that there are two (if not more) misrepresentations of fact in this letter. C. knew that the new company had not bought, but were only lessees, and that he had issued the

receipt to J. M. Stoness and not to the company. I do not doubt the honesty of C., but his conduct throughout towards his company was inexcusably negligent.

On the same day he wrote the Westport company: "I had the insurance arranged before" (what this means I cannot conjecture). "If Mr. Stoness will call and see me I can arrange the matter. I have issued interim receipt in the Anglo-American, which will keep the property insured until I hear from the company."

During the month of December C. told Stoness that he had his property insured.

December 28th, the defendants write:—

> We . . . note that you have issued our interim receipt for $2,000 covering the above firm's plant at Westport. We note we refused to renew the insurance a year ago and they ask for further information as to the nature of the risk to be insured, at present as we may not desire to write the business. Your immediate reply will very much oblige.

The following day C. writes:—

> You refused this insurance a year ago because of vacancy. Since then these people have taken it over and are carrying on business as manufacturers of gas and electrical fixtures. I am sending some person to Westport in a day or two and will be able to give you a report on the property.

C., it is said, sent some one from his office to look at the property, but the envoy did not succeed in getting that far by reason of the snow. New Year's was imminent too—at all events no inspection was made and no report made.

The Westport Company, March 20th, 1911, insured their machinery, etc., for $2000 in the Guardian Assurance Company, but there was no other insurance upon the buildings covered by the Anglo-American Co.

Stoness did not sign an application, nor did any one else. No report was asked for from C. other than as stated—the defendants did not refuse the risk, nor did they issue a policy: on the 21st April, 1911, the property was destroyed by fire. C. was notified by telephone, and he the same day wrote to his company, and again on the 22nd. In this letter he says, after setting out the facts as to his issue of the interim receipt:—

> I wrote you what I had done on 23rd December, and received your reply dated 28th December. I replied to this on the 29th December. Since that date I have always missed seeing Stoness, who resides about 30 miles from here, and so the application was never duly completed.

April 24th, the company write asking for copies of their letter of 28th December, and of C.'s of 29th December, and add a P.S.:—

> We shall be glad if you will kindly let us know the extent of the damage and the total amount of insurance.

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C. replies with copy of the letters as asked and says: "I understand it was a complete loss."

April 28th the company write C.:—

> It is quite evident that we are not on the risk, never having been furnished with application and have no entry in our books to shew that we are liable, consequently have no re-insurance protection.

It requires some charity to consider this other than a dishonest attempt to get out of a risk by taking advantage of the negligence of the company's own agent.

C. replied that if it was the company's intention to dispute the claim, he would give up his agency and act for the insured, he asked for a definite statement of the company's position, 29th April, and got it May 10th, the general manager's absence seems to have been the cause of the delay. On May 10th the general manager writes:—

> I cannot really see where the company has any liability, as we have never received an application for insurance, nor has an entry of any kind gone into our books. It appears that the matter is one entirely between yourself and the Westport Manufacturing Company.

On the 12th May C. severs his connection with the defendants, asks for a statement of his account since November 1st, 1910, and says he will send a cheque for the amount due.

> Your statement that the matter is one between myself and the Westport company is perfectly absurd. I issued an interim receipt to these people in good faith and immediately notified you of the fact. I took their money and in due course paid the same to you.

It had been the course of dealing between the insurance company and their agent C. that the company from time to time made a draft upon C. for the amount of money they considered C. owed them. There is a *bonâ fide* dispute as to the state of accounts which I do not think I am called upon to determine; there is no doubt that the company allowed C. to receive money for them, and that a payment to him for insurance was payment to the company.

The contention of the defendants is that they are not liable and if they are they are entitled to indemnity over against C., and an order has been made for the trial of this issue also. Dealing with the liability of the company I can see no reason for doubt.

Had the Westport company applied for insurance under their agreement and had the insurance issued to them, they would have been trustees for the plaintiff: *Greer* v. *Citizens Insurance Co.* (1880), 5 A.R. 596.

Both the persons effecting the insurance and the person actually named as the person insured were notified that the insurance was effected; so was the company insuring; the money was paid; it made no difference that the insurance money was made payable to the plaintiff's mortgagee, and in any case she has

since the fire made an assignment to the plaintiff. It signifies nothing in my view that the interim receipt did not actually leave C.'s custody—he held it as solicitor for the plaintiff or his mortgagee.

The insurance effected by the interim receipt was for one year, subject to the approval at the head office, and the insured was insured until the determination of the head office is notified.

It seems to me clear beyond question that the insurance continued under this receipt, and that it could come to an end only (1) by the efflux of the 12 months, or (2) by notification of the head office's adverse determination, or (3) by consent, or (4) the statutory mode.

This is a case, I think, even stronger against the company than *Coulter* v. *Equity Fire Ins. Co.* (1904), 3 O.W.R. 194, 7 O.L.R. 180, 4 O.W.R. 383, 9 O.L.R. 35.

With the internal and domestic arrangements and regulations of the insurance company the insured had nothing to do—the "policy" had been issued and it would have been a fraud for C to have cancelled or destroyed it.

Even if there were any difficulty arising from the fact that the money is made payable to Clara Galbraith, and I see none, she has made an assignment to the plaintiff.

The company's counsel strongly urges that the insurance is expressly "subject to approval at the head office," and this approval never was obtained, but this loses sight of the express provision I have already set out.

The subsequent insurance is not on the same property nor for the same insured.

There must be judgment for the plaintiff for the amount sued for and costs.

As to the third party, I have already said that he has been guilty of inexcusable negligence toward his principals. But I cannot find that any damage has accrued from this negligence, I do not believe that he made the fullest disclosure of all the facts of the case, the company would either have cancelled the insurance or reinsured. This conclusion I arrive at from having seen the witnesses and heard their evidence given in the witness-box. The claim for indemnity, therefore, will be dismissed, but without costs. Thirty days' stay.

Statement

The appeal was dismissed with half costs as to the plaintiff, but was allowed with costs as to the agent made a third party.

F. E. Hodgins, K.C., for the defendants.

J. L. Whiting, K.C., for the plaintiff and the third party.

Boyd, C.

The judgment of the Court was delivered by BOYD, C.:—The learned Judge found that the risk in question was of a hazardous (perhaps extra-hazardous) character, and that a larger premium should have been paid than was collected by

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the agent—he should have charged double the amount at least, i.e., $80 instead of $40. None of this has been paid to the company.

The learned Judge again finds that, if he had power, he would be strongly inclined to allow the agent to pay the costs throughout, as, no doubt, the whole matter had been largely due to his negligence. He thinks the agent's conduct was such as to justify a direction that the costs of the litigation should be paid by that agent; but he apparently doubts the power so to do.

I think that both these items, the extra premium not received by the company and the extra expense incurred by the company in this litigation, may be rightly included as damages payable by the agent on account of the misleading manner in which the situation was placed before the Toronto office, and also by reason of his inaction in not carrying out his undertaking to supply the further information that was needed to enable the head office to appreciate the danger of the risk by being informed of the conditions under which the operations of the insured were being conducted.

I see no ground to disturb the finding that the company are liable to pay the amount of the "interim receipt" policy and costs of action. The company should also pay the plaintiff half the costs of the appeal—this division of appeal costs because the insured and the agent join in opposing the appeal.

But, as to the agent, I think the appeal should be allowed with costs, and that he should pay as damages $80 (for extra risk) and the amount of the taxed costs of the action of both the insured and the defendant company.

I have no reason to doubt that the company would have reinsured the risk to the extent of $1,000 if they had been aware that they were legally responsible for the $2,000 insurance. The company had so reinsured as to the earlier policy on this property, when it was operated by the present plaintiff, and would have done so again. But I do not see my way to charge this as damages on the agent, because the company might have acted so to protect, had they not been in error as to the expiry of the interim receipt in thirty days.

If an officer of the Court combines a variety of engagements, acting as agent of an insurance company and also acting for the owner and lessees of property to be insured, and is also a mortgagee of the property, the mortgage being assigned to another, and then gets matters so mixed up that he gives the insurance company to understand that the insurance is for the benefit of a new concern which has purchased the plant and property from the owner, whereas the real transaction is that the lessees insure in the name of the owner for the benefit of the mortgagee—given this situation, the knowledge of which is confined to the

solicitor, who is also the original mortgagee and the insurance agent, and not communicated to the company till after the fire, it is little wonder that an investigation in the Court is called for and is needed before the tangle is cleared up—and, even as it is, is not satisfactorily cleared up.

Nor is the situation simplified by the insurance agent acting as solicitor and chief witness in this suit for the plaintiff, a stranger to the insurance company.

That the Court has ample power to order payment of costs by a third party and to deal with him in this respect as a defendant, is shewn by *Hornby* v. *Cardwell*, 8 Q.B.D. 329; *Piller* v. *Roberts*, 21 Ch. D. 198, 201; *Edison and Swan United Electric Light Co.* v. *Holland*, 41 Ch. D. 28, 34, and many other cases.

Judgment varied.

NATIONAL TRUST CO. v. MILLER. SCHMIDT v. MILLER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. March 21, 1912.

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Mar. 21.

1. TRESPASS (§ I B—10)—PATENTEE OF MINING LANDS—WHO MAY MAINTAIN ACTION FOR.

The patentee of mining lands in Ontario under the Mines Act, (R.S.O. 1897, ch. 36; see now 8 Edw. VII. ch. 21, sec. 112), has such an interest in the pine timber, as well as in the other timber thereon, as entitles him to maintain an action of trespass against anyone wrongfully cutting and removing such timber.

[*Casselman* v. *Hersey*, 32 U.C.R. 333, followed.]

2. DAMAGES (§ III K—216)—TRESPASS IN CUTTING TIMBER—MEASURE OF COMPENSATION.

The measure of damages in an action by a patentee of mining lands in Ontario for trespass in cutting and removing pine timber is the full value of the timber so cut and removed.

3. EVIDENCE (§ II K—339)—PRESUMPTION OF OWNERSHIP OF PROPERTY FROM MERE POSSESSION.

In the case of chattels, as in the case of land, no presumption is made in favour of a wrongful possessor either as to the extent or as to the duration of his possession.

[*Ex parte Fletcher*, 5 Ch. D. 809, at p. 813, and *Trustees and Agency Co.* v. *Short*, 13 A.C. 793, at p. 798, followed; *Glenwood* v. *Phillips*, [1904] A.C. 405, discussed and applied.]

4. COURTS (§ V B—297)—PREVIOUS DOUBTFUL DECISION—ACTED ON—STARE DECISIS.

Where a decision upon the construction of a statute, though doubtful, has been acted upon for many years by those acquiring rights under the statute construed, and has received legislative recognition by the re-enactment of the statute in the same terms, the principle of *stare decisis* should be applied, and the decision should not be disturbed. (*Per* Anglin and Brodeur, JJ.)

5. STATUTES (§ III—134)—THE INTERPRETATION ACT (ONT.)—EFFECT ON EXISTING RIGHTS—RE-ENACTMENT, REVISION, AMENDMENT.

The Interpretation Act of Ontario, 7 Edw. VII. ch. 2, sec. 7 (52), has changed the previous rule of law by enacting that a re-enactment, revision or consolidation of a statute shall not be deemed an adoption

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of the judicial construction which the same or similar words in the prior statute had received. (*Per* Anglin and Brodeur, JJ.)

6. MASTER AND SERVANT (§ III B—298)—LIABILITY OF MASTER FOR ACTS OF INDEPENDENT CONTRACTOR—SALE OF GOODS WRONGFULLY TAKEN BY CONTRACTOR.

One who, with knowledge of the circumstances, has received, through an independent contractor engaged by him, chattels wrongfully taken by the contractor from another, and has sold such chattels, is answerable to that other for the value thereof.

7. EVIDENCE (§ II E 5—167)—PRESUMPTION OF KNOWLEDGE—OF PRINCIPAL OR AGENT.

Where one who has engaged an independent contractor has an agent upon the work, though the agent be without authority to authorize or adopt a wrongful taking of chattels by the contractor for the purpose of the work, yet, if he have knowledge of such a wrongful taking, such knowledge may be imputed to his principal.

[*Commercial Bank* v. *Morrison*, 32 Can. S.C.R. 98, at p. 105; Halsbury's Laws of England, vol. 1, pp. 215-6, and Bowstead on Agency, 4th ed., p. 346, specially referred to.]

Statement

THE appellants in the first action were owners of certain mining locations in the district of Rainy River, in the Province of Ontario, and the appellants in the second action were lessees of other mining locations in the same district. They sued for damages for alleged wrongful cutting upon and removal from their respective locations of pine and tamarac timber and for incidental injuries due to negligence in the cutting and removal.

The defendants, Miller and Dickson, cut and removed the timber under contract for their co-defendants, the Eastern Construction Company, who obtained the lumber and ties so produced. For the cutting and removal of the pine the Court of Appeal of Ontario held, reversing the judgment of Clute, J., the trial Judge, that the appellants could not recover from either of the defendants. Under its judgment the Eastern Construction Company was also relieved of liability in respect of the other items of the plaintiffs' claim. Miller and Dickson were, however, held liable for the tamarac, its ownership by the plaintiffs not being questioned, and for such damages, if any, as the plaintiffs sustained, owing to negligence in cutting and removing both pine and tamarac. From this part of the judgment no appeal was taken.

The appellants sought by the present appeal to restore the judgment of Clute, J., awarding them damages against all the defendants for the cutting and removal of the pine, and to have the Eastern Construction Company, as well as Miller and Dickson, declared liable to them in respect of the other items of their claim.

The appeal was allowed with costs, Idington and Duff, JJ., dissenting.

Argument

A. W. Anglin, K.C., and *J. A. McIntosh*, for the appellants:—The patentees bought the statutory right to use the timber for

the purposes specified: *Gordon* v. *Moose Mountain Mining Co.*, 22 O.L.R. 373, and see *McLean* v. *The King*, 38 Can. S.C.R. 542, at page 546. Miller and Dickson cannot rely on a subsequent license from the Crown which would be to permit a wrongdoer to set up in justification permission to deprive the injured party of his vested rights. See *Lamb* v. *Kincaid*, 38 Can. S.C.R. 516. The Eastern Construction Co. by accepting and paying for the ties became liable for the trespass.

J. H. Moss, K.C., for the respondents, referred to *Freeman* v. *Roscher*, 13 Q.B. 780; *Lewis* v. *Read*, 13 M. & W. 834.

SIR CHARLES FITZPATRICK, C.J.:—I would allow this appeal with costs. Fitzpatrick, C.J.

ANGLIN, J.:—The appellants in the first action are owners of certain mining locations in the district of Rainy River in the Province of Ontario and the appellants in the second action are lessees of other mining locations in the same district. They seek damages for alleged wrongful cutting upon and removal from their respective locations of pine and tamarac timber and for incidental injuries due to negligence in the cutting and removal. Anglin, J.

The defendants, Miller and Dickson, cut and removed the timber under contract for their co-defendants, the Eastern Construction Company, who obtained the lumber and ties so produced. For the cutting and removal of the pine the Court of Appeal, reversing Clute, J., has held that the appellants cannot recover from either of the defendants. Under its judgment the Eastern Construction Company is also relieved of liability in respect of the other items of the plaintiff's claim.

Miller and Dickson are, however, held liable for the tamarac, its ownership by the plaintiffs not being questioned, and for such damages, if any, as the plaintiffs sustained owing to negligence in cutting and removing both pine and tamarac. From this part of the judgment no appeal has been taken.

The appellants seek to restore the judgment of the trial Judge awarding them damages against all the defendants for the cutting and removal of the pine and to have the Eastern Construction Company, as well as Miller and Dickson, declared liable to them in respect of the other items of claim.

The fact of the cutting and removal of the timber from the plaintiff's locations is not in question. No justification is advanced for the cutting of the tamarac. Neither it is contended by the respondents, that when the pine was cut and removed, they had a license from the government to cut or take it, although some subsequent ratification or approval by the Department of Crown Lands of their having done so, is now set up. The Eastern Construction Company claims that it is not responsible for the tortious acts of its co-defendants,

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Miller and Dickson, who, though made respondents, were not represented at bar in this Court.

The principal question is as to the right of the appellants to recover against any of the defendants in respect of the cutting and removal of the pine. The Crown grant and Crown lease under which the appellants respectively claim, are subject to the provisions of the Mines Act (R.S.O. 1897, ch. 36), and contain the reservation prescribed by sec. 39 of that statute, which as amended by 62 Vict. ch. 10, sec. 10, reads as follows:—

> 39. (1) The patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands, may at all times, during the continuance of the license, enter upon the lands, and cut and remove such trees and make all necessary roads for that purpose.
>
> (2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing and fuel, on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.
>
> (3) No pine trees except for the said necessary building, fencing and fuel or other purposes essential to the working of the mine, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing and fuel, or other purposes aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs.

For the plaintiffs it is contended that, notwithstanding the exceptions thus made, they had such possession of what was so excepted, or such an interest in it, as sufficed to give them a status to maintain an action in trespass or in trover against the defendants as strangers and trespassers.

That such an exception of standing trees (it appears to be an exception though called a reservation: *Douglas* v. *Lock*, 2 A. & E. 705, at pp. 743 *et seq.*), has the effect of "dividing the trees in property from the land, although *in facto* they remain annexed to the land," (*Herlakenden's Case*, 4 Rep. 62*b*) and "parcel of the inheritance" (*Liford's Case*, 11 Rep. 48*b*), is old and undisputed law. It is argued that of the part of the inheritance so excepted from a grant the grantee has no possession in law, although the land on which the trees stand is his, the right to nutriment out of it for the trees being the only interest in it of the grantor: *Legh* v. *Heald*, 1 B. & Ad. 622, at p. 626. It may be that the rule of English law, which ascribes to the person in possession of land, the possession of chattels upon it and, as against a trespasser, title to them by reason of such possession, thus enabling him to maintain an action for

the wrongful taking away of them by a stranger and to recover as damages their full value although they are the property of another (*Glenwood* v. *Phillips*, [1904] A.C. 405, 410-11), does not apply to trees reserved out of a grant or lease while standing, and that, apart from any proprietary or licensees' interest in the pine trees which the statute gave them, the plaintiffs could recover in respect of the mere felling of such trees only damages for the wrongful entry on their lands. But that possession such as the plaintiffs had of their mining lands would, notwithstanding an unqualified reservation in the Crown patent and Crown lease of the pine trees, entitle them to maintain an action in detinue against a stranger wrongfully cutting and removing such trees and to recover as damages the value of the timber taken was held by the Upper Canada Court of King's Bench in *Casselman* v. *Hersey*, 32 U.C.R. 333, decided in 1872. The possession which the plaintiffs in that case had of the lands from which the timber was removed was much the same as that which the present plaintiffs had of their mining locations. Upon the sufficiency of such possession that decision has since been approved in *Kay* v. *Wilson*, (1877), 2 Ont. A.R. 133, 143, and in *Mann* v. *English* (1876), 38 U.C.R. 240, 249; (See Lightwood on Possession of Land p. 60); and I do not understand it to be questioned in the judgment of the Court of Appeal in the present case what was decided by the other branch of the judgment in *Casselman* v. *Hersey*, 32 U.C.R. 333 has never been challenged in Ontario, so far as I am aware, until the decision of the Court of Appeal now before us, in which, it is noteworthy, no allusion is made to that case. It is cited with approval on the question of damages by Osler, J., in *Johnston* v. *Christie* (1880), 31 U.C.C.P. 358, 362. It is probably now too late to question its correctness: *Trust and Loan Co.* v. *Ruttan*, 1 Can. S.C.R. 564, 584.

Since *Casselman* v. *Hersey*, 32 U.C.R. 333, was decided, the statutes of Ontario have been thrice revised and consolidated. On each occasion, the legislature re-enacted the provision of section 39 of the Mines Act (R.S.O. 1897, ch. 36), for the reservation of pine substantially in the form in which it is now found. (*Vide* R.S.O. 1877, ch. 29, sec. 12; and R.S.O. 1887, ch. 31, sec. 12.) The same course has been followed in regard to sections 13 and 14 of the Free Grants and Homesteads Act, (R.S.O. 1897, ch. 29), which make similar provisions. (*Vide* R.S.O. 1877, ch. 24, sec. 10; 43 Viet. ch. 4, secs. 2, 3, and 4; R.S.O. 1887, ch. 25, secs. 10 and 11.) Both the Mines Act and the Free Grants Act contain reservations of pine timber in terms substantially the same as those which were passed upon in *Casselman* v. *Hersey*, 32 U.C.R. 333. In re-enacting them without making any attempt to change the effect which such a reservation was held to have, or

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to alter or restrict the rights which the grantee, notwithstanding it, was held to enjoy, the legislature must be understood to have done so in the light of the interpretation put by the Court upon the language which it used: *Clark* v. *Wallond*, 52 L.J.Q.B. 321, 322. The following provision of the Interpretation Act of the R.S.O. 1897, (ch. 1, sec. 8, clause 57) first became law in Ontario in 1897:—

> The Legislature shall not, by re-enacting an Act or part of an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language.

There is no similar clause in the Interpretation Act in the consolidation of 1877, nor in that of 1887. Whatever may be said, therefore, of the effect of the re-enactment of these statutes in the revision of 1897, in view of sub-sec. 57 of sec. 8 of the Interpretation Act of that year, it cannot be assumed that the legislature re-enacted the sections of the Mining Act and of the Free Grants Act in 1877 and again in 1887 in ignorance of the judicial interpretation which had been put upon such a reservation of pine timber as they provided for. When re-enacted in 1897, not only had the language of these statutory provisions received judicial construction, but that construction must be deemed to have already had legislative recognition and acceptance. Thousands of grants and leases of mining and homestead lands have been taken and paid for under this legislation in the interval of forty years since the decision in *Casselman* v. *Hersey*, 32 U.C.R. 333. In these circumstances, even if we entertained doubts as to the effect of the reservation of pine timber under sec. 39 of the Mines Act, we should in my opinion, if necessary, apply the doctrine of *stare decisis* and decline to disturb the legal rights which Crown patentees were declared to possess under language substantially the same by a judicial decision rendered so long ago and which has been since acquiesced in and never questioned until the present time: *Casgrain* v. *Atlantic and N. W. R. Co.*, [1895] A.C. 282, 300; *Ex parte Campbell*, L.R. 5 Ch. 703, 706; *Whitby* v. *Liscombe*, 23 Grant, 1, 17, 18, 21, 27, 35; *Macdonell* v. *Purcell*, 23 Can. S.C.R. 101, 114.

But in the case at bar the reservation to the Crown was not unqualified, as it appears to have been in the *Casselman* case. The present plaintiffs had attached to their mining lands a right not merely to enjoy, until they should be cut down by some duly authorized licensee of the Crown, the shade of the pine trees and any other advantage to be derived from their standing on the lands, but they also had the very substantial right of themselves cutting down and using these trees for "building, fencing and fuel on the land so obtained or for any other purposes essential to the working of the mines thereon," and, sub-

ject to payment of Crown dues, also the right to "cut and dispose of all trees required to be removed in actually clearing the land for cultivation." Of this substantial interest in the pine trees the plaintiffs were deprived by their being cut down by the defendants, because, upon their severance from the land, whether effected by a duly authorized Crown licensee or by a trespasser, their special interest ceased just as the special interest or property in timber trees of a lessee holding under a lease without reservation of timber cease upon severance of the trees from the soil however effected: *Herlakenden's Case*, 4 Rep. 62*b*. The plaintiffs' statutory rights were confined to cutting for certain purposes and to taking and using what they themselves so cut. They had no statutory right to take or use what the defendants cut, although such cutting was done in trespass. For the wrongful destruction by mere trespassers of their right to cut and use the pine trees so annexed to their property they had, in my opinion, a right of action: *Nuttall* v. *Bracewell*, L.R. 2 Exch. 1; *Jeffries* v. *Williams*, 5 Exch. 792; *Bibby* v. *Carter*, 4 H. & N. 153; Smith's L.C. (11 ed.) vol. 1, pp. 358-60. The evidence shewed and the learned trial Judge has found that there was not enough timber on the lands for the mining purposes of the plaintiffs. As wrong-doers and trespassers the defendants cannot be heard to say that the plaintiffs might never have used this timber for such purposes. As against them in assessing damages, it must be assumed in the plaintiffs' favour that, but for the wrongful interference of the defendants, they would have had the full benefit of the rights conferred upon them. If entitled to any damages in respect of the destruction of their interest in the pine trees, whether it be regarded as proprietary in its character or as merely an interest of licenses, the plaintiffs in this aspect of the case would seem to be entitled to recover the full value of what was wrongfully cut. But I do not rest my judgment on this ground.

On another ground the plaintiffs' claim against the persons responsible for the wrongful removal of the pine trees seems to unanswerable. When those trees were felled the plaintiffs' special interest or property in them ceased. But it did not vest in the wrong-doers. Neither did they acquire by their trespass the rights of the Crown. As the pine trees lay upon the ground they were the property of the Crown. But for the reservation, they would have been the plaintiffs' property. The cutting, however, though wrongful, converted that which had been a part of the inheritance into chattel property: *McLaren* v. *Ryan*, 36 U.C.R. 307, 312. Lying on the plaintiffs' lands, those chattels, though belonging to the Crown, were legally in their possession because of their possession of the land.

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Even if continuous physical possession of the pine trees by Miller and Dickson, from the moment when they were cut until they were removed from the plaintiffs' lands, would have precluded legal possession of them as chattels being ascribed at any time to the plaintiffs as owners and lessees respectively of such lands, there is no proof of such continuous physical possession in the record and in the absence of proof it will not be presumed in favour of trespassers. "Delivery is favourably construed; taking is put to strict proof." The evidence of continuous physical possession, if they had in fact kept such possession, lay peculiarly within the knowledge of the defendants and the burden was certainly upon them to produce it: Taylor on Evidence, 10th ed., 376(*a*).

As trespassers, Miller and Dickson could have no constructive possession of anything of which they had not actual possession. While, if a person enter under title, his possession of part of a tract of land will generally be regarded as giving him constructive possession of the entire property, where the entry is without title, the legal possession of the trespasser, at all events as against the person lawfully entitled to possession, is limited to the area of his effective occupation. So in the case of moveables, "a man who is not entitled to take possession can obtain possession only of that which he actually lays hold of": *Ex p. Fletcher*, L.R. 5 Ch. Div. 809, 813. The same rule applying to land and to chattels in regard to the extent of wrongful possession, there is no reason why they should be subject to different rules as to the duration of such possession. In the case of land, the possession of the trespasser ceases as soon as his actual occupation comes to an end: *Trustees and Agency Co.* v. *Short*, 13 A.C. 793, 798. By an application of the same principle, on the cesser of the physical possession of moveables held by wrong, the law will not attribute to the wrong-doer continued constructive possession of them, but the right to possession will draw after it the constructive possession, and the person having such right will be deemed to have the legal possession. "Possession acquired by trespass is a continuing trespass from moment to moment, so long as the possession lasts." There is no presumption of the continuance of illegality: at all events, its continuance will not be presumed in aid of a guilty person seeking thus to improve his legal position. Moreover, "in the case of goods, legal possession is recognized more readily than in the case of land and mere right to possession is sometimes described as 'constructive possession' and is allowed the advantages of legal possession": Encyc. Laws of England (2nd ed.) vol. 11, p. 327. The removal of the pine trees from the plaintiffs' lands by Miller and Dickson should, in my opinion, be regarded as a taking of them from the possession of the

plaintiffs. Either on this ground, or because their right to possession gave them, as against the trespassing defendants, "the advantages of legal possession," they had a status to maintain this action.

Lord Davey, delivering the judgment of the Judicial Committee in a case in which unsuccessful applicants for a lease of timber lands (the appellants) had cut timber on the lands in anticipation of obtaining such lands and had removed it after the lease had been granted to the respondent, said:—

> The action was in substance for trespassing on the respondent's lands and for detinue of the logs removed from his lands. The action was in fact so treated by the learned judge at the trial. It was then said that at any rate the logs were, as between the respondent and the Crown, the property of the Crown.
>
> The answer to this argument is that the appellants were wrongdoers in every step of their proceedings. There is not a hint in either the pleadings or the evidence of any title in the appellants to cut the trees. . . . The appellants were wrongdoers in entering on the lands of the respondents for the purpose of removing the logs, and also in removing the logs, which were certainly not their property.
>
> *The respondent, on the other hand, was, in their Lordships' opinion, lessee and occupier of the lands, and, as such, had lawful possession of the logs which were on the land.* It is a well-established principle in English law that possession is good against a wrongdoer, and the latter cannot set up a *jus tertii* unless he claims under it. This question has been exhaustively discussed by the present Master of the Rolls in the recent case of *The "Winkfield,"* [1902] P. 42. In *Jeffries* v. *Great Western R. Co.* (1856), 5 E. & B. 802, at p. 805, Lord Campbell is reported to have said: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrongdoer, and cannot defend himself by shewing that there was title in some third person, for against a wrongdoer possession is title." The Master of the Rolls, after quoting this passage, continues: "Therefore, it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all, and therefore, as between those two parties, full damages have to be paid without any further inquiry." Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion, and are content to express their entire concurrence in it: *Glenwood* v. *Phillips*, [1904] A.C. 405, 410.

I am unable to distinguish between the act of the defendants in removing the pine logs from the plaintiffs' lands (the cutting of them is not material to this aspect of the case) and the act of the appellants in removing the logs in the *Glenwood* case, *Glenwood* v. *Phillips*, [1904] A.C. 405, which was held to entitle the respondent (plaintiff) to recover as against the trespassers the full value of the logs removed, on the ground that

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when removed they were in the possession of the respondent as lessee of the land upon which they lay and that, as against the trespasser, such possession was equivalent to title.

Although it does not appear in the reports of this case either before the Judicial Committee or in the colonial Courts (N.F. Reps. 1897-1903, 390, 454), that the appellants had at any time relinquished or that the respondent had acquired physical possession of the lumber after it was cut and prior to its removal, their Lordships seem to have found no difficulty in ascribing legal possession of it to the latter as lessee of the land and in treating the removal of it as a wrongful taking out of his possession.

The decision in *Casselman* v. *Hersey*, 32 U.C.R. 333, may be upheld on the ground that after they were cut and lay as chattels on the plaintiff's land the defendant in that case wrongfully took away the logs, although Wilson, J., no doubt held the view

> that the lessee or grantor when the trees are excepted is in possession of them as against a stranger and wrongdoer (p. 341).

See too *McLaren* v. *Ryan*, 36 U.C.R. 307, 312.

But it is urged that, although the respondents admittedly had no right or title when they cut and removed the pine timber from the plaintiffs' lands, they subsequently acquired the Crown title to it and must now be treated as if they had been Crown licensees *ab initio*. This defence was not pleaded and it appears not to have been set up at the trial. It is given effect to, however, in the judgment delivered for the Court of Appeal by Meredith, J.A., who says:—

"It is not a case of setting up the *jus tertii;* the defendants have acquired the rights of the Crown and are setting up their own rights so acquired."

The evidence of Alex. McDougall is relied upon to support this finding of the learned appellate Judge. I have seldom perused testimony more unsatisfactory. Had the defence now relied upon been pleaded this evidence would not support it. *A fortiori* it does not justify an appellate Court giving effect to a contention not presented on the pleadings and not raised at the trial and which the plaintiffs had no opportunity to meet. Assuming that it was competent for the Crown Lands Department, after the pine had been all cut and removed from the plaintiffs' lands and delivered to the Eastern Construction Company, to make an agreement in respect of it, which would have the effect of destroying the plaintiffs' vested right of action, the evidence in the record falls far short of establishing such an agreement.

Miller and Dickson had cut in trespass upon the Crown property as well as upon the locations of the plaintiffs. Apparently in respect of the former, Mr. Margach, a Crown Lands

official, notified the Eastern Construction Company, by letter of the 6th March, that:—

> The Department has refused the permit. You will please see that they do no more cutting. They are at liberty to remove what they have cut and make a separate return of it.

There is no allusion in this letter to the cutting on the plaintiffs' locations, and in view of the attitude of the department in regard to the rights of the plaintiffs as mining locatees as against the trespassing lumbermen, disclosed by a letter of Mr. White, the Deputy Minister, to which I am about to refer, it would seem reasonably certain that the permission for removal given by Margach was intended to cover only timber cut on the Crown lands. The cutting on the plaintiffs' locations appears to have been brought to the attention of the department later in the same month. On the 18th March, Mr. White writes to the plaintiff:—

> Toronto, March 18th, 1909.
>
> Gentlemen,—Referring to your letter of the 15th inst., with regard to the cutting of Messrs. Miller & Dickson on territory south and east of Vermilion river outside of area covered by permit granted to the Eastern Construction Company, I beg to say that the Department has been in communication with Mr. Crown Timber Agent Margach, in relation to this cutting, and he has been fully instructed in the matter so far as relates to lands of the Crown, but if these parties are removing illegally timber from locations to which you may be legally entitled, it would seem to be a matter between you and the parties cutting and taking the timber.
>
> Your obedient servant,
>
> AUBREY WHITE,
> *Deputy Minister.*

There is nothing to shew that the department ever changed its attitude as expressed in this letter in regard to the plaintiffs' rights, or undertook in any way to interfere with or derogate from them, or to give to the defendants a status which would enable them to do so. The timber in question was not cut for the purpose of "building, fencing or fuel on the mining lands, or for any purpose essential to the working of the mines." If cut by the appellants in the course of clearing for cultivation, it would have been subject to payment of Crown dues. The defendants having cut in trespass were, no doubt, liable to the Crown for penalties. If the Minister of Crown Lands saw fit to waive the Crown's right to exact penalties, and, as a matter of grace, in lieu thereof to accept from the defendants merely ordinary dues in respect of the timber of which they had possession, it by no means follows that he put, or intended to put them for all purposes in the same position as if they had cut under license. The acceptance by the Crown of dues in such circumstances is at the most an equivocal act. It is entirely consistent with an intention on the part of the de-

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partment to treat the defendants as persons who had acquired from the plaintiffs timber cut for the purpose of clearing the land for cultivation, which the plaintiffs would have the right to dispose of, subject to payment of Crown dues. These dues the Crown claimed from the defendants as the persons in possession of the timber subject to them. It would require something much more conclusive, especially in the face of Mr. White's letter, to establish that the Crown intended to confer on the defendants the rights of licensees *nunc pro tunc* and to deprive the plaintiffs of their vested right of action, or that what took place had that effect. There is no evidence on this point from the department of Crown Lands, and the testimony of Alex. McDougall is quite inconclusive. It is sufficiently surprising that the defendants should have been permitted to take for the first time in the Court of Appeal the position that they should be treated as having cut and removed the timber in question under Crown license. But I find it still more extraordinary that effect should have been given to such a contention upon the evidence before the Court. There is in my opinion nothing to sustain it.

For these reasons, I would hold the defendants, Miller and Dickson, liable as claimed by the plaintiffs, and, as to them, would allow the appeal and restore the judgment of the trial Judge.

The liability of the defendants, the Eastern Construction Company, however, does not necessarily follow. Miller and Dickson were not their servants or agents, but independent contractors.

But the timber and ties cut on the plaintiffs' lands were all delivered either to the Construction Company or to its nominees. The company received property, or the proceeds of property, title to which, because it was wrongfully taken from the plaintiffs' possession, must, in the circumstances of this case, as against all the defendants, be deemed to have been in the plaintiffs. The trial Judge has expressed the view that, in crossing the line of their license limits and in entering upon the plaintiffs' mining locations, Miller and Dickson acted with the concurrence, if not under the direction of Mr. Samuel McDougall, Sr., who represented the Eastern Construction Company. Although I have no doubt that his powers and authority were much wider than either he or his nephew Alex. McDougall, will admit, whether it was within the scope of his agency for the company to give such a direction so as to bind his principals and to render it in law their direction is possibly doubtful on the evidence. But there is in the testimony of Dickson, Miller, Smith, McLean and Proud, abundant evidence to warrant a finding that Samuel McDougall, Sr., knew from the first that Miller and Dickson were cutting for his company on the plaintiffs' lands. The learned trial Judge says:—

> I think Miller & Dickson crossed the line and cut those ties, and that that cutting was afterwards brought to the attention of the Eastern Construction Company, and that they deliberately received and accepted those ties from their contractors, and paid part upon them, and sold them and received the payment therefor.

Although its formal judgment relieves the Construction Company from liability in respect of the tamarac as well as the pine, in delivering the opinion of the Court of Appeal, Meredith, J.A., said:—

> Upon the finding of the trial Judge that the Eastern Construction Company took the goods with knowledge of the circumstances, the holding that they are answerable for the value is right.

I entirely agree with that statement of the law, and, as I have already said, the finding upon which it is based is fully supported by the evidence. Why the Court of Appeal, while accepting this finding, by its formal judgment relieved the Construction Company from liability for the tamarac which they got, it is difficult to understand. The discrepancy has not been explained.

Whatever may have been the extent of Samuel McDougall's authority, his position at the Miller and Dickson camp and his relations to the construction company were such that I have no difficulty in imputing to that company the knowledge which he had of the fact of the wrongful cutting on the plaintiffs' locations: *Commercial Bank* v. *Morrison*, 32 Can. S.C.R. 98, 105. That knowledge was material to the business in which he was employed; it came to him in the course of his employment; and it was undoubtedly of such a nature that it was his duty to communicate it to his principal. Halsbury's Laws of England, vol. 1, pp. 215-6; Bowstead on Agency, 4th ed., 346.

The Eastern Construction Company having taken the timber and ties with notice that they were wrongfully cut and removed from the plaintiffs' lands is, in my opinion, equally liable with Miller and Dickson to the plaintiffs in detinue in respect of both the pine and the tamarac so removed. (See Pollock and Wright on Possession, p. 151, note.)

But for such damages as may have been caused by mere negligence or by cutting in an improper and improvident manner, Miller and Dickson are alone responsible. Such misconduct of independent contractors is not imputable to the persons by whom they are engaged.

For these reasons to the extent indicated. I would allow the appeal of the plaintiffs and would restore the judgment of Clute, J., against the Eastern Construction Company.

The respondents should pay to the appellants their costs in this Court and in the provincial Court of Appeal.

BRODEUR, J.:—I concur with the views expressed by Mr. Justice Anglin. Brodeur, J.

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Idington, J.

IDINGTON, J., (dissenting):—The question raised herein is reduced to the narrow point of whether or not the grantee of lands under the Mines Act, R.S.O. 1897, has such possession in the pine timber on such lands so granted him by the Crown, that he can recover the value thereof when cut and removed from the lands, not only from the actual trespasser, but from those taking under him the fruits of the trespass, after the removal, and without the purchaser having any notice or knowledge of such trespass until after the removal.

I think the question must be answered by the interpretation of section thirty-nine, subsection 1, of the said Act, which is as follows:—

> (1) The patents for all Crown lands sold as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such land may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

The grant is made expressly subject thereto, and then the title declared to be qualified "in this that it is subject to the conditions imposed by the said Act for the purpose of securing the carrying out of mining operations in and upon the said land."

When we turn to section 34 of the Act, we find the title thus qualified is in truth dependent for seven years from the grant upon certain mining developments taking place at the instance of the grantee from year to year, notwithstanding the apparently absolute grant, and that in default of that being done, the title may revert to the Crown.

He has no more property in the pine trees, or charge of or over them, than if they were growing upon an adjacent lot under such legal conditions that he might by virtue of a covenant from the owner in fee simple in certain contingencies which might or might never happen, have a license to cut and use same for his use in developing his mining interest in the land granted for such purpose, but for no other purpose.

The trees having continued the property of the Crown, how can the grantee in any such case assert the right of property claimed here, when the trees have been cut and removed from the land?

The appellants as such grantees had neither a legal nor physical possession of the pine trees and hence no basis on which to rest a claim to the ties into which they were cut.

They were under no position of responsibility to the Crown to have them protected from the acts of others than themselves.

Their sole relation to the pine trees, or the Crown as owner of them, was that upon certain contingencies happening, if the

Crown by its license had not in the meantime taken the trees, then they (the appellants) had a license to use them for specified purposes.

But when we find they had been removed from the land, cut into ties and are being delivered to the respondent company, how can it be possible by virtue of such a contingent license, to say the appellants had any property in the ties?

Their legal position may have entitled them to bring an action for damages against any one without colour of right so changing the condition of things that they could not enjoy that to which they had a legitimate and reasonable expectation of enjoyment, by virtue of their implied license when it had become operative.

Whatever the form of action, it does not appear to me it could ever be trespass. Nor can it be trover. It has been said a bailor can call on a bailee recovering in trover for an account. What right would the Crown have to call on the appellants for the fruits of such an action? The bailor has that right *pro tanto* his interest in case the bailee makes recovery. But on what legal ground could the Crown here rest such a claim?

Likewise in the case of lessor and lessee, the latter being liable for waste is responsible therefor, and being answerable to the lessor is the proper party to sue for trespass and to recover full damages.

The Crown might sue the trespassers for and recover the value of these trees taken notwithstanding the appellants' recovery. But how can the trespasser answer the Crown by any such recovery as sought herein?

It seems an extraordinary thing if because the appellants have a grant which may terminate, indeed be abandoned, by reason of necessity for an expenditure upon it far beyond its commensurate value in order to comply with the terms of the grant, they can thus indirectly strip the land of its pine timber and carry away that which may far exceed the minerals in value.

This would be to convert that which was intended to convey minerals and preserve timber into a grant to convey timber.

The possession of the appellant was, it is said, found by the learned trial Judge. Such possession as he had evidence of must be attributable to the title disclosed.

What rights of recovery the bare possessor owing no duty, in relation to the thing trespassed upon, to anyone else may have as against a mere trespasser and the measure of damages in such a case are beyond the present enquiry.

This is a case where the actual or physical posssesion clearly goes no further than the legal, and that does not entitle ap-

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pellants to claim as alleged in the statement of claim that the trees were their property. Nor does it entitle them to follow the trees when cut and converted into a something else.

Again the right of the appellants was subject to be divested by any licensee of the Crown cutting by virtue of his license.

How do we know there has not been outstanding such a license?

The parties hereto argued as if none existed, but when a something happened in the Crown Lands office of which we only know part, the appellants say with force, we do not know it all.

Assume a renewable license outstanding at the date of the grant, what possible right is left in the appellants to claim those ties or their value?

The argument, addressed to us, which maintained it was only licenses existent at the date of the grant that the statute had in view, does not meet the possibility I have adverted to.

Nor do I think it meets the point in any aspect. The mining might fail to be of any value to anyone and the last possibility of the miners resorting to the timber might disappear; are we to assume that the Crown could not then issue a license to cut these trees reserved as its property?

Surely no such absurd result was ever contemplated by anyone.

And unless we can maintain it was so, this pine timber was liable to be cut at any time by licensees of the Crown.

But why labour with it? How can trespass as to these pine trees ever lie on such a title?

No case cited, when examined closely, has in truth any but an illusory resemblance to this case, save the case of *Casselman* v. *Hersey*, 32 U.C.R. 333, which is distinguishable, but I may add, no more binds us than the finding of the learned trial Judge which is sought to be restored by virtue of a finding of possession.

I think the appeal ought to be dismissed with costs.

The appeal in the case of Schmidt against the same parties must also fail.

They were argued together, being so much alike. I have not found them identical, by any means, but the case of the grant is so much stronger in some aspects, needless to dwell upon, that having fully examined it, I need not say more than that the weaker one fails also.

Duff, J.

DUFF, J. (dissenting):—This appeal arises out of two actions which were tried together, in which the appellants claimed reparation from the respondents for damages, alleged to be suffered by them in consequence of the cutting and taking away of timber from certain mineral locations. These locations consisted of two sets (each comprising four locations) one of which,

throughout the proceedings referred to under the head of the "National," was held by the plaintiffs in the action of the National Trust Co. against Miller, under Crown grants issued pursuant to the Mines Act of Ontario, secs. 26 to 34. The other set, referred to in the proceedings as the "Schmidt" locations, was held by the plaintiffs in the action of Schmidt against Miller under leases granted under the authority of sec. 35 of the same Act. Of the timber in question all but a very small percentage (less than eight per cent.) consisted of pine, which was the property of the Crown, being expressly excepted from the grants and leases referred to. The learned trial Judge held the respondents accountable to the appellants for the full value of the pine timber taken from the locations; but on this point his judgment was reversed by the Court of Appeal. The substantial question is whether on this point the judgment of the Court of Appeal is right.

The material facts are either undisputed or are decided by the findings of the learned trial Judge; but in the view I take of the questions arising on the appeal, more especially of some points not raised by the parties themselves, it is necessary to dwell with a little care upon these facts as well as upon the course of the trial and the nature of the case made by the parties there.

The trespasses complained of took place in the month of February, 1909. They were actually committed by the defendants Miller and Dickson, who had entered into a contract with the respondents, the Eastern Construction Co., to cut, from a defined area, timber for railway ties, to manufacture this timber into ties, and to deliver the ties at certain places designated on the line of the Northern Transcontinental Railway, then in course of construction. The Eastern Construction Co. had a permit, issued by the Ontario Government under the authority of the Crown Timber Act, to cut timber from Crown lands within an area described in the permit, which will be sufficiently designated for my present purpose, by saying that the southern boundary of it was Vermilion river—which it may be mentioned is a short river connecting two lakes north-west of Lake Superior, in Rainy River District, at a distance of about 200 miles from Port Arthur. The Eastern Construction Co. had entered into an arrangement with the firm of O'Brien, Fowler and McDougall (who were engaged in constructing part of the Transcontinental Railway under a contract with the Dominion government), by which the Eastern Construction Co. (who were not themselves engaged in railway building) were to give to the O'Brien firm, the use of their permit for a commission of one cent upon each tie manufactured from timber cut under the permit; and the method by which the arrangement was carried out was

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that the Eastern Construction Co. engaged Miller and Dickson as contractors to cut the ties required from the area affected by the permit, and to deliver them at the railway line where they were taken possession of by O'Brien, Fowler and McDougall. The appellants' locations were all situated south of Vermilion river outside the area affected by the permit.

In the beginning of February, Miller and Dickson, in circumstances which it will be necessary to refer to more particularly when considering the responsibility of the Eastern Construction Co., began cutting timber south of Vermilion river from Crown lands as well as from the appellants' locations. On the 24th February, when nearly the whole of the timber cut in the course of these trespasses had been manufactured into ties and delivered, Mr. Margach, the Crown timber agent for the district of Rainy River, then on one of his tours of inspection with Inspector Smith, observed that Miller and Dickson were exceeding the limits of the Eastern Construction Co.'s permit, and ordered them to stop. A few days afterwards Mr. Margach notified Miller and Dickson that they might remove any timber that had been cut. When this permission was given, Mr. Margach was aware of the fact that Miller and Dickson had been cutting on the mineral locations in question, and the permission was intended to apply, and was understood to apply to the Crown timber cut there.

On the 26th February, Mr. Margach reported Miller and Dickson's trespass to the Department of Crown Lands, informing the department at the same time that the area trespassed upon included the appellants' locations. On the 6th March he formally notified the Eastern Construction Co., that Miller and Dickson had been trespassing south and east of Vermilion river, that he had ordered them to stop trespassing, but had authorized them to remove what they had cut and to make a separate return of it.

Some time in April or May, Mr. Alexander McDougall, the managing director of the Eastern Construction Co., interviewed the Commissioner and Deputy Commissioner of Crown Lands, on the subject of the dues to be charged in respect of the government timber affected by these trespasses. According to the government regulations, the government is entitled to charge double dues for timber cut in trespass. In September, Inspector Smith of the department was directed by the Crown timber agent to make an examination and return of the extent of Miller and Dickson's trespasses, including the trespasses on the mineral locations. Smith's report was made in September, 1909, and that report was put in at the trial by the appellants and upon it the learned trial Judge based his estimate of the damages to which he found the appellants entitled. In November of the same year, the Crown timber agent, by direction

of the department, delivered an account to the Eastern Construction Co. for Crown dues on timber cut under the company's permit, including the Crown timber cut upon the mining locations. The dues so charged for the timber cut in trespass were the ordinary dues payable to the Crown for timber cut under license, in other words, the department treated timber taken by Miller and Dickson from the mining locations as timber lawfully cut under the authority of the department.

These facts, as I have already said, are either found by the learned trial Judge, or not seriously open to dispute; and on these facts the respondents were held by the learned trial Judge to be accountable to the appellants for the full value of the timber taken from the mining locations. The Court of Appeal held on the contrary that as respects the pine timber which was vested in the Crown, the appellants were not entitled to recover.

Before examining the respective grounds of these conflicting views, it will be convenient to state what are the rights of the Crown and the appellants respectively in the timber standing on mining locations. With regard to the granted locations, those rights are defined in sec. 39 of the Mines Act (R.S.O. (1897), ch. 36), which is as follows:—

> 39. (1) The patents for all Crown lands sold as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.
>
> (2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing and fuel on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.
>
> (3) No pine trees, except for the said necessary building, fencing and fuel, or other purpose essential to the working of the mine, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing and fuel, or other purpose aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs.

By sec. 40, sec. 39 is made applicable, with some modification, to locations held under lease. For the purposes of this case the rights of the lessees in respect of timber upon leased locations may be treated as if they rested upon sec. 39. The effect of the first sub-section is apparently to leave the property in the pine trees in the Crown entirely unaffected by the grant. "The pine trees shall," the Act says, "continue to be the property of Her Majesty." The

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effect of such a provision seems to be that the ownership of the trees is severed from the ownership of the soil, but the quality of the ownership of the trees is not in any degree altered by the grant of the soil. The timber remains vested in the Crown as a corporeal hereditament. As Chitty, L.J., said in *Lavery* v. *Pursell*, 39 Ch. D. 508, 57 L.J. Ch. 570, 37 W.R. 163:—

> A standing tree is just as much a hereditament in point of law as a house which is standing on the land and just as much so as the mines which are underneath. I only speak now as a real property lawyer. I am bound of course by English law to say that a tree is not a chattel. There is no distinction in point of law between the timber on the land and the mines.

I am dwelling on this because it appears to me to have an important bearing upon the principal argument addressed to us by Mr. Anglin on behalf of the appellants.

The principle (as applicable to the case where the grantor is a subject) seems to be stated by Mr. Leake with his usual accuracy in his book on the Uses and Profits of Land, at p. 30:—

> A grant, or an exception from a grant, of the trees growing in certain land, creates a property in the trees, separate from the property in the soil; but with the right of having them grow and subsist upon it. An estate of inheritance in a tree may thus be created; which would be technically described as a fee conditional upon the life of the tree.

The authorities cited by Mr. Challis, at p. 256 of his book on the Law of Real Property, 2nd ed., establish beyond question that a determinable fee may be validly limited to a man and his heirs "as long as such a tree shall grow," or "as long as such a tree stands"; and the reason why such limitations are good is given in *Liford's Case*, 11 Co. 46 (*b*), at p. 49 (*a*), and is there said to be "because a man may have an inheritance in the tree itself." It is perfectly true there is authority that where trees are sold under a contract that they shall be removed, the trees may, for certain purposes, be held to be chattels, the land being regarded simply as a warehouse for the timber; and, of course, a grant or reservation of timber may be so framed as to grant or reserve, as the case may be, only a chattel interest in the trees. We are not concerned with such cases. The language of sec. 39, to which I have adverted, makes it impossible, in my judgment, to give any other effect to that section than this, that the property in all pine trees standing on a Crown location granted under the provisions of the Mines Act, is to remain in the Crown unaffected entirely by the grant of the location, with all the incidents normally attaching by law to such property. It would follow, of course, that, notwithstanding the grant of the location, the Crown would retain all its powers of dealing with the reserved timber and all such powers

are exercisable lawfully with respect to such timber as may be exercised in respect of Crown timber growing upon any part of the Crown domain. It is material to add that, in view of the contentions which have been made in this case, in my judgment this timber falls within the scope of sec. 3 of the Public Lands Act which vests in the Crown Lands Department the "management and sale of the public lands and forests"; that such timber, moreover, is "timber on the ungranted lands of the Crown," within the meaning of sub-sec. 1 of sec. 2 of the Crown Timber Act; and that, consequently, it may be made the subject of licenses granted under that section. It would, I think, be an unwarranted restriction upon those words to confine their application to lands the soil of which remained ungranted. The contention that they ought to be so restricted was made by Mr. Anglin, not with much confidence I thought, but a moment's consideration shews that the difficulties in the way of that construction are insuperable. It is obvious that the Legislature is addressing itself, in this phrase, to the question of the Crown's power of disposition over the timber which is to be the subject of a license granted under those sections. Nobody would argue, for example, that a grant of the minerals would take the land which was the subject of the grant out of the category of "ungranted lands" within the meaning of this section, nor do I suppose anybody would argue that lands sold under the provisions of secs. 13 and 14 of the Free Grants and Homesteads Act are not, with respect to minerals and timber, "ungranted lands" within the terms of the Act. With respect to the minerals reserved as well as with respect to the pine trees reserved, such lands are correctly described as ungranted lands. So it seems clear that the lands comprised within a mineral location, to which sec. 39 applies, are, with respect to the pine timber, "ungranted lands." The grantee of the location holds his location, therefore, subject, as regards the pine timber, to the right of the Department of Crown Lands to deal with that timber in every respect as if it were timber standing upon soil still vested in the Crown. That being so, the provision in the first sub-section of sec. 39 authorizing the holders of licenses to enter upon the locations for the purpose of cutting Crown timber thereon, obviously cannot be restricted to licenses in existence at the time of the grant of the location. Sub-secs. 2 and 3, however, confer upon the grantees of locations certain rights in respect of this timber. These rights become exercisable only upon the happening of the statutory conditions, namely, that the timber is required for the purpose of working the mines on the location, or that there has been an actual clearing of the land for the purposes of cultivation, and that it has been necessary to remove the pine trees in the course of such clearing. It is important to observe that there is

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here no grant of the timber necessary for mining purposes. The right of the mine owner is to take such pine timber as may be necessary for mining purposes, provided that, when it becomes necessary to take it, it is there to be had. The grantee of the location acquires no property in the pine trees *in situ*, no assurance that they will not be removed, no right to object to the removal of them under the authority of the Crown. Until they are appropriated by him, or at all events until the necessity for taking them has arisen, they are absolutely subject to the authority and disposition of the department having the management of the Crown forests. Licenses may be granted in respect of them under the Crown Timber Act. If required for a public work, the construction of a government railway for example, the Crown Land Department would unquestionably have the power to devote them to such purposes. If they are cut and taken away by a trespasser, the department has precisely the same discretionary powers of dealing with the trespass as it would have in the case of timber cut from any other part of the Crown domain.

It is necessary in order to make my view of the case clearly understood, to observe, before proceeding to examine the validity of the grounds upon which the learned trial Judge proceeded, that the appellants did not at the trial rest their claim upon any contention that there had been any interruption of, or interference with, the exercise of their rights to take pine timber for mining purposes.

It was not alleged that the appellants were engaged in any mining operations upon any of the locations which required the use of the timber, or that they had any intention of undertaking such operations. As to the locations held in fee, the evidence is perfectly clear; it is admitted by Mr. Shilton himself explicitly, at p. 52, that at the time of the trial there never had been "any actual sinking of the shaft or penetration to the rock"; nor any "straight attempt to develop them and find out what quantity of ore can be found in place." It is also admitted that there was no intention of working or developing these locations within the near future.

With regard to the locations held under lease, it appears that some work was at one time done upon one of them; a cross cut had been made 20 or 30 feet long, 15 deep at one end, and about 8 feet wide at the top. But at the time of the trial no mining operations were in progress or in contemplation. No timber had ever been cut on any of the eight locations for mining purposes.

There is another ground upon which one might have expected, the appellants to attempt to base their claim to relief if the facts had justified it. The appellants' right to take the pine timber for mining purposes is a right annexed by the statute

to the ownership or other interest held by them in the locations. The acts of the respondents Miller and Dickson have, of course, deprived them of all possibility of exercising this right in respect of the timber which has been removed; and if, as the appellants contend, this was done without lawful justification or excuse, by means of and in course of trespasses upon the land, for the benefit of which the right is exercisable, then I should have thought the appellants entitled to reparation to the extent of the loss suffered by them by reason of these wrongful acts. But the measure of that loss is not the value of the trees; obviously it is the value of the contingent right to take the trees. In estimating the value of that right two elements must, of course, be taken into account: first, the probability of the timber ever being required for the purposes for which the statute permits it to be taken; and second, the probability of the timber being permitted by the Department of Crown Lands to remain until it should be so required. In estimating the amount of the loss to the appellants which can fairly be said to have been the "natural and probable consequence" of the acts complained of, these two elements must necessarily be considered. We are not at liberty, however, to consider the appellants' case from this point of view. The appellants in the most explicit way refused to put their claim as a claim to the value of a contingent right; and the learned trial Judge refused to consider the points I have just indicated as in any affecting either the appellants' right to recover or the extent of the damages to which they should be entitled. Evidence was tendered by the respondents of the practice of the department in granting licenses to cut timber on locations such as the appellants' with a view to shewing the precariousness of the appellants' rights. This evidence was, on the objection of the appellants, rejected as irrelevant. It was, I think, irrelevant in view of the proposition of law on which the appellants based their case. The learned trial Judge also treated the probability of the locations being developed to such an extent as to require the use of the timber taken, as irrelevant. I repeat, the appellants' claim is not, and has not at any stage of the proceedings, been based upon an allegation that they have been interrupted in the exercise of their timber rights, nor have they asked to be compensated for the actual loss they have suffered by reason of being deprived of the possibility of exercising those rights in future in respect of the timber removed.

The mode in which the appellants put their case at the trial, as well as in the Court of Appeal and in this Court, was this: They were, they said, in possession of the soil on which the pine timber stood, and consequently in possession of the timber; that, notwithstanding the fact that the timber was owned by the Crown and delivered by the Crown officers into the possession of the respondents after it was cut, the respondents are, under the

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authority of *The Winkfield*, [1902] P. 42, responsible for the full value of what they took away by that trespass. As the learned trial Judge puts it at page 201:—

> Nevertheless, it seems to me to be clear that there were interests and rights given with the lands to the patentee and to the lessee for mining purposes, and that they were in fact in possession of the whole lands including the timber, and, whatever rights the Crown may have, a mere trespasser has no right to avail himself of the rights of the Crown, that in short, a trespasser is responsible for the whole value of that which he takes away by his trespass, and the damages arising from the injury done to the property by reason of the trespass, and that in this case, the fact of the trespass not being in dispute, the fact of the timber being actually taken away and sold and converted by the defendants not being in dispute, the fact that the plaintiffs were in possession, that they had put improvements upon the lands, that there was a *bonâ fide* development of the prospect upon the lands, that they were in possession lawfully and legally, and have the right to be protected from the acts of any trespassers; and the trespassers cannot, I say, rely upon any rights of the Crown in reducing the amount of damages caused by reason of the trespasses which they have committed.

As I understand the view of the majority of the Court, each step in this course of reasoning is assented to in the judgment of this Court, and out of deference to that view, it is, I think, my duty to examine the two principal propositions upon which it is based.

1. Were the appellants in possession of the timber *in situ*? It may be noted that there is no suggestion of a possession of the timber *de facto*. Mr. Shilton candidly admits that the appellants had never cut any pine timber. As to possession (he is a member of the Ontario Bar and solicitor on record for the plaintiffs in the Schmidt case), he said that it was "probably a question of law" depending upon the statute and the instruments in evidence. As to possession in law then, let us look at the case of the leased locations first; in respect of which the point has been explicitly decided more than once. Where trees are excepted they are, in the words of *Herlakenden's Case*, 4 Rep. 63b, "severed from the possession of land during the term." In *Liford's Case*, 11 Rep. 50a, it was held that the lessor in such a case "has the young of all birds that breed in the trees." And in *Raymond* v. *Fitch*, 2 C.M. & R. 588, it was held by the Court of Exchequer that a covenant by the lessee not to cut trees excepted from the demise was purely collateral to the land demised for the reason that "the trees being excepted from the demise the covenant not to fell them is the same as if there had been a covenant not to cut down trees upon an adjoining estate of the lessor" (p. 589).

The effect of the decisions is stated by Mr. Leake in the work already referred to [Leake on the Law of Uses and Profits of Land (1888)], at p. 31:—

> A lease of land for life or for years, excepting the trees growing upon the land, leaves the trees in the possession of the lessor, with the right of having them grow in the soil; the trees then are no part of the demised premises, and the fruit or product of the trees presumptively goes with the trees. Consequently the wrongful cutting of the excepted trees by the lessee is technically an act of trespass, being committed upon property which is in the possession of another. But if the lessee wrongfully cut trees included in the lease, it is an act of waste and not a trespass, and the distinction is to be observed in the remedy.

I am unable to understand for what reason, not applicable to the case of the leased locations, the timber on the granted locations could be held to have passed into the possession of the grantees. The possession of the timber, I should have thought, was just as distinct as that of a seam of coal excepted out of a grant. Indeed, it was frankly admitted by Mr. Anglin, who argued the case on behalf of the appellants, that his contention on the subject of possession would logically result in this, that the grantee in fee of land, under a grant containing an exception of the coal, would acquire by virtue of his grant alone, such a possession of any seams of coal as would entitle him to maintain an action against the under-ground trespasser for the full value of the coal taken, even in a case in which the trespass should be literally confined to the coal bed itself. That I should have thought, with great respect to the majority of the Court, who, I understand, accept the contention so advanced, distinctly contrary to all principle. I do not know why the usual rule should not be followed and the scope of the grantee's possession determined by his right of possession: *Low Moor* v. *Stanley Coal Co.*, 34 L.T.N.S. 186.

I do not know why an underground trespasser should, in such a case, be held to be a trespasser as against the owner of the surface, any more than a trespasser on the surface should be held to be a trespasser as against the owner of the coal. Nor, indeed, why in this case a trespasser on the timber should in respect of his acts of trespass on the timber be held to be a trespasser as against the owner of the soil, any more than the trespasser on the soil should be held to be *ipso facto* a wrongdoer against the owner of the timber. In the case of timber the proprietor of the timber as having the right to some extent to exclude the owner of the soil from the occupation of it, in virtue of his right to have the trees grow upon the soil, would seem rather to be in possession of the soil to the extent of the occupation thus involved. Mr. Anglin relied upon two cases: the case of *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405,

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20 Times L.R. 531, and that of *Casselman* v. *Hersey*, 32 U.C.R. 333. The first case involved no question of the possession of a corporeal hereditament and I cannot understand its application to such a case.

As to the second decision. With all respect to the Court that decided it, I am unable to follow the view there expressed and acted upon. It is now, however, suggested, and I understand the majority of the Court to agree although the view was not presented on the argument, that a rule was laid down in *Casselman* v. *Hersey*, 32 U.C.R. 333, which, even if erroneous, has, on the principle of *stare decisis*, become a part of the law of Ontario because that decision has stood unreversed and so far as the reports of decided cases are concerned at all events, unquestioned for a great number of years. I think it is impossible to invoke with any propriety the doctrine of *stare decisis* in connection with this decision. It is a very wholesome rule that where a decision of a superior Court has been acted upon for a great many years so that the rule established by it has regulated the transactions of business men or the practice of conveyancers, or the proceedings of Courts, that the decision, or rather the rule, which has been drawn from it, may properly be treated as constituting a part of the law applicable to such things independently altogether of the question whether or not the decision was originally founded upon satisfactory grounds. That is because in such cases as stated by Thessiger, L.J., in *Pugh* v. *Golden Valley R. Co.*, 15 Ch.D. 330, at p. 334, the rule may "fairly be treated as having passed into the category of established and recognized law." But this is a principle which has no possible application to the point now said to have been established by the case in question. There was no dispute in that case, as there is no dispute here, as to the meaning of the exception in the patent. At p. 340, Mr. Justice Wilson, says:—

> The trees remained, therefore, notwithstanding the grant, the property of the Crown, and they were so at the time of the cutting and removing of them by the defendant.
>
> The right of the Crown to the soil itself on which the trees grew was not excepted; but by reason of the exception, the Crown had the right to the nutriment of the soil sufficient for the growth and preservation of the trees which were excepted.

So far as the reciprocal rights of the Crown and the patentee were concerned, the decision is unquestioned, and is obviously right; nobody on this appeal raises any question with regard to that point. The proposition for which it is now sought to invoke the decision as an authority is that possession of the soil carries with it, *ipso jure*, the possession of the trees, notwithstanding such an exception, to such an extent at all events as to entitle the grantee to sue in trespass for the value of such

trees when cut and carried away by a trespasser. That is a point which obviously has nothing whatever to do with the reciprocal relations between the Crown and the grantee. It is a point which never could arise except in some litigation between the grantee and a trespasser. I see no ground whatever for holding that, on that point, the decision has become part of the Ontario law. It would be really a most extravagant supposition to suppose that the fact of such a point having been determined in favour of the grantee could ever have entered into the calculations of anybody when dealing with lands to which the decision could apply. There is not the slightest evidence that the decision has ever, on this point, been accepted in Ontario. It is not found referred to in any text-book. On the point in question, it is not to be found referred to in any reported case, and to me at all events, there is sufficiently convincing evidence of the fact that it has never regulated or affected transactions generally, from the circumstance that neither the Chief Justice of Ontario, nor my brother Idington, nor Mr. Justice Meredith, appears to have been aware that it has ever had any such operation. Then it is said that the decision involved the construction of the Free Grants and Homesteads Act of that time; that that Act has been re-enacted since with no material variation, and that, consequently, the Legislature must be taken, under a well-known rule of construction, to have adopted and sanctioned the decision. I repeat that the decision in so far as it involved the construction of the exception in the patent and of the statute upon which the exception was based, has no bearing upon any controversy in this appeal. The construction of the statute here is not in dispute. If it be assumed that the construction given to the Act in question in that Court has been adopted (which as I say is not disputed), the appellants have still to make good the contention on the point of possession. It would be stretching the rule relied upon to an extent not, I think, justified by any decision or by any principle, to hold that the adoption of the views expressed in *Casselman* v. *Hersey*, 32 U.C.R. 333, as to the meaning of the exception involved the adoption of the views there expressed on the subject of possession. But the truth is that the rule referred to is one which must always be applied in this country with a great deal of caution. Every one knows that statutes are often consolidated and re-enacted without careful reference by the Legislature, or by the draughtsman of the statutes, to decisions which the Courts may have given upon the construction of the words employed. It was for this reason that, in 1891, the Dominion Parliament passed an Act excluding the rule of construction referred to in the interpretation of Dominion statutes, and that enactment was adopted in 1897 in the Province of Ontario, as one of the provisions in the Inter-

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pretation Act included in the Revised Statutes of that year. These are the relevant sections:—

Sec. 7, sub-sec. 1, is as follows:—

> 7. (1) This section and sections 8 to 12 of this Act and each provision thereof, shall extend and apply to these Revised Statutes of Ontario and to every Act of the Legislature of Ontario, passed after the said Revised Statutes take effect, except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression or clause, is inconsistent with the context, and except in so far as any provision thereof is in any such Act declared not applicable thereto.

And sec. 8, sub-sec. 57, is in these words:—

> 57. The Legislature shall not, by re-enacting an Act or part of an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language.

These provisions obviously govern the construction of the statute in question, which is ch. 36 of the Revised Statutes of 1897, at all events in respect of grants and leases issued under it subsequent to the year 1897.

For these reasons it seems to me to be clear that in felling and carrying away the trees, the respondents, Miller and Dickson, were not, except as to trespasses upon the soil which was vested in the appellants, committing any trespass of which the appellants have any title to complain.

But apart from this, is it really the law of England, as Mr. Anglin contended, and as I understand the majority of the Court to hold, that the doctrine of *The Winkfield*, [1902] P. 42, and of *Glenwood* v. *Phillips*, [1904] A.C. 405, 20 Times L.R. 531, has any application to trespasses in respect of corporeal hereditaments? The rule, as I understand it, is correctly stated in Mayne on Damages, 8th ed., at p. 513:—

> In actions for injury to land, the measure of damages is the diminished value of the property, or of the plaintiff's interest in it, and not the sum which it would take to restore it to its original state. The damages will vary considerably, according to the plaintiff's interest in the land. This is obviously just, both to prevent the plaintiff getting extravagant recompense when his interest is on the point of expiring, or very remote, and to prevent the defendant being forced to pay for the same damage several times over. The same act may give rise to different injuries; the tenant may sue for the injury to his possession, and the landlord for the injury to his reversion. And so where several are entitled to succession as tenants for life, in tail, in fee, each can only recover damages commensurate to the injury done to their respective estates. Hence, where a stranger cuts down trees, the tenant can only recover in respect of the shade, shelter, and fruit, for he was entitled to no more; and so

it is where the occupant is tenant in tail after possibility of issue extinct; but the reversioner or remainder-man will recover the value of the timber itself.

The appellants in this case, as I have pointed out, have deliberately elected not to put forward any claim based upon the extent of the injury to their contingent interest caused by the acts complained of. The claim is based, and the loss has been appraised, upon the assumption that they were entitled to the full value of the timber. The appellants' contention must be rejected for another reason. Both Miller and Dickson and the Eastern Construction Co. became lawfully entitled to deal with the pine timber which had been felled on the locations by reason of the direction given to them by the Crown timber agent at the end of February. The evidence of the Crown timber agent himself is precise upon the point that his direction to Miller and Dickson to remove what had already been cut referred to the timber cut upon the locations as well as to the timber cut upon the Crown lands. The pine was the property of the Crown, and there can be no possible question that the Crown Lands Department would, in the circumstances existing, be acting entirely within its authority as having the management of the Crown forests, in disposing of the timber so felled, after the manner which it deemed to be best in the public interest. The Crown timber agent says, moreover, that he acted in accordance with a settled rule; that he gave the direction with the object of having the ties reach their intended destination. It might, he says, have been a very serious thing to prevent the delivery of the ties. He professed to act with the authority of the Crown Lands Department in what he did; and what he did was afterwards ratified by them. The evidence on this point is undisputed and it is conclusive. The agent reported stating that pine had been cut from the mining locations as well as from Crown lands outside the limits of the Eastern Construction Company's permit. The Department of Crown Lands afterwards directed the inspector to ascertain the quantity of pine timber cut from the locations, and, as I have already mentioned, the Eastern Construction Company was billed for dues for this timber in accordance with the scale in use in respect of timber cut under the authority of a permit, thus treating the timber as timber cut under such authority. It is, therefore, incontestable that from the end of February onward the possession of this timber and of the ties manufactured from it, whether in the Eastern Construction Co. or in the O'Brien firm or in the Dominion Government, was a perfectly lawful possession, and that from that time onward the persons in possession had full authority to deal with it.

Some stress was laid upon the letter of the Deputy Commissioner of the 18th March, but reading that letter in connection

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with the acts of the departmental officials, it is quite clear that the Deputy Commissioner could have intended only to refer to timber to which the appellants were entitled. The letter of Mr. Margach advising the department of the trespasses upon the locations was produced at the trial although not actually put in evidence, and the letter written in November is explicit to the effect that the bill for dues covers the Crown timber taken from the mining locations as well as that taken from lands still vested in the Crown. No other conclusion seems to be possible from the undisputed facts than that at which the Court of Appeal arrived, namely, that from the date of Mr. Margach's instructions to Miller and Dickson to remove the timber cut, the respondents were dealing with all the Crown timber in question under the authority of the Crown Lands Department. To rely on this is not, as Mr. Justice Meredith points out, to set up a *jus tertii*. The respondents are setting up their own rights. It is to be noted, moreover, in this connection, that the facts were brought out in the plaintiffs' own case. Inspector Smith called by the appellants, at p. 64 of the appeal case, says that it was by the instructions of the government that in September he made the count of ties taken from the mining locations, and at p. 73, that instructions were given to Miller and Dickson to remove the ties from the mining locations, and on the same page, that the purpose of the count of ties made by him in September, 1909, was to enable the government dues to be collected. It would be impossible, I should have thought, to sustain in these circumstances the claim for the full value of the timber, even if, in a general way, the decisions referred to could be held to have any application..

Let us take the case of the finder for example. Is it really the law that a trespasser having taken an article from a finder is liable to pay the full value of it to the finder notwithstanding the fact that before action the owner has come into the matter and has authorized the trespasser to keep the article which is the subject of the trespass? Is it conceivable that in such circumstances, unless special damages could be proved as attaching to the trespass itself as distinguished from the detention of the article, that the finder could recover more than nominal damages for the wrong done to his possession? I should have thought it was plain he could not.

Another ground is now suggested which was not suggested at the trial or in the Court of Appeal, or on the argument before us, for sustaining the judgment of the learned trial Judge. It is said that, assuming the appellants had not possession of the trees *in situ*, they came into their possession when they were felled to the ground and that their possession so acquired was sufficient to entitle them to maintain detinue and to recover the full value of the timber as it lay there. To this ground of recovery

the objection to which I have just adverted, namely, that by reason of the act of the Crown officials the respondents became, before the action was brought, entitled as against the appellants to the possession of the timber, seems equally applicable. But it appears to me to involve a very considerable strain upon the principles of English law relating to the subject of possession to hold that the timber in question ever came into the possession of the appellants as chattels. Consider the facts. The trespasses in question began about the first of February. The contractors, Miller and Dickson, proceeded in this way. They cut roads into territory south of Vermilion River, entering the sites of the locations as well as the adjoining Crown lands, and at various places in the vicinity of these roads they started concurrently the felling of timber. As the timber was felled it was manufactured into ties on the spot, and these ties were hauled to the piling stations. In this way they proceeded until the end of February without any interference. There was nobody in the locality or within hundreds of miles of the locality having any authority on behalf of the appellants to interfere with them. The only person in the district having authority to take possession of the timber, the Crown timber agent, confirmed the possession of the contractors when the cutting came to his notice. Throughout the course of the whole proceedings, it has never been suggested on behalf of any of the parties that the respondents had not *de facto* possession of the timber from the time it was felled until it was delivered at the piling stations. It is perfectly obvious from the evidence that they had and must have had as much physical control over the timber as in the circumstances would be necessary to constitute possession in fact. So far from disputing this, counsel for the appellants more than once during the trial emphasized the circumstance that the manufacturing and the hauling of the ties for delivery proceeded contemporaneously with the cutting (see, for example, p. 158). And I have already referred to the observation of Mr. Shilton that the possession upon which the appellants relied was a possession implied by law. The possession relied upon by Mr. Anglin in his argument before us was the possession upon which the learned Judge based his judgment, and upon which the claim was based at the trial, namely, the possession of the trees as they stood upon the soil. It was not suggested that the respondents had not *de facto* possession from the time the trees were felled. It would be necessary, therefore, in order to make good this position, to rest upon some rule of law vesting possession of the felled timber in the holders of the locations solely by reason of their possession, that is to say, their legal possession of the soil upon which the timber fell, as against the *de facto* possession of Miller and Dickson. I do not think there is any such rule of law, and if authority were needed

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for the purpose of negativing such a rule, it may be found in the case of *Bridges* v. *Hawkesworth*, 21 L.J.Q.B., p. 75, in which it was held that a purse found lying on a shop floor in the day time while the shop was open for business, by a customer, was not, while lying there, in the possession of the owner of the shop.

It is suggested, however, that some such rule is deducible from the language of Lord Davey in *Glenwood* v. *Phillips*, [1904] A.C. 405, 20 Times L.R. 531. The circumstances with which Lord Davey was there dealing were these:—Timber had been cut by a trespasser upon Crown lands. Subsequent to the cutting a lease was granted. After the granting of the lease and occupation under it by the lessee, the timber which had been so cut was removed by the trespassers. It was held that the lessee, as lessee and occupier, had a sufficient possession of the timber to entitle him to maintain detinue for the value of it. Of course, in its broad features, the case is immediately differentiated from the present case by the intervention of the Crown Lands Department, and the authority given by the Crown officers to the respondents in this case to deal with the timber before the action was brought. But that is of not much relevancy to the point I am now discussing. In the *Glenwood* case the granting of the lease and the occupation by the lessee under it, had the effect of vesting in the lessee the possession of the lands and a right to the possession at least for the benefit of the Crown of all chattels on the lands to which the Crown had a right of possession at the time of the granting of the lease and which were not intended to be excepted from the lessee's possession. Such chattels came under (to use the phrase of Patteson, J., in *Bridges* v. *Hawkesworth*, 21 L.J.Q.B. 75, the "protection of" the lessee's occupation. The lessee, therefore, clearly acquired a right to the possession of the timber which was felled and was lying within the limits of the demised property. This right of possession alone would be sufficient to entitle the lessee to maintain detinue even against the *de facto* possession of the trespassers, and there is no suggestion in the report of the case that the trespassers had *de facto* possession. In the case before us the trees in question had been expressly excepted from the possession of the appellants, and stood exactly in the same position as, for example, timber felled without authority upon adjoining Crown lands and piled upon ground within the limits of one of the appellants' locations. The argument under consideration logically applied would give a right to the holders of the locations to recover the full value of such timber, notwithstanding subsequent permission from the Crown Lands Department given to the trespasser to appropriate the timber. That is a result which cannot, I think, be fairly deduced from the *Glenwood* case: [*Glenwood* v. *Phillips*, [1904] A.C. 405.]

Thus far I have dealt only with the pine timber, and I have proceeded upon the assumption that the Eastern Construction Co. stand in the same case with Miller and Dickson.

As to the tamarac, there is no ground, so far as I can see, upon which Miller and Dickson can be excused. I am inclined to think that they are not responsible for damages arising from the trespass to the soil so far as such trespass may have been merely incidental to the cutting and carrying away of the pine trees. There is certainly much to be said for the proposition that as an incident of the property in the trees the Crown would have the right to deal with a trespasser in all respects as if the trespass had been committed on Crown lands, and consequently, to waive all wrongful acts incidental to the trespass, in order to claim either the value of the timber cut or compensation for it on the footing of the trespasser having acted under a permit, if the circumstances were such as to entitle the Crown to make the latter claim. In this case the Crown was clearly, I think, entitled to take that position: see the judgment of Bowen, L.J., in *Phillips* v. *Homfray*, 24 Ch. D. 439, at p. 466. The amount involved in this point is, however, trifling.

The Eastern Construction Co., however, with regard to the whole case, stand in a totally different position from that of Miller and Dickson. The learned trial Judge has found that they did not authorize the trespasses, that is to say, that the trespasses were not authorized by anybody who was in a position to bind them. They were held liable on the ground, as he puts it, that they took the ties with a full knowledge of the circumstances in which they had been obtained by Miller and Dickson; that they paid for them in part, and that they sold them. He concludes that by these acts they adopted what Miller and Dickson did and made themselves responsible for it. On this branch of the case I think the learned Judge has fallen into some error in failing to appreciate, in its bearing upon the conduct of the Eastern Construction Co., the fact that all parties from the time Miller and Dickson were stopped cutting by the orders of the Crown timber agent, dealt with the Crown timber and the ties which had been manufactured from Crown timber with the authority of the Crown Lands Department. There is no evidence that before that time the Eastern Construction Co. had done any act which could be construed as an adoption of the wrongful acts of Miller and Dickson. Samuel McDougall, Sr., who, as I have pointed out, was authorized only to count the ties, to classify them, and to submit them for inspection to the government inspector, was aware of the fact that some of these ties had been cut from the appellants' locations. But it is not disputed that the ties from the appellants' locations were mixed up by Miller and Dickson with ties taken from the Crown lands in such a way as to make identification impossible:

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see appellants' factum, p. 2; and as I have pointed out, it is not suggested that Samuel McDougall, Sr., had any knowledge of the cutting of tamarac from the mining locations, that is to say, of the cutting of any timber which was the property of the owners of those locations. McDougall had no authority to do anything on behalf of the Eastern Construction Co. amounting to an adoption of the trespass, any more than he had power to authorize a trespass antecedently. When the responsible officials of the Eastern Construction Co. became aware of the trespass Miller and Dickson had already received authority from the Crown Lands Department to deal with the Crown timber as if it had from the beginning been rightfully in their possession. What was afterwards done in dealing with the timber can fairly be attributed to this authority. It is perfectly true that during the month of April, after the Eastern Construction Co. had become aware of the trespasses, they paid considerable sums of money to Miller and Dickson, but it should be remembered that the timber taken from the locations constituted only about one-sixth of the timber cut by Miller and Dickson. The ties, as I have said, were inextricably mixed and until Inspector Smith made his report nobody was in a position to know the exact extent of the trespass upon the locations. That was not until September. The evidence is perfectly clear that Miller and Dickson at first represented to Mr. Alexander McDougall that the trespass upon the locations was very slight. The appellants themselves were unable to give any sort of accurate information, and it was not until the end of June that they assumed the utterly unreasonable position that none of the ties cut by Miller and Dickson south of Vermilion River should be used in railway construction. It is perfectly clear that when this position was taken by the appellants the Eastern Construction Co. were absolutely entitled under the authority of the permission given by the Crown timber agent to make use of all ties cut from timber owned by the Crown, whether on the locations or off the locations. As to the timber not the property of the Crown, it consisted exclusively of tamarac, and there is no reason for supposing that at this time at all events any of the officers of the Eastern Construction Co. knew that any tamarac had been taken from the locations; and of the tamarac ties cut from the locations, there were fewer than 900 altogether. Notwithstanding all these circumstances, the Eastern Construction Co. did retain a sum almost sufficient to pay Miller and Dickson all that Miller and Dickson would have been entitled to receive from them for the cutting and manufacturing of ties to the number of those manufactured from timber cut from the mining locations.

Some stress was laid upon the circumstance that the Eastern Construction Co. paid the wage bill of Miller and Dickson for work done in trespass on the locations. In paying the wages

bill they simply honoured the cheques issued by Miller and Dickson as they were bound to do under their contract. It is an impossible suggestion that in doing that they were making themselves responsible for everything done by the workmen who were so paid.

The Eastern Construction Co. are responsible for the value of the tamarac ties cut from the appellants' location which were received by them. That is more than covered by the amount paid into Court.

I think the appeal should be dismissed.

Appeal allowed, IDINGTON *and* DUFF, JJ., *dissenting.*

SILVER v. STANDARD GOLD MINES, Ltd.

Quebec Superior Court, Greenshields, J. March 23, 1912.

1. MASTER AND SERVANT (§ I C—10)—ENGINEER ENGAGED AT YEARLY SALARY—CONSTRUCTION OF CONTRACT OF EMPLOYMENT.

An engagement of an engineer at a salary of $3,000 a year payable monthly is a contract for the term of one year and the words "payable monthly" are a mere indication of the manner in which such remuneration is to be paid.

2. DAMAGES (§ III A 5—87)—WRONGFUL DISMISSAL—SEEKING OTHER EMPLOYMENT—ENGINEER—MENIAL WORK.

A professional man (*e.g.*, an engineer with managerial functions) is not obliged to seek for menial work if he cannot find a position equal in importance to that from which he has been dismissed unjustly, and the employer in that event is responsible for the payment of the salary for the entire period of the contract up to the date of its expiry.

3. MASTER AND SERVANT (§ I E—23)—EMPLOYMENT OF ENGINEER—DISCRETION—ENGAGEMENT OF SECRETARY—LIABILITY OF EMPLOYER FOR DISMISSING.

An engineer engaged to superintend or manage a mine is entitled to employ a secretary to look after the routine business, correspondence etc., and generally to use his discretion as to the manner in which he shall discharge his duties, and unless a clear abuse of such discretion is shewn, his employer cannot dismiss him before the term of his engagement.

4. DAMAGES (§ III A 5—87)—WRONGFUL DISMISSAL—OCCUPYING HOUSE OF EMPLOYER—DAMAGES IN LIEU OF EXPENSES OF RENTING HOUSE.

An engineer who is engaged to superintend a mine and who is also as incidental to his employment housed by the company employing him, is also entitled to damages in lieu of housing expenses for the balance of such contract.

ACTION for breach of contract of engagement.

The action was maintained.

Messrs. *S. W. Jacobs,* K.C., and *A. R. Hall,* K.C., for plaintiff.

F. W. Hibbard, K.C., for defendant.

GREENSHIELDS, J.:—Some time previous to the 14th of October, 1910, the company defendant was organized and acquired Greenshields, J.

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certain mining lands situated in the district known as the "Porcupine district," in the Province of Ontario, and having decided to prospect and develop the same, engaged the plaintiff as engineer in charge of the company's mine. This engagement is evidenced by a resolution of the board of directors of the company defendant, which reads as follows:—

> On motion of Mr. Geraghty, seconded by C. G. Walsh, it was resolved that Mr. L. P. Silver be appointed engineer in charge of this company's mine, at a salary of $3,000.00 per year, commencing the first of November, 1910, and payable monthly; travelling expenses to be paid extra. Mr. Silver to devote his entire time and attention to the affairs of the company.

This engagement was accepted by the plaintiff on or about the first of November, 1910, and he entered upon his duties and continued in charge of the property at Porcupine, as engineer, until on or about the 13th day of June, 1911, when he received a telegram from the president of the company, ordering him to report at Montreal without delay. Obeying this telegram, he came to Montreal, and in an interview with the president of the company, shortly after his arrival, he was told to remain in Montreal pending further action by the company. He remained.

Apparently, the company defendant had decided previous to the 28th day of June, 1911, to discharge the plaintiff, inasmuch as at a meeting of the directors held on the last-mentioned date, the following minute appears:—

> The secretary reported that on the advice of the president he had not notified Mr. Silver as to his discharge, pending legal advice on the matter.

No action appears to have been taken until the 21st day of July, when the company defendant instructed its secretary to write the following letter to the plaintiff:—

> I have been instructed by the directors, at a meeting held by them this day, to notify you that your services are no longer required by the company.

The plaintiff received the letter; protested that his discharge was not justified; tendered his services, and on the 3rd of August, 1911, instituted the present action.

Reciting the above facts, and further alleging his impossibility of obtaining employment until the first of November, 1911, the date when his yearly engagement would expire, he concludes for a condemnation against the defendant in the sum of $1,600.00—$1,000.00 being the salary he would have drawn, and $600.00 to cover expenses which he alleges he would be entitled to receive during the four months.

The company defendant disclaims all liability. It admits the engagement of the plaintiff, but denies that he was en-

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gaged for one year. It admits that he purported to enter upon the discharge of his duties as manager on or about the date claimed by the plaintiff, and that he ceased therefrom on or about the first of August, 1911. The other allegations of fact set forth in the plaintiff's statement of claim are denied. Affirmatively, the defendant states that the plaintiff represented himself at the time of the engagement to be a competent and experienced mining engineer and manager, and agreed to give all his time to the company's affairs; that in truth, and in fact, he did not give his entire time and attention to the affairs of the company, but frequently absented himself from the company's works for prolonged periods, during which he was occupied with his own business; that far from being a competent and practical mining engineer and manager, the plaintiff did a great deal of unnecessary and useless work upon the property in the way of sinking shafts, digging trenches, building and like work, at great expense and waste; that instead of overseeing and controlling the work to be done upon the property, the plaintiff insisted in employing one Levinson to do a great part of the work which he should have done, thus entailing a further useless expense upon the company; that, moreover, he employed a large portion of the time of the men, which should have been given to the service of the company, in work that was of no advantage, in building and embellishing and ornamenting a house and grounds for himself at extravagant and useless expenditure; that generally, the plaintiff failed to carry out the terms of his engagement, and the defendant company was justified in his dismissal; that, without being bound or obliged to do so, the defendant, in lieu of notice, offered and tendered to the plaintiff the sum of $250,00, which sum is deposited in Court; and the defendant prays *acte* of its tender and deposit, and further prays for the dismissal of the plaintiff's action, with costs.

By way of answer to the charges made in defendant's plea, emphatic denial is made by the plaintiff, accompanied by an admission that he did represent himself to be a competent engineer, and did agree to give such time and attention to the company's affairs as his position required.

The issues as joined, call for an answer to two questions: (1) Was the plaintiff's engagement, as evidenced by the resolution of the board of directors of the 14th of October, 1910, an engagement for a year? (2) Was the defendant company justified by the proof made in dismissing the plaintiff without notice in the manner and at the time it did?

(1) The resolution on its face purports to engage the plaintiff, and to pay him an annual salary of $3,000.00 per year, and travelling expenses. If the resolution had stopped there, little, if any, difficulty would arise. The defendant's counsel

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insists, however, that the additional words found in the resolution, "payable monthly," constitute a monthly engagement, giving rise to the right of dismissal without cause, upon one month's notice.

I cannot follow the company defendant's counsel in thus interpreting the resolution. I find that the resolution engaged the services of the plaintiff for a fixed and determined period, viz., for one year, commencing on the first day of November, 1910, and terminating on the first day of November, 1911, and that the addition of the words "payable monthly," in no way changed the term of the engagement, but was a mere indication of the manner in which and dates upon which his salary or remuneration should be paid.

I, therefore, answer the first question in the affirmative, and declare the plaintiff's engagement to be a yearly engagement, terminating on the first day of November, 1911, and only terminable by the defendant at an earlier date for just cause. (See *McGreevy* v. *Harbour Commissioners of Quebec*, 7 Que. Q.B. 17; *Turnpike Trust* v. *Rielle*, M.L.R. 6 Q.B., p. 53.)

(2) As to the second question: Involving as the decision of this question does, a judgment upon the skill and experience in, the devotion, diligence and honest application to the work entrusted to the plaintiff by the defendant, and by the plaintiff accepted, all the circumstances surrounding the same should be given careful consideration.

The company defendant, like many others, in the hope of securing a valuable gold mine—a hope in the case of the defendant probably more or less justified by a previous examination of the locality—acquired a tract of mining land in what was at least considered a gold mining district. It could be inferred from the evidence, that some work had previously been done upon the property, but to what extent is far from clear.

The venture was purely speculative, and apart from certain well-defined lines upon which prospecting and developing work proceeds, the whole might be characterised as a "venture in the dark." What might be considered by many as a valuable gold mine, might prove to be in mining parlance, only a "pocket," and like all pockets, subject to rapid depletion.

Manifestly, the plaintiff cannot be blamed for not finding gold where none was, but might be blamed if, in the face of well-known established rules, known, or which ought to be known, to practical engineers, and without taking proper means to justify expenditure, he proceeded to the useless and wasteful expenditure of the company's money. In other words, if the proof is convincing that as an engineer in full charge he proceeded to expend large sums of money without reasonable ground or hope of paying results, I am of the opinion, that the term of his operations could be stopped without exposing his employers to an action in damages.

The charges brought against the plaintiff and sought to be established by the company defendant at the trial, may be summarized under the following heads:—

A. Not giving his entire time and attention to the affairs of the company, but frequently absenting himself from the mine and works for prolonged periods and occupying himself with his own affairs;

B. Not being a competent and practical mining engineer and manager, and doing a great deal of unnecessary and useless work upon the said property by way of sinking shafts, digging trenches, building, and like work;

C. Employing one Levinson to do a great part of the work which the plaintiff himself should have undertaken, thus increasing the defendant's expenses;

D. Employing a large portion of the time of the men while in the service of the company in work of no advantage to the company, particularly in sinking shafts, digging trenches, building, and particularly embellishing a house for his own occupation with unnecessary furnishing and fittings, ornamental grounds, etc.

I proceed to consider these charges in the light of the proof made in the order above given:—

A. There is not, in my opinion, a tittle of proof to justify this charge as laid in the defendant's plea. There is no proof that plaintiff absented himself for any prolonged periods from the mines and works of the company defendant, occupying his time, when absent, on his own affairs. On the contrary, the proof establishes that his absences from the works were due to his being called by the company defendant to Montreal for the purpose of reporting to the directors, or in other business of the company.

There is a statement made by the witness, Beidleman, who was sent by the company to report upon the mine, and upon the plaintiff's mode of conducting the operations—made in a general way—that the plaintiff during the few days Beidleman was there, was in the habit of getting up at eight, nine and even ten o'clock in the morning. As against this, there is the proof that the men were working in two shifts, a day and a night shift, and the plaintiff was under the necessity sometimes of spending the greater part of the night upon the works.

I am satisfied the company have no grounds of complaint under this head.

B. So far as the present case is concerned, the answer to the latter part of the charge contained in this paragraph would decide the first. Little proof has been made as to the general experience or competency of the plaintiff; the proof being confined to the work done by him upon this particular property.

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It is urged by the defendant that a shaft, known as shaft No. 2, was ill advisedly made, and was useless to the company defendant. Fault is also found with the trenching done, and with the manner in which a building, viz., the power house, is constructed. The other building, viz., the house erected by the plaintiff for himself, is covered by another paragraph.

As to the shaft, the proof shews that it was sunk to a distance of 84 feet when the plaintiff was dismissed. The witness Beidleman says that the shaft was sunk without preliminary work to justify its sinking; diamond drilling should have been done; and generally, the witness, employed by the defendant company to report upon the work, condemns it as useless, and a useless waste of money. The plaintiff on the other hand, by a written report to the directors, and by his testimony in the box, seeks to justify the sinking of the shaft. His general plan of development seems to have been to sink a shaft to a 100 foot level, and then to diamond drill perpendicularly from the bottom of the shaft 100 feet, and to side drill from the four sides of the shaft at a distance of 400 feet or 100 feet in each direction. His plan was communicated to the directors, and the directors, if not formally approving of the plan, at least sanctioned it. At no time previous to the dismissal of the plaintiff did they complain of the plan, but complaint was made by the president that the work was progressing or proceeding too slowly. The plaintiff gives his reason in detail for sinking the shaft and offers serious justification for the same.

It cannot be doubted that the plaintiff acted in good faith in the matter, and hoped to realize his expectations, and in like manner, there is no doubt that had his expectations been realized congratulations instead of complaints would have been the order of the day. One thing is certain, that he was not allowed to carry out his plan; in other words, his dismissal arrived before his plan was completed.

The engineer, Beidleman, differs in opinion from the plaintiff. It cannot be said that Beidleman's experience or his training was greater or better than the plaintiff's, and it can be readily understood, that engineers dealing with an undeveloped property, and an unknown quantity, may greatly and honestly differ in their plan in searching for gold.

Beidleman's report is dated the 21st of June, 1911, and he condemns the whole proposition or property as being worthless as a gold mine.

Another engineer, Tyrell, was employed by the defendant company to make an examination of the property and report upon the same and upon the work of the plaintiff. Tyrell's report is filed. He is not examined as a witness.

Tyrell gives no glowing report upon the value of the property, but he does say in his report that the prospecting and

developing work has been fairly well done. This goes far in aid of the plaintiff's position.

It should also be observed here, that the shaft, since the resuming of the work by the company defendant, work which they are now carrying on, apparently with some success, notwithstanding Beidleman's condemnation, has been used in side trenching from it.

It is difficult in the extreme to conclude from the proof that the sinking of this shaft was evidence of the plaintiff's incapacity, lack of experience and skill, sufficient to justify his dismissal.

A delay occurred in the diamond drilling, which the plaintiff has explained. These delays are bound to occur in a mining district such as this, and I do not think it is a sufficient reason to condemn the plaintiff or his work. The defendant company was well aware of the delay in the diamond drilling, and suggested making a change in the contractor for the same, and in the late spring of 1911, the plaintiff suggested that the defendant company should proceed to close a contract with another company to do the diamond drilling.

As to the trenching complained of, the only proof offered in support of this is the statement to be found in the report of the witness Beidleman who says that the trenching seems to have been done without any system, and in his testimony before the Court he adds that in one instance a trench one hundred feet long was ten feet wide, whereas two feet would have been sufficient width, and he states that this would involve an extra cost of $200.00, which he considers useless.

The plaintiff answers this by saying that, owing to the topography of the locality, trenching could not be done upon any definite and laid out system and appear on a map or plan as being made as it were in straight lines. The plaintiff's idea in this was to follow the rising rocks and avoid the shallow places.

It is impossible to condemn the plaintiff's work on this head under the proof made, and particularly when the witness, Beidleman, anxious enough to find fault, can find an unnecessary expenditure only of $200. It is a small expenditure compared with the total sum expended (*de minimus non curat lex*).

Tyrell makes a general statement, which covers trenching, that the work was very well done.

There remains the complaint of faulty construction of building, which in this paragraph must refer only to the power house.

The only fault found by Beidleman with the construction of the power house is that the roof slants towards the shaft, thereby directing the water flow towards the shaft, which would increase the accumulation of water in it. There is proof that between the water-flow from the roof of the power house and the opening of the shaft, there is a rising ground. In any

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event, Beidleman admits that at trifling expense the water flow from the roof, which at the most is very limited, the roof being only 12 by 16, could be directed, after reaching the ground, away from the shaft's opening.

I am entirely against the defendant on this particular heading.

C. During the course of the plaintiff's employment, he engaged the services of a young man named Levinson, at a salary of $15.00 per week. Levinson's duties seem to have been to do stenography, and use the typewriter for correspondence; keep track of all stores and generally to do clerical work. He states that his time was fully occupied. The correspondence between the plaintiff and the company's president was fairly active. Reports were directed to be made each Sunday. The company defendant never seriously objected to the employment of Levinson, and if it was a mistake on the part of the plaintiff, it was certainly a mistake that was approved of by the plaintiff's successor and successors in office, as Levinson continued in the employ of the company defendant, performing the same duties, after the plaintiff's dismissal. I should hesitate to find that an engineer in charge, or manager as he is called by the defendant company in its plea, would not have the power to employ a clerk to do the clerical work, unless, indeed, I was convinced that it was a mere subterfuge on the part of the plaintiff to escape work which he should have done and had plenty of time to do.

Again I conclude against the defendant company on this head.

D. The question of the shaft and the trenching I have already dealt with. There remains only the bitter complaint of the defendant company as to the house constructed by the plaintiff, its furnishing, and what the defendant company calls, "its embellishment and the ornamentation of the grounds surrounding it."

That the company defendant understood that the plaintiff and his family had to be housed is clear. The company was aware that the house was being built, and was informed of the fact that the total cost of the house itself was $540.00, and its furnishing would bring the total cost up to about $1,000.00. The company defendant was advised of this cost, and upon receiving this information caused insurance to be placed on the house and furniture to the extent of $1,000.00, which sum, it may be remarked was subsequently collected by the company, the house and furnishing having been destroyed by fire.

At the time the defendant company was informed of the cost of the house and furnishing no complaint was made.

I cannot find that the plaintiff was extravagant or reckless in the expenditure of this amount, nor do I believe that the

defendant company ever intended to object to it until called upon to defend the present action.

As to the grounds or garden in front of the house, the plaintiff, apparently, made an attempt to change a wilderness into a garden of flowers.

There is no proof of any serious expenditure of money, and I cannot condemn the plaintiff's act in this respect.

Upon the whole I rule in favour of the plaintiff and answer the second question, and all the sub-paragraphs thereof in the negative, and find the defendant company has failed to prove a just cause for its act of the 21st of July, 1911, in dismissing, without notice, the plaintiff.

There remains only to assess the damages. Had the contract been carried out by the defendant company, the plaintiff would have received by way of salary, $1,000.00. He positively states under oath that he made endeavours to secure employment, but was unable to do so, and, as a matter of fact, earned nothing during the four months for which he claims damages. An attempt was made by the company defendant to establish that the plaintiff could have obtained employment during that time. This attempt was made in the examination of the witness Beidleman. The net result of his testimony upon this point is, that he thought a first-class engineer could obtain employment but that the supply was greater than the demand. If the company defendant saw fit to dismiss the plaintiff without cause, it took its chance that the plaintiff would be unable to obtain employment elsewhere, and incurred a liability to reimburse the plaintiff for the loss. I cannot conclude from the record other than that the plaintiff did endeavour to get work and failed, and thereby lost what he would have received under his contract. A person educated and fitted for a profession is not, in law, bound to accept menial work in order to lessen a liability for an unjustified dismissal.

I award the plaintiff the full sum of $1,000.00 for loss of salary. As to the remaining $600.00 claimed by the plaintiff, in addition to the grounds already covered, his right to the same is seriously contested by the defendant. Says the defendant, "You are only entitled to out-of-pocket travelling expenses." The plaintiff answers: "I was entitled to, and as a matter of fact, did, during the period of time I was in the services of the defendant, receive from the defendant a free house and the up-keep of myself and family." I have no doubt that if the plaintiff had not been dismissed he would have continued to live with his family in the house erected for that purpose, and his family and himself would have lived at the expense of the company, free of all expense to himself.

I am of opinion that the claim of the plaintiff is excessive when placed at $600.00. I should have liked more assistance

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from the proof on this head. It is somewhat meagre and unsatisfactory, but the plaintiff is certainly entitled to some compensation, and I fix the same at the sum of $350.00.

Judgment will go in favour of the plaintiff for the sum of $1,350.00, with interest on $250.00 from the first of August, 1911; on $250.00 from the first of September, 1911; on $250.00 from the first of October, 1911; on $250.00 from the first of November, 1911, and interest on $350.00 from the date of service of process, and costs.

Judgment for plaintiff.

N.B.—An appeal has been taken to the Court of Review.

REX v. MANCONI.

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Quebec King's Bench (Appeal Side) Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. March 30, 1912.

1. NEW TRIAL (§ IV—31)—NEWLY DISCOVERED EVIDENCE—REFUSAL TO RECALL JURY.

When new facts of an essential nature have been discovered by the defence in a criminal trial before verdict rendered, even after the Judge has charged the jury and the jury has retired to deliberate, the jury should be recalled to hear this additional evidence, and a new trial will be granted where the jury has not been allowed to hear such additional evidence.

2. APPEAL (§ I C—25)—CRIMINAL CASES—NEWLY DISCOVERED EVIDENCE—PRACTICE.

A Court of criminal appeal has the right to order a new trial when new evidence discovered before the rendering of the verdict is not allowed to be placed before the jury. After verdict rendered, however, only the Minister of Justice could order a new trial.

Statement

MOTION for a new trial after a verdict of manslaughter.

The motion was granted.

Alban Germain, for the prisoner.

J. C. Walsh, K.C., for the Crown.

The opinion of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—This is a motion for a new trial. The prisoner was placed on trial on an indictment for murder committed on November 11, 1911, on the person of one Santini. He was found guilty of manslaughter.

After the jury had retired and whilst they were deliberating, counsel for the prisoner learned that two witnesses that had not been heard and had been present at the affray were in the possession of very important facts unknown to counsel and to the jury, when these retired to deliberate. The Judge presiding at the trial was immediately informed of this, and application made to have the jury recalled and the witnesses heard. The Judge replied that it was too late for him to do anything as the case was in the hands of the jury.

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As I said, the jury brought in a verdict of manslaughter. The prisoner then moved for a new trial and Mr. Justice Lavergne allowed him to lay this motion before the full Bench.

In this motion the prisoner alleges that, after the charge of Mr. Justice Lavergne and whilst the petty jury was deliberating on the verdict to be rendered, the accused for the first time learned of the existence of two eye-witnesses of the tragedy at which accused was charged with having committed the offence for which he was on trial, to wit, Alfred Maréchal and Georges Maréchal; that the evidence of these witnesses was of such a nature as to modify the verdict of the jury, and induce them to bring in a verdict of not guilty; and that counsel for prisoner immediately acquainted the Court with these facts and requested that the witnesses be heard at a new trial.

The motion is supported by the affidavit of Mr. Alban Germain, counsel for the accused, who declares that he only learned of the existence of these two witnesses after the Judge had charged the jury.

The motion is also supported by the sworn declarations of the two witnesses in question.

Alfred Maréchal declares that he lives in the rear of the yard where the tragedy occurred on November 11, 1911; that he saw, that evening, a man fire a revolver shot at another. After the first shot the combatants went towards St. James street. He followed them, and, just before arriving at St. James street, he heard two other revolver shots, but cannot say who fired them. Arriving on St. James street he saw three men, two of whom were running away towards a lane, and the third in another direction, which he doesn't remember.

He adds that when he saw Manconi in Court it was for the first time that he saw him, and that the prisoner is not the person he saw firing a revolver on November 11th.

Georges Maréchal declares that on the evening of this tragedy he heard revolver shots and went out of his dwelling, which is next to that of Alfred Maréchal. He saw a man striking another with a knife and then run away; and he adds that Manconi, whom he saw in Court, is not the man who struck with the knife.

Annexed to the motion is a declaration signed by eleven of the petty jurymen who rendered a verdict against Manconi to the effect that they have taken communication of the affidavits of Alfred Maréchal and Georges Maréchal and that had the facts mentioned therein been laid before them at the trial they would have been of a nature to modify their verdict.

Finally, Mr. Justice Lavergne has made a report containing an analysis of the evidence adduced at the trial and of the procedure followed. He ends his report by stating that the evidence offered would probably have had an influence on the

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opinion of the jury and that he would have granted a new trial if he had been of opinion he had jurisdiction to do so. This report also mentions the fact that counsel for the accused drew the Court's attention to the discovery of new evidence before verdict rendered and during the deliberations and prayed for a new trial.

The motion for a new trial now submitted to us was presented to Mr. Justice Lavergne immediately after the verdict had been rendered and the Judge has practically referred the same to this Court for adjudication.

Under the circumstances we are of opinion that we can grant a new trial and that we ought to grant it.

Were the demand based on new evidence discovered since the rendering of the verdict, I, for one, am of opinion that we could not intervene. Only the Minister of Justice would have this power. But in the present case the new evidence was discovered before the end of the trial, before verdict, and we are of opinion that the trial Judge had the power and the right to call back the jury in order to hear the new witnesses.

We, therefore, treat the question as a sort of reserved case submitted to us by the trial Judge, and applying the dispositions of art. 1018 of the Criminal Code, which says that the Court of Appeal may order in such a case a new trial or render any other order as justice may require, we believe that the ends of justice require a new trial, and, therefore, we grant the motion of petitioner.

New trial ordered.

BRAZER v. J. ELKIN AND CO. LTD.

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Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll and Gervais, JJ. March 30, 1912.

1. APPEAL (§ III B—76)—STAY OF PROCEEDINGS—JUDGMENT FORFEITING GUARANTEE DEPOSIT—OPTION.

Where a defendant by its plea and cross-demand gives to plaintiffs the option of resuming work within fifteen days after judgment to be rendered and the judgment does order plaintiffs thereupon to resume work within a stipulated delay, failing which a deposit made by plaintiffs will be forfeited and defendant appeals from such judgment on another point, this fact does not prevent plaintiffs from tendering their services within such delay and if they fail to do so and await the decision of the appellate Court they will be too late to avail themselves of this offer and the deposit will be forfeited.

2. JUDGMENT (§ II A—60)—RES JUDICATA—AWARDING DAMAGES WITHOUT DIRECTION AS TO PAYMENT—SUBSEQUENT ACTION.

Where a judgment finds that a party (*e.g.*, plaintiffs) has caused to another damages in a given amount this judgment has the authority of a final judgment *res judicata*, even though it does not condemn such party to pay such amount; and in a subsequent action the production of the first judgment is sufficient proof of the amount of damages suffered either as set-off or as direct action; nor can such judgment in a previous action be attacked or enquired into for alleged irregularities in procedure or insufficiency of proof.

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Statement

APPEAL from a judgment of the Superior Court for the district of Montreal, Lafontaine, J., rendered on June 26th, 1912, dismissing with costs plaintiffs' action for the recovery of a deposit of $500 left as guarantee with company defendant.

The appeal was dismissed with costs.

The facts of the case were as follows:—

On July 18th, 1907, plaintiffs and respondent company entered into the following contract:—

This agreement made this 18th day of July, 1907.

Between Messrs. Brazer & Goldstein, of the city of Montreal, in the county of Hochelaga of the first part, and J. Elkin & Company, Ltd., of the second part.

Whereas the party of the first part agrees and binds himself to make up for the party of the second part, Men's Double and Single Breasted Sack Coats at the following prices, viz.: A1 at 90 cents; No. 1 at 75 cents; No. 2 at 65 cents; No. 3 at 55 cents; No. 4 at 45 cents.

Also Men's Overcoats and Rainproof Coats at the following prices, viz.: No. 1, at $1.10; No. 2, at 90 cents; No. 3, at 75 cents, and for silk facing overcoats, $1.25 and $1.50 each.

The party of the second part agrees and binds himself to supply the party of the first part with the use of sewing machines, power, floor space, etc., for the purpose of the carrying out of this contract, in the premises of the party of the second part, being situated at No. 427 St. James street, Montreal, for which use the party of the first part agrees and binds himself to pay to the party of the second part three per cent. of the dollar value of work done, as a royalty for the use of the machines, power, floor space, etc.

The party of the first part agrees and binds himself to make all the work that the party of the second part may require and all the work must be made to the entire content of the party of the second part.

The party of the second part agrees and binds himself to pay for goods made up for him by the party of the first part every Wednesday, after said goods have been checked, examined and accepted.

The party of the first part will deposit in the hands of the party of the second part five hundred dollars ($500.00) to guarantee fulfilment of this present contract which is furthermore made for the period of one year from the first of August, 1907.

The party of the second part agrees and binds himself to pay the party of the first part fifteen cents more on sample coats made of tweed, and twenty-five cents more on sample coats made of serge.

J. ELKIN & CO. LTD.,
A. M. Jones.

On November 13th, 1907, Brazer & Goldstein brought suit to have this contract annulled on the ground that they had not been given the amount of work promised and prayed for the return of the deposit of $500, and for a condemnation in damages of $400. Plaintiffs also claimed $68 for salary due.

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J. Elkin & Co. pleaded, admitting they owed $51.74 for work done and deposited this amount in Court, and denied they had failed to carry out their part of the contract in any respect; they affirmatively set up that plaintiffs had never fulfilled their contract and concluded their plea—which, later, was on application to the Court at the trial converted into a cross-demand—as follows:—

> WHEREFORE defendants, hereby renewing the tender already made by them to plaintiffs of the sum of $51.74, and depositing same in Court, though not bound to do so, plaintiffs still retaining the receipts and coupons above referred to, pray that their tender and deposit be declared sufficient; and defendants hereby renewing their offer to plaintiffs to at once resume the obligations which plaintiffs assumed in virtue of the contract in writing passed between the parties, and declaring their willingness to allow plaintiffs to resume such work, though defendants are no longer bound to do so, pray *acte* of their willingness to so allow plaintiffs to continue the execution of such contract; but in case plaintiffs refuse to resume such work and fulfil the conditions undertaken by them in virtue of the contract in question, within such delay as this Court may fix, defendants demand that the contract passed between the parties be cancelled and set aside, on account of plaintiffs' refusal to fulfil the terms thereof, and defendants further ask that in that event the said sum of $500.00 deposited with them by plaintiffs to guarantee the fulfilment of their contract with defendants, be declared forfeited and that defendants be entitled to retain such sum of $500.00, as well under the terms of the contract passed between the parties as in payment of liquidated damages sustained by defendants on account of plaintiffs' refusal to fulfil such contract; and that in any event plaintiffs' action be declared unfounded, and be dismissed with costs.

On May 4th, 1908, after a lengthy trial, Mr. Justice Charbonneau rendered judgment as follows: he found that plaintiffs were entitled to $51.74 for work done and not paid for, and condemned the company-defendant to pay this amount with costs of an action of this class and dismissed the action as to the surplus; on defendant's cross-demand he found that plaintiffs had failed to carry out their contract without legal cause, that they had caused damages to cross-plaintiff in the sum of $853.53, and ordered them to return to work within fifteen days from the judgment, failing which the contract would stand as resiliated and the company authorized to keep as its own property as damages the deposit of five hundred dollars.

On May 12th, 1908, both parties inscribed in Review from this judgment of Mr. Justice Charbonneau.

On May 28th, 1909, the Court of Review (Pagnuelo, Dunlop and Demers, JJ.) unanimously confirmed the judgment of the Court below in all respects: (reported in Quebec Reports, 37 S.C. 154).

Thereupon, on June 12th, 1909, the plaintiffs called on the J. Elkin Co., Ltd., and offered to resume work as per their con-

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tract of July 18th, 1907, for a time corresponding to the time which was unexpired at the date of the first judgment on May 4th, 1908. The president of the company declined their offer as being too late.

Plaintiffs subsequently on two occasions moved for the return of their deposit, but their motions were dismissed on grounds of procedure.

Finally, on December 16th, 1909, plaintiffs brought their present action, praying that it be declared that the condition imposed by the judgment of May 4th, 1908, confirmed by the Court of Review, be declared to have lapsed and to be of no effect as a result of defendant's inscription in Review, and that the company be condemned and ordered to return to plaintiffs the deposit of five hundred dollars.

Statement.

The company pleaded that the aforesaid judgments were final and were *res judicata*, that plaintiffs had failed to comply with the terms of the judgment of May 4th, 1908, that it was entitled to retain this deposit on account of the damages suffered, and finally if it owed this amount of $500 the same was more than compensated by the amount of $853.53, which it was entitled to set off against it.

On June 28th, 1911, the Superior Court, Lafontaine, J., rendered judgment, maintaining defendant's plea of compensation and dismissing plaintiffs' action holding, however, that there was no *chose jugée* (*res judicata*) in the judgment of Mr. Justice Charbonneau as regards the deposit inasmuch as neither of the parties had acquiesced therein as evidenced by the two inscriptions in Review.

From this judgment plaintiffs appealed to the Court of King's Bench. Argument at the January term, 1912, before Trenholme, Lavergne, Cross, Carroll and Gervais, JJ.

Argument.

Messrs. *E. Pélissier*, K.C., and *G. Lamothe*, K.C., for plaintiffs-appellants:—In the original action the trial Judge should not have allowed defendant-respondent's plea to be converted into a cross-demand as the position of the parties was entirely changed thereby. Plaintiffs should at least have been allowed to file an answer thereto: C.P. 204. Nor can this judgment have the authority of a final judgment between the parties as dedefendant by its cross-demand did not pray that appellants be condemned to pay $853.53. Otherwise the judgment of May 4th, 1908, would have adjudged *ultra petita*, beyond the conclusions prayed for. This finding on the question of damages can, therefore, only be a motive (*motif*) of judgment and the authority of final judgment attaches to the *dispositif* only. This view of the situation has been, moreover, accepted by the Judge *a quo*. In the absence of *chose jugée* plaintiffs' action herein should have been maintained as the only proof adduced by defendant-respondent is that appellants did not pay it the

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sum of $853. Nor is the original judgment of May 4th, 1908, susceptible of execution; no writ of execution could have been issued thereunder. And, besides, by inscribing in Review therefrom, respondent prevented the execution of the condition by appellants and, therefore, C.C. 1084 comes into play. Had appellants on May 4th, 1908, resumed their work and this until the expiry of their contract, they certainly would have been entitled to recover their deposit. They were prevented from so doing. The condemnation of May 4th, 1908, constitutes a judicial obligation with a penal clause and this penalty can only be exacted when the debtor is in default and, in any case, when nothing prevents the fulfilment of the principal obligation, C.C. 1131 and *seq.* It should also be noted that plaintiffs in their first action succeeded for part of their claim and on this account, no doubt, the trial Judge did not condemn them in damages.

G. C. Papineau-Couture (*E. F. Surveyer*, K.C., with him), counsel for respondent-company:—Appellants cannot now appeal from the two judgments in a former case. All the objections against Mr. Justice Charbonneau's judgment were submitted then to the Court of Review and the confirmation of the said judgment must set at rest forever all questions relating to its merits or demerits. The respondent did not illegally defeat and prevent the fulfilment of the conditional obligation which it had assumed by its cross-demand in the first action so as to fall under the application of C.C. 1084; it merely exercised, by its inscription in Review, an undoubted right recognized by law and can in no way be found to have acted illegally: Pothier, Obligations, No. 212; Aubry and Rau, vol. 4, p. 70; 17 Laurent, No. 76; *Fuzier-Herman*, C.N. 1178, Nos. 1 and 2; Pandectes Francaises, Vo. Obligations, Nos. 1218, 1221; 5 Mignault, p. 442. And the fact of respondent's inscription in Review in no way prevented appellants from resuming work as prayed for by respondent itself. Nor is the clause in the contract a penal clause; it is merely a guarantee clause: *Finnie* v. *City of Montreal*, 32 Can. S.C.R. 335. Respondent can still claim for the remainder due on account of damages. The judgments in the previous case constitute *res judicata*, being between the same parties and on the same cause and for the same object as the present suit. Appellants are now asking the Court to contradict the judgment in the former case: Langelier, De la Preuve, Nos. 185, 197, 198, 168, 169, 209. It is not necessary that there be absolute identity between the two demands. A judgment dismissing the demand for a whole claim is *chose jugée* against the demand for part or fraction of the same thing. The whole judgment must be examined to arrive at its true purport: *Stevenson* v. *City of Montreal and White*, Que. 6 Q.B. 107, confirmed by the Supreme Court (27 Can. S.C.R. 593). As to com-

pensation or set-off the Code is clear: C.C. 1188, 1190, C.P. 217; 5 Mignault, p. 654. See also Cassation, Oct. 18th, 1887 (*Pand. Fr.*, Vo. Oblig., No. 5754). The appeal must fail.

Lamothe, in reply.

March 30, 1912. The unanimous judgment of the Court was delivered by

TRENHOLME, J.:—This is an appeal from a judgment of the Superior Court dismissing the plaintiffs' action under the following circumstances.

In July, 1907, the appellants, who were working tailors it appears, entered into a partnership agreement with the company-respondent to make for the company-respondent all the clothing that it required during the period of one year from the first of August, 1907, to the first of August, 1908.

After a few months the appellants, the working tailors, became dissatisfied, and brought an action against the present respondents for damages and to recover a sum of $500, which they had been obliged to deposit as security at the time they entered into this contract. This action was met by the respondent-company, and also an incidental cross-demand was put in by the company-respondent, *i.e.*, the plea was converted into a cross-demand by which it claimed damages resulting from appellants' failure to carry out their contract, and loss of trade in consequence.

The case went to trial in the Superior Court and Mr. Justice Charbonneau gave judgment against the appellants in this sense: he held that the appellants were bound to carry out their contract, had failed to do so, and that the appellants were not entitled to get back the $500, but that respondents were entitled to claim it on account of damages suffered to a greater extent.

That judgment also contained a disposition of this kind. The respondents in their plea had offered to allow the appellants, even then, to carry out the contract. The respondents expressed their willingness that the appellants should proceed then and there with their contract and carry it out, and this was embodied in the judgment. The judgment, therefore, was one refusing the deposit to the appellants, finding that they had caused damage to a much greater extent than the deposit to the respondents; and acting upon the declaration of respondents, that it was prepared to allow the appellants to carry out their contract within fifteen days from the judgment, ordered appellants to resume their work. Otherwise the action stood dismissed, and appellants stood declared to be indebted to the respondent in over $800, and stood under a condemnation of losing their deposit, which had been absorbed by the damages they had caused.

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Trenholme, J.

Both parties went to Review, and the Court of Review, after a year from the time of the inscription, confirmed the judgment in all its phases.

After the judgment was confirmed, appellants tried by motion before the Superior Court to get their deposit back. They were refused in two instances by the Superior Court and, under these circumstances, they took their present action to recover their deposit, and to the present action respondent says: "We have got it established, by judgment of the Superior Court and finally by the Court of Review, that you are not entitled to get your deposit back."

Now, this is the case. There is a judgment declaring they are not entitled to get their deposit back. This has been confirmed by the Court of Review, and more than that, the judgment declares that the appellants are indebted in a sum exceeding the amount of the deposit, in a sum over $800, and in face of that fact this action is taken. These judgments of the Superior Court and of the Court of Review are ignored, and it is sought to go by these and have the present respondents condemned to refund the five hundred dollars. We say it cannot be done. We say that the judgment of the Superior Court confirmed by that of the Court of Review establishes the fact that the appellants are not entitled to get back their deposit, and that they are liable to have the deposit absorbed for the damages they have caused. This judgment has not been reversed. It stands there.

It is claimed that the inscription by the respondents in Review prevented the appellants from tendering their services and carrying out the option which the Court gave them of finishing their contract. Not at all; the respondents had nothing to do with it. It was for the appellants, if they wanted to carry out their contract, to at once, within fifteen days, tender their services and offer to carry out their contract. They did nothing of the kind. They went to Review. Whether the other party went to Review or not, they could not take advantage of that, unless they made the offer within the fifteen days prescribed by the judgment. They did not do it and, therefore, that condition was a nullity; it could not be carried out. A year had gone by before the judgment in Review was given, and it was impossible to carry out that option of executing the contract and, therefore, the judgment stands as given by Mr. Justice Charbonneau, confirmed by the Court of Review, that the present appellants are not entitled to get their deposit back, it being absorbed by eight hundred odd dollars in damages. The appeal is, therefore, dismissed, with costs.

Appeal dismissed.

BINGHAM v. SHUMATE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 1, 1912.

B.C.

C.A.

1912

April 1.

1. TRUSTS (§ II B—48)—POWER OF SALE BY TRUSTEE WITHOUT REFERENCE TO CESTUI QUE TRUST.

Where a power expressly confers upon a trustee the right and privilege of selling upon certain terms the timber licenses held by him in trust without reference to the *cestuis que trustent*, the trustee, upon making a sale thereof within the terms of the power, can execute the necessary documents of sale without the *cestuis que trustent* joining as concurring parties.

2. TRUSTS (§ II B—48)—RIGHTS OF TRUSTEE TO CONVEY UNDER ABSOLUTE POWER OF SALE—TRUSTEE DEMANDING CONCURRENCE OF BENEFICIARIES.

Where an absolute power of sale and of transfer is formally conferred upon a trustee with a fixed limitation as to price and terms and the power is expressed to be exercisable without reference to the *cestuis que trustent*, the Court will not require the latter to join in the formal transfer of a sale by the trustee in terms of the power, where counterclaimed by him in an unsuccessful action brought against him by the *cestuis que trustent* charging him with fraud in connection with the trust agreement.

3. TRUSTS (§ II A—43)—REMOVAL OF A TRUSTEE—PLEADINGS.

The question of the removal of a trustee from his trust will not be considered in an appellate Court when not raised either by the pleadings or notice of appeal in an action brought against him by the *cestuis que trustent* where the charges of fraud and misrepresentation made against him are dismissed.

Statement

AN appeal from the judgment of Morrison, J., at the trial dismissing plaintiff's action, and on the defendant's counterclaim, directing that the plaintiff execute all documents necessary to enable defendant to carry out the sale.

The judgment of the trial Judge was varied.

H. A. Maclean, K.C., for appellant.

E. V. Bodwell, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The trial Judge has negatived the fraud or misrepresentation charged by the plaintiff against the defendants in connection with the trust agreement. In this I think he was right, but I think he was in error in finding in defendant Shumate's favour on his counterclaim.

By the contract of 24th October, 1907, which declared the rights and interests of the parties in the subject matter of this action, it was agreed that defendant Shumate should have the right and privilege of selling the timber licenses mentioned in the pleadings without reference to his associates and *cestuis que trustent*, provided he did so on the terms specified in the agreement. By his counterclaim alleging that he had made a sale to Messrs. Fields in accordance with said power, defendant Shumate asked that the plaintiffs be ordered to execute the documents of sale. The licenses being vested in himself as trustee, he had no need of the plaintiffs' concurrence, nor of their signatures to the documents provided the sale was within the power. If the sale were not within the power, then the plaintiffs should

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not have been ordered to concur. The order, therefore, that the plaintiffs should execute these documents was in my opinion unnecessary and erroneous, and the judgment on the counterclaim should be reversed.

It would not be necessary in my view of the case to say more were it not for the contention before us that defendant Shumate should be removed from his trusteeship. That question was not properly before us at all, although it was referred to and argued to a certain extent by Mr. Maclean for the plaintiffs. Mr. Bodwell took some objection, but Mr. Maclean was not stopped. It was not called to our attention that no claim of this kind was made in the pleadings, nor was the question raised in the notice of appeal. That being so, we ought not to make the order asked for. It is quite apparent that no evidence was directed to it. The evidence that was relied upon in what little argument there was, was directed to an entirely different issue. Shortly, Mr. Maclean's argument was that because defendant Shumate entered into an agreement of sale with Messrs. Fields, which was not strictly in compliance with his power of sale, we ought to hold that he was not a fit and proper person to remain a trustee. What Shumate did was to sell, or attempt to sell, the licenses for the price mentioned in his power, but instead of requiring the whole 50 per cent. in cash, the purchasers were to pay sufficient to give the plaintiffs half of their interest in cash and the balance in a year, Shumate's interest to be otherwise arranged. There is no evidence that in such an arrangement Shumate was to get any more advantageous terms than the plaintiffs, in fact, for aught the evidence shews, they may have been much less advantageous. That question was not sifted down because it was not in issue.

I do not understand the law to be that whenever a trustee makes a mistake as to the extent of his powers he ought to be removed from his trusteeship. Now, had the issue been raised and Shumate charged with dishonesty in connection with the alleged sale to the Fields, evidence might have been forthcoming to shew that he acted as he believed honestly and in the interest of the partnership, and without seeking any peculiar advantage for himself. To allow this issue to be raised now would be most unjust to said defendant.

I think, therefore, the judgment dismissing the action should be sustained, but that part of it based on the counterclaim should be reversed.

A question of account was referred to in argument but as I remember counsel for the plaintiffs did not press that.

Irving, J.A.

IRVING, J.A.:—The learned trial Judge dismissed the plaintiff's action, and on the counterclaim directed that the plaintiff should execute all documents necessary to enable the defendant Shumate to carry out a sale to Messrs. Fields. This portion of the judgment is easily dealt with.

The evidence at the trial shews that Shumate has not sold the property to Fields, and there is no contract between Shumate and Fields. At the most, Fields was prepared to buy the plaintiff's interest.

Then as to the appeal on the original action. The notice of appeal is that the Judge below only considered one branch of the plaintiff's claim for relief—that is, the application to set aside and cancel the deed of 23rd October, 1907, on the ground of fraud. The other ground is for an order for accounts, and the removal of Shumate from his office as trustee. The notice I feel ought to have been more explicit, and the only doubt I have about the order that should be made is the vagueness of the notice of appeal.

Shumate, in his letter of 16th November, 1910, did not disclose the true facts of the case, and in my opinion he is unfitted to be a trustee. Had he been honest, he would have written Bingham, "I can get you $10 an acre for your share, will you take it?"

The removal of a trustee—as a rule—is a delicate matter. The main principle for the Court to proceed upon in exercising its jurisdiction is the welfare of the beneficiaries. The matter of the exercise of this power was discussed in *Letterstedt* v. *Broers* (1884), 9 A.C. 371, by Lord Blackburn.

In *Forster* v. *Davies* (1861), 4 DeG. F. & J. 133, it was laid down by Turner, L.J., that the mere fact of there being dissension between one of the several *cestui qui trustent* and the trustee was not a sufficient ground for the trustee's removal. But the letter in my opinion is sufficient to shew that Shumate should be removed from his position as trustee and a receiver appointed.

As to the objection that the removal of a trustee was not specifically asked for, in my opinion the prayer in the original claim for a receiver was sufficient. In view of the fact that the action asked to set aside the trust deed; that it is merely a technical objection, and as the merits are all against Shumate, and as there has been no surprise or disadvantage to Shumate by the formal omission, I would not give effect to it: *Gorman* v. *Dixon* (1896), 26 Can. S.C.R. 87. *In re Wrightson*, [1908] 1 Ch. 789 (where Warrington, J., refused to remove a trustee), the learned Judge said that there was power to remove although not prayed for.

I would discharge the order made by Morrison, J., and dismiss the action so far as false representations are concerned, but remove Shumate from the trusteeship, and order him to account. Divide the costs of the action below; direct Shumate to pay costs of the counterclaim, and of this appeal.

GALLIHER, J.A., concurred in the judgment of the Chief Justice. Galliher, J.A.

Judgment below varied.

Re McKINNON.

ONT.

Ontario High Court, Middleton, J. March 21, 1912.

H. C. J. 1912

March 21.

1. WILLS (§ I A—7)—PARTIAL INVALIDITY—CLAUSE FORFEITING BENEFITS IF THEY ARE ALIENATED.

A clause in a will is invalid which forfeits altogether a beneficiary's interest in the testator's estate if he should alienate any benefit to which he may be entitled under the will.

[*McFarlane* v. *Henderson*, 16 O.L.R. 172, followed; *Blackburn* v. *McCallum*, 33 Can. S.C.R. 65, specially referred to.]

Statement

MOTION by the executors of the will of S. F. McKinnon, deceased, for an order, under Con. Rule 938, determining questions arising upon the construction of the will.

J. Bicknell, K.C., and *W. H. Wallbridge* for the executors and the widow.

N. W. Rowell, K.C., for Mrs. Miles and her husband and sons.

F. W. Harcourt, K.C., for the unborn and as yet unascertained class entitled to take in certain contingencies.

Middleton, J.

MIDDLETON, J.:—The sole question argued before me is the effect of clause 36 in the will:—

> Should any legatee or beneficiary under this my last will and testament . . . in any way hypothecate mortgage pledge sell transfer or assign any interest benefit legacy bequest or advantage in which the said legatee or beneficiary is or may be in any way interested or entitled to hereunder then I will and direct that immediately thereupon any benefit advantage legacy or bequest to such beneficiary or any person through him or her shall be forfeited and the same shall revert to my estate and form part of the corpus thereof and such beneficiary shall be cut off entirely from receiving any benefit or advantage under this my last will and testament.

The scheme of the testator's will is unusual. He first gives his dwelling-house and furniture to his wife for life, and then devises the residue of his estate to trustees for investment, and out of the income directs payment of $12,000 annually to his wife for life. He makes a number of smaller legacies and annuities, and directs that on the 1st May, 1912, or upon the earlier decease of his wife, the accumulated estate shall be distributed or partly distributed. Those entitled to take are the daughter and her sons; but, in certain events, the estate is to be distributed in equal shares among the heirs-at-law of the testator and his wife.

The question argued is the validity of the restraint upon alienation found in the clause above quoted.

No good purpose would be served by adding to the confusion at present existing upon this subject, by any attempt to analyse and reconcile the decisions. I can only conclude that *Blackburn* v. *McCallum*, 33 Can. S.C.R. 65, has given a new

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starting-point, and that the full extent to which it has overruled the earlier cases will not be ascertained until the question is again taken to the Supreme Court. In the meantime *McFarlane* v. *Henderson*, 16 O.L.R. 172, justifies me in holding that the restraint here is invalid.

As indicated upon the argument, I do not think that question 4 is ripe for determination. It is not the practice of the Court to deal with contingencies until the contingent events happen.

The costs of all parties may be out of the estate; the executors' as between solicitor and client.

Judgment accordingly.

FEIGLEMAN v. MONTREAL STREET RAILWAY CO.

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April 2.

Quebec Superior Court. Motion before Charbonneau, J. April 2, 1912.

1. STATUTES (§ II A—95)—QUEBEC CODE OF CIVIL PROCEDURE—INTERPRETATION—ENGLISH PRACTICE.

The articles of the Quebec Code of Civil Procedure being derived from the English law, the terms and expressions used therein are to be interpreted according to English practice and jurisprudence.

2. DISCOVERY AND INSPECTION (§ I—2)—PRODUCTION BY STREET RAILWAY CO. OF REPORT OF ACCIDENT—SUCH REPORT "A DOCUMENT."

A company examined on discovery by a plaintiff injured in a railway accident will be compelled to produce and file a report of such accident prepared by the company's employees (*e.g.*, motorman or conductor) at the time of the accident when such report is required from them in the ordinary course of their duties; such report being a "document" within the meaning of the Code of Civil Procedure Que. (C.P. 289).

[*Southwark* v. *Quick*, 9 Ruling Cases 587, approved.]

Statement

A motion by plaintiff to compel the company-defendant to produce the report of the accident, at which he suffered the injuries for which he is suing, prepared by the motorman and conductor at the time thereof.

The motion was granted.

A. Rives Hall, K.C., for the motion.

R. Taschereau, K.C., *contrà*.

Charbonneau, J.

CHARBONNEAU, J.:—In a previous case against the present company-defendant (*Beardsell* v. *Montreal Street Railway Co.*) on a similar motion, I had occasion to hold that the report made by the employees of the company-defendant at the time of an accident could not be considered as a document within the meaning of article 289 C.P., and this for the reason that this report could have no compelling force and could not in any way be binding upon the company. The only value which I then thought could be attributed to this report was that of a memorandum to which the motorman or conductor might have recourse

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during their deposition, or as a source of information to the counsel in charge of the case. If these notes or this memorandum were in existence at the time of the trial they could be used even by the plaintiff in order to check the assertions of these witnesses and even though they had been handed over to the attorneys for the company-defendant, or even if they had been prepared for them by these witnesses. Nevertheless their intrinsic value, as an admission binding the company-defendant, is absolutely null, and looking at the question from this viewpoint only, I was of opinion that the demand made by the plaintiff that this report be produced should be refused.

At the hearing on the present motion a new aspect of the question was presented, and I am compelled to retrace my steps.

Where the action is taken against an individual, himself personally the cause of the accident, there is no doubt but that at the examination on discovery the plaintiff could question him as to how the accident happened and obtain from him all the details of the case. The defendant could even be asked the names of the persons who were present or of those who gave him information, and also the nature of this information.

If I understand it properly the object of this examination is to prepare the way for the trial, that is to say, the object is to enable both parties to place all the facts relevant to the case before the trial Judge.

Now, if these details and these facts can be asked of an individual why cannot they be asked of a company? The company cannot answer that it knows nothing about it when it has received a report from its employees who were witnesses of the accident.

In the present case the report of the employees, who were not only witnesses but the cause of the accident, if this accident is chargeable to the company-defendant, may have a much more important bearing than if they were simply the memorandum of an ordinary witness who had not participated in the tort. These notes may even be admitted as circumstantial evidence to establish the negligence of those who themselves have admitted it in writing: they form part of the *res gestae* and thus constitute secondary documentary evidence.

I note here this theory which I have found summed up in the American and English Encyclopedia of law, under the words, "Documentary Evidence," not for the purpose of declaring it a principle of our law—for this is not necessary for the purposes of the present case—but in order to try to establish what must be understood by the word "document." The innovation which was introduced in our Code of Civil Procedure by articles 286 to 290 seems to have been taken from the English law, and the words used in these articles should therefore be interpreted according to the meaning given to them under the English practice.

This is how the word "document" is defined at page 879 of this encyclopedia:—

> The term *document* has been defined as meaning any substance having any matter expressed or described upon it by marks capable of being read (I-Steph. Dig. of Ev., art. I.) or more comprehensively, as including all material substances on which the thoughts of men are represented by writing or any other species of convenional mark or symbol.

A little further on, at page 898, the value which should be given to such notes made by third parties is indicated:—

> Entries made by third persons are not generally admissible, since they are not made under the sanction of an oath, and there is no opportunity for cross-examination; but such entries are admissible where they accompany and explain a material fact, being thus a part of the *res gestæ*, and again upon a principle of necessity warranted by particular circumstances which afford a reasonable assurance that the person who made the entry, whose testimony is no longer attainable, knew the fact and recorded it faithfully, as where the entry was against the pecuniary or proprietary interest of the person making it, or was made at the time by a person whose duty it was to make it, and in the ordinary course of his business, and where recourse cannot be had to his testimony in consequence of his death.

All this shews clearly that the word document may include writings of third parties, even though these writings may have no compelling force or direct weight as against the other party, and it seems to me that the word is used in this sense in article 289.

If we read this article we find that not only can the production or communication of everything considered as written proof be demanded, but everything which may be accessory to the written or oral evidence may also be demanded. For the Court may order a party to exhibit any object or to give communication of any book or document. It is evident that an object cannot constitute a written proof, and that a book cannot constitute such proof unless the entries made therein have been made by the party against whom they are urged. Why should the rule be different as regards other documents?

Therefore, the present report which is not a document in the sense of written evidence, may be considered as such in that it may perhaps form part of circumstantial evidence; that it may be useful as accessory to part of the verbal evidence; and that it also supplies information necessary to allow the parties to direct their course at the trial of the case.

I have no hesitation in admitting that the present decision is in direct contradiction to that rendered previously, but this contradiction appears to me to be necessary and justified.

Among the precedents cited by plaintiff the cases of *Southwark* v. *Quick*, 9 Ruling Cases 587, at p. 592; *Bolckow* v. *Fisher*, 47 Law Times 724; *Pavitt* v. *North Metropolitan Tramways*

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Company, 48 Law Times 730; and *Potter* v. *The Metropolitan District Railway*, 28 Law Times 231, seem in point.

Therefore, the plaintiff's motion is granted and the company-defendant is ordered to produce the report made by its employees concerning the accident which occurred on or about the 24th of February, 1911, with costs to follow suit.

Order to produce report.

N.B.—Permission to appeal to the Court of King's Bench from this interlocutory judgment was granted on April 12th by Mr. Justice Gervais.

PROVOST es qual v. CITY OF MONTREAL.

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Court of Review.
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April 19.

Province of Quebec Court of Review (Montreal), Tellier, DeLorimier and Dunlop, JJ. April 19, 1912.

MALICIOUS PROSECUTION (§ II A—5)—REASONABLE AND PROBABLE CAUSE—MALICE.

Reasonable and probable cause, as well as want of malice, in preferring a charge of theft and of aiding and abetting another to obtain money from a municipal corporation by false pretences, is shewn where it appears that the plaintiff, a girl of 16 years of age, who was able to read and write, presented money orders drawn by her father, a sectional foreman employed by the city, in which she was fictitiously named, at the city hall, all of which were in unsealed envelopes, for the payment to her of wages of city labourers her father had fraudulently carried on his pay rolls, and that the plaintiff delivered to her father the money she obtained thereon, as, under such circumstances, the inference was warranted that she was aiding her father to defraud the city.

Statement

AN appeal from the judgment of Archer, J., dismissing plaintiff's action for damages for false arrest.

The appeal was dismissed.

A. Théberge, for plaintiff, appellant.

W. H. Butler, for defendant, respondent.

The judgment of the Court was delivered by

Dunlop, J.

DUNLOP, J.:—This is an appeal from a judgment rendered by his Lordship Mr. Justice Archer, on April 23, 1910, dismissing appellant's action in damages.

The appellant, in his quality of tutor to Miss Anita Charest, brought action against the respondent on December 19, 1908, in the sum of $25,000 damages to reputation of his pupil, because the respondent had caused her arrest on the charge of theft and on the charge of aiding and abetting one Auguste Charest, her father, to obtain under false pretences from the respondent, at various times, various sums of money, amounting in all to about $1,400 or $1,500.

The respondent pleaded to appellant's action that it had acted with reasonable and probable cause, without malice, and that whatever it had done, it had done it legally.

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In the years 1907 and 1908, the respondent had in its employ, as a sectional foreman in the eastern division, one Auguste Charest, the father of the appellant's pupil. As foreman, Auguste Charest naturally had under him numerous employees. It was his duty to see that the men under him did their work and to keep record of the time of his subordinate employees in a book called the time-book. This he was supposed to do by entering, opposite the name of each employee, the number of days, half days or hours, as the case might be, that the man worked. On these entries in the time-book the pay sheet of the respondent was based and the employees were paid. It followed, therefore, that if the time-book was wrong, the pay sheet would also be wrong.

From about August, 1907, to August, 1908, Mr. Charest falsely and fraudulently had entered in his time-book two names, viz., Z. Provost and A. J. Robert, the first as a carter, the second as a laborer, and as working for the respondent.

According to the pay sheet of the respondent, based on the time-book of Charest, various sums of money, in all amounting to about $1,049.50, were credited opposite the names of Z. Provost and A. J. Robert. All the while no men of that name worked under him for the respondent and the said names represented nobody.

The employees of the respondent are always paid by the paymaster or his assistants, and according to the pay sheet. A great number of those employed by respondent, chiefly the laboring men, are paid on their work, not at the city hall, but only after answering the call of their names by the paymaster reading from the pay sheet and after identification of them by their foremen. This identification is made by the foreman for the paymaster to ensure payment to the man whose name appears on the pay sheet and is called, because the paymaster does not know the men. When any of the employees usually paid on the work are not there paid owing to their absence, the paymaster pays them at the city hall, provided they bring a signed order from their foreman. This order takes the place of the identification on the work.

No men bearing the names of Z. Provost and A. J. Robert ever answered the pay call on the work. Instead, a young lady always presented at the city hall orders signed by A. Charest, requesting that the wages of A. J. Robert and Z. Provost be paid to Miss Robert, mentioned in the order, and she received their wages. The young lady who presented these orders was Miss Anita Charest, the pupil of the appellant.

As these orders and the presentation of same to respondent's paymaster, and the receipt of the moneys called for, led respondent to lay the charges that were laid against the appellant's pupil, the respondent will speak more in detail of these orders.

The sum of $1,049.43 was paid by the respondent as wages earned by Z. Provost and A. J. Robert to the appellant's pupil.

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Orders were not filed for all the payments made as some were lost, but twenty-five of them, still in the possession of the respondent at the time criminal proceedings were taken, are filed.

As to the contents of these orders, reference might be made to the description given of A. J. Robert as the father of Miss Robert, who presented the orders to the paymaster, also to the description of Z. Provost, as uncle of Miss Robert. These descriptions will be found in the orders referred to. The respondent further draws the attention of the Court to the description of the payee of the orders, who was sometimes described as Miss Robert, and sometimes as bearer, and sometimes as Miss simply.

As we already stated, these orders were invariably presented to the paymaster or his assistants by Miss Anita Charest, the pupil of the appellant and the daughter of the said Auguste Charest, and after presentation she received the various sums of money called for.

Prior to the middle of July, 1908, and when the said orders were presented, the paymaster knew Miss Charest only as Miss Robert.

These orders presented by Miss Anita Charest were not sealed in any envelope. They were presented to the paymaster or his assistants just in the state in which they are filed as exhibits, so that if she chose to read them she could read that A. J. Robert was described as her father and Z. Provost as her uncle, and that she was described in numerous orders as Miss Robert.

She continued to present these orders at numerous intervals during a period of time of about a year, after receiving them from her father and handing him back the moneys she had received from the paymaster. At the time, she was sixteen years of age, able to read and write, and, in appearance, seemed much older. There can be no question as to the unlawful conduct of Mr. Charest, particularly that he made false and fraudulent entries in his time-book purporting to represent men working for the city, when such was not the case, and that he made false and fraudulent orders to the paymaster, who paid the moneys credited on the pay sheet under these men's names and based on his time-book, appellant having admitted paragraphs 11 and 12 of respondent's plea.

Respondent submits that this appeal should be dismissed, in the first place, because the appeal can raise no question of law and the judgment *a quo* is based on evidence. In my opinion, it cannot be contended that the said judgment was so clearly against the weight of evidence as to warrant a reversal of the judgment of the Superior Court.

The trial Judge heard and saw all the witnesses and was in a better position to appreciate and weigh the evidence than this Court can possibly be.

In the second place, the respondent contends with great force that the evidence shews clearly that the respondent had reason-

able and probable cause to arrest the appellant's pupil. Would any prudent and reasonable man believe that this girl, who, in appearance, seemed much older than she really was—her age was sixteen years—did not know the contents of these orders before presenting them? She went to the paymaster's office and drew money almost every week during a period of about a year, and she drew in all about $1,400 or $1,500. It is established that she could read and write, and, in my opinion, there is every reason to believe that she had read the orders, and that, therefore, she knew that she was not Miss Robert, as described in the orders; that A. J. Robert, one of the men whose wages she came to claim, was not her father, and that Z. Provost, the other man whose wages she came to claim, was not her uncle nor a laborer, as described in these orders. These orders were not fastened or sealed in any way, but were exactly in the same state as they now are in the record.

It seems to me, after an examination of the orders and full consideration of the evidence, that the city had reasonable cause to believe that she was helping her father to defraud the city, and that she was doing something that she ought not to do.

The trial Judge held that, although the said Anita Charest was not guilty of the crimes alleged in the complaint against her, it had been proved that defendant had acted in good faith, with reasonable and probable cause, and that, consequently, the city could not be held responsible for the damages caused to the said Anita Charest. I am of opinion that the judgment of the Superior Court was well founded in every respect.

In support of his decision reference might be made to the following cases:—

Hétu v. *The Dixville Butter and Cheese Co.*, reported in 16 K.B., p. 333. This judgment was confirmed by the Supreme Court of Canada, reported in the 40 Can. S.C.R., p. 128.

Désaulniers v. *Hird*, decided in the Court of Appeal on October 25, 1906, and reported in 15 K.B., p. 394, where it was held in an action for malicious prosecution: "The onus of the evidence is on the plaintiff to prove, not only that he was discharged from the prosecution, but that the defendant, who prosecuted him, acted maliciously and without reasonable and probable cause."

Reference might also be made to the cases cited in the present case in the respondent's factum.

After a careful consideration of the evidence and authorities, I am firmly of opinion that the judgment of the Superior Court dismissing plaintiff's action with costs was well founded and should be confirmed, with costs in both Courts.

Appeal dismissed.

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Quebec Court of Review, Sir Melbourne M. Tait, C.J., Tellier and Bruneau, JJ. April 19, 1912.

1. CONTRACTS (§ V C 2—396)—CANCELLATION OF SALE—TIME WITHIN WHICH ACTION IS TO BE BROUGHT—ABSENCE OF USAGE—OLD FRENCH LAW.

The redhibitory action (or action in cancellation of sale for latent defects) must be brought with reasonable diligence according to the nature of the defect and the usage of the place where the sale is made; and where there is no usage, the old French law prescription of six months from the date of the sale will be applied.

2. SALE (§ I D—20)—RETENTION OF THING SOLD—REPAIRING, ALTERING AND IMPROVING SAME—ACTS OF ACQUIESCENCE.

User of the thing sold as the buyer's property, the making of extensive repairs, alterations and improvements thereto, are acts of acquiescence to the sale and will bar any resolutory action, more especially when the defendant was never notified thereof.

3. ESTOPPEL (§ III E—72*a*)—TAKING POSSESSION AND PAYING INSTALMENT —ACTION FOR CANCELLATION OF SALE.

A buyer who has taken possession of the immoveable sold and some time thereafter has paid an instalment on account of the purchase price, is estopped from later instituting a redhibitory action.

4. CONTRACTS (§ V C 3—407)—WHAT CONSTITUTES LATENT DEFECTS.

The absence of sills from doors, the faulty manner in which bricks are placed, a leaking roof, are not latent defects which can give rise to the redhibitory action in respect of the sale of real property and buildings thereon used as dwellings, latent defects being those which a buyer could not possibly have ascertained at the time of the purchase, either personally or by an expert's examination, and which are so inherent to the thing sold that they cannot possibly be remedied; it does not suffice even that they be not apparent if they could be easily ascertained.

Statement

APPEAL from a judgment of the Superior Court, Lafontaine, J., rendered on February 3, 1911, whereby the plaintiff's action to cancel a deed of sale of some buildings bought was maintained and the vendor (defendant, appellant) ordered to reimburse the amount of purchase price paid and the value of repairs and improvements made by the purchaser on these buildings.

The appeal was allowed.

L. E. Beaulieu, for defendant, appellant.

E. Pélissier, K.C., for plaintiff, respondent.

Bruneau, J.

BRUNEAU, J.:—On January 15, 1909, by deed before Lemire, N.P., the plaintiff bought from the defendant a property containing six flats, situated on Frontenac Street in this city, for the sum of $11,000, of which $8,000 was paid in cash. The balance of $3,000 was payable as follows: $500 in April, 1909, and $250 on February 1 of each subsequent year. The instalment of $500 was, as a matter of fact, paid on May 7, 1909.

By his action, instituted on August 24, 1909, the plaintiff prays that this sale be cancelled, that he be reimbursed of the sum of $8,000 paid to the defendant and also indemnified for certain repairs made and damages suffered, in all the sum of

$10,417. He alleges that this sale was made under the legal warranties and also under the express warranty that the buildings erected by the defendant himself on this lot were "in first-class sanitary order and condition," that these buildings are not in the state represented and warranted, that on the contrary they are unfit for the object to which they were destined; that there exist defects of construction and faulty materials affecting the solidity thereof and so diminishing their usefulness that the plaintiff would never have bought them had he known thereof; that as soon as he had taken possession thereof he was obliged to make urgent repairs to the amount of $915, of which the defendant was duly notified and paid no attention thereto, and that every day new defects in construction are discovered; that later, on July 27, 1909, he again notified the defendant that he would have the buildings inspected by an expert who should make a report thereon and invited the defendant to join therein, which the defendant neglected to do; that it appears from the expert's report that in order to remedy these defects and to insure the stability of the buildings, repairs to the extent of $1,377 would be immediately necessary. The plaintiff further alleges that the sale was made under the warranty that the property yielded a revenue of at least ten per cent., which representation was false to the defendant's knowledge.

The defendant pleaded that the plaintiff bought the property as it stood, knowing its state and condition, and that, in consequence, if he made any repairs and improvements he did so of his own accord and for his own benefit without in any way affecting the defendant's responsibility; that he, the defendant, has fulfilled all his obligations under the deed of sale, and that plaintiff's action is in any event tardy and unfounded seeing his acquiescence in the sale and his waiver of all complaints as evidenced by his long user of the thing sold without objection, and by treating the same as his absolute property through the making of repairs and improvements.

The trial Judge has maintained the action, cancelled the deed of sale and condemned the defendant to return to the plaintiff the sum of $8,000 paid cash, the instalment of $500 paid in May, plus $498.97 interest and besides a sum of $899.33 for expenses and improvements — in all a condemnation in the sum of $9,898.30. Finally the judgment contains a reserve to the effect that the plaintiff must account to the defendant for the rents collected that these may be deducted from the condemnation but "après déduction des impenses et déboursés par lui faits depuis la date de l'action."

The defendant contends that the judgment, *a quo*, is badly founded because

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(a) There is in the immoveable sold no defect which could give rise to the redhibitory action either at common law or under the agreement of the parties;

(b) The redhibitory action of the plaintiff is, in any event, unfounded, as it has not been taken in good time and as the plaintiff has accepted the thing sold and has acquiesced in the sale;

(c) Subsidiarily, even if the sale should be cancelled, the amount of $899.33 awarded to the plaintiff for disbursements and improvements is excessive and contrary to all legal principles in the matter.

It is clear that the facts of which the plaintiff complains, even if true and proven, cannot justify the institution of legal proceedings, if the right of action thereunder is prescribed or outlawed. This is the first question to be examined, as the defendant alleges the action is tardy. The redhibitory lies in favour of the buyer of an immoveable as well as in favour of the buyer of moveable things. The dispositions of article 1522 C.C. being general, apply to sales of immoveables as well as to sales of moveables. (Pothier, Nos. 205, 206; 3 Delvincourt, 381, note 7, ed. 1819; 2 Troplong, No. 548; 1 Guillouard, No. 438; 24 Laurent, No. 287.)

The old French law, being desirous of ensuring the stability of sales, had established fairly restricted delays within which the buyer might exercise the actions allowed him by law. Thus, as regards the sale of an immoveable, the delay was usually six months from the time of delivery. This delay also obtained in Roman Law (Pothier, Vente, No. 231) and in Bretagne, Provence and other provinces. (Troplong, vol. 2, No. 586.)

The codifiers have as a general rule followed the rules laid down by Pothier in drafting articles 1522 to 1531 C.C., which govern latent defects. Thus, as said Portalès in his "Exposé des motifs du Code Napoléon" (arts. 1641 to 1649): "Le Code ne fait que rappeler des maximes consacrées par la jurisprudence de tous les temps liées aux principes de l'eternelle équité." And here follow a few examples shewing how these principles have been applied by the French Courts in modern times.

The Court of Appeals of Lyons held on August 5, 1824, that the action was instituted in proper time when taken at the time the defects were discovered. (D., 1825-2-17; D. Rep., No. 165.)

The action will lie when instituted as soon as possible after the discovery of the latent defects, said the Court of Appeals of Paris on December 30, 1864. (S., 1865-2-133.) The Judge may even, according to circumstances, extend the delay determined by the usage of the place, seeing this delay has not been fixed by law. (S., 1865-2-41.)

This power extends even to the fixing of the period from which the delay is to run, and he may accept as the starting point of such delay, either the date of the sale, that of delivery, or even that of the discovery of the defect: Cass., November 12, 1884, S., 1886-1-149, D., 1885-1-357; June 27, 1887, S., 1887-1-

316; D., 1888-1-300; *Sic* 1 Guillouard, No. 475. The Judge may also take into consideration the special nature of the object sold, the time necessary for the buyer to take full possession thereof, and the difficulty of ascertaining the existence of latent defects, in order to establish whether or not the legal delay has expired. (Cass., October 25, 1886, S., 1886-1-470; D., 1887-1-167.)

Some hold to another theory and say that the resolutory action based on latent defects is an action in nullity or rescission for cause of error within the meaning of art. 1304, C.N., and, therefore, that the delay within which the action should be taken should be computed not from the date of the sale, but from the date of the discovery of the error, *i.e.*, of the latent defect giving rise thereto. (Cass., November 15, 1853, *supra;* Lyon, August 5, 1824, *supra;* Aix, November 8, 1864, *supra;* Paris, December 30, 1864, *supra;* July 30, 1867, D.P., 1867-2-227; *Sic* 24 Laurent, No. 302.) In other words, that the delay runs only from the day of the discovery of the latent defect, and, necessarily, only from the day of the judicial "*expertise*," if such "*expertise*" alone could reveal the latent defect to the buyer; and that it matters little that the buyer's attention had already been directed to the defective quality of the thing sold. (Paris, February 24, 1882, S., 1883-2-229, P., 1883-1-1207, D., 1883-2-78.)

But this system is at the present time completely abandoned. And it is now held that the dispositions of art. 1304 C.N. cannot apply either as regard the starting point or the duration of the brief period within which the action may be brought. The Judges may, therefore, take the day of the sale, instead of the day of the discovery of the defects, as the starting point of such delay where the defects could be easily ascertained. (Cass., August 23, 1865, S., 1865-1-397; P., 1865-1-1048; D., 1865-1-261.) (See also Cass., February 7, 1872, S., 1872-1-222; P., 1872-1-532.)

Under a third system it is held that the date of the sale should always be the starting point of this delay, even though delivery should have been fixed at a subsequent date and the defects discovered but later. (Cass., March 17, 1829, D., 1829-1-366; D., Rép. *vo.* Vice Rédhibitoire, No. 289; *Sic* 1, Duverger, No. 405; Zachariae, Massé and Vergé, vol. 4, p. 304, par. 586; Ruben de Couder, *vo.* Vices Rédhibitoires, No. 44.)

Some authors assert that the delay should run from the date of delivery (Massé and Vergé sur Zachariae, vol. 4, p. 304, par. 686, note 14). Other authors state that the starting point should, in principle, be fixed at the day of the sale; but that where the date of delivery has been deferred by agreement, or when the vendor has been put in default to deliver, then it should run only from the day of delivery. (2 Troplong, No. 587 and 588; 4 Aubry and Rau, p. 391, par. 355 *bis.*)

Under art. 1526 C.C., the plaintiff had the option of returning the houses in question and recovering the price thereof, or of

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keeping them and recovering a part of the price according to an estimation of their value. He has chosen the first alternative, but in both cases his action had to be taken in accordance with art. 1530 C.C., "with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made." Now, the plaintiff himself alleges that hardly had he entered into possession of these houses than he was obliged to make urgent repairs to the amount of $915.44 in order to remedy defects in construction which he had not noticed and which the defendant had hidden from him at the time of the sale. By the statement he has produced, the plaintiff shews he began repairs on February 4, 1909, and from that time up to August 18, the date of the institution of the present action, he made repairs daily. Another statement claims for repairs made subsequently to the action, from the 18th to the 24th of August. Not only has he repaired them, but he has improved and embellished them. For over seven months he made use of them as belonging to him irrevocably. Thus, he fixed up the shed so that it would be warmer; he installed water in the shed; he had additional platforms built, and he raised the level of the yard. And all this was done after the plaintiff had full time to examine the buildings in every particular, after he knew all the defects in construction and all the faults of which he complains.

More than that, he employed the defendant himself for the execution of improvements, which the defendant had positively refused to undertake, and for which he paid him $96 as promised, and now he claims this from the defendant.

Finally, on May 7, 1909, four months after the sale, he paid without objection an instalment of $500 on account of the purchase price. If the buyer who grants real rights on the immoveable after the discovery of latent defects ratifies the contract tacitly and is estopped from bringing the redhibitory action (Pand. Fr., vol. 59, *vo.* Vice Rédhibitoire, No. 490), all the more is he estopped by the payment of the purchase price.

It is only on June 25, 1909, that the plaintiff began to complain. On that day he served a notarial protest on the defendant, in which are enumerated the defects complained of. These defects were then seven, and we are far from the Charpentier estimate. These complaints related to the roof of the house; to the manner in which the brick had been placed at certain places; to the absence of proper sills for the outside doors, etc. Evidently many of these grievances do not constitute latent defects.

And how does the protest conclude? In default, says he, "par le dit Peltier, de se conformer à nos présentes injonctions et sommations, nous l'avons averti que le dit Jacobsen se porvoira contre lui en justice pour l'y contraindre et pour tous dépens, dommages et intérêts, y compris le coût des présentes, si mieux n'aime cependant le dit Jacobsen faire exécuter les dits travaux

de construction et réparations et en répéter en justice le coût du dit Peltier."

So even then, the plaintiff was accepting the thing sold and intended keeping it, saving his right to require certain repairs.

"L'acceptation de la chose vendue est une fin de non-recevoir à l'encontre de l'action rédhibitoire." (Fuzier-Herman, C.C. Annoté, art. 1648, No. 38.)

I am therefore of opinion that the action should have been dismissed by the first Court for these two reasons:—

1. Because it was instituted too late, and

2. Because it was brought after the thing sold had been accepted with full knowledge of all the defects complained of.

Arriving at this conclusion, it becomes unnecessary for me to examine the question as to whether the sum of $899.33 awarded for disbursements and improvements is excessive.

The appeal should be allowed and the action dismissed with costs.

Tellier, J.

TELLIER, J., concurred, and was of opinion to reverse for these and additional reasons.

It is established by the evidence that the buildings which were sold to the plaintiff with legal warranty and the additional guarantee that they were "in first-class sanitary order and condition" had been built by the defendant, his workmen and private contractors with diverse materials of good quality. The plaintiff had seen them and had visited them in part before making his purchase and he was therefore in a position to ascertain their nature, state, quality and defects. If he did not find this out before the sale he has himself only to blame. He could have ascertained any natural and inevitable defects of construction, which had arisen since the construction of these buildings and could have foreseen those that might arise in a three-storey house built in the autumn and winter of 1907-08. A simple examination sufficed for this purpose.

Now what does the plaintiff do? He takes possession, and immediately sets about making considerable repairs and improvements without the defendant's knowledge, without notice to him or putting in default: he even pays to the defendant without a murmur the value of works done by the defendant himself, and he then, on May 7, 1907, pays the defendant a further sum of $500 on account of the purchase price. Only on June 25, 1909, did he begin to complain and denounce seven defects in construction by means of a notarial protest. Now these alleged defects were not due to latent defects, to the bad quality of materials used by the defendant: they were not of a nature to threaten the loss of the buildings, either partial or total, nor even to diminish the enjoyment thereof.

No proof has been made of any fraudulent manoeuvres whereby the defendant might have attempted to hide from the

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buyer the alleged defects. On the contrary, it is established beyond question that the defendant acted in absolute good faith, and, besides, the plaintiff cannot plead any deceit when in answer to an invitation he went and saw the premises in part, and was in a position to see and foresee everything of which he now complains.

Now, error is a cause of nullity only when it occurs in the nature of the contract itself, or in the substance of the thing which is the object of the contract, or in some thing which is a principal consideration for making it; and accidental defects in the thing sold which do not affect its individuality do not constitute error susceptible of allowing a resiliation of such contract even though all the expectations of the buyer be not fulfilled.

And fraud is a cause of nullity only when the artifices practiced by one party or with his knowledge are such that the other party would not have contracted with them. It is never presumed and must be proven. And in the present case no fraud has been proven.

Nor are the latent defects within the meaning of the law those which the buyer did not know of. They are those which he could have ascertained either through himself or through the examination made by an expert. The most simple examination would have revealed to the plaintiff the defects of which he complains. The defendant cannot be held liable for these seeing "the seller is not bound for defects which are apparent and which the buyer might have known of himself." (C.C. 1523.)

In order to succeed in such an action as the present one the buyer must prove "such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them." (C.C. 1522.) This article means that the latent defects are so inherent to the thing that on account of their very nature they cannot be remedied; that they prevent for ever the partial or total enjoyment of the thing sold according to its destination. Therefore the ordinary, natural and inevitable defects and wear and tear which manifested themselves in the buildings in question cannot constitute such latent defects, and this even though they had not been apparent at the time and could not have been ascertained by the plaintiff. These defects did not endanger the solidity of the buildings; their only drawback resulted in the necessity of making more or less important repairs, which the plaintiff could easily foresee.

Besides, during the whole period of these repairs the plaintiff remained in occupation; he had all the enjoyment of these premises, and right up to the time of the institution of the action they were inhabited by tenants, who have declared themselves quite satisfied and contented with their lodgings.

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I concur in the remarks of my brother Bruneau as to the delay within which the redhibitory action should be brought. It must be brought, says article 1530, with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made. If the defects complained of were latent defects within the meaning of the law, they could have been ascertained a very few days indeed after the sale, and as no usage exists at the place where this sale was made we must look for guidance to the old law, under which such an action had to be taken within six months from the date of the contract. As over seven months went by before the plaintiff took his action he was estopped absolutely from bringing this action even if we were to admit these defects could have justified a cancellation of the sale if prayed for within the six months.

The alterations made by the plaintiff to the thing sold, the lack of any previous notice to the defendant, the payment without reserve of a portion of the purchase price, the delay of more than six months before the institution of proceedings—all these are so many grounds of nonsuit.

Under the circumstances there is no need to compel or to authorize the plaintiff to take subsidiary conclusions in diminution of price or in indemnity; we think it better to leave him with all the rights which he may have in virtue of his title of acquisition and more especially of the following clause, which he caused to be inserted therein:—

"Declares the vendor that the building erected on said property is in first-class sanitary order and condition," that he may enforce these rights when and in whatever manner he may see fit.

I conclude, therefore, to the reversal of the judgment *a quo* and the dismissal of the action.

Appeal allowed and action dismissed with costs.

ROY v. ADAMSON.

Quebec Superior Court, District of Montreal, Greenshields, J.
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1. BAILMENT (§ III—17)—WAREHOUSED GOODS—RESPONSIBILITY.

A public warehouseman is only required to exercise the reasonable care of a prudent man in the storage of merchandise entrusted to him; he is not responsible for damage resulting from the precarious nature of the goods stored and does not occupy the relation of insurer with relation thereto.

[*Searle* v. *Laverick*, L.R. 9 Q.B. 122, specially referred to.]

2. EVIDENCE (§ II H 1—263)—DAMAGE TO GOODS STORED.

The burden of proving the exercise of reasonable care and that a suitable place for storage has been furnished lies upon the warehouseman when he delivers in a damaged condition goods received by him in apparently good state.

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3. BAILMENT (§ III—24)—WAREHOUSEMAN CHANGING PLACE OF STORAGE.

When the place of storage is changed, the warehouseman must shew that the new premises are equally safe and suitable; if he does so then the mere change of premises will not create any liability for goods becoming damaged whilst in his keeping.

[*Lilley* v. *Doubleday*, 7 Q.B.D. 510, approved.]

THIS was an action by the owner of goods left in storage to recover $929.80 damages from the warehouseman.

The action was dismissed.

E. Roy, for plaintiff.

G. A. Campbell, for defendant.

Greenshields, J.

GREENSHIELDS, J.:—The plaintiff is a tobacco merchant, carrying on business in the city of Montreal, and the defendants are public warehousemen, doing business at No. 30 St. Francois-Xavier street, in the city of Montreal.

In the month of March, 1906, the defendants' warehouse was situated at No. 27 St. Sacrament street.

During the month of March, 1906, the plaintiff bought 500 cases of canned tomatoes, containing in all 12,000 cans. These goods, I am satisfied, were in good condition when bought.

Shortly after the purchase of the said goods, the plaintiff, accompanied by Mr. Grenier, visited the warehouse of the defendants, and then and there made arrangements for their storage at the rate of $15 for every three months.

The goods were delivered at the warehouse of the defendants, and, after delivery, the plaintiff again visited the warehouse and found the goods stored in a place and in a manner apparently to his satisfaction, as he declares under oath.

When the first instalment of storage became due, for some reason or another, the defendants did not have the plaintiff's address. An advertisement was inserted in a newspaper, when the plaintiff appeared and paid the storage for the first three months, and continued to pay the same regularly up to and including the month of June, 1911.

The plaintiff after his visit to the warehouse of the defendants a few days after the goods were stored never returned, and never at any time made any examination or inspection of his goods.

This, I may at once say, the proof convinced me to have been extremely imprudent.

The proof establishes to my satisfaction that cans containing tomatoes or other vegetables, are for one cause or another to some extent at least, liable to burst and the contents allowed to escape, and this happening to one can in a case might, and most likely would, destroy a large part, if not the entire cans contained in the case, unless more or less prompt precautionary measures be taken.

One of the witnesses, with considerable experience in such matters, does not hesitate to testify that ordinary prudence

would require an inspection of goods of this class once every three months; the object apparently being, that if a leaking can is found in any one of the cases to have it removed, and any others that may become dampened by the escaping contents of defective cans be cleaned and dried. Nothing of this kind was done by the plaintiff.

The goods remained in the warehouse of the defendants, No. 27 St. Sacrament street, for a period of about four years, when the defendants, changing their place of business, moved the same to another warehouse, *viz.*, No. 30 St. Francois-Xavier street. This the defendants did without any notice to the plaintiff; without his knowledge, and therefore, of course, without his assent or acquiescence.

It should be here stated that the proof is conclusive, and on that point is uncontradicted, that when the goods were removed to a new warehouse, the cases, to a large number, gave evidence of serious damage having happened to their contents. A large proportion of the cases were covered with the contents of the cans and the floor space upon which they were stored gave evidence of the escape of the contents of the cans, to such an extent did this state of affairs exist, that the vehicle in which they were carted became, more or less, covered with the same, and the clothes of the men handling the cases became so covered with the contents of the cans that, says one witness, they had to be discarded. This latter statement struck me at the time as somewhat exaggerated.

After the removal of the goods to No. 30 St. Francois-Xavier street they remained there for a period of about fourteen months when they were sold by the plaintiff, without having examined them, to the firm of Forbes & Nadeau, which firm bought them without previously examining same.

Upon the said firm of Forbes & Nadeau taking delivery of the goods, it was found that the contents of 7,992 cans were completely useless, unfit for human food, and were sent to the incinerator for destruction.

Of this the defendants seem to have had no notice, nor does it appear that such an examination was made as would enable the cause of the damage to be established. In any event, proof was not offered upon that point.

Of the balance of the goods, 248 dozens were sold for $1.35 per dozen, being in first-class condition, 86 dozens were more or less damaged, and were sold at $1 per dozen, making a total amount of $420.80 realized from the entire quantity.

The plaintiff had sold the entire 500 cases to Forbes & Nadeau for $1,350, and it is the difference that is sought to be recovered by the present action.

The plaintiff alleges that the deterioration of the goods resulting in damage to the amount of $929.80 was due to the fault,

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imprudence and negligence of the defendants and their employees, consisting in placing the plaintiff's goods in an improper place for their preservation, where they were exposed to frost and humidity, and this damage principally resulted after the transfer of the goods from No. 27 St. Sacrament street to No. 30 St. Francois-Xavier street.

The defendants deny any responsibility and in effect say that the goods at all times were kept by them with care and diligence and in a fit and proper place, both in St. Sacrament street and in St. Francois-Xavier street, or 19 Eloi street, the latter being the back entrance and the former the front entrance to the same warehouse; that if any deterioration in the goods in question took place while stored in the defendants' warehouse, such was due to the nature of the merchandise or to some inherent defect therein, or to the failure of the plaintiff to claim and remove his goods with reasonable diligence; that, moreover, the goods and merchandise stored with the defendants were in the same state and condition within a period of four months from the spring of 1906, as they were when removed by the plaintiff; finally, the defendants say the action is prescribed.

The plea of prescription was not insisted upon by the defendants' counsel.

By an amended plea the defendants say that by the universal custom governing such matters the said goods were at all times at the owners' risk.

It will be at once seen that the decision of the present case involves the determination of the obligations and liabilities of a warehouseman:—

(a) Who contracts to store goods in a common warehouse, and receives the same in good condition, always keeping them in the warehouse where he has contracted to store them;

(b) His obligation and liability when without notice to or consent by the owner the warehouseman removes the goods from where he originally contracted to store them, and stores them in another and different place;

(c) His obligation and liability if during the storage it is apparent that damage or deterioration is taking place to the goods stored.

Dealing with the first, it may in general terms be stated that the warehouseman in the care of the goods stored with him, is bound to exercise ordinary care and prudence or the care that a prudent man under like circumstances would exercise in the preservation and protection of his own goods: Am. and Eng. Encyclopædia of Law, 2nd ed., vol. 30, p. 45, and cases therein referred to:—

> It is well recognized that a warehouseman is under no obligation to make his building free from all possible contingencies, yet it must be reasonably and ordinarily safe against common and ordinary oc-

currences, and he is liable where injury results from the lack of reasonable skill and diligence in its construction or choice. It is not necessary that it should be fire proof or burglary proof, or frost proof.

But in like manner the warehouseman is responsible for his own negligence, if that negligence results in damage to goods stored with him. He is not the insurer of his customers' goods.

The question as to whether or not ordinary care was exercised by the warehouseman is a question of fact, in the determination of which all the circumstances must be taken into consideration:—

> The obligation to take reasonable care of the thing entrusted to a bailee of this class, involves in it an obligation to take reasonable care, that the building in which it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it: *Searle* v. *Laverick* (1874), L.R. 9 Q.B., p. 122, remarks of Blackburn, J., at pages 126-27.

But there is something to add. Although the warehouseman is held only to reasonable care, and the owner can recover only for negligence, and the burden of proving that negligence rests with the plaintiff, if goods are stored with a warehouseman in good condition and when delivery is made by him they are found in a damaged condition, it constitutes a *primâ facie* case of negligence which shifts upon the warehouseman the burden of proving that the damage did not result from any fault of his; in other words, the warehouseman must prove that in storing the goods he exercised reasonable and proper care and diligence both as to the place in which they were stored and the manner in which they were cared for; that is to say, it would be incumbent upon the warehouseman under those circumstances to affirmatively prove the exercise of prudent care and diligence. Having done this to the satisfaction of the Court, he would in law escape liability.

As to the second condition stated under sec. (*b*), where the warehouseman of his own motion and without the knowledge or consent of the owners, moves the goods from one warehouse to another, I do not find his obligations or liabilities greatly changed. Says Mr. Justice Grove in the case of *Lilley* v. *Doubleday*, 7 Q.B.D., p. 510:—

> I think the plaintiff is entitled to judgment. It seems to me impossible to get over this point, that by the finding of the jury there had been a breach of contract. The defendant was entrusted with the goods for a particular purpose, and to keep them in a particular place; he took them to another, and must be responsible for what took place. The only exception I see to the general rule is, where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts, and inherent in the property itself. If goods are

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stored in a different warehouse from the one agreed upon, or are removed without the owner's direction or knowledge, and are there damaged the warehouseman is liable: Am. and Eng. Encyclopædia of Law, 2nd ed., vol. 30, p. 53.

I should not hesitate to say that a warehouseman removing goods from the warehouse contracted for with the owner to another, and when delivering them from that other the goods are found damaged, the whole burden of proof is upon him to shew that the warehouse to which he removed the goods was proper in every way and equal as to safety to the other from which they were removed, and that the damage in no way resulted from any defect of construction or maintenance in the new building; he in so moving the goods without the consent or knowledge of the owner, violates his contract, *viz.*, a contract to store the goods in a particular place and he must bear the consequences unless he fully excuses himself; he chose the new warehouse without consulting the owners of the goods and it is upon him to justify his choice.

The mere fact of the removal of the goods or the violation of the contract would not of itself render him liable if the damage was in no way due to the removal, or to some defect in the place to which they were removed.

If damage resulted to the plaintiff, the owner of the goods, solely because they were removed and would not have happened in the warehouse contracted for, then, as in the case of *Lilley* v. *Doubleday*, 7 Q.B.D. 510, above referred to, the owner must succeed. In the case just referred to, goods were insured in one warehouse and were removed to another without the owner's knowledge, and were in the latter destroyed by fire. The owner had insured the goods in the first warehouse, but they were not covered in the second, and the owner lost his insurance and suffered damages to that extent, and the Court came to his relief and condemned the warehouseman to pay it.

As to the condition under sec. (*c*), it was urged by plaintiff's counsel that when it was perceived by the defendants that the goods in question shewed evidence of damage, it was their duty to take steps to stop or prevent further damage. I do not find this position sustainable. It is true the defendants knew they had canned tomatoes on storage. It is equally true the plaintiff knew he was storing canned tomatoes. If the defendants were bound to know to any extent of the possibility of damage occurring from the inherent nature of the goods to a greater degree, would the plaintiff, the owner, be held to know?

If the defendants exercised prudence and care in the storage of the goods I do not consider that they were under any obligation to notify the plaintiff of possible or probable damage to the goods by something inherent in the goods themselves.

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The plaintiff exercised not the slightest care or diligence with respect to the goods for a period of five years, and if during the same period of time the defendants exercised ordinary prudence and care, I cannot find under the circumstances the existence of a greater obligation.

Applying then the law as briefly stated and as I understand it to the facts established, I find, first, that no act of negligence or want of prudence has been established affirmatively by the plaintiff. I find that even if the fact of the goods being damaged when delivery was offered constitutes a *primâ facie* case of negligence, the defendants have affirmatively established that in the care of the said goods, both in the warehouse in which they were placed and the maintenance of that warehouse, all reasonable care and prudence was exercised.

I do not consider it necessary or useful to enter into a minute analysis of the evidence, but I am convinced that a great part of the goods was seriously damaged before they were removed from the warehouse, No. 27 St. Sacrament street, against which warehouse no complaint is made and no proof is offered. The proof convinces me that the warehouse at No. 30 St. Francois-Xavier street was a fit and proper place to store these goods and was maintained in a fit and proper manner, and that all due care and diligence was exercised by the defendants.

Upon the whole, I find in favour of the defendants, and the plaintiff's action must be dismissed with costs.

Action dismissed.

N.B.—The plaintiff has inscribed this case in Review.

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Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. April 29, 1912.

1. WATERS (§ II D—95)—DAM—RAISING LEVEL OF RIVER—DUTY AS TO PROTECTING BANKS.

Where a power company builds a dam across a river and thereby causes a rise in the level of the river, resulting in the rapid erosion or eating away of the banks of the river, such company should protect such banks, along which highways run, by means of revetment walls and guard-rails, so as to ensure the safety of pedestrians and vehicles using the highway.

2. DAMAGES (§ III U—365)—APPORTIONMENT—MUNICIPALITY AND POWER COMPANY JOINTLY LIABLE.

Where a municipality and a power company have been jointly condemned to pay damages to the heirs of a person who was drowned in a river owing to a defective guard-rail, the Court will, as between the co-defendants, condemn the company to pay the entire amount

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so found to the corporation, plaintiff in warranty, when it is established that the municipality has for years been protesting the company to take proper precautionary measures to ensure the safety of the highway and of banks of the river, and where the power company was under a legal duty in that regard the neglect of which was the cause of the death.

Statement

THIS was an appeal from the judgment of the Superior Court for the district of St. Hyacinthe, Martineau, J., rendered on January 8, 1910, condemning the appellant to pay to the principal plaintiff (not a party to this appeal) the sum of $4,000 damages for the death of her husband, and maintaining the action of the appellant, plaintiff in warranty, against the defendants in warranty, respondents, for $2,000 only instead of $4,000 as claimed.

The defendants in warranty entered a cross-appeal to be relieved entirely.

The appeal was allowed and the cross-appeal dismissed.

The trial Judge found that the proximate cause of the accident in question was two-fold: the dangerous and defective condition of the guard-rail erected by the respondents on this appeal, and the dangerous state of the highway in contravention with the dispositions of the Municipal Code. (752, 757, 793 Mun. C.)

Argument

Louis Lussier, K.C., for appellant and cross-respondent:—The respondents hold their powers and privileges under 61 Viet. (Que.) ch. 65, as amended by 1 Ed. VII. ch. 67, and by virtue thereof they are responsible for all damages caused by inundations resulting from the damming of a river or the execution of works by these companies. Besides these special provisions they are governed by the common law dispositions of C.C. 1053-4-5. And on this account the respondents in answer to protests of the appellant erected guard-rails. It was unnecessary for the corporation council to pass a resolution to this effect as stated by the trial Judge, as the common law provided therefor. And since the accident the respondents have clearly admitted their liability as shewn by their repairing the roadway where the accident occurred. In any event they should have been condemned in the same amount and to the same extent as the appellant.

The whole cause and the only cause of the accident is the rapid erosion of the river bank due to the higher level of the river waters resulting from the works built by the respondents.

Authorities referred to: C.C. 1053-4-5; *La Cie de Pulpe de Mégantic* v. *Corporation of the Village of Agnès*, Que., 7 K.B. 339, *The Chambly Manufacturing Co.* v. *Willet*, 34 Can. S.C.R. 502; *Montreal Light, Heat & Power Co.* v. *Archambault*, Que. 29 S.C. 356, 16 K.B. 410; *Corporation of Notre Dame de Bonsecours* v. *Montreal and St. Lawrence Light & Power Co.* (unreported); American and Eng. Ency., 2nd ed., vo. Dams, Nos. 709, 714-16, 721-23.

Geo. H. A. Montgomery, K.C., for respondents and cross-appellants:—The dam of the defendants in warranty caused no damage to the roadway, the erosion being due to natural causes only. No evidence was adduced as to the necessity of there being a guard-rail, for this could only have been legally obligatory under a resolution and by-law. (612 Mun. C.) The fact that a guard-rail was put up was not an acquiescence in the alleged obligation to erect it, and far less of an obligation to maintain it. Under Mun. C. (art. 788) the obligation to erect a guard-rail, if any, rested on the municipality, not on the companies. Even a resolution of the council could not have transferred such obligation on the respondents: *Town of St. Louis* v. *Citizens' Light, Heat & Power Co.*, 13 Que. K.B. 19; Mun. Code, art. 457. If any action in warranty exists in favour of the appellant against the company as riparian proprietor it must be in virtue of 791 Mun. C., but in order that such action should exist the person sought to be held must be bound by the provisions of the law or of a process verbal or by-laws regulating roads and sidewalks, and none such exist in the present case.

But even if the respondents had the obligation of maintaining a proper guard-rail the one put up was sufficient for all purposes. The functions of a guard-rail are only to indicate danger and it is not supposed to be built to withstand any shock which may be imposed upon it: Elliott on Roads and Streets, p. 783, sec. 618; *Stickney* v. *Salem, etc.*, 3 Allen 374; *Richards* v. *Enfield*, 13 Grey 344; *Orcutt* v. *Kittery, etc.*, 53 Me. 500; Elliott on Roads and Streets, sec. 63, note 2, sec. 40, sec. 608; 32 Cyc. vo. Railing, p. 1470. The proximate cause of the accident was not attributable to any act or neglect on the part of the respondents.

Lussier, in reply.

April 29, 1912. The judgment for the majority of the Court was rendered by

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Both the plaintiff in warranty and the defendants in warranty pray for the quashing of the judgment rendered by the Superior Court for the district of St. Hyacinthe, on January 8, 1910, maintaining to the amount of $2,000 the action in warranty of the corporation against the companies, taken as a result of the main action instituted against it on November 3, 1908, by Dame R. Marcoux as a result of the death of her husband, Alphonse Steben, on August 30, 1908, by reason of the bad state of the road and of the guard-rail built thereon within the limits of the corporation's jurisdiction, and under its control, which main action resulted in a judgment of $4,000, against the corporation defendant.

An appeal from this judgment on the main action was also taken by the corporation of the village of Richelieu, but as this appeal was dismissed with costs by this Court on December 30, 1911, we are no longer interested therein except in so far as we

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must recognize the fact of *res judicata* as regards the indebtedness of the corporation to the principal plaintiff in a sum of $4,000 with interest and costs.

The judgment on the main action was based on the ground that the corporation appellant had been negligent and failed in its duty to compel the companies respondent, defendants in warranty, to keep in good order according to the prescriptions of the civil law, and of the municipal code, that is to say, free from ruts, incumbrances and danger, the highway along the south bank of the Chambly River, within the limits of the village of Richelieu (the accident having taken place on this road). According to the judgment of the Court below the plaintiff in warranty failed in its duty to prevent the defendants in warranty from allowing the bank of the river to be undermined by the high water resulting from the construction of a dam about half a mile farther down than the spot where the accident happened, and in not compelling the construction of a revetment wall or solid guard-rails along this bank.

The declaration in the main action alleged that the said Steben met death by drowning on August 30, 1908, as the result of a fall into the said river with his vehicle, which fall was caused by a hole about twelve feet deep and about one and a half feet wide, by one and a half feet long, in which one of the supports of the guard-rail, built by the defendants in warranty about ten years ago at the request of the corporation, was resting.

In answer to this action, the appellant corporation prayed for leave to call in the respondent companies in warranty, and obtained this leave. In the action in warranty the corporation appellant declares that it will hold the respondent companies liable for all damages which might be awarded against it (the corporation), because the companies, after having constructed in 1897 and 1898 the dam in question and thereby raised the level of the river by over twelve feet, neglected, in spite of notarial and other protests emanating from the corporation, to build a revetment wall sufficient to prevent the bank of the river from being eaten away by the erosion resulting from the higher level of the river, and more particularly neglected to build and maintain a well-built guard-rail resting on supports properly sunk in firm earth.

In brief, the cause of Steben's death was alleged to be due to the fact that one of the supports of the guard-rail in question instead of resting on a solid foundation was really suspended in the hole above described. Steben's horse, as he was coming along, stepped into this hole, the rail gave way, and horse and driver rolled into the river.

In answer to the action in warranty, the respondent companies pleaded that although they had built the guard-rail in question, they had never admitted that they were obliged to

either build or maintain it; that they were not responsible for Steben's death, that such death had not been caused by the defective condition of the guard-rail, but that he had been victim of his own imprudence and lack of skill as a driver of a spirited horse; and that the plaintiff in warranty had rendered the road more dangerous by allowing stones to be piled up thereon.

The appellant replied that the road was in perfect order, that it was incumbent on the respondent to intervene in the main action and obtain its dismissal by proving the imprudence and unskillfulness of Steben; that in any event his death was due to the defective condition of the said guard-rail and to the absence of protective works to prevent people from falling into the river.

The respondents replied generally.

The main action and the action in warranty were united for trial and judgment. And by consent dated November 12, 1909, the respondents, to wit the Montreal & St. Lawrence Light & Power Company and the Montreal Light, Heat & Power Company, agreed that any condemnation that might be rendered should go against them jointly and severally.

The plaintiff in warranty now prays this Court to condemn the defendants in warranty to pay it the full amount of $4,000 in order to indemnify it from the main condemnation of January 8, 1910, confirmed on December 30, 1911. The defendants in warranty on the other hand pray that the corporation of the village of Richelieu be declared purely and simply responsible for Steben's death and condemned therefore to bear alone all the damages found in the premises and which it has been condemned to pay.

The evidence is most voluminous on one side and on the other. . . . As I have already said, the respondents did not see fit to intervene in order to prove Steben's imprudence and lack of skill, and as a result the plaintiff in warranty which pleaded these was nevertheless condemned to pay $4,000 to his widow and his heirs. On this phase of the case there is therefore "*res judicata*" as to the acts of negligence charged against Steben, seeing the Court of Appeals as well as the Superior Court has found that Steben's death was due to the bad state of the highway.

There remains therefore but one question left for our decision: Who is responsible for the bad state of the highway?

(The learned Judge here went into the evidence of the different witnesses minutely and concluded:)

So we have, on the one side, the witnesses of the respondents who are content to enunciate, with more or less vagueness, opinions and theories as to the probable causes of the erosion eating away the bank of the Chambly River; and, on the other, we have the statements and the personal experience, in some cases going

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back fifty years, in most of them thirty years, of the witnesses for the appellant. We do not hesitate in coming to the conclusion that the river bank in question is eaten away year by year through the action of water, cold, freezing and ice; that this erosion has caused the formation of the hole in question, and that the existence of this hole is due to the exclusive fault of the respondents, defendants in warranty; that it was their duty to have it filled up or to have all danger removed by the construction of another guard-rail or by a proper revetment wall; that they alone are responsible for the damages claimed and obtained by Steben's widow; and that they must indemnify the plaintiff in warranty therefore, in principal, interest and costs.

We therefore allow the appeal of the corporation of the village of Richelieu and dismiss the cross-appeal of the respondents with costs.

CROSS and CARROLL, JJ., dissented and would have dismissed the main appeal as well as the cross-appeal.

The dissenting opinion of Mr. Justice Cross follows:—

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CROSS, J., (dissenting):—While it has been proved on the one hand that the banks of the river have for many years been undergoing here and there a process of being washed away and eroded, the weight of the evidence establishes that, at the place of the accident to Steben, this process was markedly accelerated by the act of the power companies in building the Chambly dam. The surface of the water of the river was thereby brought to act upon the river bank at a higher level and one at which the soil was softer than it was at the old surface level, and as a consequence, the bank was worn away more rapidly than would otherwise have happened.

Much reliance was placed by the defendants in warranty upon the fact that, at the place of the accident, the face of the bank still had a slope of forty-five degrees. In view of this fact it was said that the crumbling away of the bank could not have been due to washing away from below. I nevertheless consider that the weight of the testimony establishes that the effect of the washing away from below was to produce a sort of advance sinkage at the crest of the bank, at first imperceptible and insufficient to disturb the mat of growing grass at and near the roadside, but, nevertheless, sufficient to destroy the firmness of the soil to such a degree that, when Steben's horse trod upon it, it went down and slid away.

But, side by side, with that process, but whether connected with it or not cannot be stated with certainty, there was the existence of the depression in the surface of the road which is mentioned in the judgment of the Superior Court, just such a depression as would be caused at such a place by the action of the spring thaw upon the snow accumulated on the travelled part

of the road in winter, though it may be true that the surface water of summer rains might discharge about twenty-five feet farther along the road.

That depression in the road, whether connected with the advance sinkage above mentioned or not, ought to have been detected and removed by the village corporation long before the date of the accident. Besides, it appears that, notwithstanding the requirements of article 771 Mun. Code, there were no side ditches for the road at all. Notwithstanding that it had assumed the charge of the upkeep of the highway, I find nothing in the testimony submitted to us by the village corporation upon this appeal to shew that it did any work at all by way of upkeep of the piece of the highway in question for over three years before the date of the accident. The village corporation even appears to have made a point of proving, at the trial, that some loads of gravel, which had been spread upon the road, were put there, not by itself, but by the power companies.

No road inspector or road foreman was brought forward to give testimony. We have thus before us a case of damage caused by contributing negligence, that is to say, neglect on the part of the village corporation to keep the highway in proper order, and negligence on the part of the power companies in depriving the highway of lateral support.

And the matter to be decided upon the appeal of the village corporation is whether that corporation can call upon the power companies to pay all the damages or not.

When once negligence on the part of a defendant is proved, the defendant is responsible for the full amount of damages which are the effect of the negligence in favour of a non-negligent injured plaintiff.

If the plaintiff is himself chargeable with negligence, which has contributed to the damages, he must bear his share of the damages, and can recover only the remainder from the defendant. Then legally and logically it follows, that if persons other than the defendant have contributed by negligence to cause the damages, the defendant has a right of action against these other persons to have the Court determine and adjudge how much of the damages they shall pay. The idea of there being no right to contribution between *tort feasors* does not receive recognition in our law. The rule is the same whether the joint and several liabilities arise from contract or from participation in a *tort* or *quasi* offence. A list of authorities to this effect may be found in Fuzier-Herman C.N. art. 1214 at No. 11 and Supplement to the same work art. 1214, No. 4. The result of the decisions is summarized in the notes to two cases reported in Dalloz 1894-1-513 and *ib.* p. 561, from which one may quote as follows:—

> Une jurisprudence constante décide depuis longtemps et la doctrine admet presque unanimement que les co-auteurs d'un quasi-délit sont

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solidairement astreints à la réparation du dommage causé par ce quasi-délit, toutes les fois du moins, qu'il est impossible de déterminer exactement la mesure dans laquelle chacun y a participé. . . . Il n'y a pas à rechercher d'ailleurs, si les torts respectifs s'identifient les uns avec les autres ou si, étant distincts mais simultanés, ils ont simplement convergé au même résultat et, en se combinant, ont produit l'accident survenu. . . . Si, dans leurs rapports avec le créancier les codébiteurs solidaires sont tenus chacun pour le tout, dans leurs rapports réciproques, ils ne le sont que pour une portion (C. Civ. 1213) et en général l'obligation se devise entre eux par parties égales; mais cette règle n'est pas absolue, et le juge peut, si les circonstances le comportent, ordonner qu'ils contribueront pour des fractions inégales. Spécialement, quand une responsabilité est solidairement encourue par les agents multiples d'un délit ou d'un quasi-délit et quand les fautes imputables à ces derniers n'ont pas le même degré de gravité, les tribunaux peuvent décider que, les uns par rapport aux autres, ils supporteront la perte dans des proportions graduées, d'après l'importance relative de ces fautes . . . quand il s'agit d'évaluer la quotité pour laquelle ces derniers devront, dans leurs rapports réciproques, supporter définitivement l'indemnité, il est impossible de recourir aux mêmes éléments d'appréciation, impossible de s'attacher à l'influence ou à la part d'influence que l'imprévoyance de tel ou tel à pu exercer sur le sinistre car souvent, on l'a vu, elle n'est pas mesurable, et quand elle ne l'est pas dans les rapports des co-auteurs avec les tiers, elle ne l'est pas davantage dans les rapports des co-auteurs entre eux. Cependant, il faut bien procéder à une répartition entre ces derniers; ayant, en effet, concouru au préjudice, ils doivent tous finalement concourir à sa réparation. Alors, pour opérer équitablement cette répartition qui s'impose, les juges se guident d'après la gravité respective des torts, abstraction faite de leurs conséquences."

Effect was given to these legal considerations in *City of Montreal* v. *City of St. Cunégonde*, 32 Can. S.C.R. 135, and also in *Montreal Gas Co.* v. *St. Laurent*, 26 Can. S.C.R. 176. In the particular circumstances of the last cited case, it was held that the municipal corporation was entitled to be indemnified in entirety in respect of the damages which it had been adjudged to pay.

Applying these conclusions to the facts of the present case, I consider that the appeal of the village corporation fails.

That corporation had assumed charge of the upkeep of the roads. Its obligation was to have kept this highway "in good order, free from holes, cavities, ruts, slopes, stones, incumbrances, or impediments whatsoever, with guard-rails at dangerous places, in such a manner as to permit of the free passage of vehicles of every description, both by day and night." Art. 788 Mun. Code.

It has been argued that the by-law whereby the village corporation assumed the burden of upkeep of the roads is void because it purported to introduce a condition and to divide the obligation, by leaving the frontagers to keep up the roads

between November 15 and April 1, but apart from what the learned Judge of the Superior Court has said upon that point, it may be pointed out that irrespective of any ordinance requirements, the council retains its authority over persons interested in roadwork for winter maintenance (art. 837 M.C.), so that the reservation in the by-law is warranted by the code itself.

Now, the obligation of the village corporation being such as I have indicated, it is clear that that obligation is much heavier than any which rested upon the power companies.

That being so, it is clear that it can have no recourse against them for its own neglect of its duty.

That municipal councillors could take the position that they need not concern themselves about public safety upon the highways on the consideration that if some person suffers the municipal corporation can sue some other person to make good the damages to its exoneration, is a thing not to be countenanced. "L'individu condamné comme auteur d'un fait délictueux ne peut se faire relever, au moyen d'un recours en garantie, de la responsabilité pécuniaire encourue par suite de l'infraction qu'il a personnellement commise." Fuzier-Herman C.N. 1382, No. 1399, *ib.* Nos. 1164, 1400, 1405 and 1407.

No such legal duty as that of the village corporation just described, rested upon the defendants in warranty, the power companies.

I have designedly referred to the obligation of the power companies as consisting in the non-withdrawal of lateral support of the soil of the highway. No by-law or process verbal is brought forward to establish that the burden of maintaining a guard-rail was charged upon them by the municipal authority. That authority had power by by-law (art. 612 M.C.) to oblige frontagers to fence off their lands from the highways, and such fences along front roads are at the charge of the frontagers (art. 774) and must be well made and kept in good order (art. 776). It did not, however, exercise such power.

The introduction of the rule of art. 752 into the Municipal Code, made by the Act 23 Vict. ch. 61, sec. 40, effected a radical change in our highway law in the municipalities governed by that code. The familiar legal situation of a frontager, whose land was subjected to a servitude of public passage, but who, subject to that right of passage, was owner of the land "*ad medium filum*," which obtained where English law or the feudal tenure existed, was done away with, and instead of it, the legal situation now is that the frontager owns the land to the street line and the municipal corporation owns the street. They are neighbours having the obligations of owners of contiguous lands, and when thereupon the municipal corporation makes an ordinance under art. 535 M.C., assuming the burden of mainten-

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ance of the highways, its legal relation is towards the ratepayers at large and not towards each individual frontager for the portion of the road opposite to his land. In respect of highway uses, such frontager has no greater obligation respecting the piece of road opposite his land than he has respecting the piece opposite to his neighbour's land. This serves to distinguish the present case from that of the *Montreal Gas Co.* v. *Laurent*, 26 Can. S.C.R. 176, above cited.

It has been argued for the village corporation that the power companies or one of them were under a contractual obligation to protect the bank from crumbling away and to maintain a good guard-rail. This argument was based upon the fact that about six years ago, before the date of the accident, the village council made a written demand upon the Montreal & St. Lawrence Light & Power Company to erect a protecting wall opposite four shore lots of land including the one at the place of the accident, and to build a hand-rail (*garde-fou*) along the side of the highway, and upon the fact that about five years before the date of the accident that company did in fact build a certain timber wall and did build the guard fence along the roadside.

It was proved that in the year 1903, after these works had been done, the village council gave written notice to the power company that it did not consider them sufficient. The contention is further rested upon the fact that on the day of the accident the power company repaired the breach in the fence.

This argument is fallacious. That a property owner by complying with part of an order emanating from the municipal authority which has jurisdiction over him, thereby contracts or even acknowledges the existence of a legal obligation to do the thing ordered, and to do it again after the lapse of five or six years, is a proposition which has no legal foundation. That there was any acknowledgment of legal obligation involved in the act of mending the fence after the accident is analogous to the argument sometimes put forward in master and servant cases to the effect that an employer, who sends an injured man to hospital or who pays a surgeon's bill, admits liability in damages for personal injuries.

What seems to me to be a plain inference from the facts is that the municipal corporation having done nothing to shew any sign of dissatisfaction with the fence or guard-rail for over four years before the date of the accident, must be taken to have been satisfied with it as it stood and it was for it to detect and see to the correction of any defect in it. If it had by an appropriate by-law or process verbal charged upon the power company an obligation to maintain the fence-guard, then art. 789 M.C. would have applied and the company would have been under the obligation to act without notice, but no such by-law or process verbal has been brought forward.

The power company's obligation being thus merely that of a neighbouring owner not to withdraw lateral support, it is characteristic of that obligation that the owner of the dominant land has no right of action until there has been subsidence: *West Leigh Colliery Co.* v. *Tunnicliffe*, [1908] A.C. 27, at p. 30; *Bonomi* v. *Backhouse* (1861), 9 H.L.C. 503. The notarial demand for construction of a protecting wall was doubtless a prudent warning but the demand was not one with which a land owner entitled to the enjoyment of his own property was bound to comply. The distinction which I have drawn may be clearer by reference to the decision in *Lodge Holes Colliery Co.* v. *Mayor, etc., of Wednesbury*, [1908] A.C. 323.

In the result, I consider it clear that the negligence of the village corporation rested upon a legal basis different from that which applied to the power companies, that the duty of legal obligation of the village corporation was much the more weighty and imperious one, that in fact it has not been shewn that the power companies were under any affirmative obligation to see to the safety of Steben on the highway, and that, the Court "se guidant d'après la gravité respective des torts" as indicated in the extract from Dalloz should conclude that the village corporation is not entitled to be indemnified in entirety by the power companies. I would therefore dismiss the village corporation's appeal. The appeal of the power companies remains to be considered.

In a technical sense, the action in warranty fails, for the reason that, as already pointed out, the legal obligation of the village corporation in favour of Steben is not a legal obligation which rested upon the owner of the abutting land. But, notwithstanding that, I consider that the action has still to be considered as an independent action to enforce against the power companies a subsidiary responsibility for contributing fault. I consider, in the view of the facts already expressed, that the power companies were at fault. It is true that, in general, one of several persons jointly and severally indebted to a third party cannot call upon his co-debtors to contribute until he has himself paid the debt to the third party in whole or in part, but I consider it to be now recognized in the decisions that where an action has been taken against a party charged with a *tort* or *quasi* offence, he has a right of action to call into the suit any other party to the *tort* or *quasi* offence even if he has made no payment to the injured party, the object to be attained being to avoid circuity of actions and possible contradiction in judgments. The decision in *Montreal Gas Co.* v. *St. Laurent*, 26 Can. S.C.R. 176, is an authority in that sense.

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It also appears to me that the share of the damages (namely, one-half) adjudged against the power companies is warranted by the proof as being a proper proportion.

I would therefore also dismiss the appeal of the power companies.

Appeal of principal appellants allowed with costs; cross-appeal dismissed.

N.B.—The respondents and cross-appellants have lodged an appeal from this judgment in the Supreme Court of Canada.

Re HEWITT.

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Ontario High Court, Middleton, J. March 23, 1912.

1. LAND TITLES (§ VII—70)—QUESTION ARISING IN MASTER'S OFFICE—PROCEDURE.

The Land Titles Act, 1 Geo. V. (Ont.) ch. 28, sec. 88, requiring that the practice or procedure on, and incidental to, a case stated or on an issue directed for the determination of a question arising in the office of the Master of Titles shall be the same as on a special case or on an issue directed in an action, makes a respondent a necessary party and an applicant for registration as the owner of land is not entitled on an *ex parte* motion to obtain an order of the Court to determine a question of such character.

2. ADVERSE POSSESSION (§ I K—55)—SUFFICIENCY OF FENCING LAND—POSSESSORY TITLE.

The "actual, constant, and visible occupation" necessary to possessory title to land is not shewn by the fact that the land has been fenced for thirty years and by a statement by the claimant of the land that for twenty years off and on he had stored lumber and other stuff there, even when supplemented by a further statement that some material remained there continuously.

[*Campeau* v. *May*, 2 O.W.N. 1420, specially referred to.]

Statement

A PERSON applying for registration as the owner of land under the Land Titles Act, 1 Geo. V. ch. 28, moved, *ex parte*, under sec. 88 of the Act, for an order of the Court determining a doubtful question arising in the office of the Master of Titles.

The order was refused.

R. L. Defries, for the applicant.

Middleton, J.

MIDDLETON, J.:—The applicant desires to have the case disposed of *ex parte* because he does not know in whom the paper title is now vested.

I very much doubt whether there is authority to hear a special case *ex parte*, as the statute in question directs that the practice and procedure shall be the same as on a special case or on an issue directed in an action; and no actor in an action can obtain an adjudication without first finding a respondent and giving notice to him.

Apart from this difficulty, I do not think that a possessory title is made out. The land has been fenced since 1882; but that

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is not enough; there must be an "actual, constant, and visible occupation;" and this is not met by the statement that "for twenty years off and on I have stored lumber on the lot, also other building material," even when supplemented by the vague and unsatisfactory statement, "some material would remain there continuously."

I had occasion to consider this question, and to collect the authorities, in *Campeau* v. *May*, 2 O.W.N. 1420.

Upon both grounds, I refuse to interfere.

Motion dismissed.

DAVIS v. LOWRY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Gallihier, JJ.A. April 2, 1912.

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C. A. 1912

April 2.

1. CONTRACTS (§ II D—171)—VAGUE OR AMBIGUOUS TERMS—CONSTRUCTION.

In the interpretation of a vague or ambiguous term used in a contract, a letter having reference to the same subject-matter written by another person on the plaintiff's instructions in which the same term is used, may be considered as the language of the plaintiff for the purpose of assigning to such term a meaning consistent with that in the letter but adverse to the meaning which the plaintiff seeks to place upon it in the contract.

2. PLEADINGS (§ II D—185)—STATEMENT OF CAUSE—ACTION RIGHTFULLY DISMISSED—ALTERNATIVE REMEDY.

An action is rightfully dismissed where the plaintiff, if entitled to recover at all, could do so only on an alternative claim which was not pleaded.

3. PLEADINGS (§ I N—118)—AMENDMENT AFTER JUDGMENT—ADDING NEW CLAIM NOT PLEADED ORIGINALLY.

A request, after judgment dismissing an action, to permit an amendment so as to allege an alternative claim, not originally pleaded, was rightfully denied.

Statement

APPEAL by plaintiff from the judgment of Murphy, J., dismissing the action.

The appeal was dismissed, IRVING, J.A., dissenting.

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

S. S. Taylor, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The first agreement entered into between the parties is in no wise ambiguous, but on the same day what is expressed to be a "further agreement" was made, the meaning of which is the principal question—practically the only question in this action. It may be useful to state briefly the circumstances in which these agreements were made. The plaintiff had theretofore located several parcels of land with the intention of purchasing them from the Crown; but he appears to have been financially unable to complete the purchases. The time within which these locations could be utilized for such purpose had nearly expired, and the intention was to re-locate them

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and apply for Crown grants. In these circumstances the plaintiff entered into the principal agreement in question. On the face of the agreement it would appear that he was to act as the agent of Lowry, who was the *alter ego* of defendant Brownlee, and was to be paid $1 per acre when the payment of 50 cents per acre of purchase money to the government was accepted. Within a few hours after the execution of this agreement, the said further agreement was drawn up and executed. It does not purport to displace the first agreement, but in it the plaintiff agrees as follows:—

> Davis agrees with Lowry to divide equally with the said Lowry all profits arising out of the disposal of the lands staked by himself and by Hankin and by Harvey, the expenses advanced by Lowry to be deducted.

The plaintiff's contention is that this substitutes for the $1 an acre clause what is virtually a partnership arrangement by which the plaintiff and Lowry are to divide the profits which should be made on the ultimate sale or disposal to others of the land to be staked. Defendants, on the other hand, contend that this was simply an agreement by Davis to divide the $1 an acre after deducting his expenses, including what he should pay Hankin and Harvey for assisting him, of locating the lands. There is a great deal of conflicting and, in part, irrelevant evidence as to what the parties meant. There are also expressions used in the power of attorney from Lowry to Brownlee, which though dated earlier than the agreements, was drawn up and executed afterwards, and refers specifically to the two agreements, tending to support the plaintiff's claim. The power of attorney authorizes just such a partnership as the plaintiff contends for. Looking at the three documents, namely, the power of attorney and the two agreements, alone I should be disposed to find that the plaintiff's contention is right.

Much depends upon what the parties meant by the words in the second agreement, "disposal of the land." The true construction, as I view it, of the first agreement, standing alone, should be not that the plaintiff was disposing of the lands to Lowry, but was acting as an agent in locating them. He and Brownlee may, however, have regarded the transaction as a disposal of the lands by the plaintiff and Lowry, and that is conceivable bearing in mind that plaintiff, at the time the agreements were made, was in a sense the owner, he held an inchoate right and was in a sense selling that, subject to re-staking by him. That that was what the plaintiff meant is borne out by the letter of the 7th September, 1911, signed by Herbert C. Hankin, and addressed to the plaintiff, but written by a solicitor on the plaintiff's instructions, in which these lands are mentioned as "the land staked by me, which has been disposed of to Brownlee and Lowry on account, as it has since transpired, of the North Coast

Land Company." The language there used, I think, must be considered to be the language of the plaintiff, who procured the letter to be written, and there he treats the land in question as having been disposed of by himself to Brownlee and Lowry. He even assumes that defendants were even in the beginning the agents of the lumber company. It is not a chance or careless expression as the context, I think, clearly indicates. This appears to me to be an interpretation by the plaintiff himself of an expression used in the second agreement which, if so interpreted, makes the meaning of that agreement quite plain, that is to say, he was to divide the profit he would make out of the $1 per acre. This interpretation is also borne out by the plaintiff's letter to Brownlee of the 15th November, 1910, which, I think, is consistent only with the conclusion at which I have arrived.

It was urged on the argument that in any event the plaintiff is entitled to recover something from the defendants, therefore the action ought not to have been dismissed. But the plaintiff could only so recover on an alternative claim which was not pleaded. The learned trial Judge was requested to permit an amendment after he had delivered his judgment, which I think he rightly refused to do. The defendants professed in their pleadings to have always been ready and willing to settle with the plaintiff on the basis of their construction of the agreements. There was also evidence to shew that payments on such a construction were not due when the action was commenced. There may also be a question as to the amount the plaintiff is entitled to deduct for expenses before his share of the profits can be ascertained, and there was further the declaration of counsel for the defendants at the trial that they were then ready and willing to pay the plaintiff on the basis of the construction which I find myself driven to place upon the agreements. Doubtless the defendants will pay the plaintiff what is justly due, if they do not, the plaintiff has his right of action.

I would, therefore, dismiss the appeal.

Irving, J.A.

IRVING, J.A. (dissenting):—Under the first agreement of the 26th August, 1909, the plaintiff was to cruise and stake lands for Lowry, and was to receive $1 an acre, to be paid to him when the government accepted the 50 cents per acre deposit. As there was no definite acreage mentioned, I should assume that these payments would be made from time to time as the government accepted the 50 cents, and that it was not the intention that Davis should receive nothing until the contract was put an end to.

Under the second agreement the cruise and staking by the plaintiff was to be continued. Therefore, we may take it that the plaintiff was to continue to receive payment for his services, and that Lowry was still to be regarded as the purchaser of the lands surveyed.

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The second agreement reads:—

> Davis agrees with Lowry to divide equally with him (Lowry) all profits arising out of the disposal of the lands staked, expenses by Lowry to be deducted.

The plaintiff's contention is that by the second agreement, the $1 an acre payment was wiped out, and that instead he was to share with Lowry the profits to be made out of the lands when disposed of by Lowry.

The defendants on the other hand, say that the "profits" referred to in the second agreement mean the profits that Davis would make in the deal between himself and Lowry, that is to say, that the agreement should read this way—Davis agrees with Lowry to divide equally with him (Lowry) all profits arising out of the disposal of the land by Davis to Lowry.

It is reasonable to suppose that within half an hour of making a bargain whereby he was to receive at least 75 cents an acre clear, the plaintiff should without any consideration agree to give one half of his profits on the staking to Lowry? I should think not.

The word "disposal" seems inapplicable to the acquisition by Lowry of land staked by his employee, Davis. The power of attorney helps the plaintiff's contention, but on the other hand, there is the letter written by the plaintiff himself.

The defendant, in my opinion, is right on the construction of the two documents. But as the plaintiff is to share in the profits arising from the acquisition of the land by Lowry he is entitled to have an account and payment of the amounts due. As many payments of 50 cents per acre have been accepted by the government, the action is not premature.

In my opinion, the learned trial Judge should not have dismissed the action, but should have ordered the pleadings to be amended so as to dispose of the case finally between the parties, declared the true meaning of the documents, and directed an account to be taken so as to settle the case for all time. To quote language of Knight-Bruce, L.J.:—

> It is of the utmost importance to the right administration of justice in these Courts, that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be, by adjournment, for a decision of the real points in dispute.

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See reasons for judgment of Hunter, C.J., in *Belcher* v. *McDonald* (1902), 9 B.C.R. 377 at p. 388.*

I would allow the appeal, amend the pleadings, fix the plaintiff with the costs thereof and of his failure at the trial, and declare that under the contract of 26th August, 1909, the plaintiff and Lowry are entitled to share in the profits in the sale to Lowry of the land, and direct an account to be taken on that basis.

Galliher, J.A.

GALLIHER, J.A., concurred in the judgment of MACDONALD, C.J.A.

Appeal dismissed, IRVING, J.A., *dissenting.*

TEBB v. BAIRD; TEBB v. HOBBERLIN BROS. AND CO.; HOBBERLIN BROS. AND CO. v. TEBB.

Ontario High Court, Riddell, J. April 2, 1912.

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April 2.

1. PARTNERSHIP (§ II—6)—LIABILITY OF PARTNERSHIP—NOTE OF ONE PARTNER FOR A PRIVATE DEBT.

A note given by one partner in the name of the firm for the payment of a private debt of his own due the payee who took the same in good faith, cannot be enforced by the latter against the partnership unless he shews that it was in fact given with the authority of the other partners.

[*Kendal* v. *Wood*, L.R. 6 Ex. 243, 248, specially referred to.]

2. MASTER AND SERVANT (§ I E—22)—SALESMAN—GROUNDS FOR DISMISSAL.

No wrongful dismissal of an employee hired to travel for his employers and to assist their local agents in selling goods, is shewn where the reason for the dismissal was the employee's receipt of a bonus from the agents for his assistance to them.

[*Pearce* v. *Foster*, L.R. 17 Q.B.D. 536, 542; *Marshall* v. *Central Ontario R. Co.*, 28 O.R. 241, and *McIntyre* v. *Hoskin*, 16 A.R. 498, specially referred to.]

3. PARTNERSHIP (§ II—8)—ASSIGNMENT OF BOOK DEBTS BY ONE PARTNER —ABSENCE OF AUTHORITY TO—LIABILITY OF PARTNERSHIP.

An assignment of the book debts due a partnership by one of the two partners composing the firm in the absence of the other is valid as to the other partner, even though the partner executing the assignment was by agreement between him and the other member of the firm without power in that regard, if the assignee was without knowledge of the lack of authority on the part of the partner who executed the assignment.

[*Marchant* v. *Morton Down & Co.*, [1901] 2 K.B. 829, specially referred to.]

Statement

THE first action was brought by the wife of one Tebb, against Baird, Tebb's partner, Tebb himself, and "The Veribest Ordered Clothes Company," the name of the firm composed of Tebb and Baird, to recover $2,500 and interest upon a promissory note signed by Tebb in the firm name.

*The decision in *Belcher* v. *McDonald* (1902), 9 B.C.R. 377, was reversed (1903), and a new trial ordered by the Supreme Court of Canada, *Belcher* v. *McDonald*, 33 Can. S.C.R. 321, but was restored on a further appeal to the Privy Council, *McDonald* v. *Belcher*, [1904] A.C. 429, reversing *Belcher* v. *McDonald*, 33 Can. S.C.R. 321.

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Statement

There was judgment for the plaintiff against the defendant Tebb with costs. The action was dismissed as to the other defendants but without costs.

The second action was brought by Tebb against Hobberlin Bros. & Co. and Baird for conspiracy and fraud, and against Hobberlin Bros. & Co. for wrongful dismissal of Tebb from their service and for a balance of wages.

There was judgment for the plaintiff for arrears of wages but the charges of conspiracy and wrongful dismissal were held to fail.

The third action was brought by Hobberlin Bros. & Co. against Tebb, Baird, and "The Veribest Ordered Clothes Company," for the amount of certain bills of exchange drawn upon the firm and accepted by Baird for the price of goods supplied to the firm, and for the price of other goods supplied.

The Court allowed an amendment of the plaintiffs' pleadings so as to permit them to claim for the value of the goods supplied and judgment was then rendered for the plaintiffs.

W. M. McClemont, for the plaintiffs in the first two actions, and for the defendants in the third.

Messrs. *M. J. O'Reilly*, K.C., and *G. H. Levy*, for the defendants (except Tebb) in the first and second actions and for the plaintiffs in the third.

Riddell, J.

RIDDELL, J.:—One Tebb, being in business in Hamilton as a dealer in men's clothing, sold out a one-sixth interest in the business to Baird, for $500, forming a firm under the name of "The Veribest Ordered Clothes Company"—the real agreement being apparently that Baird should put in $500 cash or capital and Tebb $2,500. Mrs. Tebb had, a short time before, come into a little money, and Tebb borrowed $2,500 from her "to put into the business." At the trial it was said more than once that the loan was to "the business" or to the firm; but at length it was clearly made to appear to me that the real transaction was, not a loan to the partnership, but a private loan to Tebb, to enable him to put up his share of the capital. A promissory note payable on demand for $2,500 was given to Mrs. Tebb by her husband, signed "The Veribest Ordered Clothes Company," per Tebb. It was contended at the trial that this note was given long subsequent to the loan; but I find against that contention.

Tebb had full power to sign the firm name—the firm has become insolvent.

Mrs. Tebb made a demand for the amount of the note, and, when it was not paid, she brought action, making Baird, Tebb, and "The Veribest Ordered Clothes Company" defendants.

Although the husband had full power to sign the firm name, his using the firm name to a note for his own private debt was a fraud on the partnership. And it is well established that "a person who knows that a partner is using the credit of the firm for a private purpose of his own knows that he is using it for

a purpose prima facie outside the limits of his authority. Therefore . . . if one partner makes a note in the name of the firm and gives the . . . note in payment of a private debt of his own, the creditor who takes the . . . note . . . will not be able to enforce it against the firm, unless it was in fact given with the authority of the other partners, which it is for the creditor to prove:" Lindley on Partnership, 7th ed., p. 201: see also pp. 179, 202, and notes. And a belief that there was authority, however *bonâ fide*, is not sufficient to charge the firm: *per* Cockburn, C.J., in *Kendal* v. *Wood*, L.R. 6 Ex. 243, at p. 248.

Baird knew nothing about the note being given, and gave no authority to sign the note for the purpose—and, with whatever good faith the plaintiff acted in the business, she cannot recover from any one but her husband upon the note. Nor can she recover for money lent; for, although the husband put most of the money into the business, it was not put in as a loan from Mrs. Tebb, but as a contribution by himself to the capital—a contribution he was bound to make.

The $100 paid to Mrs. Tebb was paid as interest; and she will have judgment against her husband for the amount of the note, interest, and costs; but the action will be dismissed against the other defendants without costs. This is the first of the actions.

Tebb, when the business was getting in low water, was employed by the House of Hobberlin, the chief—indeed almost the only—creditor, to travel for them and to assist their local agents in selling goods. He left behind Baird to manage the whole business; and the Hobberlin company from time to time drew upon Tebb for the amount of their claims for goods supplied. Baird accepted these drafts in the name of "The Veribest Ordered Clothes Company," per himself. The business went from bad to worse; the rent was allowed to remain in arrear, and so were the taxes; and the landlord sold. The Hobberlin company bought certain goods at the sale.

In the meantime, Tebb, going to the Maritime Provinces and elsewhere, while he assisted the local agents of the Hobberlin company to sell goods, asked (indeed rather demanded) and received money from the agents for his services. These services he was bound to render under his agreement with the Hobberlin company for the fixed salary agreed upon—if they should have been rendered at all. What he asserts is, that he enabled the local agents to sell at a higher profit than they otherwise would, and so it was not improper that they should pay him a "bonus." This course of dealing came to the knowledge of the Hobberlin company, through complaints of their agents—and that company promptly dismissed Tebb. The hiring had been for the season—say, six months.

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Tebb brought his action against the Hobberlin company and Baird for conspiracy and fraud; against the Hobberlin company also for wrongful dismissal and balance of his wages.

It needs no argument for any business man to recognise at once that Tebb's manner of dealing with the agents was most deleterious to his employer's business and interest.

As was said by Lopes, L.J., in *Pearce* v. *Foster*, L.R. 17 Q. B.D. 536, at p. 542: "If a servant conducts himself in a way inconsistent with the lawful discharge of his duty in the service, it is misconduct which justifies immediate dismissal . . . It is sufficient if it is conduct which is prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing the servant."

This was followed in *Marshall* v. *Central Ontario R. Co.*, 28 O.R. 241.

It was said that the master here did not know, at the time of the dismissal, of any of the improper acts proved at the trial. Such is not the case, taking the evidence of the plaintiff; but, in any event, "if good cause for dismissal exists, it is immaterial that at the time of dismissal the master did not act or rely upon it, or did not know of it, and acted upon some other cause in itself insufficient:" *McIntyre* v. *Hockin*, 16 A.R. 498, and cases cited.

The action for wrongful dismissal fails; but the plaintiff is entitled to $50 arrears of wages and expenses—and this the Hobberlin company may apply on their costs.

As to the alleged conspiracy, there is no shadow of foundation for the charge.

Tebb also contends that an assignment of book-debts made by Baird in his absence to the Hobberlin company is invalid. The assignment was made by the partner left in full control of the business—and notice was given by the Hobberlin company to the debtors, some of whom have paid the amounts to the Hobberlin company.

It is said that "one partner can assign a debt due to the firm:" Lindley on Partnership, 7th ed., p. 161; *Marchant* v. *Morton Down & Co.*, [1901] 2 K.B. 829. No doubt, if the Hobberlin company knew that the assignment was not within the power of the partner Baird, for any reason, they could not take advantage of the assignment; but that is disproved. The recollection of Tebb that he himself was to sign all documents, etc., when he was absent, is not to be relied upon.

I thought at the trial that I should not pass upon this question adversely to the Hobberlin company, without allowing those debtors who had paid their accounts to be heard. But, as the law is clear, I think I should now declare the assignment valid so far as the parties to the record are concerned.

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Then the Hobberlin company sue on the drafts and for an open account.

Objection is made by Tebb to paying the amounts of the drafts given for goods, drafts signed by Baird. I do not think it of any importance to determine whether the bills of exchange are valid. I allow an amendment of the pleadings, and allow the Hobberlin company to claim for the value of the goods supplied, which value is in part represented by the bills of exchange.

The Hobberlin company are entitled to their costs, and judgment will go accordingly.

Judgment accordingly.

Re GRIFFIN.

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April 12.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Sutherland, JJ. April 12, 1912.

1. EXECUTORS AND ADMINISTRATORS (§ IV C 2—111)—BASIS ON WHICH COMPENSATION TO EXECUTORS MAY BE FIXED.

There is no fixed rate of compensation applicable under all circumstances for services of executors and trustees; they are entitled to reasonable compensation; and what is reasonable compensation must be governed by the circumstances of each case.

[*Re Griffin*, 3 O.W.N. 759, reversed on appeal; *Robinson* v. *Pett*, 2 White and Tudor, L.C. Eq. 214, followed.]

2. EXECUTORS AND ADMINISTRATORS (§ IV C 2—111)—COMPENSATION—MANAGEMENT OF CORPORATE SHARE HOLDINGS.

Though shares in companies may be readily convertible, yet the risk of liability upon an executor in case of a loss to the estate owing to their fluctuation in value should be considered in fixing his compensation where a large part of the estate consists of corporate shares.

[See Annotation to this case.]

3. EXECUTORS AND ADMINISTRATORS (§ IV C 2—111)—ASSETS IN DIFFERENT PROVINCES—NUMEROUS LEGATEES—COMPENSATION.

Where an estate consists of assets in different provinces, and there are a large number of pecuniary legacies, many of the legatees being infants, and a trust fund is created by the will, a sum equivalent to about 3 per cent. of the value of the estate is not too large a compensation to be allowed to the executors.

[See Annotation to this case.]

Statement

APPEAL by the executors of the will of G. H. Griffin, deceased, from the order of Middleton, J., 3 O.W.N. 759, setting aside the order of the Judge of the Surrogate Court of the County of Lambton, whereby he allowed the executors the sum of $3,000 for their care, pains, and trouble as such executors, and in lieu thereof awarding them the sum of $815.73.

The appeal was allowed, and order of the Surrogate Court restored.

C. A. Moss, for the executors.

R. C. H. Cassels, for the residuary legatee.

F. W. Harcourt, K.C., for the infants.

Mulock, C.J.

The judgment of the Court was delivered by MULOCK, C.J.:—There is no fixed rate of compensation applicable under

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all circumstances for services of executors and trustees. They are entitled to reasonable compensation; and what is reasonable compensation must be governed by the circumstances of each case: *Robinson* v. *Pett*, 2 W. & T. L.C. Eq. 214. Various authorities upon the subject are collected in Weir's Law of Probate, p. 389, et seq. An examination of the cases there cited shews the following allowances to executors according to circumstances. In some instances they have been given a commission on moneys passing through their hands, varying from one to five per cent.; in others, a bulk sum; in others, a commission and a bulk sum; in others, an annual allowance in addition to or exclusive of commission.

As said by Chancellor Vankoughnet in *Chisholm* v. *Barnard*, 10 Gr. 479 at p. 481: "Five per cent. commission on moneys passing through the hands of executors or trustees, may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labour, anxiety, and time spent in managing an estate, when five per cent. would be a very insufficient allowance."

And in *Thompson* v. *Freeman*, 15 Gr. 384, at p. 385, Spragge, V.-C., says: "On the other hand, the amounts might be so large, and the duties of management so simple, that five per cent. would be more than a reasonable allowance."

Thus, there being no established uniform rate or method of compensation, it is necessary here to consider the nature of the estate and the duties required by the testator to be performed by the executors in order to determine what would be a proper allowance for their care, pains, and trouble.

The testator died on the 10th October, 1910, leaving an estate valued at $100,002.98. The estate consisted of the sum of about $3,000 cash on hand, a life insurance policy which realised $3,693, shares in some fourteen different companies of an estimated value of about $93,000, and household furniture of trifling value. The testator bequeathed pecuniary legacies to fifty-three different persons, resident in twenty-three different places in Ontario, Quebec, Manitoba, Great Britain, and the United States. Fifteen of them were infants, under the age of twenty-one years. He also gave legacies to six charities. He created a fund of $10,000 to be held by his trustees for the benefit of his half-sister Frances Griffin during her life, and thereafter for the daughter of his half-brother, Frank Wetherall. He also directed his trustees to acquire a burial plot at a cost not exceeding $500.

The executors have carried out the trusts of the will, and in the course of administration sold certain stocks, realising therefor $23,837.17. They have also collected interest and

dividends amounting to $4,022.67, making together the sum of $27,859.84, and have disbursed in payment of legacies, funeral and testamentary expenses, taxes, debts, and succession duties, $26,813.12. The assets of the estate were situate in the Provinces of Ontario, Quebec, and Manitoba, and the executors were obliged to adjust with the several Governments of those Provinces the amounts of succession duties to which they were respectively entitled. The realising of this sum of $27,859.84 began in October, 1910, and continued throughout the year and until the following October. There were in all forty-seven items of receipts. The disbursement of the said sum of $26,813.12 extended throughout the same period, and involved sixty separate transactions. There are still in the hands of the executors stocks of the estimated value of $66,641.50, and unpaid specific legacies amounting to $5,853.34.

It appeared during the argument that the executors are now prepared to wind up the estate and transfer the residuary estate to the residuary legatee. I, therefore, am dealing with the case upon the basis of a full administration of the estate.

The learned Surrogate Court Judge has allowed the executors $3,000 or about three per cent. of the value of the estate when taken over by the executors. Adding to that the $4,022.67 income, the total value of the estate would be $104,025.65.

Having regard to the labour and responsibility involved in the carrying out of the testator's directions, I am unable to reach the conclusion that the learned Surrogate Court Judge allowed an excessive amount. On the contrary, I am of opinion that, if he erred at all, it was in not allowing a larger sum. I have not overlooked the circumstance that the estate consisted largely of shares in companies, which, it was argued, were readily convertible; but shares in companies are liable to fluctuation in value, and a loss accruing to the estate because of their falling in value might, under some circumstances, render executors liable therefor, although exercising what they considered good judgment. Such a risk on their part should not be overlooked when compensation for their services is being fixed. No complaint is made that the executors in any respect failed in their duty; and it, therefore, may be assumed that they exercised good care and judgment in the administration of the very large estate intrusted to them.

I, therefore, am, with very great respect, unable to agree with the view expressed by my learned brother Middleton, and think the order of the Surrogate Court should be restored, with costs of this appeal.

Appeal allowed.

Annotation

Compensation of executors

Annotation—Executors and administrators (§ IV C 2—111)—Compensation—Mode of ascertainment.

By permission of the owners of the copyright of Weir's Canadian Law of Probate, a synopsis of Mr. Weir's collection of authorities on the subject of executors' compensation, to which reference is made in the above reported judgment (*Re Griffin*, 3 D.L.R. 165), is subjoined.

The amount of compensation to be allowed to executors and administrators depends wholly upon circumstances. They cannot have an allowance for work done by others without charge. Five per cent. commission on moneys passing through the hands of executors and trustees may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labour, anxiety, and time spent in managing an estate, when five per cent. would be a very insufficient allowance: *Chisholm* v. *Bernard*, 10 Gr. 479, Weir's Probate, pp. 387, 388.

Until the statute, 23 Vict. (Can.), ch. 93, sec. 47, no executor or administrator as such could claim any allowance for his services. This rule in regard to trustees was established early in Courts of equity, and was inflexible. One of the principal reasons for the rule was that he might not create work with which to charge and load the estate. The trustee should not make his duty subservient to his interest. Consequently, since the statute, compensation will not be allowed where he has not done the work, or has done it in such a way as to prejudice the estate or benefit himself. The Act [now R.S.O. 1897, ch. 129, as amended by 63 Vict. (Ont.), ch. 17, sec. 8, and 3 Edw. VII. ch. 7, sec. 27], provides "for a fair and reasonable allowance to the executor for his *care, pains*, and *trouble*, and his time expended in and about the executorship, and in *administering, disposing of*, and generally in *arranging* and *settling* the same; and therefor the Court may make an *order* or *orders from time to time*." This provision seems to mean that for such portion of the duties as the executor or administrator has bestowed his care, pains, trouble, and time upon, in the proper administration of the estate, he shall receive reasonable compensation. When he has neglected any portion of his duties, or has applied his care and pains in mal-administration, it would scarce be asked that in respect of it, however much trouble may be brought upon him thereby, he should receive any wages or reward: *McLennan* v. *Heward*, 10 Gr., at p. 283.

That statute abrogated the old rule, for the benefit of executors and administrators only, not in the case of other trustees: *Wilson* v. *Proudfoot*, 15 Gr. 103. In that case the principles on which an administrator should be charged with interest on funds in his hands, were considered. The administrator who had acted as agent of the intestate in his lifetime, had, with the assent of the deceased, used moneys belonging to him, without any attempt at concealment; the Court refused to take the account with rests, and allowed the administrator five per cent. on moneys received and paid out again, and two and one-half per cent. upon money gotten in and not paid, or to be paid over under the compulsion of an administration action: *McLellan* v. *Heward*, 9 Gr. 179, 279.

Four per cent. has been allowed to executors as a commission upon transfers of stocks: *Torrance* v. *Chewett*, 12 Gr. 407.

In *Thompson* v. *Freeman*, 15 Gr. 384, the Master allowed one executor five per cent. on the sum of $286,798.19 received and disbursed by him,

Annotation (*continued*)—**Executors and administrators** (§ IV C 2—111)—**Compensation—Mode of ascertainment.**

Annotation

Compensation of executors

and two and one-half per cent. on about $12,000 more which had been received but not disbursed, a total commission of more than $14,600. Upon appeal from the Master's report it was said that regard should be had to the amounts passing through the hands of executors and trustees. The sliding scale adopted in fixing the poundage payable to sheriffs on levying money upon executions, allowing the maximum percentage upon small sums, and reducing the scale as the amount increases, was considered as furnishing an analogy applicable to the compensation to executors and trustees. For making investments upon mortgages, five per cent. up to six hundred dollars, and three per cent. upon the excess over six hundred dollars, was said to be a reasonable compensation. But it was indicated that if there was any special trouble or difficulty in making the investments, that should entitle him to higher compensation: *Thompson* v. *Freeman*, 15 Gr. 384. A different sum was allowed to each of the executors in that case, according to the extent of the services each one rendered.

An allowance of five per cent. on a sum of more than $27,000 both received and disbursed by a paid agent in Indiana was made by the Master. The Court decided upon the appeal that a percentage was not the proper mode of compensation. Some compensation should be made, for it was the duty of the executors to see that the estate did not suffer detriment in the conduct of the business, and this would involve some care, labour and anxiety, and for this they should be compensated, and that not illiberally. One of the executors, who occasionally visited Indiana for the general supervision of the business there, was entitled to be specially compensated. The report was referred back to the Master: *Thompson* v. *Freeman*, 15 Gr. 384.

For the unequal division of the remuneration amongst the executors, see also *Re Fleming*, 11 P.R. 272; *Denison* v. *Denison*, 15 Gr. 306.

In the case of *In re Central Bank, Lye's Claim*, 22 O.R. 247, the Master in Ordinary allowed one and one-quarter per cent. on all moneys got in by the liquidators of the defunct Central Bank, without pressure, and three per cent. upon all sums got in after pressure. His reasons are given in 26 C.L.J. 24. Upon his refusal of a subsequent application for an allowance on claims adjusted by way of set-off, an appeal was taken to the Court, and one and one-quarter per cent. was allowed on $231,000, the amount adjusted or set-off as compensation for services in that connection. The total remuneration of the liquidators was $48,032, which was about two and one-quarter per cent. of the whole amount collected.

In Scotland, an allowance of two and a half per cent. on "ingatherings" of £312,000 was not considered too much: *Assets Co.* v. *Guild* (1885), 23 Scotch L.R. 170.

In *Re Bassford* (1884), 13 Daly 22 (New York), it appears that the rate allowed to assignees for the benefit of creditors is five per cent. upon the whole sum which comes into their hands, including the amount of claims adjusted by set-off, the rate being fixed by statute. In Ohio the rate is six per cent. on the first $1,000, four per cent up to $5,000, and all above that two per cent. In Scotland the usual rate in bankruptcy is five per cent. but that is regarded as excessive in cases of large estates: *In re Central Bank*, 22 O.R. 255.

Annotation **Annotation (*continued*)—Executors and administrators (§ IV C 2—111)—Compensation—Mode of ascertainment.**

Compensation of executors

In *Re Batt*, 9 P.R. 447, an allowance of two and one-half per cent. upon the receipts and two and one-half per cent. upon the disbursements was said not to be excessive. Some securities were handed over to, or allowed to remain in the hands of, a residuary legatee. Compensation was calculated with reference to their value, as the transaction involved personal risk, and the calculation of assets and liabilities.

In *Berkley's Trusts*, 8 P.R. 193, the trusts commenced in 1865, and in 1879 application was made to the Court to fix the remuneration of the trustees for taking over and investing about $72,000, and paying the income for the life of the life beneficiary, the following points were decided: (1) That on trustees assuming a trust estate, a commission is not to be allowed to them for merely taking it over, but that if they properly deal with it and hand it over on the determination of the trust, they are entitled to one commission for the receipt and proper application of the estate; (2) That trustees are not entitled to commission for the investment or re-investment of the funds of the estate, as that would encourage changes of investments; (3) That they are entitled to a commission on the receipt and payment of the income of the estate, and to a reasonable compensation for looking after the estate; (4) That it is not unreasonable to make some allowance for services not covered by the commission awarded. An allowance of $100 was made to each of the trustees for four times taking over the estate as they became entitled to it, $50 a year was allowed each year from 1865 to 1878 for general supervision, seeing that taxes were paid, insurance kept up, etc., and as the estate had greatly increased, $150 a year after 1878. These payments were to be made out of the corpus of the estate. $20,000 of income had been collected and paid over. On this the trustees were allowed four per cent., to be paid out of income. These payments left untouched the commission which might thereafter be allowed when the trust ends so far as these trustees are concerned, for the assumption and handing over of the estate. The Court directed that for the future the trustees might charge $240 against the income and $150 against the corpus annually.

But in *Thompson* v. *Freeman*, 15 Gr. 384, commission was allowed on re-investments.

Re Berkley's Trusts was followed in the case of *In re Williams*, 4 O.L.R. 501. The Master allowed two and one-half per cent. on all the personal property, other than household furniture, taken over, and five per cent. on the collection of interest owing at the time of the testator's death. At a later date he allowed them five per cent. on the amount of interest collected in the interval of eleven years, which was nearly $40,000. The corpus of the estate was $60,000, of which about $4,000 was real property. Upon appeal, it was held that the remuneration of trustees whose duties cover a period of years should not be confined to an allowance by way of percentage for the collection and payment over of income, but that it is proper to make them an annual allowance for their service in looking after the corpus of the fund, receiving repayments upon principal and re-investing it. Reasons are given why this allowance should not depend upon the amount so collected and re-invested, but should be a fixed annual allowance, based upon the value of the property and the consequent degree of care and responsibility. An annual allowance of $100 was made

Annotation (*continued*)—Executors and administrators (§ IV C 2—111)—Compensation—Mode of ascertainment.

Annotation

Compensation of executors

for nine years for the care of the principal, in addition to five per cent. on the income. Of the sum, three-quarters was paid to one executor, and one-quarter to the other: *Re Williams*, 4 O.L.R. 501.

The ordinary commission upon the moneys received and paid out by the trustee may not be an adequate allowance to him. He may, for instance, have the care and management of real property. The burden of managing unproductive real property situate in the suburbs of a city is considerable: *Wagstaff* v. *Lowerre*, 23 Barb. 221; *Stinson* v. *Stinson*, 8 P.R. 563.

A lump sum may be allowed for services as executor or trustee, as the remuneration for the care and management of real estate, but there should be evidence from which the Court can see what services have been rendered, and what would be fair compensation therefor: *Stinson* v. *Stinson*, 8 P.R. 563.

In an estate of about $115,000, of which $32,000 was money, and the rest debentures and stocks, a great many of them payable to bearer, one executor, F., had done nothing in the management of the estate, except on one occasion, when he secured some additional benefits for the widow. He also, under the direction of the private solicitor of the other executor, W.M., signed papers from time to time. The usual commission, in the ordinary case, is five per cent. of the whole sum received and properly paid over; and, having regard to the relative amount of work done by the two, W.M. was paid three and one-half per cent., though the work had been done by his private solicitor, and F. one and one-half per cent: *Re Fleming*, 11 P.R. 272.

In *Denison* v. *Denison*, 15 Gr. 306, a lump sum of $1,500 was allowed to one executor and the same amount for the other two executors between them.

Though trustees employ and pay an agent for actually making the collection of rent, they are bound to look after the agent, and for their care, trouble and responsibility are entitled to an allowance. Two and one-half per cent. was allowed to the trustees on the collection of $5,800 of rents extending over several years, though an agent did the actual work: *Re Prittie's Trusts*, 13 P.R. 19.

A legacy given to executors as compensation for their services does not abate upon a shortage of assets, as do general legacies: *Anderson* v. *Dougall*, 15 Gr. 405.

In *Bald* v. *Thompson*, 17 Gr. 154, in an administration suit, the Master found that the executor had received, or but for his wilful default might have received, $17,063.19; $3,518.75 was personal estate; $10,283.76 was the proceeds of real estate sold under powers contained in the will; the remainder, $3,261.28, was rents of the real estate before it was sold. The Master allowed the executor a commission of five per cent. on $11,227.48, and disallowed commission on the balance, $5,836.31. Upon appeal, the rule, that an executor should not be allowed commission on sums which he has not realized, and which he is chargeable with in consequence of his neglect or other misconduct, was affirmed; and the principle was taken to be established that compensation is to be allowed in respect of real estate as well as of personal property: *Bald* v. *Thompson*, 17 Gr. 154.

Annotation

Compensation of executors

Annotation (*continued*)—Executors and administrators (§ IV C 2—111)—Compensation—Mode of ascertainment.

Compensation was allowed to the administratrix for services rendered by her as guardian of her infant children, in which capacity she acted without letters of guardianship. She was guardian by nature and for nurture, and though this did not give her a strict right, it was some excuse for her for receiving rents. She was allowed compensation on the receipt and application of the rents on the same basis as upon her receipts as administratrix; but the case was regarded as exceptional: *Doan* v. *Davis*, 23 Gr. 207.

The gift of a share of the residue of the estate is an element to be considered in fixing the executor's commission. The estate realized amounted to $20,662.85; of this sum the executors had paid out $3,434.68; leaving $17,228.17 in their hands. The Master allowed them $826.51 as compensation for their personal services. Of the residue, the executors were entitled, under the will, to one-third. As affecting the compensation there is a difference between a specific legacy and a bequest of a share of the residue. In the former case the assumption is that it was given in respect of the trouble incurred in regard to the executorship; in the latter case this is not to be inferred, though it is an element in dealing with compensation. The Master's decision as to commission was varied by directing that no commission should be paid on that portion of the residue which the will gave to the executors: *Boys' Home of Hamilton* v. *Lewis*, 4 O.R. 18.

In *McDonald* v. *Davidson*, 6 A.R. 320, the trustee was employed to adjust questions of considerable interest and value between three unmarried ladies and their brother. The nature of the services demanded on the part of the trustee firmness, temper, tact, and address. The matters in question were complicated, and extended over several years. There were many interviews on the part of the trustee with the three ladies, with their brother and with a firm of solicitors, and it took considerable time and attention on the part of the trustee from February to autumn. The Master allowed him $125.00 for his services. Vice-Chancellor Blake, on appeal, increased this sum to $250.00, and his decision was affirmed by the Court of Appeal: *McDonald* v. *Davidson*, 6 A.R. 320.

In *Thompson* v. *Freeman*, 15 Gr. 384, the total amount received by the executors was $29,000, and they paid out in all about $5,000. One item on both sides of the account was a transfer of mortgage, on which no compensation was allowed, as it was done by arrangement made by the solicitors in an administration action and sanctioned by the Master. The plaintiff's solicitor collected $2,400, and paid it over to the executors, and paid a mortgage to them for which he was personally liable, of $10,000. The compensation allowed was:—

One per cent. on $2,400 + $10,000	$124.00
Two and one-half per cent. on the balance collected, after deducting the mortgage, *i.e.*, $12,000	300.00
Five per cent. on the disbursements except the transfer	15.00
	$439.00

Annotation (*continued*)—Executors and administrators (§ IV C 2—111)—Compensation—Mode of ascertainment.

Annotation

Compensation of executors

All the dealings of collecting and paying were after the administration order had been made. The absence of responsibility, in consequence, accounted for the small allowance.

In *Archer* v. *Severn*, 13 O.R. 316, the personal estate not specifically bequeathed was $41,818.99, of which they expended $25,100.93; the rents and profits of real estate received amounted to $4,051.90, of which they expended $3,816.91. There were over 300 items on one side of the account, and over 400 on the other. There had been a good deal of care, trouble and labour in the management. Five per cent. on the total receipts was held not to be an excessive remuneration, though there was nearly $17,000 in the executors' hands with which they were chargeable.

Trustees are not entitled to an allowance upon taking over an estate, but an allowance should be made to them for taking over and distributing. In *Re McIntyre*, 7 O.L.R. 548, the trustees took over about $60,000 of property in cash, mortgages, notes, furniture and farm property, of which they had distributed a little less than half and had set aside the residue for payment of legacies not matured, annuities, etc. They had collected about $6,500 of interest, and had looked after the estate for a little more than four years. The trusts were numerous and somewhat complicated in their nature, and the estate was not a simple one to deal with. They were allowed two and one-half per cent. upon the principal taken over and distributed; and the like allowance was to be made of two and one-half per cent. on the residue when distributed, and five per cent. on all the interest collected. They were also allowed $100 a year for the first two years, and $75 per year for the next two years.

The fact that the business was done, and the accounts kept loosely, by an executor who was not a man of education or acquaintance with accounts, and who intended to act carefully and with pains, and did act with a rude sort of care and pains, and with much trouble and expenditure of time, entitles him to compensation notwithstanding these shortcomings, it not appearing that he intended to act otherwise than honestly. Fair and reasonable compensation ought to be measured to some extent by results; where the care and pains are not of a high quality and the results are poor, $50 a year was regarded as a fair sum, for a period of nine years: *Hoover* v. *Wilson*, 24 A.R. 424.

The grounds for refusing compensation are various. Indebtedness to the estate on the part of the executor is not alone sufficient to disentitle him to compensation: *McLennan* v. *Howard*, 9 Gr. 178; *Archer* v. *Severn*, 13 O.R. 316; nor is retaining money in his hands unemployed: *Gould* v. *Burritt*, 11 Gr. 523; but in that case compensation was allowed to one executor and refused to another.

Commission will not be allowed on sums which the executor did not receive, but is charged with on the ground of wilful default, neglect or other misconduct: *Bald* v. *Thompson*, 17 Gr. 154; nor will commission be allowed on rents collected by an executor who, under the will, is a mere intermeddler as to such rents: *Dagg* v. *Dagg*, 25 Gr. 542.

Lack of skill in keeping accounts where they are honestly kept will not disentitle the executor to his remuneration: *McMillan* v. *McMillan*, 21 Gr., at p. 379.

Annotation

Compensation of executors

Annotation (*continued*)—Executors and administrators (§ IV C 2—111)—Compensation—Mode of ascertainment.

The use of the money of the estate in the executor's own business is improper. So also is the taking of a mortgage to secure funds of the estate in the name of one of the executors; but in the absence of wilful misconduct, that will not suffice to deprive them of commission: *Kennedy* v. *Pringle*, 27 Gr. 305.

The course of decision has been that an executor or trustee will be allowed his commission, though he may have so managed the estate as to justify the appointment of a receiver, and to be deprived of and even to be made to pay costs. There may, however, be cases of such exceptional misconduct as to induce the Court to deprive him of a commission. The hands of the Court are not bound in such a case. The fact that, upon taking the accounts, a balance is found against the executor, is not alone sufficient: *Sievright* v. *Leys*, 1 O.R. 375.

In *Simpson* v. *Horne*, 28 Gr. 1, the mismanagement of the estate by the executor was not only careless, but even perverse. His misconduct jeopardized the safety of the estate, and made an administration suit necessary to prevent loss. His dealing with the goods was characterized in one instance as simply unaccountable, and he was not allowed compensation. But the rule, as stated in that case, is not to deprive a personal representative of compensation unless there has been serious misconduct or misconduct or mismanagement on his part.

Where an executor retained a portion of the trust money under the belief that it was his own, and had acted upon that belief for many years, without objection by those who were interested under the will, he was charged with simple interest only on such moneys, as it did not appear that he had employed them in trade. But he was allowed his commission: *Inglis* v. *Beatty*, 1 A.R. 453.

Even when executors, by reason of neglect to invest moneys in their hands are charged with interest thereon, that is not sufficient to deprive them of compensation for their services. When the money is kept in hand without excuse, the Court rate of interest is allowed. When the executors are guilty of misfeasance, a higher rate may be charged. If the act of misfeasance is of such a character as to lead to the conclusion that considerable profits have been made or the money employed in trade or speculation, the beneficiaries will be allowed the option of having interest with rests or an account of the profits. But if the services of the executors are of value to the estate, they are entitled to compensation, and some allowance will be made on moneys received *pendente lite*. The administration suit does not end their duties: *Re Honsberger*, 10 O.R. 521.

If an executor or trustee takes no care or pains whatever, or so little that the trust estate has received no benefit, or if the care and pains have been used and applied, not for the advantage of the trust, but dishonestly and for the trustee's own benefit, then there may be a proper case for disallowance: *Hoover* v. *Wilson*, 24 A.R., at p. 426.

If administration is in progress in the High Court, the compensation of the executors or administrators will be fixed in that Court: *McLennan* v. *Heward*, 9 Gr. 279.

And it is improper for the Surrogate Court to fix the commission of an executor or administrator while an administration suit is pending in the High Court: *Cameron* v. *Bethune*, 15 Gr. 486.

Annotation *(continued)*—**Executors and administrators (§ IV C 2—111)—Compensation—Mode of ascertainment.** Annotation

Compensation of executors

But an administration suit does not deprive the personal representatives of their duties, and compensation may be allowed for services rendered *pendente lite*: *Re Honsberger*, 10 O.R. 521.

If all the estate of the testator has been fully administered by the executors, but, by the terms of the will, a part of it has been retained and invested by them, as trustees and not as executors, for the use of a beneficiary who becomes entitled to payment thereof at a future time, the compensation to which they are entitled in respect of such services should be charged against the trust fund, and not against the estate generally. It is well settled that the expenses and compensation of executors in getting in, clearing, dealing with, and generally administering the assets of an estate are to be borne by the aggregate of the estate. But the share in question when set apart for the trusts ceased to be assets of the estate, and it would be unfair to burden the estate with its administration: *Re E. J. E. Church Estate*, 12 O.L.R. 18.

ROWE v. QUEBEC CENTRAL RAILWAY.

QUE.

Quebec Court of Review, Tellier, Dunlop and Beaudin, JJ. March 22, 1912.

Court of Review.

1912

March 22.

1. RAILWAYS (§ II C—25)—FENCES—BREACH OF STATUTORY DUTY—LIABILITY.

A railway company which fails to maintain such fences and gates as required by the Provincial or Federal Railway Acts commits a breach of duty and will as a result be presumed responsible for any damages caused to animals escaping on to its right of way unless it can rebut absolutely the statutory presumption that it is responsible for the killing of the animals on the track.

[*Canadian Pacific R. Co. v. Carruthers*, 39 Can. S.C.R. 251, and *Rogers v. G.T.P.R. Co.*, 2 D.L.R. 683, specially referred to.]

Statement

INSCRIPTION in Review from the judgment of the Superior Court for the district of St. Francis, Demers, J., rendered on October 1, 1910, condemning the company-defendant to pay $150, value of a mare, belonging to plaintiff, killed by one of defendants' engines.

The appeal was dismissed.

Plaintiff alleged two grounds of action: (1) That the gate at the farm crossing by which the mare got from the pasture upon the track was not furnished with proper fastenings as required by art. 6606 R.S.Q. 1909 (5171 R.S.Q. 1888); (2) that by the exercise of proper caution by defendants' employees the accident would have been prevented.

Defendant pleaded the gate was a "proper sliding gate, commonly known as a hurdle gate, with proper fastenings," as and for such hurdle gate; that a horse was killed but through no fault of its own, but through that of plaintiff.

QUE.

Court of Review. 1912

ROWE v. QUEBEC CENTRAL RAILWAY.

Argument

The trial Judge found for the plaintiff on the ground that the gate was not furnished with proper fastenings as required by statute.

A. S. Hurd, K.C., for defendant-appellant, urged that as the gate was a sliding gate the proper fastenings were the upright posts at either end of sufficient length and weight and that a hook and staple or chain and padlock are not necessary for such a hurdle gate, although necessary for a swing gate. Appellant relied on *Lambert* v. *G. T. R.*, 7 L.N. 4, where the Court of Review confirmed a judgment dismissing an action similiar to the present one.

C. W. Cate, K.C., for plaintiff-respondent, relied on *Vernon* v. *G. T. R.*, M.L.R. 2 S.C. 181, where it was held that the erection of slide gates which are supported and held in position merely by their own weight is not a compliance with the statute.

The unanimous judgment of the Court was delivered by

Beaudin, J.

BEAUDIN, J.:—Article 6606 of the Revised Statutes of Quebec 1909, obliges every railway company to erect and maintain at its own costs and charges, on each side of the railway, fences with sliding gates, commonly called hurdle gates, with proper fastenings, and paragraph 3 declares that until these fences and gates are duly made the company shall be responsible for all damages which may be done by their trains, motors, cars, carriages or engines to cattle, horses or other animals on the railway. There can be no doubt as to the absence of hurdle gates with proper fastenings and, although the company may have been right in thinking they were sufficient, the presumption is against the company in the event of an accident as it is impossible to know what would have occurred if the law had been carried out. The company disobeyed a statutory disposition and this suffices to make it guilty of a fault from a legal point of view: see Abbott on Railways, page 366.

The proof seems to establish conclusively that plaintiff's brother shut the gate when the mare was brought to the pasture at 9 a.m., and that it was still closed at 11 a.m., when he went to dinner. It is true that the position of the gate after the accident shews that it must have been opened, but there is no evidence to shew that the mare did not pass through this opening and that she didn't open the gate herself. The legal presumption is against defendant and defendant has not been able to rebut this presumption.

See *Rogers* v. *Grand Trunk Pacific Railway*, 2 D.L.R. 683, 48 Can. L.J. 155; *C.P.R.* v. *Carruthers*, 39 Can. S.C.R. 251.

Appeal dismissed with costs.

INDEX OF SUBJECT MATTER, VOL. III., PART II.

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CASES REPORTED, VOL. III., PART II.

LABONTÉ v. NORTH AMERICAN LIFE ASSURANCE CO.

Ontario High Court, Kelly, J. January 25, 1912.

ONT.

H. C. J. 1912

Jan. 25.

1. INSURANCE (§ III D—70)—LIFE POLICY—COMPLETION OF TONTINE PERIOD —INSURED ELECTING TO TAKE ONE OF SEVERAL OPTIONS.

In a policy of insurance stipulating for the payment to the insured's wife "should his death occur within the tontine period, hereof, otherwise to himself, his executors, administrators, or assigns, the sum of $1,000.00" and further providing that it was issued and accepted under the insurer's semi-tontine dividend plan upon special provisions incorporated in the policy and made a part thereof, one of which was that upon completion of the tontine period, if the policy had not been terminated previously by surrender, lapse or death, the legal holder thereof should have the option to withdraw in cash the accumulated reserve fixed by the policy at $465.70, and in addition thereto the surplus apportioned by the defendants to the policy, and the insured outliving the tontine period, he and his wife agreed to take such option and surrender the policy and accept its entire cash value of $642.70 and there was afterwards a disagreement as to the amount of the option, the insured and his wife were not entitled in an action on the policy to recover $1,000.00—the face value thereof—but their recovery would be limited to the amount of the option.

2. JUDGMENT (§ VI A—258) — ENFORCEMENT — DECREE AS TO EXHIBITS FILED—DELIVERY UP FOR CANCELLATION—INSURANCE POLICY.

In an action on an endowment and life insurance policy in which the Court finds that, according to the terms thereof, only a lesser sum than the face of the policy is payable at the option of the insured on accepting cash at the termination of the expired tontine period, and that the insured had given notice of his election to take the accelerated cash payment plan under the option contained in the policy, a direction may be included in the judgment that in default of the plaintiff accepting the amount so found due, and on payment thereof into Court, the policy filed as an exhibit on the trial be declared satisfied and delivered up to the insurance company.

Statement

ACTION upon a policy of life insurance. The action was dismissed with costs.

W. F. MacPhie, for the plaintiffs.

J. A. Paterson, K.C., for the defendants.

Kelly, J.

KELLY, J.:—The defendants issued a policy of insurance, dated the 21st October, 1890, on the life of the plaintiff Pierre Labonté, on the defendants' semi-tontine investment plan, and in consideration (amongst others) of the annual premium of $29.65 payable on delivery of the policy, and thereafter on the 20th October in every year for nineteen years, insured the life of the plaintiff Pierre Labonté, and therein promised to pay to his wife, Zelia Mahen, "should his death occur within the tontine period hereof, otherwise to himself, his executors, administrators, or assigns, the sum of one thousand dollars, first deducting therefrom the balance of the current year's premium, if any, and all loans on account of this policy, upon satisfactory proof at its head office, of the death of the insured during the continuance of this policy and its surrender with the last renewal receipt thereof," under the provisions contained in the policy.

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It was also set forth in the policy that it "is issued and accepted under the company's semi-tontine dividend plan, upon the following special provisions printed and written and also those on the back hereof, all of which are hereby incorporated herein and made part hereof." One of these provisions was, that the tontine dividend period of the policy would be completed on the 20th October, 1910, and that, upon completion of that period, provided that the policy should not have been terminated previously by surrender, lapse, or death, the legal holder or holders of the policy should have certain options upon its then surrender, one of which options was to withdraw in cash the policy's entire share of the assets, that is, the accumulated reserve fixed by the policy at $465.70; and, in addition thereto, the surplus apportioned by the defendants to the policy.

On the 22nd September, 1910, a representative of the defendants wrote to the plaintiff Pierre Labonté, transmitting to him a form setting forth various options which the legal holders of the policy had the right to chose from, on the completion of the tontine dividend period, on the 30th October, 1910, and asking him to signify the options selected, so that the necessary voucher might be forwarded.

One of the options set forth in the form was "No. 4," that the policy might be surrendered for its entire cash value, comprising surplus and reserve, and amounting to $642.70.

The plaintiffs, by writing under seal, dated the 3rd October, 1910, which was transmitted to and received by the defendants, signified that, after carefully considering the various options offered them, they had decided to take that numbered 4 (namely, surrender the policy and accept its entire cash value, $642.70).

On the 28th October, 1910, the defendants sent to the plaintiff Pierre Labonté a form of discharge, to be signed by him and the beneficiary in accordance with the option so chosen by the plaintiffs. In reply, the plaintiff Pierre Labonté wrote to the defendants on the 31st October, 1910, stating that the amount which he had chosen to accept was $662.70, and not $642.70, and asking the defendants to look over the matter. On receipt of this letter, the defendants, to convince the plaintiff Pierre Labonté, wrote him on the 3rd November, 1910, returning to him for inspection the option form which had been signed by the plaintiffs, and requested that it be returned to the defendants with the discharge and policy, when the defendants' cheque for the proceeds would be immediately mailed to him.

The option form was not returned to the defendants, nor was the policy surrendered to the defendants, both of these documents having remained in the possession of the plaintiffs and being produced by them at the trial. The plaintiffs did not further communicate with the defendants, but commenced this

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action, claiming that, by the terms of the policy, they are entitled to payment of $1,000.

Having regard to all the terms of the policy, I find that what the plaintiffs were entitled to, at the end of the twenty years' dividend period, namely, on the 20th October, 1910, was not $1,000, but one or other of the options mentioned in the policy; that the plaintiffs chose to accept the option which entitled them to the cash surrender value of the policy at that time, and which was stated by the defendants and admitted in writing by the plaintiffs to be $641.70, on surrender of the policy. Not only did the plaintiffs choose to accept the $642.70, but the evidence shews that, under the terms of the policy or contract of insurance in question, this sum is the amount which an annual premium of $29.65 for twenty years produced or purchased as the surrender value, at the end of that time, of a policy on the plan and terms of that in question here, and having regard to age, etc., of the insured.

The defendants have been ready and willing to pay the holders of the policy the cash surrender value thereof, $642.70, on compliance by the plaintiffs with the conditions of the policy.

I, therefore, dismiss the plaintiffs' claim with costs; and, I direct that, on payment by the defendants to the plaintiffs, or if the plaintiffs refuse to accept it, then into Court, of $642.70, less their taxed costs, the policy be declared satisfied and be delivered to the defendants; and that in the meantime the policy remain in Court.

Action dismissed.

VIDITO v. VEINOT.

N. S.

S. C. 1912

Jan. 9.

Nova Scotia Supreme Court, Graham, E.J., in Chambers. January 9, 1912.

1. WRIT AND PROCESS (§ II—23)—SERVICE—LEAVING WRIT WITH DEFENDANT'S WIFE—DATE OF ACTUAL RECEIPT BY DEFENDANT.

An application to set aside a default judgment on the ground of irregularity in service of the writ of summons will not be entertained where it appears that the writ was given to the defendant's wife and that she gave it to her husband on the same day.

[*Phillips* v. *Ensell*, 1 C.M. & R. 374, followed.]

Statement

APPLICATION on the part of the defendant before the presiding Judge at Chambers on the 9th day of January, 1912, for an order directing that the judgment entered herein, the certificate and the recording of said judgment, and the writ of execution issued thereon, and all subsequent proceedings in the action, be set aside for irregularity, with costs to be taxed, on the ground that the writ of summons in the action was not duly served on the defendant. The affidavits shewed that the summons was left with defendant's wife and was handed by her to defendant.

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Graham, E.J.

T. R. Robertson, K.C., in support of application.
D. Owen, contra.

GRAHAM, E.J.:—I think the application to set aside the judgment and the service of the writ of summons on the ground of irregularity must be refused. The case of *Phillips* v. *Ensell*, 1 C.M. & R. 374, a decision of the full Court, controls this case. There the writ was given to the defendant's brother living in the same house, but because it was not sworn that it did not come to the knowledge or possession of the defendant the application to set aside was refused. Here it was given to the wife and there is affirmative evidence that the wife gave it to the husband that same day when he returned from his work in a field 90 rods away. The application will be dismissed, the plaintiff's costs to be costs in the cause. The defendant has sworn to a defence on the merits, but has not disclosed the grounds. If he files an affidavit disclosing a defence within thirty days I would have no hesitation in opening up the judgment, as I said at the hearing.

Motion dismissed.

Re ATKINS.

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H. C. J.
1912

Feb. 12.

Ontario High Court, Riddell, J. February 12, 1912.

1. WILLS (§ III L—196)—SPECIFIC LEGACY—INTENTION OF TESTATOR—WILLS ACT (ONT.).

Under Wills Act, R.S.O. 1897, ch. 128, sec. 26 (1) providing that every will shall be construed with reference to the real and personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears in the will, where one clause of a will bequeathed money in a certain bank to specified legatees and another clause did the same with money in another bank to other specified legatees and before his death the testator withdrew the account in the one bank and deposited it in the other, the fund so increased is to be divided among the legatees to whom was bequeathed the account in the bank to which the transfer was made and not among the legatees of the money in the bank from which the account was drawn, there being nothing in the will to indicate a contrary intention on the part of the testator.

2. WILLS (§ III L—196)—SPECIFIC LEGACY—DEMONSTRATIVE LEGACY—GENERAL ASSETS.

The bequest of a specified sum of money to be drawn from funds of the testator in a specified bank is a demonstrative legacy and if before the testator's death he withdraws the funds and deposits them to his account in another bank, the legatee will not lose his legacy merely because the will directed the money in the second bank to be otherwise bequeathed, but he will be permitted to receive it from the general assets of the estate.

[*Re Clowes*, [1893] 1 Ch. 214, and *Re Dods*, 1 O.L.R. 7, specially referred to.]

Statement

MOTION by the executors of William E. Atkins, deceased, under Con. Rule 938, for an order determining certain questions

as to the disposition of his estate, arising upon the construction of his will.

Grayson Smith, for the executors.

R. C. H. Cassels, for the legatees mentioned in the second clause of the will.

M. C. Cameron, for the legatees mentioned in the third clause.

A. G. MacKay, K.C., for the legatees mentioned in the fourth clause.

RIDDELL, J.:—The testator made his will on the 10th June, 1902, wherein, after appointing executors, he made the following dispositions:— Riddell, J.

"(2) I leave Robert Ernest Seaman the sum of four hundred dollars to come from the amount deposited in the Molsons Bank. The balance in the Molsons Bank, after paying funeral expenses and a stone to mark my grave, not to cost over $20 dollars, to be divided equally between Martha Wright, Alice Weaver, and Robert Neeland's four children. The expenses in connection with the payment of this part of the estate to come from the same, viz., that amount in the Molsons Bank account.

"(3) To my relatives in England I leave one thousand dollars in equal shares to the following persons, viz., Eli Atkins, my brother, Emma Bunce and William Atkins, eldest son of John Atkins, my deceased brother, and if Eli Atkins be not living then his share to go to the invalid daughter now living with Eli Atkins her father, these amounts to come from the Savings Bank account, together with any expenses in this connection with this division.

"(4) I direct that my Meaford real property be sold and divided (after the expenses of the sale be taken out and after a wise and judicious sale can be effected) equally between Tilly Short, wife of W. J. Short, Seymour Bumstead and William Edwin Bumstead, sons of Charles Bumstead, and Mrs. William Ufland. The time of the sale of this property to be in the discretion of the executors so as to effect an advantageous sale of the same. The expenses of selling and the division of this property to come out of this part of the estate."

It will be seen that there is no residuary clause.

At the time of making his will he had:—

1. In the Molsons Bank, Meaford.....$ 639.58
2. In the Post Office, savings bank department 1,103.19
3. A note of one R. C. T. and interest..... 100.00
4. Lots 61 and 62 W. side Bayfield street, Meaford.

In June and July, 1905, the account in the post office savings bank was closed out, and apparently the money was deposited in the Molsons Bank account. No further sum was deposited in the post office savings bank.

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On the 3rd October, 1903, the Meaford lots were sold for $925, and a mortgage taken in June, 1907, for $500, part of the purchase-money.

In March, 1907, the testator transferred into the joint names of himself and one of the persons he had named as executors the money then to his credit in the Molsons Bank. At the time of the death of the testator, in January, 1911, the whole of the testator's property was as follows:—

1. In Molsons Bank to the joint account spoken of	$2,394.80
2. Mortgage, on which there was due and interest	367.10
3. Note of R.C.T. and interest	100.00

It seems, although it is not and perhaps cannot be proved, that the proceeds of the Meaford lots, except so far as they are represented by the mortgage, were used by the testator for his support.

It is quite plain that the testator, when he made his will, intended that the $1,000 mentioned in clause 3 should be paid out of the $1,103.19 then to his credit in the post office savings bank —and that he did not intend any of the money then in the post office savings bank to go to the legatees named in clause 2. But he himself destroyed the fund in the post office savings bank, and deposited it in the Molsons Bank. It is contended, then, that those named in clause 2 should receive the benefit, and that all the money in the Molsons Bank should go to them. (There is no question as to Robert Ernest Seaman—he gets his $400—nor as to the expenses of this fund.)

The Wills Act, R.S.O. 1897 ch. 128, sec. 26 (1), provides: "Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will." There is nothing in this will indicating any such contrary intention—the testator retained the power of increasing or diminishing the amount on deposit, and must be taken to have understood that it was the fund so increased or diminished upon which this clause of his will would take effect. There is nothing to indicate that he did not, when he destroyed the fund, intend to play a sorry jest upon the persons named in this clause, if the destruction of the fund should have that effect.

And, in like manner, the Molsons Bank deposit he retained the power to increase or diminish, and there is nothing to indicate that he did not intend the fund so increased or diminished to be divided among those named in clause 2, or that these should not have the benefit of the increase actually made. Paraphrasing the words of the Master of the Rolls in *Bothamley* v. *Sher-*

son (1875), L.R. 20 Eq. 304, at pp. 312-3, "the balance in the Molsons Bank" does not mean "the balance in the Molsons Bank at the time of my making this will" but "the balance in the Molsons Bank at the time of my death:" *Goodlad* v. *Burnett* (1855), 1 K. & J. 341; *In re Holden* (1903), 5 O.L.R. 156; *Re Dods* (1901), 1 O.L.R. 7.

Then as to the land and clause 4 of the will. It was decided as long ago as 1784, by Lord Thurlow, L.C., in *Arnald* v. *Arnald*, 1 Bro. C.C. 401 (S.C., *sub nom. Arnold* v. *Arnold*, 2 Dick 645), that, where a testatrix orders her estate to be sold, and the produce to be divided, and afterwards she sells the estate, this is a revocation of the will. In that case the testratrix left a will whereby she devised a messuage in Lancashire to C. for life, and after C.'s death to C. H. and W. A. to sell the same and apply £200 to the use of M. C. A., one-third of the residue to the use of C. A., one-third to the use of W. A., and the interest of the other third to E. T. for life; remainder to E. T.'s children. The testatrix, after the making of the will, sold the estate for £2,500; a part of the purchase-money was left upon mortgage on the messuage, and the remainder invested in consol. annuities. The Lord Chancellor held that "the alteration is an ademption"—"there is an absolute disposition made by the will, and before that can take effect, another absolute disposition, inconsistent with it, is made by the testatrix herself:" 1 Bro. C.C. at p. 403. (The life tenant had apparently died during the lifetime of the testatrix; and the plaintiff was one of those entitled under the will to a part of the proceeds of the sale of the estate.) "It is clear that the money arising from the real estate devised by the testatrix, and afterwards sold by her, made part of her general personal estate:" 2 Dick. at p. 646. The same rule prevails even though the land be not conveyed during the life time of the testator, so long as a contract for sale exists: *Farrar* v. *Winterton* (1842), 5 Beav. 1; *In re Bagot's Settlement* (1862), 31 L.J. Ch. N.S. 772. And where, even on the day following the sale, the land is reconveyed to the testator by way of mortgage for securing part of the purchase-money: *In re Clowes*, [1893] 1 Ch. 214. Our own case of *Re Dods*, 1 O.L.R. 7, is also in point. The provisions, then, of clause 4 are wholly negatory.

The bequest in clause 3 is what is called in the civil law—and the terminology has been adopted by our Courts of Equity—a demonstrative legacy, *i.e.*, one which is a legacy of quantity in the nature of a specific legacy as of so much money, with reference to a particular fund for payment. In this case, if the fund be called in (as in the present case) or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets: *Fowler* v. *Willoughby* (1825), 2 Sim. &

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Stu. 354; *Creed* v. *Creed* (1844), 11 Cl. & F. 491, 509; *Tempest* v. *Tempest* (1857), 7 D.M. & G. 470, 473.

Therefore, the legatees in clause 3 are entitled to look to the assets other than the money in the Molsons Bank, and to receive so much as these assets can be made to realise.

The testator clearly was ignorant of the method of administering estates—an ignorance not uncommon amongst laymen. His intention, however, may be carried out by:—

1. Pay out of Molsons Bank fund the debts, and for the stone not more than $20.

2. Make a statement of all the costs of administration, including Surrogate Court costs, the costs of this motion, executors' commission, etc., etc.,

3. Divide this total *pro rata* between the balance of the Molsons Bank fund and the remainder of the estate.

Costs of all parties out of the estate, those of the executors between solicitor and client. I declined to dispose of the matter without hearing what could be urged by counsel for the beneficiaries under clause 4, and dispensed with his appearance in person, accepting a written statement in lieu of this. He frankly says that he cannot find authority for contending that his clients have any rights; but counsel who says as much assists the Court quite as much as one who advances arguments which are unsound. I think he may be allowed, upon taxation, a fee out of the estate.

Order accordingly.

SONIER v. BREAU.

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S. C. 1912

Feb. 23.

Supreme Court of New Brunswick, Barker, C.J., White, Barry and McKeown, JJ. February 23, 1912.

1. PLEADING (§ II K—249)—LIBEL AND SLANDER—INNUENDO IN STATEMENT OF CLAIM—INSUFFICIENCY OF.

The statement of claim in an action for slander, is insufficient where the defamatory words alleged were not, in themselves, actionable, and were without point or meaning, being portions only of three separate conversations had with three different persons, without any allegation of circumstances shewing that the words pleaded were used in a defamatory sense.

[*Harris* v. *Clayton*, 21 N.B.R. 237, *Harris* v. *Warre*, 4 C.P.D. 125, and *Vye* v. *Newman*, 11 N.B.R. 388, specially referred to.]

2. TRIAL (§ II C 7—105)—SUBMISSION OF QUESTIONS TO JURY IN LIBEL AND SLANDER ACTION.

Special questions relevant and necessary to the complete determination of a matter can be submitted to the jury at the instance of the parties thereto, under the provisions of secs. 22 and 23 of the Judicature Act, 9 Edw. VII. (N.B.), 1909, ch. 5, only where the trial Judge shall, in his discretion, instead of having a general verdict returned, have himself submitted similar questions to the jury, for the purpose of entering a verdict on their answers thereto.

[*Toronto Ry. Co.* v. *Balfour*, 32 Can. S.C.R. 239; *Furlong* v. *Carroll*, 7 A.R. (Ont.), 145, 154, specially referred to.]

3. LIBEL AND SLANDER (§ II E—58)—PRIVILEGED COMMUNICATIONS—WORDS SPOKEN TO MAGISTRATE—NO INTENTION OF BASING CHARGE.

Where the jury finds that defamatory words were spoken to a magistrate without intention of basing a criminal charge on the facts disclosed, the communication is not privileged.

[See Odgers, Libel and Slander, 5th ed., pp. 273-276, and p. 306*l*; and compare *Byers* v. *McDonald* (1911), 4 Sask. R. 58, 16 W.L.R. 370, to same effect.]

4. APPEAL (§ VII I 3—356)—DISCRETIONARY MATTERS—AMENDMENT OF PLEADINGS—SUPPLYING OMISSION OF INNUENDO IN SLANDER ACTION.

Where it appears that the evidence was taken at the trial of an action for damages for slander as if the circumstances shewing how the words alleged, which were not in themselves actionable, could have been understood in the defamatory sense charged in the innuendo, the Court hearing an appeal from a verdict for the plaintiff may direct an amendment of the pleadings to supply the omission under the powers of the Judicature Act of New Brunswick 1909, marginal rule 486.

Statement

MOTION by defendant to set aside the verdict and judgment in an action for slander tried before Landry, J., and a jury at the Gloucester Circuit. A verdict was entered for the plaintiff for $15.

The statement of claim was as follows:—

(1) That the plaintiff has suffered damage from the defendant falsely and maliciously speaking and publishing of the plaintiff to Fabien Sonier at Tracadie, in the Parish of Saumarez, in the County of Gloucester, the words following, that is to say: "It is Ferdinand (meaning the plaintiff), he who makes you go around the fields," the defendant meaning thereby that the plaintiff had been guilty of incendiarism, by setting fire to the defendant's buildings; and the plaintiff's claim is, that the plaintiff has suffered damage from the defendant falsely and maliciously speaking and publishing of the plaintiff to John Basque and Charles Sonier, the words following, that is to say: "It is yours, no others, Charles, the one who has sent you to the devil every spring and who makes you go around the fields to get to your upper field," meaning thereby that the plaintiff had been guilty of incendiarism by setting fire to the defendant's buildings; and the plaintiff's claim is: That the plaintiff has suffered damage from the defendant falsely and maliciously speaking and publishing of the plaintiff to J. Raymond Young, of Tracadie, in the County of Gloucester, the words following, that is to say: "It is nobody else than him (meaning the plaintiff). He is a bad character," the defendant meaning thereby that the plaintiff had been guilty of the crime of incendiarism, by setting fire to the defendant's buildings; and the plaintiff's claim is, that the plaintiff has suffered damage from the defendant falsely and maliciously, and without any reasonable or probable cause, speaking and publishing of the plaintiff to Joseph H. Sonier, of and at the Parish of Saumarez, in the County of Gloucester, the words following, that is to say: "He (meaning the plaintiff) set fire to my premises," thereby charging the plaintiff with a felony and an indictable offence, meaning thereby that the plaintiff had set fire to the defendant's buildings and had been guilty of the crime of incendiarism.

And, for all of said slanders, the plaintiff claims the sum of one thousand dollars as damages.

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Statement

The defendant denied the slander and also amended his statement of defence at the beginning of the trial and before any evidence had been put in by adding the following paragraph:—

> The defendant will object that the words complained of in the first, second and third paragraphs of the plaintiff's claim are not defamatory in themselves, and that no circumstances are alleged shewing them to have been used in any defamatory sense and they are insufficient in law to sustain the action.

Argument

J. P. Byrne, for the defendant, moved to set aside the verdict for the plaintiff and to enter a judgment for the defendant or for a nonsuit or for a new trial. He said that Mr. J. R. Young, justice of the peace for Gloucester county, gave evidence that the words set out in the third paragraph of the plaintiff's claim were spoken to him in connection with laying an information. This was a privileged communication and no malice was proved. The plaintiff was allowed to say that he did not set the fire, but I was not allowed to cross-examine as to threats made by him. After the case closed I asked that the third count be withdrawn from the jury but the trial Judge told the jury there was malice. That I claim was misdirection. In this case there was a general verdict for $15 damages but this amount was not apportioned to the different counts. The case should therefore be sent back to the jury to assess the damages on each count: *Tell* v. *Hawkins*, 16 A. & E. 308. There was material variance between the slanderous words set out and those proved. For instance the words proved under the second paragraph were, it is one of your own, "the one that makes you go round the fields." The words proved under the first paragraph were, "It is the one that makes you pass through the woods to your upper field, Ferdinand." I submit that the words set out in the plaintiff's claim are not sufficient in law.

[BARKER, C.J.:—Is it not enough if the innuendo alleges defamation?]

Byrne:—Where the slander consists of question and answer both must be set out in the declaration: *Harris* v. *Clayton*, 21 N.B.R. 237. Where other words are necessary to make the words charged slanderous they must be set out in the count.

[WHITE, J.:—The same nicety in pleading is not required since the Judicature Act.]

Byrne:—I submit that the practice has not changed the requisites of a statement of claim: *Harris* v. *Warre*, 4 C.P.D. 125; *Darbyshire* v. *Leigh*, [1896] L.R. 1 Q.B. 554. Order 19, R. 4, referred to in *Harris* v. *Warre*, 4 C.P.D. 125, is the same as our rule. I asked the trial Judge to leave some questions to the jury but the Judge refused. This is not a case where a general verdict is required. The Judicature Act, 1909, sec. 23, has changed the former practice.

[MCKEOWN, J.:—Your right to submit questions depends on the right of the Judge to submit questions.]

Byrne:—He had the right although he did not exercise it and I had the right as well.

[WHITE, J.:—Fox's Act was passed to allow the jury to decide law and facts in actions of slander. That Act is in force here.]

Byrne:—Section 23 of the Judicature Act, 1909, governs the case and overrules Fox's Act.

P. A. Guthrie, for the plaintiff, *contra.* (He read the statement of claim.)

[BARRY, J.:—I cannot see how these words can mean what the innuendo states.]

Guthrie:—I contend that was a matter for the jury.

[BARKER, C.J.:—The objection is that further facts should be set out in the pleadings.]

Guthrie:—I claim it is simply a matter of proof and that it is only necessary to set out the actual words used.

[WHITE, J.:—Would it be sufficient to say that the defendant said "Yes" meaning thereby the plaintiff was a thief?]

Guthrie:—I contend that it would.

[BARRY, J.:—The plaintiff could ask for further particulars.]

Guthrie:—In regard to variance it is enough to prove words having practically the same meaning.

[BARKER, C.J.:—I see nothing that cannot be cured by amendment except the point that the Judge did not submit questions.]

Guthrie:—I cite *Ecklin* v. *Little,* 6 Times L.R. 366; *Vye* v. *Newman,* 11 N.B.R. 388. There was no privileged communication in this case: *Carvill* v. *McLeod,* 9 N.B.R. 332.

J. P. Byrne, in reply.

February 23, 1912. The judgment of the Court (BARKER, C.J., WHITE, BARRY and MCKEOWN, JJ.) was delivered by

Barker, C.J.

BARKER, C.J.:—This is an action for slander tried before Landry, J., and a jury which resulted in a verdict for the plaintiff for $15. A motion is now made for a nonsuit or judgment for the defendant to be entered or for a new trial.

As to the first branch of this motion it is claimed that there was a variance between the word alleged and the evidence, and also that the words as set out in the first three paragraphs of the statement of claim are insufficient in law inasmuch as they are not in themselves actionable and no circumstances are alleged shewing them to have been used in a defamatory sense. The first paragraph alleges that the defendant spoke the following words of the plaintiff to Fabien Sonier: "It is Ferdinand (meaning the plaintiff) he who makes you go around the fields," the defendant meaning thereby that the plaintiff had been guilty of

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incendiarism by setting fire to the defendant's buildings. The second paragraph alleges that the defendant spoke the following words of the plaintiff to John Basque and Charles Sonier: "It is yours, no others, Charles, the one who has sent you to the devil every spring and who makes you go around the fields to get to your upper field," meaning thereby that the plaintiff had been guilty of incendiarism by setting fire to the defendant's buildings. The third paragraph alleges that the defendant spoke the following words of the plaintiff to J. Raymond Young: "It is nobody else than him (meaning the plaintiff). He is a bad character," the defendant meaning thereby that the plaintiff had been guilty of the crime of incendiarism by setting fire to the defendant's buildings.

At the beginning of the trial and before any evidence had been given the defendant was allowed to add to his pleadings the following paragraph:—

> The defendant will object that the words complained of in the first, second and third paragraphs of the plaintiff's claim are not defamatory in themselves, and that no circumstances are alleged shewing them to have been used in any defamatory sense and they are insufficient in law to sustain the action.

This amendment I suppose was made under O. 25, R. 2, which allows a party to raise by his pleading any point of law and provides that it shall be disposed of by the Judge who tried the cause at or after the trial or by consent or special order, before the trial. I cannot find by the record that any mention was made of it afterwards or that it was dealt with in any way, unless by a casual remark of the Judge in disposing of a motion for nonsuit at the close of the plaintiff's case. The record contains the following:—

> Mr. Byrne:—I argued the point more along the line of a demurrer, that is, upon the record itself, in the absence of any evidence.
>
> The Court:—Yes, but I think it amounts to the same thing. The innuendo is there and that gives the defendant notice of what was meant. I do not think he should go any further than that.

I agree in thinking that the first three paragraphs of the statement of claim are insufficient. The alleged defamatory words are not in themselves actionable. Taken alone they are without point or meaning. It appears from the evidence that one night the defendant was awakened by finding his home on fire. He suspected that the plaintiff had set the house on fire and the alleged defamatory words set out in these three paragraphs are parts of conversations had on three separate occasions with different persons in reference to the fire. For instance, it is alleged in the first paragraph that the words were spoken to Fabien Sonier, who, it seems, is a brother of the plaintiff, whose name is Ferdinand. Fabien, on his way to see a neighbour by the name of Brittain, met the defendant, who shewed him the place where

the house had been on fire. His evidence of the conversation between him and the defendant is this:—

> I asked him, is it here the fire was put? He said, yes. I said, do you think the people bad enough to set fire? He said, yes. I said, who do you think would be bad enough to set fire? He told me, it is one that makes you pass through the woods to go to your upper field, Ferdinand. I told him I didn't think it was him. He said, yes, it is him, it is Ferdinand and no other.

This whole question is so fully discussed in *Harris* v. *Clayton*, 21 N.B.R. 237, that I need only to refer to it. The words relied on are the material facts which by O. 19, R. 4, it is necessary in a case like this to set forth in the statement of claim and the words so set forth must be such that the Court can say they are capable of the defamatory meaning attributed to them: *Harris* v. *Warre*, 4 C.P.D. 125. And as to proof of the exact words see *Vye* v. *Newman*, 11 N.B.R. 388. The fourth paragraph in the statement of claim seems to have been abandoned. The Judge withdrew it from the consideration of the jury. It, however, remains on the record undisposed of.

The principal ground relied on for a new trial arises out of the following facts: At the close of the Judge's charge Mr. Byrne, the defendant's counsel, submitted four questions which he requested the Judge to submit to the jury. The Judge said, "This is not a case, I think, where questions are left to the jury." To this Mr. Byrne replied, "I wish to have them noted, Your Honour—the questions are as follows." The Judge did not submit questions; the case went to the jury and they gave a general verdict. The Judge was in error in thinking this a case where there must be a general verdict. The practice—for it is treated as a mere question of practice, *Toronto Ry. Co.* v. *Balfour*, 32 Can. S.C.R. 239, is regulated by secs. 22 and 23 of the Judicature Act. By the corresponding secs. 162 and 163 of the Supreme Court Act by which the practice was governed before the Judicature Act came into force, there were several kinds of actions—libel and slander among the number—to which these sections did not apply. By section 23 of the Judicature Act the only excepted action is libel. So that in the present case it was within the authority of the Judge to have submitted questions of fact to the jury and on their answers to have himself entered the verdict. This change in the statutes had escaped the Judge's attention and Mr. Byrne refrained from setting him right. I shall not stop to discuss the abstract right of counsel in such a case, but I cannot think that if Mr. Byrne had called the Judge's attention to the amendment, he would in any possible way have violated his duty to his client. There is, however, nothing in the objection. The true construction of the section is this. When any action, except libel, is being tried with a jury the Judge is authorized, instead of having a general verdict by the jury, to submit questions of fact to them and on their answers to enter the verdict

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himself. Whether he shall adopt that course or not is a matter for his consideration exclusively. The parties have nothing to say as to the course to be pursued. If, however, the Judge does submit questions of fact to the jury with a view of himself entering a verdict, the parties have a right also to have submitted such relevant or necessary questions for the complete determination of the matters involved in the case as they may suggest; and in that case it is the duty of the jury to answer both sets of questions. It is therefore immaterial what is the reason for the Judge adopting the one method of proceeding or the other. The defendant not having any right in the matter cannot have been deprived of any: *Furlong* v. *Carroll*, 7 A.R. (Ont.) 145 at p. 154. In a charge to the jury to which no objection has been made he directed attention to all the matters for their consideration including those to which the questions submitted by the defendant were directed.

As to the question of privilege raised in reference to the conversation alluded to in the third paragraph there is I think nothing whatever in it. The jury evidently were of the opinion that the defendant did not go to Young as a justice of the peace to institute proceedings against the plaintiff. They would have disregarded the evidence if they had done so. Neither is there anything in the questions as to the admission of evidence.

The question then is what disposal should be made of this motion. There is no question here as to the amount of damages, none as to misdirection, none as to the verdict being against the weight of evidence, none as to the improper rejection or reception of evidence. I think under such circumstances we ought not to order a new trial, either on payment of costs as was done in *Carvill* v. *McLeod*, 9 N.B.R. 332, or without such condition as was done in *Harris* v. *Clayton*, 21 N.B.R. 237, already cited, if any other course is open. Order 40, R. 10, empowers this Court on a motion of this kind to draw all inferences of fact, not inconsistent with the finding of the jury, and to finally determine the questions in dispute, if we are satisfied that we have before us all the material necessary for that purpose. This I think we have. All that is required is to amend the statement of claim from the plaintiff's proof by adding to the words set out in the three paragraphs, such material parts of the several conversations as may be necessary by the rule I have mentioned. Perhaps not technically but certainly in fact the evidence as well as the verdict were given in view of the statement of claim thus amended and they are both applicable to it. We have therefore all the materials before us for a final determination of the case and I think we should use them.

The order which I think should be made is as follows:—

(1) Expunge paragraph 4 from the statement of claim.

(2) Plaintiff on or before April 1 next to amend the three

remaining paragraphs of his statement of claim by adding to the defamatory words therein alleged the other material parts of the several conversations therein referred to as proved by the plaintiff's witnesses. Such amendments to be submitted to Landry, J., at Chambers and approved by him.

(3) The plaintiff not to have costs of the amendment and this present motion to be refused without costs.

Amendments directed and defendant's appeal dismissed.

YACKMAN v. JOHNSTON.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. January 30, 1912.

1. NEW TRIAL (§ IV—32)—SURPRISE—WITNESS' TESTIMONY DIFFERING FROM PRIOR STATEMENT TO SOLICITOR.

A new trial will not be granted on the ground of surprise in that the principal witness for the defence had departed from the statements made to the defendant's solicitor before the trial as to the nature of his testimony, if the affidavits do not disclose the difference between the two statements, nor specify in detail what the witness had represented before the trial.

[*Caswell* v. *Toronto R. Co.*, 24 O.L.R. 339, specially referred to.]

Statement

AN appeal by the defendant from the judgment of the District Court of the District of Nipissing in favour of the plaintiff in an action to recover possession of a strip of land. The defendant also asked for a new trial on the grounds of surprise and the discovery of new evidence.

The appeal was dismissed.

G. H. Kilmer, K.C., for the plaintiff.

F. Arnoldi, K.C., for the defendant.

Riddell, J.

RIDDELL, J.:—The plaintiff is the owner of lot 31 on the north side of Second avenue in North Bay—the defendant, of lot 30, adjoining to the west. A wire fence runs apparently dividing the properties, but the plaintiff alleges that it is at the street line four feet in on his lot, and this is one of the disputes in the action—and the only dispute on the pleadings. But at the trial the Statute of Limitations was appealed to by the defendant, although no amendment of the pleadings was made or asked. The learned trial Judge, Judge Leask, found, and rightly found, that the plaintiff had the paper title, and, holding that adverse possession for the statutory period had not been proved, he gave judgment for the plaintiff. The defendant now appeals.

It cannot be successfully argued, although it was urged, that, upon the evidence given at the trial, the learned Judge was not right: it is said also that the defendant was taken by surprise by the evidence of his witnesses, and especially his main witness Turcotte, and that material evidence could have been given

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by three persons named, whose evidence, it is said, the defendant did not know of and could not with reasonable diligence have discovered before the trial.

At the trial the defendant swore that he had bought his lot in April, 1907, and that the fence was then in its present position—also that his house had been on the four feet in dispute and close against the fence, but he had moved it back, gardening and planting flowers and shade trees on the strip. McLean, Johnston's vendor, swore that the fence was placed as the defendant said, when he sold, and when he had bought the lot himself from Ferguson. Ferguson cannot fix this date accurately, but "it must have been in the latter part of the eighties." McLean was not asked, but the deed is produced, and the date is actually 1903. Ferguson says there was an old fence, a poor fence, for a line fence at the time, but does not say whether it was placed as the present fence is, nor for how long it had been so placed.

The defendant called Turcotte, who had bought lot 30 from Ferguson before the McLean deal, and 17, 18, or 19 years ago. He swears there was no fence when he took possession at all, but that he built the fence which was on the premises when McLean took possession, or "it looks like the same fence"—he sold again to Ferguson about 12 years ago, never having got his deed.

At the time he built the fence, there was no fence existing, but he found the surveyor's posts and laid his fence on the line so marked out, and this 17 or 18 years ago.

The learned Judge in giving judgment at the close of the trial says:

> The only possible evidence as to the adverse possession is that of Johnston himself, and that only extends back to a period of approximately five years, more exactly four years in April last. The location of this fence is not at all definitely fixed by any other witness, nor the period for which it was there. Unless Turcotte was wrong when he said that he built his fence along the line of the surveyor's posts, or those surveyor's posts were incorrectly placed, it is evident that there must have been some alteration in the fence since its construction by Turcotte, as it is manifestly not now upon the proper dividing line between the two lots. When any such alteration was made does not appear, and the period during which Johnston or his predecessors were in adverse possession is anything but certain.

And that is the ground on which he proceeds.

The statement that "the location of this fence is not at all definitely fixed by any other witness" (than the defendant) is susceptible of two interpretations—the learned Judge may have overlooked the very definite statement by McLean that the fence when he bought, which was some 9 years ago (April, 1903), was in the present position—or the learned Judge may have taken this as a mild way of saying that he did not believe

McLean, although not contradicted. The former can hardly be the case; the evidence had been given but a few minutes before; and, if the latter alternative is to be taken, it would have been much more satisfactory if it had been stated in plain language.

But, even so, the time runs back only to 1903—not sufficient for the defendant's purpose.

Ferguson cannot be definite—he says that he cannot remember how long the fence had been there when he sold to McLean—and the learned Judge was justified in holding that the defence had not been made out. Especially was this the case when Turcotte swore that the fence he built was on the surveyor's line, which the present line plainly is not.

As to the application for a new trial, it was put in the original notice of motion upon the ground of discovery of new evidence, but another notice was served setting up "surprise at the trial by the evidence then given by the witnesses for the defence, and particularly by the evidence of the witness Turcotte, who had previously stated that his knowledge and recollection supported the defendant's title."

The solicitor swears that

> Turcotte . . . departed from the statements he had made to me of his evidence as to the position of the fence in question and as to the same being in position enclosing the four feet of land in question at the time McLean took possession. I had relied upon the said Turcotte to prove this fact.

This exasperatingly loose statement is inexcusable—we are not told what Turcotte said or what the departure was—there is no doubt, no possible doubt, and no one contends there is any doubt, "as to the position of the fence in question"—and no evidence of Turcotte can modify the finding in that regard. There is also no doubt—and no one contends there is—that this fence enclosed the 4 feet of land in question at the time McLean took possession. The only things Turcotte swore that could be a surprise were: (1) that he put his fence on the surveyor's line—and no evidence is claimed to be available to contradict that; and (2) that he could not swear that the fence he built was the same as that when McLean took possession, though it looked to be the same. He never was even asked definitely about the position of the fence, the only important matter.

Then as to the other witnesses, the solicitor with the same looseness swears: "I was also taken by surprise by the inability of other witnesses for the defence to state positively in the witness-box facts which I had previously understood in my instructions they would prove in the box." What these facts were, we are not told, nor what the witnesses said about them—and no solicitor would think of being satisfied with an "understood."

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He must have "understood" from the witnesses themselves, and they must have given the instructions, as the defendant himself swears, "I never at any time deemed it necessary to procure evidence as to the fence in question." In the affidavit of the defendant, there is the same inexcusable lack of definiteness as appears in that of the solicitor—and he does not shew any diligence in seeking for evidence, although he swears in general terms to "all due diligence." The solicitor does not swear to any attempt at all, but says he relied upon the witnesses he adduced.

It must have been perfectly apparent from the beginning that the defendant must rely upon the Statute of Limitations; the plaintiff had had a survey made, and then attempted to take possession of the strip in dispute, and the defendant refused to give up possession; the plaintiff pulled down the existing fence and built it on the surveyor's line, and the defendant replaced it. At the trial, no attempt was made to shew that the survey made was at all incorrect; the surveyor was not even cross-examined—the whole defence was based upon the fence and possession up to the fence. That, even now, must be the whole defence.

This being so, the defendant swears that he never at any time deemed it necessary to procure evidence as to the fence in question—and it is perfectly plain that he did not look for any such witnesses; the solicitor does not pretend that he did; all he seems to have done was to "understand" something from those who were brought to him.

The only evidence intended to be adduced, if a new trial be granted, is that of persons who can (as they say) swear to the fence. There was no such diligence to obtain this evidence as would justify us in acceding to the motion.

It cannot be necessary to cite authorities, but the following may prove of interest: *Robinson* v. *Rapalje*, 4 U.C.R. 289; *Murray* v. *Canada Central R.W. Co.*, 7 A.R. 646; *Trumble* v. *Hortin*, 22 A.R. 51; *Caswell* v. *Toronto R.W. Co.*, 2 O.W.N. 1405, 24 O.L.R. 339.

The motion should be dismissed with costs.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B., agreed in the result.

Britton, J.

BRITTON, J., also agreed in the result.

Motion dismissed.

RE WEST NISSOURI CONTINUATION SCHOOL.
(Decision No. 2.)

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. February, 16, 1912.

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1. SCHOOLS (§ IV—74)—SCHOOL BOARD'S APPLICATION FOR FUNDS—DUTY OF MUNICIPAL COUNCIL—APPROVAL OF APPLICATION ONCE GIVEN—HIGH SCHOOL ACT, 9 EDW. VII. (ONT.) CH. 91, SEC. 38.

Where the application of a school board for funds under section 38 of the Ontario High Schools Act, has been once approved by the municipal council to whom it is made, it is the duty of the council to pass a by-law and do all that is necessary for the raising of the money, and this duty cannot be evaded by a subsequent disapproval or by repealing the by-law that had been passed in compliance with that duty.

[*Re West Nissouri Continuation School*, 1 D.L.R. 252, 25 O.L.R. 550, 3 O.W.N. 478, affirmed on this point.]

2. MANDAMUS (§ I D—31)—WHEN IT MAY ISSUE—TO MUNICIPALITY—SUFFICIENT DEMAND.

Where after a written demand had been made on it for funds for the maintenance of a continuation school by the chairman and secretary-treasurer of the school board, followed by a personal demand for the money by the chairman and other members of the school board but the council did nothing to fulfil its statutory obligation to furnish the money, this inaction is a sufficient refusal, to indicate that it did not intend to do what was required, and a mandamus will lie to compel the council to supply the money.

[*Re West Nissouri Continuation School*, 1 D.L.R. 252, 25 O.L.R. 550, 3 O.W.N. 478, affirmed; *Rex* v. *Brecknock, etc., Canal Co.* (1835), 3 A. & E. 217; *Rex* v. *Ford* (1835), 2 A. & E. 588; *Regina* v. *Conservators of Thames* (1839), 8 A. & E. 901, 904, and Halsbury's Laws of England, vol. 10, p. 101, sec. 199, specially referred to.]

3. MANDAMUS (§ I D—31)—WHEN IT MAY ISSUE—INSUFFICIENCY OF DEMAND—CONDITION PRECEDENT.

Mandamus will not lie against a municipal corporation at the instance of a school board where there has not been a sufficient demand for the providing of funds by the school board under the High Schools Act, 9 Edw. VII. (Ont.) ch. 91, sec. 38, but the application for the mandamus may be dismissed without prejudice to another application to be made after formal demand.

[*Regina* v. *Mayor, etc., of Bodmin*, [1892] 2 Q.B. 21, specially referred to.]

Statement

AN appeal by the township corporation from the judgment of Middleton, J., 1 D.L.R. 252, 25 O.L.R. 550, 3 O.W.N. 478.

The appeal was allowed in part and the judgment below varied.

Argument

Sir George Gibbons, K.C., and *G. S. Gibbons*, for the appellants. As to the granting of a mandamus to compel the payment of $7,000, there is no evidence to support the finding of fact upon which the conclusions of the learned Judge below were founded, that there had been a demand amounting to a corporate act of the board for the moneys in question, with which the corporation would be bound to comply. They referred to *Re Oakwood and Township of Mariposa* (1888), 16 A.R. 87, at p. 92; *Re Peck and County of Peterborough* (1873), 34 U.C.R. 129; 9 Edw. VII. ch. 91, sec. 38; Halsbury's Laws of England, vol. 10, pp. 78, 98, and 101.

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Argument

In regard to the granting of a mandamus to compel the appellants to pay $1,000 for maintenance of the school, it has been clearly shewn that the performance of the duty sought to be enforced was impossible, at the time demanded, by reason of want of funds; and that a mandamus would not be granted when it could not be enforced. They referred to *In re Bristol and North Somerset R.W.Co.* (1877), 3 Q.B.D. 10; *Holmes* v. *Town of Goderich* (1902), 5 O.L.R. 33; *Re Oakwood and Township of Mariposa, supra*, at p. 90; 3 Edw. VII. ch. 19, sec. 435, sub-sec. 4. By-law 208, enacted by the former council, had been repealed.

T. G. Meredith, K.C., and *W. R. Meredith*, for the respondents. In regard to the objection that a corporate demand should have been made for the $7,000, such a demand was made in the first place, and that was sufficient. The *Oakwood and Mariposa* case is rather in favour of the respondents, and the *Peck and Peterborough* case does not shew a corporate act to be necessary in order to get the money. As to the $1,000 for maintenance, a mandamus should certainly lie. It was the proper remedy: *Toronto Public Library Board* v. *City of Toronto* (1900), 19 P.R. 329. The school board had a perfect right to ask for the money for improvements. The money could be borrowed and paid over to the board. Counsel referred to 9 Edw. VII. ch. 90, sec. 7, as being the governing section. They contended that the judgment appealed from was right and should be affirmed.

Sir George Gibbons, in reply.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—I agree with the judgment of Riddell, J.

Riddell, J.

RIDDELL, J.:—The County Council of the County of Middlesex, on the 27th January, 1910, under the Continuation Schools Act, 9 Edw. VII. ch. 90, sec. 5, established the whole Township of West Nissouri as a continuation school district.

There was much opposition to this in the township—and a motion was made to quash a by-law of the township passed the 1st June, 1910, based upon the resolution. The motion failed; Middleton, J., dismissed it: *Re Henderson and Township of West Nissouri* (1910), 23 O.L.R. 21, at p. 22; that judgment was affirmed by a Divisional Court, 23 O.L.R. 21, at p. 25, and by the Court of Appeal, 24 O.L.R. 517, on the 29th September, 1911. Application was made to the Supreme Court of Canada for leave to appeal, and leave was refused.

The township by-law referred to, *viz.*, by-law No. 208, recited: "And whereas the Municipal Council of the Township of West Nissouri have approved of the application or requisition for the said moneys . . ."—this referring to a previous recital—"Whereas a requisition has been made by" the Township of West Nissouri Continuation School Board "for the issue of $7,000 debentures for the purchase of a school site and the erection of a school house for the Township of West Nissouri Continuation

School." The by-law No. 208 provided for raising $7,000, by debentures of not less than $100 each, payable in twenty years after the day upon which the by-law took effect, and interest payable yearly at five per cent., coupons to be attached for that purpose—the by-law to take effect on the 15th December, 1910.

The proceedings resulting in the by-law were, of course, taken under the provisions of 9 Edw. VII. ch. 91, sec. 38, which provides for an application by the board; and (3) that the council shall, at its first meeting after receiving the application, or as soon thereafter as possible, consider and approve or disapprove the same. It is abundantly manifest that the council did approve the application; and, had no motion been made to quash the by-law, no doubt the money would have been raised and paid over to the school board.

After judgment had been given in the Divisional Court, and while an appeal was pending to the Court of Appeal, the township council, on the 20th July, 1911, passed by-law No. 216, which, reciting the proceedings in the Courts, and that "the majority of the rate payers of the Township of West Nissouri are desirous of having submitted to them the desirability of issuing debentures for the purpose of purchasing a site and erecting a school house for the continuation school in the said township," then proceeded to repeal by-law No. 208. This was because the Reeve and most of the council believed that they were elected on the issue raised at the election of opposing the establishment of a continuation school. I can see no impropriety in raising such an issue at the municipal election, or in making the attitude of a candidate upon that issue a test or the test of whether he should be voted for. The people were to pay for a school, if established, and they had a right to express their views by their votes, if they saw fit. More than one Provincial election has been lost and won on Dominion issues. And the council have a perfect right to do all they can *lawfully* to carry out the mandate of their constituents.

But, as the Legislature gave the power to the council to approve or disapprove only "at its first meeting after receiving the application, or as soon thereafter as possible," it is obvious that, once the council had approved (as it undoubtedly did in June, 1910), no power was left in the council which would enable it to change or reverse that approval. Accordingly, by-law No. 216 does not affect the approval.

The approval having occurred, sec. 38 (4) applies; and it became the duty of the council to "raise the sum required by the issue of debentures in the manner provided by the Consolidated Municipal Act, 1903."

All parties are agreed that the council is blameless in not raising this money until the motion made to quash by-law 208 was finally disposed of, about October or November, 1911.

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But on the 20th March, 1911, a document, under the seal of the school board, and signed by the chairman and secretary-treasurer, was served upon the council, in the following terms:—

"To the Municipal Council of the Township of West Nissouri. The Trustees of the West Nissouri Continuation School Board require of you the sum of $1,000 on account for the sum applied for for the maintenance dated 15th day of March, 1911. In witness whereof," etc., etc., etc.

On the 27th March, by a similarly executed document, the school board notified the council "that they withdrew that portion of their claim submitted in their estimate on the 20th day of March, being the issue of $500 demanded for equipment, including library, chemical and physical apparatus." Nothing turns upon this withdrawal, as it refers to an item specifically for library, etc., in the estimates—the whole estimates for maintenance and permanent improvements being $3,570.

Nothing was done on the demand, and on the 5th April, the chairman and others of the board attended a meeting of the council and urged the council to raise and pay over the money to the board, as the board intended to open a school at once, and it was necessary that they should have funds in order to carry on their work. They were informed by the Reeve, in presence of the council, that the matter should be referred to the township solicitor for advice. It is sworn and not disputed that the $1,000 was required for the purpose of the school and in order that the school should be started.

Subsequently, and on the 3rd May, a member of the school board appeared for the board at a meeting of the council, and "demanded from them that they should pay to the school board the moneys required by the board under their written requisitions, and I was told by the Reeve, in the presence of the councillors, that we could go to the Courts and get our money." Letters were written by the solicitors for the board to the members of the council, on the 7th April and the 15th April, demanding the payment of the $1,000. No answer was given to these letters, so far as appears.

Finally, a motion was launched by the board for a mandamus to compel the township to pay the board the $1,000—this was apparently abandoned, as the applicants did not appear on the return; and the Chancellor made an order, on the 16th June, dismissing it with costs, but without prejudice to a renewal of the application. The motion was reinstated by the Chief Justice of the Common Pleas on the 22nd June; it came on for hearing on the 20th October, but was enlarged pending application, in *Re Henderson and Township of West Nissouri*, to the Supreme Court of Canada for leave to appeal. Notice was served on the 6th December for a renewal of the motion—and it finally came before my brother Middleton, who ordered the council to pay the amount. One branch of the appeal is from this order.

After the Court of Appeal had, on the 29th September, disposed of the appeal in the *Henderson* case from the Divisional Court, two members of the school board, on the 6th October, 1911, attended a meeting of the council, and "requested the council to pass a debenture by-law for the purpose of raising $7,000 required by the school board for the purpose of the school building and property," but were told by the Reeve that they "had no official notice of the decision of the Court of Appeal on the motion to quash the debenture by-law passed previously, and that they would have to consider the matter for thirty days." It does not anywhere appear that these two had been appointed by the school board, that they represented or purported to represent the school board, or that the school board had in fact determined to press for the $7,000. So, too, at the meeting of the council on the 29th November, 1911, one Wentworth McGuffin attended the council, and "requested them on behalf of the West Nissouri Continuation School Board to pay to the treasurer of the school board the sum of $1,000 for the maintenance of the school, and the sum of $7,000, or the proceeds of the debentures to be issued to build the school house, but I was told by the Reeve and other councillors that we had no by-law, and by one of the councillors . . . that the matter would have to be laid over for consideration. . . ." No resolution or official or other act of the school board is adduced to shew any authority in McGuffin, even if he be the same McGuffin who in the previous June describes himself as a member of the West Nissouri Continuation School Board. Nothing was done by the council, and, on the 6th December, 1911, a notice of motion was served for a mandamus "directing the Corporation of the Township of West Nissouri . . . and the Reeve and councillors . . . to raise the sum of $7,000 by the issue of debentures in the manner provided by the Municipal Act, 1903, and to pay the same to the treasurer of the West Nissouri Continuation School or to issue the debentures provided for under by-law 248 . . . and to pay the proceeds . . . to the treasurer of the West Nissouri Continuation School Board, or for such further or other order as may be just."

This motion came on along with the other before my brother Middleton, and he made an order as asked. And an appeal is also taken from this order

As to the first appeal, the formal order provides that the township do forthwith pay to the treasurer of the board the sum of $1,000, as required by the board, for maintenance of the school, in pursuance of 9 Edw. VII. chs. 90 and 91.

I can see no ground for interfering with this disposition of the matter. The statute is plain—9 Edw. VII. ch. 91, sec. 37: the demand was official and sufficient; and, while the council may well have been justified in neglecting to comply with the demand until the Court of last resort had given its decision, there was no excuse after this decision. There may, indeed, have been no official

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refusal—no specific refusal in words; but "it is not necessary that there should have been a refusal in so many words:" Littledale, J., in *Rex* v. *Brecknock, etc., Canal Co.* (1835), 3 A. & E. 217, at p. 223. "All that is necessary in order that a mandamus may issue is to satisfy the Court that the party complained of has distinctly determined not to do what is demanded:" Halsbury's Laws of England, vol. 10, p. 101, sec. 199. "There should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required:" *per* Lord Denman, C.J., in *Rex* v. *Brecknock, etc., Canal Co.*, 3 A. & E. 217, at pp. 222, 223. See also *Rex* v. *Ford* (1835), 2 A. & E. 588.

"No rule can be laid down for determining whether there has been a refusal or not. It is a waste of time to cite former decisions on the subject, as if the want of some one circumstance which existed in a former case would decide this:" Lord Denman, C.J., in *Regina* v. *Conservators of Thames* (1839), 8 A. & E. 901, 904.

I think it must be abundantly manifest from all the circumstances that the council "had distinctly determined not to do what is demanded." And, although the township seems to have no money, there need be no difficulty in procuring enough for this purpose.

This appeal must be dismissed.

As to the other appeal, there are different considerations. Our law does not, like the law in some at least of the American States, make a distinction between duties of a private nature and those which affect the public at large. In the law of these States, while in the former class of cases a demand and refusal are a condition precedent to relief by mandamus, in the latter the law itself stands in lieu of the demand, and the omission to perform the required duty in place of a refusal: Shortt on Informations, etc., p. 249; High on Extraordinary Remedies, pp. 17, 18. But, in our law, where the extraordinary remedy by mandamus is sought, the applicant must be *rectus in curia*—he must have made a demand and received a refusal.

I do not think that there was any request by the school board shewn—two individual members of the board did indeed demand, but not on behalf of the board—while McGuffin, the farmer who asked on the 29th November, 1911, did not adduce or pretend to any authority from the school board. It was the school board which was interested in the application; and I do not think the kind of demand made is sufficient. A formal demand would, in all probability, have been of no use; but, in proceedings such as these, the demand seems to be necessary.

While I agree that it was the duty of the council to provide the $7,000, I do not think mandamus lies. But, while the appeal should be allowed, the dismissal of the motion for mandamus will be without prejudice to another application, after formal demand, so as to avoid the very stringent rule laid down in *Regina* v. *Mayor, etc., of Bodmin*, [1892] 2 Q.B. 21.

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Counsel for the township said at the hearing that, if a proper demand were made, the township would accede to the demand—so that it may be that another application will be unnecessary.

As the appeal succeeds in part, I think there should be no costs of the appeal; but that, in the proceedings below, costs should follow the event in each case.

BRITTON, J.:—I agree that the appeal in regard to the application for a mandamus as to the $7,000 should be allowed, and that the appeal as to the $1,000 should be dismissed. There should be no costs of these appeals to either party. The Township of West Nissouri should get costs in the proceedings below for the mandamus as to the $7,000, and the Trustees of the West Nissouri Continuation School should get costs in the proceedings below for a mandamus as to the $1,000.

This case differs materially in the facts from *Re Medora School Section No.* 4 (1911), reported 23 O.L.R. 523.

I adhere to the dissenting opinion expressed by me in that case as to the exercise of judicial discretion in granting a mandamus as between school and municipal corporations.

Order below varied.

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Feb. 6.

Rev. Adam ROBERTSON (plaintiff, appellant) v. John GRANT and William MEIKLE (defendants, respondents).

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross, and Gervais, JJ. February 6, 1912.

1. FISHERIES (§ II—12)—STATUTORY RIGHTS—FISHING STANDS.

The rights conferred by sec. 35 of the Fisheries Act (Canada), as enacted by the statute 22 Vict. (Can.) ch. 86, sec. 39, and consolidated in Consol. Stat. of Canada, 1859, ch. 62, sec. 35, were preserved to the persons who were thereby to be "deemed the owners" of fishing stations of which they were in possession in the year 1858, in Lower Canada (now Quebec), notwithstanding the repeal of ch. 62 of the Consolidated Statutes of 1859, by the statute 29 Vict. (Can.), ch. 11, in view of the fact that the latter statute recognized the rights so acquired by directing that leases and fishing licenses should be issued only for places in which the exclusive right of fishing did not already exist by law in favour of private persons, and that the same exception was continued in the later statutes 31 Vict. (Can.) ch. 60, sec. 2, and R.S.C. 1886, ch. 95, sec. 4.

[See also *Lavoie* v. *Lepage*, 12 Que. L.R. 104.]

2. FISHERIES (§ II—12)—STATUTORY RIGHTS—TRANSMISSION OF OWNERSHIP.

The rights conferred by sec. 35 of the Fisheries Act, Consolidated Statutes of Canada 1859, ch. 62, on persons who were in peaceable possession of fishing stations in Lower Canada on August 16, 1858, are transmissible as "immoveable property" under the laws of Quebec.

3. WILLS (§ I D D—39z)—WHAT MAY BE DISPOSED OF—FISHERIES RIGHTS.

Universal legatees under Quebec law take and may transmit a fisheries right which their testator acquired under ch. 62 of the Consolidated Statutes of Canada (1859), by sec. 35 of which certain persons were to be "deemed the owners" of fishing stations held in peaceable possession by them in the public waters of Canada.

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4. FISHERIES (§ II—10)—RIGHTS OF OWNER AGAINST AN ENCROACHER—SALMON FISHERY.

Where a right of salmon fishery was acquired under title from a person who became the owner thereof under ch. 62 Con. Stat of Can. (1859), an encroacher thereon, will be compelled to demolish his fishery, pay damages for the encroachment, and, under the Fisheries Act (Can.), will also be prohibited from setting up another within 250 yards of that of the owner of the salmon fishery although the latter's fishing stand is used also to take other kinds of fish as well as salmon, the distance being fixed with reference to the statutory directions of the Fisheries Act, R.S.C. 1906, ch. 45, sec. 18, that a salmon fisheries shall be not less than 250 yards apart without intermediate fishing materials of any kind.

[*Lavoie* v. *Lepage* (1886), 12 Que. L.R. 104, specially referred to.]

5. EVIDENCE (§ I E—69)—JUDICIAL NOTICE—GRANT OF FISHERIES RIGHTS.

The Court is not bound to take judicial notice, as of a public deed, of a grant made to the Crown of a fishery right by the seigneurs who theretofore had proprietary rights or seigneurial title therein under Quebec law. (*Per* Lavergne, J.)

6. JUDGMENT (§ VI A—257)—ENFORCEMENT—JUDGMENT FOR DEMOLITION—PLAINTIFF'S RIGHT TO DEMOLISH AND ENFORCE PAYMENT OF EXPENSES.

A judgment for the demolition of a fishery which is being maintained in infringement of the plaintiff's ownership of a salmon fishery on the Lower St. Lawrence river may further direct that in default of its removal to a distance of not less than 250 yards from the plaintiff's fishery [R.S.C. 1906, ch. 45, sec. 18], the plaintiff may cause the infringing fishery to be demolished and that the defendant in that event shall pay to the plaintiff the expense of demolition.

Statement

APPEAL from the judgment of the Superior Court, dismissing the action claiming title to a fishery.

Fiset, Tessier & Tessier, for appellant.

Louis Taché, and *L. P. Pelletier*, K.C., for respondents.

The opinion handed down by Judge Lavergne which is here given is followed by the formal judgment of the Court, no written opinions having been delivered by the other members of the Court.

Lavergne, J.

LAVERGNE, J.:—This is an appeal from a judgment rendered by the Superior Court sitting at Rimouski on May 4th, 1910, dismissing the action of the appellant, plaintiff in the Superior Court.

The appellant by his declaration alleges that since the 22nd April, 1831, he has been in possession *à titre de propriétaire*, and is the owner of a fishing place and fishery situate in a bay of the St. Lawrence River called "Anse des Morts," in the first range of the Seigniory of Peiras in the district of Rimouski. The case relates to a fascine fishery which the plaintiff acquired at the same time as he acquired certain lands from the estate of the late Peter Leggat in May, 1905.

His immediate predecessors in title are the universal heirs of Peter Leggat under his will of February 3, 1896. The immoveable property of the late Peter Leggat was acquired by him from Adam L. MacNider on August 22, 1831.

The plaintiff pretends that since the acquisition of the said immovable property, to wit, since 1831, the said Leggat set and carried on every year with possession requisite for prescription the fishery in question in this case; that Leggat's universal heirs also carried it on in the same manner and that they are his vendors; that he himself has also carried it on in the same manner since he acquired it and without disturbance, until the year 1906, at which date the defendants began to disturb him by setting a fishery themselves 300 feet away from the plaintiff's in such a way as to prevent fish entering the plaintiff's fishery, and that the defendants have continued since then to set their fishery in spite of the plaintiff's protests and prohibitions. The plaintiff has also continued to set his fishery in the same way as before but it has been ruined by the defendant's fishery and has become practically unproductive. The plaintiff asks that he be declared the sole and lawful owner of the right of setting the fishery above mentioned and of all the adjoining territory necessary for the proper exploiting of the fishery. He asks for the demolition of the defendant's fishery and for $400 damages.

The defendants, respondents, deny the titles and right of the plaintiff and allege that the fishery they have set is opposite their property and that they have the right to set it. They also pretend to have set their fishery for upwards of thirty years, but this pretension is not serious and is not proved.

The facts alleged by the plaintiff are proved except for the amount of the damages which is not as high as the amount claimed.

There only remains so to speak, the question of law raised by the judgment in the Court of first instance, a question which had not been raised by the defendants' pleadings.

This judgment establishes the fact that the sale or title of concession from the seigniors MacNider to P. F. Leggat of certain immovable property does not speak of the concession of the right of fishing, and it then contains the three following *considerants:*—

> Considering that the plaintiff has not proved that the right of fishing which he claims and of which he would have himself declared owner, was ever taken out of the public domain or was even granted either to the original seignior or to any other person.
>
> Considering that it appears from the facts of the case that the right of fishing is public property, that it forms part of the Crown domain and consequently is imprescriptible.
>
> Considering that a riparian proprietor cannot acquire the ownership of the right of fishing by prescription unless he proves that such right has been taken out of the public domain.

The judgment continues by saying that it is not proved that the right of fishing was ever granted to the McCallum ladies the appellant's predecessors in title.

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It is quite certain, nevertheless, that the McCallum ladies possessed in their quality of universal legatees of P. F. Leggat all the rights which the latter could have of whatever nature these rights might be. Therefore, the McCallum ladies have the same rights as Leggat could transmit to them. If it was a question of an ordinary immovable and he had had the enjoyment of it under all the conditions necessary to prescribe, he would transmit the ownership of the immovable. No one will deny that if the right of fishing in question has been taken out of the Crown domain it is possible to acquire the ownership of it by a thirty-year prescription.

The first question which presents itself is to know whether the right of fishing in question has been taken out of the Crown domain.

If we examine vol. C. of the "Seignorial Questions" [Decisions du Bas-Canada, by Lalievre and Angers], we find that the fishery rights were granted by the seigniors to the Crown. I do not think, however, that we can consider the document in question as a public deed of which we are bound to take cognizance.

This title of the seigniors to the right of fishing has not been invoked in the action and has not been alleged nor has it been fyled or invoked in the Court below. We have, moreover, a letter from Mr. Dufault, Deputy Minister of Colonization, Mines and Fisheries, to the effect that the right of fishing at the place in question belongs to the seigniors and not to the Crown. These facts, however, establish a strong presumption in favour of the plaintiff.

But, moreover, chapter 62 of the Consolidated Statutes of Canada enacts as follows:—

> Any subject of Her Majesty who shall be in peaceable possession of any fishing station at the time of the passing of this Act shall be deemed the owner thereof for the purposes of this Act and he shall be deemed so to be when he shall not have abandoned it during twelve consecutive months; and it shall not be lawful for any person to set therein any apparatus for catching fish so as to injure his fishing.

It is true that chapter 62 of the Consolidated Statutes of Canada was repealed by 29 Viet. ch. 11, sec. 1, but section 3 seems to preserve the rights already recognized by the preceding statute by conferring on the Commissioner of Crown Lands the right to issue leases and fishing licenses only for places where the exclusive right of fishing did not already exist by law in favour of private persons. But it existed at that time by law in favour of those whe were in peaceable possession on the 16th August, 1858, since the statute which repealed this latter law had recognized it.

The Act 31 Viet. ch. 60, sec. 2, has copied the same provision. If we now consult the Revised Statutes of Canada, 1886, ch. 95, sec. 4, we see that the same legislation has been preserved. It says that the Minister of Marine and Fisheries may issue and authorize fishing leases and licenses at any place where this right does not already exist by law. We see nothing since which has modified this legislation. The question is resolved, therefore, into knowing whether on 16th August, 1858, Peter Leggat was in peaceable possession of the right of fishing and of the fishing station in question. We think that the proof shews that at this time Leggat's fishery was already set and it has continued to be set since then without interruption.

It is incontestible that the fishery set by the respondents has been set in such a way as to injure that of the appellant. They should, therefore, be condemned to demolish it. It is necessary to fix more or less arbitrarily the distance to which the appellant's right of fishing extends. It must be noticed that the fishery in question is a salmon fishery, although many other fish are taken there. In fixing this distance, then, I think, we can be guided by sec. 12, No. 7, of 29 Viet. ch. 11, which prohibits the setting of nets or other apparatus for taking salmon at a distance of less than 250 yards from one another.

The statute 31 Viet. ch. 30, also repeats this rule and I am not aware that this statute has been repealed.* We consequently adopt this distance of 250 yards to fix the limit which the defendants cannot pass. As to damages, they are far from being established in the amount which the plaintiff claimed, but we are disposed to fix them at a sum of $50, which, I think, is justified by the evidence.

I refer especially to the case of *Lavoie* v. *Lepage*, cited by the appellant and reported in vol. 12, Quebec Law Reports, p. 104; this precedent is absolutely *ad rem*, and has much facilitated the study of this case.

In consequence the appeal should be maintained, the petitory action also maintained, the demolition of the defendants' fishery ordered and the condemnation of fifty dollars damage pronounced, the whole with costs against the respondents.

Per CURIAM:—The formal judgment of the Court was as follows:— Judgment

"The Court after having heard the parties by their respective attorneys upon the merits of the appeal, after having examined the record and procedure both in the Court of first instance

*Section 18 of the Fisheries Act, R.S.C. 1906, ch. 45, is as follows:—
18. All nets, or other lawful appliances for the capture of salmon, shall be placed at distances of not less than two hundred and fifty yards apart, without intermediate fishing materials of any kind being set or used in and about any other part of the stream.

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and in appeal and after having fully deliberated upon the whole;

"Considering that the appellant has established the essential allegations of his demand and that the respondents have not established their defence;

"Considering that the appellant by his predecessors in title and by himself was on the 16th day of August, 1858, in peaceable possession of the fishing station which he claims and should be considered as the owner of it according to the terms of chapter 62 of the Consolidated Statutes of Canada, sec. 35;

"Considering that the said appellant is deemed proprietor of the said fishing station which he has not abandoned during twelve consecutive months and that it is not lawful for any other person to set therein any apparatus for catching fish so as to injure his fishery;

"Considering that notwithstanding the repeal of chapter 62 of the Consolidated Statutes of Canada the subsequent laws have preserved in favour of the proprietors of a fishing station the rights already recognized by the statute in question;

"Considering that the fishery set by the respondents there and in such a way as to injure that of the appellant and that the said respondents should be condemned to demolish their said fishery;

"Considering, moreover, that the impresciptibility of the public domain is not absolute in the sense that it can be invoked by all those who are interested therein. Only the State or the province within whose domain the property is situated can avail itself of it. Private individuals are not the representatives of the general interest and they cannot invoke it in matters of private relations; possession by a private individual of an immovable belonging to the public domain can serve as a basis for a possessory action in case of interference with this possession by another private party;

"Considering that the fishery of the appellant in question is a salmon fishery, although other fish are taken there, and that no other fishery should be set at a distance of at least 250 yards from that of the appellant;

"Considering that the respondents have caused the appellant damages of at least fifty dollars;

"Maintains the said appeal, reverses and sets aside the judgment under appeal, to wit, the judgment rendered on the 4th day of May, 1910, by the Superior Court at Rimouski, and proceeding to render the judgment which should have been pronounced by the said Superior Court, declares the appellant to be the sole and lawful proprietor, and in possession of the right of setting the fishery described in his action, to wit, a fishing station situate in a bay formed by the River St. Lawrence and commonly called "Anse des Morts" in the first range of the

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Seigniory of Peiras in the District of Rimouski, doth prohibit the respondents from setting a fishery at a distance of less than 250 yards from that of the appellant, orders the respondents to demolish the fishery which they have set at a distance of less than 250 yards from that of the appellant within three months from the date of the present judgment, and in default of their doing so, the appellant is authorized to proceed to demolish or to cause to be demolished the said fishery of the respondents at the expense of the latter; condemns the respondents jointly and severally to pay to the appellant the sum of fifty dollars damages with interest from this date and condemns also the respondents jointly and severally to pay to the appellant all his costs both in the Superior Court and in appeal."

Appeal allowed.

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Ontario Divisional Court, Clute, Latchford, and Middleton, JJ. February 21, 1912.

1. LANDLORD AND TENANT (§ II B—12)—LEASE—COVENANTS TO REPAIR—SUFFICIENCY OF NOTICE TO REPAIR—LANDLORD AND TENANT ACT, ONT.

A notice to repair purporting to be given under a lease, which contained a general covenant to repair and a covenant to repair according to notice with a proviso for re-entry in case of breach or non-performance of covenants may be sufficient, not only as a notice to repair under the lease, but as a notice of re-entry and forfeiture under sec. 13 of ch. 170 of R.S.O. 1897 (Landlord and Tenant Act) even if such notice does not require the lessee to make compensation in money for the breach.

2. COVENANTS AND CONDITIONS (§ III A—27)—WAIVER OF BREACH—LEASE.

Where an opening had been made in a party wall of part of the demised premises by a lessee in breach of a condition in the lease, without the knowledge of the lessor, although the latter was aware that extensive alterations were contemplated, the receipt of rent eleven days subsequent to the date of making the opening, but prior to the lessor's knowledge of such fact, does not operate as a waiver of the breach of the condition or covenant of the lease.

3. COVENANTS AND CONDITIONS (§ III A—27)—RECEIVING PAYMENT WITHOUT PREJUDICE—SUBSEQUENT RENT.

Receipt of rent with knowledge of a breach of condition in the lease by the lessee will not operate as a waiver of the breach when received under a special agreement, that such rent should be received without prejudice to the respective contentions and rights of the parties.

4. LANDLORD AND TENANT (§ II B—12)—COVENANT TO REPAIR—CONTINUING COVENANT—EFFECT OF NOTICE TO REPAIR.

A covenant to repair which includes keeping the premises in repair is a continuing covenant and a notice to repair is not a waiver once and for all of its breach, but an election not to take advantage of it during the currency of the notice and after the expiry of the notice there is a right of re-entry if the premises continue out of repair.

[*Doe d. Morecraft* v. *Meux*, 4 B. & C. 606, and *Penton* v. *Barnett*, [1898] 1 Q.B. 276, specially referred to.]

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5. ELECTION OF REMEDIES (§ I—7)—WAIVER OF FORFEITURE IN A LEASE—ELECTION—INTENTION.

A forfeiture in a lease is waived if the lessor elects not to take advantage of it and shews his election either expressly by a statement to that effect to the lessee or impliedly by acknowledging the continuous tenancy and if after a cause of forfeiture has come to his knowledge he does anything to recognize the relation of landlord and tenant as still subsisting, he is precluded from saying he did not do the act with the intention of waiving the forfeiture.

[*Evans* v. *Davis* (1878), 10 Ch. D. 747, and *Moore* v. *Ullcoats Mining Co.*, [1908] 1 Ch. 575, approved.]

6. LANDLORD AND TENANT (§ II B—12)—WHAT AMOUNTS TO BREACH OF COVENANT TO REPAIR.

Making large openings in a wall, pulling down and removing part of same in an entire building so as to cause the premises to become a part of two buildings, to be thrown together and used as one, is a breach of the covenant to repair even where the lessee had the right "to maintain, continue, use, build and rebuild such wall," and is not only a continuing breach of the covenant to repair, but also waste.

[*Holderness* v. *Lang*, 11 O.R. 1 and *Rose* v. *Spicer*, [1911] 2 K.B. 234, specially referred to; *Doe d. Dalton* v. *Jones*, 4 B. & Ad. 126, 2 L.J.N.S. Q.B. 11, distinguished.]

7. MANDAMUS (§ I—3)—MANDATORY ORDER TO RESTORE WALL—BREACH OF COVENANT IN LEASE.

A mandatory order to restore a wall may be granted under the prayer for general relief although not specifically asked for where a proper case is made on the pleadings and evidence.

[*Ganghan* v. *Sharpe* (1881), 6 A.R. (Ont.), 417, and *Gunn* v. *Trust and Loan Co.*, 2 O.R. 393, specially referred to.]

8. LANDLORD AND TENANT (§ II B—12)—SUFFICIENCY OF SIGNATURE OF NOTICE TO REPAIR.

A lessor's notice to repair given on behalf of several trustees if signed by one and adopted by all is sufficient.

9. COSTS (§ II—28)—DISCRETION OF COURT AS TO SCALE OF COSTS—TRUSTEES AS LANDLORDS.

The Court of Chancery had and the High Court of Justice in Ontario now has, in matters of equitable jurisdiction a general discretionary power to give costs as between solicitor and client; but even in equity did not do so, except in special cases such as suits affecting charity funds, administration suits, actions as to trusts, etc., and an action by trustees, as landlords only, does not fall within such class of cases and the rule should not be extended.

[*Andrews* v. *Barnes*, 39 Ch. D. 133, *Cockburn* v. *Edwards*, 18 Ch. D. 449, and *Willmott* v. *Barber*, [1881] W.N. 107, specially referred to.]

Statement

APPEAL by defendants and cross-appeal by plaintiffs from the judgment of Sutherland, J., at the trial of two actions consolidated.

The judgment below was varied.

The actions were by the trustees under the will of The Honourable William McMaster, deceased: (1) for an injunction restraining the defendants, the lessees from the plaintiffs of the premises on the north-west corner of Queen and Yonge streets, in the city of Toronto, from taking down the wall between the building on the land demised to them by the plaintiffs and a building adjoining it, upon land also demised to the defendants, and for damages; and (2) to recover possession of the land demised and damages, the

plaintiffs alleging breaches of covenants in the lease. The actions were consolidated.

April 19, 1911. The consolidated action was tried before SUTHERLAND, J., without a jury, at Toronto.

The decision appealed from was as follows:—

October 24, 1911. SUTHERLAND, J.:—This is an action with reference to demised premises. As the title and facts in question are sufficiently set out in the statement of claim, I quote the following paragraphs therefrom:—

"(1) By an indenture of lease dated the 27th day of June, 1895, made in pursuance of the Act respecting Short Forms of Leases, Her late Majesty Queen Victoria, represented therein by The Honourable William Harty, Commissioner of Public Works for Ontario, demised to Philip Jamieson, of the city of Toronto, all and singular that certain parcel or tract of land and premises situate, lying, and being in the said city of Toronto, in the county of York, more particularly described as follows: being part of park lot number nine in the first concession west of the River Don on the north-west corner of Yonge and Queen streets in the said city, being butted and bounded as follows: commencing at the south-east angle of said park lot number nine, thence about north sixteen degrees west parallel to and along the western side of Yonge street and the eastern limit of the said park lot number nine, forty feet; thence about south seventy-four degrees west parallel to Queen street and the front of the said park lot number nine, eighty-two feet and six inches more or less, to the westerly boundary of that part of the said park lot number nine conveyed by The Honourable George Crookshank and James B. Macaulay, then one of the Justices of the Court of King's Bench in Upper Canada, to the late John McIntosh; thence about south sixteen degrees east parallel to Yonge street and the eastern limit of the said park lot number nine, forty feet more or less, to Queen street and the front of the said lot number nine; thence about north seventy-four degrees east along the front of said lot number nine and the northerly boundary of Queen street, eighty-two feet and six inches more or less, to the place of beginning; together with the wall (about eighteen inches thick) described in a deed dated the 19th day of July, 1867, made between Charles McIntosh, of the first part, and the Board of Agriculture for Upper Canada, of the second part, as projecting nine inches upon the next adjoining land to the north of the parcel of land above described, and the right and liberty to maintain, continue, use, build, and rebuild such wall as granted to the Board of Agriculture for Upper Canada by virtue of the provisions of the said deed, subject to the lessee assuming the obligation (if any) existing on the part of the grantee under the said deed or the lessor to maintain or repair the said wall as appurtenant to the land thereby demised; together with all

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easements and appurtenances thereto appertaining, for the term of twenty-one years, at the yearly rental of $4,000 payable quarterly as therein mentioned.

"(2) By the said indenture (to which for the full and exact terms thereof the plaintiffs will refer) the said Philip Jamieson covenanted, for himself, his executors, administrators, and assigns: (a) to repair the said premises and keep the same in repair in accordance with the terms of the covenant in the said indenture contained; (b) to repair the said premises according to notice in writing in accordance with the terms of a covenant in the said indenture contained.

"(3) The said indenture of lease contained a proviso for re-entry in case of breach or non-performance of any of the aforesaid covenants.

"(4) Afterwards on the 27th day of June, 1899, by an indenture bearing that date Her Majesty the late Queen Victoria did grant the said premises as above described to Humphry Ewing Buchan, Charles J. Holman, Daniel Edmund Thomson, and James Short McMaster, trustees under the last will and testament of The Honourable William McMaster. The said Humphry Ewing Buchan died on or about the 17th day of October, 1907 and the said premises thereupon became and are now vested in the plaintiffs.

"(5) Afterwards during the said term the said term became and was vested in the defendants as assignees of the said term, and they took and now hold possession of the said demised premises."

The defendants are also lessees from the Jones estate of the building situated on the property north of that already referred to.

Jamieson had erected on the land so leased by him as aforesaid the building which is now upon the property, and in doing so had utilised the wall erected on the projecting nine inches hereinbefore mentioned as part of the north wall of the said building.

The defendants, being the lessees of the two adjoining buildings, conceived the idea of tearing down in part the wall between them, so as to make openings sufficiently large to utilise the two stores practically as one. Without asking the consent of the plaintiffs, their lessors and the owners of the wall in question, they, on or about the 20th March, 1909, made the first opening in the wall.

On or about the 30th March, 1909, the plaintiffs learned, through some "slips" received from certain insurance agents, that the defendants were apparently intending to make alterations in their premises, "including openings communicating with building 182 and 184 Yonge street." Thereupon the solicitors for the plaintiffs wrote a letter containing the following: "We represent, as you know, the owners of the land, and would be glad to know, before there is any interference with the outer wall, just what is proposed." The receipt of this letter was acknowledged by a letter from the defendants' solicitors on the following day.

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An interview was then arranged and took place on the 5th April, 1909, between the defendant Good and the plaintiff D. E. Thomson at the latter's office, to which Good was accompanied by two men named Patterson and Witmer. When they arrived, Thomson, who is a solicitor, as well as one of the plaintiff trustees, was engaged in his private room with other people and was called out to speak to Good. Thomson says that the interview was somewhat short and hurried, assigning two reasons, one that he himself was engaged with other people, and that Good was in a hurry, as he was leaving Toronto for Buffalo by an early train.

He also says that the main portion of the interview was with Good alone, and that just at the last the other two men were present and heard part of the conversation. He states that Good intimated that he desired to make openings in the wall, and would do everything to the satisfaction of the plaintiffs, adding that he would give security to restore the wall, mentioning a security company, and that he had an architect who would do the work under the supervision of the plaintiffs' architect; that the plaintiffs could select an architect, and the defendants would pay all expenses.

Thomson states that his position at the moment was, that he did not know just what the nature of the plaintiffs' title to the wall and the conditions of the lease were, and that he intimated to Knox that he had not looked into the matter or examined the papers. He said that Good said he would arrange to have Patterson, the defendants' inspector, or the manager, and Witmer, their draftsman, call the next day.

Thomson's evidence is, that no understanding of any kind was come to that day. The defendant Good, on the contrary, says that at the interview he told Thomson that they had already made an opening and perhaps had exceeded their rights. He also says that he shewed Thomson the sketches indicating the proposed openings. He adds that Thomson thereupon gave him permission to go on and complete the work. He admits that the main part of the conversation was between him and Thomson, but adds that he repeated, in Thomson's presence, to Patterson and Witmer, that Thomson had said that the defendants could go on with the work.

Good admitted on cross-examination that there was a discussion between him and Thomson about an agreement to be signed, and that Thomson was to prepare the agreement, which was to be submitted to the defendants and sent by mail to Buffalo for that purpose. There was a discussion between Good and Thomson about the latter's architect.

On the following day, Wightman, the defendants' Toronto manager, and Witmer called at Thomson's office, when the latter sent for the plaintiffs' title papers and looked them over. He thereupon intimated to them that he would send to the registry office and get a copy of a certain document and see them the next day.

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There was a further interview on the following day, when Wightman and Witmer saw Thomson. On this occasion, Burke, an architect employed by the defendants, was also present. A discussion occurred between Burke and Witmer as to what was necessary in order to render the wall safe. On this occasion there was a discussion between Thomson and Wightman as to the terms on which the defendants had secured permission from the Jones estate as to their portion of the wall. As a result of this talk, Thomson's legal firm wrote J. Gordon Jones a letter, dated the 7th April, 1909, which, with some further correspondence put in at the trial as exhibit 7, was objected to by counsel for the defendants, but which I admitted as part of the surrounding circumstances.

Thomson says that, at the interview last-mentioned, it was arranged between himself and Wightman that he should write to the Jones estate. A letter was written, and in it the following expression is used:—

> Knox and Company, who bought out Jamieson's interest, are asking our clients' approval for removing the party wall on the ground floor storey," etc.

Apparently the matter of the preparation of the written agreement was not promptly proceeded with.

Patterson also testified to the fact that a written agreement was to be prepared and sent to Buffalo. He says that no details of it were discussed in his presence. He corroborates Good as to the latter's statement that Thomson gave leave to proceed with the work. He admits that he heard Thomson say he wanted to look into their rights, and that, before preparing an agreement, he would have to look into the matter. He also says that Good stated that he was under heavy expense and wanted Thomson to hurry up about the agreement so as to get at the work.

Nothing apparently having been done in the meantime about the written agreement, Thomson accidentally discovered, in passing the building in question on the 21st May, 1909, that the work was being proceeded with, and thereupon on the 22nd May caused a letter to be written in the following terms to the defendants: "We have just learned from Mr. Burke that the tearing down of the party wall has already been begun. Our understanding was that nothing should be done until there was a satisfactory agreement between you and our clients, or whether it should be a three party agreement with Mr. Jones included. We came to the conclusion Mr. Jones was not a necessary party to the agreement, as he admits the wall belongs to us. Possibly we ought to have communicated this to you, but we expected to hear from you before anything was done, when we could have reported as above. You must remember this party wall is not a part of the building owned by the late Mr. Jamieson and purchased by you. It belongs to our clients. We must ask you to stop work until matter arranged."

To this letter a reply from the defendants was written dated at Buffalo, the 24th May, as follows:—

> Your kind favour of May 22nd to our Toronto address was forwarded to this office, and in reply would say that the writer, Mr. Good, if you will recall, was in your office in Toronto and discussed this matter with you and arranged to have our Mr. Patterson call on you the next day. We presumed that he had done so and that everything was satisfactory for us to go ahead. As a matter of fact this never came back to my notice again until we received this letter. We have to-day communicated with our solicitor, Mr. Charles H. Ivey, of London, and requested him to call and see you Tuesday and to arrange everything satisfactorily. It is certainly our intention to respect every right you have in the premises, and have so instructed our solicitor, as we are not at all desirous of taking advantage of your clients in this matter in any way. Trusting Mr. Ivey will be able to arrange everything in a satisfactory manner, we remain.

Patterson testified that the work of taking out the stone and brick from the wall was completed within two or three days after the 24th May. The opening made is a very large one, and extends from about 5 feet from the front or Yonge street wall back to about 12 or 15 feet from the rear wall, pillars or columns being put in to replace the wall and as supports.

The defendants gave some evidence as to an arrangement made with Thomson under which the plans of the proposed alterations and openings were to be submitted to Burke; but their own witness, Witmer, on being asked about this, testified that the plans were not submitted to Burke. They were submitted to the city architect for approval, certain municipal regulations requiring that to be done. Witmer does say, later on in his evidence, that Burke saw the working plans and made no objection to them. Thomson denied that there was any arrangement made that, if the plans were satisfactory to Burke, he would be satisfied. He says that Burke did not approve of any plans. He does state that the details of the plans in connection with the proposed alterations were to be submitted to Burke, but added that nothing was to be done before he (Thomson) passed upon the matter. He says that, after the 6th April, when Burke was present, he never heard from him again until the 21st May, when, on seeing that the work was going on, he telephoned Burke about it. Burke had died before the trial of the action.

On the 24th May, Ivey called to see Thomson, and there was a discussion as to the terms of the agreement, particularly the question of security. Ivey asked that there should be no obligation on the part of the defendants to replace the wall until the end of the term. In an interview on that or the next day, reference was made to a clause in the Jones lease which apparently provided for the replacing, at any time desired by the lessors, of any portion of the wall taken down. Thomson was insisting that any alterations made should be replaced on reasonable notice. He says

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that he pointed out that the defendants were already obliged to do that under the terms of the Jones arrangement.

A draft agreement was prepared by Johnston, a law partner of Thomson, and was put in as exhibit 10. It contains a clause to the effect that the lessees would at any time, on receiving six months' notice in writing from the trustees (plaintiffs) so to do, restore the said wall and every part thereof in a good workmanlike manner, etc. The draft agreement was sent by the plaintiffs' solicitor to Mr. Ivey in a letter dated the 27th May.

On the 9th June, 1909, Mr. Thomson wrote a letter to Mr. Ivey as follows: "The writer is sorry to have been out of town when Mr. Good and yourself called last week. Mr. Johnston understood that you would be here again to close matter by yesterday at the latest. Have had no word from you, however. It is, you will appreciate, quite out of the question for us to allow the matter to drift much longer. As indicating our clients' attitude, we may say to you that they are disposed to meet you generously on the matter of security, but are not disposed on any terms to forgo the right to have the wall restored on reasonable notice.

On the 10th June, Mr. Ivey replied as follows: "I beg to acknowledge receipt of your favour of 9th inst. in reference to this matter, and have written Mr. Good asking him the earliest date he can meet me in Toronto for the purpose of closing the matter. As soon as I hear from him I will let you know."

On the 14th June, the plaintiffs' solicitors telegraphed to Mr. Ivey at London: "Impossible allow Knox McMaster drift longer. Must institute proceedings unless arranged immediately;" and wrote a letter on the same day to the same effect.

On the 19th June, the plaintiffs' solicitors wrote to Mr. Ivey again, as follows: "In view of the stand taken by your clients at Wednesday's interview, there seems no way but to institute proceedings. Kindly let us know by return whether you will accept service of process for Messrs. Knox and Good and oblige."

To which Mr. Ivey replied on the 21st June, stating that he had "written Mr. Good in reference to the matter with a view of making one more effort towards an amicable settlement, but have not yet heard from him."

The plaintiffs' solicitors wrote to the defendants' solicitors on the 22nd June, as follows:—

> We have your letter of the 21st inst., and we note that you have written to Mr. Good, from whom you expect to hear shortly. In view of the arrangement between us that our clients are not to be in any way prejudiced as to any of their rights by reason of their refraining from taking immediate proceedings, there is no reason why we should not wait until you hear from Mr. Good. At the same time, we cannot let the matter stand indefinitely, in view of what we take to be the extraordinary contention of Mr. Good that, though an agreement had to be entered into between us, he was to be permitted, before any

agreement was made, to demolish our clients' wall and do with it as he chose. The wall is part of the tenement leased, and is covered by the covenant to repair contained in the lease; and, altogether apart from this, we are satisfied that the action of your clients in demolishing the wall amounts to waste, giving us an immediate right to an injunction and a mandamus. The proposition that we have already made to Mr. Good is eminently fair, and we shall certainly not be disposed to renew it if we have to take proceedings. Please let us hear from you as soon as you hear from Mr. Good.

On the 2nd July, 1909, Mr. Thomson wrote the defendants at Buffalo, as follows:—

I am this morning in receipt of the enclosed cheque and form of receipt. You have marked the cheque in the written part as "rent in full to 1st October, 1909." It is then stamped "rent in full to 1st August, 1909." Both dates are wrong. The amount covers only to 1st July, 1909. Hence I return cheque. Besides this, it is my contention, as Mr. Ivey is aware, that the destruction of the wall amounts to a breach of covenant, entitling the landlords to forfeit the lease. As, however, Mr. Ivey and Mr. Good have all along stated that anything that may take place between us, until our rights have been determined or until some settlement has been reached, shall be without prejudice to our respective contentions and rights (whatever they may be), I am willing to accept cheque for $1,000 on these terms as being in full up to the 1st inst.

Yours truly,

D. E. THOMSON.

To this letter the defendants replied on the 6th July, as follows:—

We wish to acknowledge receipt of you favour of July 2nd, with which you return the cheque which we mailed you on June 30th, account of the notation written thereon in reference to the period of time covered by the rent cheque. Your statement in reference to the matter is correct, and we very much regret that this incorrect notation was made on the cheque by the party who drew the same, which error was undoubtedly occasioned from the fact that, with few exceptions, we always pay rent in advance, and for this reason the party evidently assumed that the cheque covered rent from July 1st to Oct. 1st, instead of from April 1st to July 1st. Yesterday being a legal holiday, your communication was not received until this morning, and we are pleased to herewith enclose a cheque covering the proper period of time, and trust you will receive the same without delay.

On the 7th July, Mr. Thomson replied as follows:—

I am duly in receipt of your letter 6th inst. with cheque as stated, but saying nothing about the condition mentioned in my last letter, without which I am not in a position to accept the cheque. I return same herewith. If you will strike out the word "rent" and make it read simply, "in full to July, 1909," and will say explicitly that the payment is made without prejudice to the rights and contentions of

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the parties, I will accept it. My position is, that I am willing to accept $1,000 in full to 1st inst., irrespective of whether same is to be treated as rent or for use and occupation, but am not in a position to accept payment of rent until the point between us has been settled, or some satisfactory agreement come to.

In answer to this the defendant wrote on the 9th July, as follows:—

> In reply to your kind favour of July 7th, would say that we are herewith returning to you a cheque written as you suggest, and the understanding is, that your acceptance of the cheque shall be without prejudice to your rights. We have no desire to be technical and trust this is satisfactory. If not, kindly write us and we will make any change that you wish that is consistent with our rights in the matter.

Receipt of this was acknowledged by letter from Thomson to the defendants dated the 10th July:—

> I have to acknowledge with thanks receipt of your letter of the 9th inst., returning cheque with the word rent struck out, and agreeing that same may be accepted without prejudice to the rights of the parties, which is satisfactory.

Thomson says that not until some time after the letter of the defendants dated the 24th May, and at one of the personal interviews, did the defendants for the first time put forward the suggestion that they had had permission to make the openings before the agreement was made. This is what he meant by the "extraordinary contention" in the letter of the plaintiffs' solicitors to the defendants' solicitors of the 22nd June.

No arrangement having been come to between the parties, on the 29th June, 1909, the plaintiffs issued a writ, asking "for an injunction restraining the defendants from tearing down, demolishing or removing any part of the wall belonging to the plaintiffs as landlords and leased to the defendants", and caused the same to be served upon the defendants.

On or about the 6th July, 1909, the plaintiffs caused to be served upon the defendants a notice to the following effect:—

> To Seymour H. Knox and Daniel Good, Sirs: Having this day entered (to examine the condition thereof) the demised premises situate at the north-west corner of Queen and Yonge streets, in the city of Toronto, now occupied by you under lease thereof bearing date the 27th day of June, 1895, and expressed to be made between Her Majesty the Queen, represented therein by The Honourable William Harty, the Commissioner of Public Works for Ontario, as lessor, and one Philip Jamieson, of the city of Toronto, in the county of York, merchant, as lessee, whereby Her Majesty the Queen did demise and lease to the said Philip Jamieson the lands therein particularly described, together with the wall described in deed dated the 19th day of July, 1867, and made between one Charles McIntosh, of the first part, and the Board of Agriculture for Ontario, of the second part, and having

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on such examination found the following want of reparation, to wit, that openings had been made in the said wall and part of the same has been entirely demolished and removed, and said openings and portion of wall removed have not been restored:—Now we hereby give you notice to well and sufficiently repair and make good the said want of reparation by well and sufficiently restoring said wall to its former condition and closing all openings therein within three calendar months next after the giving of this notice.

Dated at Toronto this sixth day of July, 1909.

Trustees under the last will and testament of The Honourable William McMaster, per D. E. Thomson, one of said trustees.

On the 22nd day of October, 1909, the plaintiffs issued another writ against the defendants, claiming to recover possession of the land in question, by reason of breaches of covenants to repair contained in the lease in question and of the powers of entry therein contained.

The two actions were consolidated by order of the Master in Chambers dated the 6th November, 1909.

The plaintiffs further allege in their statement of claim that shortly prior to the 29th June, 1909, the defendants made openings in the wall described and demolished part of the wall and removed the same from the premises, and in doing so committed a breach of the covenants contained in the lease for re-entry in case of breach or non-performance of such covenants. They also allege therein that the period of three months mentioned in the notice before referred to had expired, and that the defendants had failed to remedy the breaches. They accordingly claim to recover possession of the premises, ask for money damages for the breaches, an injunction to restrain the defendants from further breaches, and such further or other relief as may be just.

The defendants in their statement of defence deny that before the action was brought for possession on the 22nd October, 1909, the plaintiffs had served a notice such as is required by the Act respecting Landlord and Tenant, and allege that, in consequence, the plaintiffs cannot maintain an action for possession of the lands.

They further say that, if the taking down of part of the wall was a breach of any covenant contained in the lease, which they deny, the plaintiffs accepted rent which accrued after such alleged breach and before the issue of the writ claiming possession, and thereby waived their right of re-entry, if any they had.

They also set up that, before making the openings in the wall, they obtained the consent of Thomson thereto, and they say that the whole work was done and completed before, at, or about the time when the first of the above-mentioned writs was issued, on the 29th June, 1909.

They also allege that, under the terms of the lease in question, the Board of Agriculture, the predecessors in title of the plaintiffs, granted to the lessee and his assigns the right and liberty to maintain, continue, use, build, and rebuild such wall, and that,

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therefore, they had a right to alter, maintain, and rebuild at their pleasure the said wall, pursuant to the said terms and the effect of the said deed and lease.

They ask, in any event, and should the Court be of opinion that the acts complained of constitute a breach of the covenants of the lease, that they may be relieved against the said alleged breaches, upon such terms, having regard to all the circumstances, as shall seem just and proper to the Court.

The question as to whether the plaintiff Thomson did or did not, knowing that an opening in the basement had already been made, give permission to the defendants, at the interview on the 5th April, 1909, to go on with the main portion of the work to be done pending an agreement to be made between the parties, is a matter of importance in determining this action.

I have come to the conclusion that the testimony of Mr. Thomson is to be preferred to that of the defendants. On the face of this matter, it seems incredible that any man, much less an experienced lawyer and trustee, without consultation with the two other plaintiff trustees, and without knowing from the documents to be resorted to just what the rights of his *cestuis que trust* were, would off-hand, and that in a somewhat casual and hurried interview, give such an important consent.

He says himself that he met the defendant Good courteously in the matter and expressed a willingness to facilitate the wishes of the defendants in every possible way. He denies expressly that he then or at any time gave any consent that the work should proceed before a proper written agreement was arrived at. He stated that he told the parties at the first interview that he would have to look into the matter, and in this he is corroborated by Patterson, called for the defendants.

Thomson says that the next day he told the persons who saw him then on behalf of the defendants, that he had not had time to look into it. Patterson says that he does not remember this being said by Thomson on that day. It is admitted that a written agreement was talked of and was to be prepared. But the subsequent conduct of and correspondence between the parties confirm the view that no consent was given by Mr. Thomson on behalf of the plaintiffs.

When express objection was taken by the plaintiffs in their letter to the defendants of the 22nd May in these words, "Our understanding was that nothing should be done until there was a satisfactory agreement and security for replacing the wall," the defendants, in their written reply dated the 24th May, did not pretend that they had obtained a consent from Thomson on the 5th April, but put the matter in this way: "Mr. Good, if you will recall, was in your office in Toronto and discussed this matter with you and arranged to have our Mr. Patterson call on you the next day. We presumed that he had done so, and that everything was satisfactory for us to go ahead."

The fact appears to be that the defendants were very anxious to proceed with the work, and assumed, without leave or license, to go on with it and take the chances.

I, therefore, find as a fact that no leave was given to the defendants to proceed with the work as they allege. I think, that, under the terms of the lease, the defendants had no right to make openings of the kind they did in the wall in question, and that their so doing was a breach of the covenants to repair and keep in repair contained in the lease. It is plain that the whole matter would have been satisfactorily arranged, a written agreement arrived at, and litigation avoided, if the defendants had consented to a term being placed in the proposed agreement to the effect that the wall would be replaced by the defendants on reasonable notice. The defendant Good in his evidence admits that the defendants would not agree that they would restore on three months' or six months' or any notice. As he puts it, "We split on that."

Their conduct in this respect was unreasonable. Surely the least they could do, when they had taken down a large part of the wall of their lessors' building without leave, was to consent to replace it on reasonable notice.

Even if the defendants had been able to make out the verbal permission suggested by them, it could not be held to be more than a permission to go on, subject to a reasonable agreement being entered into for the restoration of the wall. Such an agreement, a reasonable agreement in my view of the matter, was submitted to the defendants, who refused to execute it.

The plaintiffs ask that a forfeiture of the lease be declared and that they be given possession of the premises. As to this branch of the case several contentions are put forward on behalf of the defendants. In the first place, they say that the notice referred to in paragraph 7 of the plaintiff's statement of claim, and dated the 6th July, 1909, is not a notice given under sec. 13 of the Landlord and Tenant's Act, R.S.O. 1897, ch. 170, but is a notice given under the clause as to repair in the Act respecting Short Forms of Leases, R.S.O. 1897, ch. 125; and an examination of it would appear to confirm this view.

Section 13, sub-sec. 1, of the first-mentioned Act, is as follows: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach."

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It provides that the notice should require the lessee to remedy the breach, and in any case require him to make compensation in money for the breach; and, if the lessee fail within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach, then only the right of re-entry or forfeiture for the breach of the covenant or condition in the lease shall be enforceable by action or otherwise.

No mention is made of three months, although that might well be considered under the section, in certain cases, "a reasonable time." The notice should require "the lessee to make compensation in money." It does not. In the notice in question, served by the plaintiffs, the time given within which the repairs are to be done is the term of three months.

When we turn to the Act respecting Short Forms of Leases, the clause as to the form of this particular covenant reads as follows: "(6) And that the said (lessor) may enter and view state of repair, and that the said (lessee) will repair according to notice in writing," etc. And the extended form, as follows: "6. And it is hereby agreed that it shall be lawful for the lessor and his agents, at all reasonable times during the said term, to enter the said demised premises to examine the condition thereof; and further, that all want of reparation that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly, reasonable wear and tear and damage by fire, lightning and tempest only excepted."

The extended clause expressly mentions the term of "three calendar months next after such notice," and notifies the lessee to "well and sufficiently repair and make good" the want of reparation.

It would appear, therefore, that no notice as to the forfeiture of the lease, in the terms required by the Landlord and Tenant's Act, R.S.O. 1897, ch. 170, sec. 13, was given; and, consequently, that the landlord was not in a position, when the writ for possession was issued, to assert "a right of re-entry or forfeiture under any proviso or stipulation in" the lease.

The defendants also contend that there was a waiver by the plaintiffs of any breach, by their receiving rent on the 1st April, 1909, after notice that repairs were contemplated of the kind in question. It appears that a small opening in the wall had been made on or about the 20th March, 1909. When the plaintiffs received the rent on the 1st April following, they had no knowledge of this. I do not think that the receiving of the rent on the 1st April could be considered a waiver merely because, prior to that date, notice had been received to the effect that repairs were in contemplation, but no part of which repairs, so far as the lessors

then knew, had been done. When the next instalment of rent for three months became payable on the 1st July following, and was finally accepted by the plaintiffs without prejudice to their rights, it is contended on behalf of the defendants that such acceptance was a complete waiver. They argue that the plaintiffs could not accept the rent without prejudice. But the correspondence filed on the trial of the action discloses that there was an express agreement on the part of the defendants at the time of the payment of this rent that it should be received without prejudice to the respective contentions and rights of the parties. At that time one of the contentions on behalf of the plaintiffs was, that the defendants had committed a breach of the lease by breaking through the wall, and had failed to repair as requested. The defendants also contend that the plaintiffs, by issuing the first writ, in which they claimed only an injunction and damages, thereby elected to pursue that remedy with notice and knowledge of the existing facts, and that that was an election which could not subsequently be altered and changed into a claim for a forfeiture and possession.

"A forfeiture is waived if the lessor elects not to take advantage of it, and shews his election either expressly, by a statement to that effect to the lessee, or impliedly, by acknowledging the continuous tenancy. And if the lessor, after a cause of forfeiture has come to his knowledge, does anything whereby he recognizes the relation of landlord and tenant as still subsisting, he is precluded from saying that he did not do the act with the intention of waiving the forfeiture:" Fawcett's Landlord and Tenant, 3rd ed., p. 499; *Evans* v. *Davis* (1878) 10 Ch. D. 747; *Moore* v. *Ulcoats Mining Co.*, [1908] 1 Ch. 575.

I do not think that the plaintiffs have made out a case for forfeiture of the lease, or that I can, on the facts in evidence, make an order giving them possession of the property. Even if a case for forfeiture had been made out, one would hesitate, in a lease of so much importance, to give effect to it, and would rather incline to relieve therefrom, if possible, and seek for and grant another appropriate remedy less drastic.

The defendants also contend that the taking down of the wall was no breach of the terms of the lease; that under its terms, viz., to "build and rebuild," they were entitled to take down a portion of the wall as they have done. I do not think this contention can be given effect to. I am of opinion that to make an opening in the wall of such a size as has been indicated was a breach of the terms of the lease as to "repair," and that this is particularly so in a case where the opening practically causes the building in question, which was an entire building before, to become a part of two buildings thrown together and used as one.

I find, therefore, that the defendants, by breaking into the wall in question, as disclosed in the evidence, committed a breach of the covenant to repair.

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Then as to the claim for an injunction. The defendants contend that all the demolition complained of was done before the writ was issued, and that the claim for an injunction in it and in the statement of claim has in contemplation and refers to future breaches only. The defendants say that, since the writ was issued, they have not done any work about which the plaintiffs have complained or can complain, and do not contemplate doing any, and, therefore, there is nothing to which an injunction can apply.

They also argue that there is no request in the writ or in the statement of claim for a mandatory order compelling the defendants to restore the wall to its original position; and that, consequently, the plaintiffs cannot obtain such an order, except after amendment and on terms. But is this so? There is the following statement of fact set out in the sixth paragraph of the statement of claim: "The defendants made openings in the wall above described, being part of the said demised premises, and demolished part of the said wall and removed the same from the said premises, and in so doing the defendants committed a breach of the above-mentioned covenants contained in the said indenture of lease." There is a prayer for "such further or other relief as may be just." They complain of demolition; they ask for an injunction restraining from further similar acts; and they ask for such further or other relief as may be just.

The principle on which a relief not expressly asked for may under a prayer for general relief, be granted is discussed and determined in the case of *Gaughan* v. *Sharpe* (1881), 6 A.R. 417. The head-note states:—

> If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though his specific prayer may have been for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim upon facts stated in the bill *alio intuitu*, a relief entirely foreign to the scope of the bill.

See also *Johnson* v. *Fesenmeyer* (1858), 25 Beav. 88, affirmed in appeal in 3 DeG. & J. 13; *Gunn* v. *Trust and Loan Co.* (1882), 2 O.R. 393.

I think that, under the prayer for general relief, the plaintiffs were, upon the pleadings and evidence, enttiled to ask, as by their counsel upon the argument they did, and that it is proper and appropriate to grant, a mandatory order requiring the defendants, within a reasonable time, to restore the wall in question to the same condition in which it was before it was broken into by them. I make such order accordingly, and fix the period of restoration at one month.

No evidence as to damages to the reversion or as to what it would cost to restore the wall was given at the trial. The lease has some time yet to run, with rights of renewal; and damages

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to the reversion could not, one would think, in any event be large. I fix and allow to the plaintiffs the sum of $10 as nominal damages for breach of the covenant.

The plaintiffs will have their costs of the action, which, under the circumstances, as they are trustees, will be costs as between solicitor and client.

The defendants appealed from the judgment of SUTHERLAND, J., and the plaintiffs cross-appealed.

Argument

E. D. Armour, K.C., for the defendants:— The judgment appealed from is evidently wrong in awarding costs to the plaintiffs as between solicitor and client. There is no authority for such a direction. A more important objection to the judgment is, that the learned trial Judge had no jurisdiction, asserting as he did the non-forfeiture of the lease, to grant a mandatory order. The lack of a proper notice under sec. 13 of the Landlord and Tenant's Act was fatal to a case constituted as the plaintiffs' was, and the relief granted to the plaintiffs was in the nature of specific performance, and could not properly be granted, either on the pleadings and findings as they stand, or as a part of the "general relief" asked for in the statement of claim. No amendment was asked for at the trial, and it cannot now be given; and, if given, costs should at all events have been awarded to the defendants. The proper course for the trial Judge to have taken, when it was shewn that the plaintiffs' claim to forfeit the lease had failed, was to stop the action at that point. Even if the Court had jurisdiction to give "other relief" such as was granted in this case, it should not be granted where, as in this case, it is contradictory to the particular relief asked for in the action. "General relief" can only be of something germane to the particular relief prayed for: *Gaughan* v. *Sharpe*, 6 A.R. 417, 422; *Stevens* v. *Guppy* (1826), 3 Russ. 171; *Graham* v. *Chalmers* (1862), 9 Gr. 239; *Gunn* v. *Trust and Loan Co.*, 2 O.R. 393; *Jessup* v. *Grand Trunk R.W. Co.* (1882), 7 A.R. 128. The following cases were referred to as being similar to the case at bar: *Doe dem. Dalton* v. *Jones* (1832), 4 B. & Ad. 126; *Holderness* v. *Lang* (1886), 11 O.R. 1. No damage to the reversion has been shewn, and the landlords are protected by the tenants' covenant to "leave in repair" at the end of the term. As no damage was proved, none should have been allowed. Where there is a covenant to repair, the ordinary law of waste does not apply. There is no case in equity of specific performance of a covenant to repair: *Lucas* v. *Comerford* (1790), 1 Ves. Jr. 235, 3 Bro. C.C. 166; *Mosely* v. *Virgin* (1796), 3 Ves. Jr. 184; Fry on Specific Performance, 5th ed., p. 48 *et seq.* As regards the necessity of a proper notice, it has been said by a great Judge that "the statute is cast in an iron framework," and where forfeiture is claimed by virtue of notice under the statute, it must be shewn to be in absolute conformity with the statute's provisions.

Messrs. W. N. Tilley and *R. H. Parmenter*, for the plaintiffs:— The $10 damages and the costs are not matters of prime import-

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ance. The real issue is as to the right of the plaintiffs to have their wall restored. This is a matter in which they have a substantial interest, as the lease contains an express provision requiring the erection of a building according to an approved plan, to secure which a deposit of $10,000 is required, and the building is to revert to the landlord in case the tenant does not require a renewal at the end of his lease. As to the propriety of making a mandatory order in such a case, while we are not in a position to cite a precedent, there seems to be no good reason why such an order should not be made. As regards the notice, it is submitted that the notice given was proper and sufficient under the statute. It is not necessary that the notice should require payment of compensation in money: *Lock* v. *Pearce*, [1893] 2 Ch. 271. [*Armour*. The defendants do not contend that the notice is bad on that account.] The form of notice given satisfies the object of the statute; and, if it does that, it is of no significance that it does something else as well. It was served both personally and on the premises, and it is thus shewn that the plaintiffs were endeavoring to comply with the terms both of the lease and of the statute. The following cases were referred to and discussed: *Doe dem. Morecraft* v. *Meux* (1825), 4 B. & C. 606. This case is relied on by the defendants, as shewing an abandonment of the forfeiture clause, but it was decided before the Conveyancing Act, and the statute now intervenes, and it should be given a liberal, and not a narrow or technical, construction: *Few* v. *Perkins* (1867) L.R. 2 Ex. 92, a case which explains the *Meux* case; *Penton* v. *Barnett*, [1898] 1 Q.B. 276, *per* Collins, L.J., at p. 281. This was a case very similar to the present, and is an authority for the validity of the notice. As to the intent of the Conveyancing Act and the liberal construction of the notice under it, reference was made to *Fletcher* v. *Nokes*, [1897] 1 Ch. 271; *In re Serle*, [1898] 1 Ch. 652, 656, 657; *Pannell* v. *City of London Brewery Co.*, [1900] 1 Ch. 496. Reference was also made to Encyc. of Laws of England, vol. 7, p. 667, and cases there cited, especially *Doe dem. Vickery* v. *Jackson* (1817), 2 Stark. 293; *Gange* v. *Lockwood* (1860), 2 F. & F. 115. The *Holderness* case, cited on behalf of the defendants, is really in our favour, as the distinction is there drawn between alterations such as those made by the defendants in the present case, and such as are contemplated by the terms of the lease. The right "to build and rebuild" the wall, on which the defendants rely, is not a right to destroy it, as they have done. As to the power of the Court to give such a judgment as is here in question, reference was made to *Woodhouse* v. *Newry Navigation Co.*, [1898] 1 I.R. 161; *Allport* v. *Securities Corporation* (1895), 64 L.J. N.S. Ch. 491; Seton, 6th ed., vol. 1, p. 530, and cases there cited; *Attorney-General* v. *Furness R.W. Co.* (1878), 26 W.R. 650; *Lane* v. *Newdigate* (1804), 10 Ves. 192.

E. D. Armour, K.C., in reply:—It now appears that the plaintiffs rely upon forfeiture of the lease, and not upon their right to specific

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performance of the covenant to repair. This claim of forfeiture and right of entry, which is the subject of their cross-appeal, depends upon the sufficiency of their notice, which was evidently given under the lease and not under the statute. It is submitted that, by giving the notice in question, the plaintiffs elected to waive the forfeiture. Reference was made in this connection to the *Meux* and *Few* cases, also to Foa's Landlord and Tenant, 4th ed., pp. 654, 655, and to *Cove* v. *Smith* (1886), 2 Times L.R. 778. The notice was invalid, as it was not signed by the trustees, nor did it specify the particular breach of covenant of which the tenants had been guilty. The plaintiffs, by coupling a claim for an injunction with a prayer for forfeiture, had waived the latter: *Evans* v. *Davis*, 10 Ch. D. 747; *Moore* v. *Ullcoats Mining Co.*, [1908] 1 Ch. 575. The *Meux* case is not overruled by *Penton* v. *Barnett*. The breach complained of is not a continuing one, as it involves demolition, and not mere dilapidation, which would constitute a continuing breach. The right of the plaintiffs to forfeit, having once been waived, cannot now be revived, as in the case of a continuing breach. Their only remedy would be in damages. The *Allport* and *Furness* cases are not applicable, the former not being a case of waste, and the latter being a railway case, and an exception to the general rule. He cited *Hill* v. *Barclay* (1810-11), 16 Ves. 402, 18 Ves 56.

Tilley, in reply as to the plaintiffs' cross-appeal, referred to the Interpretation Act, as shewing the power of one trustee to give notice on behalf of the others. The statute does not require the notice to be signed. *Penton* v. *Barnett*, [1898] 1 Q.B. 276, is an authority as against the necessity of a new notice after the expiration of the time specified in the notice.

Clute, J.

February 21, 1912. CLUTE, J.:—There were two writs issued, the first on the 29th June, 1909, and the second on the 22nd October, 1909,—the plaintiffs, under the first, claiming to restrain the defendants from tearing down the party wall and for damages for breaches of covenants to repair; and, under the second, claiming possession for breach of covenant and right of re-entry, under lease from the plaintiffs' predecessor in title to the defendants' predecessor in title.

The plaintiffs claim title by grant from the Crown dated the 27th June, 1899. Prior to their grant, the Crown had leased the property in question to one Jamieson, by lease dated the 27th June, 1895. The property is situate on the north-west corner of Yonge and Queen streets, with a frontage of 40 feet on Yonge street, and a depth of 82 feet 6 inches on Queen street, "together with the wall about 18 inches thick described in a deed dated 19th of July, 1867, made between Charles McIntosh, of the first part, and the Board of Agriculture for Upper Canada, of the second part, as projecting 9 inches upon the next adjoining land to the north of the parcel of land above described, and the right and liberty to maintain, continue, use, build, and rebuild such

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wall as granted to the Board of Agriculture for Upper Canada by virtue of the provisions of the said deed."

The McIntosh deed, here referred to, further provides that the wall may be used as a party wall by the grantee and the grantor, the latter being then owner of the property on Yonge street immediately north of the lands conveyed. This lease is made in pursuance of the Act respecting Short Forms of Leases, and includes the wall described in the McIntosh deed. In this lease the lessee covenants to build, at his own expense, under plans approved by the architect to be named by the lessor, a building of certain description of the value of not less than $25,000, the lessor to deposit $10,000 to insure the performance of this covenant. At the date of the execution of the lease, the land was vacant with the exception of the wall on the north side referred to in the McIntosh deed, which was then standing, the building, of which it formed the north wall, having been burned.

The lessee covenants, in the usual short form, to pay rent and to repair, and that the lessor may enter and view the state of repair, and that the lessee will repair according to notice and will leave the premises in good repair.

The building was erected and occupied for some time by the tenant Jamieson, who assigned the lease to the defendants, and on or prior to the 12th March, 1909, the defendants went into possession.

The defendants are also tenants of the premises to the north, and occupy both premises as a store; and, for the more convenient use of the same, have taken down the partition wall between the two premises.

It appears from the evidence called for the defence that, on the 20th March, 1909, the defendants cut a door-way through the wall, without the knowledge or consent of the plaintiffs. This coming to the knowledge of the plaintiff Thomson, objection was made, and negotiations were entered upon and continued for some time, with a view of reaching an agreement permitting a further portion of the wall to be taken down; and from the evidence of both parties it appears that a written agreement was contemplated. This was drafted, but the parties differed as to what it should contain, and never reached a satisfactory conclusion. The defendants now contend that what was done was by leave. The trial Judge has found against them on this point.

The learned trial Judge refers fully to the various interviews had between the parties, and accepts the statement of the plaintiff Thomson as to what took place, as against the witnesses of the defendants, and finds as a fact that no leave was given to the defendants to proceed with the work, as they allege.

I have carefully read all the evidence, which, I think, fully supports such finding.

On the 6th July, 1909, the defendants gave the following notice:—

To Seymour H. Knox and Daniel Good, Sirs: Having this day entered (to examine the condition thereof) the demised premises situate at the north-west corner of Queen and Yonge streets, in the city of Toronto, now occupied by you under lease thereof bearing date the 27th day of June, 1895, and expressed to be made between Her Majesty the Queen, represented therein by The Honourable William Harty, the Commissioner of Public Works for Ontario, as lessor, and one Philip Jamieson, of the city of Toronto, in the county of York, merchant, as lessee, whereby Her Majesty the Queen did demise and lease to the said Philip Jamieson the lands therein particularly described, together with the wall described in deed dated the 19th day of July, 1867, and made between one Charles McIntosh, of the first part, and the Board of Agriculture for Ontario, of the second part, and having on such examination found the following want of reparation, to wit, that openings have been made in the said wall and part of the same has been entirely demolished and removed, and said openings and portion of wall removed have not been restored:—Now we hereby give you notice to well and sufficiently repair and make good the said want of reparation by well and sufficiently restoring said wall to its former condition and closing all openings therein within three calendar months next after the giving of this notice.

Dated at Toronto this sixth day of July, 1909.

Trustees under the last will and testament of The Honourable William McMaster, *per* D. E. Thomson, one of the said trustees.

The extended form of the covenant to enter and view the state of repair, and to repair according to notice in writing, provides that all want of reparation that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, shall be made within three calendar months next after such notice is given. The above notice is the form usually adopted under this covenant.

The trial Judge held that no notice had been given as to the forfeiture of the lease, in the terms required by R.S.O. 1897, ch. 170, sec. 13; and that the landlords were not in a position when the writ of possession was issued to assert a right of re-entry or forfeiture under the lease.

Sub-section 1 of sec. 13 provides that "a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach." The reparation must be made "within a reasonable time after notice."

The trial Judge found that the plaintiffs had failed to make out a case of forfeiture; but that, by taking down the wall, the

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defendants committed a breach of the covenant to repair. He entered judgment for the plaintiffs; and, under the prayer for general relief, directed that the defendants restore the wall in question to the condition it was in before it was interfered with, within one month, assessed $10 for damages for breach of the covenant to repair, and gave the plaintiffs costs as between solicitor and client.

Mr. Armour's contention, as I understand it, is, that the notice is obviously given under the covenant to repair according to notice; that that was a waiver of the forfeiture (if there was one) under the covenant to repair; and the finding of no forfeiture was right. The action cannot be maintained under the second covenant, because the notice required by sec. 13, sub-sec. 1, of the Landlord and Tenant's Act has not been given; that the relief given cannot be granted, under the findings as they stand, or under the prayer for other relief, and no amendment was asked, and leave to amend should not now be granted; that the relief granted was in effect specific performance, which could not be given; nor had the Court jurisdiction to grant a mandatory order in a case of this kind; and that what was done by the defendants was within the right of the tenant under the lease.

On the first point, the case chiefly relied upon was *Doe dem. Morecraft* v. *Meux*, 4 B. & C. 606. In that case, a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any of the covenants, and the premises being out of repair, the landlord gave a notice to repair within three months. The notice to repair was given on the 6th August, 1823. On the 24th October, 1823, the lessor of the plaintiff received a half year's rent to the 29th September, 1823; and the declaration in ejectment (which was the commencement of an action of ejectment prior to the Common Law Procedure Act of 1852) was served on the 28th October, 1823, being prior to the expiration of the three months' notice to repair. The premises were and continued out of repair until the trial. Bayley, J., said that the landlord had an option to proceed under either covenant; and, after giving notice to repair within three months, he might have brought an action against the defendant upon a former covenant for not keeping the premises in repair.

> But that is very different from insisting upon the forfeiture. It is said that the premises being out of repair on the 6th of August, when the notice was given, the lease was thereby forfeited. But the landlord has affirmed that the lease subsisted up to the 29th of September, by receiving the rent which became due at that period. It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given, and I think that notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded *himself from bringing an ejectment before the expiration of that period.*

He further points out that "in *Roe dem. Goatly* v. *Paine* (1810), 2 Camp. 520, the language of the notice was very different, the tenant was required to put the premises in repair *forthwith;* that did not prevent the landlord from bringing his ejectment at any time." Holroyd, J., said:—

> I am of opinion that this ejectment was *brought too soon*, for it appears to me that the notice requiring the tenant to repair within three months was equivalent to an admission that the tenancy *would continue up to the expiration of that time.* If it did not operate as a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises into complete repair pursuant to notice; which would be extremely unjust. But I think that although the action for breach of covenant would remain, yet the forfeiture was waived.

The *Meux* case [*Morecraft* v. *Meux*, 4 B. & C. 606], decided that the effect of the notice was a waiver of forfeiture until after the expiration of the notice, by which time, if repairs were completed, no forfeiture would occur; and, as the action was commenced before the expiration of the three months, it was premature. It does not decide that this was not a continuing breach, but rather implies the contrary; else what is the meaning of the statement that the landlord did not intend to insist upon an immediate forfeiture and that the notice amounted to a declaration that he would be satisfied if the premises were repaired within three months, and thereby precluded himself from bringing his action before the expiration of that period?

That case was referred to in *Few* v. *Perkins*, L.R. 2 Ex. 92, 95. There, under a similar lease, containing covenants on the part of the lessee to keep the premises demised in repair, and a further covenant that he would repair within three months after notice, the premises demised being out of repair, the landlord gave notice to repair in accordance with the covenants. *Before the expiration of three months*, ejectment was brought, and it was held that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable. Kelly, C.B., distinguished the *Meux* case by pointing out that there the notice was specific to repair within three months, and that in the case before him the notice was general in terms and similar to that in *Roe dem. Goatly* v. *Paine, supra*, where it was held to have no effect on the right of entry for breach of the general covenant. He then points out: "He has pursued the usual, though not necessary, course of giving his tenant notice to repair, *But he does not thereby lose his right of entry if the repairs are not effected by the tenant.*" Channell, B., refers to the observations of Bayley, J., and Holroyd, J., in *Doe dem Morecraft* v. *Meux*, but does not think that they apply to the facts of the case before him.

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It will be seen on reference to the *Meux* case [*Morecraft* v. *Meux*, 4 B. & C. 606], that notice was given on the 6th August, and rent was received which became due up to the 29th September, which made it clear that an immediate forfeiture was not intended at the time when the notice was given, and indicated that the landlord would be satisfied if the premises were repaired within three months, thereby precluding himself from bringing ejectment before the expiration of that period. The declaration in ejectment was in fact served before the expiration of the three months' notice to repair.

It is said in Fawcett's work on Landlord and Tenant, 3rd ed., p. 502, that where there is a general covenant to repair, and also a covenant to repair after notice, a notice to repair within a specified period, as three months, is a waiver of the general covenant, and there is no forfeiture till the period has elapsed, referring to the *Meux* case, and also to *Doe dem. de Rutzen* v. *Lewis* (1836), 5 A. & E. 277. In the latter case Patteson, J., refers to *Doe dem. Morecraft* v. *Meux*, and points out that Bayley, J., does not say that the party, by proceeding on the special proviso, waives his right to proceed on the other; but Holroyd, J., does say so. He also refers to *Doe dem. Rankin* v. *Brindley* (1832), 4 B. & Ad. 84. In that case there was a general covenant to repair, but no specific power for re-entry for breach of that covenant. Then there was a covenant for re-entry in case of non-repair within three months after notice, or in case of breach of the other covenants. Notice was given to repair within three months. Ejectment was brought before the *expiration of the three* months. On the trial, by consent an order of the Court was made that a juror should be withdrawn, and the repairs performed on or before the 24th June. Afterwards rent accrued, which the landlord accepted. This was before the 24th June, so that the forfeiture, which was afterwards incurred by not repairing on or before the 24th June, was not waived. Repairs not being performed on that day, ejectment was brought. The plaintiff had a verdict. The Court refused a rule for a new trial. It was held that the right of entry was at all events only suspended. Parke, J., said: "And the lessor of the plaintiff being unable to support that action, put an end to it by consenting to the order of the Court . . . it was merely a consent to postpone the time for completing the repair for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time. The receipt of rent was only an admission that the defendant was tenant until the 25th of March, and could not operate as a waiver of the forfeiture." Taunton, J., was of the same opinion. This appears, having regard to the facts in that case, to have reference to the right of entry for non-repair after the expiration of three months' notice.

Doe dem. de Rutzen v. *Lewis* (*supra*), [5 A. & A. 277], appears to be authority only for the view that where a lessor has a remedy for recovering the expense of repairing, and elects to do the repairs himself, he waives the forfeiture under the general covenant. Patteson, J., points out that the circumstances differ from *Doe dem. Rankin* v. *Brindley*, 4 B. & Ad. 84, for the time is not enlarged for the benefit of the defendant:—

> The landlord says, I shall take advantage of the proviso enabling me to compel you to repair, *or*, if you do not repair within the two months, to perform the repairs myself, and, on so doing, to distrain, not to re-enter. The tenant thus has the option given him, and exercises it by not repairing. The relation of landlord and tenant is so far from being put an end to by this transaction, that it is affirmed, the tenant being placed in a situation different from that in which he would have been if the general proviso had been insisted upon.

In *Cronin* v. *Rogers* (1884), 1 Cab. & El. 348, a notice requiring a tenant to remedy a breach of covenant, by repairing premises within three months, expired on the 1st February, 1884. No repairs were then done, and on the 2nd February the rent due at Christmas, 1883, was accepted. It was held that the acceptance of the rent was no waiver of the breach of covenant.

Coward v. *Gregory* (1866), L.R. 2 C.P. 153, is a very important decision, bearing upon the question of waiver in respect of the general covenant to repair. In that case the lessor engaged to put the whole of the demised premises in repair and to keep in repair certain portions thereof. Two breaches were assigned, the first for not putting the whole of the premises in repair, and the second in not keeping in repair the portions mentioned in the covenant in that behalf. The first part was held not to be a continuing covenant, that that part of the covenant could only be broken once, and that damages under that breach was an answer to a subsequent action. As to the second breach for not keeping the premises in repair, that was held to be a continuing breach, for which prior action and recovery was no answer.

Penton v. *Barnett*, [1898] 1 Q.B. 276, is in some respects like the present case. It deals not only with the question of waiver, but also with the notice required under sec. 14 of the Conveyancing Act, which corresponds in this respect to sec. 13 of the Landlord and Tenant's Act. The lease contained a general covenant to repair and a covenant to repair within three months after notice. The premises being out of repair, the lessor gave notice to the lessee under the Conveyancing Act, 1881, to repair within a given time. Three days after the expiration of the notice, a quarter's rent became due. No repairs having been done by the tenant, the lessor brought an action to recover possession, and in the action claimed the quarter's rent. It was held that, the breach of covenant being a continuing one, no new notice was required in respect of the non-repair after the expiration of the

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time specified in the notice, and that the claim for rent did not affect the right to possession in respect of the non-repair after the date when the rent fell due. The dates are material. The lease was granted in 1873. In 1896 the premises were confessedly out of repair, and on the 22nd September the notice was given. The notice was given under the Act and was so held, and claimed compensation, which could only be done under the Act. The writ was issued on the 14th January, 1897, more than three months after the time mentioned in the notice had elapsed, and rent was claimed up to the previous 25th December. The defence was, that, by bringing the action to recover rent which accrued due after the alleged causes of forfeiture by reason of the alleged breaches of covenant to repair, with knowledge thereof, the plaintiff had waived the alleged forfeiture, and was not entitled to recover possession of the premises. At the trial judgment was given for the defendant. On the argument it was urged that the plaintiff must be taken to have elected to treat the breach of covenant as a forfeiture. The premises were still out of repair. The appeal was allowed. A. L. Smith, L.J., after referring to the facts, says:—

> It is perfectly well settled that the acceptance of rent is an acknowledgment of the existence of the tenancy, and if the case depended solely on that, I should have thought that the action was not maintainable; but it is pointed out that the claim for rent is at most an election to treat the defendant as tenant up to December 25, and that, inasmuch as between that date and January 14 following the premises were in the same state of disrepair in which they had previously been, there was a breach of covenant between those dates in respect of which the plaintiff could maintain his action for possession. In my opinion, apart from the Conveyancing Act, this contention is well founded. But then it is said that we must deal with sec. 14 of the Conveyancing Act, 1881. 'Under that Act a right of re-entry for breach of covenant is not enforceable unless the lessor serves on the tenant a notice specifying the particular breach complained of, so that the tenant may have a reasonable time to remedy the breach and make reasonable compensation to the lessor. The defendant had such a notice, and a reasonable time in which to comply with it; but it is said that the notice does not cover the breaches between December 25 and January 14. In my opinion this answer is insufficient, because the breaches during this latter period are the same as those in respect of which the notice was given.

Rigby, L.J., said:—

> This is the case of a lease which contained two covenants as to repairs—one a general covenant to repair as occasion should require, the other to repair within three months after notice. The power of re-entry applies to breaches of either of these covenants. Independently of the Conveyancing Act, directly the premises were out of repair the landlord had a right of re-entry under the lease; but he was not bound to re-enter on any particular day. At any rate, he had the power of re-entry so long as there was a broken coven-

ant and a continuing breach. The position on January 14, 1897, would be that, as nothing had been done since the notice as to repairs, the plaintiff had the right to determine the tenancy by the issue of the writ, and to sue in respect of such rights as had accrued to him during the tenancy.

He then refers to sec. 14 of the Conveyancing Act, under which notice was given on the 22nd September, 1896, and states:—

It cannot be doubted that the time indicated by the notice was a reasonable time, for it is the time specified in one of the covenants to repair contained in the lease. The action could therefore be maintained by the lessor—that is to say, the conditions imposed by the Act had been complied with, and for the purposes of this case the lessor was in the same position as if there had been no legislation. Then he brought his action for possession, and in it he claimed for a quarter's rent due on the previous December 25. In my opinion, this claim does not constitute a waiver of the forfeiture. All that was laid down in *Dendy* v. *Nicholl* (1858), 4 C.B. N.S. 375, was that an action for rent was as good as a waiver of forfeiture as an action of ejectment was as a determination of the tenancy. If there had not been a recurring breach, but something which had happened once for all, the state of things might have been different; but in this case, in my opinion, there is nothing in the statement of claim inconsistent with an election to determine the lease from December 25.

Collins, L.J., was of the same opinion:—

It is not now denied that there was a breach which may be described as continuing or accruing day by day. That being so, but for the Conveyancing Act there would be no answer to the claim for possession. Undoubtedly the words of the statute do give rise to the contention put forward on behalf of the defendant. It is said that the breach of covenant in respect of which this action to recover possession is brought is not the antecedent failure to repair in respect of which three months' notice was given on September 22, but the failure to repair day by day after December 25, and that in respect of this a fresh notice must be given. If the section is to be construed with a great degree of strictness, that might be so. I think, however, that we ought to construe the words "particular breach" in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression "breach" means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is, that the tenant is to have full notice of what he is required to do. He has had notice, and has failed to act on it; and with regard to that the physical condition of the premises which he was required to make good was the same when the action was brought as when the notice was given. Under these circumstances, I agree that the requirements of the Conveyancing Act have been complied with, and that the tenant has, within the meaning of sec. 14, had notice of the breach of covenant which is the foundation of the action.

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Fawcett, in his able work on Landlord and Tenant, enumerates the instances in which a tenancy may be affirmed and forfeiture waived (p. 500) and says (at p. 501): "Where a writ claims possession for the forfeiture and also arrears of rent accruing due subsequently to the forfeiture, the latter claim operates as a waiver of the forfeiture," citing *Bevan* v. *Barnett* (1897), 13 Times L.R. 310, "though if the breach is a continuing one—as in the case of non-repair—the lessor may still be entitled to forfeit in respect of the breaches subsequent to the date up to which rent has been claimed," citing *Penton* v. *Barnett* (*supra*), [1898] 1 Q.B. 176.

As to the sufficiency of the notice, reference may be made to *In re Serle*, [1898] 1 Ch. 652. In that case the notice merely informed the lessee that he had "not kept the said premises well and sufficiently repaired, and the party and other walls thereof." It was held insufficient, as the notice did not direct the attention of the lessee to the particular breaches complained of, so as to give him an opportunity of remedying them before action.

In Roscoe's Nisi Prius, 18th ed., p. 1034, it is said that a waiver of a forfeiture incurred by a breach of a continuing covenant to repair is no waiver of a forfeiture for a subsequent breach, although merely a continuance of the original breach, citing *Doe d. Baker* v. *Jones* (1850), 5 Ex. 498. In that case it was also held that where the covenant was to repair within a reasonable time, and after breach the lessor received rent, he might bring ejectment immediately thereafterwards. Platt, B., says (p. 505): "It is a fallacy to say that the receipt of rent was a waiver of the breach of contract to repair, for it was a continuing breach, and until the repairs were perfected, the lessors of the plaintiff were entitled to re-enter for the forfeiture." And it seems that if an act of waiver takes place one day, a landlord may sue out a writ for a continuing breach on the next day: *Price* v. *Worwood* (1859), 4 H. & N. 512. In that case, in ejectment, against a tenant for forfeiture by non-insurance, brought on the 24th December, it was proved that rent had been paid on the 23rd December of the same year. Held, that there was evidence from which a jury might presume a continuing breach of the covenant to insure on the 24th December at the time the action was brought.

In the present case, the covenant to repair, in its extended form, is that the lessee will well and sufficiently repair, maintain, amend and keep said premises in good and substantial repair when, where and so often as need shall be, reasonable wear and tear and damage by fire, lightning and tempest only excepted. Having regard to the authorities above referred to and the wording of the covenant to repair, I am clearly of opinion that here there is a continuing breach of the covenant to repair, and that the effect of the notice was not a complete waiver of that covenant, but only delayed the right of action until after the expiration of the notice to repair, when, the repairs not having been made, the right of action for possession immediately accrued.

I am also of opinion that the notice given was sufficient under the 13th section of the Landlord and Tenant's Act, and the mere fact that it did not claim a certain sum for damages would not, I think, make it bad. The defendants had all the information which the Act requires to be given except as to damages, and as to that, I apprehend, the plaintiffs might waive their right; so that the plaintiffs' right to bring this action was complete after the expiration of the notice; and, having regard to the decision in *Penton* v. *Barnett* (*supra*), [1898] 1 Q.B. 176, the right of action for possession was also complete after the expiration of three months from the giving of the notice under the covenant to repair according to notice; and no further notice claiming the forfeiture was required. The notice in form was not limited to either the statute or the covenant, and was, I think, sufficient under both.

Although there was thus, in my opinion, a forfeiture entitling the plaintiffs to possession, the Court should, nevertheless, accede to the prayer of the defendants, under sub-sec. 2 of sec. 13 of the Landlord and Tenant's Act, and grant relief from the forfeiture.

I do not think effect can be given to the further contention of Mr. Armour, that the removal of the wall was within the rights of the defendants under the lease. The wall was a part of the demise, and the lessees thereby have "the right and liberty to maintain, continue, use, build, and rebuild such wall . . . subject to the lessee assuming the obligation (if any) existing on the part of the grantee under the said deed or the lessor to maintain or repair the said wall as appurtenant to the land hereby demised." So far from this clause having the effect contended for, it rather imposes upon the lessees and their assigns the obligation to maintain and repair it. It creates an obligation to maintain it, instead of liberty to remove it.

I am further of opinion that the receipt of rent without prejudice to the plaintiffs' rights precludes the contention that the receipt of sums equivalent to the rent was a waiver of the plaintiffs' rights of forfeiture in the lease.

I think the terms imposed by the trial Judge, to restore the wall within three months, are reasonable and appropriate. The time may be extended for that period from the date of this judgment; and, in default of restoration within the time limited, the plaintiffs should be entitled to recover possession of the premises.

Objection was taken to the sufficiency of the notice, which was signed by Mr. Thomson on behalf of the trustees. This objection is, I think, untenable. It was given by one trustee and adopted by all, and, being sufficient under the statute, the objection fails.

Even should it be held that there was no forfeiture giving a right of re-entry, I am of opinion that the plaintiffs would be entitled to the relief given by the trial Judge: first, because waste had been committed of such a nature that under the circumstances a mandatory order to restore the wall would be the only

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sufficient and appropriate remedy. See the Encyclopædia of the Laws of England, vol. 14, p. 587; Fawcett on Landlord and Tenant, 3rd ed., pp. 348, 350; Woodfall's Landlord and Tenant, 18th ed., p. 695; Kerr on Injunctions, 4th ed., pp. 51 (*a*), 431, 432. Secondly, upon the ground that a sufficient notice having been given to repair, and the repairs not having been made within the time limited by the notice, a right of action arose under that covenant, not only of forfeiture, but also, if forfeiture for any reason was not available to the plaintiffs, for other relief, and for which the appropriate remedy would be to restore the wall. See Fawcett on Landlord and Tenant, 3rd ed., pp. 367, 373, and 375. At p. 338 it is said: "It is a breach of this covenant to pull down the demised premises either wholly or partially, or to open a doorway in a wall:" *Gange* v. *Lockwood*, 2 F. & F. 115; *Doe dem. Vickery* v. *Jackson*, 2 Stark. 293; and other cases there cited.

In *Allport* v. *Securities Corporation*, 64 L.J. N.S. Ch. 491, a tenant was in possession of rooms on the fourth and fifth floors of certain premises for residential purposes, with the use of the entrance hall, staircase, and lift. The landlord, without the consent of the tenant, and during his temporary absence, proceeded to make structural alterations in the premises, including (*inter alia*) the removal of the staircase, the tenant's access to his rooms being now by another staircase, which was a circuitous and less convenient route. On motion for injunction by the plaintiffs, the Court granted a mandatory order against the landlord to reinstate the staircase. North, J., said: "I think I ought to grant a mandatory injunction. It is quite clear, in my opinion, that the defendants have not any right to act as they have done. It is said that they may be able to find more evidence in their favour before the trial of the action, but I do not think they could find more than they have at present. Again, it is said that a mandatory injunction ought to be granted on this motion, or indeed at any time, requiring the defendant to reinstate what they have pulled down. I refer to the case of *Lane* v *Mewdigate*, 10 Ves. 192, where, although the order specificially to repair the banks of a canal and stop gates and other works was refused, the Lord Chancellor said:—

> So, as to restoring the stop gate, the same difficulty occurs. The question is, whether the Court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction I shall order will create the necessity of restoring the stop gate, and attention will be had to the manner in which he is to use these locks, and he will find it difficult, I apprehend, to avoid completely repairing these works—that is, the order would create the necessity of restoring the stop gate and works. In *Rankin* v. *Huskisson* (1820), 4 Sim. 13, an injunction was granted on interlocutory application before answer, restraining the defendants from permitting to remain erected such part of certain buildings as had been erected in violation of the agreement between the plaintiff and

the defendants, and in the case of *Morris* v. *Grant* (1875), 24 W.R. 55, the defendant, having after express notice erected a porch in breach of a covenant, was on motion ordered to remove the erection, although it had been completed before the filing of the bill. It is suggested that the plaintiff ought to have damages if any relief is granted, but, in my opinion, it is a case in which he has a right to say that his rights shall not be interfered with in a high-handed manner in his absence. I think it is a case which should be decided at once, and therefore I make the order now instead of directing that the motion stand to the hearing.

See Lord Esher's observations on *Lane* v. *Newdigate* in *Ryan* v. *Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116, 124.

As to the question of costs allowed below between solicitor and client, it was argued that the trial Judge had no jurisdiction to impose such costs, and Mr. Tilley was unable to cite any authority where they had been allowed in a case similar to the present.

In *Andrews* v. *Barnes* (1888), 39 Ch. D. 133, it is said that the Court of Chancery had, and the High Court of Justice now has, in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client. "The giving of costs in equity," said Lord Hardwicke, in *Jones* v. *Coxeter* (1742), 2 Atk. 400, "is entirely discretionary, and is not at all conformable to the rule at law." The former rule in the Chancery Court, above indicated, is in effect the present rule now applicable to all Courts. Nevertheless, even in equity, costs as between solicitor and client were not given except in special cases, such as suits affecting charity funds, administration suits, actions brought by trustees and in certain cases of misconduct, and where an arbitrator had power to dispose of the question of costs. In *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449, it was held in appeal that the difference between solicitor and client costs and party and party costs in an action cannot be given by way of damages in the same action, the latter being all that the successful suitor is entitled to. In *Willmott* v. *Barber*, [1881] W.N. 107, it was held that the Judge had no jurisdiction to impose costs by way of penalty beyond the costs of the suit. See Morgan on Costs, 2nd ed., p. 5. In the present case it is true that the plaintiffs are trustees, but the action is not brought in respect of the trust or arising out of the will. The plaintiffs' claim is as landlords. I have been unable to find any case such as this where costs between solicitor and client have been given. It does not fall within the class of cases where such costs have been allowed, nor do I think the rule should be extended.

With deference, I think the trial Judge was in error in finding that there was a waiver of the forfeiture to re-enter. The covenant to repair, which includes the keeping of the premises in repair, is a continuing covenant, and the effect of the notice to

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repair was not a waiver once for all of the general covenant, but an election that the plaintiffs would not take advantage of it during the currency of the notice to repair; and, after the expiration of that notice, the plaintiffs had the right to re-enter if the premises continued out of repair. The same may be said of the covenant to repair according to notice. Default in complying with the notice gave the right of re-entry after the expiration of the time limited by the notice. The notice was sufficient under sec. 13 of the Landlord and Tenant's Act, giving all the information required; and no subsequent notice was, in my opinion, necessary.

The premises being admittedly out of repair, the right of re-entry was complete, and the plaintiffs are entitled to succeed upon their cross-appeal.

Relief may be granted to the defendants' prayer under subsec. 2 of sec. 13; and the only appropriate relief, in my view, is the restoration of the wall within a reasonable time. Three months, I think, is a reasonable time, and that may be extended from the date of this judgment. Aside from the question of forfeiture, the taking down of the wall, under the circumstances, was, in my opinion, waste, the appropriate remedy for which was the restoration of the wall within the time limited by the trial Judge.

The costs below should be allowed between party and party; the time for completing the repairs to be extended to three months from the date of this judgment. With this variation of the judgment below, the plaintiffs' appeal is allowed with costs, and the defendants' appeal dismissed with costs.

Middleton, J.

MIDDLETON, J.:—It is desirable to state accurately and at some length the exact contention made by the defendants' counsel before dealing with the cases. His contention may, I think, be put thus: The lease contains two covenants: a covenant to repair, and a covenant to repair on three months' notice. On a breach of either, the landlord has the right to forfeit. No action can be brought to enforce a forfeiture unless and until the notice required by the statute is given. This notice must be given after the breach which brings about the forfeiture. Assuming that what is alleged is a breach of the covenant to repair, the landlords had two courses open. They might treat the breach of the covenant as working a forfeiture, and give the notice required by the statute, so that they might re-enter by virtue of the forfeiture; or they might elect to waive the forfeiture and to continue the tenancy. By giving the notice under the covenant to repair according to notice, the landlords, it is said, have adopted the latter course, and cannot be heard to say that the term which they have, by the giving of that notice, elected to treat as existing, was forfeited and ended by the prior breach of the covenant to repair.

This does not mean that the landlords are without remedy. They could, before the statute, after the three months, bring ejectment either on the breach of the covenant to repair according to notice or by reason of the continuing breach of the covenant to repair, and, since the statute, upon the terms prescribed by the statute, *i.e.*, upon reasonable notice of intention to forfeit, they may avail themselves of any forfeiture which has taken place since the waiver of the particular forfeiture by the notice in question.

The plaintiffs contend that the notice which was given can be regarded as a notice under the statute as well as under the covenant. It is said that a moment's consideration will shew that this cannot be, because the notice under the statute is an election to forfeit, and the notice under the covenant is an election to waive the forfeiture. A notice may be so vague and ambiguous that it may be difficult to ascertain the landlord's real intention; but no notice can be supposed to express these two opposite and conflicting ideas. When the notice is ambiguous, it must be construed against the landlord who gave it, and the tenant is entitled to regard it as a notice under the covenant if it is capable of being so construed. No one reading the notice here given can doubt that it is an apt notice under the covenant, and it must be so treated; and it is not important that possibly the notice might have answered as a notice under the statute, if there had been no second covenant in the lease, and so no ambiguity.

This is a fair summary of Mr. Armour's very able argument upon that branch of the case.

Turning then to what has been decided. In *Doe dem. Morecraft* v. *Meux*, 4 B. & C. 606, an action was brought after the giving of notice and before the expiry of the three months. Bayley, J., said:—

> The landlord in this case had an option to proceed on either covenant, and after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant for not keeping the premises in repair. But that is very different from insisting upon the forfeiture. It is said that, the premises being out of repair on the 6th August, when the notice was given, the lease was thereby forfeited. But the landlord has affirmed that the lease subsisted up to the 29th September, by receiving the rent which became due at that period. It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given, and I think that notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an ejectment before the expiration of that period.

Holroyd, J., said:

> "It appears to me that the notice requiring the tenant to repair within three months was equivalent to an admission that the tenancy would continue up to the expiration of that time. If it did not operate

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as a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises in repair pursuant to the notice; which would be extremely unjust. But I think that although the action for breach of the covenant would remain, yet the forfeiture was waived.

In addition to what I have quoted, the earlier case of *Roe dem. Goatly* v. *Paine*, 2 Camp. 520, is distinguished upon the ground that the notice given was a notice to repair forthwith. And in *Few* v. *Perkins*, L.R. 2 Ex. 92, a somewhat similar notice is regarded in the same way. The notice was vague and general, and was not an election of the landlord to waive the forfeiture, because there could not be found in it anything necessarily referable to the latter covenant or making it anything more than "the usual, though not necessary, course of giving the tenant notice to repair," given as a matter of courtesy before bringing ejectment.

In *Doe dem. de Rutzen* v. *Lewis*, 5 A. & E. 277, the covenants were slightly different, but the principle is the same. Denman, C.J., says:—

> The non-repair was proved; but the original lessor had reserved to himself a particular remedy, in case of non-repair . . . If the reversioner takes upon himself to repair, under a proviso like this, he waives the forfeiture for breach of condition. . . . The lessors of the plaintiff, by giving the notice of November . . . took into their own hands a remedy inconsistent with a right to insist on a forfeiture.

Littledale, J.: "By giving notice under this latter proviso, the lessors of the plaintiff have waived their right of proceeding under the general power." Patteson, J., accepts the judgment of Holroyd, J., in *Doe dem. Morecraft* v. *Meux*, 4 B. & C. 606, as establishing that "the party, by proceeding on the special proviso, waives his right to proceed on the general one," and refuses to regard *Roe dem. Goatly* v. *Paine*, 2 Camp. 520, as authority to establish that "such provisoes as these are independent, so that ejectment may be maintained on one, though recourse has been had to the other;" for the very reason above indicated, that the notice was not in that case sufficiently definite to enable it to be said that recourse had been had to the other.

So far Mr. Armour's argument is borne out by the cases. The fallacy comes when he deals with the statute. The statute does not require that the notice should be given after the right of re-entry has arisen. It must be given after the act or neglect upon which the right to re-enter arises, but it may be given before the forfeiture takes place.

The covenant to repair is a continuing covenant, and each day that there is a state of non-repair, constituting a breach of the covenant, there is a right of entry and a right to forfeit the lease.

Assuming that on the 16th July, 1909, there was a breach of the covenant to repair, and that the notice then given was a waiver

of the forfeiture that had then taken place, and, by reason of the recognition of the existence of the term for three months, precluded the landlords from acting on any breach of the covenant to repair during the three months, it does not preclude them from acting upon the subsequent breaches and on the right of entry arising from day to day during the period that elapsed from the expiry of the three months to the bringing of the action.

Then does the statute preclude the landlords from bringing the action without a new notice? I think not. We must be on our guard against reading into a statute more than it contains. What it requires is that before the landlord asserts the forfeiture he shall have given notice, not of his intention to forfeit, as is argued, but of his desire to have the covenant lived up to, drawing attention to the particular thing which the tenant has done or left undone. The notice does not need to be an election, but is to serve as a warning to the tenant so as to prevent him being taken by surprise.

This construction of the Act was adopted in the Court of Appeal in *Penton* v. *Barnett*, [1898] 1 Q.B. 276. There a notice was given under the Act. Then rent was demanded down to a period long subsequent to the notice, and any forfeiture was waived. The non-repair continued; and it was said that a new forfeiture took place because the covenant was continuing, and there was a new breach every day. This case also determined that the statute, though requiring a notice of the "particular breach complained of," did not require a notice of the "breach" in the legal significance of that term, but of the physical condition of the premises which the tenant was required to make good; and it also determicad, in the third place, that such a notice might be well given before the "breach," in the legal sense upon which the right to forfeit and re-enter is based.

The question then resolves itself into the narrower one, was what was done a breach of the covenant?

The Crown leased to Jamieson on the 27th June, 1899, a vacant lot at the corner of Queen and Yonge streets, "together with a wall eighteen inches thick," described in a deed of the 19th July, 1867, "as projecting nine inches upon the next adjoining land to the north," "and the right and liberty to maintain, continue, use, build, and rebuild such wall as granted to the Board of Agriculture for Upper Canada by virtue of the provisions of the deed."

The deed of the 19th July, 1867, referred to, is one by which McIntosh, the owner of the lands in question and the lands to the north, conveyed to the Board the lands in question, "with the right and liberty to maintain and continue the wall of the building erected by the Board," "as it now projects, and hereafter from time to time to build the wall of any building which hereafter may be built by" the Board, "their successors or assigns, projecting nine inches upon the next adjoining land," to the intent that the wall may be used as a party wall.

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In the lease Jamieson covenants to erect a building costing $25,000 in accordance with plans to be approved by the lessor.

The building actually erected cost very much more than this. The north wall consists of the old party wall and an extension upward. The wall had not sufficient strength to carry the floors of the building, so that a steel structure was adopted; and the only function of the wall is that of a partition between the southern building and the building to the north.

There is a right of renewal for a certain time; and on the termination of the term the landlord is to pay the tenant the actual value of the building at the time the lease terminates.

The present tenants having acquired a lease of the building to the north, with the consent of the landlord of that building, have removed part of the wall, so as to enable the ground floor to be used as one store. This does no real harm to the plaintiffs, in view of the long lease (105 years) and the fact that the building is the tenants' and is to be paid for on the footing of its actual value.

The wall in question is not the tenants,' but the amount that its restoration will cost is very small when compared with the value of the rest of the building.

If the covenant prevents its removal, then the plaintiffs have the right to assert the covenant, even though the advantage to them bears no comparison to the injury to the defendants. The familiar case found in Æsop does not indicate that the Court can refuse to interfere upon this ground.

Mr. Armour's contention is, that the act complained of here does not come within the covenant. The covenant is aimed at permissive waste. The act done is voluntary waste, and the remedy is in damages only.

This contention is supported by *Doe dem. Dalton* v. *Jones*, 4 B. & Ad. 126. (See also report in 2 L.J. N.S. Q.B. 11.) There a dwelling was turned into a store. A window was enlarged and a door in an inside partition was closed and another door opened. This was found to be no breach of the covenant to repair, "the effect of which was merely that the tenant should supply the ordinary wear and tear of the premises."

Holderness v. *Lang*, 11 Ont. R. 1, deals with the same question; and I must confess that a careful perusal of it leaves my mind in much confusion as to what was really decided. The covenants in the lease contemplate the erection of buildings and the making of changes by the tenant. The $25,000 building to be erected at the beginning of the term (lasting, including renewals, 105 years) would not remain suitable for all purposes throughout the term without alteration. The extended covenant to repair calls upon the tenant to "well and sufficiently repair, maintain, amend, and keep" the demised premises. The covenant in *Doe dem. Dalton* v. *Jones* was to "repair and keep repaired." Armour, J., in *Holderness* v. *Lang* (11 Ont. R. at p. 10) was "inclined to think

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what was done by the defendant was not a breach of his covenant" there, which was the same as that here; and in appeal Wilson, C.J., says, "I am inclined to think the lease before us is substantially like the lease just referred to." Neither Judge places his decision upon this ground.

Bearing in mind that what was demised was the wall and not the building, and that here the covenant is to "maintain, amend, and keep" it, I cannot agree that this lease is substantially the same as the lease in *Doe dem. Dalton* v. *Jones* [4 B. & Ad. 126]. And it seems to me that the removal and destruction of the party wall is a breach of the covenant to "maintain" it.

Doe dem. Vickery v. *Jackson*, 2 Stark. 293, is in point, and is cited with approval in all text-books.

I notice that in *Holderness* v. *Lang* [11 Ont. R. 1], it is said that the covenant is not a continuing covenant, and that the breach once made and waived cannot be relied on. This is in conflict with the weighty cases before quoted in dealing with this question.

As regards the contention made by the plaintiffs that restitution ought to be ordered, in specific performance of the covenant to repair, I am quite unable to assent. Platt (Covenants) p. 293, states: "The rule may now be taken to be established that equity will not decree specific performance of a covenant to repair, but will leave the party to recover damages in an action at law." This rule, so far as I can ascertain, has never been broken in upon, and applies also to waste. I mention this, that my position may be clear; but, as my judgment does not turn upon this, I do not discuss the cases.

There being, therefore, a breach of the covenant, and forfeiture, I agree with the terms suggested by my brother Clute upon which the defendants may be relieved.

I also agree that there was not power to order payment of solicitor and client costs, save as the price of indulgence, and that they should not be so awarded in this case.

Since the above was written, I have had my attention called to *Rose* v. *Spicer*, [1911] 2 K.B. 234, which is much in point.

LATCHFORD, J.:—I concur.

Latchford, J.

Judgment below affirmed, with a variation.

FORBES v. FORBES.

Ontario High Court. Trial before Latchford, J. January 13, 1912.

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1. MARRIAGE (§ II A—9)—FOREIGN MARRIAGE—VALIDITY—COHABITATION.

An agreement to marry, followed by cohabitation which constitutes a valid marriage in a foreign country where it was made by two residents of Ontario not forbidden by the law of that Province to enter into such contract will be recognized as a valid marriage in Ontario.

[*Robb* v. *Robb*, 20 Ont. R. 591, specially referred to.]

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FORBES v. FORBES.

THE trial of an issue as to the validity of a marriage by which the plaintiffs, as the wife and children of William Alexander Forbes, deceased, claimed an interest in his estate.

Judgment for the claimants.

F. C. Kerby, for the claimants.

T. G. McHugh, for the administrator of the estate of William Alexander Forbes, deceased.

Latchford, J.

LATCHFORD, J.:—The issue which I am called upon to decide, under the order made on the 13th November, 1911, is, whether Ida Marney Forbes, Irene Forbes Morrow, Mamie Forbes Cavanaugh, and William Alexander Franklin Forbes, are the widow and children respectively of William Alexander Forbes, deceased.

By the same order the parties were at liberty to put in before me the evidence taken and proceedings had at the trial of the same issue in the Surrogate Court of the County of Essex; and the parties supporting the affirmative have availed themselves of that liberty. I have carefully read this evidence and considered the testimony given before me at Sandwich. It was, in my opinion, clearly established that Irene Forbes Morrow, Mamie Forbes Cavanaugh, and William Alexander Franklin Forbes, are the children of William Alexander Forbes, deceased. In fact, the parentage of these children was not seriously questioned before me or in the proceedings in the Surrogate Court.

The issue really contested was, whether or not Ida Marney Forbes (now Mrs. Daly) is the widow of the deceased; and this turns on whether or not she was the wife of the deceased. Mrs. Daly asserts that she was married to Forbes in Detroit on the 22nd May, 1878. Both, at the time, had their domiciles in Ontario. She was then about fourteen years of age, and Forbes was mate—he later became captain—of a ferry steamer plying between Detroit and Windsor.

The steamers did not run after midnight; and Forbes and one of his brothers carried belated wayfarers across the river in row-boats, and incidentally engaged in the practical free trading so popular after dark in all border communities. On the date mentioned, according to Mrs. Daly, she, Forbes, one Miles King, and "his lady" (whose name is now forgotten by the witness), embarked in a small boat owned by Forbes, and were rowed across the river. The young girl had no anticipation that he was matrimonially inclined. They had been acquainted for some time; and, while marriage had been talked of, they were not "engaged." Detroit at the time afforded facilities for easy and rapid marriage, similar to those now offered in this province by Windsor and Niagara Falls. "There was," as Mrs. Daly puts it, "no nonsense, no red tape." The quartette on landing repaired, she says, to the residence of Judge Chip-

man, where Forbes and young Ida were declared man and wife. A certificate of the marriage was delivered to the bride, and the party returned to Windsor. King was not called at the trial. He was last heard of in Chicago some years ago. His unmarried and unknown friend was, of course, not available as a witness. Forbes was living with his mother, a widow, in Pitt street, Windsor, where his two younger brothers, one aged fifteen and the other twenty, also dwelt. He did not bring his bride to his home on the night he was married, nor at any time afterward, but visited her at a room in Windsor, which he rented for her, sometimes in an hotel and sometimes in a private house. During a fire, a jewel case which contained—with other treasures—the certificate of marriage, was thrown into the street and broken open, with the result that the contents were lost. They were, according to Mrs. Daly, advertised for by Mr. Forbes in a local newspaper, but never recovered. After the fire, she returned to Amherstburgh, where she lived for a time with her mother, and where the first fruit of the union, a son, was born in 1883. Forbes visited his wife frequently while she was at her mother's, and expressed to several his delight that a son had been born to him. The child was, in September, 1884, baptized in St. John's Church, Sandwich, as the son of William Alexander Forbes and Ida Forbes, and is the claimant William Alexander Franklin Forbes. Afterward, Forbes brought the woman and her child to Windsor, where they lived together in various houses, one within a block of his mother's house, and in the same street. There is evidence, as satisfactory as such evidence can be, that by general repute Captain Forbes and Ida Marney Forbes were married. There is some evidence to the contrary, but it is very slight and not entitled to much credit. It is certain that the woman was always known in Windsor as Mrs. William Forbes, and not by any other name.

From the date of the alleged marriage in 1878 to the time he fell ill in 1892, he supported her and the three children born in that interval. He procured medical attendance for her when the girls were born, and paid the physician at Amherstburgh who attended her in her first confinement. He introduced her to his friends as his wife, and after he became ill sent money to her by one of his brothers—a fact which that brother first denies and then admits with manifest reluctance. Captain Forbes did not introduce his wife to his mother, who, it appears, objected strongly—as many another mother has objected—to the daughter-in-law selected by her son. He was the eldest son and his mother's main support. In 1878, her daughters had married, and the younger sons were, from their evidence, clearly not a great comfort to their mother. . . . In the circumstances, the fact that Captain Forbes spent most of his time with his mother, and supported her out of his earnings, is not surpris-

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ing. He was also maintaining his children and his reputed wife —spending days and nights in their company both in Windsor and Detroit.

I am satisfied that there was some ceremony of marriage at Detroit. It may be that Mrs. Daly is mistaken as to the person who officiated. When first approached by Mr. Wigle, she could not remember the Judge's name. She was, however, at the time, in great distress, owing to the conduct of her second husband. I cannot help thinking that she adopted Judge Chipman's name afterwards upon suggestion, and in her enfeebled condition of health came, as often happens, to regard the suggestion as a fact. Her evidence before me convinced me that she stated nothing but what she honestly believed to be true. There was a distinguished Judge named Chipman in Detroit who held office for many years. He, however, was not elected (or appointed) Judge until 1879, and had not at any time authority to perform the marriage ceremony. Mrs. Daly's description of the person who married her to Forbes does not apply to Judge Chipman, but is definite as to the stature, complexion, and general appearance of the person who did perform the ceremony. On the whole, while the evidence fails to establish a marriage by Judge Chipman, I find that there was a marriage before a person represented to her to be a Judge. It is notorious that in many American cities Justices of the Peace are often called Judges. Such Justices had, in Michigan, in 1878, the power to celebrate marriage; and it was, I think, a Justice of the Peace that officiated and gave Mrs. Forbes the certificate which she lost a few years later.

But, even if there was no marriage in fact, it is undoubted that there was an agreement to marry, followed by cohabitation, within the State of Michigan at various times between 1878 and 1892; and, upon evidence that is undisputed, such agreement and cohabitation constituted a valid marriage according to the laws of Michigan. The parties were not forbidden to contract marriage by the laws of the province.

Even if a doubt existed as to the legality of the marriage, I should feel bound to declare in favour of the alleged marriage. All laws, all morality, require and sanction this view of a doubtful case: see *Robb* v. *Robb*, 20 O.R. 591, at p. 597, and the cases there cited.

I, therefore, find that Ida Marney Forbes, as she is named in the issue, is the widow of William Alexander Forbes, and that Irene Forbes Morrow, Mamie Forbes Cavanaugh, and William Alexander Franklin Forbes, are his children. If necessary, the proceedings may be amended by substituting for the name Ida Marney Forbes, the name Ida Marney Forbes Daly. The claimants are entitled to their costs.

Judgment for claimants.

Annotation—Marriage (II B—12)—Foreign common law marriage—Validity. **Annotation**

Foreign common law marriages

The marriage described in *Forbes* v. *Forbes*, above reported, as arising from an agreement to marry followed by co-habitation, is what is known as a common law marriage, that is one which arises from an agreement between a man and woman to become husband and wife and to live together as such, followed by their actually co-habiting together as man and wife and holding themselves out to their acquaintances as occupying such relationship: See *Cuneo* v. *DeCuneo*, 24 Tex. Civ. App. 436.

Forbes v. *Forbes* seems to be a case of first impression upon the question whether a common law marriage is valid in Canada, if valid in the foreign country where performed. There are, however, a few very interesting Canadian cases, dealing with the question of the validity of marriages between white men and Indian women, which were entered into according to the Indian custom and without any religious or civil ceremony.

A marriage was held to be valid where the evidence shewed that a native of Lower Canada went to a place called Rat River in the Indian country, and while still a minor took to live with him as his squaw, or Indian wife, an Indian girl residing there, also a minor. The marriage was celebrated according to the usages of the country without any religious or civil ceremony, it not being possible otherwise to celebrate it, there being no priest, clergyman, missionary, or civil officer with authority to perform marriages resident there at the time, and the woman went by the man's name, and they co-habited 28 years in the Indian country without any infidelity on either side, and when the man returned to Lower Canada taking the woman and his children with him, he introduced the woman as his wife, and had the priest baptise two of his children on his assurance that she was his lawful wife, although shortly after he repudiated her and went through a marriage service with a white woman: *Johnstone* v. *Connolly*, 1 Rev. Leg. 253, affirming *Connolly* v. *Woolrich*, 11 L.C.J. 197, 3 L.C.L.J. 14.

A later Quebec case, *Fraser* v. *Pouliot*, 13 Rev. Leg. 1, and on appeal 13 Rev. Leg. 520, also reported *sub nom. Jones* v. *Fraser*, 12 Q.L.R. 427, is often cited as opposed to the principle of the case last reviewed, and while the Court of Queen's Bench on appeal held that the marriage in question was invalid, such decision was unnecessary to the disposition of the case as the history of the litigation will shew. The action was brought in the Superior Court by a special legatee for an account against the curator of the testator's estate. It appeared that the testator devised certain seigniories to some of his children of whom the plaintiff was one, and that, afterwards being pressed with debt and being offered from eight to ten times more for the seigniories than he had theretofore valued them, he sold them and paid some of his most pressing debts with part of the proceeds and invested the balance. It was held that under the law as it was at that time the sale under the circumstances shewn had not the effect of defeating the legacies of the seigniories to the plaintiff and his co-legatees, and that they had a right to that portion of the proceeds of such sale so invested by the testator; and the curator was accordingly ordered to deposit such proceeds in Court: *Fraser* v. *Pouliot*, 7 Q.L.R. 149. The testator had formed a connection with an Indian woman in the Indian country and her grandson was brought in as a defendant and he set up a claim to the fund as the heir of his mother,

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Annotation (*continued*)—Marriage (II B—12)—Foreign common law marriage—Validity.

the daughter of the testator, basing his right thereto upon the assertion that his grandmother and the testator had been legally married. It was also shewn that the testator had formed a subsequent connection with a white woman by whom he had the plaintiff and several other children, but there was no question as to their illegitimacy. The Court deemed the question of the validity of the marriage of the testator and the Indian woman as immaterial to the decision of the case because of the holding that the legacies were unaffected by the sale of the seigniories. The curator in accordance with the order in the case last cited, paid the money into Court; and the prothonotary at a further order of the Court drew up a report of distribution, in accordance with the directions of the will as to the legacies of the seigniories, to which the Indian woman's grandson then filed his opposition. Mr. Justice Caron in the Superior Court held that the legacies had lapsed because of the sale of the seigniories there being no shewing that the same was made for urgent necessity. He also held that the testator had married the Indian woman though there was no religious or civil ceremony, upon the ground that a marriage contracted where there were no priests or ministers, no magistrates, no other religious or civil authority, and no registration, could be established by oral proof, and that the admissions of the parties themselves coupled with the fact that they had co-habited a long time were the best proof. It was also held that the legitimacy of the Indian woman's daughter was proven by the certificate of her baptism, made with all the formalities required by the laws then in force, wherein it was stated that the mother of the opposing defendant, and her brother and sister were baptised as the children of the testator, giving his name, and of the Indian woman giving her own name, but not that of the testator, and in which certificate there was the further statement that the father was present, and the mother absent: *Fraser* v. *Pouliot*, 13 Rev. Leg. 1.

Upon appeal to the Queen's Bench the judgment of the Superior Court was reversed, the appellate Court holding that the legacies were not affected by the sale of the seigniories, which decision ought, it seems, to have left it unnecessary to decide the question as to the validity or invalidity of the alleged marriage. But the Queen's Bench further held that no valid marriage was proven between the testator and the Indian woman by the mere shewing that they had co-habited together for several years in the absence of any evidence that the testator ever gave her his name, or admitted that she was his wife, even to the minister who baptised his children, and it being shown that in giving her an annuity in his will he spoke of her by her maiden name: *Fraser* v. *Pouliot*, 13 Rev. Leg. 520; *Jones* v. *Fraser*, 12 Q.L.R. 427.

Upon appeal to the Supreme Court of Canada, that tribunal held that the alienation of the seigniories under the circumstances shewn by the evidence, did not revoke the legacies, that, in any event, the first judgment of the Superior Court to the effect, from which there was no appeal, was *res judicata*, and that the Superior Court had no authority to hear the question anew; that consequently the balance of the proceeds of the sale of the seigniories invested by the testator after paying his debts passed in the same manner and proportions as the seigniories would themselves have passed under the will; that, therefore, it was necessary to

Annotation (*continued*)—Marriage (II B—12)—Foreign common law marriage—Validity.

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determine who would have been entitled to the proceeds of the sale if the legacies had lapsed, thus leaving undecided the question of the validity of the alleged marriage between the testator and the Indian woman. Mr. Justice Taschereau, who delivered the opinion of the Supreme Court, then went on to say:—

> "I deem it only proper to add, however, that when I therefore did not enter into the question of the legitimacy, the appellate (the testator's grandson) must not infer from my silence on this point that I have no doubt as to the correctness of the judgment of the Court of Queen's Bench thereupon." *Jones* v. *Fraser*, 12 Q.L.R. 427, at p. 467; *Jones* v. *Fraser*, 13 Can. S.C.R. 342, at p. 347.

There is this to be added, however, that, if the judgment of the Queen's Bench that there was no marriage is to be considered final, it can hardly be said with justice that it overrules *Johnstone* v. *Connolly*, 1 Rev. Leg. 253, affirming *Connolly* v. *Woolrich*, 11 L.C.J. 197, 3 L.C.L.J. 14, *supra*, considering the great difference of the facts proven in the two cases. Connolly always called the woman his wife, and gave her his name, as long as he lived with her, and told the priest who baptised his children that she was his lawful wife. On the other hand Fraser, the testator in the last case, who was himself illegitimate, never gave the woman his name, never called her his wife, not even to the Presbyterian minister who baptised his children, and left her not for the purpose of marrying anybody else, but in order to form a second illicit connection with another woman.

It has been unanimously held by the Supreme Court of the Territories that the laws of England respecting the solemnization of marriage were not applicable to the Indians residing there and that a marriage since the Territories Act between Indians by mutual consent and according to Indian custom was a valid marriage, provided that neither of the parties had a consort living at the time, "at any rate so as to render either one, as a general rule incompetent and not compellable to give evidence against the other on trial charged with an indictable offence," under the rule of law that a wife is not competent or compellable to testify for or against her husband, though the man afterwards took another "wife." Therefore, where an Indian, on trial for assault, tendered the evidence of two women whom he called his wives, it was proper for the trial Judge to admit the testimony of the woman whom the prisoner had last "married," and to reject the testimony of the one first married: *The Queen* v. *Nan-e-quis-a Ka*, 1 N.W.T.Rep., part 2, page 21, 1 Terr. L.R. 211.

In an action by the administrator to have the next of kin of the deceased ascertained, and the rights of all claimants to the estates decided, it was held that a contract of marriage *per verba de presenti* in the Territories, entered into between a white man and an Indian woman, domiciled there, without a ceremony of any kind followed by co-habitation as husband and wife, was not a legally valid marriage in view of the fact that in that portion of the Territories where the contracting parties were domiciled there were facilities for the solemnization of the marriage within reach of the parties: *Re Sheran*, 4 Terr. L.R. 83. Mr. Justice Scott in delivering his judgment said that from a review of the English authorities it would appear that it was only in cases where the

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marriage *per verba de presenti* took place in a strictly barbarous country, where a marriage according to the English common law, or perhaps according to local rules and customs could not be effected, that it would be deemed sufficient.

In *Robb* v. *Robb*, 20 O.R. 591, cited in *Forbes* v. *Forbes*, above reported, the Court refused to pass upon the question whether a marriage would be valid between a former resident of Ontario and an Indian woman in British Columbia, where all that was shewn in evidence was that the relation was entered into according to the Indian custom requiring only the giving of presents to the woman's father and acceptance thereof by him, and that this was followed by the co-habitation of the man and woman as husband and wife till the woman's death, although it was held that a marriage according to the recognized form among Christians could be presumed between a white man and an Indian woman and that therefore their daughter who was the only surviving issue of the connection was his legitimate child and legal heir, where the evidence shewed that upon her father's return to Ontario bringing her with him, he made repeated declarations that he had been legally married to her mother and in the same manner as he would have been had the marriage taken place in Ontario, and that his daughter was his legitimate child, and that he had brought her up as such.

See also Holmested, Marriage Laws of Canada, and Lafleur, Conflict of Laws in the Province of Quebec, 58-66.

The English Courts will undoubtedly recognize a foreign consensual marriage unaccompanied by or religious or civil ceremony, if such connection be a valid marriage in the country where it was entered into. The principles of law applied in England dealing with this question are clearly stated in 6 Halsbury's Laws of England, 252, 253. The English Courts only recognize as a true marriage one which, in addition to being valid in other respects, involves the essential requirement that it is a voluntary union of one man and one woman for life to the exclusion of all others. No union will be recognized which is founded on principles which are in conflict with those generally recognized in Christendom. Hence, no marriage will be recognised as valid in England if contracted in a country where polygamy is lawful, and where the marriage does not exclude the possibility of additional wives at a subsequent date.. Nevertheless, even in a country where polygamy is in certain circumstances lawful, the English Courts will not refuse to recognise the validity of a marriage essentially monogamous by the *lex loci celebrationis;* but it must be clearly proved that such is the case. The English Courts refuse to recognize any marriage regarded as incestuous by the general consent of Christendom; but the mere fact that English law so regards any particular union is no ground for refusing recognition to a similar union (provided that it is otherwise valid) contracted in a foreign country where it is regarded as legal. The general condemnation of Christendom is necessary. The phrase "Christendom" is used (it seems) to describe civilized nations in general, and not exclusively those which profess the doctrines of Christianity; and a "Christian" marriage means no more than a marriage based on Christian ideas, as defined above, though celebrated in

Annotation (*continued*)—**Marriage (II B—12)—Foreign common law marriage—Validity.**

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a heathen country with the forms prescribed by the law of the country, and (it would seem to follow) between persons who are not themselves Christians.

A valid marriage is sufficiently proven in a suit for the dissolution thereof by evidence that the petitioner and respondent had lived together for five years in Virginia, and were received in society as man and wife; that by the law in force in Virginia, when the co-habitation began, no religious ceremony was necessary to the validity of a marriage, nor was any registry of marriages required to be kept; and that in consequence of war in Virginia, the record of any religious ceremony which might have taken place could not now be obtained: *Rooker* v. *Rooker*, 3 Sw. & T. 526, 9 Jur. N.S. 329, 33 L.J. Mat. N.S. 42, 12 W.R. 807.

And the Chancery Division of the English High Court, recognised as valid a marriage entered into in the state of New York, which was valid there, and held legitimate a child thereof born in that state during the relationship, where the evidence shewed that an Englishman who, while resident in England, had gone through a form of marriage with his deceased wife's sister at the time when such marriages were void under the English law, went after some years to America to escape the effect upon his social position and comfort and made his residence in the State of New York and there lived with his deceased wife's sister for over fifty years, the relationship being unbroken until her death, though they went through no religious or civil ceremony of marriage there, because having been already known as husband and wife they were unwilling to attract remark by going through another form of marriage, especially after the husband consulted a lawyer of eminence in New York and learned from him that the law of the state recognised what was known as a common law marriage, or a marriage by repute, constituted by the man and woman agreeing to live together as husband and wife and acting and giving themselves out as such: *Noyes* v. *Pitkin*, 25 Times L.R. 222.

And Scotch marriages contracted *per verba de praesenti*, by mutual declarations of marriage in presence of witnesses, were upheld in *Bell* v. *Graham*, 13 *Moore* P.C. 242, 1 L.T.N.S. 221, 8 W.R. 98, and *Dalrymple* v. *Dalrymple*, 2 Hagg. Const. 54; and the force of the principles governing these decisions was admitted in *Dysart Peerage Case*, 6 App. Cas. 489, though it was held that there was no such marriage shewn by the evidence adduced.

So, a Japanese marriage was held valid in *Brinkley* v. *Attorney-General*, 15 Pro. Div. 76, entered into between a British subject temporarily resident in Japan and a Japanese woman, according to the form of the country, though it cannot be certainly said whether or not the officer whose certificate under the laws of Japan conclusive of the marriage, officiated as an officer performing the ceremony of marriage or merely as a certifying officer. The following is the opinion rendered by the Right Hon. Sir James Hannen: "This case is clear from the difficulties which arose in the Mormon case [Hyde v. Hyde, L.R. 1 P. & D. 130], and in the South African case [Bethel v. Hildgard, 38 Ch. D. 220], because in both those instances it was an attempt to establish as a valid marriage one which admitted of the possibility of a marriage with another person than the first spouse. The principle which has been laid

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down by those cases is that a marriage which is not that of one man and one woman, to the exclusion of all others, though it may pass by the name of a marriage, is not the status which the English law contemplates when dealing with the subject of marriage. But in this case it has been proved in the most satisfactory manner by the deposition of a Japanese professor of law, that by the law of Japan, marriage does involve this, and that one man unites himself to one woman to the exclusion of all others. Therefore, though throughout the judgments that have been given on this subject, the phrase "Christian marriage", "Marriage in Christendom," or some equivalent phrase, has been used, that has only been for convenience to express the idea. But the idea which was to be expressed was this, that the only marriage recognized in Christian countries and in Christendom is the marriage of the exclusive kind I have mentioned, and here it was proved that in Japan marriage is of that character. We all know that Japan has long taken its place among civilized nations, whose forms and laws and ceremonies are not to be treated as on the same footing with those of the Baralong tribe of South Africa. I have, therefore, come clearly to the conclusion that these cases do not apply, and that, as has been candidly admitted by Mr. James, a valid marriage can take place in Japan between an Englishman and a Japanese woman according to the law of Japan, which would be a valid marriage in this country and everywhere else. The only question, therefore, which remains is that which has been very properly raised by Mr. James, whether or not I have evidence before me that a valid marriage according to the law of Japan has been celebrated. Mr. Lowder has been called, who practised thirty years in Japan before the Japanese Courts. He has given satisfactory evidence upon the subject of the law. He states that the marriage is constituted by the persons obtaining from a particular officer, the governor or his deputy, a certificate that they had agreed to become man and wife. And I have before me that which purports to be a certificate from that officer. He certifies that those two persons were duly married according to the laws of the empire, and, of course, I must assume that things have been rightly done; indeed Mr. Lowder has himself proved that the governor and his deputy, the secretary named here, are persons filling that office, and therefore would be competent to give a certificate to that effect. The evidence, therefore, does satisfy my mind that a valid marriage has been celebrated between these two persons. I therefore pronounce the decree asked, that the marriage be declared valid."

A marriage made in a strictly barbarous country between British subjects, or between a British subject and a citizen of a civilized country, e.g., an Italian, and it would seem even between a British subject and a native of such uncivilized country, will, it is submitted, be held valid as regards form, if made in accordance with the requirements of the English common law; and it is extremely probable that, with regard to such a marriage, the common law might now be interpreted as allowing the celebration of a marriage *per verba de praesenti* without the presence of a minister in orders. A local form, also, if such there be, would seem to be sufficient, at any rate where one of the parties is a native. It is, however, essential that the intention of the parties should be an intention

to contract a "marriage" in the sense in which that term is known in Christian countries, i.e., the union of one man to one woman for life to the exclusion of all others: Dicey, Conflict of Laws, 2nd ed., page 725.

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In the United States the undoubted rule is that a common law marriage if valid in the state or country where entered into is valid everywhere: *Meister* v. *Moore*, 96 U.S. 76, 24 L ed., 826; *Meister* v. *Bissell*, 96 U.S. 83, note; *Travers* v. *Reinhardt*, 205 U.S. 423, 51 L ed., 865; *Darling* v. *Dent*, 82 Ark. 76; *Hilton* v. *Stewart*, 15 Idaho 150; *Jackson* v. *Jackson*, 82 Md. 17, 34 L.R.A. 773; *Smith* v. *Smith*, 52 N.J. Law 207; *Clark* v. *Clark*, 52 N.J. Eq. 650; *Hynes* v. *McDermott*, 82 N.Y. 41, 37 Am. Rep. 538.

And this rule has been carried to such an extent as to call for the recognition of a common law marriage which was valid in the state where it arose, in a state where such marriages were not valid when entered into there: *Nelson* v. *Carlson*, 48 Wash. 651.

But a common law marriage entered into in a state where such marriages were declared void by statute will not, of course, be held to be valid in another state: *Jordan* v. *Missouri and K. Telephone Co.*, 136 Mo. App. 192.

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Jan. 17.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. January 17, 1912.

1. PRINCIPAL AND AGENT (§ III—33)—LIABILITY OF AGENT FOR NEGLIGENCE—INSURANCE AGENT—FAILURE TO READ POLICY.

A person employed to secure additional insurance on certain property, a correct specification of what was required being given him, who receives the policy from the underwriters and forwards it to his clients without reading it is liable for the damages sustained by the latter by reason of their being compelled, upon the loss of their property by fire, to compromise their claim against the insurers because of an erroneous specification in the policy so obtained of the prior insurance carried by them.

2. BROKERS (§ III—30)—INSURANCE BROKER—LIABILITY TO CLIENT.

It is the duty of an insurance broker to the client by whom he is employed to place the latter's fire insurance, to see that any policy which he obtains for his client appears to be in valid form and that it is in conformity with the class of risk which his client has submitted; so, therefore, if the policy is issued with a wrong specification of the concurrent insurance the broker will be liable in damages where he fails to discover the error through neglect to inspect the policy when received, and the client not becoming aware of the discrepancy is compelled to accept a lesser amount from the insurer than he would otherwise have received.

Statement

APPEAL by the defendant from the judgment of Meredith, C.J.C.P., *Rudd Paper Box Co.* v. *Rice*, 2 O.W.N. 1417, in an action to recover damages for the negligence of the defendant in securing a fire insurance policy for the plaintiffs.

The appeal was dismissed with costs.

Messrs. *Bicknell*, K.C., and *W. H. Irving*, for the defendant.
W. C. Chisholm, K.C. for the plaintiffs.

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GARROW, J.A.

GARROW, J.A.:—The action was brought to recover damages from the defendant, caused, as alleged, by his negligence in the employment of an insurance broker, in which he had acted for the plaintiffs.

The defendant carried on the business of a real estate and insurance agent or broker, and in the latter character was employed by the plaintiffs, who are manufacturers, to obtain, in addition to the fire insurance which they already had, a further insurance for the sum of $5,000 upon their machinery, office furniture, and stock of merchandise. The defendant undertook the employment (which is not denied), and, after trying one or more companies, who declined, applied to a Mr. Hardman, residing at the city of Toronto, to obtain the required insurance in Lloyds, underwriters, of England. He apparently gave to Mr. Hardman a correct specification of what was required. After some delay, the policy arrived from England, and was received by the defendant, who says he at once forwarded it to the plaintiffs without reading it. This policy was, at the end of the year, renewed by another policy, in similar terms; but in both a mistake had occurred in the proper specification of the prior insurance carried by the plaintiffs, with the result that, after the plaintiffs' loss, they were compelled to compromise at a loss, for which loss they now sue.

In his judgment, the learned Chief Justice seems to have been of the opinion that Mr. Hardman had not been proved to be an agent for Lloyds, but was merely the defendant's agent. The matter is not, I think, vital; but I gather a different impression from the evidence, for I see nothing to contradict the defendant's statement, at p. 21 of the appeal-case, that he "got the insurance finally effected through an agent of Lloyds—A. L. Hardman—the agent of Lloyds at Toronto." This, it is true, appears in the defendant's examination for discovery; but the whole seems to have been put in at the trial by the plaintiffs' counsel.

But, while the judgment deals in the way I have mentioned with Hardman's agency, it does not rest upon that circumstance, which at best bears only upon the minor question, whether the defendant can invoke the second statutory condition as a protection against the consequences of his negligence.

The duty of the defendant was, not merely to make a proper application, but to obtain a valid policy conforming to the application. And it is no answer to say, that, when the policy came, he did not read it. It was his duty to read it; and, if he had read it, or even if he had read Mr. Hardman's letter of advice, he must have seen at once that a mistake had occurred, resulting in a serious misrepresentation as to the prior insurance. And it is for a breach of that duty that he has been held liable—correctly, in my opinion.

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It may be that the plaintiffs could have succeeded in recovering the full loss from Lloyds. But the defendant's negligent conduct had clearly rendered an action necessary. After the difficulty arose, he was given the opportunity of carrying on the litigation, but declined; and he is not now in a position to complain of the settlement, which, the learned Chief Justice finds, was a reasonable one to make.

I would dismiss the appeal with costs.

MEREDITH, J.A.:—As this case appears to me, it is a plain one of liability on the part of the defendant to the plaintiffs, for breach of his contract with them. Meredith, J.A.

For valuable consideration he contracted to procure, for them, valid insurance, if any; but failed to do so, the policies which he procured being on their faces invalid: that, I find, was the character of the transaction; and the result.

But, if it is to be put, as it was at the trial, and generally is in cases somewhat analogous, as a question of breach, by an agent, of his duty to his principal, the same result—liability—must follow.

It is, however, contended that, even if that be so, the defendant is relieved from any such liability, because the plaintiffs should have read the policies, and have seen for themselves that they were invalid; and, I suppose, have procured valid ones themselves, or have paid some one else for doing so. That is to say, that, because they did not do, themselves, that which they had paid the defendant for doing, and which it was his duty to do, they must bear the loss, which was caused by his breach of contract, or failure to perform his duty; which, I feel bound to say, seems to me to be absurd.

In the case of *Denew* v. *Daverfall*, 3 Camp. 451, the plaintiff, an auctioneer, employed by the defendant to sell for him a leasehold house, made out the conditions of sale omitting the usual provision that the vendor was not to be called upon to shew the title to the lessor in consequence of which the sale fell through; the action was for recovery of a commission on the sale; Lord Ellenborough, before whom the case was tried, with a jury, directed the jury that if they found that the plaintiff's services were wholly abortive he could not recover, using these pertinent words: "By the omission, the defendant has the house thrown back upon his hands, with expensive litigation. It is no answer that the particulars were shewn to him, and that he made no objection to them. I pay an auctioneer, as I do any other professional man, for the exercise of skill in my behalf which I do not myself possess; and I have the right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness, he leads me

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into mischief he cannot ask for a recompense although, from a misplaced confidence, I followed his advice without remonstrance or suspicion." The plaintiffs were entitled to rely upon their contract, or their agent, and were not in law bound to supervise his work, and to detect and correct his mistakes.

If the defendant failed to get from the insurers that which he ought, it was for him, not for the plaintiffs, to enforce any right there might be against the insurers; his contract with the plaintiffs, or his duty towards them, was, not to procure a lawsuit, but was to procure a valid insurance; and he had abundant opportunity for enforcing any possible right against the insurers—if anything of the sort really ever existed before the compromise made between the plaintiffs and the insurers, was effected; on the 27th December, 1909, he made an appointment with them to meet him, at his office, on the following day, and the appointment was kept, the result of it being, as noted in writing by him, as follows: "Mr. Rudd called, Dec. 28th, 1909, and R. B. Rice asked him to decide whether he wished to take legal proceedings to collect, or to accept our friendly services to assist him in getting the matter settled. He decided upon the latter in the presence of R. B. Rice and B. W. Rice." There was no suggestion, on the defendant's part, of any right which should, or might, be enforced against the insurers; on the contrary, it was "settle;" and I feel bound to add, that, in the "settlement" which was eventually made, the plaintiffs seem to me to have got very well out of the difficulty into which the defendant's breach of contract, or of duty, put them.

I would dismiss the appeal.

Magee, J.A.

MAGEE, J.A.:—The handwriting of the warranty in the policy looks very much as if that alteration had been made in Toronto; and the wording of the policy, "Buildings and for contents," in the absence of the attached specifications, looks very much as if the Toronto agent had a very wide power; but there is not proof of that; and I do not think the evidence for the defendant establishes a right of reformation of the policy as against the insurers, Lloyds; but, at most, a right to return of the premium.

I agree in the result.

Moss, C.J.O. Maclaren, J.A.

MOSS, C.J.O., and MACLAREN, J.A., also agreed in the result.

Appeal dismissed with costs.

THE KING v. SEGUIN.

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March 30.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. March 30, 1912.

APPEAL (§ VII K—446)—WAIVER OF OBJECTION TO PRELIMINARY ENQUIRY BY ARRAIGNMENT AND PLEA—CR. CODE (1906), SEC. 898.

An objection that the preliminary enquiry in a criminal case was not conducted according to law will not avail where the accused, who had been committed for trial, pleaded not guilty and stood trial without questioning the regularity of the preliminary proceedings.

Statement

A criminal appeal from the district of St. Hyacinthe. At the end of October, 1911, the store of one Bissonnette at St. Hyacinthe was broken into and articles stolen. The prisoner was arrested on suspicion of being party to the theft and was brought up before a magistrate and committed not for theft, but for receiving, "*recel*." After his committal the prisoner made option for a speedy trial, was found guilty and condemned to three years in the penitentiary. He then made an application for and was granted a reserved case.

Messrs. *N. K. Laflamme*, K.C., and *A. Fontaine*, K.C., for the prisoner.

J. C. Walsh, K.C., for the Crown.

Trenholme, J.

The judgment of the Court was delivered by TRENHOLME, J.:—The grounds are two-fold, firstly, it is claimed that the identity of the prisoner was not established, and secondly, that the preliminary *enquête* was not properly conducted according to law.

We say this second objection comes too late. The prisoner never raised this objection before his plea, nor at any time during his trial. He appeared before the magistrate and pleaded not guilty and stood his trial. Once he made his option and appeared before the magistrate, the magistrate had jurisdiction to hear the case. Therefore, we say that all objections on the score of irregularities in the preliminary enquiry must be overruled.

As to his identity we have no doubts either that it was properly established. The evidence is clear. The conviction is affirmed.

Conviction affirmed.

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FARQUHARSON v. CANADIAN PACIFIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

April 2.

1. RAILWAYS (§ II D 7—75)—LIABILITY OF RAILWAYS FOR FIRES—THE RAILWAY ACT, R.S.C. CH. 37, SEC. 298.

Where, from the testimony, the inference is strong that sparks from a locomotive started a fire at a point off a railway company's right-of-way, where, to the knowledge of the company's servants, the fire smouldered for nearly a month, and then, fanned by a high wind, it spread, jumped across a river and destroyed standing timber belonging to the plaintiff, the company is properly held liable therefor under sec. 298 of the Railway Act, R.S.C. 1906, ch. 37.

Statement

AN appeal by the plaintiff from the judgment of Morrison, J., in favour of the defendants in an action for damages for the loss occasioned by fire started by sparks from an engine operated on defendant's railway.

The appeal was allowed.

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

E. V. Bodwell, K.C., for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In this case, apart from the question of damages, there is little or no conflict of evidence. On the whole, the witnesses appear to have been exceptionally fair. The learned Judge treated the question of the origin of the fire as one of inference to be drawn from the facts in evidence, and came to the conclusion that no safe inference could be drawn that the fire was started by sparks from the defendants' train. That being so, I am not embarrassed by questions turning on the credibility or deportment of witnesses, and am free to draw the inferences which appear to me to be just. The first question is, did the fire which was discovered near the defendants' railway at about 2 o'clock in the afternoon of the 15th June, originate from a spark or sparks from defendants' locomotive engine which passed that point half an hour previously. The inference I draw from the evidence is that the fire so originated.

The second is, was it this fire smouldering in the locality until the 13th July, then fanned into flame by a high wind, which on that day leaped the Elk River, and catching on the opposite bank, spread to the plaintiff's land and destroyed his timber? I think the evidence is conclusive that it was. While it has been satisfactorily proven that defendants' right of way was covered with inflammatory material, at or opposite to the place where the fire originated, yet it has not been shewn that the fire originated in the right of way, or that the dangerous condition of the right of way facilitated its spread. Hence, I

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think the plaintiff's recovery must be subject to section 298* of the Railway Act, it appearing that defendant used modern and efficient appliances.

The only other question is that of the quantum of damages. I have read the evidence on this head with some care, because I felt that we ought not to put the parties to the expense of an assessment by referring the case back for that purpose. There is great discrepancy between the estimates given by witnesses on each side, but having regard to the evidence of defendant's experts, and the price at which similar timber tracts could be purchased in the neighbourhood, the plaintiff's estimate must be materially cut down. I think full justice would be done by fixing the sum at $500.

The plaintiff is entitled to costs here and below.

Irving, J.A.

IRVING, J.A.:—With every deference to the learned trial Judge, I am of opinion that he misapprehended the evidence given before him. There can be no doubt that the fire leaped across the river, the several witnesses have said so, and the Judge has so found. The question is really limited to this: did the defendants start the fire which crossed the river on the 13th July? The driver of the second train saw the fire about 2.15; the driver of the first train did not see it at 1.55. Johnson saw it about 2 p.m., and Anderson, the defendants' servant, also saw it about 2.15. We may take it that he went to put it out as soon as he was aware of it. Teefer, the defendants' roadmaster, said that in the evening of the 15th June some four acres had been burnt. Murphy, the fire warden, who saw it on the 16th June, said there were some four or fire acres burnt, that he examined the ground and found it burnt from the

*Section 298 of the Railway Act, R.S.C. 1906, ch. 37, as amended 1-2 Geo. V. (Can.), ch. 22, is as follows:—

298. Whenever damage is caused to any property by a fire started by any railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage, and may be sued for the recovery of the amount of such damage in any Court of competent jurisdiction: Provided that if it be shewn that the company has used modern and efficient appliances, and has not otherwise been guilty of any negligence, the total amount of compensation recoverable from the company under this section in respect of any one or more claims for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed five thousand dollars; provided also that if there is any insurance existing on the property destroyed or damaged the total amount of damages sustained by any claimant in respect of the destruction or damage of such property shall, for the purposes of this sub-section, be reduced by the amount accepted or recovered by or for the benefit of such claimant in respect of such insurance. No action shall lie against the company by reason of anything in any policy of insurance or by reason of payment of any moneys thereunder. The limitation of one year prescribed by section 306 of this Act shall run from the date of final judgment in any action brought by the assured to recover such insurance money, or, in the case of settlement, from the date of the receipt of such moneys by the assured, as the case may be.

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track, and across the track down towards the river; that the right of way at this point was dirty; that the soil was peaty, and that the fire started on the 15th was never wholly extinguished.

Johnson, who remained working in the immediate vicinity, says the fire continued till the 13th July, when it leaped across the river.

Johnson, Anderson and Murphy all say that the fire they saw on the 13th July was the same fire they had seen on 15th June. Anderson says that on the 13th July it had spread a little closer to the river. Murphy, Johnson, Jackson and Campbell testify to its crossing the river on the 13th July.

The defendants did not call Anderson at the trial. His admissions at pp. 212 and 213 probably account for this. If he had really stamped out the fire which occurred on the 15th June he would no doubt have been called.

Again, if the officer who examined the engine immediately after the fire had found the bonnet in good order, his testimony would have been most valuable as tending to shew that the engine could not have emitted sparks. The defendants with these means of refutation in their power, having omitted to call these witnesses, the strongest presumption arises that the fire arose from a defect in the first engine. I, therefore, infer they were guilty of negligence. The measure of proof sufficient to warrant a verdict of a jury, or a finding by a Judge, varies much according to the nature of the case. I can only say that I am satisfied, to the entire exclusion of every reasonable doubt, that the fire in question was caused by the defendants' negligence. I cannot say that the fire arose on the right of way.

For these reasons, I think my brother Morrison should have found for the plaintiffs.

I agree with the Chief Justice as to damages.

Galliher, J.A.

GALLIHER, J.A., concurred in judgment of IRVING, J.A.

Appeal allowed.

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Feb. 14.

Ontario High Court, Riddell, J. February 14, 1912.

1. WILLS (§ III L—196)—SPECIFIC LEGACY—SUBSEQUENT DEVISE IN TRUST —CONSTRUCTION.

Where a will contained (1) a clause devising land to a son wherein nothing was stated as to the devise being in trust, (2) other clauses following the one just mentioned and giving other property to trustees in trust for other children, and (3) a general clause following these and commencing with the following words: "The terms and conditions and limitations in the several devises and bequests to my executors and trustees in trust for my children are as follows" in which general clause the trustees were authorized to rent the real estate willed to each child, and apply the income as they might think fit for the maintenance of the children, and then providing for the disposition of the property upon the death of any of the children or their forfeiture of any interest therein, the clause then concluding with the words: "The trustees may allow my children or any of them to occupy their respective lands," the language of the general clause as to the power of the trustees is to be limited by the introductory words, that is to those devises and bequests specifically given, by the will, in trust, and does not apply to the first clause, and therefore, the devise to the son by the first clause is absolute.

2. WILLS (§ III A—75)—CONFLICTING CLAUSES—CONSTRUCTION.

Specific devises of property to a son, in one clause of a will are not modified by a subsequent clause, which, following the provision for the distribution of the residue of the estate, declares the intention of the testator in the distribution of his property to be that his children should receive equal shares.

3. WILLS (§ III A—75)—RESTRICTION ON DISPOSITION — INCONSISTENT CLAUSES—CONSTRUCTION.

The direction in a will as to the disposition of the interest of any of the testator's children in his estate, upon the death of any of them or upon the termination of the interest of any therein, occurring in a clause declaring the terms and conditions in the several devises and bequests given in trust, applies only to the property covered by that clause.

Statement

MOTION, under Con. Rule 938, by Richard Tew, assignee, for the benefit of the creditors of Charles Edward Jones, for an order determining certain questions as to the disposition of the estate of Henry Jones, deceased, arising upon the construction of his will, under which Charles Edward Jones was a beneficiary.

Henry Jones, the testator, died in 1909. His children all survived him.

The material parts of the will were as follows:—

1. Unto and to my son Charles Edward Jones I will and devise the following property, viz.: (a) my double house and lots . . . in the town of Uxbridge . . .; (b) my mill property in the township of Scott . . . ; (c) my stable and lot on the west side of Bascom street . . . ; (d) my red grain warehouse . . . . These devises . . . I value at $6,800. (e) One-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . . This devise . . . I value at $55 per acre.

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2. Unto and to my daughter Zella Jane Jones I will and devise the following property, viz.: (a) my present homestead and lots in connection therewith . . .; (b) . . . what is known as the Anderson lot . . . town of Uxbridge. These devises . . . I value at $2,900. (c) Unto and to my daughter Zella Jane Jones I will and bequeath all my household goods and furniture . . . . (d) Unto and to my daughter Zella Jane Jones I will and devise the east half of lot 6 . . . containing 100 acres; (e) the east 50 acres of the south half of lot 7 . . .; (f) lot 8 . . . the Stewart or Harper property; (g) the south-east quarter of lot 28 . . . . All of which said property I value at . . . $2,600.

3. Unto and to my executors and trustees . . . I will and devise in trust for my daughter Florence Henrietta Evans the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) the Dobson & Crosby store . . . which I value at $2,000; (b) one-quarter of my real estate . . . on east side of . . . Uxbridge . . . about 4 acres . . . . This devise I value at $55 per acre.

4. Unto and to my executors and trustees . . . I will and devise in trust for my daughter Eliza Sarah Amelia Jones the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) the Weldon farm . . . which I value at $800; (b) one-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . . I value the lot with the buildings on at $800 and the balance of the land at $55 per acre.

5. Unto and to my executors and trustees . . . I will and devise in trust for my son Robert Henry Jones the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) my hardware store and block . . . together with all of the fixtures and office furniture . . . . This devise I value at . . . $7,000. (b) the north storehouse . . . which I value at $600. (c) One-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . . This devise . . . I value at $55 per acre.

6. (Describes the method of division of the land east of the town of Uxbridge, and provides that the devises are to be "subject to the terms and conditions set out in paragraph of this my last will and testament.")

7. All the residue of my estate, both real and personal, I direct my executors . . . to sell . . . and the proceeds thereof I will and bequeath as follows: (a) Unto and to my daughter Zella Jane Jones I will and bequeath . . . $2,000 over and above what the other children may receive . . . . (b) The residue then remaining to be so distributed that each of my five children will receive shares equal in value out of

my estate after taking into consideration the values I have placed on the property willed to each of my said children, subject in the case of all of the children to the same terms and conditions as set out in paragraph 13 of this . . . will. . . .

8. In the distribution of my property my intention is that all my children should receive equal shares from my estate with the exception of the $2,000 which I have willed and bequeathed to my said daughter Zella. . . .

9. Unto and to my executors and trustees . . . I will and devise in trust for my estate and which shall form part of the money to be divided among my heirs when converted into money, my property in . . . the township of Sinclair . . . in trust to sell the same . . . and the proceeds to go into my estate for the benefit of my family, subject to the terms and conditions of paragraph 13.

10. I will and direct that any accounts which I have charged to any of my children shall be deducted from their share in the estate and to be considered as that amount paid on their shares.

11. I further will and direct that all manufactured lumber and wood . . . shall be sold . . . for the benefit of my estate.

12. Unto and to my executors and trustees . . . I will and devise in trust for my estate and which shall form part of the money to be divided among my heirs when converted into money, my property in New Ontario. . . .

13. The terms and conditions and limitations in the several devises and bequests to my executors and trustees in trust for my children . . . are as follows: My said executors and trustees are to rent the real estate willed to each child . . . and invest the personal property . . . and apply the several incomes as they . . . may think fit for the maintenance of my said several children (their wives or husbands as the case may be) and children for and during the terms of the natural lives of my said several children, with this proviso that if my said children or any of them become insolvent or attempt to sell, mortgage, or anticipate in any way the said rents and profits of his or her share, then the one so attempting to sell, mortgage, or anticipate shall lose *if so facts* all right, title, and interest in the said rents and profits of his or her share, if my said executors and trustees see fit and deem it proper that he or she should so lose all right, title, and interest therein, and my said executors and trustees if they deem it advisable have full power and discretion in any event and under any circumstances to divert the share of any of my children from them or any of them to the benefit their or any of their wives (or husbands) and children for and during the lifetime of such child or children whose share or shares have been so diverted. On the

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death of any of my said sons or daughters or upon the termination of their interest in the said property, I will and devise the interest of such to their children if any survive their parent or are alive at the termination of their estate. If they or any of them should die without issue them surviving, or if they or any of them have no children alive at the termination of their estate, then I will and devise the shares of such to my then surviving children share and share alike upon the same terms and subject to the same conditions as their own shares are willed to them. . . . The executors and trustees may allow my children or any of them to occupy their respective lands. . . .

14. I would . . . suggest, L. T. Barclay of Whitby as solicitor.

15. Unto and to my sons Charles Edward Jones and Robert Henry Jones I will and devise the following property, viz.: To my son Charles Edward Jones I will and devise part of the frame store-house adjoining my brick hardware store as follows, he is to have the first and second flat extending from the north and south to within one foot north of the door leading from brick hardware store into said store-house and . . . all the land east of the brick store . . . for the consideration that he is to give me a free right of way three feet wide and extending south . . . . To my son Robert Henry Jones I will and devise the top flat and the right of way . . . and the two bottom flats extending south. . . . For the consideration of the land east of the brick store C. E. Jones is to protect himself forever from anything falling from the brick store roof on to his at his own expense.

16. Appointment of executors and trustees.

R. S. Cassels, K.C., for Richard Tew.
C. A. Moss, for C. E. Jones and his wife.
H. P. Coke, for the executors of Henry Jones.
H. H. Davis, for all children of testator.
E. C. Cattanach, for the infant child of C. E. Jones.

Riddell, J.

RIDDELL, J.:—In November, 1910, Charles Edward Jones made an assignment, in the usual form, to Tew, for the benefit of his creditors; he has a wife and infant child, Dorothy.

At the time of the death, Charles E. was indebted to his father in the sum of $2,225.49, which was charged against him; and since the death the executors have from time to time lent him money, in all $530.49, on the agreement that the same was to be deducted from his share of the estate.

The devisees have been allowed to occupy the real estate devised to them, under cl. 13 of the will.

I have sent for and examined the original will; and it would seem quite plain that the testator did not write the will with his own hand, but the conveyancer (who writes a very plain

hand) wrote the first ten pages, i.e., down to the suggestion to employ Mr. Barclay as solicitor, leaving blanks where now appears the word "thirteen" as the number of paragraph referred to. In cl. 13 the words "if so facts" are quite plainly written and are unmistakable. The remainder of the will is written with different pen and ink, but the same as the "thirteen," and also (which was not brought to my attention upon the argument, and which may not be material) an interlineation in cl. 5(a), where "eight" thousand is changed to "seven" thousand, with an apparent corresponding change in the figures following. The words at the end of cl. 10 "and to be considered as that amount paid on their shares" also appear in this pen and ink.

It would appear—though this is not certain—that it was not the same hand which wrote the two parts of the will.

1. The first question (raised by the assignee) is: "Are the devises to Charles Edward Jones contained in cl. 1 absolute, or are they subject to the provisions of cl. 13?"

It is to be observed that the operation of cl. 13 is limited to the "several devises and bequests to my executors and trustees in trust for my children Charles Edward Jones, Zella Jane Jones, Florence Henrietta Evans, Eliza Sarah Amelia Jones, and Robert Henry Jones."

The devises in cl. 1 are not to the executors in trust at all, but direct to C. E. Jones, and consequently these do not fall under the wording of cl. 13.

Nor do I think there is any application of cl. 13 by implication. The devises to Florence, Eliza, and Robert Henry are explicit to the executors, etc., in trust for them: clauses 3, 4, 5—those to C. E. Jones and Zella in clauses 1 and 2 are not. There is land which is to be converted into money (and therefore a bequest) left to the executors in trust for C. E. Jones and Zella (with others)—cl. 9—and that is specifically "subject to the terms and conditions of paragraph 13."

I can see no possible reason for holding that cl. 1 is subject to cl. 13, except that certain land in Uxbridge is left to the devisees without the intervention of executors or trustees by cl. 6; but there the testator clearly intended to have cl. 13 apply, although he omitted (no doubt by inadvertence) to fill in the number.

2. I cannot find authority which would induce me to believe that the specific devises to C. E. Jones are modified in any way by the expression of intention in cl. 8.

3. The provision "on the death of any of said sons or daughters or upon the termination of their interest in the said property" applies only to the property which comes under cl. 13.

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The other questions submitted to me are matters of administration, and I do not think an answer should be given now. If the parties cannot agree, an order for administration may be applied for, when all the facts can be developed, the effect of interlineations, etc., considered, and so on.

The assignee will have his costs out of the estate coming to his hands of C. E. Jones—otherwise there will be no costs.

Order accordingly.

B.C.

C. A. 1912

April 2.

MILLS v. MARRIOTT.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, J.J.A. April 2, 1912.

1. CONTRACTS (§ I D 2—52)—MUTUALITY IN CONTRACT FOR SALE OF REAL PROPERTY.

An unilateral agreement is not created by the fact that but one party to the contract signed it, as it may become binding by the acts of the parties thereunder.

2. CONTRACTS (§ V C—391)—FORFEITURE CLAUSE—CIRCUMSTANCES CALLING FOR STRICT CONSTRUCTION OF SAME.

Notwithstanding time is declared to be of the essence of a contract for the sale of lands, specific performance will be decreed where a failure to promptly make a stipulated payment was due to the inadvertence of the vendee's partner, with whom, upon his departure for England, the vendee had left funds with which to make payments which came due during his absence, and it appeared that a day or two after such payment was due the vendor called up the vendee's office and without inquiring whether the latter had left instructions regarding the payment, obtained his address in England; and afterwards the vendor mailed a notice of forfeiture to the vendee's office in an unofficial-looking envelope, addressed in a lady's handwriting, marked "private," on account of which the vendee's partner returned it to the post-office; and the notice of forfeiture forwarded to the vendee's English address was not received by him until after his return to Canada, as these circumstances cast such suspicion upon the vendor's conduct as to require a strict construction of the stipulation in the contract providing that notice of forfeiture should be given by personal service, or by delivery at the vendee's place of business by registered mail.

3. RECORDS AND REGISTRY LAWS (§ III D—31)—APPLICATION TO REGISTER AGREEMENT ON FILE—NOTICE TO SUBSEQUENT PURCHASER.

A purchaser of land takes with notice of the existence of a contract for its sale made by his vendor, where, at the time of purchase, an application to register such agreement, as well as the agreement itself, was on file in the land registry office.

Statement

AN appeal by the plaintiff in an action for specific performance from the judgment at trial dismissing the action.

The appeal was allowed.

C. W. Craig, for appellant.

J. A. Russell, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I concur with judgment of Galliher, J.A.

IRVING, J.A.:—The plaintiff's application for specific performance cannot be regarded as *bonâ fide*, or he would have gone into the witness box. I think the plaintiff applying for specific performance or for relief against forfeiture ought, as a rule, to submit himself to cross-examination.

In this case the plaintiff through his own carelessness got into default. The true agreement between the vendors and purchasers was that time should be of the essence of the contract. Strong, C.J., a great authority on equitable doctrine and practice, said in *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171:—

> In order to entitle a party to a contract to the aid of the Court in carrying it into specific execution, he must shew himself to have been prompt in the performance of such of the obligations of the contract as fell to him to perform.

I break off to ask, does the plaintiff satisfy this requirement by getting from another person, partner or friend, an undertaking to meet the anticipated payment? What follows shews how necessary it was for the plaintiff to go into the box:—

> and always (that means hereafter) ready to carry out the contract within a reasonable time even though time might not have been of the essence of the agreement.

In my opinion the notice to the purchaser was not invalidated by writing the word "private" on the envelope. I see no good reason to believe that the use of that word, or of the other so-called devices, constituted a trick to prevent the purchaser receiving the notice. As a matter of fact it was actually in the hands of the plaintiff's clerk. The fact that the defendants sent a duplicate notice to the plaintiff's address in England rebuts the idea that there was any intention on their part to take an unfair advantage of the plaintiff. No person in the world would be able to anticipate that the plaintiff's partner would act in such an unreasonable way as to send a letter addressed to him to the dead letter office. The notice, in my opinion, was not sufficient to put an end to the contract. It was not delivered to the postal authorities until the 25th February. Therefore the notice was not a thirty-day notice. The defendant's notice must be in strict compliance with the power contained in the agreement: see *March Bros.* v. *Banton*, 45 Can. S.C.R. 338.

But as the plaintiff was aware of the default on the 14th March, 1910, the day the duplicate notice reached his mother's house in England, and took no steps, he should be refused specific performance.

The plaintiff, it appears, did not execute the deed of agreement, nevertheless, I think the plaintiff, having brought this action of the written agreement, ought to be held to all the conditions imposed by the vendor.

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It is not possible for him to execute it in part.

As to the $250 paid down, I would order that to be returned and the contract to be rescinded. The word "deposit" is not used—the word "balance" shews it is part of the purchase money—the amount being an aliquot portion of the purchase money tends to support the idea that it is a payment on account, and the absence of a forfeiture clause—all these circumstances shew we should not regard it as a payment simply on account of and as part of the purchase money.

Galliher, J.A.

GALLIHER, J.A.:—I would allow this appeal.

I think, with respect, that the learned trial Judge erred in classing this as an unilateral agreement.

It does not follow that because one party to an agreement does not sign that it is a unilateral agreement.

It may become a binding agreement by the acts of the party.

In the case at bar, the plaintiff paid the first instalment of the purchase money, and knowing he would be absent, left instructions with his partner to pay the second when it became due, together with the necessary funds for that purpose. This is clearly shewn by Dodson's evidence. His partner, through inadvertence, omitted to do so. The whole question then turns upon the insufficiency of the notices sent in accordance with the agreement. The words are, "The said notice shall be well and sufficiently given if delivered to the purchaser or mailed under registered cover addressed as follows: Clement Mills, 531 Richards street, Vancouver, B.C."

The second payment was due on February 22nd, 1910, and was not made, and on that day or a couple of days afterwards the defendant Marriott called up the plaintiff's office and obtained his address in England. It is to be noted that he made no mention to Mills' partner, Mr. Dodson, that a payment was due, or any inquiry as to whether Mills had left any instructions regarding same, but instead he proceeds to have a notice of forfeiture made out, addressed in a lady's handwriting, in an unofficial looking envelope, which was marked private, and same mailed to the address as specified in the agreement, and a duplicate sent to the English address. The notice mailed to the Vancouver address was received there, but on account of its being marked private, and the manner in which it was addressed, and the envelope used, was not opened by the plaintiff's partner, but returned to the post office.

These circumstances have created a suspicion in my mind which has caused me to construe that notice with strictness, and the conclusion I have come to is that under the circumstances it was not a good notice.

It is not proven that the notice mailed to England was delivered to him there, and in fact Mills swears he never received it until after his return to Canada.

I may say, however, that I am not very much impressed with Mills' evidence in this regard, but the defendants have failed to satisfy the onus cast upon them if they rely on the notice sent to England as delivery.

I think the defendant Boyd must be taken to have had notice of the plaintiff's claim, as an application to register the Mills' agreement, together with the agreement itself, was on file in the land resistry office at the time Boyd purchased.

There should be judgment for the plaintiff as in the first paragraph of the plaintiff's prayer, and with costs.

Appeal allowed.

THOMSON v. McPHERSON.

Ontario High Court, Kelly, J. March 4, 1912.

1. CONTRACTS (§ I D—55)—INDEFINITE AND INCOMPLETE AGREEMENT—PRICE ASCERTAINABLE.

An agreement is too indefinite and incomplete to call for a specific performance thereof, by which the plaintiff was to sell to the defendants his interest in a mining claim upon the basis of a specified amount for the whole claim, less a sum not to exceed a certain amount for charges against the first mentioned sum, the price to be in certain instalments at fixed dates, shares to be delivered as paid for or secured, and there was nothing to shew what interest the plaintiff had in the claim or how many shares he was entitled to, so that the price was not ascertainable without further negotiations between the parties.

[*House* v. *Brown*, 14 O.L.R. 500, followed.]

2. CONTRACTS (§ V A—381)—FILING OF CAUTION—ABANDONMENT OF CONTRACT—RESCISSION.

The contract for the sale of an interest in a mining claim of a fluctuating character must be held to have been rescinded where a caution was filed against the claim after the execution of the agreement and the vendor knowing that it was useless to try to complete the sale while the caution remained undischarged had so conducted himself as to give the vendees reasonable ground to conclude that he had abandoned the contract and they did so conclude.

[*Morgan* v. *Bain*, L.R. 10 C.P. 15, specially referred to.]

3. CONTRACTS (§ IV F—371)—TIME OF THE ESSENCE.

In contracts for the sale of claims and interests of a fluctuating character time is necessarily of the essence of the contract and, if the vendor fails to use his utmost diligence to complete his part of the contract, the purchaser may withdraw therefrom.

[*Macbryde* v. *Weekes*, 22 Beav. 533, applied.]

Statement

ACTION for specific performance of an agreement, or, in the alternative, for damages for breach, or, in the further alternative, for payment of $14,666.66 and interest.

The action was dismissed.

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Statement

The agreement was dated the 25th September, 1909. By it, the plaintiff agreed to sell to the defendants his "interest in the Mac Mining Company, upon a basis of $80,000 for the claim, less an amount, not to exceed $6,500, for charges against the $80,000. Terms: one-quarter cash in 15 days from date; one-eighth in 30 days thereafter; one-eighth in 60 days thereafter; and one-eighth in 90 days thereafter; the balance to be paid in two payments, one in 6 months thereafter and one in 9 months thereafter (after said 15 days). The shares to be delivered as paid for or secured, or buyers to give promissory notes for payments at said dates; stock to be delivered on delivery of notes at the option of the buyers." This was signed by the plaintiff, and "accepted, one-half each," by the two defendants, over their signatures.

Messrs. *R. C. H. Cassels*, and *J. F. Lash*, for the plaintiff.

Messrs. *S. H. Bradford*, K.C., and *A. D. Crooks*, for the defendant McPherson.

Messrs. *W. N. Tilley* and *G. W. Mason*, for the defendant Lobb.

Kelly, J.

KELLY, J. (after setting out the facts):—The company's sole asset was a mining claim—part of broken lot No. 8 in the 4th concession of the township of Coleman.

On the 5th October, 1909, a caution was registered by one Milne against the claim, alleging, amongst other things, ownership of an interest therein. All parties conceded that this registration had a very detrimental effect on the value of the property.

The defendants have set up that the agreement sued on is indefinite and incomplete and cannot be enforced. I agree with that contention. In *House* v. *Brown*, a decision of a Divisional Court, reported in 14 O.L.R. 500, Mr. Justice Anglin, at p. 505, says: "That the want of a definite provision in a contract fixing the amounts and dates of payment of deferred instalments of purchase-money renders a contract incomplete and unenforceable, where it is contemplated that these matters shall be the subject of further negotiations and future settlement between the parties thereunder, is well established."

It is well-settled law that to render a contract for sale complete there must be a price ascertained or ascertainable: *Logan* v. *Le Mesurier*, 6 Moo. 116, at p. 132.

The price payable to the plaintiff was not and is not yet ascertained.

That was to be determined in further negotiations between the parties. From the 23rd September, 1909, until April, 1910, the plaintiff did not meet or have any communication of any kind with the defendants. Arthur Thomson (the plaintiff's brother and representative), however, during that time, did see the

defendants, when the question of coming to an agreement settling upon the numbers of shares, or the interest, which the defendants should receive, came up.

[The learned Judge here set out a portion of the evidence of Arthur Thomson.]

This, of itself, apart from the other facts, shews that an unsuccessful attempt was made, after the signing of the document of the 25th September, 1909, to open up negotiations to determine these interests; that the interests of the parties had not been determined; and that an essential element of a completed contract was wanting. There is the evidence, too, of the plaintiff, on cross-examination, that he never offered to deliver any shares to the purchasers, and was not in a position to do so.

Moreover, even if the number of shares receivable by these parties had been determined, there was still to be ascertained the amount to be deducted from the $80,000 for charges. The document sued upon says this was not to exceed $6,500, but it is not otherwise fixed, and for this reason also the amount to which the plaintiff was entitled could not be definitely arrived at.

It seems reasonable to conclude, too, that if, at the time the agreement for sale by the plaintiff was under consideration, it had been clear and certain what number of shares, or what interest, the plaintiff was entitled to, this agreement would have stated the exact price he was to receive, instead of making use of the more roundabout and more cumbersome method of stating a selling value of the whole claim as a basis of calculating the value of the plaintiff's interest.

For these reasons, I think the plaintiff's action fails.

The defendants also set up that the property owned by the Mac Mining Company was really the subject of the sale by the plaintiff, and that the filing of the caution by Milne, in effect, operated as a destruction of the subject-matter of the contract; and, further, that, from the filing of the caution, all parties treated the contract as rescinded. Even if the agreement had been complete, I would feel bound to conclude that, under the circumstances of what followed the filing of the caution, it was rescinded.

In *Macbryde* v. *Weekes*, 22 Beav. 533, Sir John Romilly, at p. 539, says: "This, in my opinion, is one of those cases in which time was, from the nature of the property, necessarily of the essence of the contract, in this sense and to this extent that it was incumbent on the owner to use his utmost diligence to complete his part of the contract, and that if he failed in so exerting himself, the defendant might decline having anything further to do with the matter;" and this he states to be the owner's duty, although no time is specified in the contract. This was a case in which the subject of the contract was in part a lease for working a mine, which Sir John Romilly says

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"is a trade of fluctuating character," and the rest of the property contracted for was not merely for the same purpose, but was leasehold, having a short period to run.

The subject of the contract now under consideration was certainly of a fluctuating character, and the words of Sir John Romilly are applicable to it.

In *Morgan* v. *Bain*, L.R. 10 C.P. 15, Lord Coleridge says: "It is clear that the omission to perform certain acts incumbent upon the party to a contract may justify the other party in coming to the conclusion that, in point of fact, the party guilty of the omission intends to abandon the contract, and is himself treating it as abandoned, and rescinding it."

Here the plaintiff, from the filing of the caution on the 5th October, 1909, until April, 1910, did not see the defendants or personally do anything in recognition of the agreement; and, though his brother, who represented him, says he communicated by telephone with the defendant Lobb a number of times, in the latter part of 1909, asking for payment, Lobb's evidence is to the effect that these communications had reference to the settling of what shares or interest the plaintiff was entitled to. This latter is, I think, the more probable view, having in mind the evidence of Arthur Thomson quoted above.

Both the plaintiff and Lobb knew the disastrous effect of the filing of the caution, and that it was useless to endeavour to sell while the caution remained undischarged. A remarkable circumstance is, that, though from the time the caution was filed until the plaintiff met Lobb in April, 1910, Arthur saw the plaintiff weekly or oftener, and at times stopped in the same house with him, he did not tell him of the caution. Arthur knew of it soon after it was filed. It is difficult to find an explanation of such indifference to a matter of so serious import, and in a transaction of a nature requiring prompt attention and the utmost diligence, unless on the assumption that the plaintiff, realising the disastrous effect of the caution, considered and treated the whole matter of the sale as at an end. It is quite clear that the defendant Lobb, and, I think, the defendant McPherson also, so treated it, and I think they were justified in coming to the conclusion that the plaintiff looked upon it as abandoned or rescinded. The defendants would have the right to rescind if the plaintiff had rescinded, or if the plaintiff, having so behaved himself as to give them reasonable ground to conclude that he had abandoned the contract, they did so conclude (*Morgan* v. *Bain*, L.R. 10 C.P. 15). I think the plaintiff and his representative did so behave; and that the defendants concluded he had abandoned.

The plaintiff's claim is dismissed with costs.

Action dismissed.

WALLACE BELL CO. v. MOOSE JAW.

(Decision No. 1.)

Saskatchewan Supreme Court, Wetmore, C.J. April 13, 1912.

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April 13.

1. CONTRACTS (§ I F—121z)—VARYING WRITTEN CONTRACT—INCORPORATING EXTRINSIC DOCUMENT—SOLICITOR'S LETTER CONTAINING TENTATIVE SUGGESTION.

The terms of a written contract with a municipal corporation, under its seal, can not be varied so as to result in a binding agreement, by a written acceptance of a proposition to enter into a new and modified contract, contained in a letter written by the city solicitor, under directions from the city council, where such letter expressly stated that the offer therein contained was merely a tentative suggestion which was not to have any legal effect on the existing contract until reduced into a new written agreement.

[*Bonnewell* v. *Jenkins*, 47 L.J. Ch. 758; *Rossiter* v. *Miller*, 3 A.C. 1124; *Stow* v. *Currie*, 21 O.L.R. 486, and *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638, at p. 645, applied.]

2. CONTRACTS (§ IV E—369)—BREACH OF CONTRACT TO DIG A WELL—COMPLETION CONDITION PRECEDENT TO PAYMENT.

Upon the failure to sink a well to the depth specified in a contract, money advanced the contractor by the other party to the agreement may be recovered back where the contract expressly provided that boring the well to the depth specified should be a condition precedent to the contractor's right to retain any money advanced him.

Statement

AN action by contractors for $2,500.00 and the cancellation of a bond and the possession of certain plant and machinery pursuant to an alleged variation of a written contract. The defendants counterclaimed for the money paid under the contract.

The action was dismissed and the defendants' counterclaim allowed.

W. F. Dunn, for plaintiffs.

W. B. Willoughby, for defendants.

Wetmore, C.J.

WETMORE, C.J.:—The plaintiffs and the defendants entered into an agreement, dated November 1st, 1909, in which the plaintiffs were described as the parties of the first part, whereby the plaintiffs agreed to dig or drill a well in that city to the depth of 3,000 feet or such less depth as should be accepted by the defendants. The well was to be what was called a dry well, and was to be sunk for the purpose of finding gas. It was to be drilled in accordance with certain specifications annexed to the agreement, which were made part of such agreement. The defendants executed the agreement under its corporate seal. The plaintiffs were to be paid for such work at a specified rate per foot, and at the time specified in the specifications.

The agreement contained the following clauses, among others:—

> It is further agreed that notwithstanding any advances made to the parties of the first part during the carrying on of the contract, that it is and shall be a condition precedent to the right of the parties of the first part to retain any moneys so advanced or recover any

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moneys under said contract that they shall have drilled said well to a depth of three thousand feet or such shallower depth as shall have been accepted in writing by the parties of the second part as a performance of the contract.

In the event of failure by the parties of the first part to complete the said well in accordance with the said specifications, the parties of the second part shall have a lien on the plant employed or used by the parties of the first part in the digging thereof and the same shall not be removed from the well or where the same is then placed until the parties of the first part shall first pay or cause to be paid to the city of Moose Jaw any advances made to the parties of the first part on account of said well.

The parties of the first part agree to furnish to the parties of the second part a bond to be executed by themselves and James Pyke and Co., of Montreal, in the sum of ten thousand ($10,000) dollars for the faithful performance of this contract according to its terms, such bond to be drawn to the satisfaction of the parties of the second part.

This agreement strikes me as an exceedingly harsh one. It contemplates that if the contractors fail to reach the depth to which they agree to drill without finding gas, if they are prevented by some unforeseen accident or conditions, they will not in effect receive anything for their work. Nevertheless my experience teaches me that it is by no means an unusual contract to enter into in this country for drilling wells.

The plaintiffs, having got their plant on the ground, commenced work some time in March, 1910. They drilled down about 978 feet and struck water. They, however, continued their operations, and drilled down to about 1,189 feet, when the pressure of the water became so great that they could not proceed further, and it became impossible to shut the water off and keep the well dry. This occurred about the latter part of December, 1910, or the first part of January, 1911, when operations ceased, and no further work was done. Matters being situated as above described, the plaintiffs applied to the defendants for a variation in the terms of the agreement. There is no evidence as to the terms of this application, but it brought forth the following reply from Mr. Willoughby, the city solicitor:—

Moose Jaw, Sask.,
February 21, 1911.

The Wallace Bell Co., Ltd.,
City.

Dear Sirs,—Inasmuch as you have applied to the council of the city at previous times and again by your letter of February 14th, as to a variation of the contract between the city and yourselves for digging the test well, you asserting that the well cannot be completed as the water cannot be shut off, and have requested the city to take the matter up and give you an answer, we beg to advise you that the matter has been considered in council and the city has decided to make you a final proposition as to what it will do.

It is first to be clearly understood that any negotiations with you in reference to a change in the contract are carried on on the express

understanding that they are to in no way affect the contract now in force unless the same result in a proposition or agreement suitable to both parties. For the present they are merely tentative suggestions on the part of each party to the contract and until such time, if any, as they are reduced into a new written agreement they shall have no legal effect on the existing contract. Premising this much we may say that the city asks the privilege of calling in an expert to examine the condition of the well with your well-boring plant and machinery to ascertain whether or not the water can be closed off in such a way as to allow the well to be completed. If in the opinion of the experts, to be approved by the city council, the water can be closed off so as to enable the well to be completed, then the city will expect and insist on the contract being completed as per its terms. If the water cannot be closed off to the satisfaction of the council, the city will pay you a further $2,500.00 and take over the well and casing. The city is to have a reasonable time to make the necessary experiments and do the necessary testing. You are given two weeks from this date to say whether or not you accede to this proposition, which is final on the part of the city, and if you do not accede within that time then the city will insist on the existing contract being carried out according to its terms.

Yours truly,
(Sgd.) W. B. WILLOUGHBY,
City Solicitor.

On the 27th February, and before any reply by the plaintiffs to Mr. Willoughby's letter, the city council passed the following resolution: "That the action of the Sewer and Water Committee in forwarding a final offer to the Wallace Bell Company as contained in letter forwarded by the city solicitor be confirmed."

This resolution had reference to Mr. Willoughby's letter above set out, but beyond giving official endorsement to, and authority for that letter, and recognizing the fact that Mr. Willoughby is the city solicitor, it does not carry the matter any further than the letter itself. On March 1st, the plaintiffs sent the following letter in answer to Mr. Willoughby:—

March 1st, 1911.

Mr. W. B. Willoughby,
City Solicitor,
Moose Jaw, Sask.

Dear Sir,—We are in receipt of your letter of the 21st ult., re city well. The terms of your letter are satisfactory and we accept them.

We understand that by the words, "take over the well and casing," on the second page you refer to the casing already in the well.

Ask the city council to please inform us when they will be ready to have an expert start operations, so that the writer can arrange to be at the plant or have our representative there to give any assistance that might benefit in trying to shut off the water.

Yours truly,
THE WALLACE BELL CO., LTD.

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To this letter Mr. Willoughby sent the following reply:—

Moose Jaw, Sask.,
March 4th, 1911.

The Wallace Bell Co., Ltd.,
78 Mitcheson Ave.,
Montreal, Que.

Dear Sirs,—Your favour of the 1st inst., to hand to-day and by me shewn to the city council. I am directed to acknowledge receipt of your letter and say that the council are at the present time endeavouring to get into touch with an expert of established reputation and as soon as the man is found you will be wired when to start. No delay will be incurred.

Yours truly,
(Sgd.) W. B. WILLOUGHBY,
City Solicitor.

Nothing further, apparently, was done until 1st April, when the plaintiff wrote Mr. Willoughby a letter that date which is as follows:—

Dear Sir,—We have been expecting to hear from you further what is being done in this well matter. Now, please be so good as to let us know by return mail.

In reply, Mr. Willoughby wrote the following letter:—

Moose Jaw, Sask.,
April 5th, 1911.

The Wallace Bell Co., Ltd.,
Montreal, Que.

Dear Sirs,—Your favour of the 1st inst. to hand. I have communicated the matter to the Mayor. Difficulty has been found, it appears, in getting an expert. It is hoped, however, that definite word will be sent to you inside of three or four days at latest.

Yours truly,
(Sgd.) W. B. WILLOUGHBY.
City Solicitor.

One Robert Bell, an employee of the plaintiffs, was left in charge of the drill and plant at the time the operations ceased, and he remained there until about the 1st May, 1911. He testified that he remained for the purpose so that "if they were going on with the test" and if they "wanted to ask any questions about the machinery or the plant" he would give them information. This is not very definite or satisfactory, because there was a previous agreement in writing entered into between the plaintiffs and the defendants respecting testing which was dated 26th October, 1910. The evidence is not clear as to what extent Bell was influenced by that agreement as regards his remaining and continuing in charge. No test was made as suggested in Mr. Willoughby's letter of 21st February, and nothing was done towards such testing, and on the 30th June, 1911, Mr. Willoughby wrote the plaintiffs as follows:—

The Wallace Bell Co.,
Montreal, Quebec.

Dear Sirs,—The following resolution has been passed by the council: "That the Wallace Bell Company be advised that this council are not satisfied that the well contract cannot be completed and that they therefore be instructed to proceed at once to complete the well to the depth according to the contract."

I have been instructed to send you this resolution which speaks for itself.

Yours truly,
(Sgd.) W. B. WILLOUGHBY,
City Solicitor.

There was some other correspondence put in evidence, but in view of the conclusion, I have reached, it is not necessary to particularly refer to them in dealing with the question of the plaintiffs' right of action. It is claimed on the part of the plaintiffs that Mr. Willoughby's letter of the 21st February, as indorsed by the resolution of the city council of the 27th February and the plaintiffs' letter of 1st March constituted a binding and valid contract carrying the terms of the agreement of 1st November, 1909, and that the defendants thereby, as stated in the statement of claim, agreed: that in consideration of the plaintiffs allowing them to use their plant and machinery for the purpose of making a test to see if the water could be shut off from the well, in the event of their inability to shut off the water to cancel the bond mentioned in the original agreement (which had been furnished by the plaintiffs) and to allow the plaintiffs to take away their machinery and to retain the sum of $10,000 which had been paid them by the city, and to pay them for their work the further sum of $2,500; and the plaintiffs claim payment of the $2,500, cancellation of the bond hereinbefore mentioned and possession of the plant and machinery used in the drilling operations.

It is set up on the part of the defendants that the letters I have referred to do not constitute an agreement at all, either in themselves or by reason of anything that subsequently occurred. I have arrived at that conclusion. The plaintiffs' contention was, that offer having been made in Mr. Willoughby's letter of 21st February, and the plaintiffs having accepted it, that the minds of the parties came together upon the subject-matter, and that therefore there was a binding agreement notwithstanding the reference to a new written agreement. In support of this contention, *Bonnewell* v. *Jenkins*, 47 L.J. Ch. 758; *Rossiter* v. *Miller*, 3 A.C. 1124; and *Stow* v. *Currie*, 21 O.L.R. 486, were relied on; but in view of the contents of the letters put in evidence in this case, those cases are against the plaintiffs' contention. As stated by James, L.J., in *Bonnewell* v. *Jenkins supra*: "It is settled law that a contract may be made by letters, and that the mere reference in them to a future formal

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contract will not prevent their constituting a binding bargain;" but he proceeds: "No doubt there may be cases, such as *Rossiter* v. *Miller*, 46 L.J. Ch. 737, where the Court may hold that the reference to the future contract is such as to shew that the parties did not intend to be bound until it was signed." *Rossiter* v. *Miller*, referred to by the Lord Justice, went to appeal and is the case relied on by the plaintiffs, as before stated, and reported in 3 A.C. 1124, and was reversed by the House of Lords. In doing so, the learned Lords did not controvert what was so generally stated by Lord Justice James, namely, that there may be cases where the reference to the future contract may be such as to shew that the parties did not intend to be bound until it was signed; on the contrary they practically agreed to that proposition: they merely held that in the particular case before their Lordships the reference to the future contract was not such as to shew that the parties did not intend to be bound until it was signed. That is the effect of that decision, as I understand it. The leading judgment in that case was delivered by Lord Cairns. At page 1138, he quotes the following from the judgment of Lord Westbury in *Chinnock* v. *The Marchioness of Ely*, 4 DeG. J. & S. 638, at p. 645:—

> I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of *Fowle* v. *Freeman*, 9 Ves. 351; *Kennedy* v. *Lee*, 3 Mer. 441, and *Thomas* v. *Dering*, 1 Keen. 729, which establish, that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." . . . I can only say that I am willing to accept every word of Lord Westbury as there given. I assume that the construction put by him upon the letter I have quoted was a proper construction, and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made.

These judgments of Lord Westbury and Lord Cairns were commented upon by Meredith, C.J., in *Stow* v. *Currie*, 21 O.L.R. 486, and approved, with whom Teetzel, J., concurred. It is true that, according to that judgment, it was held that the agreement relied upon could not be enforced, not because the offer or acceptance was expressed to be subject to a "formal contract being prepared," but because the question before the Court was one of construction, and its solution depended upon whether "the parties intended that the terms agreed on should merely be put into form or whether they should be subject to a new agreement, the terms of which are not expressed in detail," and the two learned Judges were of opinion that the latter was the proper conclusion. (See p. 493 of the Report.) Clute, J., as it appears to me, did not limit his judgment to that ground. Reading the letter of Mr. Willoughby in the light of *Bonnewell* v. *Jenkins*, 47 L.J. Ch. 758; *Chinnock* v. *The Marchioness of Ely*, 4 DeG. J. & S. 638, and the judgment of Lord Cairns in *Rossiter* v. *Miller*, 3 A.C. 1124, I cannot conceive of a more clear and expressed intention that the city did not intend to be bound by what was suggested therein until reduced into a new, formal written agreement to be prepared and executed. In the meanwhile the suggestions were declared to be tentative only and not to affect the original contract in force. It is important to bear in mind that the defendants were a corporation, that they had executed a formal agreement under seal, and therefore it would be reasonable that before they authorized the corporation seal to be affixed to a new agreement so materially altering the effect of the original agreement, that the city council should know exactly the terms of the new agreement. However, that may be, there is Mr. Willoughby's letter, merely a tentative suggestion, and the plaintiffs could not turn it into a binding agreement by merely writing that they accepted it, in other words, they could not accept it in so far as it suited them; they must accept it in whole, and not in part; and the provision respecting a new written agreement was part of the suggestions contained in it, and the old contract was not to be affected until that new formal agreement was entered into. I may add that it has occurred to me whether the consideration on which the agreement sued on is alleged to be based, namely the consideration "of the plaintiffs allowing the defendants to use their plant and machinery, for the purpose of making a test" is warranted. That if so, it seems to me, must be spelled out from the letters of 21st February and 1st March. Does Mr. Willoughby in his letter hold that out as a consideration? Is what he writes with respect to that anything more than a suggestion? I merely throw this out: I express no decided opinion upon it.

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There will be judgment for the defendants dismissing the plaintiffs' action with costs.

The defendants counterclaim to recover the $10,000 paid under the contract according to the terms thereof hereinbefore set forth. It was proved that that amount was paid, and counsel for the plaintiffs admitted that if no new contract was proved the plaintiffs were liable under the counterclaim to return the amount.

There will be judgment for the defendants on the counterclaim for $10,000 and costs.

Decree that the defendants have a lien on the plant employed or used by the plaintiffs in the drilling of the well in question for the amount of such judgment on the counterclaim, and that the plaintiffs within three months from the date of such judgment pay into Courts to the credit of this cause the amount of such judgment, and that on default the said plant be sold at public auction at Moose Jaw to the highest bidder under the direction of the sheriff of the judicial district of Moose Jaw, one month's notice of the time and place of such sale being first given by publishing such notice in a newspaper published at Moose Jaw, and by posting printed notices of the time and place of such sale in at least fourteen public places in Moose Jaw at least one month before the time fixed for such sale, the defendants to have leave to bid at such sale. The proceeds of such sale to be applied:

(1) In payment of the expenses of the sale, including an allowance to the sheriff.

(2) On account of the defendants' judgment on the counterclaim and the costs of any execution issued thereon;

(3) The balance, if any, to be paid into Court for the use of the plaintiffs.

If not sufficient realized from the sale to satisfy the expenses of sale, including the allowance to the sheriff, and the defendants' judgment on the counterclaim, they will have execution for the balance.

Nothing in this judgment to be held to restrain the defendants from realizing on their judgments herein by issuing executions thereon either on the counterclaim or for the costs of defending the plaintiffs' action.

Judgment dismissing plaintiffs' action and allowing defendants' counterclaim.

REX ex rel. FROEHLICH v. WOELLER.

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Ontario High Court, Sutherland, J., in Chambers. March 14, 1912.

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March 14.

1. QUO WARRANTO (§ IV—41)—MUNICIPAL ELECTION—RECOGNIZANCE — TIME FOR APPLICATION.

Under Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, sec. 220, providing that in proceedings to contest the election of certain municipal officers, upon the relator shewing by affidavit reasonable ground for supposing that the election was not legal, etc., the Judge shall authorize the relator upon entering into a sufficient recognizance to serve a notice of motion to determine the matter and under section 222 of the same Act requiring the relator before serving the notice to file all the material upon which he intends to rely, an application upon the hearing of the motion to file such recognizance is too late.

2. QUO WARRANTO (§ IV—41)—PROCEEDINGS TO CONTEST—TIME FOR APPLYING.

Under Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, sec. 220, providing that proceedings to contest the election of certain municipal officers may be instituted if, within six weeks after the election or one month after acceptance of office by the person elected, the relator shews reasonable ground for suspicion that the election was not legal, etc., the application of the relator comes too late if made more than six weeks after the election and more than a month after the acceptance of the office.

[*R. ex rel. Telfer* v. *Allan*, 1 P.R. (Ont.) 214, applied.]

3. ELECTION (§ IV—93)—AFFIDAVIT OF INFORMATION AND BELIEF—QUO WARRANTO.

An allegation on information and belief in an affidavit filed by the relator in proceedings to contest an election, that the municipal councillor whose election is questioned is not a British subject either by birth or naturalization is not admissible under Con. Rule 518 requiring affidavits to be confined to a statement of facts within the deponent's knowledge, the *quo warranto* motion not being an interlocutory one so as to warrant the admission of affidavits on information and belief.

[*Robinson* v. *Morris*, 15 O.L.R. 649, specially referred to.]

Statement

A *quo warranto* application to unseat a member of the Municipal Council for the Town of Waterloo, on the ground that he was at the time of his election an alien.

The application was dismissed upon the preliminary objections.

A. R. Lewis, K.C., for the relator.

J. C. Haight, for the respondent.

Sutherland, J.

SUTHERLAND, J.:—The applicant, in his affidavit, after setting out the election of the respondent as councillor, the signing by him of the usual declaration of qualification, his acceptance of office, his attendance on and taking his seat at council meetings, his voting thereat and otherwise taking part in deliberations of the council, goes on to say: "5. That I am credibly informed and believe that the said Carl W. Woeller was not, at the time of such election or declaration, and is not now, a British subject either by birth or naturalisation."

The relator's affidavit was sworn on the 28th February, 1912, and filed with the Clerk in Chambers on the next day. It states

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that Woeller was nominated as a candidate for election as councillor on the 22nd December, 1911; and, there being no opposition, was then declared elected by acclamation; and that he took the usual declaration of qualification on the 8th January, 1912. No other material than this affidavit appears to have been filed in support of the motion up to the time of the hearing before me on the 8th instant.

Counsel for the respondent took the following preliminary objections to the motion, viz.:—

1. That the relator had not entered into a recognisance or obtained a fiat of a Judge allowing the recognizance, before service of his notice of motion, or filed any such recognizance before doing so, pursuant to the provisions of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, secs. 220 and 222.

It was admitted by counsel for the relator that no recognizance had been filed. He stated, however, that he had one in his possession, and asked to be permitted to file it upon the motion. As produced, it appears to have been entered into on the 29th February, 1912, and has upon it a fiat of the County Court Judge to the effect that it was allowed. There is no date on this fiat: see *Regina ex rel. Chauncey* v. *Billings*, 12 P.R. 404.

2. That the application is too late. It is provided by sec. 220 of the Municipal Act that, "in case within six weeks after an election or one month after acceptance of office by the person elected, the relator shews by affidavit to such Judge reasonable ground for supposing that the election was not legal," etc. Here the election was on the 22nd December, 1911, and the declaration of office and acceptance was on the 8th January, 1912. The notice of motion is dated the 28th February, 1912. The application, therefore, appears to be too late: *Regina ex rel. Telfer* v. *Allan*, 1 P.R. 214.

3. That the allegation in the affidavit of the relator that Woeller was not, at the time of such election or declaration, or at the time the affidavit was made, a British subject either by birth or naturalisation, is upon information and belief, and that it is, therefore, inadmissible under Con. Rule 518.* See *Gilbert* v. *Stiles*, 13 P.R. 121; *Dwyre* v. *Ottawa*, 25 O.A.R. 121, at p. 129; *Robinson* v. *Morris*, 15 O.L.R. 649, at p. 653.

Effect, I think, must be given to the objections, and the motion dismissed with costs.

Since the above judgment was dictated on the 12th instant, and before it was delivered to-day, the relator desired to file a further affidavit, which I declined to permit, as too late.

Objections sustained and motion dismissed.

*Rule 518, Con. Rules 1897, Ont. is as follows:—
Affidavits shall be confined to the statement of facts within the knowledge of the deponent, but on interlocutory motions, statements as to his belief, with the grounds thereof, may be admitted.

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March 28.

Ontario High Court, Latchford, J. March 28, 1912.

1. ARBITRATION (§ II—10)—PROPOSED STATUTORY ARBITRATOR—DISQUALIFICATION—BIAS.

The fact that the person proposed as an arbitrator by a corporation in a statutory arbitration is largely interested in another corporation which for a number of years previously had operated some of its undertakings upon joint account with the appointing corporation will not alone be a ground of disqualification where no such joint operations had taken place in two years and likelihood of bias was not suggested on any other ground.

[*Christie* v. *Town of Toronto Junction*, 24 O.R. 443; *Vineberg* v. *Guardian Assurance Co.*, 19 A.R. 293; *Rex* v. *Justices of Queen's County*, [1908] 2 I.R. 285, at p. 294, specially referred to.]

2. COSTS (§ II—20)—PREMATURE ACTION OR APPLICATION.

The costs of an unsuccessful summary application to remove an arbitrator made before the writ was issued in an action for that purpose which failed for want of jurisdiction, may be disposed of in the subsequent action under Ontario Con. Rule 1130 (Rules of 1897).

Statement

MOTION by the plaintiff, in the Weekly Court at Ottawa, for an injunction restraining the defendant John Burwash from acting as arbitrator in certain arbitration proceedings between the plaintiff and the defendants Gillies Brothers Limited, instituted pursuant to the Saw-Logs Driving Act, R.S.O. 1897 ch. 143.

Upon the return of the motion the parties consented that it should be treated as a motion for judgment upon the whole case.

Judgment was given for the defendants.

W. L. Scott, for the plaintiff.

R. V. Sinclair, K.C., for the defendants.

Latchford, J

LATCHFORD, J.:—The plaintiff and the defendants Gillies Brothers Limited are lumbermen, who, during the season of 1911, operated upon the Madawaska river. The plaintiff was bringing down telegraph poles, and Gillies Brothers Limited were bringing down railway ties. The progress of the telegraph poles was, it appears, slower than that of the ties; and, the Gillies Brothers refusing to assist in a joint drive, the plaintiff was, as he alleges, obliged to drive the Gillies Brothers' ties with his telegraph poles, thus greatly delaying his drive and entailing upon him expense which he now desires to have settled by arbitration.

Gillies Brothers Limited first proposed as their arbitrator Mr. H. F. McLachlin, of Ottawa, lumber merchant; but objection was made by the plaintiff to Mr. McLachlin, on the ground that Mr. McLachlin was largely interested in McLachlin Brothers Limited, a company which had been concerned for many years in driving the Madawaska river in conjunction with Gillies Brothers. Mr. McLachlin, however, objected to serve,

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owing, as he stated, to his business engagements. Gillies Brothers then formally appointed Mr. John Burwash, of Arnprior, as their arbitrator.

It appears that Mr. Burwash is the woods manager for McLachlin Brothers. Objection is, therefore, taken to his appointment, on the ground that his employers are directly and pecuniarily interested in the result of the litigation, and that he will be biassed against the plaintiff's claim and incapable of fairly trying the matters in question in this arbitration and of making a fair award between the parties.

The contention that Burwash's employers have any direct or pecuniary interest in the result of the arbitration is, in my opinion, met and overcome by the evidence before me. It is also shewn that they and Gillies Brothers have not driven the Madawaska on joint account for three years, and that McLachlin Brothers Limited have not driven the river at all for two years. It is shewn beyond question that Mr. Burwash is a man of great experience in the lumbering business. He has been engaged in it for over forty years, and has during that period had charge of the driving of logs and timber on the Madawaska and other rivers, and is therefore familiar with the conditions which would have to be dealt with by the arbitrators. He deposes that he can be perfectly independent and that he is capable of trying the matter in question fairly and without bias or prejudice. He is well known to be a man of high character; and, as the matter was presented to me upon the argument, while he does not desire to take part in the arbitration, he considers that to abandon the position to which he was appointed would be an admission of his unfitness for it.

A number of authorities were cited to me regarding the duties of an arbitrator and umpire. It is manifest that he ought to be a person who stands indifferently between the parties. Beyond the fact that the employers of Burwash have had business relations in the past with the defendants, there is no suggestion here which would tend in the slightest degree to shew that Mr. Burwash has any bias unfitting him for the position of arbitrator.

It is urged that a distinction must be drawn between the freedom from bias required in an arbitrator chosen by the parties themselves—"an agreed arbitrator"—and that necessary in persons to whom the parties are obliged *ex necessitate* to have recourse.

In cases of decisions by judicial tribunals, any direct pecuniary interest, however small, disqualifies.

Blackburn, J., in *Regina* v. *Rand* (1866), L.R. 1 Q.B. 230, shews that there is another cause. He says (p. 233): "Wherever there is a real likelihood that the Judge would from kindred or other cause have bias in favour of one of the parties, it would be very wrong for him to act."

In *Eckersley* v. *Mersey Docks Co.*, [1894] 2 Q.B. 667, Lord Esher is reported to have said (p. 671): "Persons ought not to act as judges in a matter in which the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biased."

This is regarded as extending the rule far beyond the principles stated in *Regina* v. *Rand*, L.R. 1 Q.B. 230; *Regina* v. *Dean of Rochester* (1851), 17 Q.B. 1; and *Regina* v. *Meyers*, 1 Q.B.D. 173.

Vaughan Williams, L.J., in *Rex* v. *Justices of Sunderland*, [1901] 2 K.B. 357, states that mere possibility or suspicion that a judge may be biassed is not sufficient to disqualify him.

Lord O'Brien, also, speaking for the King's Bench Division of Ireland, in *Rex* v. *Justices of Tyrone*, [1909] 2 I.R. 763, comments adversely on the supposed rule laid down by Lord Esher. He says: "That, in my opinion, goes too far. It makes the mere suspicion of unreasonable persons the test of bias. I think that the judgment was not a considered one, and that Lord Esher made use of some loose expressions. We decline, on a consideration of the cases, to go so far as that very eminent Judge. There must, in the words of Blackburn, J., be a 'real likelihood' of bias: *Regina* v. *Rand* (1886), L.R. 1 Q.B. 230. In *Rex* v. *Justices of Queen's County*, [1908] 2 I.R. 285, at p. 294, I expressed myself as follows: 'By "bias" I understand a real likelihood of an operative prejudice. There must, in my opinion, be reasonable evidence to satisfy us that there is a real likelihood of bias.'"

To disqualify a Judge or Justice, there must exist a reasonable likelihood of a bias which would affect his mind in deciding between the parties.

In *Vineberg* v. *Guardian Assurance Co.* (1890), 19 A.R. 293, an arbitrator who was a sub-agent of the agent of the defendant company was held disqualified.

Mr. Justice Rose, in *Christie* v. *Town of Toronto Junction* (1894), 24 O.R. 443, states that the *Vineberg* case probably goes the farthest of any that can be cited, and that it is difficult to distinguish it from the case then before him, in which one of the arbitrators had from time to time advised as counsel the standing solicitor for the defendant corporation. But that learned Judge did draw a distinction, and held (p. 445) that there was not such a relation between the arbitrator and the corporation as might give rise to bias or that should fairly lay the arbitrator open to observation.

The plaintiff's case fails, and I direct that judgment be entered for the defendants with costs.

As to the costs of the application, made before the issue of the writ, for the removal of the arbitrator—when no order could be made owing to want of jurisdiction—they also must

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be paid by the plaintiff. Notwithstanding that an application fails on the ground that the Court has no jurisdiction to give the relief sought, the unsuccessful party may nevertheless be ordered to pay the costs of the proceeding: Con. Rule 1130; Holmested and Langton's Judicature Act, p. 1339.

Judgment for defendant.

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April 16.

AYLESWORTH v. LEE.

Saskatchewan Supreme Court, Johnstone, J. April 16, 1912.

1. PLEADING (§ III B—312*a*)—UNCONSCIONABLE BARGAIN—FRAUD—WHAT MUST BE PLEADED.

A plaintiff suing for cancellation of an instrument given as security on the purchase of a business as a going concern upon the ground of failure of consideration, will not be permitted, after repudiating the agreement and declining to accept delivery or transfer of the assets of the business, which his vendor was always prepared to hand over in terms of the agreement, to shew that the defendant took an unconscionable advantage of him in making the contract, where he has not pleaded that the contract was voidable as an unconscionable bargain or on the ground of fraud or otherwise.

Statement

THIS was an action to have a mortgage given by the plaintiff in payment of the amount due under an agreement to purchase certain goods and chattels, and of the purchase of a business as a going concern, delivered up and cancelled and the registration of the mortgage removed from the registry; the defendant counterclaimed for the principal and interest due on the mortgage.

Judgment was given referring the matter to the local registrar to report, and further directions and costs were reserved.

D. MacLean, for plaintiff.

T. P. Morton, for defendant.

Johnstone, J.

JOHNSTONE, J.:—It is alleged by the plaintiff in the second and third paragraphs of his statement of claim, and not denied by the defendant in his defence, that in November, 1909, the defendant agreed to sell to the plaintiff certain goods and chattels in the statement of claim particularly set out, to be delivered to the plaintiff within one month, and further to sell and transfer to the plaintiff a coal business at Bladworth then being carried on by the defendant, and further to pay to the plaintiff the sum of $25.00, in consideration for which the plaintiff should execute and did execute to the defendant a mortgage on certain lands also mentioned in the statement of claim owned by the plaintiff in the sum of $1,100.00.

It was further claimed by the plaintiff that the said goods and chattels were not and had not been delivered to or received

by him as agreed, by the defendant, although frequently demanded, nor had he been placed in possession of the coal business or the buildings or appurtenances as agreed; and the plaintiff seeks to have the mortgage given by him to the defendant, which has been registered against his (the plaintiff's) lands, delivered up and cancelled, and the registration of the mortgage removed from the registry.

It is not claimed by the plaintiff that he was induced to enter into an arrangement by the defendant through fraud or connivance on the part of the latter, or that he was induced to enter into an unconscionable contract or into a contract for any other reason voidable, but he rested his right to relief solely upon the ground of failure of consideration.

In my judgment the defendant took what I would term an unconscionable advantage of the plaintiff, whether the contract was the result of the plaintiff's anxiety to enter into it or not; but with this I have nothing to do, and the question does not arise here. I find as a fact that the defendant delivered to and the plaintiff accepted all the goods and chattels, and $25 money, mentioned in the statement of claim, save the coal sheds and scales, but as to which the defendant was always ready and willing to make delivery. The plaintiff, however, having rued entering into an arrangement by which he virtually parted with his farm, became unwilling to further deal with the defendant, and refused to recognize the arrangement into which he had some considerable time previously entered.

The defendant counterclaims against the plaintiff for principal and interest past due under the said mortgage, and in default of payment, foreclosure.

Principal and interest was and is past due under the mortgage, and the defendant is entitled to be paid the amount, or such amount as may be found to be due.

It is referred to the local registrar at Saskatoon to ascertain and to report:—

(1) As to the amount due the defendant for principal and interest under the said mortgage;

(2) The value of the coal buildings mentioned in the statement of claim, together with the scales used in connection therewith, unless the defendant shall have executed and delivered to the plaintiff's solicitors within one month a good and valid bill of sale of the said buildings and scales, which he is hereby directed to do or have done, together with an assignment of his lease from the Canadian Northern Railway Company, such bill of sale and assignment of lease to be subject to the approval of the local registrar in case the parties disagree as to the sufficiency of the same.

Further directions and the question of costs of the action and of the counterclaim and reference are hereby reserved.

Order of reference made.

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APPLEYARD v. MULLIGAN.

Ontario High Court, Middleton, J., in Chambers. April 1, 1912.

1. WRIT AND PROCESS (§ I—8)—RENEWAL OF WRIT—EXCUSE FOR FAILURE TO EFFECT SERVICE WITHIN TWELVE MONTHS—INSUFFICIENT AFFIDAVIT.

A motion to vacate the renewal of a writ not served within twelve months of its issue will be granted where the order for renewal was made on an insufficient affidavit, reserving, however, to the defendants the right to move against the order if there were no adequate grounds for the renewal, and where, on the hearing of the motion to vacate, the plaintiff offers no good excuse for the failure to serve the original writ within the twelve months.

2. WRIT AND PROCESS (§ I—8)—RENEWAL OF WRIT—ABUSE OF PROCESS—KEEPING WRIT RENEWED SOLELY TO DEFEAT—STATUTE OF LIMITATIONS.

It is an abuse of the process of the Court to keep renewed for service, for the sole purpose of preventing the operation of the Statute of Limitations, and without any *bonâ fide* intention of proceeding in the action, a writ of summons of which service is deliberately withheld to keep the litigation pending for a longer time.

Statement

MOTION by the defendant George Mulligan to set aside an *ex parte* order for the renewal of the writ of summons.

The motion was granted with costs.

J. E. Jones, for the applicant.

J. H. Spence, for the plaintiff.

Middleton, J.

MIDDLETON, J.:—The action was brought by writ issued on the 31st December, 1910, for damages for breach of contract and conversion of the plaintiff's goods. The writ was not served, and on the 30th December, 1911, an application was made before me for an order for renewal of the writ; the plaintiff's solicitors stating that the writ had not been served, owing to instructions received from the plaintiff, and an affidavit was filed by a student stating that the solicitors were informed that, owing to litigation in England, the plaintiff had been unable to give the necessary instructions.

This affidavit was entirely insufficient to justify the renewal of the writ; but, as I was told that if the writ was not renewed the plaintiff would be without remedy, as her claim would be barred by the statute, I made an order providing for the renewal of the writ, and reserving to the defendants the right to move against the order if there were not in fact adequate grounds for the renewal, and directing that the writ should be served within six weeks, otherwise the renewal should be vacated.

The writ was served on one of the defendants within the time, but was not served upon the other. The defendant who was served moved to vacate, upon a number of grounds.

It is quite clear that there was no difficulty whatever in effecting service upon this defendant at any time after the

issue of the original writ. If there is any cause of action, it arose in September, 1904. The matter has been already once litigated, and the action dismissed without prejudice to any other action the plaintiff might bring with reference to her alleged claims.

In making the order of the 30th December, I thought that, if the plaintiff had any *bonâ fide* excuse for not having served the writ within the twelve months, she would be in a position to shew the facts on the return of any motion to set aside the order; and, upon this motion being made, the matter has stood from time to time until to-day, and ample opportunity has been given to put forward any excuse there may be. Nothing has been suggested. The plaintiff's solicitor says that the only information he has is a cablegram protesting that the time limited for the service of the writ was unreasonable; and I am, therefore, obliged to give effect to this motion and to vacate my former order and to set aside all that was done under and in pursuance of it, with costs against the plaintiff.

The limitation of twelve months within which a writ may be served is not intended to be idle; and, before a writ can properly be renewed, there must be some real excuse for the delay. The renewal is by no means a matter of course, and is only to be granted under very exceptional circumstances. In my view, the fact that the plaintiff, by holding a writ without service, and thereby seeking practically to extend the time allowed by the Statute of Limitations for the bringing of an action, indicates that her conduct amounts to an abuse of the processes of the Court, and is entirely unjustifiable.

Order and all done under it vacated with costs.

Motion allowed.

BARTLETT v. BARTLETT MINES, Limited.

Ontario High Court, Middleton, J., in Chambers. April 3, 1912.

1. GARNISHMENT (§ I C—18b)—EMPLOYEE RECEIVING PERCENTAGE OF PROFITS—JUDGMENT CREDITOR—ENQUIRY AS TO ARRANGEMENT.

Judgment creditors who have obtained a garnishee order attaching all debts due the debtor from a partnership firm of which the debtor is an employee and from which in addition to his wages he receives a percentage of profits under an agreement lawful under the Ontario Masters and Servants Act, 10 Edw. VII. ch. 73, sec. 3, which does not create any relation in the nature of a partnership, have no right to enter into an inquiry as to the organization of the garnishee's firm for the purpose of shewing that the judgment debtor is partner therein. [*Donahue* v. *Hull*, 24 Can. S.C.R. 683, specially referred to.]

2. GARNISHMENT (§ III—60)—JUDGMENT CREDITORS—RIGHT TO EXAMINE GARNISHEES' BOOKS — DEBTOR AN EMPLOYEE — MASTER AND SERVANTS ACT (ONT.).

Where judgment creditors have obtained a garnishee order attaching all debts due the debtor from a partnership firm of which the debtor

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is an employee and from which in addition to his wages he receives a percentage of profits under an agreement lawful under the Ontario Masters and Servants Act, 10 Edw. VII. ch. 73, sec. 3, which statute further provides that such agreement shall give to the employee no right to examine into the accounts of or interfere in the management of the business and that any statement of the employer of the net profits of the business on which he declares and appropriates a share of profits payable under such agreement shall be final and conclusive between the parties and all persons claiming under them except in the case of fraud, such creditors have no right to go into the books of the firm and its business transactions with a view of establishing that there were greater earnings than the amount shewn by the statements exhibited by the garnishees and that there ought to have been more carried to the credit of the debtor as his share of the profits.

Statement

MOTION by the defendants (judgment creditors) to commit C. W. Allen for contempt, or "for a writ of *capias ad satisfaciendum*, upon the ground that Allen, in cross-examination upon an affidavit filed by him on behalf of the garnishees, the Allen General Supplies, improperly refused to answer certain questions."

The motion was dismissed with costs against the judgment creditors.

M. L. Gordon, for the judgment creditors.
J. D. Falconbridge, for Allen.

Middleton, J.

MIDDLETON, J.:—The judgment creditors have a judgment against J. W. Bartlett, and have obtained a garnishee order attaching all debts due by the Allen General Supplies to him. It appears that Bartlett is an employee of the Allen General Supplies, a partnership, consisting, it is said, of Allen and others. Bartlett receives, in addition to his fixed salary, a percentage of the net profits—an agreement which is perfectly lawful under the Masters and Servants Act, 10 Edw. VII. (Ont.) ch. 73, sec. 3, and which does not create any relation in the nature of a partnership or give the employee the right to examine into the accounts of the business, and makes any statement by the master as to the profits conclusive between the parties, and unimpeachable except for fraud.

It appears that, at the time of the service of the garnishee summons, Bartlett's account, including his share of the profits, was overdrawn, so that there was no debt to be attached. The accounts shewing the position of the firm were produced, and from these it appeared that all declared profits had been apportioned, including Bartlett's share; and Bartlett is quite content.

On cross-examination upon this affidavit, counsel for the judgment creditors sought to inquire into the constitution and organisation of the firm and its business transactions, with a view of shewing that Bartlett was a partner. This is quite irrelevant to the inquiry, which is solely as to the existence of an attachable debt. The questions were quite improper, and

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the objection to answer was well taken. Then it was sought to go into all the books of the firm and its business transactions; it is said with a view of establishing that there were greater earnings than the amounts shewn by the statements exhibited, and that there ought to have been more carried to the credit of Bartlett as his share of the profits. This, again, seems to me to be quite beyond the limited scope of the inquiry now on foot; which, as I have already intimated, is limited to the narrow question of debt or no debt: *Donohoe* v. *Hull*, 24 Can. S.C.R. 683.

It was said by counsel in support of the motion that the whole claim was fraudulent, and that in truth Bartlett is not a servant but a partner, and that an inadequate sum is being declared as dividend, by collusion with Bartlett, in order to defeat the applicant. If this is so, all I can say is, that the applicant has entirely mistaken his remedy. He cannot enter upon an inquiry of this kind in cross-examination on an affidavit upon a garnishee application, where the sole question at issue is debt or no debt.

The motion must be dismissed, with costs to be paid by the judgment creditors to Allen forthwith after taxation.

I need not say that, so far as a *ca. sa.* is sought, the motion must have been launched under some misapprehension.

Motion dismissed.

BROWN v. STREET.

SASK.

Saskatchewan Supreme Court, Johnstone, J. April 16, 1912.

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April 16.

1. CONTRACTS (§ I E 5—97)—SALE OF LAND—SEVERAL DOCUMENTS—STATUTE OF FRAUDS.

Where the defendant orally agreed with the agent of the plaintiff to sell the plaintiff certain land and thereafter enclosed the conveyance thereof and other documents to be executed in compliance with the oral contract in a letter signed by him and addressed to the plaintiff stating that he therewith handed him a transfer of the land, describing it, to be delivered to the plaintiff upon the payment of the purchase price, the letter and the documents enclosed therein together with a sight draft made by the defendant on the plaintiff for the amount of the purchase price, constitute a contract of sale in writing under section 4 of the Statute of Frauds.

2. PRINCIPAL AND AGENT (§ II A—8)—PURCHASER'S AGENT CONTRACTING AS TO REAL ESTATE—RIGHT OF OWNER TO WITHDRAW FROM CONTRACT.

That an owner of land in agreeing to sell the same dealt with the purchaser's agent and not directly with the purchaser himself, gives the owner no right to withdraw from the contract until the purchaser signifies his approval of his agent's act, in the absence of a stipulation to that effect in the contract.

Statement

THIS is an action for specific performance of a contract for the sale of land situate in the judicial district of Saskatoon.

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Johnstone, J.

H. Y. MacDonald, for plaintiff.
A. Moxon, for defendant.

JOHNSTONE, J.:—On the 28th day of November, 1910, the plaintiff's agent, one Lovering, and the defendant met at Scott, in the said district, where an agreement for sale of the land in question was concluded between the parties, the transaction to be a cash one on completion of title. A transfer of the land purporting to be to the plaintiff was drawn up and executed by the defendant on the same day, the 28th November, as appears from this document and the affidavit of execution thereof; and in accordance with the provisions of the concluded agreement then arrived at, a bill of sale of certain of the buildings and "movable improvements" on the property from the plaintiff to the defendant was also prepared and executed by the defendant.

Further, a lease of the premises for a term of ten months from the plaintiff to the defendant was prepared and executed as well by the defendant, and the only thing yet to be done to render the contract a completed contract was the payment of the purchase-price by the plaintiff and the furnishing of a good title by the defendant, which the latter was not on that day or for some little time in a position to furnish. He had yet to acquire title, which he did, as appears from the abstract of title, on the 13th of November, 1911. On the 29th of November, 1910, the defendant wrote to the plaintiff, enclosing the said documents, in the following terms:—

> Edwin Brown, Esq., Scott, Sask.
> Canada Permanent Building,
> Winnipeg.
>
> Dear Sir,—I herewith hand you transfer for the N.W. quarter of section twenty-one (21/T. 39 R. 20 W. 3rd M.) lying immediately north of and adjoining Scott, Saskatchewan, to be delivered to you upon the payment of $7,200.00. Said property is free and clear of all incumbrances.
>
> Also bill of sale which allows me to remove my buildings on or before September 15th, 1911.
>
> Also privilege of harvesting crop for season of 1911.
>
> These papers to be delivered only upon the proper execution of the same and payment of above sum.
>
> Very truly yours,
> C. F. STREET.

These documents and this letter, with sight draft on the plaintiff in the name of Edwin Brown for $7,200, constitute the contract between the parties.

There can be no question but that the 4th section of the Statute of Frauds has been complied with, and that there was a concluded and legally binding contract as far as the defendant is concerned was clearly proved. It was urged by counsel for the defendant that the defendant had a right to withdraw

from this contract until the plaintiff had signified his approval of the act of his agent in making the purchase. I find there was no such condition attached to the contract of purchase. Both parties, agent and defendant, acted throughout on a different assumption, namely on the assumption that the sale would be carried out, as would have been the result had not the defendant, on the day he recalled the draft, had a better offer, as appears from his evidence, and the caveat of the International Securities Company, Ltd. In fact, this caveat shews a sale by him to this company as of the 9th December, 1910, of the lands in question, and the telegram of the defendant recalling his draft and the documents accompanying such draft bear date the 10th December. In my judgment the defendant in asserting he understood the agent Lovering was acting in the purchase in the interest of the International Securities Company, together with the other objections raised by him to the carrying out of the sale as was agreed, was setting up mere subterfuges and excuses for non-performance of the contract by him with the view of making better money. He did not attempt to withdraw from the one until he had secured the other—the better one.

There will be judgment for specific performance, with costs. The plaintiff to pay into Court at Saskatoon within one month $7,200 with interest at the legal rate. The defendant in the meantime to re-execute a transfer in the name of the plaintiff, or in default a vesting order to issue. With leave to the plaintiff to move for an order to add parties should this be found necessary owing to defects in title, or for an order for further direction.

Judgment for plaintiff.

D. v. W.

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April 9.

Ontario High Court, Middleton, J., in Chambers. April 9, 1912.

1. DISCOVERY AND INSPECTION (§ IV—33)—EXAMINATION OF A WITNESS—MOTION FOR PARTICULARS—ATTEMPT TO OBTAIN DISCOVERY.

On a motion for particulars of the statement of defence, a witness cannot be examined by the plaintiff as to matters not relevant to the motion but which will be in issue at the trial, where it is plain that the ulterior purpose of the questions is to obtain discovery of the evidence which the defendant will produce at the trial.

2. ABUSE OF PROCESS (§ I—2)—EXAMINATION OF WITNESS ON INTERLOCUTORY MOTION—ATTEMPTED DISCOVERY OF EVIDENCE ONLY.

It is an abuse of the process of the Courts for a plaintiff by means of the examination of a witness on a pending interlocutory motion to seek to obtain discovery of the defendant's witnesses and the evidence upon which he intends to rely at the trial, but which is not relevant to the motion itself.

Statement

MOTION by the plaintiff for an order directing Bertha Alice D. to answer certain questions asked her upon her examination

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as a witness on a pending motion, and, in default, committing her to the common gaol for contempt.

The motion was dismissed with costs to the wife.

W. T. J. Lee, for the plaintiff.

G. M. Clark, for the defendant.

C. A. Moss, for Bertha Alice D.

Middleton, J.

MIDDLETON, J.:—The action is brought by D.E.D. for $50,000 damages said to have been sustained by reason of the defendant having procured Bertha Alice D., the plaintiff's wife, to desert him and to live in adulterous intercourse with the defendant.

The defendant, in addition to denying the charges made against him, says that, if the said Bertha Alice D. did at any time cohabit with him, the defendant, and absent herself from the home of the plaintiff, this was done with the consent and connivance of the plaintiff, and for the purpose of carrying out a conspiracy between the plaintiff and his said wife, for the purpose of placing the defendant in a false and compromising position, so as to enable the plaintiff to obtain money from him.

The plaintiff has served notice of motion returnable before the Master in Chambers for particulars of the acts upon which the defendant relies in support of the allegations that the plaintiff connived at the relation between the defendant and his wife, and for particulars of the conspiracy between the plaintiff and his wife, and the times when and places where and the acts upon which the defendant relies in proving such conspiracy.

In support of this motion the plaintiff has filed no affidavit of his own, but seeks help from the examination of his wife as a witness.

The wife, on being served with a subpœna, attended with counsel, and protested against the examination sought; and, after being sworn, answered some preliminary questions; but, as soon as it became apparent that the examining counsel intended to inquire into her relations with the defendant, she, on the advice of her counsel, declined to answer, whereupon the plaintiff launched this motion.

With the pleading and its sufficiency or the fate of the motion for particulars, I am in no way concerned. It is, however, quite clear to me that the examination sought is a flagrant abuse of the process of the Court. The sufficiency of the pleading and the plaintiff's right to particulars must depend, in the first place, upon the pleading itself; possibly it may be important that he should pledge his own oath as to his ignorance of the matters upon which he seeks information; but I am clear that he has no right, by the mere launching of this motion, to call upon his wife to undergo, at his instance, an examination touching the matters which will be in issue at the trial of the action. The desire of the plaintiff, it is quite clear, is to use the process of the Court for

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an indirect and ulterior purpose. The evidence sought is not relevant to the issue upon the motion; in fact, the plaintiff's counsel went so far as to say that he was seeking in this way to ascertain the evidence upon which the defendant would rely when he came to prove his case at the trial.

Obviously this is not the function of particulars; and, if it were, the party seeking particulars would not be allowed to anticipate a favourable result of his motion by obtaining in this indirect way the information he seeks by it.

Other reasons were suggested upon the argument as justifying this examination at this stage. These reasons were even more improper than that specifically dealt with.

The motion must be dismissed; and I fix the costs of the wife, to be paid forthwith, at $30; this to cover any claim she may have for allowance to her counsel for attending upon the examination. The costs of the defendant will be to him in any event of the cause.

Motion dismissed.

WILEY v. TRUSTS AND GUARANTEE CO.

(Decision No. 1.)

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Ontario High Court, Teetzel, J. April 10, 1912.

April 10.

1. Escrow (§ I—1)—Delivery of transfer in escrow—Rights of depositor where deeds registered.

Where a transfer of property was delivered to a company on the condition that it should be held in escrow until the consideration money was paid, and it agreed to hold it unregistered so that the rights of the parties would not be prejudiced by such transfer of possession, a reconveyance will be required where, without the consideration money being paid, and without the knowledge or consent of the depositor, the company caused the transfer to be registered and transferred the property in trust to one of its officers.

Statement

Action to compel the defendants to reconvey certain properties to the plaintiffs as executors of deceased person.

There was judgment for the plaintiffs with costs.

I. F. Hellmuth, K.C., for the plaintiffs.

J. W. Bain, K.C., and *M. L. Gordon*, for the defendants.

Teetzel, J.

Teetzel, J.:—As between the plaintiffs and the defendants (the company, Warren, and Stockdale), the right of the plaintiffs to a reconveyance of the properties in question rests upon the letter of the 7th March, 1907, from the plaintiffs' solicitors to the defendant company and the reply thereto of the same date.

The first letter encloses the transfers and expressly states that they are deposited with the company only in escrow until

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the consideration-money is paid, and that, "if you cannot hold these transfers on the above conditions, kindly return the same to us, as they are left with you on no other conditions." In the letter from the defendants' manager to the plaintiffs' solicitors acknowledging the receipt of the transfers, he says: "All I can say is, that I will hold the transfers unregistered subject to the terms of the undertaking I have." (This has reference to an undertaking, dated the 22nd November, 1906, by the testator whose executors the plaintiffs are, to execute the transfers to the defendant company as trustees for the Nipegon Syndicate.) "I know of no arrangement by which Mr. Wiley is entitled to any consideration for these transfers; but, in taking this stand, I wish to state that the position of the parties is not to be prejudiced merely by the transfer of possession of the transfers from you to me."

Instead of holding the transfers "unregistered" and so that the "position of the parties is not to be prejudiced merely by the transfer of the possession of the transfers from you to me," as undertaken in the last-recited letter, the company shortly afterwards, without the knowledge or consent of the transferor or his solicitors, registered the transfers, and conveyed the properties to one of their officers in trust, who afterwards conveyed them to another officer in trust. These officers are both defendants, and the plaintiffs' claim is for a reconveyance.

I think, upon a proper construction of the letters above recited, and there being no pretence that the consideration for the transfers was paid, the plaintiffs are entitled to judgment directing the defendants to reconvey to them the lands described in the transfers, free from any incumbrance done or suffered by them, but without prejudice to any action the defendant company may be advised to bring upon the above-mentioned undertaking.

The defendants must also pay the costs of this action.

Judgment for plaintiff.

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H. C. J. 1912

April 11.

GOTTESMAN v. WERNER.

Ontario High Court. Trial before Mulock, C.J.Ex.D. April 11, 1912.

1. SPECIFIC PERFORMANCE (§ I A—11)—ENFORCING PARTIAL PERFORMANCE WITH COMPENSATION.

In an action by the purchaser for specific performance of an agreement to sell land, if it appears that the vendor has a part interest only in the land, the purchaser is entitled to specific performance to the extent of such interest, with compensation in respect of any outstanding estate.

[*Kennedy* v. *Spence*, 24 O.L.R. 535, 3 O.W.N. 76, followed.]

Statement

ACTION for specific performance of a written agreement entered into between the parties for the exchange of certain properties situate in Toronto.

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Mulock, C.J.

Judgment was given for the plaintiff for the extent of the defendant's interest in the land with compensation in respect to the outstanding estate.

L. F. Heyd, K.C., for the plaintiff.

Frank Denton, K.C., for the defendant.

MULOCK, C.J.:—The defendant, honestly believing himself to be the owner of or able to make title to certain lands on Richmond street, agreed to exchange the same for certain lands of the plaintiff; the defendant to assume payment of an existing mortgage for $1,900 upon the plaintiff's lands, and to be entitled to a mortgage for $4,000 to be made by the plaintiff on the Richmond street lands.

At the trial, the defendant alleged and endeavoured to prove that he was not the owner of the Richmond street lands, and at most had but a part interest therein, and had no control over any outstanding interests. The plaintiff, however, expressed a willingness to take specific performance to the extent of the defendant's interest in the land, with compensation in respect of any outstanding estate.

He is entitled to such relief: *Kennedy* v. *Spence*, 24 O.L.R. 535, 3 O.W.N. 76.

It should be referred to the Master to ascertain whether the defendant can make title to the lands in question, or to any interest therein. If he cannot, then the action should be dismissed with costs of the reference. If the defendant can make title, the plaintiff to be entitled to specific performance, with costs of the action, including those of the reference; but, if he is able to make title to a part interest only, then the Master should determine what sum by way of compensation should be allowed the plaintiff in respect of any outstanding estate; and, in such case, further directions and costs should be reserved.

Judgment for plaintiff.

LEE v. CHIPMAN.

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April 12.

Ontario High Court, Boyd, C. April 12, 1912.

1. WILLS (§ III K—187)—CHARGE ON LAND—ANNUITY FOR MAINTENANCE —COMMUTATION.

Where land subject to a charge for maintenance created by will is sold, the Court has no power to order the commutation of the charge for a lump sum, without the consent of all who are entitled to the purchase money.

[*Hicks* v. *Ross* (1891), 3 Ch. 499, specially referred to.]

2. WILLS (§ III K—187)—CHARGE ON LAND—ANNUITY.

Where land, subject to an annual charge for maintenance created by will is sold in partition proceedings, the Court will set apart a sufficient sum to answer the annuity claim as it falls due from time to

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time, and will retain the whole purchase money in Court for that purpose where the capitalization of the annuity would amount to more than the purchase money.

[*Harbin* v. *Masterman*, [1896] 1 Ch. 351, followed.]

Statement

AN appeal by the plaintiff and the defendant Robert Stevenson from the report of the Local Master at Cornwall in a proceeding for the partition or sale of land.

The appeal was dismissed.

D. B. Maclennan, K.C., for the appellants.

G. I. Gogo, for the other defendants.

Boyd, C.

BOYD, C.:—The testator has charged the land in question with the maintenance of his niece Bridget Lee, without limiting such support to the income of the land and without requiring her to live on the place. That, of course, runs for the life of Bridget, who is about sixty years old and somewhat infirm, and the charge is upon the whole of the lands—not merely the rents and issues thereof.

She applied, being also a part owner of the lands, for a sale or partition, and this the Master has granted, in the shape of directing a sale freed from the charge for maintenance. The sale has produced the net sum of $4,315, which is all chargeable with what will be required for maintenance. The Master finds that she is entitled to receive $500 a year for maintenance, and that the annual payment, if capitalised, would amount to more than the entire purchase-money. The amount he fixes would be $4,470; but, in his view, it is not proper so to apply the fund; he directs all to remain in Court, subject to the payment with accruing interest of the yearly sum, and no distribution of the surplus (if any) till her death.

The appeal is taken by her and one of the co-owners, Robert Stevenson, who owns five-eighths of the land, she being owner of one-eighth, to have a lump sum paid out, and she is willing to have that fixed at $3,600, which would leave a surplus, of which Robert would get $448, and she $89, and the others, five in all, small sums under $50 each.

The fund in Court represents the land, and by retaining the fund in Court she gets precisely what was intended for her by the testator so long as she lives and so long as the fund lasts. As against the resisting co-owners, who desire to take the chances of her living a less period than that accepted by the Master as her probable term of life, I do not think I should interfere with the report. There would be a change made in the terms and manner of payment by this process of commutation; and I do not think the Court would have jurisdiction so to determine against the opposition of any co-owner. Power to pay a lump sum is given by statute in certain cases of dower and the like, but not in case of a charge for maintenance created by will. That the consent of both sides is required is implied in the case

of *Hicks* v. *Ross*, [1891] 3 Ch. 499; and the general rule of the Court is, when charged land is sold, to set apart a sufficient sum to answer the claim for the annuity as it falls due from time to time: *In re Parry*, 42 Ch. D. 570, 583, approved in *Harbin* v. *Masterman*, [1896] 1 Ch. 351. That the Master has done in this report.

It was argued that the terms of the judgment suggest a lump sum as being contemplated. But the Master who made the report was the judicial officer who issued the judgment for partition, and he does not so read his judgment, nor do I. The clause relied on is, that the parties are, after paying costs, entitled to the proceeds of the sale, in the following order and proportions: the said plaintiff is entitled to such an amount as may be sufficient in the aggregate to satisfy her claim and lien for support . . . and that the residue be distributed in proper proportion among the co-owners. The word "aggregate" does not mean one payment of one lump sum, but that a sufficient aggregate sum shall be held to answer the claim as it falls due from time to time. The Master has carried out this direction and has provided fully for her claim during life. The annuitant is living with the defendant Robert; and, no doubt, it is for his interest to forward her claim; but I do not think that can be done by the Court as against the other parties interested.

The appeal should be dismissed with costs to be paid to the respondents out of the money in Court; but no costs to those supporting the appeal.

Appeal dismissed.

BIRCHENOUGH v. CITY OF MONTREAL.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Carroll and Gervais, JJ. April 29, 1912.

1. MUNICIPAL CORPORATIONS (§ II F—192)—POWERS OF—PURCHASE OF LAND.

In the absence of special provisions as to the procedure to be followed, a municipal corporation (e.g., the city of Montreal) desirous of purchasing realty for administrative purposes, may do so on resolution of its municipal council as in ordinary cases of administrative functions.

2. MUNICIPAL CORPORATIONS (§ II F—192)—PURCHASE OF LAND—FIXING PRICE.

A municipal council is not restricted as to the price to be paid for land purchased for administrative purposes, and it may be determined upon between the corporation and the vendor without any reference to the values appearing on the assessment roll.

3. EMINENT DOMAIN (§ I A—4)—RIGHT TO EXPROPRIATE—LAND FOR IMPROVEMENTS—ADMINISTRATIVE PURPOSES—MONTREAL CHARTER.

Articles 421 and 423 (*a*) of the Montreal charter as to expropriation for improvements do not apply to the acquisition of real estate for the administrative purposes of the city corporation.

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BIRCH-ENOUGH v. CITY OF MONTREAL.

APPEAL from an interlocutory judgment of the Superior Court, Charbonneau, J., rendered on December 30, 1911, whereby petitioner-appellant's petition for the issue of a writ of injunction against the city respondent was dismissed with costs.

The appeal was dismissed.

E. Pélissier, K.C., for appellant.

J. A. Jarry, for respondent.

April 29, 1912. The unanimous judgment of the Court of King's Bench was rendered by

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—Appellant prays for the issue of a writ of injunction to restrain respondent from executing a deed of purchase of certain immovable property. This demand has been rejected by the Court below.

The only question at issue is to know what procedure the city of Montreal must follow in order to acquire real estate which it needs for purposes of public utility. May the city proceed to purchase by mutual consent on a mere resolution of the council or is it obliged to submit to all the formalities laid down in articles 421 *et seq.* of its charter, which indicate the method to be followed in matters of expropriation?

The facts which gave rise to this litigation are quite simple. The city owns a sewage farm which requires to be enlarged. On November 18, 1911, the commissioners of the board of control reported to the council recommending the acquisition of certain lots of land for the purposes of this enlargement. The purchase price was fixed at the sum of $71,680. On November 27 the council, on motion carried by two-thirds of its members, approved this report and authorized the mayor and the clerk of the city to sign the deed of purchase of these lots.

This is the contract which the appellant seeks to prevent the city from executing.

He contends that when the city wishes to acquire a parcel of land for purposes of public utility it may do so in two ways only —by agreement or by proceedings in expropriation.

If it proceeds by agreement or purchase then the price cannot exceed the average value on the valuation and assessment roll for the four previous years, plus twenty per cent. thereof. If it does not proceed by purchase or agreement then it must proceed by way of expropriation.

Articles 422 and following of the charter of the city of Montreal lay it down, it is true, that the city can proceed in this manner only in matters of expropriation for reasons of general interest.

Article 421 states that the council shall not authorize or resolve upon any expropriation proceedings for carrying out any improvement until they have had a report made to them as to

the probable cost of the said improvement established by two of the assessors and by the city surveyor.

Article 422 adds that upon such report the absolute majority of the members of the entire council may decide to acquire an immovable property required for any improvement or purpose of public utility. Such acquisition may be made by agreement or by expropriation. Articles 423 and 423a add that when the immovable is acquired by agreement no greater price shall be paid therefor than the average of its value on the valuation and assessment roll for the four years preceding the year upon which such expropriation is determined upon, plus twenty per cent. thereof, and the price is apportioned amongst the proprietors whose property borders on the street or the part of the street which is to be widened or extended.

It is clear that these enactments are not applicable to the acquisition of immovables by the city for purposes of administration when the city itself has to pay the price thereof.

Article 4 of the charter declares that the city has the power to purchase and hold lands and tenements, movables and immovables and to use and put in operation all other powers that may be necessary for the just and proper fulfilment and performance of its obligations and functions.

The powers conferred on a municipal corporation are exercised through the ministry of its council. The council exercises these powers in the manner indicated by law or by the charter. If no mode of action is indicated, the council acts according to the manner it deems the most convenient. The questions submitted to the council are decided by the majority of the members present.

These principles are too elementary for us to dwell thereon more insistently.

As the charter of the city of Montreal confers upon the city the right to acquire immovable property, it may do so for all purposes of public utility or for reasons of general interest; and this power is exercised by its council, which is its agent for this purpose as for all other attributions conferred upon it.

If a mode of action is indicated for a special case, this mode must be followed. If no mode is indicated, then the municipal council has to decide in what manner the power is to be exercised.

We have seen already that in cases of widening or of extension of streets, the charter indicates the procedure to be followed. The council has no right, in such cases, to adopt another method of procedure.

But in the present case we are not dealing with the widening or extension of a street. We are dealing here with the acquisition of an immovable property which will remain the property of the city for purposes of administration.

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Archambeault, C.J.

No special mode of proceeding is indicated by the charter. The resolution of the council is, therefore, in order, and legal.

It is quite true that article 422 states that when the council is of the opinion that an immovable property is required for any improvement or purpose of public utility, the acquisition may be made by purchase or agreement, and article 423 fixes a maximum price in such a case.

But these two articles must be read together with those which precede, and those which follow them.

Article 421 speaks of expropriation for the purpose of carrying out an improvement, and article 423 (*a*) states that the purchase price agreed upon must be apportioned amongst the proprietors whose lots border on the street to be widened or extended.

In the case submitted to us the purchase price is payable from the loan fund. There can be no question of apportioning it among the neighboring proprietors.

It is, therefore, evident that the case is totally different from that covered by articles 421, and the following.

No mode of acquisition of such a property is indicated in the charter. The only restriction imposed by law on the powers of the council in this connection is that which orders the expense to be approved of and recommended by the board of commissioners.

As already stated, this recommendation has been made in this case. The council acted on the report of the board of commissioners recommending the purchase of the immovable in question, and fixing the purchase price thereof.

For these reasons we are of opinion that the judgment of the Superior Court is well founded, and it is, therefore, affirmed.

Appeal dismissed.

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April 29.

ROSTROM v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. April 29, 1912.

1. MASTER AND SERVANT (§ II B 3—156)—LIABILITY FOR INJURIES—MEMBER OF WRECKING CREW—RAIL PLUNGING.

Where in emergency work on a railroad, a member of the wrecking crew, while assisting in clearing the track after an accident from an unknown cause, is injured by the unexpected and unusual plunge of a twisted rail on its release by cutting the bolts on the fish-plate connecting the rail, no negligence is shewn against his employer and the doctrine *res ipsa loquitur* does not apply.

[*Readhead* v. *Midland*, L.R. 4 Q.B. 379; *Ferguson* v. *C.P.R.*, 12 O.W.R. 943; *O'Brien* v. *Michigan Central R. Co.*, 19 O.L.R. 345, specially referred to.]

Statement

APPEAL from verdict entered for plaintiff for injuries received.

The appeal was allowed.

Messrs. *M. G. Macneil* and *B. L. Deacon* for plaintiff.
O. H. Clark, K.C., for defendants.

RICHARDS, J.A.:—An accident happened on the defendants' railway and, as a result, a train was derailed and the track twisted out of shape. It does not appear whether the twisting of the track caused the derailing of the train, or *vice versa*. The plaintiff was employed by the defendants' section foreman to aid in the emergency work of straightening the track. In doing this it was necessary to detach the rails from the ties and fish-plates. Owing to the strain to which the track had been put, the nuts on the bolts, which held the rails in line between the fish-plates, could not be unscrewed, and it was necessary to remove them by the use of a cold chisel and sledge hammer. The cold chisel was fixed at the end of a handle, which was at right angles to the line of the chisel; and, to remove the bolts, it was necessary for one man, holding the cold chisel by this handle, to place it above the bolt, while another, by striking the chisel with the sledge hammer, drove it through the nuts.

After a number of nuts had been removed in this way the plaintiff was holding the cold chisel while the section foreman was using the sledge hammer to remove the last nut which held one of the rails in place. At the first blow of the hammer the nut flew off and the rail, which had been bent by the accident, the result of which the plaintiff was assisting in repairing, sprung outwards, striking the plaintiff on his leg, which it broke. The plaintiff's action for damages resulting therefrom was tried before Mr. Justice Macdonald with a jury. The jury found, in effect, that the injury to the plaintiff was caused by the negligence of the defendant company, or one or more of its servants, by not warning the plaintiff, who was inexperienced man at wrecking work, that there was danger in working on, or separating, bent rails. They further held that, had the plaintiff been warned that there was a probability or possibility of the rail springing, he could have executed his work just as efficiently by, and while, standing clear of the rail in question. The jury fixed the damages and the learned trial Judge entered a verdict for the plaintiff. From that the defendants appeal.

The question is whether there was anything to justify the finding of the jury, that there was negligence on the part of the defendants, or their servants. The evidence shews that, in the course of many years, no such accident was known to have happened, and that there was no reason whatever to anticipate that the rail would spring; all experience being to the contrary. I think that, if the onus is on the plaintiff, as it seems to me that it is, he has failed to shew anything that would justify the jury in its finding of negligence.

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But it is urged by counsel for the plaintiff, that it was not necessary to do more than prove the accident to the plaintiff while in the defendants' employ, and that the rule *res ipsa loquitur* applies. Probably the best definition of the rule is that of Channell, B., in *Bridges* v. *North London Ry. Co.*, in the Exchequer Chamber, reported in L.R. 6 Q.B. 377. The learned Baron says, at page 391:—

> It is clear that in order to succeed the plaintiff had to give evidence that the death of the deceased was caused by the negligence of the defendants. There is no real exception to the rule that in these cases the burden of proof lies on the plaintiff. There may be cases of accidents the mere proof of which supplies the necessary evidence of negligence, for the nature of the accident may be such that it could not be caused otherwise than by the defendants' negligence. There, as has been said, *res ipsa loquitur*.

The learned Baron in the same paragraph states another line of cases where the proof of the accident may be sufficient to put the defendants on their defence. He says:—

> Again there may be cases, as in *Scott* v. *London Dock Co.*, 3 H. & C. 596, where it is shewn that the accident is such that its real cause may be the negligence of the defendant, and that whether it is so or not is within the knowledge of the defendant, and not within the knowledge of the plaintiff. In such cases the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant.

In the present case no such circumstances, as referred to by the learned Baron arise. There was no reason whatever, to suppose that the rail might spring. That, I think, is clearly established by the evidence. Then, the case does not come within the line of those cases, such as where the brick fell from a viaduct, which the defendants had constructed, and injured the plaintiff, where negligence could be presumed from the fact that the defendants constructed the viaduct and it nevertheless was so badly constructed that the brick fell.

Here the defendants are not shewn to have in any way been guilty of negligence in the original accident, which caused the bending of the track and the derailment of the train. They were endeavouring to put right that which had happened from some unknown cause; and the plaintiff, knowing, as everyone must, that a certain amount of danger is connected with emergency work, such as that of putting this track to rights, entered the defendants' service for that purpose, and, in so doing, took upon himself the risk of any dangers which the defendants could not, by reasonable skill or knowledge, have been expected to guard against.

In *Ferguson* v. *C.P.R.*, 12 O.W.R. 943, the facts were that, as a train of the defendant company was being drawn around

a curve at the usual rate at which passenger trains were there drawn, but by a somewhat heavier engine than was ordinarily used, an apparently good rail broke across and caused an accident to the plaintiff, who was a railway mail clerk, travelling upon the train in the course of his duties as such. It was held there that the rule of *res ipsa loquitur* had no application. Although the facts in that case differ from those in the present, the principle underlying it seems to me to be the same.

Richards, J.A.

In *Readhead* v. *Midland*, L.R. 4 Q.B. 379, the plaintiff was a passenger on the defendant's railway, and was injured by an accident caused by the breaking of the tire of one of the car wheels, arising from a latent defect in the tire, which defect was not attributable to any fault on the part of the manufacturer and could not be detected previous to the breaking of the tire. That case has become a leading one. It was held in the Exchequer Chamber, that the defendants were not liable for negligence, and the principle applied seems to me applicable here. I cannot see how, in any way, it could have been expected, or anticipated, that the rail which injured the present plaintiff, would spring on being loosened from the fish-plates.

No evidence upon which the jury could have found that there was negligence on the part of the defendants having, in my opinion, been given, I think the appeal should be allowed with costs. The judgment entered in the Court below should be set aside and judgment entered for the defendants with costs.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff has failed to prove negligence on the part of the defendants.

In his statement of claim he alleged two grounds on which he complained the defendants had failed to exercise due care. The first of these was the failure to supply proper appliances to the plaintiff to enable him to do in safety the work he was ordered to do. There was no evidence shewing what appliances should have been, or could have been, furnished, which would have obviated the danger and prevented the accident. The work on which the plaintiff was engaged was the clearing up of a wreck on the railway. The defendants could not have been expected to furnish ways, means or appliances in such a sudden emergency in the same manner as would be required of them in the prosecution of an ordinary work.

The other ground taken by the plaintiff was that the defendants and their foreman in charge of the work failed to warn the plaintiff of the dangerous nature of the operation which he was attempting to perform: namely, the cutting of a bent or twisted rail, which it is alleged the foreman knew, or ought to have known, was liable to fly and cause danger. The plaintiff charges that the dangerous nature of the work was well-known to the defendant's foreman, but unknown to the plaintiff. The evidence wholly failed to shew that the danger was

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known to the foreman or that anyone feared or anticipated the occurrence of the accident. According to the evidence, the occurrence was an extraordinary one. A number of joints between the bent or twisted rails had been severed without any of them shewing signs of rebounding when the connection was divided. That the rail in question would fly and strike the plaintiff when the bolt was cut was a thing which was wholly unexpected and was a danger which, as far as the evidence shews, was unknown to the defendants or their servants and could not reasonably have been anticipated from past experience.

The plaintiff sought to invoke the application of the maxim *res ipsa loquitur*, but I cannot find a similarity between any of the cases in which that maxim was applied and the present one. The principle is thus stated by Erle, C.J., in *Scott* v. *London, etc. Docks Co.*, 3 H. & C. 596, at page 601:—

> Where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management, use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Without discussing the cases in which *res ipsa loquitur* has been invoked, I might say that its application seems to have been carried furthest in *Kearney* v. *London, Brighton, etc. Ry. Co.*, L.R. 5 Q.B. 411; L.R. 6 Q.B. 759. In that case a brick fell from a pier of a railway bridge over a highway and injured the plaintiff while he was passing along the highway underneath. The jury having found for the plaintiff, the verdict was upheld. In that case the railway had constructed its bridge over a highway and was bound to keep it in repair so that damage would not be caused to persons using the highway. The falling of the brick, therefore, afforded some presumption of negligence when otherwise unexplained.

In the present case the defendants cannot be held responsible for the condition of the bent rail, which caused the injury. That condition was the result of an accident, the responsibility for which is not shewn. While the foreman and the plaintiff were endeavouring to remove this bent rail, the accident occurred. The springing of the rail on cutting the joint was an exceptional and wholly unexpected occurrence. It cannot be assumed that there was a lack of proper care to guard against the happening of something unforeseen, which the evidence shews had never before been known to occur.

Counsel for the defendants urged that the maxim does not apply as between master and servant, relying upon the cases cited in Beven on Negligence, 3rd ed. p. 130. In *O'Brien* v. *Michigan Central R.R. Co.*, 19 O.L.R. 345, the Ontario Court

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of Appeal expressed a contrary opinion. Lord Halsbury in *Smith* v. *Baker*, [1891] A.C. 325, at page 335, appears to take the same view.

I think, however, that the principle sought to be invoked cannot be applied in this case for the other reasons which I have mentioned. The occurrence which gave rise to this action must be regarded simply as an accident for which no one can be held responsible.

The judgment should be set aside and a judgment entered for defendants.

Perdue, J.A.

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

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

Appeal allowed.

HAWKINS v. McGUIGAN.

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April 15.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Sutherland, JJ. April 15, 1912.

1. HIGHWAYS (§ IV C—222)—OBSTRUCTION IN HIGHWAY—SUBSTITUTE FOR REGULAR HIGHWAY—PEDESTRIAN USING HIGHWAY—CONTRIBUTORY NEGLIGENCE.

Where an obstruction has been placed upon a highway, failure on the part of one using the highway to avail himself of an alternative road provided by the person responsible for the obstruction does not of itself disentitle him to recover damages for injuries sustained by reason of the obstruction, but the question of contributory negligence may still be left to the jury.

2. HIGHWAYS (§ IV B—182)—LIABILITY OF INDEPENDENT CONTRACTOR—OBSTRUCTIONS IN HIGHWAY.

One who, as an independent contractor and for his own profit, agrees with a municipal corporation to do work upon a highway within the municipality, is liable in damages to persons who, without fault on their part, are injured by reason of any obstruction to the highway caused by him.

[*Tilling* v. *Dick*, [1905] 1 K.B. 562, at p. 571, and *City of Birmingham* v. *Law*, [1910] 2 K.B. 965, referred to.]

Statement

APPEAL by the defendant from the judgment of Meredith, C.J.C.P., in an action tried by him with a jury, in which the plaintiff was awarded $1,000 damages for injuries sustained by him by falling, while upon King street east, at the junction of that street with the Don Improvement road, in the city of Toronto.

The appeal was dismissed.

M. K. Cowan, K.C., for the defendant.

H. D. Gamble, K.C., for the plaintiff.

Britton, J.

The judgment of the Court was delivered by BRITTON, J.:—The defendant was engaged, under a contract with the Corporation of the City of Toronto, in erecting a bridge over the Don river at its intersection with King and Queen streets east. A roadway had been made, called the Don Improvement road,

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crossing King street and extending southerly upon the Don Esplanade. It is alleged that there was a sharp decline from the sidewalk upon the south side of King street to the Don Improvement road, and that this sidewalk and the roadway at the point of intersection of the sidewalk with the Don Improvement road was in a dangerous condition.

The plaintiff was a workman employed in Sabiston's factory, which is situate on the Don Improvement road, south of King street. He resides on Sumach street, and on the morning of the accident went from his home by his usual route, which was down Sumach street to Queen street, along Queen street to River street, across River street to King street, then along King street to the corner of King and the Don Esplanade. He turned that corner to go to Sabiston's factory. There was a sidewalk, two or three planks wide, laid longitudinally, leading from or nearly from the corner mentioned, to the factory. This had been the plaintiff's usual route for five years. The defendant, in the execution of his contract work, had thrown a considerable quantity of earth upon the King street sidewalk at this corner, erecting there a bank two or three feet high. As stated, the plaintiff, arriving at this corner, turned to the right and started to go down the icy incline, when he slipped and broke his leg. This bank, upon the sidewalk, directly upon the road usually travelled by persons going to and from the factory by way of King street, was a dangerous obstruction. Depositing earth there to the extent proved, leaving it there until ice formed upon it, leaving what appeared as a pathway, connecting, or nearly connecting the plank walk on Don Esplanade with the sidewalk on King street, was evidence of negligence.

The jury found that the defendant, in not providing a proper approach to the sidewalk, and in leaving the road in the place where the accident happened in the condition in which it was when the accident happened, was guilty of negligence.

It was established—it was apparently admitted by the defendant—that, before his interference with King street, it was higher than the Don Esplanade—and consequently a slope down to the Don Esplanade. To increase this slope upon the pathway in such general use, and not either stopping it up or in some way protecting persons using it, was a dangerous experiment, by the defendant.

The defence, apart from that of denial of negligence by the defendant, is that of contributory negligence by the plaintiff, and in that connection it is said that there was a good and sufficient road provided by the defendant which the plaintiff could and ought to have used. I am unable to say that, even with the bank in plain sight—increasing the incline to the Don Esplanade—it was so much the duty of the plaintiff, in the circumstances of this case, to go by another road—newly made,

apparently more for horses and vehicles than for those on foot —as to prevent his recovery. It was a question for the jury. This case could not have properly been taken from the jury. The finding of the jury is entirely in favour of the plaintiff, not only as to there being no negligence on his part, but that the newly made roadway provided as a means of access from King street to the Don Esplanade, was not reasonably safe and sufficient for traffic, vehicular and pedestrian. I cannot agree that, as argued, the findings of the jury were "perverse." I cannot think that it was necessarily a negligent act on the part of the plaintiff to attempt to go to the Don Esplanade by means of this incline. He knew of the danger; but it was in his path, on the place where he had a right to be; and he sought to protect himself by careful walking—he did not apparently realise the extent of the danger. The plaintiff took his chances, but did so carefully endeavouring to avoid accident.

As between the defendant and those lawfully using King street and the Don Esplanade, this is a case of wrongful obstruction by the defendant of the highway, and the defendant is not protected by his contract with the city corporation against damages to persons, without fault on their part, sustained by reason of such obstruction. I do not need to consider or discuss the question of liability of the Corporation of the City of Toronto to the plaintiff, further than to say, as was said in the case of *Tilling* v. *Dick*, [1905] 1 K.B. 562, at p. 571, to which case reference was made on the argument, that the contractor was not the servant of the corporation. The work complained of was done by the defendant as contractor, and in doing it he was not acting in the execution of any public duty or authority, but simply in performance of the private obligations which arose from the contract into which he had entered. The defendant, as an independent contractor doing the work for his own profit, was not authorised to obstruct the street in the manner complained of; and his duty to the public was to do his work in such a way as not to injure persons lawfully and carefully using the street.

There was no suggestion that this pathway could not, if allowed to remain, have been made safe.

I have read the charge to the jury of the learned trial Judge, and also his reasons for judgment; and it seems to me that the plaintiff is clearly entitled to recover.

The case of *City of Birmingham* v. *Law*, [1910] 2 K.B. 965, is in favour of the plaintiff's contention.

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

Appeal dismissed.

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DINNICK v. CITY OF TORONTO et al.

Ontario High Court, Riddell, J., in Chambers. April 15, 1912.

1. BUILDINGS (§ I A—5)—MUNICIPAL BY-LAW—REGULATION OF DISTANCE FROM STREET LINE.

A municipal by-law passed under the authority of the Municipal Amendment Act, 4 Edw. VII. ch. 22, sec. 19, regulating the distance from the street line at which buildings on a residential street may be built, need not be confined to such buildings as front on the residential street, and a prohibition in such a by-law against the erection of any building within the given distance from the street line is therefore valid.

[*City of Toronto* v. *Shultz*, 19 O.W.R. 1013, dissented from, and question referred to a Divisional Court.]

Statement

MOTION by W. L. Dinnick for a mandamus directed to the Corporation of the City of Toronto and the City Architect to issue a permit to the applicant for the erection of an apartment house on the corner of Avenue road and St. Clair avenue, in the city of Toronto.

This case was referred to a Divisional Court.

W. C. Chisholm, K.C., for the applicant.

H. Howitt, for the respondents.

Riddell, J.

RIDDELL, J.:—By the Act (1904) 4 Edw. VII. ch. 22, sec. 19, it was provided that "the councils of cities . . . are authorised . . . to pass and enforce . . . by-laws . . . to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street."

The Council of the City of Toronto, purporting to act under the powers given by this statute, in December, 1911, passed by-law No. 5891, containing the following provisions: "No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road, from St. Clair avenue to Lonsdale road, within a distance of forty feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

Avenue road is admittedly a "residential street," within the meaning of the Act.

Mr. Dinnick, being the owner of the block of land at the north-east corner of St. Clair avenue and Avenue road, desired to build an apartment house at the corner, 60 feet on St. Clair avenue and 130 feet on Avenue road. Drawing up all proper plans and specifications, he applied to the City Architect for a building permit, which was refused, solely on the ground that the proposed building would be in violation of by-law 5891.

Upon motion for a mandamus, the respondents did not insist upon any technical objection—and the real matter to be

decided is as to the validity of the by-law and its application to the present case.

It is admitted that the building "fronts" on St. Clair avenue.

The first and substantial contention of the applicant is, that the legislation does not empower the city to pass a by-law prohibiting the erection of a building within a certain distance of a residential street, unless the proposed building "fronts" on the street.

I do not agree with that contention. The power is given to limit the distance of buildings from the line of the street in front of the proposed buildings—the street is in front of the building, indeed, but that does not necessarily imply that the part of the building which is in common parlance called "the front" should face or look toward the street.

Any side or face of a building is a front, although the word is more commonly used to denote the entrance side: New Oxford Dict., sub voc. "Front," p. 563, col. 3, para. 6. Back-front, rear-front, the four fronts of a house, are all terms in common use—and there is no reason why a building should not "front" on two, three, or four streets—or that two, three, or four streets should not be "in front thereof"—all such streets would, I think, "confront" the building: New Oxford Dict., "Front," p. 564, col. 1, para. 10 (*a*).

We must look at the object of the legislation. It must be plain that the whole object was to enable the city to make residential streets more attractive, etc., by preventing building out to the street line. It would make a farce of the legislation if persons were to be allowed to build with the gable ends of their houses toward the street and up to the line of the street, claiming that they did not front on the street, and therefore the street was not "in front thereof." And it would be no less absurd to say that, if people could not build in that way in the middle of the block, they could at the corners. I am of the opinion that the power exists to prevent any buildings being placed within a distance (of course reasonable) of the line of a residential street.

Then it is said that this is in effect an expropriation of the applicant's land on St. Clair avenue, but this is an argument to be advanced to the legislature and to the council.

The by-law is not perhaps very well drawn—it is not lots through which Avenue road runs, and which, therefore, are "on both sides of Avenue road," which are meant, but lots on each side. But the language is quite intelligible; and can fairly be made to cover the lot of the applicant. "East and west lines" must, of course, be read distributively. No objection can be taken to the prohibition to "build on the lots fronting or abutting on . . . Avenue road," where the legislation

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authorises a prohibition to build on any lot within the fixed distance of the line of the street.

I should dismiss the motion but that a decision of the Chief Justice of the King's Bench has been brought to my attention, *City of Toronto* v. *Shultz* (1911), 19 O.W.R. 1013, which seems to be the other way. I am not at liberty to disregard sec. 81 (2) of the Ontario Judicature Act; but, as, with the utmost respect, I "deem the decision previously given to be wrong and of sufficient importance to be considered in a higher Court," I refer this case to a Divisional Court.

Order referring case to Divisional Court.

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GUY MAJOR CO. v. CANADIAN FLAXHILLS.

Ontario High Court. Trial before Britton, J. April 15, 1912.

1. PENALTIES (§ I—4)—RIGHT OF CORPORATION TO SUE FOR PENALTIES—STATUTORY AUTHORITY.

A corporation cannot sue for penalties as a common informer, unless expressly authorized to do so by the statute imposing the penalties.

[*Guardians of the Poor of the Parish of St. Leonard's, Shoreditch* v. *Franklin*, 3 C.P.D. 377, followed.]

2. CORPORATIONS AND COMPANIES (§ IV A—49)—POWERS OF CORPORATIONS TO SUE FOR PENALTIES—MEANING OF A PRIVATE PERSON.

A corporation is not a "private person" within the meaning of sec. 131, sub-sec. 6 of the Ontario Companies Act, 7 Edw. VII. ch. 34 (see now 2 Geo. V. ch. 31, sec. 134, sub-section 6), and, therefore, cannot sue for the penalties provided thereby for default in making annual returns.

Statement

ACTION by a corporation for penalties, alleged to have been incurred for failure to comply with the Ontario Companies Act.

The action was dismissed.

R. S. Hays, for the plaintiffs.

H. D. Gamble, K.C., and *F. Erichsen Brown*, for the defendants.

Britton, J.

BRITTON, J.:—The plaintiffs, a foreign corporation, having their head office at Toledo, Ohio, have brought this action against the defendants for penalties which, it is alleged, the defendants incurred because they did not on or before the 8th February in each of the years 1909, 1910, and 1911, transmit a summary, properly verified, containing, as of the 31st December preceding, the particulars required by the Companies Act, 7 Edw. VII. ch. 34, sec. 131, sub-secs. 5 and 6, to the Provincial Secretary for the Province of Ontario.

The penalty for such default is $20 for every day during which the default continues.

The Act cited, sec. 131, sub-sec. 6, provides that these penalties "shall be recoverable only by action at the suit of or brought by a private person suing on his own behalf with the written consent of the Attorney-General of the Province of Ontario."

The defendants were incorporated by letters patent dated the 10th September, 1908, and therefore should have made the returns required on or before the 8th February in each of the years mentioned.

The consent of the Attorney-General was obtained by the plaintiffs dated the 19th December, 1911, for bringing this action, but limiting the plaintiffs' right of recovery to a sum not exceeding $3,000.

The action was commenced on the 27th September, 1911.

The returns which should have been made on or before the 8th February, 1909 and 1910 respectively, were not made until the 1st September, 1911, and the return due on the 8th February, 1911, was made on the 28th July, 1911. The aggregate of the *per diem* penalties, if the plaintiffs are entitled to recover, would, for the period within two years prior to the commencement of this action, largely exceed $3,000. The action was commenced not only against the defendant corporation but also against George A. Turner, who, at the time the returns should have been made, was manager of the company. The action as against Turner was discontinued, but was proceeded with against the company.

The pleadings do not afford much information as to the real merits of the action or defence. In fact, the statement of defence, if it sets up any defence, is, that the requisite returns were duly made before the consent of the Attorney-General was obtained and before the commencement of the action. The argument was, that there must, under the Act, be a continuing default at the time of the consent of the Attorney-General and at the time of the commencement of the action. I am not prepared to accede to that contention; and, taking the view I do of the plaintiffs' right to recover, it is not necessary to consider that objection further.

At the trial many other objections were raised to the right of the plaintiffs to recover—and I allow, if necessary, an amendment of the statement of defence, so that these objections may be set out.

All that is known of the plaintiff corporation is what appears in the statement of claim, that they "carry on the manufacture and sale of linseed oils." As the defendants did not specifically deny the incorporation of the plaintiffs, it was not necessary to prove it: see Con. Rule 281. Passing over all the other objections raised, I am of opinion that the plaintiff corporation have no right, as such corporation, to sue for these penalties.

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Britton, J.

The plaintiff is not "a private person" suing on his own behalf within the meaning of the statute. There is nothing in the Act under which this action is brought as to appropriation of these penalties—so 7 Edw. VII. ch. 26, sec. 1, sub-sec. 2, applies, and one half would go to the "private party" suing, and the other half to the Crown.

A corporation cannot for the purpose of recovering penalties be a common informer, unless expressly authorised by statute—and express authority to the plaintiffs to sue is wanting in this case.

The case seems covered by the authority of *Guardians of the Poor of the Parish of St. Leonards, Shoreditch*, v. *Franklin*, 3 C.P.D. 377, 9 L.T.R. 122.

The point came up so recently as the 9th January last before the Beaconsfield Petty Sessions, when the above case was cited and followed. At the Petty Sessions, the points were successfully raised that the prosecutor had not proved the minute of the corporation authorising the commencement of proceedings and had not passed the minute authorising the prosecuting solicitor to appear to prosecute. I would be slow to follow—even if I should follow—mere technicalities raised to prevent recovery in a proper case; but in an action for a penalty the law must be strictly followed and rigidly interpreted. A reference to the Sessions case may be found in Law Notes (Northport, N.Y.), the April number, 1912, at p. 16.

In this case it was not shewn that the plaintiff corporation had any power to collect penalties even in the State of Ohio—much less to collect them in Ontario.

The Joint Stock Companies Act may be wide enough to permit the incorporation of a company to collect penalties from defaulting companies or individuals. The plaintiff corporation were not shewn to be such, and no license was produced authorising them to do business in Ontario. The Interpretation Act, 7 Edw. VII. ch. 8, sec. 7, clause 13, which provides that "person" shall include any body corporate, does not help the plaintiffs. This interpretation clause seems to me to emphasise the words "private person" to distinguish a private person from an ordinary corporation. Once the position of the plaintiff is established as that of attempting to act as a common informer—there must be express statutory authority to sue. American cases are in accord with the English, and they allow a corporation to sue for a penalty only when the corporation is, eo nomine, to get the penalty for its own use—or for other purposes. See *Wiscasset* v. *Trundy*, 12 Me. 204.

In *Ancient City Sportsmen's Club* v. *Miller*, 7 Lansing (N.Y.) 412, it was held that the power to sue and be sued is subject to the qualification that it is within the scope of the statute and the legitimate purpose of the organisation. Where

penalties are recoverable by any person in his own name, power to recover them is not conferred upon corporations.

Judgment will be for the defendants, dismissing this action with costs.

Action dismissed.

LLOY v. WELLS.

Saskatchewan Supreme Court. Trial before Johnstone, J. April 16, 1912.

1. CONTRACTS (§ I E—97)—STATUTE OF FRAUDS—SEVERAL WRITINGS—BINDING AGREEMENT.

Where an owner answers a real estate agent's inquiry as to price and terms and intimation of the possibility of prospective sale on given terms, by instructions to take a deposit and prepare agreements for signature, the contract is closed by taking the deposit and giving a receipt shewing a sale on the terms of the instructions.

2. SPECIFIC PERFORMANCE (§ I A—12)—RECEIPT FOR CASH PAYMENT—AGENT'S AUTHORITY.

Though payment of a cash deposit on a purchase of land is not such part performance as to remove the case from the operation of the Statute of Frauds, yet a receipt given for said deposit which sets out a sale by an agent, upon terms authorized by his written instructions from the owner, may furnish the written memorandum of the sale required by the statute, so as to warrant specific performance as against the owner.

[*Hussey* v. *Horne-Payne*, 3 A.C. 316, specially referred to.]

Statement

THE plaintiff sues for specific performance of a contract entered into by the defendant to sell to her certain lands.

Judgment was given for specific performance of the contract.

G. A. Cruise, for plaintiff.

A. M. McIntyre, for defendant.

Johnstone, J.

JOHNSTONE, J.:—As laid down in *Hussey* v. *Horne-Payne*, 3 A.C. 316, the plaintiff must shew two things: she must shew that there was a concluded contract between the parties and that there is a note or memorandum in writing of that contract sufficient to satisfy the requirements of the Statute of Frauds. That there was such a note or memorandum in writing to satisfy the statute referred to it is claimed by the plaintiff is proved by correspondence between the defendant and his agent, one Smith, and the receipt of the latter for $25 received by such agent from the plaintiff's husband, who was acting in the matter of the purchase of the lot in question for the plaintiff, including the agreement of sale prepared at the instance of the defendant and the agent Smith and signed by the plaintiff.

On the 14th October, 1910, one F. W. Smith, a real estate agent at Saskatoon, wrote to the defendant asking in effect for the price and terms on which he (the defendant) would sell the lot in question, intimating at the same time that he (Smith)

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had a prospective purchaser who might be induced to buy on terms of one quarter cash, balance six, twelve and eighteen months, 8 per cent. interest. In reply to this inquiry the defendant wrote to Smith "that for lot 25, the inside one, I will take $1,200 on the terms you mention. Now, take a deposit on this lot at once and get agreements made, and send to me here to sign. Now close this deal out quick," etc., etc.

On the 20th October Smith sold to the plaintiff through her husband on the terms stated, taking a deposit, as evidenced by the following receipt:—

Saskatoon, Sask., Oct. 20, 1910.

No. 2.

Received from Alexander Lloy for Mrs. Isabella A. Lloy the sum of twenty-five dollars deposit on lot 25, twenty-five in block 20, twenty, plan C.E., Riversdale, Saskatoon. Price $1,200, quarter cash balance 6-12-18 months, 8 per cent.

$25.00.

F. W. SMITH.

On the same day Smith wrote to the defendant advising him of the sale and enclosing to him the twenty-five dollar deposit, and asking for the full name of the defendant so that an agreement of sale might be prepared and signed by the purchaser. The defendant replied as follows:—

Evesham, Sask., Oct. 22, 1910.

Mr. F. W. Smith,

Saskatoon, Sask.

Dear Sir,—Yours of the 20th to hand this morning, and in reply would say that my name in full is just Alfred Wells, occupation, "farmer." I am sorry that you could not have made the payments 6 and 12 month only, not eighteen. You might work him for that yet. Got the $25 O.K., thanking you for same. Trust this is enough for now, am in big hurry.

Yours truly,

ALFRED WELLS.

Agreements of sale were prepared at the instance of Smith and signed by the plaintiff on the 22nd October. The defendant refused to carry out the sale. The plaintiff then sued for specific performance, and in the alternative, for damages for breach.

The defendant set up several defences, but he relied chiefly upon his defence under the 4th section of the Statute of Frauds. The other issues I find in the plaintiff's favour.

Looking at the whole correspondence and the documentary evidence, I have no hesitation in holding that there was a concluded contract between the parties, and also a memorandum of that contract sufficient to satisfy the requirements of the Statute of Frauds. The evidence of such a memorandum is even stronger than that in *Andrews* v. *Calori*, 38 Can. S.C.R. 588.

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In my opinion the plaintiff is entitled to specific performance, and in the alternative to damages.

There will be a reference to the local registrar at Saskatoon to inquire as to title, and should the defendant be not in a position as to title to specifically perform his contract, a further inquiry as to the damages to which the plaintiff should be held entitled.

Further directions and the question of costs are reserved until the local registrar shall have made his report.

Judgment for specific performance.

McNAUGHTON v. MULLOY.

(Decision No. 2.)

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April 15.

Ontario High Court, Riddell, J., in Chambers. April 15, 1912.

APPEAL (§ VII I—351)—ORDER DISMISSING ACTION FOR WANT OF PROSECUTION—DISCRETION.

The dismissal of an action for want of prosecution is discretionary, and the order of the Master in Chambers in such a case will not be interfered with, unless the Judge in appeal can say that the Master exercised his discretion wrongly, or that his order was not the right order.

[*Sievier* v. *Spearman*, 74 L.T.R. 132, followed.]

Statement

AN appeal by the defendant from the order of the Master in Chambers, 3 O.W.N. 970.

The appeal was dismissed.

Grayson Smith, for the defendant.
D. Inglis Grant, for the plaintiff.

Riddell, J.

RIDDELL, J.:—In *Sievier* v. *Spearman* (1896), 74 L.T.R. 132, in a motion to dismiss for want of prosecution, the Court of Appeal said: "No doubt, the Master had a right to dismiss the action for want of prosecution, or to make an order in such terms as he might think just and proper . . . What form of order he will make depends upon the circumstances of the case as they are presented to him. Also he might attach other conditions to the order, provided they were not unreasonable or unfair. The Judge could alter the order made by the Master if he thought that it was not the right order . . ."

I am unable to say, on the facts of the present case, that the discretion to be exercised by the Master was wrongly exercised —or to say that the order "was not the right order."

The appeal will be dismissed; costs to the plaintiff in any event.

Appeal dismissed.

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April 15.

Re McCREARY v. BRENNAN.

Ontario High Court of Justice, Middleton, J., in Chambers. April 15, 1912.

1. GARNISHMENT (§ I C—19)—BREACH OF WARRANTY—"CLAIM FOR DAMAGES"—DIVISION COURTS ACT (ONT.).

An action for breach of warranty of quantity upon a sale of goods is a "claim for damages" within the meaning of section 146 of the Division Courts Act, 10 Edw. VII. (Ont.) ch. 32, and the plaintiff in such an action cannot garnish before judgment.

2. PROHIBITION (§ IV—15*a*)—GARNISHMENT PROCEEDINGS IN DIVISION COURT—JURISDICTION.

Prohibition lies against garnishment proceedings in a Division Court before judgment in an action for breach of warranty of quantity upon a sale of goods such being a "claim for damages" within the exception of sec. 146 of the Division Courts Act (Ont.), and there being, therefore, no jurisdiction in the Division Court to issue garnishment proceedings before judgment in respect thereof.

3. PROHIBITION (§ I—1)—JURISDICTION OF DIVISION COURTS—MOTION TO COURT BELOW TO SET ASIDE PROCESS.

An unsuccessful motion before the Division Court Judge under section 160 of the Division Courts Act to discharge garnishment proceedings does not defeat the right to prohibition for want of jurisdiction.

Statement

MOTION by the primary debtor for an order prohibiting a further prosecution of garnishee proceedings before judgment, in the Fifth Division Court in the County of Kent, upon the ground that the claim of the primary creditor against the primary debtor was "a claim for damages;" and that, therefore, under the provisions of the Division Courts Act, 10 Edw. VII. ch. 32, sec. 146, there is no right to garnish before judgment.

The order was granted.

Featherston Aylesworth, for the primary debtor.
Christopher C. Robinson, for the primary creditor.

Middleton, J.

MIDDLETON, J.:—The claim of the primary creditor, as set forth in his affidavit filed upon a motion in the Division Court, arises in this way. Brennan was holding an auction sale upon his farm. When the auctioneer put up the hay in the mow for sale, and asked for bids, the quantity of hay became a very material factor. Brennan then announced that the hay had been measured, and that there were nine tons; whereupon the auctioneer said: "You hear what Mr. Brennan says:; he has had the hay measured: there is nine tons of hay in it; how much am I offered for it?" Thereupon the plaintiff bought the hay and paid for it; but, when he came to draw it away, he found that under the hay was a large quantity of worthless straw, and that there were only four and a half tons of hay.

In his affidavit the primary creditor states that he is advised that these words constitute a warranty, and that he is entitled to recover for breach of warranty.

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Upon a motion made against the garnishee summons in the Division Court, the Judge allowed an amendment; and upon the amended claim the primary creditor rests his case not only upon the warranty, but upon an allegation that there was a part failure of consideration, and that the four and a half tons of hay which he did not receive were worth $60; and he claims that sum.

The clause of the statute gives the right to garnish before judgment only where there is a debt or money demand "not being a claim for damages;" and I think the defendant has a right to prohibit proceedings in the Division Court, if he has successfully made out that the claim here is a claim for damages and not a debt.

It seems clear to me that, no matter how the case is looked at, the primary creditor's claim cannot be regarded as a debt or a liquidated demand for moneys. It is essentially an unliquidated demand, and is for damages for failure to receive whatever quantity of hay the contents of the mow fell short of the nine tons sold. If there had been an entire failure of consideration, then at common law the money paid might have been recovered as money received by the defendant for the use of the plaintiff. But here there was not a complete but only a part failure of consideration.

I am, therefore, compelled to award the order sought; but I do not think that it is a case in which I should award costs. If the primary debtor has a good defence upon the merits, he might well have allowed the money to remain idle pending the trial in the Division Court. If he has no defence, the judgment creditor cannot be blamed for seeking to avail himself of this remedy, even if his effort is unsuccessful.

Motion granted.

McDERMOTT v. BIELSCHOWSKY.

MAN.

K. B. 1912

April 19.

Manitoba King's Bench, Mathers, C.J. April 19, 1912.

1. MORTGAGE (§ VI C—82)—FORECLOSURE OR SALE—PARTIES ADDED IN MASTER'S OFFICE.

Under Rule 118 of the Manitoba King's Bench Rules, R.S.M. 1902, ch. 40, providing that upon a reference under a judgment for foreclosure or sale the Master is to inquire and state whether any person other than the plaintiff has any charge upon the land subsequent to the plaintiff's claim, a party is added in the Master's office on the assumption that he is a subsequent encumbrancer, and if he claims priority over the plaintiff he must move to discharge the order making him a party, or to add to, vary or set aside the judgment, and upon his failure so to do he is bound by the judgment to the same extent as an original party.

[*McDougall* v. *Lindsay*, 10 P.R. (Ont.) 247, and *McDonald* v. *Rodger*, 9 Gr. 75, specially referred to.]

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Statement

THIS is an appeal by one Kelly made a party in the Master's office, against the Master's report refusing him priority over the plaintiff.

The appeal was dismissed.

Rules 118-123 of the King's Bench Rules of Court, R.S.M. 1902, ch. 40, are as follows:—

118. Upon a reference under a judgment for foreclosure or sale, the Master is to inquire and state whether any person or persons, and who other than the plaintiff, has or have any lien, charge or incumbrance upon the land and premises embraced in the mortgage security of the plaintiff, in the pleadings mentioned, subsequent thereto.

119. The plaintiff is to bring into the Master's office certificates from the registrar or district registrar of the registration district or land titles district and the sheriff of the judicial district wherein the lands lie, setting forth all the incumbrances which affect the property in the proceedings or pleadings mentioned, and such other evidence as he may be advised.

120. The Master is to direct all such persons as appear to him to have any lien, charge or incumbrance upon the estate in question, to be made parties to the action, and to be served with a notice in the form No. 17 in the schedule to these rules.

121. Any party served with a notice under Rule 120 may apply to the Court, at any time within fourteen days from the date of the service, to discharge the order making him a party, or to add to, vary or set aside the judgment.

122. The Master, before he proceeds to hear and determine, is to require an appointment to the effect set forth in Form No. 18 in the schedule to these rules, to be served upon incumbrancers made parties before the judgment.

123. Where any person who has been duly served with notice under Rule 120, or with an appointment under Rule 122, neglects to attend at the time appointed, the Master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the Court orders otherwise upon application duly made for that purpose.

F. M. Burbidge, for plaintiff.

B. L. Deacon, for defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—The judgment directing the reference bears date the 8th November, 1911, and contains the following paragraphs:—

2. It is further adjudged that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure, and that for these purposes the cause be referred to the Master of this Court at the city of Winnipeg.

3. And it is further adjudged and declared that the plaintiff has a lien, charge and encumbrance upon the lands and premises in the pleadings mentioned (describing them) in priority to defendant's interest therein to the extent of the sum of $11,613.04, and costs and of the moneys to be found due by the Master as aforesaid.

By rule 634 a judgment expressed as in paragraph 2 is to be read and construed as if it set forth the particulars contained in rules 118 to 131.

The appellant recovered a judgment in the County Court against the defendant (by original statement of claim) for $274.60 on the 11th day of March, 1910, and registered a certificate of such judgment on the 15th day of March, 1910. The Master added him as a party in his office and the usual notice to encumbrancers was served upon him, notifying him that if he wished to apply to discharge the order making him a party, or to add to, vary or set aside the judgment, he must do so within fourteen days after the service of the notice, and if he failed to do so he would be bound by the judgment and the further proceedings in the cause as if he had been originally made a party to the action.

The appellant appeared by his solicitor before the Master, and obtained time to move against the order making him a party. He did not, however, move against the order, but at the time fixed for such motion came in and proved his claim under his judgment in the usual way. The plaintiff had in the meantime obtained an order from a Judge fixing the time for redemption at three months. To this last-mentioned order the appellant took exception and the solicitors for the plaintiff and appellant went before Robson, J., who, at the instance of the appellant and consent of the plaintiff, amended the judgment so as to provide for a sale instead of foreclosure, with three months for redemption. Upon settling the Master's report, the appellant claimed priority over the plaintiff, but his claim was not allowed.

The Master informs me that in deciding the question of priority, he had before him and considered the facts alleged in the plaintiff's statement of claim. He says the statement of claim was read without objection, and that he understood the appellant intended to admit and did admit the truth of the allegations contained in it.

In my opinion, however, this appeal can be decided without going behind the judgment.

I am disposed to think, without actually so deciding, that the appellant has misconceived his right. Rule 118, which is the foundation of the proceedings in the Master's office, confines the enquiry to persons who have charges subsequent to the plaintiff's charge. A party added in the Master's office is so added on the assumption that he is a subsequent encumbrancer. If he claims to rank ahead of the plaintiff his right is to move to discharge

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the order making him a party. In one case, *McDonald* v. *Rodger*, 9 Gr. 75, Esten, V.-C., entertained an appeal by a party added in the Master's office against the decision of the Master assigning the plaintiff priority over him. That may have been a convenient course under the circumstances of that case, but I agree with the remarks of Boyd, C., in *McDougall* v. *Lindsay*, 10 P.R. 247, that in *McDonald* v. *Rodger*, "there was a deviation from the ordinary practice" and that "he was against extending that case so as to allow play fast and loose in the Master's office when they come in to get the benefit of a decree." That the proper procedure where a party added in the Master's office claims priority over the plaintiff is to move to discharge the order making him a party, is shewn by such cases as *Glass* v. *Freckleton*, 10 Gr. 470; *McDougall* v. *Lindsay*, 10 P.R. 247, *supra*; *Lally* v. *Longhurst*, 12 P.R. 510, and *Crawford* v. *Meldrum*, 19 Gr. 165.

In this case the appellant not having moved to discharge the order making him a party or to add to, vary or set aside the judgment, is bound by it in the same way as if he had been made a party originally and had made default in setting up any defence, and had suffered judgment to be recovered against him: *McDougall* v. *Lindsay*, 10 P.R. 247, *supra*, at 249. Not only has the appellant impliedly assented to the judgment by not taking steps to move against it, but his counsel, on the argument of this motion, expressly disclaimed any desire to question the judgment or the order making him a party. The judgment thus binding upon the appellant, declares that the plaintiff has a lien, charge and encumbrance upon the lands in question in priority to the interest of the defendant Bielschowsky to the amount of the plaintiff's claim as found by the judgment, and also by the Master. The judgment proved by the appellant forms a charge upon Bielschowsky's interest, and of course gives him no greater right than Bielschowsky himself has. As by the judgment the plaintiff's claim is prior to Bielschowsky's interest, it follows that it must also be prior to the appellant's.

The appeal must be dismissed with costs.

Appeal dismissed.

COREA v. McCLARY MANUFACTURING CO.

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April 16.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. April 16, 1912.

1. TRIAL (§ II B—46)—NEGLIGENCE—VIEW BY JURY—FINDING IN ABSENCE OF EVIDENCE TO SUPPORT.

Where the Court or jury look at the locus of an accident, or the machine which is said to have caused one, it is simply to enable the trial tribunal the better to follow the evidence, and the verdict is still to be given upon the evidence.

2. MASTER AND SERVANT (§ II B 3—143)—SERVANT DISOBEYING INSTRUCTIONS—LIABILITY OF MASTER.

If a servant, who has been injured in the course of his employment, has disobeyed any order of his master, or has put himself in the wrong place or otherwise acted as he should not, and if his act was one without which he would not have been injured, he cannot recover damages from his master, even though his act was due to mere inadvertence.

[*D'Aoust* v. *Bissett*, 13 O.W.R. 1115, and *Mercantile Trust Co.* v. *Canada Steel Co.*, 3 O.W.N. 980, followed.]

Statement

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the plaintiff, in an action for damages for personal injuries sustained by the plaintiff while working in the defendants' factory.

The appeal was allowed and a new trial granted.

G. S. Gibbons, for the defendants.

E. M. Flock, for the plaintiff.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B., agreed in the result.

Riddell, J.

RIDDELL, J.:—The plaintiff, an Italian, 21 years of age, was working on a stamping press, stamping dipper bottoms. The operation was as follows. The workman would take a tin "blank" up with his left hand, place it upon the plate of the machine in the reverse part of the die, put his foot upon the treadle of the machine, which caused the obverse of the die to descend upon the blank, and, after pressing it into shape, rise, leaving the blank; then the operator would, with a small lever in his right hand, raise the stamped tin from the reverse of the die, when he saw that the part of the machine carrying the reverse, in the meantime, had come to a standstill. This operation was repeated *da capo*.

The workman, the plaintiff, was thus working on the 22nd July, 1911, when, by some means, his hand got caught between the parts of the die, and he sustained a permanent injury to his left hand. He says his foot was not on the treadle at the time of the accident, but he had it on the stool upon which he was sitting: and he does not know "why it dropped."

Much evidence was given that it was impossible for the die to come down, unless the plaintiff put his foot upon the treadle—

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and some (rather vague indeed) that a certain "tick, tick," or "click, click," which the plaintiff says he heard, might indicate that a spring or key was "not clear of this connecting point," that the "click click there might keep on until it would wear the corners off and in some . . . cases it would fetch the press down ahead of its time."

The machine was produced at the trial for the inspection of the jury. . . .

[The learned Judge then set out certain of the proceedings at the trial. The jury were allowed to visit the defendants' factory, where they saw similar machines in operation. The questions left to the jury and their answers were as follows:—

1. Was the machine on which the plaintiff was working a dangerous machine? A. Yes.

2. Was it practicable to securely guard the machine? A. Yes.

3. Was there a defect in the machine which caused the die to come down without the treadle being pressed upon by the operator? A. Yes.

4. If so, what was the defect? A. Weakness of the coil spring which operated the steel dog.

5. If the machine was defective, was its defective condition not discovered or remedied owing to the negligence of some person intrusted by the defendants with the duty of seeing that the condition or arrangement of the machine was proper? A. Yes.

6. If so, to whose negligence? A. The negligence of the foreman of this special department.

7. Was the plaintiff sufficiently instructed as to the way in which the machine should be operated so as to avoid accident to the operator? A. No.

8. If he was not, in what respect were the instructions insufficient? A. We firmly believe the operator was not properly instructed by his foreman.

9. Was the accident due: (a) To the absence of a guard? (b) To the plaintiff being insufficiently instructed how to operate the machine? (c) To a defect, if any, in the machine, or to any or either of these causes, and, if so, which of them? A. Owing to the absence of a guard.

10. Was the accident due to the plaintiff having kept his foot on the treadle? A. No.

11. If so, was the plaintiff negligent in keeping his foot on the treadle? A. No.

12. Damages? A. $700.]

From all that took place it is, to my mind, perfectly clear that the jury have proceeded, not upon the evidence at all, but upon their own judgment (if it can be called a judgment, and not a mere guess, as I think it was) in finding that the coil

spring which held the steel dog was weak, and that allowed the die to come down without the treadle being pressed upon by the operator.

It was this, and this only, which would justify them in finding (if they did find) that the plaintiff did not cause the die to descend by putting his foot upon the treadle.

It is quite clear that where Court or jury look at the locus of an accident or the machine which is said to have caused one, it is simply to enable the trial tribunal the better to follow the evidence—and that the verdict is still to be given upon the evidence. Nothing of the kind absolves the jury from their oath, "You shall well and truly try the issues joined between the parties and a true verdict give according to the evidence."

In any view, it is, if not inevitable, at least nearly so, that it must have been found that the plaintiff himself, in violation of his instructions, had put his foot on the treadle at the wrong time, and that at the time of the accident he was not standing as he should have done.

In such case, the verdict would be for the defendants, even if a possible guard had been left off.

In *Mercantile Trust Co.* v. *Canadian Steel Co.*, 3 O.W.N. 980, I had occasion recently to consider the case of a workman, by inadvertence or otherwise, putting himself in the wrong place. Following a Divisional Court case, *Laliberté* v. *Kennedy*, [(1904), not reported] there mentioned, I held that mere inadvertence in disobeying an order did not excuse.

Then *D'Aoust* v. *Bissett*, 13 O.W.R. 1115, followed as it has been in the Divisional Court, is authority for saying that if the workman gets into the wrong place or acts as he should not, his act being one without which the accident would not have happened, the master cannot be made liable.

The defendants' counsel saying he would be satisfied with a new trial, I think that relief should be granted.

Costs of the appeal to be to the defendants in any event; costs of the last trial to be in the cause unless otherwise ordered by the trial Judge.

BRITTON, J., agreed in the result. Britton, J.

Appeal allowed and new trial granted.

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THE WESTERN TRUSTS CO. v. POPHAM.

Saskatchewan Supreme Court. Lamont, J., in Chambers. April 23, 1912.

1. COSTS (§ I—7)—MORTGAGEE'S COSTS ON FORECLOSURE—OFFER TO PAY WITHOUT TENDER.

A mortgagee is entitled to the costs of foreclosure subsequent to an offer of the mortgagor to pay the arrearages and costs, when taxed, unless the latter pays or tenders the mortgagee the amount so due him.

[*Hodges* v. *Croydon*, 3 Beav. 86, followed; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1, specially referred to.]

Statement

THIS is an application for an order *nisi* foreclosure.

The order was granted, with a reference.

J. N. Fish, for plaintiffs.

H. V. Bigelow, for defendant.

Lamont, J.

LAMONT, J.:—The defendant mortgaged his property to the plaintiffs. The mortgagor having made default in the payments under the mortgage, the plaintiffs began this action for the foreclosure of the mortgage. After the issue of the writ the defendant paid the sum of $150 to the plaintiffs on account of the arrears, and his solicitors notified the plaintiffs' solicitors that he would pay up all arrears necessary to be paid in order to relieve him from the consequences of his default, as provided by sec. 93, sub-sec. 10, of the Land Titles Act, and the costs of the plaintiffs. The plaintiffs furnished the defendant with a statement of the arrears and a statement of the costs. The defendant made no objection to the statement as to the amount of the arrears, but did object to the bill of costs furnished. The defendant's solicitors then asked the plaintiffs to have their costs taxed, and repeated their offer to pay arrears and costs as soon as costs were taxed, but no tender of the arrears was made. The plaintiffs did not tax their costs. The defendant then attempted to have the costs taxed, but the local registrar ruled that this could not be done "inasmuch as it did not appear that the defendant had paid the claim to the plaintiff or into Court or that any judgment or order had been made against the defendant." The claim not being paid, the plaintiffs served a notice of motion for judgment.

Counsel for the defendant admits that he cannot oppose the motion, but contends that the plaintiffs are not entitled to any costs subsequent to the offer of the defendant to pay the arrears and costs as soon as the costs could be taxed. The plaintiffs contend that they are entitled to prosecute their action until their claim is paid, and consequently are entitled to the costs incident to such prosecution.

I am of opinion that the contention of the plaintiffs is right. In *Hodges* v. *Croydon*, 3 Beav. 86, the plaintiff, the mortgagee, brought action to recover under his mortgage. The only point

in dispute was whether the mortgagee was entitled to six years' or twenty years' arrears of interest. The defendants the mortgagors were willing before suit to pay the principal and six years' interest, but made no tender. At the hearing the mortgagor succeeded on the point of interest, but it was held that as there had been no tender, the mortgagee was entitled to his costs. The Master of the Rolls, in giving judgment, said:—

> As to the costs, there was no tender or offer to pay, until the bill was filed; the defendant (mortgagors) must therefore pay the costs. If there had been a tender of the principal and six years' interest, then the plaintiff would have to pay them. The result of this litigation is that the plaintiff loses his fourteen years' interest, and the defendants, the whole costs of the suit.

In Fisher's Law of Mortgages (6th ed.), at p. 940, the author says:—

> But if the mortgagor makes no tender, but only states in his defence that he is willing to pay so much as he considered to be due before the institution of the suit, he will not save the costs, although at the hearing he succeeds in establishing his case as to the amount due.

It therefore seems clear that in order to deprive a mortgagee of his costs there must be paid or tendered to him the amount of principal and interest necessary under the Act to relieve the mortgagor of the consequences of his default and to place the mortgage in good standing. If the mortgagor does this, the mortgagee is only entitled to costs to that date: *Broad* v. *Selfe*, 9 Jurist (N.S.) 885; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1. A mortgagee rightfully commencing an action to enforce his mortgage security is entitled to prosecute that action until he has been paid or tendered his money, and he cannot be compelled to tax his costs until he gets it. The reason for this is, that were he to go to the trouble and expense of taxing the costs he might not then get the money and would be obliged to continue the action, and the taxation of the costs would thus have been rendered useless.

There will, therefore, be the usual reference to the local registrar to ascertain the amount to be paid, and judgment accordingly. If the amount is not paid within 6 months, foreclosure absolute.

Order made with reference.

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DE LA RONDE v. OTTAWA POLICE BENEFIT FUND ASSOCIATION.

Ontario High Court, Riddell, J. April 29, 1912.

1. BENEVOLENT SOCIETIES (§ III—12)—POLICE BENEFIT FUND—ADOPTION OF ORIGINAL BY-LAWS.

Where the application for the incorporation of a Police Benefit Fund Association contained a statement that the by-laws governing such corporation and its members should be approved of at the first annual meeting of the corporation after its incorporation or at any general meeting of the members called for that purpose, a portion of a by-law offered at a meeting of the police force who were members of the Association, which portion was objected to and not adopted at that or any other meeting of the Association is not operative by reason of any ratification or adoption thereof by the board of trustees of the funds of the Association.

2. BENEVOLENT SOCIETIES (§ III—10)—POLICE BENEFIT FUND—RIGHT TO ON DISMISSAL FROM FORCE.

A by-law of a Police Benefit Fund Association providing that in no case shall a member be allowed to retire who is in good health and capable of performing his duties, and that a member dismissed from the police force for cause, shall immediately cease to have any interest in the fund of the association and shall not be entitled to any benefit therefrom, does not apply to a member who was forced out of the police service by the Board of Police Commissioners without a hearing.

Statement

ACTION by the former Chief Constable of the City of Ottawa to recover $1,000 retiring allowance out of the fund of the defendant association.

Judgment was reserved in order to give the parties an opportunity to agree.

A. E. Fripp, K.C., for the plaintiff.

M. J. Gorman, K.C., for the defendants.

Riddell, J.

RIDDELL, J.:—The plaintiff was Chief of Police, Ottawa; and in 1905, largely through his exertions, the members of the police force agreed to establish and maintain a superannuation and benefit fund for the benefit of the members of the force and their families. Many, if not all, signed a declaration accordingly, directing their officers (named) to become incorporated under the Ontario Insurance Act, under the name of "The Board of Trustees of the Ottawa Police Benefit Fund Association."

The trustees did not obtain such incorporation, but the members of the force contributed to the fund according to a prescribed plan; and at length, in March, 1907, the acting trustees applied under the Benevolent Societies Act, R.S.O. 1897 ch. 211, for incorporation under the name of "The Ottawa Police Benefit Fund Association." The application was certified under sec. 3(3) of the Act by the County Court Judge, and filed on the 11th March, 1907; and there is no doubt that the effect of sec. 3(5) is to form a corporation.

In the application appears the following: "6. That the by-laws and regulations governing the said corporation and the members thereof shall be approved of at the first annual meeting of the said corporation after the incorporation thereof, or at any general meeting of the members called for that purpose, provided that said by-laws shall not contain any particulars or provisions which are contrary to law."

Mr. Sinclair, a solicitor in Ottawa, was employed to draw up by-laws, etc., and did so, making use where he thought proper of the regulations previously drawn up, but not used as by-laws, etc., of a corporation.

The by-laws drawn up by Mr. Sinclair contained the following:—

"10. Every application for a retiring allowance, gratuity, or aid, must come before the board of trustees, when the whole circumstances of the case will be fully gone into, and a report on the case sent in for the sanction of the Board of Commissioners of Police; and in case of differences between the trustees and the Board of Commissioners of Police, the trustees shall be heard in person by the said Board of Commissioners of Police, and, if possible, concurrence arrived at: but, in case of failure to concur, the judgment or decision of the Board of Commissioners of Police shall be final; but in no case shall a member be entitled to retire who is in good health and capable of performing his duties."

"14. The Chief Constable shall be treasurer of the fund, but no money shall be paid out of said fund by him unless ordered by the board of trustees and sanctioned by the Board of Commissioners of Police, subject, in case of differences, to the result as stated in section 10."

"18. So far as the funds of the association will provide . . . the following scale of benefits at retirement and death respectively shall be paid to members of the association in good standing (or their representatives . . .) who are not in arrears for dues or other authorised assessments towards the benefit fund:"—

(A scale is set out.)

A clause, No. 19, was introduced to cover the case of the plaintiff, then the Chief Constable.

"19. Any member who joined the police force previous to the 1st day of March, 1905, and who at that date had attained the age of 50 years, shall upon retiring be entitled to one month's pay (as at date of such retirement) for each year of service, but shall in no such case receive more than the sum of $1,000."

Other provisions are:—

"24. Any member who is compelled to resign by reason of illness shall have his case considered by the board of trustees, subject to the approval of the Board of Commissioners of Police."

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"26. Any member of the association who may be dismissed from the police force for cause by the Board of Police Commissioners shall immediately thereupon cease to have any interest in the fund of the association, and shall not be entitled to any gratuity or benefit therefrom."

These were adopted, perhaps informally, but nevertheless adopted in fact, by a meeting of the force in December, 1909—except the last clause in sec. 10, which was objected to and not adopted.

In 1910, the plaintiff was asked for his resignation, and he refused: the Board of Commissioners sent their secretary to see him and force him to resign—"no compulsion but you must"—and the plaintiff did resign. The Board accepted his resignation and spread in their minutes a fulsome commendation of the resigning Chief (22nd February, 1910).

In March, 1910, at a meeting of the trustees of the fund, it was moved, seconded, and carried to strike out the words, "but in no case shall a member be entitled to retire who is in good health and capable of performing his duties" from sec. 10. I think this was wholly unnecessary, as that clause had not in fact been adopted at any time. This resolution was approved by the Board of Commissioners of Police in May, 1910. I cannot see that either the board of trustees of the fund or the Board of Commissioners of Police had any power in the premises—the by-laws, etc., are to be made by the members, not the trustees, and the Commissioners are not mentioned in the application.

In September, 1910, the plaintiff applied for an allowance of $1,000 under sec. 19. This was considered by the board of trustees, and "they regretfully" came to the conclusion that they could not recommend him for a retiring allowance under the rules and regulations governing the benefit fund at the time of his leaving the force." In this judgment the Board of Commissioners of Police concurred. In April, 1911, a demand was again made, and the board of trustees at a meeting decided that, "under the by-laws, Major de la Ronde is not entitled to a retiring allowance." This action was then brought.

It would seem that the boards were, in deciding upon the application, of the impression that the last part of sec. 10 was in force. This is an error. This clause never was adopted, and I shall so declare. Even were it in force, the plaintiff does not come within its provisions. He did not claim the right to retire—he was forced out. The clause never was intended to cover such a case—nor does sec. 26 apply.

I do not at present give judgment; I retain the case in the hope that, with the above findings, the parties will be able to agree. If not, I shall give judgment.

Ruling accordingly.

ONTARIO AND MINNESOTA POWER CO. v. RAT PORTAGE LUMBER CO.

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Ontario High Court, Middleton, J., in Chambers. April 29, 1912.

1. PLEADINGS (§ I S—149)—STRIKING OUT—ONT. RULE 298 (CON. RULES OF 1897).

The tendency of the practice at present is against any interference with the pleadings of either party, except in the very plainest cases; the application of Ont. Con. Rule 298 (Rules of 1897), is usually confined to cases where statements are made which could not be considered at the trial, and which would tend to prejudice a fair trial.

[*Flynn* v. *Industrial Exhibition Association of Toronto*, 6 O.L.R. 635 referred to.]

2. PLEADINGS (§ III B—303)—WHAT MUST BE PLEADED—ASSERTION OF ALL RIGHTS.

A party litigant must assert all his rights and every title that he may have justifying his claim; it is not open to him to try the matter piecemeal.

Statement

APPEAL by the plaintiffs from the order of the Master in Chambers, 3 O.W.N. 1078, refusing to strike out certain paragraphs of the statement of defence.

Rule 298 of the Consolidated Rules of Practice 1897 (Ont.) is as follows:—

> 298. The Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in the pleadings respectively, which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action.

The appeal was dismissed. By the statement of claim, the plaintiffs alleged that they were riparian owners in respect of certain lands on the north shore of Rainy river, and as such entitled to the use of the waters of that river naturally flowing over and past their lands; that they had constructed thereon a large and valuable dam and works for generating hydraulic and electrical power, and were erecting a pulp mill. They complained that the eight defendants had obstructed the natural flow of the waters of the river, interfering with the rights of the plaintiffs, and causing them loss and damage; and asked for an injunction and damages. Four of the defendants delivered statements of defence; and the plaintiffs moved to strike out eleven paragraphs of each. It was alleged by paragraph 16 that the plaintiffs had no office or place of business and no assets, business, or property under their control in Ontario; that the plaintiffs were controlled by the Minnesota and Ontario Power Company, an American company, and the real owners of the assets nominally belonging to the plaintiffs; that the American company had no charter or license to do business in Ontario, and were not entitled to invoke the equitable jurisdiction of the Court The Master referred to *Stratford Gas Co.* v. *Gordon*, 14 P.R. 407, 413, and said that paragraph 16, and also paragraphs 27

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and 28, which were similar in effect, could not be summarily exercised at this stage: they might be unnecessary—but that did not make them embarrassing.—In the other paragraphs objected to, the defendants alleged that the plaintiffs had not complied with the statutes under which their works were constructed, and that the plaintiffs, by reason thereof, were not entitled to rely upon those statutes; and, further, that the statutes were void and ineffective; and they asked a declaration to that effect. The Master said that the paragraphs based upon that line of defence were not so clearly bad as to justify their excision upon an interlocutory application. The plaintiffs alleged special damage, which it was important to prove in order to obtain an injunction: *White* v. *Mellin*, [1895] A.C. at p. 167. The tendency of the practice at present is against any interference with the pleadings of either party except in the very plainest cases. Con. Rule 298 is usually confined to cases where statements are made which could not be considered at the trial, and which would tend to prejudice a fair trial. See *Flynn* v. *Industrial Exhibition Association of Toronto*, 6 O.L.R. 635. The Master dismissed the motion with costs to the defendants in the cause.

R. C. H. Cassels, for the plaintiffs.

Grayson Smith, for the defendants.

Middleton, J.

MIDDLETON, J.:—I think the conclusion arrived at by the learned Master is right. The statement of claim, it is true, puts the plaintiffs' rights upon their riparian proprietorship. The real meaning of the defence is, that the plaintiffs applied for and obtained the right to construct the works in question under certain statutes, and that these statutes imposed conditions which have not been complied with. Upon this it will be argued that the plaintiffs, having attorned to the jurisdiction of Parliament and having accepted the provisions of the Acts, is not now at liberty to repudiate the terms imposed and to construct the work without complying with the conditions.

Upon the argument before me, the plaintiffs' counsel declined to admit that no claim could be put forward under these statutes; but sought rather to take the position that he could, in this action, set up a claim for his clients as riparian proprietors, and confine the issue in this action to that single phase of his title; and that, if defeated in this, he would then resort to the statutes; and in some other litigation it might be open to him to support his claim under them.

I do not think that this is permissible. A party litigant must, I think, under our procedure, assert all his rights and every title that he may have justifying his claim. It is not open to him to try the matter piecemeal.

It may well be that the statement of claim is not altogether artistic, when it introduces allegations by the statement that

"the plaintiffs claim;" but this can occasion no real embarrassment, because it is quite open to the plaintiffs, if so advised, to disclaim by their reply the right which they are supposed to "claim."

Quite apart from this, it is clear that, whether the matter set up is well-founded or not, it is one which ought to be left entirely to the trial Judge. It serves as notice of the contention which is to be made by the defendants at the hearing; and it would be quite out of place to eliminate matters of this importance from the record at this stage. This is not the true function of a motion against pleadings as embarrassing.

The second ground of attack upon the pleading is the way in which the defendants set up certain matters which they rely upon as influencing any discretion which the Court may have to refuse an injunction. I think it would have been preferable if the pleader had used less ornate language; but this, I think, is not sufficient to justify a striking out of the pleading. When one company is described as an "appendix" to another company, a surgical operation is, no doubt, suggested; but the pleader probably used this metaphor in some secondary sense, as, in the same paragraph, he refers to the same company as "a mere creature of" the other; and, although when one finds a metaphor in a legal argument one suspects a fallacy, this is for the trial Judge.

The costs may be in the cause to the defendants.

Appeal dismissed.

HUTCHISON v. CITY OF WESTMOUNT.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. April 29, 1912.

1. HIGHWAYS (§ II A—23)—RIGHTS OF ABUTTING OWNER TO COMPEL MUNICIPALITY TO OPEN UP STREETS IN A SUB-DIVISION.

Where the facts do not establish an immediate necessity for opening and grading a public street, a municipal corporation will not be required to do so under the terms of an agreement between the municipal corporation and the dedicators of the right of way, whereby the municipality was to open and grade, "when necessary," certain streets in a sub-division in which the plaintiff was an owner under conveyance from the dedicators of lots abutting a new street so contracted for.

Statement

THE plaintiff, appellant, sued the defendant municipal corporation asking that the Court declare that the town of Westmount is obliged to open up and grade that part of Grosvenor avenue which faces his property along its whole width and that the respondent be condemned to pay $10,000 damages.

Hutchison had bought this property from the Westmount Land Company in 1899. And this company in 1897 had ceded

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to the town a certain lot of land under certain conditions and amongst others:—

> 2. The opening and grading of the said avenues lying between said Western avenue, and Cote street, Antoine road, shall be undertaken by the town in the present year and commenced on or about the twentieth instant (1897), and continued with due diligence until completed; and the remainder of the said avenues shall be graded by the said town when necessary.

P. B. Mignault, K.C., (*E. Lafleur*, K.C., with him) for appellant.

L. Boyer, K.C., (*F. S. Maclennan*, K.C., with him) for respondent.

The opinion of the Court was delivered by

Carroll, J.

CARROLL, J.:—It is evident that when this deed was passed the grading had not yet become necessary; otherwise the opening and grading would have been provided for immediately.

Although the granters gave this ground to the town and dedicated part thereof for streets and avenues, there was a consideration: the town was to open up and grade the riparian streets and avenues and the company had other properties which would increase in value through such work.

Anyway, Hutchison acquired a few lots facing Grosvenor avenue at a place where the town had undertaken to do the grading and he says this work has been long required.

I shall not discuss the questions debated in this cause nor the reasons of judgment given.

We have heard arguments and been referred to authors and dictionaries to enlighten us as to the meaning of the word "necessary." This word may have different meanings according to circumstances, and the authors can be of little help to us.

We decide this case solely on the circumstances thereof, and on common sense, and we declare the plaintiff's action to be at least premature.

When this work becomes necessary the council will have to act, but at the present time there is no proof that it is necessary. . . .

This Court is unanimously of the opinion that Hutchison has not established the necessity of this work at the present time and we confirm the judgment of the Superior Court.

Appeal dismissed.

LACHINE SCHOOL COMMISSIONERS v. LONDON GUARANTEE AND ACCIDENT CO., Ltd.

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Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. April 29, 1912.

1. INSURANCE (§ VIII—435)—GUARANTY POLICIES—CONDITIONS PRECEDENT.

In matters of guarantee insurance the employer, who is the beneficiary under a policy guaranteeing him against loss by embezzlement or theft of money by his employee, must comply strictly with all conditions, stipulations and undertakings contained in the policy.

2. INSURANCE (§ VIII—435)—GUARANTY—REPRESENTATIONS AS TO AUDIT—DELAY IN HAVING SAME MADE.

Where the employer represents in an application for guarantee insurance that an audit of the employee's (a book-keeper) books made regularly once a year at a fixed period and the audit is delayed for some months and loss occurs by theft in the meantime, the insurer will be relieved of all liability.

3. INSURANCE (§ VI A—246)—GUARANTY—NOTICE OF SHORTAGE—TIME OF GIVING SAME.

Where the policy of guarantee insurance calls for immediate notice of any shortage and the insured fails to notify the insurer until a month after the discovery of loss, this notice is tardy and the insured cannot recover, even though the unfaithful employee be apprehended and convicted as a result of his, the insured's, efforts.

Statement

THIS appeal was taken by plaintiffs-appellants from the judgment of the Superior Court, Demers, J., rendered on October 7th, 1911, which dismissed their action for $2,100 brought under a guarantee policy insuring the honesty of their secretary-treasurer in the sum of $2,000, save for a sum of $100 being legal expenses incurred in securing the arrest and conviction of the defaulting employee.

The appeal was dismissed with costs.

Argument

J. A. Hurteau (*A. Decary*, K.C., with him), for appellants. It was only in June, 1908, that the appellants' auditor reported a deficit of $904 in Poitras's books during a period covering nineteen months. Three weeks after the company-respondent was notified thereof. At the company's request Poitras, the unfaithful employee, was arrested and convicted on the complaint of the appellants. Then only was the claim for $2,100 filed. It is clear that appellants after the 26th of June could not have done any more against Poitras than appellants did. And even though the notice was not absolutely immediate respondent suffered no prejudice therefrom, and in fact could not have been afforded more protection than it received. No item of the claim filed covered any amount subsequent to June 2nd, date of the auditor's report. How could the contract be null *ab initio* as contended by respondent? It was at respondent's solicitation that Poitras was arrested and convicted. Their request was based on the contract, and the trial Judge himself recognized the contract since he found appellants entitled to $100 for

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damages, in which finding the respondent did not file a cross-appeal. It is impossible to comply strictly with all the provisos and conditions of insurance policies and where the insured has acted in good faith throughout he should recover.

Campbell Lane, for respondent. The notice was twenty-four days late, contrary to the terms of the policy. Even a week's notice is not a compliance with an immediate notice clause: *The Harbour Commissioners of Montreal* v. *Guarantee Company of North America*, 22 Can. S.C.R. 542, confirming the Court of King's Bench, Que., 2 Q.B. 6; *Commercial Mutual Building Society* v. *London Guarantee and Accident Co.*, M.L.R. 7 Q.B. 307. Even two days' notice has been held insufficient: *Molson's Bank* v. *Guarantee Co. of North America*, M.L.R. 4 S.C. 376. The fact that the employee did not escape makes no difference. Poitras was not arrested for over a fortnight after the discovery of his shortage. So that plaintiffs cannot argue that they used all diligence. Moreover, the promissory warranty of an annual audit was not carried out: art. 2827 R.S.Q.; *School Commissioners for the Municipality of the Parish of St. Edouard* v. *The Employers' Liability Assurance Corporation*, Que. 16 K.B. 402. The appellants cannot, therefore, recover.

Hurteau, in reply.

Judgment

The judgment of the Court was delivered by

Gervais, J.

GERVAIS, J.:—On October 7th, 1911, the Superior Court for the district of Montreal dismissed the action of the appellants seeking payment of a sum of $2,100, as regards the sum of $2,000 being the amount of a guarantee policy issued by respondent on September 16th, 1903, in favour of appellants, to guarantee them against embezzlement by their secretary-treasurer, one Poitras; but the Superior Court maintained this action as regards the sum of $100, being legal expenses incurred by the appellants, for the benefit of the respondent, under and by virtue of the said policy, to obtain the arrest and imprisonment of the said Poitras after his misappropriations during the year 1907-8.

The judgment of the Superior Court is based on two grounds: Firstly, the lack of an annual audit of Poitras' accounts; secondly, want of notice following immediately upon the discovery of the shortage.

Should this judgment be reversed?

In order to answer this we must first of all examine the conditions of the policy and of the application for insurance. In this application, which was signed on July 18th, 1903, by Canon Savaria, chairman of the Catholic Board of School Commissioners for the town of Lachine, we find the following answers given by appellants to questions put to them:—

> Q. How often do you require him to settle his accounts with you?
> A. Once a year.

Q. By whom are his accounts and books checked?
A. By a person named by the board.
Q. How often does an audit take place?
A. Once a year.
Q. Do you employ an independent auditor?
A. Yes.
Q. When were the applicant's accounts last audited?
A. In July instant.

The declarations and undertakings made and entered into by the appellants in their application for insurance form part of the policy.

The company had by its policy guaranteed the appellants against loss by embezzlement or theft of money on the part of Poitras, in consideration of the payment of an annual premium of $12. This policy was renewed from year to year, including the year 1907.

One of the main conditions of the policy reads as follows:—

> Or if the employer shall continue to entrust the employee with money or valuable property after having discovered any act of dishonesty, or shall fail to notify the company if any writ of attachment or execution shall issue against the property or salary of the employee, as soon as it shall have come to the knowledge of the employer, this agreement shall be void and of no effect from the beginning.

This is the contract entered into between the parties on September 16th, 1903, and renewed from year to year under the same conditions and representations. And the action is based on this contract.

The respondent alleges the failure to make an audit in the month of July of each year according to the undertaking of the appellants and in conformity with the law as laid down in article 333 of the Code Scolaire of the Province of Quebec. In the second place respondent alleges want of immediate notification after the discovery of the shortage.

What does the evidence shew?

As to the failure to make an audit in July we have only to read the deposition of Canon Savaria, the chairman of the board, to see that the respondent is right in this respect:—

> Q. There was no audit in July?
> A. No; the July audit was delayed owing to the fact that Mr. Imbleau was on his holidays.

According to Imbleau, the audit for the year expiring on January 31st, 1908, was only made towards the end of May, or the beginning of June, 1908. In this report Imbleau finds that Poitras, in his quality of secretary-treasurer, misappropriated the funds of the appellants to the amount of $904.84.

Notice thereof was given to the respondent only on the 29th of June, 1908.

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And yet the audit of Poitras' accounts by an auditor in the month of July, 1907, had it been made then, could not have failed to reveal this embezzlement. So Imbleau, the auditor appointed by the appellant, declares; and this witness the appellants declined cross-examining.

Instead of the conditions of the policy governing the annual audit and the giving of an immediate notice being faithfully observed, they were most negligently carried out.

Appellants have urged reasons of equity to relieve them from their negligence to comply with their obligations as laid down in the policy and to compel the respondent company to carry out theirs; but the obligations of the insurer, in this case as in all insurance contracts, are subject to conditions which must be fulfilled by the insured if he wishes to be in a position to compel the respondent to pay him a sum of $2,000 in return for an annual premium of $12.

We find that the appellants have violated their obligations in a very serious way and that their contentions cannot be admitted. Besides, the jurisprudence is firmly established on the point that when a policy requires an immediate notice this notice must be given without any delay; that even a notice given two days after the discovery of the loss is not an immediate notice and is, therefore, insufficient. Now in the present case, the appellants themselves admit they knew at the beginning of June or the end of May, 1908, that Poitras had embezzled their funds, and yet they notified the company on the 29th of June only.

The Court considers this notice as tardy; and it also finds that the appellants failed to carry out their obligations concerning the annual audit of Poitras' accounts inasmuch as this was done nearly a year after the time fixed by the policy.

The appeal is, therefore, dismissed with costs.

Cross, J.

CROSS, J.:—The appellants' obligation was that, if they discovered any embezzlement or theft committed by their servant, they should give the respondent "immediate notice" thereof.

In March, 1908, it was discovered that there was an apparent shortage of about $200 in the cash of the employee guaranteed. The employee said that it was due to a mistake of arithmetic, or at least that he would be able to explain it. The auditor admitted at the time that that might be so, and nothing was said about it to the insurer.

At the end of May, 1908, the auditor told the appellants that the employee had converted (*détourné*) $904.84, and, a new treasurer having been engaged, it was afterwards discovered that the misappropriations amounted to about $1,600.

Notice of the defalcations was given to the insurer on the 29th of June, 1908.

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LACHINE SCHOOL COMMISSIONERS v. LONDON GUARANTEE AND ACCIDENT CO., LTD.

Cross, J.

The guarantee company contends that notice should have been given to it in May, and that the appellants did not give "immediate" notice.

It is laid down as established by Court decisions that:—

> The condition that the assured must give immediate notice of default to the insurers means that notice must be given with that degree of promptitude which is reasonable in the circumstances: Macgillivray: Insurance Law (1912), p. 974.

It is said for the appellants that the condition of the policy did not require them to give any notice of what happened in March because that did not make them aware of any embezzlement or theft, and that it was not as if they had bound themselves to give notice of mere default or irregularity. There is authority to support that argument: *Aetna Indemnity* v. *Crowe*, 154 Fed. Rep. 545; and I take it that the inference to be drawn from what happened in March is that the employers were under a duty towards the insurer to lose no time in ascertaining the real state of their employee's accounts and to give notice when they did ascertain it. But even as late as the end of May, when they did become aware that there had been misappropriations of money, they failed to give the notice for about three weeks.

While it is regretted that the appellants should lose the benefit of the contract in this way because of conditions which arose after the occurrence of the very facts which were to give effect to it, it has to be said that they did not comply with the condition and, therefore, cannot recover the indemnity.

I would dismiss the appeal.

Appeal dismissed.

SMITH v. HOPPER.

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April 18.

Ontario High Court, Kelly, J. April 18, 1912.

1. EXECUTORS AND ADMINISTRATORS (§ IV C—103)—LEGATEE CLAIMING IN ADDITION TO LEGACY—ABSENCE OF AGREEMENT TO PAY.

> Where a niece went to live with her aunt, a widow and childless, but no arrangement was made as to the niece remaining any definite time and nothing being said by either party as to remuneration except a voluntary statement of the aunt that she would do well by the niece, and the niece ran errands, purchased provisions, and did a small portion of the housework and the aunt allowed her the sum of $10 a month, and by will bequeathed her $2,000 with a contingent interest in a further sum of $1,000, the niece cannot enforce any further claim for her services against her aunt's estate, for the period during which such allowance was accepted.
>
> [*Walker* v. *Boughner*, 18 O.R. 448; *Mooney* v. *Grout*, 6 O.R. 521; *Johnston* v. *Brown*, 13 O.W.R. 1212, 14 O.W.R. 272, specially referred to.]

2. CONTRACTS (§ I B—8)—IMPLIED AGREEMENT WITH AGED RELATIVE—PERSONAL SERVICES.

> Where there has been no agreement for payment of any definite amount as remuneration for personal services, in looking after an aged

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person, the fact that a fixed monthly allowance had been for a long time paid and accepted, will not bar a claim for a larger allowance for a later period during which the services were more onerous by reason of the illness of the aged person during which the usual allowance was not paid.

Statement

ACTION against the executor of Selina Gillbard, deceased, to recover the value of services alleged to have been rendered by the plaintiff to the deceased.

Messrs. *F. M. Field*, K.C., and *T. F. Hall*, for the plaintiff.

Messrs. *A. M. Peterson* and *Irving S. Fairty*, for the defendant.

Kelly, J.

KELLY, J.:—The plaintiff, a widow, is a niece of Selina Gillbard, who died on the 16th November, 1910. The defendant is the executor of the will and codicil of Selina Gillbard, the will being dated the 4th December, 1908, and the codicil the 17th February, 1909. Probate of the will was issued to the defendant on the 13th February, 1911.

The estate, as shewn by the inventory filed on the application for probate, amounted to $24,493.77. In addition to bequests of some personal articles, the specific legacies amounted to $15,857.54, of which more than $8,000 was given to the brother, nephews, nieces (including the plaintiff), and a cousin of the testatrix, and the remaining part of these bequests and the residue of the estate go to objects chiefly of a religious, charitable, and educational character.

At the time of her death, Selina Gillbard was eighty-one years of age. Her husband died in August, 1907; and, as they were without children, and Mrs. Gillbard was then left alone, the executors of the husband's will (one of whom is the defendant) and some of her relatives thought it inadvisable that she should be allowed to live alone; and it was, therefore, suggested that the plaintiff should take up her residence with Mrs. Gillbard. The plaintiff at that time was occupying a house for which she paid a rental of $6.50 per month.

Mrs. Gillbard intimated that she did not require any person to live with her; but, when pressed by those interested in her, she consented that the plaintiff should come to her, and volunteered the statement that she would do well by the plaintiff. There was no arrangement for the plaintiff remaining with the deceased for any definite time, nor was anything said on either side about remuneration except the voluntary statement of the deceased that she would do well by the plaintiff.

The plaintiff lived with the deceased from August, 1907, until her death, on the 16th November, 1910; and during that time the services she performed consisted of going to the bank when the deceased needed money, or when she received any cheques or orders for money which she wished to have cashed or deposited, making purchases of provisions for the house, making

up the bed which was used by the plaintiff and the deceased, and attending to the furnace. All the other housework, except the laundry work, which was done by another person, was done by the deceased, who refused to permit the plaintiff to assist her in the performance of this work, when at times the plaintiff offered her services.

The evidence shews that the deceased was a person who rarely left her house, and associated but little with her friends or neighbours; she was careful of her money to an extent verging on penuriousness, but always paid promptly any debts she incurred, and at the time of her death owed nothing except some small current accounts.

She had suffered from cancer in her finger, and in March, 1909, it became necessary to have it amputated. Notwithstanding this, however, she continued until a very short time prior to her death to perform her household duties to the extent which I have stated.

The plaintiff in her evidence complained that conditions of life with the deceased were unpleasant, by reason of the somewhat exclusive life she led, her economy in providing necessary food, and her persistence in preparing the food when she was suffering from cancer in her finger.

Though the plaintiff did not ask for remuneration, Mrs. Gillbard from August, 1907, until the 1st October, 1910, paid her a monthly sum of $10. The plaintiff states that the deceased said this was for pin-money.

By her will, the deceased also gave the plaintiff a bequest of $2,000 and a contingent interest in a further sum of $1,000. The plaintiff expected that the deceased would have been more generous towards her, and she says that she thought the deceased would have "done by her" to the extent of about $5,000 at least. This was a matter purely of expectation on her part, and her hopes were not based upon any agreement, promise, or suggestion by the deceased, except the statement that she would do well by her.

After Mrs. Gillbard's death, the plaintiff filed with the defendant a claim for services amounting to $2,379, made up of a charge at the rate of $60 per month for three years and one and one-half months, beginning in August, 1907 ($2,250), and at the rate of $21.50 per week for the six weeks ending with Mrs. Gillbard's death.

The defendant refused to acknowledge the claim, except that he expressed an inclination to recognise the plaintiff's right to some payment for the time from the 1st October, 1910, until the death of the testatrix; the plaintiff's evidence being, and it is not contradicted, that, when she asked the defendant if she had any chance of putting in a claim, he replied that she might for the last six weeks..

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The defendant, while denying the plaintiff's right, has brought into Court $141.50. He also stated in his evidence that the plaintiff, after the death of the testatrix, said she had been paid up to the 1st October.

Under the authority of such cases as *Walker* v. *Boughner* (1889), 18 O.R. 448; *Mooney* v. *Grout* (1903), 6 O.L.R. 521; and *Johnson* v. *Brown* (1909), 13 O.W.R. 1212, 14 O.W.R. 272, the plaintiff cannot succeed, at least for the time down to the 1st October, 1910, when the monthly payments ceased.

There having been no agreement or promise for payment of any definite amount, the most that the plaintiff can claim for her services and trouble while living with the deceased is the fair and reasonable value thereof. Apart from the monthly sum of $10, paid promptly by the deceased and accepted by the plaintiff for almost the whole period of her residence with the deceased, the amount of the bequest made to her by the will was more than ample remuneration, on the most liberal scale of allowance, for the services of every kind which she performed and any trouble she was put to, in any event down to the 1st October, 1910.

In view, however, of the fact that there seems to have been some recognition of the special claim put forth for the last six weeks of the lifetime of the deceased, during part of which she was ill and perhaps required attention such as the plaintiff had not previously been called upon to give her, it is not unreasonable that there be allowed to plaintiff out of the $141.50 paid into Court the amount claimed by her for that period, namely, $129.

Subject to this allowance to the plaintiff, I dismiss her action with costs.

Action dismissed.

SASK.

S. C. 1912

April 25.

WOOD v. SAUNDERS.

Saskatchewan Supreme Court. Trial before Wetmore, C.J. April 25, 1912.

1. LANDLORD AND TENANT (§ III A—44)—RIGHTS OF PARTIES—AS TO POSSESSION—SALE OF PERSONAL PROPERTY.

The refusal of a lessee to make a cash payment for personal property purchased from a lessor under an agreement apart from a lease, as he agreed to do, does not justify the former's refusal to let the lessee into possession of the demised premises.

2. LANDLORD AND TENANT (§ III B—53)—COLLUSIVE SALE OF PERSONALTY—TERMINATION OF TENANCY.

A collusive sale will not put an end to a tenancy under a lease under a stipulation whereby the lease was to terminate upon a sale of the demised premises.

3. LANDLORD AND TENANT (§ III D—98*a*)—RESERVATION OF RIGHT TO SELL DEMISED PREMISES—TERMINATION OF TENANCY.

A right reserved to the lessor in a lease "to sell the demised premises at any time, subject to the right of the lessee to the crops sown prior

to sale," includes by implication the right to terminate the lease on a sale being made although the lease itself did not expressly declare that a sale should have that effect.

4. COVENANTS AND CONDITIONS (§ II A—6)—RESERVATION OF RIGHT TO SELL —NOTICE OF INTENTION TO TERMINATE TENANCY—CONSTRUCTION.

Where a sale of demised premises is made under a right reserved in a lease for a term of years to terminate the lease on a sale being made, it is unnecessary that the lessor should give three months' notice of intention to terminate it as provided in such lease at the expiration of any year, such two provisions being separate and distinct and not inconsistent.

5. COVENANTS AND CONDITIONS (§ II A—6)—LEASE—COVENANT FOR QUIET ENJOYMENT—RESERVATION OF RIGHT TO SELL DEMISED PREMISES.

A covenant for quiet enjoyment of demised premises is to be construed as subject to the termination of the tenancy on a sale of the premises where the right of cancellation in such event is reserved in the lease.

6. DAMAGES (§ III A 3—64)—BREACH OF LESSOR'S COVENANT—RIGHT OF LESSEE TO POSSESSION.

Upon the refusal of a lessor to deliver possession of demised premises at the commencement of a term that was subsequently terminated, under a power reserved in the lease, by a sale of the premises, the lessee can recover damages for deprivation of possession from the commencement of the term to the date of such sale only, and not for the whole term.

ACTION upon a rental agreement.

Judgment was given for the plaintiff for a part of the claim only.

John Munro, for plaintiff.

Donald McLean, for defendant.

WETMORE, C.J.:—The defendant and plaintiff entered into a written agreement dated the 18th September, 1911, whereby the defendant leased to the plaintiff the north-east quarter of section 24, township 39, range 3, west of the 3rd meridian, for the term of three years, to be computed from the 10th November last, from thenceforth next ensuing, and fully to be complete and ended on the 15th day of December, 1914, yielding and paying therefor, one-half of the entire crop grown on such land, to be delivered free of charge in the name of the lessor in one of the grain elevators in Aberdeen to be designated by the lessor, such share of crop to be delivered on or before the 1st day of December in each year. The lease provided that either party thereto might terminate it at the expiration of any year of its existence, by giving the other party three calendar months' notice of his intention so to do in writing by registered mail. The lease, by a later clause to the last mentioned one, provided that the lessee paying the rents and performing the covenants therein contained on his part

Wetmore, C.J.

> shall and may peaceably and quietly enjoy the said premises during the said term, without any molestation, hindrance or disturbance from or by the said lessor, his executors, administrators, or assigns, or any person claiming under.

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The very last clause in the lease was as follows:—

> It being further agreed between the parties herein that the said lessee reserves the right to sell any or all of the within mentioned property at any time during the term of this lease, but in case a sale is made any time after a crop has been sown, the lessee shall be entitled to his share of crop.

The defendant remained in possession of the land from the date of the lease and was at the time of the trial still living thereon with his family. When the time had arrived for the term to commence and when the plaintiff should have been let into possession, the defendant refused to give up possession. There is some difference in the testimony as to how that refusal came about, but that is not material. Possession was refused, and I will accept the defendant's version as to how it was refused, and his reason for doing so, as I think it is probably correct.

The plaintiff had agreed to purchase some horses from him for $1,100, and he was to make a payment of $400 on account thereof. He did not pay this amount, and the defendant refused to let him into possession of the land until he did pay it. This horse transaction was entirely outside the lease and had nothing whatever to do with it. The defendant was therefore not justified in refusing possession.

By agreement under seal, dated 6th December, 1911, the defendant agreed to sell the land in question to one Frederick W. Campbell, for $9,600, of which $100 was to be paid on the execution of the agreement, the receipt of which was thereby acknowledged, $500 before 1st May, 1912, and $1,500 on the first day of March in each and every one of the years, 1912, 1913, 1914, 1915, 1916, and 1917, with interest. The purchaser was to have immediate right to the possession of the premises. Campbell for a short time before and up to the time of the execution of this agreement had been living with the defendant on the premises, doing chores there, and he and the defendant and the defendant's family continued living there ever since. I must say I view the sale to Campbell with very great suspicion; that is, I suspect that it was not *bonâ fide*, but that it was a mere pretended and collusive sale to enable the defendant to avoid the lease. If so, it was a fraud on the plaintiff, and as fraud was not pleaded, it is not necessary for me to express a decided opinion on the subject. As a matter of fact, I have not formed a decided opinion with respect to it. It is urged, however, in the first place that the sale to Campbell does not put an end to the plaintiff's rights under the lease; that the clause in the lease reserving the right of sale to the defendant does not state that it puts an end to the lease. It does not so state in express words, but I am unable to draw any other inference from it. The provision that the lessee was, in the event of a sale being made,

after a crop had been sown, to be entitled to his share of the crop infers that if the sale took place before a crop was sown he would not get his share of the crop. That means, in my opinion, that the demised term was to be considered at an end.

It was also contended that the plaintiff was entitled to the three months' notice mentioned in a preceding part of this judgment, and further, that the sale clause is inconsistent with this clause providing for the three months' notice. Of course, if these clauses are so inconsistent that they cannot be read together, the sale clause would have to be held of no effect. But under the rules of construction, I must not, if possible, construe this document so that any clause of it will be held ineffective. I find little difficulty in so construing this agreement. The lease or the term demised may be determined in three different ways. First, by the expiration, on 15th December, 1914, of the full term demised. Second, by the three months' notice provided for. In that case either the lessor or the lessee may put an end to the term without any change of interest and without any reason at all, just to suit the convenience of the party giving the notice. Third, by a sale of the property by the lessor under the right reserved in the sale clause. No notice is necessary in that case, because it is not provided for. The three months' notice does not apply to that clause at all.

Then it is claimed that the clause for quiet enjoyment protects the interest of the plaintiff. I am of opinion that it does not. That clause cannot be held to protect the plaintiff against a termination of the lease brought about under its terms. For instance, it would not prevent the lessee terminating the lease at the end of any year by a three months' notice, so it will not prevent the lessor putting an end to the term by a sale, because the lessee has agreed to it.

The plaintiff was therefore at the time of the commencement of this action in January last, neither entitled to specific performance nor to the possession of the land. Nor is he entitled to damages for being deprived of his whole term in the land. He was, however, entitled to be put in possession on the 10th November and to continue there until the 6th December, when the agreement of sale was made between the defendant and Campbell, and I will allow damages to him in that respect. I think that a fair amount of damages would be the value to him of the occupation of the premises during that short period; I will put it at ten dollars. I will just state that the plaintiff was aware of the sale to Campbell before he brought this action.

Judgment for the plaintiff for $10.00 and costs.

Judgment for plaintiff.

ONT.

H. C. J.
1912
May 3.

DEMERS v. NOVA SCOTIA SILVER COBALT CO.

Ontario High Court. Trial before Middleton, J. May 3, 1912.

1. MASTER AND SERVANT (§ II E 5—255)—LIABILITY OF MINE OWNER—TEAMSTER EMPLOYED TO TRANSPORT WORKMEN—SUPERINTENDENCE.

A teamster employed by a company to carry its workmen to and from their work, has not "superintendence entrusted to him" over the workmen whom he is carrying, within the meaning of the Workmen's Compensation for Injuries Act (R.S.O. 1897, ch. 160, sec. 3), and a workman injured by his negligence has no right of action against the company under that statute.

Statement

ACTION for damages for personal injuries sustained by the plaintiff whilst in the employment of the defendants, owing, as alleged, to the negligence of the defendants, or their servant.

The action was tried before MIDDLETON, J., and a jury, at North Bay.

Judgment was entered for the defendants without costs.

A. G. Slaght, for the plaintiff.

J. W. Mahon, for the defendants.

Middleton, J.

MIDDLETON, J.:—The plaintiff, a carpenter in the employ of the defendants, was engaged upon work a mile or more distant from the defendants' boarding-house. The defendants supplied a team to drive men from the boarding-house to the work in the morning and back in the evening. On the 2nd November, 1911, while the plaintiff and a number of other workmen were being driven along the road, the plaintiff was thrown from the waggon, and sustained very severe injuries.

The jury have found, upon questions submitted to them, that the plaintiff was rightly upon the waggon—in fact, this was not disputed after the evidence was closed—and that the accident was occasioned by the reckless driving of the waggon by Walker, also an employee of the company. The company were not negligent in employing Walker, as he was undoubtedly competent.

At common law, the plaintiff cannot recover, because the negligence occasioning his injury was the negligence of a fellow-servant; and I do not think that the Workmen's Compensation for Injuries Act in any way improves his position, because the common law still prevails unless the fellow-servant is one who has superintendence intrusted to him, and the accident occurs while he is in the exercise of such superintendence.

The statute defines "superintendence" as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour.

There is no dispute of fact concerning the position occupied by Walker. He was a teamster employed by the defendants, and

was engaged in and about the same undertaking as that upon which the plaintiff worked. He was employed to draw material to the work, and upon two trips during the day he carried the men to and from the work. Upon these uncontradicted facts, I think it is clear that it cannot be said that he had superintendence within the statutory meaning.

As a matter of precaution, I explained the law to the jury, reading to them the statutory provisions found in the Workmen's Act, and asked them to determine as a question of fact whether Walker had superintendence intrusted to him, within the meaning of the statute. The jury first returned the answer, "We do not know;" but, after my further explaining the matter to them, they brought in the answer, "Yes."

The plaintiff's counsel was not satisfied with the way in which I presented the question to the jury, and thought that the question asked was not entirely apt. At his instance, I submitted a further question, framed in accordance with his view: "Had Walker superintendence over the waggon and workmen while riding in the waggon?" To this the jury first answered: "Yes, over the team and waggon; as to the workmen we are not sure." After I had sent them back to consider further, they modified this answer so as to state that Walker had no superintendence over the workmen while riding in the waggon. This is in accordance with the evidence, and the only answer that could properly be given.

Under these circumstances, I very much regret that I am compelled to enter judgment for the defendants; but I do not think I should award costs, as the plaintiff was very seriously injured by the negligence of the driver.

Judgment for defendants.

REX v. PEMBER.

(Decision No. 2.)

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. May 4, 1912.

1. MUNICIPAL CORPORATIONS (§ II C 3—111*a*)—BY-LAW REGULATING "TRANSIENT TRADERS"—TAKING ORDERS.

A person is not a "transient trader" requiring a municipal license as such under the Ontario Municipal Act 1903, 3 Edw. VII. ch. 19, sec. 583, where, although not permanently resident within the municipality nor assessed therein, he takes orders for hair goods and toilet articles to be supplied directly to the public and not to the retail trade only, if the samples from which orders are solicited are not sold by him and the orders are taken and the business transacted at one place only (*ex gr.* an hotel) and the orders so taken are addressed to a firm located in another municipality subject to acceptance or rejection by the firm after being transmitted to its place of business.

[*Rex* v. *St. Pierre* (1902), 4 O.L.R. 76, followed; *Rex* v. *Pember* (Decision No. 1), 2 D.L.R. 542, affirmed.]

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2. MUNICIPAL CORPORATIONS (§ II C 3—111*a*)—WHO IS A "TRANSIENT TRADER"?—WHAT AMOUNTS TO AN OFFER OF GOODS FOR SALE.

One who, though not a resident in a municipality, merely exhibits samples of, and takes orders for, his goods therein, the goods themselves not being within the municipality, does not "offer goods for sale," and is not a "transient trader," within the meaning of the provisions of the Municipal Act, 1903 (Ont.), or of a municipal by-law passed thereunder.

3. MUNICIPAL CORPORATIONS (§ II C 3—111*a*)—OFFENCE UNDER BY-LAW REGULATING TRANSIENT TRADERS.

In order to constitute an offence against a municipal by-law passed under the authority of the provisions of the Municipal Act relating to "transient traders," 3 Edw. VII. (Ont.) ch 19, sec. 583 (30 and 31), the goods offered for sale must be goods in the municipality. (*Per* Britton, J.)

Statement

APPEAL by the complainant from the order of Middleton, J., *R.* v. *Pember*, 2 D.L.R. 542, 3 O.W.N. 957, quashing a conviction made by the Police Magistrate for the city of Brantford, against the defendant, for unlawfully doing business in Brantford, on the 29th January, 1912, without first having obtained a license, contrary to a transient traders by-law of the city.

The appeal was dismissed.

A. J. Wilkes, K.C., for the appellant.

J. Jennings, for the defendant.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

Britton, J.

BRITTON, J.:—It is a matter of complaint against the defendant that he advertised his going to Brantford in a way that indicated a clear intention of going with a stock of goods to be sold in Brantford. I do not think so. The advertisement stated that he would be at the Kerby House, in Brantford, on the day named, with the latest Parisian and American styles of ladies' hair goods shewn in the Dominion. He stated that "all hair and scalp troubles will be diagnosed free of charge," and he had "something to say for the comfort of bald men" about the "Pember ventilated light weight toupees worn and recommended by the medical profession." Nothing was said about selling the goods or offering them for sale in Brantford. In the meagre evidence given before the Police Magistrate no sale was proved.

The witness Mrs. Bush apparently had no personal knowledge of what she was called upon to prove. She had a strong suspicion that opposition to her in her business was coming from the outside, and naturally she wanted something done to repel the invader. The defendant's admission, whatever it amounted to, was not made until after the conviction. What he said was—and no objection was made to considering that as evidence—that his going to Brantford was to exhibit samples, take orders for similar goods, and forward these orders, so that, if the orders were accepted, goods would be supplied from the

factory outside of Brantford, by the employer of the defendant.

This, as I understand the evidence and business, is what commercial travellers, by the hundreds, are doing all over Ontario. I do not think that kind of business makes the commercial traveller a "transient trader," within the meaning of the Act or within the by-law of the City of Brantford.

In addition to the one argument addressed to us, counsel for the appellant handed in a carefully prepared argument in writing. I have read it with care, and I have consulted the cases cited; but I am unable to agree with the contention of the appellant.

To constitute the offence charged, the goods offered or sold must be goods in Brantford. I agree with the learned Judge appealed from.

The appeal should be dismissed with costs.

RIDDELL, J.:—The appeal should be dismissed, upon the short ground that before the magistrate there was no evidence, i.e., no legal evidence, of any offence. It is said that the magistrate disbelieved the defendant: that may be so—no tribunal is compelled to believe anybody, witness or party: *Rex* v. *Van Norman* (1909), 19 O.L.R. 447, at p. 449. But no tribunal can find the existence of any alleged fact proved simply because a witness or party who is not believed swears that it does not exist.

Riddell, J.

But, as it is desired to have a decision on the facts alleged, I would say that Mr. Wilkes, in his able and exhaustive argument, has entirely failed to convince my mind that the case followed by my learned brother, *Rex* v. *St. Pierre* (1902), 4 O.L.R. 76, is wrongly decided.

Nor am I able to draw any substantial distinction between that case and the present. To my mind, there is no difference in principle in taking orders for an article to be supplied from a distant city, whether what is produced to those from whom it is hoped to secure orders is a picture of the article, or a sample of goods from the counterpart of which the article is to be made, or a sample of the article itself—in none of these cases are goods offered for sale.

The argument, when reduced to its lowest terms, was in reality based upon a supposed principle, dear to those concerned in raising revenue for municipalities, etc., that prima facie every one should be taxed for everything he does or leaves undone and on everything that he has.

But that is not the law yet. And the argument that "transient traders" should be held to include all who do any business in a municipality who do not pay taxes in and to the municipality must be addressed to the Legislature, not to the Court.

The appeal should be dismissed with costs.

Appeal dismissed.

MAN.

C. A.

1912

April 29.

Re ST. VITAL MUNICIPAL ELECTION; TOD v. MAGER.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. April 29, 1912.

1. OFFICERS (§ I A 3—16) — ELIGIBILITY AND QUALIFICATION — HOLDING OTHER OFFICE—MUNICIPAL WEED INSPECTOR CANDIDATE FOR REEVE.

Where there are two candidates for a municipal office under the Manitoba Municipal Act, R.S.M. 1902, ch. 116, the returning officer has no jurisdiction after the close of the nomination proceedings to deal with an objection that one of the nominees is disqualified, nor to declare the other candidate elected without the votes being polled on the ground of the disqualification of his opponent, although the disqualification alleged was that the candidate as the "Noxious Weed Inspector" of the same municipality was its paid officer.

[*St. Vital Municipal Election; Tod* v. *Mager* (Decision No. 1), 1 D.L.R. 565, affirmed on different grounds.]

2. QUO WARRANTO (§ II C—30)—ELECTIONS—VOTE PREVENTED BY IMPROPER RULING OF RETURNING OFFICER.

After the close of a municipal nomination under the Manitoba Municipal Act, R.S.M. 1902, ch. 116, and after having granted a poll to take the votes for the respective candidates, the returning officer is *functus officio* as to the nomination and has no jurisdiction on a succeeding day to withdraw the order for a polling of the votes or to declare one of the candidates elected on the ground of disqualification of his opponent as being already an office-holder of the same municipality; there has been no "election," either at the nomination or at the polls, which could be questioned by an election petition under the Manitoba Municipal Act and the proper method of contesting the right to the office which the candidate so declared elected had assumed to fill, is by *quo warranto*.

[*Re St. Vital Municipal Election; Tod* v. *Mager* (Decision No. 1), 1 D.L.R. 565, 20 W.L.R. 537, affirmed, as to the right to proceed by *quo warranto* but on a different ground.]

3. QUO WARRANTO (§ II C—30)—ELECTIONS—ANOTHER STATUTORY REMEDY.

Under sub-section (*c*) of section 217 of the Manitoba Municipal Act, R.S.M. 1902, ch. 116, providing that a municipal election may be questioned by an election petition on the ground that the person whose election is questioned was not duly elected by a majority of lawful votes and under section 218 of the same Act providing that an election shall not be questioned on any of the grounds mentioned in section 217 except by petition, *quo warranto* will not lie to question a municipal election on that ground. *Per* Howell, C.J.M., and Perdue, J.A.

4. ELECTIONS (§ II B 1—34)—IRREGULARITY—REJECTING NOMINATION PAPER.

Under section 88 of the Manitoba Municipal Act, R.S.M. 1902, ch. 116, providing that if at a meeting of electors to nominate candidates for office only one candidate be nominated for a certain office within the time limited by law, the returning officer shall declare such candidate duly elected and under section 89 of the same Act, providing that if more candidates be nominated than are required to be elected, the returning officer shall announce the same and make known the time and place of the election, the returning officer has no authority after having announced that two candidates have been nominated and after having made known the time and place of election, to reject the nomination paper of one of the candidates on the ground that he was disqualified and to declare the other candidate duly elected.

Statement

APPEAL by the defendant from the decision of Robson, J., *Re St. Vital Municipal Election; Tod* v. *Mager* (Decision No. 1),

1 D.L.R. 565, 20 W.L.R. 537, in proceedings by *quo warranto* to test the defendant's title to the office of reeve of a municipality.

The appeal was dismissed, CAMERON, J.A., dissenting.

H. Phillipps, for appellant.

H. M. Hannesson, for respondent.

HOWELL, C.J.M.:—Section 71 of the Municipal Act provides that the electors shall annually on the third Tuesday in December elect the members of the council "except such members as have been elected at the nomination." Section 84 requires that "A meeting of electors shall be held in each year for the nomination of candidates." Section 86 declares that "The clerk of the municipality shall be the returning officer to preside at such meeting." By section 87 "The time for receiving nominations shall be between the hours of twelve o'clock noon and one o'clock in the afternoon" and by section 88 it is provided that "If only one candidate for the office of mayor or reeve has been nominated within the time limited the returning officer or chairman shall declare such candidate duly elected." Section 89 provides that if more candidates are nominated "the returning officer or chairman shall announce the same and make known to the electors present the time and place" when and where the polls will be opened, and by sub-sec. (*a*) of that section it is provided that if more candidates than the required number are nominated

> any one of them may before two o'clock on the day following the nomination day tender his resignation, which will be accepted by the returning officer when a sufficient number of them remain for election.

It seems then that the statute requires a meeting of electors over which there shall be a presiding officer and that at the meeting and between noon and one o'clock the nomination shall take place, that if there is but one person nominated the presiding officer shall declare him elected and this person is by section 71 called a person "elected at the nomination," and the presiding officer at the meeting shall—if there is more than one candidate —"announce the same and make known to the electors present" as to the time and place of voting. Plainly this shall all take place at the meeting of electors, or in other words at the nomination meeting.

Sub-section (*a*) of section 89 makes one exception to this and allows the returning officer apparently to act otherwise in the single case where within twenty-five hours a rival candidate tenders his resignation to that officer.

In this case there were two candidates nominated and the returning officer duly made the announcements required by section 89. The next day, and of course after the meeting was over, that officer, believing that one of the candidates was disqualified, declared the other one, the defendant, duly elected and the latter has taken the office and is acting as if elected.

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The action of the returning officer was clearly illegal, *Re Pritchard* v. *Mayor of Bangor*, 13 A.C. 241. He had no power whatever to decide this question and no power to arrest the election proceedings commenced by him.

The defendant was not elected either at the nomination or at the polls.

If the returning officer had at the nomination treated the defendant as the only candidate, and had declared him elected, then he would have been elected at the nomination, and although the action of the returning officer would have been illegal the remedy would be by petition under section 217, and following sections: *Harford* v. *Linskey*, [1899] 1 Q.B. 852. It seems clear that 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.

It is not pretended that the defendant was elected at the nomination, nor was there an election at the polls. It is not a case of the defendant having been unlawfully elected at the nomination, for, as above mentioned, the returning officer took the opposite position at the nomination and gave notice of the polls.

If there is jurisdiction for a petition it arises under sub-sec. (*c*). "That he was not duly elected by a majority of lawful votes." To again repeat: he was not elected by the voters—even if unlawfully—at the electors' meeting for nomination, and there was no other election. While the election matters were proceeding and before any election was held he obtruded himself into the office and pretends still to hold it. I think the case of *The King* v. *Beer*, [1903] 2 K.B. 693, is an authority for holding that in this case a writ of *quo warranto* will lie.

The appeal must be dismissed with costs.

Richards, J.A.

RICHARDS, J.A.:—It seems clear that where the remedy is by petition, under section 217 of the Municipal Act, there is no remedy by *quo warranto*, and the question simply is whether, in this case, the remedy sought could have been had under that section. The section reads: "A municipal election may be questioned by an election petition on the ground:" Then follow three grounds. The first two need not be considered. The third is: "(*c*) That he was not duly elected by a majority of lawful votes."

The learned Judge, whose decision is appealed from, held that, in this case, the remedy by petition would not lie, because a poll was not had and therefore in his opinion there was not an election by a majority of lawful votes, as defined in sub-sec. (*c*).

It will be noticed, from the wording of the main part of the section, that a petition only lies where there has been an "elec-

tion," at least of some kind. The returning officer does not elect the candidate. That is done by the methods provided by the Act. There are apparently three ways in which a candidate may become elected to the office of reeve:—

First, by being the only person nominated at the meeting held for nomination;

Second, by the withdrawal before two o'clock on the day following the nomination of his opponent or opponents, leaving him the only person nominated;

Third, by obtaining a majority of votes at the poll.

The Act provides that, on any one of these three things happening, the candidate is to be declared elected. The declaration does not elect the party that it declares elected. It is only a formal method of shewing that the party named has been elected under the provisions of the Act. It has no effect in any other way. The returning officer in making it is a ministerial officer only.

Now, in this case, there were two candidates duly nominated, so that the first condition is not complied with. Mr. Mager's opponent did not withdraw, so that the second one has not been complied with. There was not a poll held, and therefore Mr. Mager was not elected by a majority of the votes, so that the third situation did not arise.

The case of *Harford* v. *Linskey*, [1899] 1 Q.B. 852, is distinct authority that the returning officer had no power whatever to go behind the face of the apparently regular nomination papers of Mr. Mager's opponent and to declare that such opponent was not qualified. Even if he had that power, there is no provision saying that he might then declare Mr. Mager elected. His so-called declaration, made at the time it was, was of no more effect than would be that of any other person who chose to make such a declaration.

When, at the end of the hour for receiving nominations, he announced that there were more candidates nominated than were required to fill the office of reeve, and made known to the electors present the time and places when and where the polls would be opened for the taking of votes for the candidates nominated, he became *functus officio* so far as his duties at the meeting were concerned. He had no power thereafter to recall what he had done. On the contrary it was his duty to go on and have the polls held, Mr. Mager's opponent not having withdrawn by two o'clock on the following day. This seems to me, from the wording of the Act, to be so plain as to require no authority to be cited in support; but, if one be required, it was so held in *The Queen* v. *Miles*, 64 L.J.Q.B. 420. As the returning officer did not go on and hold the poll, no person was "elected" to the office of reeve, and the returning officer's declaration to the contrary was a nullity.

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It is argued that there was an election, though an irregular one. I cannot bring myself to accept this view. As stated above, it seems to me that the action of the returning officer, in deciding, as he did (and without any pretence of statutory authority for so doing), to reject Mr. Tod's nomination paper and to declare Mr. Mager elected, no more constituted an election than the same action by any other person than the returning officer would have.

It was argued that because by-laws, bonds and other acts which would be valid if signed or done by a duly elected reeve are equally valid if signed or done by a *de facto* reeve, we should hold that when Mr. Mager was declared elected and took the oath of office and acted as *de facto* reeve there had of necessity been some kind of an election. I am unable to agree with that contention. The validity given to such documents and acts does not depend upon any question of election or of the right of the party acting as reeve to so act. It is given, as I understand the law, because of the necessity to protect those who have taken some step (*e.g.*, the purchasing of a bond so signed) in reliance upon the acts of the person who has in fact entered into the office of and purported to act as reeve.

The credit and borrowing powers of a municipality would be most seriously hampered if every time that one of its bonds changed hands the purchaser had for his own safety to satisfy himself of the validity of the election of the reeve who had signed it, or of the due appointment to office of the clerk or treasurer who also signed.

There having been, in my opinion, no election whatever, I think an election petition would not lie under section 217, because that section only refers to questioning an "election."

There is much to be said for the construction put by the learned Judge appealed from, upon the wording of sub-section (*c*), as limiting section 217. But, in the view I take, it is unnecessary to here express an opinion as to that.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—The returning officer clearly acted beyond the scope of his authority in assuming to deal judicially with the question of Tod's alleged disqualification after he, the returning officer, had received Tod's nomination paper, and had made known to the electors where and when the poll would be held. It was not until the afternoon following the nomination that the returning officer pretended to reject Tod's nomination. *Pritchard* v. *The Mayor of Bangor*, 13 A.C. 241, is a clear authority against the power of the returning officer to do what he has pretended to have done.

The real question to be dealt with upon this appeal is, whether a proceeding in the nature of *quo warranto* is open to the applicant, or does section 217 of the Municipal Act compel him to proceed by election petition only.

Section 217 declares that a municipal election may be questioned by an election petition on the ground: (*a*) That the election was voided by corrupt practices or offences; (*b*) that the person whose election is questioned was disqualified at the time of the election; (*c*) that the person whose election is questioned "was not duly elected by a majority of lawful votes." By section 218, a municipal election shall not be questioned on any of the above grounds, except by an election petition. It is clear that if the present is a case in which relief could be given by an election petition, the remedy by way of *quo warranto* is excluded. The latter was the proper common law proceeding where there had been a usurpation of any office of a public and substantive nature: *per* Tindal, C.J., in *Darley* v. *The Queen*, 12 Cl. & F. 520, pp. 541-542. This remedy is still the proper one to take for the purpose of ousting a *de facto* occupant, where he is not in possession *de jure*, if some other statutory remedy has not been provided excluding proceedings by way of *quo warranto*: *The King* v. *Beer*, [1903] 2 K.B. 693; *The Queen ex rel. White* v. *Roach*, 18 U.C.R. 226.

For the appellant in this case it is contended that there was in fact an election by the action of the returning officer in rejecting Tod's nomination paper and declaring the appellant duly elected. If the course taken by the returning officer had been taken at the meeting of the electors called for the purpose of nominating candidates, there would have been, I think, considerable force in this contention. If one of two nomination papers did not comply with the law, and for that reason, or for any reason that was considered sufficient, was rejected by the returning officer and the remaining candidate was then and there declared by the same officer to have been elected, as unopposed, this might, I think, be regarded as an election coming within the meaning of sub-section (*c*) of section 217 of the Municipal Act. By the provisions of the Act the electors are called to a meeting for the nomination of candidates (section 84). If only one candidate has been nominated for the office the returning officer shall declare such candidate duly elected (section 88). The nomination is an essential part of the election and may with the returning officer's declaration constitute the election itself where only one candidate is before the meeting. But if, as in the present case, two nomination papers have been received, the returning officer shall announce to the electors present the time and the places where polls will be opened for the taking of votes (section 89). The returning officer received Tod's nomination paper, raised no question as to the candidate's qualification or the validity of the nomination and announced when and where polls would be held. I think that he had then performed his functions in regard to the nomination of candidates and that, in so far as the election now in question was concerned, he could only proceed with the taking of a vote.

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Perdue, J.A.

The case of *Harford* v. *Linskey*, [1899] 1 K.B. 852, does not afford any assistance to the appellant. In that case nomination papers had been filed on behalf of two candidates. The mayor, in accordance with the provisions of the English Act, attended at the town hall for the purpose of deciding on the validity of objections made in writing to the nomination papers: Municipal Corporations Act, 1882 (Imp.), ch. 50, 3rd schedule, part II, sec. 9. He allowed an objection taken to the qualification of one of the candidates and disallowed the nomination paper, with the result that the other candidate was in due course declared elected by the returning officer as the sole candidate nominated. It was held on petition filed, following *Pritchard* v. *Mayor of Bangor*, 13 A.C. 241, above cited, that the mayor had no power to entertain an objection of disqualification. Although it was conceded in *Harford* v. *Linskey*, [1899] 1 K.B. 852, that petition was the proper procedure, I think the case is quite distinguishable from the present one. In *Harford* v. *Linskey*, [1899] 1 K.B. 852, the mayor was empowered to decide on the validity of every written objection to a nomination paper. The returning officer was bound to follow the mayor's decision and if one of the two nomination papers was rejected, to declare the candidate named in the other elected as upon an uncontested nomination. Further, the English Act provides that the decision of the mayor, which is to be given in writing, shall, if allowing an objection, "be subject to reversal on petition questioning the election or return"; third schedule, part II., sec. 14.

In the present case the meeting of electors for the nomination of candidates was past and done with and provision had been made for taking the votes of the electors, before the returning officer rejected Tod's nomination paper. The power of the returning officer over the nomination papers was at an end when he attempted to disallow one of them. His action in declaring Mager elected was wholly unauthorized. It was not an election as it took place after the time had passed for declaring one candidate elected in the right of an uncontested nomination.

I think that proceeding by way of *quo warranto* was proper in this case and that the appeal should be dismissed.

Cameron, J.A.

CAMERON, J.A.:—In my judgment the words "by a majority of lawful votes" in sub-section (*c*) of section 217 of the Municipal Act do not restrict the meaning of the words "duly elected" and in this I must differ from Mr. Justice Robson, who made the order appealed from. The whole policy of the Act in respect of its election provisions is to secure the election of municipal representatives in accordance with the wish of a majority of the voters. The expression of this wish may be ascertained, under the provisions of the statute, either through the medium of ballot

papers deposited in the boxes at the polls or at the nomination proceedings where, if only one candidate for the office of reeve be nominated within the time limited, the returning officer shall declare such candidate duly elected. Thus the words "by a majority of lawful votes" are merely explanatory and are in no way restrictive of the words "duly elected," and, in my opinion, a petition lies under sub-section (*c*) of section 217 even if the election takes place without an actual poll or casting of the ballots.

As I understand it, however, the decision of this Court in dismissing this appeal is not based on the above ground, but on the ground that there was here no election and therefore section 217 is wholly inapplicable. That is to say, the election, or so-called election here in question, was a nullity. With deference I must dissent from that view. The date of the nomination was fixed by statute. The proceedings were regular up to and inclusive of the nomination proceedings and as to the proceedings required by section 89. Both Mager and Tod were duly nominated. That the returning officer acted without authority in over-ruling Tod's nomination is admitted. But can it be said that his declaration of Mager's election was absolutely without effect? The statute in no way limits the time within which after one candidate only has been nominated the returning officer shall declare him elected. That need not be immediately after the lapse of the hour but may be the next day or on the second or third or fourth day thereafter, so far as I can see. Had Tod's nomination paper been a plain sham, something on which the returning officer could not act, a delayed declaration would not have affected Mager's election, in my judgment.

The County Court Judge, to whom the petition under section 217 is presented, is, at the trial, to determine whether the person whose "election" is complained of was "duly elected" or whether "the election was void" (sec. 236). This clearly contemplates an election voidable on certain grounds being declared void at the hearing. For this Court now to declare this election void is, in my opinion, for it to undertake a function expressly assigned by the Act to the trial Judge.

Had no proceedings been taken to quash this election it would stand as good and valid in every respect. By-laws, debentures and other documents to which the signature of the reeve was necessary and proceedings of the council at which his presence was essential, would have been valid and absolutely unquestioned. How then can it be said there was no election whatever?

The meaning given to the word "election" in the Act varies. In the quotations from section 236 given above it means the official signification of the candidate who appears to have the majority of votes or to have been the only person nominated. This is the sense in which it seems to me to be used in the first

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line of section 217. But by the interpretation clause "election" includes nomination (section 2). In section 71 we find a provision referring to members of the council who are "elected at the nomination," and by section 88, if only one candidate be nominated, the returning officer shall declare such candidate "duly elected" without a poll. In section 276 the word "election" refers to the whole period covering the events relating to the nomination and the polling, which period commences before the nomination. Elsewhere in the Act the word "election" means the actual polling and proceedings on the day when the ballots are cast, as it seems to me is the case in section 82. The meaning which I would assign to it in the first line of section 217 would be that which it conveys in section 236, as I have set it out above.

Let us suppose a prosecution for a penalty under section 276 or 277 in a case similar to this where the offence was committed prior to the time when the returning officer made his unauthorized declaration. The fact of the declaration and the bringing of the election proceedings to an end in that way would not make the offence any the less an offence at an election and under the election provisions of the Act. How then can it be said that there was here no election?

Let me call attention to the use of the term "no completed election" by Lord Watson in *Pritchard* v. *Mayor of Bangor*, 13 A.C. 252. "If," he said in that case, "there was no declaration, then there was no completed election of either of these two candidates." During the whole period of the events in question herein it could be said that there was an election pending until at any rate the returning officer made his declaration which had in fact no validity, and was as if it had never been made. But the election, once pending, once in process of completion, was never completed. There was, in fact and in law, no completed election; but there was an election nevertheless, though not carried to a finality as contemplated by the Act.

My conclusion, therefore, with all deference, is that there was here an actual, a *de facto* election, an election in fact acted upon inasmuch as Mager took the oath of office and qualified under the Act and exercised the powers of reeve. It is quite true that the returning officer in his rejection of Tod's nomination acted illegally and in a manner wholly unauthorized by the statute, so that Mager's election must necessarily be voided when once questioned on that ground. But up to the time of that rejection his proceedings were quite regular and in accordance with the Act, so that Mager's election was not a nullity; but voidable only if attacked and not otherwise. And if so attacked power is given to the County Court Judge to declare the election void on a petition presented to him under the statute, as I have pointed out. This statutory proceeding was obviously intended to put an

end to the difficulties which have frequently arisen as to the proper procedure in cases of this kind "and to create a simple method of procedure which would, shortly after the election, settle the question in dispute": *per* Lord Herschell in *Pritchard* v. *Bangor*, 13 A.C. 252, at p. 260. There was, in point of fact, however, a municipal election here which it is now sought to set aside after the time fixed by the Act has expired.

The facts in the case of *Harford* v. *Linskey*, [1899] 1 Q.B. 852, are somewhat similar to those here. There there were two candidates, duly nominated by nomination papers properly delivered on October 25th. After Harford's nomination paper was put in Linskey objected to it and the mayor, on October 25th, allowed the objection. Subsequently, on November 1st, when the election was held, Linskey was declared elected as being the only person validly nominated. Harford then presented his petition under the sections of the Municipal Corporations Act, 1882, similar to our sections 217 and 219. There, as here, it was conceded, on the authority of *Pritchard* v. *Mayor of Bangor*, 13 A.C. 252, that the mayor had no jurisdiction to entertain the objection to the petitioner's nomination. There, as here, both candidates were validly nominated and would have gone to the polls in regular course, but for the arbitrary and illegal action of a statutory officer. There, as here, if the argument of the majority of this Court be correct, there was no election, the pretended election was a nullity, and, therefore, there having been no municipal election to be called in question, a petition did not lie. But the eminent counsel for the respondent did not apparently even suggest the objection. On this point I cannot see any material difference between the two cases.

There was, as I believe, an election here, a *de facto* election, an election acted upon, and it is sought to impeach it in this proceeding in a manner other than that prescribed by statute. I can see it in no other light, and I would allow the appeal.

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

DONALDSON v. COLLINS.

Saskatchewan Supreme Court. Trial before Wetmore, C.J. April 18, 1912.

1. CONTRACTS (§ II D 4—188)—CONSTRUCTION OF BUILDING CONTRACT—SPECIFICATIONS ATTACHED AND REFERRED TO.

Where the signed memorandum of a building contract had the specifications attached to it, but the latter were not signed, they may still be incorporated by reference into the signed memorandum so as to constitute both writings one agreement.

2. CONTRACTS (§ IV E—367)—BREACH—EFFECT OF—DAMAGES IN ADDITION.

Where an owner is relieved from making further payments under a building contract by reason of defective workmanship and failure to supply materials specified, he may also recover additional damages on proof thereof, after taking into account the balance unpaid on the contract.

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3. CONTRACTS (§ IV C—356)—TAKING POSSESSION—ACCEPTANCE OF BUILDING.

The mere taking possession of a building agreed to be built is not, of itself, acceptance of the work.

4. CONTRACTS (§ IV C—357)—ACCEPTANCE OF BUILDING—WAIVER OR ESTOPPEL—KNOWLEDGE OF DEFECTS.

Where a contract is to erect a building to certain specifications for a lump sum, the price is not recoverable until the building is completed in accordance with the specifications, unless the owner has accepted the work with a knowledge of the defects or variations, or has done something from which a new contract to pay for the work done can be inferred.

[*Broley* v. *Mills*, 1 Sask. L.R. 20, followed; *Elford* v. *Thompson*, 1 D.L.R. 1, specially referred to.]

5. CONTRACTS (§ II D—188)—BUILDING CONTRACT—WRONG NAME FILLED IN BY MISTAKE IN ONE COPY—ORAL EVIDENCE.

Where a building contract was intended to be made out in duplicate and an agreed alteration of a name therein was made on one copy left with the owner and authority given to the building contractor to similarly alter his copy, the contractor may, in case of variance, rely on the copy produced from the possession of the property owner in preference to his own copy on shewing by parol that the wrong name had been filled in on his copy by mistake.

Statement

Trial of an action upon a building contract.

J. F. Bryant, for plaintiff.

J. F. Frame, for defendant.

Wetmore, C.J.

WETMORE, C.J.:—This is an action to recover a balance claimed to be due on a contract between the plaintiff and defendant for building a house. The contract is as follows:—

"I agree to build a dwelling house as per plan and specifications prepared to the order of William G. Collins / Mrs. Simmons for the sum of two thousand three hundred dollars ($2,300)."

"A. Donaldson.

"Wm. G. Collins."

The above is a copy of the agreement kept by Collins. The specifications were attached to this agreement, but were not signed by the parties. It is conceded, however, that the specifications so attached were those referred to in the signed agreement, and I hold that they all constituted one agreement. The contract put in evidence on behalf of the plaintiff was the same as the one above set out, only the name "Mrs. Collins" was written over the name "Mrs. Simmons," marked out therein. I find that the name "William G. Collins," set out in the first-mentioned copy of agreement, was written over the name "Mrs. Simmons" after it was signed, in the presence of the plaintiff, and the plaintiff was to write the same name over his copy of the agreement, but he did not do so, but instead wrote Mrs. Collins's name. I find that the first mentioned agreement is the true and correct one.

The plaintiff entered upon the work. The defendant from time to time paid monies on account of the contract amounting

in all to $1,600. The defendant went into possession of the house, and the plaintiff, claiming that he has fulfilled his contract, brought this action to recover $700, being the balance he claims to be due to him thereon, and also to recover for some alleged extras.

In so far as the recovery of this amount, $700, is concerned, the statement of claim is based entirely on the express agreement; there is no *quantum meruit* to cover it. There is a *quantum meruit* in respect to the extras. It is quite clear that the contract in question was an entire one, and that according to the general rule the price payable thereunder is not payable until it is completed. It is claimed on the part of the plaintiff that the work was completed according to the contract except in respect to particulars wherein the defendant by himself or his agent consented to or requested an alteration, or wherein he (the plaintiff) substituted work of a different character or material as good and sometimes better than that required by the contract, and it was also claimed that the defendant by expressing himself satisfied with the work and going into possession of the building, waived a strict compliance with the terms of the agreement. The plaintiff also testified that the defendant informed him that if he procured a lien waiver instead of waiting thirty days for the balance of the money he would be able to give it to him right away. I find that that is true, and the plaintiff procured the lien waiver. The specifications provided that the plastering was to be done with hardwall plaster. As a matter of fact it was done with ordinary plaster made of lime and sand. There was some attempt made to prove that the lime and sand was as good as, if not better than, the hardwall plaster, but the question as to whether one was better than or equally as good as the other depended on so many conditions that it did not impress me. The floor joists, according to the specifications, were to be 2 in. x 8 in. throughout, 2 feet centre to centre. The plaintiff did not put 2 in. x 8 in. joists at the second floor, but instead put in 2 in. x 6 in. joists at 16 inch centres. The plaintiff swore that this was better and stronger work than 2 in. x 8 in. joists at two foot centres. That would seem, according to the evidence, possibly not to be correct. At any rate, it is a matter of opinion, because Mr. Coltman, an architect, was called, and testified that the 2 in. x 6 in. joists at 16 inch centres would have a bearing capacity of 15 per cent. less than the 2 in. x. 8 in. at two foot centres. I do not feel called upon to make any findings as to this, or whether lime and sand plaster was or was not as good as or better than hardwall plaster, because the contract provided that hardwall plaster and the 2 in. x 8 in. joists should be furnished, and the plaintiff did not do it, and, therefore, he did not fulfil his agreement and the defendant is entitled to have what he bar-

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gained for. An application was made on behalf of the plaintiff to amend the statement of claim by pleading a *quantum meruit* to cover the work actually done on the building apart from what I have hereinbefore stated was pleaded to cover the extras. No object will be attained by granting this application.

The authorities are clear (and they have been gone over so often that it is unnecessary to repeat them now) that the mere taking possession of a building agreed to be erected on land is not in itself an acceptance of the work. In this case, if the defendant did express himself as satisfied with the work, which he denies, or if he made the suggestion with respect to getting the lien waiver, which I have found he did make, and although the plaintiff procured the lien waiver, neither of these circumstances amounted to an acceptance of the work I am now dealing with, because the defendant was not aware at the time that the plaster and the joists referred to were not in accordance with the specifications. This work was covered up and he could not see it, and it was only after the alleged acts of acceptance or acquiescence had occurred that the failure to comply with the specifications was discovered. The law on the subject is concisely stated by my brother Lamont in *Broley* v. *Mills*, 1 Sask. L.R. 20, at p. 22, as follows:—

> Where a contract is to erect a building according to certain specifications for a lump sum, the price is not recoverable until the building is completed in accordance with the specifications, unless the defendant has accepted the work with a knowledge of the defects or has done something from which a new contract to pay for the work done can be inferred.

I am unable to find anything under the circumstances in this case from which a new contract can be inferred to pay for the work done. A letter from the defendant to the plaintiff, dated 14th July, 1911, was put in, which is as follows:—

> Regina, July 14, 1911.
>
> To A. Donaldson, Esq.,
> Regina.
>
> Memorandum in re House on Lot 32, Block 338, Regina.
>
> Dear Sir,—I beg to advice you that unless the damage to plaster, occasioned by jacking up house, is properly repaired and the house put into an acceptable condition within the next four days, I will engage another contractor to complete the building and charge the cost thereof against the balance due you.
>
> Yours truly,
>
> WM. G. COLLINS.

It was attempted by reason of that letter to bring this case within what I decided in *Elford et al.* v. *Thompson*, 1 D.L.R. 1, 19 W.L.R. 809. It will be observed that La Chance's letter set out in that case referred to the whole building operations. The above letter of the defendant only refers to a portion of the

operations, and I take it that in referring to getting another contractor to complete the building he had reference to completing it in respect to what he stated was wrong, namely, the damage to the plaster occasioned by jacking up the house. I also draw attention to the fact that at the time this letter was written the plaintiff had ceased his operations on the building and was claiming that he had fulfilled his contract, and that the defendant was not (so I find) aware of the fact that the plastering had not been done with the specified materials or that the joists were not as required by the specifications. I hold, therefore, that the plaintiff cannot recover for the work claimed to be done under the contract either upon the contract or on a *quantum meruit*. The amendment is, therefore, refused.

There will, therefore, be judgment for the defendant in so far as the plaintiff's action is based on the third and fourth paragraphs of the statement of claim.

The plaintiff also sues for certain extras done in the building.

The item for putting in an extra back entrance is admitted, and $30, the amount charged for it, has been paid into Court.

The next item is furnishing and adjusting a floor hinge, which was done at the request of Mrs. Collins, and which I think came within the scope of her agency. It was practically not disputed	$ 3 00
The item for putting in plumbing to the kitchen sink was done at the instance of Mrs. Collins and was within the scope of her agency	2 00
I will allow for the sash lifts, this extra supplied also at the instance of Mrs. Collins. I have some doubt, however, whether it does not come under the term "hardware," which the plaintiff was bound to provide by the specifications	75
I will also allow for building scuttle to the roof	2 50
Also for extra woodwork under stairs	3 00
Also furnishing and adjusting glass to bath room cabinet	1 50
(The last two items were done at the request of Mrs. Collins and were within the scope of her agency.)	
	$12 75

There is a charge of $13.50 for furnishing and adjusting extra bars to the sashes. The plaintiff proposed to charge 20 cents a pane for this, which he says was the price agreed on. There is no evidence as to how many panes there were. The defendant's letter authorizing the work was put in evidence, and it shews that what he agreed to pay was the difference between the cost of the windows as first called for (by the contract) and the barred upper sash agreed upon (the extra in

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question). There is no evidence to establish what this difference was, and I will not allow it.

The plaintiff will be allowed for these extras $12.75.

The defendant has counterclaimed for damages for bad workmanship in carrying out the contract, not doing work provided by the contract to be done, and using material other than that provided for thereby. I know of no reason why he should not counterclaim for this. The fact that the plaintiff has been held not entitled to recover the balance unpaid on his contract does not prevent him. Suppose the whole amount of the contract price of a contract such as this had been paid except $100 and the damage done by bad workmanship, etc., was $500, the owner would not be indemnified by merely preventing the contractor recovering the $100, and I think he would be entitled to bring an action or counterclaim for the breach of contract by bad workmanship, etc. But in arriving at the damages, I think the Court could properly take into consideration the fact that there was a balance unpaid on the principal contract and the amount thereof which the contractor could not recover. The plaintiff not only departed from the specifications to a very great extent, but the workmanship on this building was very bad. Wherever he was properly authorized to depart from the specifications he was justified in doing so, but this was no excuse whatever for the bad workmanship. The contract provides that the labour was to be performed in the most acceptable manner, by which I understand that, like every work which a mechanic agrees to perform, it was to be done in a good and workmanlike manner. After hearing the evidence, I suggested that I should view the premises, which was assented to, and I went there with the plaintiff and defendant as shewers, and I had pointed out to me what the several witnesses who testified to the character of the work and materials had reference to in their testimony, and I found that what the witnesses who testified to the bad character of the work stated was fully borne out. The plaintiff's contention all through the trial was that Mrs. Collins had a general authority from her husband to superintend the work and to give instructions to alter or depart from the specifications—that the defendant stated that he was to pay for it, but the contract was to please Mrs. Collins. The defendant denied that. He testified that:—

> It was arranged when we were discussing the erection of the building that my wife should have some say in the location of the cupboard or the swinging of a door, anything like that, but nothing whatever was to be changed in the structural appearance or the set of the house. Just the same as any wife wants—she wants the cupboard set in a certain place. It was arranged and agreed to by Mr. Donaldson that he was to do that so long as the work was not interfered with and so far as it would not necessitate the cutting or breaking or using of additional lumber it would be done.

The plaintiff does not differ from this very much in his examination for discovery. He then swore:—

> It was distinctly understood that Mrs. Collins would have the right to make any little changes that were in reason, and she was to see the house as it went along.

He attempted at the trial to carry her authority a long way further than that. I accept the defendant's version as to what authority he gave his wife. There is no doubt Mrs. Collins meddled a good deal in this matter—a good deal more than she had any authority for doing. The fact of her interference is testified to by several witnesses and was not contradicted, and I may say that she has done more than a little to complicate affairs, and that not at all in the interests of her husband. The specifications call for a beam to support the joists of the ground floor of 8 in. x 8 in., and that beam was, according to the plan, to be supported by a post set in concrete in the floor in about the centre of the basement. The plaintiff put a beam in about 5¼ in. x 7¼ in. He also put in a temporary post, but removed it at the instance of Mrs. Collins. This was not only a departure from the contract but was grossly improper workmanship. The consequence was that the ground floor sank, and to some extent perhaps, but slightly, the floor above. The floor had to be jacked up, and thereby very considerable damage was done to the building, and the first floor is still uneven, although an attempt was made to remedy it, but it could not be carried further for fear of greater damage to the plaster.

The plaintiff claims that the placing of the beam of the size he placed there was caused by directions given by Mrs. Collins. He must have known, under the testimony he gave on his examination for discovery, that Mrs. Collins had no authority either in respect of the beam or the post to give directions so far departing from the structural requirements of the building, and in so far as not putting in the post was concerned he admitted that he felt at the time reasonably certain that the house would suffer. The beam he put in was not sufficient to properly carry the works which it supported; in fact, it was the central and main carrying beam of the whole superstructure. He stated that he put a post in afterwards when he found the floor sagging. That was too late to prevent the damage which had occurred. The consequence of the jacking of the floor was to crack the plaster to a very considerable extent. The plastering was so badly done that the walls were disfigured with a large number of fine cracks. The newel post is altogether out of plumb and is very unsightly. The verandah posts were not set in concrete as required. A small strip of wood entirely out of keeping with the wood by which it is placed was put in a conspicuous place.

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I am unable to find that the defendant has done anything to prevent his counterclaiming for damages in respect to the matters above set forth. Mr. Downes, a contractor whose testimony impresses me, testified that the manner in which the work was done as compared with what the agreement and specifications, etc., call for would depreciate the selling value of the house $1,000. In view, however, of the fact that the defendant has been relieved from the payment of $700, I think the ends of justice will be satisfied by fixing the damages on the counterclaim at $100, for which amount the defendant will have judgment.

There will, therefore, be, as before stated, judgment for the defendant on the matters arising out of the 3rd and 4th paragraphs of the statement of claim and of the defendant's pleading thereto and the issues found thereon, with the costs appertaining thereto. There will also be judgment for the defendant on the counterclaim for $100, with costs.

There will be judgment for the plaintiff for $12.75 on the matters arising out of the 5th paragraph of the statement of claim and of the defendant's pleadings thereto and of the issues joined thereon, with the general costs of the action, not including the costs hereinbefore awarded to the defendant. It will be for the taxing officer to determine whether Rule 721 of the Rules of Court applies to such costs awarded to the plaintiff.

I will state for the information of the taxing officer that all the witnesses called on behalf of the respective parties except the plaintiff and defendant themselves and one, William Powers, a witness called for the plaintiff, testified exclusively respecting the matters arising out of the 3rd and 4th paragraphs of the statement of claim, and while Powers testified in respect to one extra claimed under paragraph 5 of the claim, that item was found against the plaintiff and disallowed. I may add that the case took all of two days to try, and of that time there was certainly not more than one hour occupied in dealing with the extras. While the plaintiff and defendant testified to extras, the greater part of their testimony was taken up in testifying to the matters arising out of the 3rd and 4th paragraphs.

The judgment for the plaintiff will be set off against the judgment for the defendant, and if there is a balance in favour of the plaintiff he will have execution therefor and the $30 paid into Court will be paid out to him.

If the balance is in favour of the defendant, the $30 paid into Court will be applied to such balance as far as it will go, and if it amounts to more than such balance the difference will be paid to the plaintiff; if the $30 is not sufficient to pay such balance then the defendant will have execution for what remains unpaid.

Judgment accordingly.

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April 27.

Ontario High Court, Middleton, J., in Chambers. April 27, 1912.

1. DESCENT AND DISTRIBUTION (§ III—31)—PROCEEDINGS TO PROVE HEIRSHIP—INQUIRY AS TO NEXT-OF-KIN—COSTS.

Where a reference is ordered to inquire and report who is or are the next of kin of a deceased intestate, it is the duty of the officer conducting the reference to allow any claimants to present their respective claims as best they can, and at their own risk as to costs, and, if no claims be established, the estate goes to the Crown. An inquiry at the expense of the estate for the purpose of discovering the next of kin will not be allowed.

Statement

MOTION by the administrators of the estate of Felix Corr, deceased, for an order directing that the costs of any roving commission which may be issued by the Master in Ordinary, or under his direction, to take the evidence of witnesses in Ireland, be paid out of the estate.

The application was refused.

J. S. Fullerton, K.C., for the administrators.

J. R. Cartwright, K.C., for the Attorney-General.

D. Urquhart, Grayson Smith, J. G. O'Donoghue, G. S. Hodgson, and *W. M. Brandon*, for various claimants.

Middleton, J.

MIDDLETON, J.:—It appears that the late Felix Corr died on the 3rd May, 1910, at the age of about 75 years. He had come to Canada when a lad of twenty. He left an estate of between $7,000 and $8,000. The National Trust Company were appointed administrators, and, not knowing who were the intestate's next of kin, they paid the net balance, $7,863.40, into Court, under the Trustee Relief Act.

By an order of Mr. Justice Teetzel, dated the 24th October, 1911, the matter was referred to the Master in Ordinary to inquire and report who was or were the next of kin. Pursuant to this, an advertisement was published, and a number of claims were filed.

A quantity of evidence has been taken before the Master. This evidence has not been taken, as one would have expected, in support of the various claims, but rather as if an inquest was being conducted; a great deal of rambling testimony being admitted, upon the theory that, while it was not evidence, it might give some clue which could be followed up by further inquiry. Counsel stated before me that, upon this evidence, it would be impossible to find any one of the claimants entitled.

At the close of the evidence, according to the Master's certificate, the following took place: "I now request the solicitors present to state if any of them know of any available evidence from any source which may throw light on the inquiry as to whether Corr left any relatives, whether those relatives are or are not represented by such solicitors, or whether they can

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by any means in their power further assist me in this inquiry. No one answers, which I take to mean that no further evidence is available in Ontario. It already having been disclosed by the evidence that witnesses may be available in Ireland, I suggest to counsel that, though no further evidence can be obtained here, I do not feel justified in closing the investigation, in view of the statements by affidavit and *viva voce* that evidence may be found in Ireland; and I think that the administrators would be justified in moving for a commission and asking the Court for leave to pay the expenses (disbursements) of that step out of the funds. I adjourn the matter till the 25th instant, at 11 a.m., so that counsel may consider this suggestion. The Attorney-General states that, as at present advised, he is opposed to and will oppose a commission, on the ground that the probability of identification of a Felix Corr who might be proved to have left Ireland as indicated in such evidence with the Felix Corr who dies in Toronto is too remote."

No motion has been made for a commission, but the order applied for is sought; and the statement is made that it is intended that the Master in Ordinary himself shall go to Ireland and conduct such inquiries as he sees fit, without the assistance of counsel for any of the claimants. This course is supported by counsel representing some claimants, and is opposed by the Attorney-General and by other counsel.

It appears that there are several men named Felix Corr who left Ireland at different times for America, and the different claimants seek to establish, and could probably establish, relationship between one or other of these men; but the evidence so far taken not only fails to identify the deceased with any of these, but, in some cases at least, makes it reasonably plain that the identity cannot be established.

A picture has been drawn of the intestate in his 75th year, and the evidence which it is sought to take is that of a number of old people resident in Ireland who, it is suggested, will be able to identify him from this picture.

When one remembers that Corr left Ireland now more than fifty-five years ago, a boy of twenty, the entire worthlessness of the proposed evidence becomes apparent.

Apart from all other objections, I think the motion is vicious in principle, and that the learned Master is proceeding upon an erroneous theory. It is his duty to allow the claimants to present their respective claims as they best can, and each at his own risk as to costs; and, if each and all of the claimants fail to establish a claim, then the fund goes to the Crown; and the Crown will, no doubt, recognise any fair claim that may at any time be made out.

The motion must be dismissed. I think there should be no costs.

Application refused.

INDEX OF SUBJECT MATTER, VOL. III., PART III.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. III., PART III.

STILWELL-BIERCE & SMITH-VALE CO. (plaintiff in warranty) v. **PETER LYALL et al.** (defendants in warranty).

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April 29.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. April 29, 1912.

1. MASTER AND SERVANT (§ I B—8)—WORKMAN DOING WORK AT FIXED SCALE UNDER SUPERVISION OF ENGINEERS—QUEBEC C.C., SEC. 1688.

A man who agrees to do work on a fixed scale of prices at so much per yard, etc., or furnishes materials and work at so much per foot under the supervision of engineers, surveyors, etc., is not a builder nor even a sub-contractor within the meaning of art. 1688 C.C.; he is merely a workman.

2. MASTER AND SERVANT (§ IV—310)—DEFECT IN CONSTRUCTION—LIABILITY OF WORKMAN—QUEBEC C.C., SEC. 1688.

When a workman has supplied his materials and done his work and payment thereof has been made, he has no responsibility in case of damages resulting to the structure put up, either from a defect of construction or the nature of the soil, and no presumption of fault at all rests on his shoulder, either of *aquilian* or of contractual fault under C.C. 1688.

3. CHAMPERTY AND MAINTENANCE (§ I—2)—TAKING OBJECTION PENDENTE LITE.

An exception to an agreement, whereby the principal plaintiff agrees to limit the responsibility of the principal defendant (who is also plaintiff in warranty) to a certain sum on condition that such principal defendant prosecuted an action in warranty against the defendant in warranty, on the ground that such agreement is a transfer of litigious rights should be raised by a peremptory exception to the action in warranty and cannot be entertained as a ground against an appeal from a judgment rendered on such action.

Statement

THIS was an appeal by the plaintiff in warranty from the judgment of the Superior Court, Tellier, J., rendered on May, 7th, 1906, dismissing with costs the plaintiff in warranty's actions against the respondents for some $1,500,000 damages claimed as the result of delay in delivering a dam and hydraulic plant and of the breakdown of such dam.

The appeal was dismissed.

The facts and the contentions of the parties are fully set out in the judgment of Tellier, J., appealed from, which was as follows:—

Tellier, J.

TELLIER, J.:—This relates to an action of damages instituted under No. 507 for the amount of $242,271.

In this action the principal defendant has impleaded in guaranty Peter Lyall and others. This action was founded on a contract entered into on the 25th of September, 1906, between the plaintiff and the defendant. Before this contract was entered into, another contract dated the 5th of September preceding was entered into between Peter Lyall and others and The Stilwell-Bierce and Smith-Vale Co. and others, defendants. It related to the construction of a hydraulic plant. The dam was partly carried away by water on the 16th of November, 1900, namely, the part of the dam called the waste gates and

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which also gave rise to the action No. 433 for the sum of $324,648 20/100. Later on, on the 30th of November, 1912, the crossdam broke and this loss gave rise to the incidental demand in the action No. 433, amounting to $728,361. These two actions based upon the rupture of the waste gates on the 16th of November, 1900, and the 30th of November, 1902, also gave rise to two actions in warranty, and it is now necessary to judge these actions which have brought about a very long taking of testimony, which I have read in part and heard the rest.

I will try to shew which are the principal questions presented to me in this cause:—

First of all there is a question of responsibility for the architects and for the contractors. Who are the architects and who are the contractors under these circumstances? The Stilwell-Bierce and Smith-Vale Co. undertook the entire enterprise. It was it who prepared the plans and specifications. It was it that tendered for the execution of the whole work. It was it which by its officers has supervised the execution of the works; it was it which, having called for sub-tenders, gave the contract of the 5th of September, 1896, to defendant in guaranty (Peter Lyall & Sons). Finally it was it in which were joined the double functions of architect and contractor.

This company undertook to construct the whole work, to develop hydraulic power in the river Richelieu at Chambly and in order to arrive at this result it was necessary to construct a dam, construct buildings and instal in those buildings its machinery. In fine, this company contracted for the whole of the work and was obligated to deliver the whole complete and perfect, having drawn up all the plans and having undertaken to carry them out. This company was by law responsible to deliver a perfect article, but it did not content itself with that. It gave in its contract of the 25th of September, 1896, every guaranty; it took upon itself all the responsibilities; and it so declared in that act and contract, formally; and so stated to the Chambly Manufacturing Co., who, it has declared knew nothing about these things and would not take the responsibility about them. So there is no question but that the principal defendant (the Stilwell-Bierce Co.) took every responsibility and became obligated to furnish a completed article so as to give what was contemplated, namely, to give a motive power and to furnish everything.

Has it fulfilled its obligations? It gave a sub-contract to Peter Lyall and Sons for only a part of its works and this contract is singularly drawn. It has not charged the defendants in warranty to fulfil the obligations which it itself contracted towards the Chambly Co. It contented itself to demand from Peter Lyall and Sons tenders (bids) to furnish employees, to furnish material, to furnish the necessary articles for a dam

and the materials for the building to be constructed; that is all that it demanded of Peter Lyall & Sons.

The list of articles is given, the quantities are given approximately and the submission is arrived at, and it puts opposite each item a stipulated price. The majority of these items are stipulated and are prices at so much a cubic yard and so much a thousand for brick; there were openings, there were windows, so much for each opening and so much for each window and for each door, etc. Everything was arrived at in detail.

Then, as I have already said, the principal defendants do not charge the sub-contractor to carry out the obligations which they, the principal defendants, have contracted, to make a perfect work and to produce such and such results. It contents itself to demand from the sub-contractor prices for furnishing and employing the materials and the contract of the 5th of September, 1896, is based simply on the submission furnished by Peter Lyall & Sons and at the bottom of this submission there is even a reduction of ten per cent. on all the prices therein mentioned. The contract was thereupon passed and the defendants in warranty undertook to do these works and to furnish the materials in question. It is very true that the contract is entitled "Contract for the construction of a Dam and a Power House," that is to say, a dam and a building; but the contract itself shews that the defendants in warranty undertook to furnish these materials and to do the works mentioned in the contract.

The following clause is that the defendants in warranty authorize the plaintiff in warranty to consult an engineer and they decide to give to this engineer all the powers necessary to execute the contract and it is he who must see that those works undertaken by the sub-contractor are executed according to the specifications and plans. It is not the sub-contractor who is obliged to do these works in accordance with the contract and the specifications; it is the engineer who has charge of all that. And one sees by the contract as continued that the contractor is subjected to the jurisdiction of this engineer. One sees finally that he is the judge of the material to be employed. One sees that he is authorized to modify the plans and that for the acceptance of the materials and for the employment of the materials, it is he who is the judge and that he has the right to receive and even set aside the materials which have been received, and that his decision is final. And so the contract continues to the end in such a way as to shew us that by virtue of this contract the defendants in warranty have no other thing to do than to obey and to receive the instructions and orders of the engineer of the company, the plaintiff in warranty.

Does this contract, made under the following circumstances, give to the sub-contractor any initiative? No. It gives them

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none; they have only to obey. Consequently, if they have only to obey, can they take a responsibility of any kind? I cannot see how they can possibly take responsibility. They are there obliged purely and simply to follow orders and directions. They have only to obey. Therefore they are only nominees purely and simply of the company and cannot engage of their own responsibility. Now, if one compares the two contracts, one sees a host of variations between the two contracts; one sees that Peter Lyall & Sons who are submitted to the decision of the engineer in chief of the Chambly company, must submit to his decision. There are important clauses in the principal contract which are not in the sub-contract. Thus, in the principal contract there is a clause to settle matters by arbitration, but in the sub-contract there is no such clause. The matter is very simple. There is no such arbitration to make, inasmuch as the whole matter was left to the jurisdiction of the engineer who was chosen by the Stilwell-Bierce Co. There is no arbitration clause in the sub-contract and if one reads these two contracts, one sees a host of variations sufficient to shew that in spite of the sub-contract the principal contractor remained the master of the works and was the sole judge of the works to be done, and the matter is quite simple inasmuch as it undertook all the responsibilities. It was it which obligated itself to furnish all that it promised by the contract. Under those circumstances it had in itself an indivisible obligation to deliver to the principal plaintiff the work as a whole and the sub-contractors had only a divisible obligation of each day that the sub-contractor brought the materials and the work into the plant in question. It was there to pay its debt and day by day it paid its debt, and month by month to the sub-contractor. From the moment that the works were approved and received, its debt was paid up to so much, whilst it was not that way with the principal contractor, the Stilwell-Bierce Co. It had to progress; it had to go on and arrive finally at the end of the works up to the time when they completed them and delivered the works in such way that it could present to the principal plaintiff a completed work and discharge its obligation.

Moreover, under all the circumstances, what is the responsibility of the plaintiff in warranty? Its responsibility remained entire and absolute in every respect. The works were finished, but finished after the time limited. Peter Lyall was obliged to deliver the works October 1, 1897, while the principal company was to deliver the works one month previous, and at that time all should have been complete and perfect, even the installation which the electric company should have done to complete the works for the first of September, 1897. Now one sees that on the 28th day of September, 1897, the works appear to have been finished so far as the defendants in warranty were

concerned and there comes a letter of the third of January, 1898, informing the principal plaintiff, the Chambly Company, that the works are put at its disposal.

The water is then applied on these works—on the walls of the building as well as on the dam, and what does one see? It is that the works in question leak; that the walls as constructed also leak and the consequence is that the water penetrates into the building in question and these things remain in that state during the winter. There is water in this building and it forms into ice.

One sees by the correspondence which has been put in the record by the Royal Electric Co. that it demanded the use of this building to make its installations. The works of machinery which the Stilwell-Bierce Co. should instal in this building were not there and would not operate, and one sees demand after demand made for this machinery, and complaints against the building.

What does one conclude? One finds that the draft tubes leak. What is the consequence? The consequence is that they carry away a portion of the concrete. Then they are put to expense to get rid of this humidity which is in this building, so as to prevent water from going inside the building. Who are those who are put onto this work? They are the workmen of the principal defendant, Stilwell-Bierce Co., and the defendants in warranty, Peter Lyall & Son, one does not see there at all. Now, what was their duty under the circumstances? If there was reason to complain of their works, they should have been notified that their works were defective and that they must come and repair them. No, there is nothing at all of that. The arrangement is purely and simply one between the principal plaintiff, the Chambly Co., and the principal defendant (Stilwell-Bierce Co.) and they try to ameliorate the works and they do everything they can to reinforce these works without calling upon Peter Lyall & Sons. The principal defendants (The Stilwell-Bierce Co.) do themselves a portion of this work; for example, change the draft tubes which leak, and they put in new ones; they do other works and finally make a contract, a new contract, which is given to the Engineering Contracting Co., by a contract passed on the 11th of August, 1898. In the case we have the admission that this contract has been entered into with the consent of the principal plaintiff (The Chambly Co.) The works are done for the amount of $75,000 and it is only about the 15th of July, 1899, that even these works are delivered. The principal plaintiff then takes possession and commences to operate the whole work and everything appears to go right, and everything does go right and no one ever demands of Peter Lyall and Sons to intervene in these circumstances and no one complains to them. Now we have to judge these contractors, Peter

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Lyall & Sons, to see if they fulfilled their duty. It is necessary for us to look into their contract. Have they carried out their contract? The proof shews that they have fulfilled their contract and that they have obeyed during all the time and that they were submitted to the jurisdiction of the civil engineers; there is the engineer from the defendant (Stilwell-Bierce Co.), there are his assistants; there are inspectors; there are also the engineers and assistants of the principal plaintiff. It is all done thus. Now, to judge and to know if the defendants in warranty (Peter Lyall & Sons) were in fault, one must again look at the contract.

All the employees, on both sides, have come as witnesses in favour of the defendants in guaranty, (Peter Lyall & Sons) and have testified as to what has been done, and they come to prove that all the works have been received and delivered to the Stilwell-Bierce Co., which itself put them at the disposition of the principal plaintiff (The Chambly Co.) and that after those deliveries they use them to better them and work on them up to the 15th of July, 1899, and the first action claims $242,-271. Why? Partly in execution of the contract of the 25th September, 1896—that is to say, the contract between the principal defendant (Stilwell-Bierce) and the balance are damages alleged to be suffered by the principal plaintiff (The Chambly Co.) by the fact that it could not deliver hydraulic power which it was engaged to deliver to the Royal Electric Co. and all these sums are thus claimed. There are also some sums which are claimed by reason of the wheels which were not satisfactory. As to these hydraulic wheels, the defendants in warranty, Peter Lyall and Sons, had nothing whatever to do with them and as to the sums, which were expended to finish the contract of 25th September, 1896, the defendants in warranty, (Peter Lyall & Sons) had nothing whatever to do with it, and as to the damages which are claimed in this action 507 for loss of profits, defendants in warranty have nothing to do with it by virtue of their contract. They were never asked of them. And how can they be accountable? They were incurred because the work was delayed from the first of October, 1897, to the 28th of December following.

Now the proof shews that these defendants experienced delays through the fault even of the works which the principal defendant (Stilwell-Bierce Co.) was bound to do. The contract mentions that there must be a certain allowance for delays which might arise, and nothing is claimed against the defendants in warranty. More than that. It is in their contract that damages for delays are liquidated under the contract, to wit, fifty dollars a day. It is not these $50 a day which are claimed by the principal action and the damages which are claimed by the principal action the defendants in warranty cannot in any

way be held responsible for. In fine, from all points of view the defendants in warranty have nothing to do with the principal action and when they say in the plea that they are not warrantors of the principal defendant, they are perfectly right.

Damages established amount to more than the sum of $150,000. There was an arrangement entered into between the two companies in the principal action fixing the amount of all claims that is, of the three claims, at an amount which must not go beyond $150,000.00. Now, it suffices me to say that there is proof in the principal action No. 507 for an amount exceeding $150,000.00.

Now passing to the two other actions, it is in them that one must fix the responsibility. As I have said above, there is no question but that the principal defendants are responsible, for the proof establishes in a very perfect way the errors of construction in the dam. It establishes the defects in the soil; it shews capital errors in the plan and specifications furnished by the principal defendants. The principal defendants are responsible by law as the loss took place within ten years. There is no question at the moment that this loss resulted from the defects in construction or in the plans and specifications of the principal defendants, who are responsible therefor.

Can the same be said against the defendants in warranty? To decide that we must again look into the contract. The defendants in warranty do not themselves owe anything to the principal plaintiff (The Chambly Co). They did not contract with it and there is no privity of contract between the principal plaintiff and the defendants in warranty, and if the defendants in warranty are in the case at all, it is only because they are called in in warranty.

Now can they be called in in warranty under these circumstances? We must again consult the contracts and see the variations which are found therein. Did the defendant in warranty, take the obligation to deliver a work, giving the guaranties required, of stability and efficiency? There are no such guarantees. By virtue of law are they obligated to guarantee the work giving such and such motive force? No. They are not the contractors. It is the articles of the Code to which we must go to determine the responsibility. This legal responsibility, can it be imputed to the defendants in warranty? We have article 1688 which declares:—

> If the edifice perishes in whole or in part in ten years, by the error of construction or even by the fault of the soil, the architect who supervises the work and the contractor are responsible for the loss jointly and severally.

To whom? The article does not tell us, and necessarily it must be to the proprietor who has the work supervised and

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who has the work constructed by the contractor. This article speaks of an edifice (building). The question has been raised if this dam was a building? This has been decided in France where it has been declared that it is a building, besides which we must look at it and see if this edifice comes within the other article which we have in our Code, article 2259, which reads as follows:—

"After the ten years the architects and contractors are discharged from responsibility for the works which they have done or looked after."

and if one looks at the title of the section which relates to contracts and specifications, one can see that this applies to houses, to buildings, to all huge works in general, and the jurisprudence in France is in accord with this.

Article 1688 is the one on which is founded the claim of the plaintiff in warranty (The Stilwell-Bierce Co.), or rather the principal plaintiff (The Chambly Co.). Plaintiff in warranty has assisted in this lawsuit with the indifference of an insolvent concern. The insolvency took place since and I understand that it is the principal plaintiff which is endeavouring to make out the case which the plaintiff in warranty (Stilwell-Bierce Co.) pretends to have against the defendants in warranty (Peter Lyall & Sons). And it is no doubt interested in so doing. But to judge the case one must see what are the rights of the plaintiff in warranty against the defendants in warranty. Do those rights proceed from article 1688? Article 1688 which one finds in the Code does not altogether follow out the terms of the French article which is 1792. The French article reads:—

> If the edifice constructed at a fixed price perishes in whole or in part by the faults of construction or even by the faults of the soil, the architect and contractor are responsible during ten years.

It was necessary to eliminate the words "constructed for fixed price" and our commentators on the article have explained why. It does not matter much whether the edifice was constructed at a fixed price or for another price and under the circumstances they thought that it was better not to make any distinction and therefore changed the wording in consequence. Article 1792 C.N. was applicable in France but it was only applicable in France as against an architect who constructed the building himself or against the contractor who constructed the building himself. Nevertheless they eliminated the words "constructed at a fixed price" and they made the responsibility joint and several under our law against an architect who supervises a work and the contractor who executes it, making them responsible, both of them, jointly and severally. Another consequence one finds in France is that in order to determine the responsibility one must find the fault and each one is only

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responsible up to the amount that he has committed a fault. Here we are confronted with the fact of an architect who supervises the whole work. One must hold him responsible by the fact of his illegal supervision and tacitly as the contractor who has executed the work. As to the joint and several responsibility pronounced in France, this joint and several responsibility as held is modified a little by the article following, 1699, which declares that in the case of the preceding article the architect who does not supervise the work is not responsible for a loss which has been occasioned. But if he has furnished a plan which is full of faults and errors, he is responsible. But always jointly and severally with the contractor who himself has carried out this plan. Therefore it is a joint and several responsibility and this responsibility weighs both upon the architect and upon the contractor. But in favour of whom? It must necessarily be in favour of the proprietor and in favour of no other person than the proprietor.

Now we have another article, 1696, which declares that the masons, carpenters and other workmen who undertake work by doing it at a price tendered are bound by the rules contained in this section. They are considered as contractors relatively to these works. Consider them as contractors. Those who undertake particular works have the same rights and the same responsibilities as those, amongst others, who are found referred to in articles 1688 and 1689. There is again a difference from the French article. In the French article 1799 one sees that masons, carpenters, locksmiths and other workmen who see to the carrying out of the contracts at prices tendered for are subjected to the rules which are not in the present section. They are contractors only for the part for which they contract. We find in this article the word "directly" which is not found in our article; can this word have much importance under the circumstances from the fact that it was omitted in our article? If one looks into the commentaries published by our commissioners of the civil code, one does not find anything said on this subject, from which it appears that our articles are based on those of the Code Napoleon.

On this point the only change one can see, is one that I have mentioned, namely, that the article applies to the architect and to the contractor, that the contract was made at a fixed price; that was the only change made. However, they did bring about a considerable change by the fact that they made the responsibility a joint and several one. But as to the article 1696, there is no remark made there whatsoever and I do not see that the word "directly" can make any difference. The joint and several liability is pronounced and the same rule applies to the part-contractors. Now, then, to what end will this joint and several responsibility serve if it does not

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apply to the contractor? It would not be possible. And is this responsibility in favour of the contractor? This responsibility is in favour of the proprietor. It follows the immoveable. If there is a sale, the purchaser buys it. In the case where any of the purchased property perishes by the want of construction or the fault of construction, during the ten years, it is the purchaser who can then bring an action in warranty against the architect and the contractor. Therefore it is an action which belongs to the proprietor. Therefore it does not lie in favour of the sub-contractor.

If we examine the works of Guillouard we see that this action in warranty does not apply to the general contractor against the sub-contractor. It is a responsibility which exists purely and simply in favour of the proprietor.

As I have said, in order to appreciate (weigh) the question one must look into the contracts. If the defendants in warranty (Peter Lyall & Sons) have duly fulfilled the contract in such way as to have committed no fault whatsoever towards the principal contractor, what can the principal contractor claim? If on the contrary, under the circumstances, the faults found are in the construction and in the soil and entail the responsibility of the principal contractor, by what chance can one throw that responsibility on the defendants in warranty (Peter Lyall & Sons)? Because it is the chief contractor's fault. It is he that ought to be responsible for it. There is one thing certain, that this responsibility is established in favour of the proprietor of the realty.

But between those who have committed the fault, then the division must be made and the responsibility must be borne by whom? By him who has committed the fault. Here we have an edifice which perishes by the faulty construction committed by the contractor himself. The architect has been in the wrong to have allowed him to proceed. But the person liable, the author of it, is he who has committed the fault of construction in question. The architect is responsible because he allows him to commit it. Therefore if the architect is condemned jointly and severally with the contractor to settle the damages which must be paid and has paid them, he would have a recourse against the contractor who is the author of the fault. It is necessary always to find out finally who is in fault and if one takes up the present case in presence of the contracts in question, and if one arrives at the conclusion as all the witnesses who were heard seem to have arrived at the conclusion, that the defendants in warranty have well and faithfully and wholly executed their contract, then the defendants in warranty have no fault to reproach themselves with, and not being in fault no one can come against them. But on the contrary, the defendants in warranty have made proof in this case and have suc-

ceeded in fixing the responsibility and say: "You have committed such and such faults in constructing this dam. You have dug the foundations; you have not dug them in a sufficient, substantial manner. Along the bottom of the river are layers of shale, very thin. You should have dug deeper."

There was a man who was not an engineer but who was looking on at the works as they progressed. He came afterwards to put a price on all these huge works which were completed at the cost of hundreds of thousands of dollars and his price was not very high. He says: "I would not give you ten cents for all the work." "Why?" "Because you did not make sufficiently strong construction." Can that be charged to the defendants in warranty as a crime? They were there to do what they were told and nothing else. They had no right to make supplementary work. They were under the control of the engineer and if they had wished to do supplementary work, they would not have been paid for it, and they would have been told, as under the contract, "You will do no other thing than to fill the contract? They could not supply remedies. They had to consent to the conditions under which they were governed.

Now here we have a dam which was built up, the apron itself was bad, it hadn't the necessary strength, it was not of sufficient depth, it was not located in the proper way. There was a little digging along the river for the foundation of this dam. But the digging which was done was not done on the twenty feet of base, but only a part of it; it was badly disposed with reference to the rest of the dam which was raised above it. They should have put it farther in front in the river. Those were the faults which have been pointed out. There are moreover, other things, namely, that the dam was not of the thickness required, the apron was not sufficient, the form of the apron was contrary to the rules of art, from the fact that water passing over it on to the apron arrived in such a way as to dig out or undermine the foot of the dam in question, resulting finally in destroying it little by little. We have seen what these small matters resulted in and there have been established, moreover, other faults in construction. Take, for example, the "shale." It was too light with respect to the water. The engineers come and say that a dam of this nature made on shale cannot be staunch and perfect. The water gets into this shale and then the temperature goes down and then, what happens, is that there is an expansion and the consequence is that the shale is cracked and fissures are produced in the dam. These fissures being produced in the dam are subjected to the great pressures of water which comes against it, resulting necessarily in making openings and in compromising little by little the foot of the dam in question. I am only mentioning some facts. There are others. But I always find that I must say that there were faults

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of construction, that there were faults of the soil, faults of the foundations, faults for which the principal defendant alone was responsible; for they have joined in themselves the double functions of architect and general contractor; their responsibility is therefore naturally involved and I do not see how they can come in warranty against the sub-contractors. These defendants in warranty (Lyall & Sons) cannot be considered as contractors in the sense of the article 1688 of the Civil Code. They cannot take that responsibility. They are not willing to take it, and they were not allowed to take it, moreover, so that they cannot be held responsible.

Now we come to the question of warranty. In order that it may exist, it is necessary that he who calls in a guarantor must have a privity with the principal debt; he must be bound by the act itself. But here, in order to understand the matter, when a demand was made in warranty, it was declared that the defendants in warranty (Peter Lyall & Sons) had assumed the obligation of carrying out the obligations of the plaintiffs in warranty (Stilwell-Bierce Co.). And did they carry them out? No. There was nothing in the contract and it did not result from the law. So that as those defendants were not bound to carry out the principal debt, it is important to shew that the obligation of the principal defendant is an indivisible obligation; it was one whole thing which they had to deliver.

The defendants in guaranty have brought out one point, which was moreover referred to by the principal defendants, with respect to these "flash-boards" which were placed on the dam. It was true they were placed there. Why? It was to raise the level of the water, to obtain more efficiency for the dam in question. The principal plaintiff (Chambly Co.) has certainly committed an imprudence there, and the fact is that the dam broke in 1902 and the waste gates in 1900. Were those breaks caused by the fact that they placed those flash-boards with uprights on the dam? I do not think that arises from the proof and I have read it very attentively in its details and I cannot arrive at the conclusion that it was this additional work done by the principal plaintiff which caused the breaks of the dam in question.

However, there is one very important fact that they have invoked, and that is that on the 16th of November, 1902, the same thing happened, and with the same result. Therefore it is a fact which is very important in the suits and under these circumstances, I do not think it is sufficient and I do not think the proof bears upon it sufficiently to say that these planks did raise the water above the big floods. I do not think the water was raised any higher than it was accustomed to go during these heavy floods. It is for that reason that I say that I do not think the principal plaintiff has been the cause of the loss under these breaks. The dam did necessarily perish and perish

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within the ten years after it was made, and they had the right to draw all the profits and they had the right to put these planks under it.

Finally, under the circumstances, I think that in each of the principal actions, and in the incidental demand, there is proof of loss of $150,000.00 at least, in each of these causes of action, so that the three actions, comprising the incidental demand, must be maintained, but only to one amount, of $150,000 following the arrangement of the month of March, 1904, with interest from the date of that arrangement, and the costs of the three actions, and with respect to the actions in warranty, they are dismissed purely and simply, and with costs.

The plaintiff in warranty appealed from the decision of Tellier, J.

Argument

W. W. Chipman and *P. B. Mignault*, K.C., as counsel for appellant submitted that the respondents were bound under C.C. 1688 according to the best authorities although the point has never been finally settled either here or in France. Frémy Ligneville, vol. 1, p. 458, note 141; Labori, Rep. Louage, 206 and no. 22, Fuzier-Herman, Marché Administratif no. 595, Sirey 1868-1-208; 7 Mignault 408; Lepage, Loi des Bâtiments, p. 2; *McGuire* v. *Fraser* (Que. 17 K.B. 449, 40 Can. S.C.R. 577). Whoever suffers has the action and whoever actually is at fault as builder must answer for it, whether he be called a contractor or a sub-contractor: Clark, Architect, Owner and Builder, before the Law, p. 57; 7 Mignault 410; for art. 1688 determines not who may sue but who is liable, quite irrespective of any contractual relation. The function is the main thing: Rendu, Dict. des Constructions, Entrepreneur 1724. Furthermore the respondents are bound under the general principle of C.C. 1055 which covers contractual as well as delictual responsibility: *Central Agency* v. *Les Religieuses de l'Hôtel Dieu de Montréal*, 27 Que. S.C. 281.

An ordinary warranty action exists here and even were points of difference admitted between the principal and the warranty obligations there is still the required connection between the two obligations for both are founded on contracts for lease and hire, in both of which cases the penalty for breach is the same (Lepage, Loi des Bâtiments, p. 57) in both the work was the same, done in the same manner, same delay: Pand. Fr. Garantie no. 69; Beullac C.P., art 177, nos. 54-57*a*; Fuzier-Herman, Travaux Publics, 304, 305.

Nothing done by or on behalf of the appellant in the nature of reception amounted to a waiver of its rights against the respondent. The contract admits this and public order forbids it: 7 Mignault 407. Such an acceptance is for payment only and even payment will not be a waiver: *Archambault* v. *Le Curé et al. of St. Charles*, 12 Que. K.B. 349; *McGuire* v. *Fraser*,

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17 Que. K.B. 449; *Chateauguay and Beauharnois Navigation Co.* v. *Cie Ponthriand*, 37 Que. S.C. 392; 10 Huc. 588; Lepage, Loi des Bâtiments, p. 7; Hudson on Building Contracts, vol. 1, p. 328 *et seq.* and authorities there cited; *Glacius* v. *Blake*, 50 N.Y. 145. In any event no approval from the appellant could exonerate the respondents from their liability for their work, as they are bound to know and follow the rules of their art even in the face of their employer: Rendu, Dict. 1751; *Wardle* v. *Bethune*, 8 Moore P.C. 223; *Brown* v. *Laurie*, 1 L.C.R. 143 and 5 Can. S.C.R. 64.

Counsel then discussed the facts as evidencing that the respondents were solely responsible for the damages in question. And in any case the respondents are bound for plans and foundations: *Wardle* v. *Bethune, supra; Brown* v. *Laurie, supra;* Hudson, p. 342. No putting in default was necessary, the default taking place at once by virtue of the acts and negligence of the respondents themselves.

R. C. Smith, K.C., with him *R. T. Heneker*, K.C., for respondents: By virtue of its transaction with the principal plaintiff the appellant has no interest in the present case and is merely a *prête-nom* of the Power Co. Nor can there be any warranty in this case as the contract between the plaintiff and the appellant differs totally from that between the appellant and the respondents, the latter being one on plans and specifications according to the instructions of engineers and subject to alteration by engineers: Pothier, ed., Bugnet (1890), vol. 10, sec. 89; *Gauthier* v. *Darche*, 1 L.C.J. 293; *C. V. R.* v. *Mutual Fire Insurance Co. of Montmagny, Que.*, 2 Q.B. 450; 2 Sourdat, ed. 1902, no. 750; 26 Laurent, no. 56; *Royal Electric Co.* v. *Leonard*, 23 Can. S.C.R. 298.

Besides C.C. 1688 applies to "buildings" only and should not be extended by implication as it imposes a special liability. The respondents did not work on a building: Am. & Eng. Ency., 2nd ed., vol. 4, p. 994; *People* v. *Kingman*, 24 N.Y. 559; 4 Aubry and Rau 530; *Truesdell* v. *Gay*, 13 Gray (Mass.) 311. Where the sub-contractor has no dealings with the proprietor at all there can be no liability: 2 Guillouard, Louage, nos. 795, 832-9, 861, 862; 26 Laurent no. 75; Fuzier-Herman, art. 1792, nos. 30, 31, 96; Beaudry-Lacantinerie, 2 Louage, no. 1883, ed. 1898. Counsel then discussed the facts in detail to shew respondents were blameless.

Mignault, in reply.

The opinion of the Court was rendered by

Gervais, J.

GERVAIS, J.:—This appeal is from a judgment of the Superior Court of May 7, 1906, which condemned the appellant to pay to the principal plaintiff, acting at the outset under the style of the Chambly Manufacturing Company and later under that of the Montreal Light, Heat and Power Company, a sum

of $150,000, according to contract passed between the parties. In so doing, the Court disposed of three suits as follows:—

Firstly—Action No. 507, for the sum of $242,871.83, damages resulting from the delay of the appellant in delivering to the principal plaintiff the damming and the electrical plant for the Chambly river, according to the agreement of September 25, 1896.

Secondly—Action No. 433, for $324,648.30, for damages resulting from the carrying away of the waste gates of the said dam on November 16, 1900, as a result of faulty construction by the appellant.

Thirdly—The incidental demand for an amount of $728,361.74 for additional damages caused by the breakdown of the cross-dam on November 30, 1902, as a result of defective construction.

But, at the same time, the Court nonsuited the appellant in its principal suit and its incidental demand in warranty against the respondents for the total sum of $1,053,001.00, declaring them free from any responsibility for faulty or defective construction.

Should this judgment be reversed?

It should be stated that there is no appeal as to the main actions, as declared by counsel at the hearing. The appeal is from that part of the judgment of May 7, 1906, only, which dismissed the actions in warranty or rather in recovery of indemnity.

The respondents object to the hearing of the appeal on the ground that there is no right of appeal as a result of an agreement entered into between the appellant and the principal plaintiff limiting the recourse of the latter against the former to the sum of $150,000, but allowing the prosecution of the proceedings in warranty against the respondents because this agreement of March 25th, 1904, is by its nature a transaction which, terminating the main actions, must necessarily extinguish the actions in warranty.

The respondents declare that they became aware of this settlement only on January 17th, 1907, long after judgment had been rendered in the first Court. "*Accessorum sequitur principale*," argue the respondents. Are they right?

The main actions are taken for defective construction, under a contract according to estimate and contract, the incidental actions for faulty construction of works done according to fixed scales of prices.

The appellant had undertaken to build at a fixed price and to deliver an electric power-house with its dams, hydraulic plant and accessories; the respondents to do excavation work in concrete at so much per cubic yard, to put up the steel framing at so much per pound, or to do wood work at so much per foot.

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The right of action of the principal plaintiff against the appellant is not of the same nature as that of the appellant against the respondents.

Besides, the settlement of the actions between the main parties is under the express condition that the actions in warranty or rather in indemnity, are to be prosecuted for the benefit of the appellant.

The arrangement of March 25th, 1904, is rather in the nature of a transaction coupled with a transfer of litigious rights which could give rise to an additional defence under article 199, C.P., or to an opposition by a third party or to a petition in revocation of judgment.

It may be that articles 1582 and 1583 C.C. would have been applicable, and perhaps also the second paragraph of article 1584, which declares that the provisions of the two previous articles do not apply when the transfer of litigious rights has been made to a creditor in payment of what is due him, as in the present case. Be that as it may, the ground against the appeal based on a transaction on the principal actions, or on a transfer of litigious rights is badly founded. Such a ground based on a judicial fact, the contract of the 25th of March, 1904, two years after the judgment of the first Court, and known of only on January 17th, 1907, should be raised by means of a peremptory exception to the action in virtue of arts. 199, 1177, 1185, C.P., 1582, 1583, 1584 C.C. Such a ground is in the nature of a ground of contestation to the action, but it is not a ground against an appeal from a judgment rendered on such an action.

The so-called "preliminary" objections of the respondents on this appeal are therefore dismissed. The agreement in question does not cover the judgment of May 7th, 1906, but the actions instituted prior to that date. Article 1220 C.P. cannot, therefore, be applied in the present case.

We now have to examine the merits of the case. The three principal actions, all of them actions in damages resulting from delay or faulty construction, are based on the building contract by estimate, of September 25th, 1896, whereby the appellant, for the benefit of the principal plaintiff, "*agrees to construct a dam, abutments, forebay, power-house and tail race*, all according to specifications hereto attached, and to furnish and instal the additional machinery as follows":—

The two actions in indemnity, for damages alleged to have been caused by the respondents to the appellant through faulty construction, are based on a prior agreement for work according to a fixed scale of prices, of date September 5th, 1896, whereby the respondents, for the benefit of the appellant, "the party of the second part, has *agreed to do all the work and furnish all the material called for by this agreement*, in the manner and

under the conditions hereinafter specified." But all of these actions result from the breaking down of the waste gates and of the cross dam of the principal plaintiff at Chambly.

It is clear that the agreement of September 5th, 1896, for work by the piece helped the appellant to conclude its agreement of September 25th, 1896, for work by estimate and contract. We have to deal only with the allegations of faulty construction denounced in the actions in indemnity—for these cannot be considered as actions in warranty, as they rest on a right of action which differs from that of the main actions. Now, the defects complained of are the following:—

(*a*) Use of macadam of poor quality.

(*b*) Use of Victor cement of a poor quality as compared with Portland cement.

(*c*) Use of sand of poor quality, that from the Rougemont sand pit.

(*d*) Lack of tamping.

(*e*) The use of explosives to break up the ice.

(*f*) Use of dowels.

The respondents repudiate these charges in their pleas and state that the use of Victor cement, of Rougemont sand, of the river gravel for the concrete was ordered, if not absolutely authorized by the appellant; that the use of explosives did not even hurt the workmen thirty feet away from the dam; that the masses of concrete, after the breakdown, shewed by their compactness the absence of any air-pockets in such concrete, etc. . . . and aver that the breakdown was due, among other enumerated causes, to the raising of the water level by three feet by means of boards fastened with iron clamps to the top of the wall, on the day of the accident, thus bringing about, together with the raising of the waters by a south wind, an additional pressure of 7,000,000 pounds on the dam.

The learned Judge reviewed the evidence on these questions of fact and went on:—

The proof is clear that the raising of the level of the dam occurred after the work of the respondents had been finished and accepted. The weight of the evidence seems to exonerate the respondents from any *aquilian* fault, giving rise to damages without putting in default, prescriptible by two years, as well as from any contractual fault giving rise to damages after a putting in default (which was never done in this case), which damages are only prescribed by thirty years. Yet it was for the appellant to allege and prove one or the other of these faults. Understanding this full well, the appellant has alleged it, but was unable to prove it. But, retorts the appellant, if I have proven neither *aquilian* fault nor contractual fault, I was not bound to do so on account of the presumption of fault *juris et de jure* which lays the responsibility of the breaking

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of the works on the shoulders of the respondents as sub-contractors in virtue of article 1688 C.C. (1792 C.N.), which covers the case.

The provisions of article 1688, which derogate from the general rule in favour of the non-liability of the debtor, do not support the appellant's contention; the article speaks of the builder only, *Lex plus favet liberationi quam obligationi.*

The spirit of the law in this article is in accord with this interpretation. The one who puts up a building must justify the confidence placed in him by the proprietor who has entrusted him with the task of putting together the structure, of assembling and uniting the framework, of co-ordinating the different parts, according to the rules known to each art, in order to arrive at a perfect building.

But this is not the case with a sub-contractor working on a scale of prices. Here the proprietor retains for himself the supervision of the whole, of the entire building, of the putting together of the different parts. And this is, besides, the teaching of the best authors and the jurisprudence of the Court of Cassation (Sirey, 1869-1-97, 1894-1-448, *vide* note), and also of the Courts of Limoges (D.P., 1900-2-285), of Grenoble (D.P. 1900-2-431), of Orleans (Gaz. du Pal., 1889-2-559). See also Pand. Fr. Vo. Louage d'ouvrage, Nos. 1282-3-4-5.

More than that, the respondents in this case are not even sub-contractors, who enjoy in the execution of their part of the work the freedom and discretion necessary for the application of the rules of their art; they are hardly more than labourers; at best they are workmen, deprived of any initiative, continually supervised and controlled by a large number of engineers and inspectors of the appellant, who compelled them to follow their own instructions, their own ideas in the erection of the dam in question. It is clear that the provisions of article 1688 cannot apply to such workmen, that is to say, to the respondents. And this is the opinion of this Court. For these reasons the appeal is dismissed with costs.

Appeal dismissed.

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Ontario High Court, Middleton, J. May 3, 1912.

1. BUILDINGS (§ II—18)—DETACHED DWELLINGS—APARTMENT HOUSES—BUILDING RESTRICTION IN A DEED.

The erection of an apartment house does not constitute a breach of a provision that the lands are to be used only as a site for a detached dwelling house.

[*Re Robertson and Defoe*, 25 O.L.R. 286, followed; *Campbell* v. *Bainbridge* (1911), 2 Scots L.T.R. 373, specially referred to.]

Statement

HEARING of an action on motion for judgment.

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PEARSON v. ADAMS.

The plaintiff had moved for an interim injunction restraining the defendant from erecting an apartment house upon certain lands in Maynard Place, in the city of Toronto, in alleged breach of the provisions of a conveyance of the 18th April, 1888, which stipulated that the lands were "to be used only as a site for a detached brick or stone dwelling-house."

By consent of counsel, the motion was turned into a motion for judgment.

Statement

J. H. Cooke, for the plaintiff.

J. M. Godfrey, for the defendant.

MIDDLETON, J.:—Apart from authority, binding upon me, I should have thought that an apartment house such as the defendant contemplates erecting could not be described as "a detached dwelling-house." I should have thought it clear that the building was in truth a series of separate dwellings, *attached*, and separated by the one main perpendicular wall and the two horizontal partitions. But this, as I understand the case of *Re Robertson and Defoe*, 25 O.L.R. 286, 3 O.W.N. 431, is not the law here; and, yielding to the authority of that case, there is no alternative save to dismiss the action with costs. I do not think I should attempt to refine away that decision by making distinctions without any difference.

Middleton, J.

I think it better to adopt this course, and leave it to the plaintiff to take the case to a higher Court, rather than to adopt the alternative course of investigating the matter with such thoroughness as to enable me to say that I deem the decision referred to to be wrong. See sec. 81 of the Judicature Act.

This relieves me from considering the other matters argued by the defendant's counsel.

The attention of the parties is drawn to the very recent decision of *Campbell* v. *Bainbridge* (1911), 2 Scots L.T.R. 373.

Action dismissed.

BEARS v. CENTRAL GARAGE CO.

Manitoba King's Bench. Trial before Macdonald, J. May 3, 1912.

MAN.

K. B. 1912

May 3.

1. EVIDENCE (§ XI H—810)—RELEVANCY—FAILURE TO PERFORM STATUTORY DUTY—NEGLIGENCE.

The rule that the failure of any person to perform a duty imposed on him by statute or other legal authority should be considered evidence of negligence applies only to violations of a statutory or valid municipal regulation established for the benefit of private persons, where the action is brought by a person belonging to the protected class, and only if other elements of actionable negligence concur. (Dictum *per* Macdonald, J.)

[Deering on Negligence, sec. 6; Shearman and Redfield on Negligence, 5th ed., sec. 13, specially referred to.]

TRIAL of an action against a garage proprietor for the destruction by fire of a customer's automobile.

Statement

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v.
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Macdonald, J.

N. F. Hagel, K.C., for plaintiff.

Messrs. *A. E. Hoskin*, K.C., and *J. W. E. Armstrong*, for defendants.

MACDONALD, J.:—The defendant company is incorporated and licensed under the laws of the Province of Manitoba to buy and sell motor cars and to carry on a general motor car business, and have a garage in the city of Winnipeg in which they rent floor space or stall room to their customers.

The plaintiff rented from this company stall room for his motor car, and on the 17th day of May, 1911, the garage was destroyed by fire, and the motor car of the plaintiff then in the said garage was also destroyed, and the plaintiff brings this action claiming damages against the defendant company charging the company with negligence resulting in the destruction of his car.

The plaintiff was in the chauffeur's room in the destroyed building on the night of the fire and saw the fire almost in its inception, but he could not say how it got started. A gasolene tank, which was underground, was being filled at the time from a tank wagon in the building, the gasolene being carried from the tank wagon to the underground tank in buckets of five-gallon measure, the building was lighted by electric light and how the fire originated is a mystery.

After evidence being adduced establishing the above facts and after a motion for a nonsuit, the plaintiff's counsel asked leave, and was permitted to put in evidence by-law No. 4283 of the city of Winnipeg, and on the facts as stated urged that the plaintiff, apart from this by-law, was entitled to a verdict, as there was evidence of a want of reasonable care on the part of the defendants in handling a dangerous explosive and such lack of reasonable care would constitute sufficient negligence to render them liable.

I cannot, however, find any evidence of want of reasonable care.

Gasolene was of necessity stored in the underground tank for the convenience of the plaintiff and other customers. There is nothing to shew that the manner of storing it or the quantity thereof was not the customary one.

It was urged by Mr. Hagel, K.C., with much confidence that a contravention of the by-law referred to constituted negligence, but the cases and authority subsequently cited by junior counsel do not support his contention.

It is laid down in Deering on Negligence, sec. 6, that where a statute imposes a duty upon a person a failure to perform this duty constitutes negligence in itself. "The failure of any person to perform a duty imposed on him by statute or other legal authority should always be considered evidence of negligence or

of something worse," and in support of this the author cites Shearman & Redfield on Negligence, sec. 13. This latter applies only to violations of a statutory or valid municipal regulation established for the benefit of private persons where the action is brought by a person belonging to the protected class and only if other elements of actionable negligence concur.

Here there is no evidence of anything having been done or left undone by the defendants to constitute a breach of the by-law and therefore, even if a contravention constituted negligence, which I think it would not, there is no evidence of such, and there is no negligence proven.

Furthermore, there is no evidence of the damages sustained. The plaintiff says that the car cost him $1,800 in June of 1910, and that it had been run since then for general hire in the plaintiff's livery business, and at the time of the fire the plaintiff says he would not put a value on it.

The plaintiff has failed to make out a case, and I dismiss his action with costs.

Action dismissed.

ARONOVITCH v. LOPER.

Manitoba King's Bench. Trial before Robson, J. May 8, 1912.

1. PRINCIPAL AND AGENT (§ III—36)—COMMISSION FOR SALE OF SHARES—SUB-AGENT.

   Where the defendant agreed to pay the plaintiff a commission for all sales of stock the latter's sub-agent should make, the plaintiff may recover from the defendant profits he would have realized on sales made by such sub-agent under an agreement between the latter and the defendant, made without the agreement between the plaintiff and the defendant being terminated, and with knowledge on the latter's part that the sub-agency still existed, to the effect that the sub-agent was to make sales independent of the plaintiff for the same commission the defendant had agreed to pay to the plaintiff.

2. PRINCIPAL AND AGENT (§ III—36)—PURCHASE OF SHARES BY SUB-AGENT—LIABILITY FOR COMMISSION TO MAIN AGENT.

   An agent whose sub-agent was, to the knowledge of the former's principal, to sell shares of stock belonging to the latter, cannot recover from such principal commissions for stock personally purchased from the principal direct by such sub-agent on his own account.

Statement

AN action for commission on the sale of shares sold by an agent of the plaintiffs.

Judgment was given for the plaintiff for $1,400 and costs.

J. B. Coyne, for plaintiff.

Messrs. *Wm. Crichton*, and *E. A. Cohen*, for defendant.

Robson, J.

ROBSON, J.:—The transactions in question took place in Winnipeg in the early part of the year 1911. Defendant was possessed or had control of a large number of shares of the stock of a company known as "Lucky Jim Mines, Limited." Plaintiff had made sales of certain of these shares for defen-

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dant at varying rates of commission, the rate latterly being five cents per share. Defendant expressed to plaintiff his desire to increase the sales, to which plaintiff replied that he could not personally give more time to the business but could procure the assistance therein of one McMeans.

About this time an option to purchase 40,000 shares was given by defendant to plaintiff. Defendant says this was done to enable plaintiff to induce McMeans to proceed to sell. Plaintiff denied that and gave his version of the object of the option. It was something entirely different and had nothing to do with present issues. The pretended consideration of $1,000 was returned at once. Whether by reason of the option or not McMeans, on being approached by plaintiff, entered on the subagency. Defendant was to pay plaintiff five cents a share sold. Plaintiff was at liberty to make such bargain with McMeans as he might. It was agreed between him and McMeans that the latter should receive three cents per share. McMeans describes what then took place as follows:—

> The first shares that were sold were the ones that are in that list there of Blair's and at that time no arrangement was made with Mr. Loper and myself at all; I was under the impression if I went to Mr. Aronovitch's office I would get three cents a share in the event of that sale going through. As Mr. Blair asked me for the stock I went to Mr. Aronovitch's office; he was out. I went down to Mr. Loper and found him at the hotel and told him I desired to get 2,000 shares and that I had called at Mr. Aronovitch's office and he was out and I would like to get them as Mr. Aronovitch had said he would pay me three cents a share. Mr. Loper and I had a very long conversation down at the hotel there and during the course of that conversation he asked me why it was—I was in one end of the city and Mr. Aronovitch in the other end—why it was I didn't act for myself. I said I would be very glad to, that I would certainly be more pleased to receive five cents than I would to receive three, so he gave me the Blair certificate and I turned him over the proceeds. That is the first sale that was made and the subsequent sales were done in the same manner.

The total sales through McMeans amounted to 70,000 shares. These extended from February 24th to June 6th, 1911. Plaintiff now seeks to recover from defendant two cents a share on the 70,000 shares sold by McMeans.

As I understood it the defendant put forward as a defence that the supposed option having been abandoned or surrendered defendant became at liberty to deal with McMeans independently of plaintiff. The option to my mind was not a genuine transaction. Assuming defendant's version of the facts the option was given to induce McMeans to work on sales under plaintiff. That object was attained. And it is on that subemployment that the plaintiff bases his case. I cannot see that it is of any importance what became of the option. The real

question, it seems to me, is: Did the agency to sell shares continue between defendant and plaintiff with McMeans as a recognized sub-agent during the period of the sales in question?

It is asserted that there was a termination of these relations between the three parties before the sales in question were made. Defendant says McMeans came to him and stated that he had not entered into an arrangement for three cents a share commission and would not sell except at five cents a share. This does not harmonize with McMeans' evidence as above set forth. I prefer to accept McMeans' version.

Whether defendant and McMeans or either of them could have terminated their respective relationships with plaintiff so as to enable them to contract with each other to the exclusion of plaintiff is, I think, open to question, in view of the authority I am about to mention. There was, however, no attempt in that direction. Plaintiff never was informed of any revocation of authority by defendant or of any discontinuance of agency by McMeans. He learned the state of affairs after the sales in question had been made. Inquiry of defendant in the meantime had not led to disclosure of the facts.

In *Wilkinson* v. *Alston*, 48 L.J.Q.B. 733,* plaintiff had been employed to find a purchaser. Through an agent of plaintiff one Wise learned of the property. Wise approached defendant who promised him a commission if he found a purchaser. He did find a purchaser. It was held that the sale resulted from plaintiff's efforts and he recovered commission.

The continuity between plaintiff's employment and the ultimate sale had not been broken and the defendant's dealing with Wise did not constitute a fresh departure. Bramwell, L.J., at 735 states a possible case of breach of continuity in the case of a stranger ascertaining from the first agent the name of his principal and thereupon procuring himself to be clothed with a like agency. The present case is not within any such exception. In the *Wilkinson* case, Wise, whose interest was aroused through plaintiff, could not be treated as a stranger and nothing between him and the defendant there was permitted to affect the plaintiff. Likewise I would hold here that the dealing of defendant with McMeans did not affect the present plaintiff. The present case is stronger than the *Wilkinson* one in that there the defendant did not know that Wise had so become interested, whereas here the defendant knew McMeans was plaintiff's agent. In that case likewise the defendant had incurred two commissions. Bramwell, L.J., disposes of any question upon that in a word. At 733 he says: "But if the defendant thought fit to promise Wise a commission that did not disentitle the plaintiff."

The sales in question were secured exactly in the manner contemplated by defendant when he made the arrangement

*Also reported, 41 L.T. 394, 44 J.P. 35.

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with plaintiff. That plaintiff's part therein was small is evident but he did that part and the consideration for defendant's promise cannot be weighed. As long as the results were attained by machinery set at work by plaintiff, defendant is not concerned with the simplicity of the operation. It seems to me that without effectual termination of the agency relationship between defendant and plaintiff on the one hand and plaintiff and McMeans on the other the plaintiff is entitled to insist that the sales effected by McMeans were, as between plaintiff and defendant, effected by plaintiff.

Defendant having paid McMeans directly, the plaintiff is, in my judgment, entitled to recover commission of two cents per share in respect of the 70,000 shares sold by McMeans or his firm.

As to the shares bought by McMeans or his partner personally and in respect of which plaintiff also claims commission these cannot be said to have been sold as a result of the subagency and there is no evidence that plaintiff was instrumental in bringing about the sales to them for which the claim is made.

Judgment for plaintiff for $1,400.00 and costs.

Judgment for plaintiff.

MORAN v. BURROUGHS.

ONT.

H. C. J.
1912

May 4.

Ontario High Court. Trial before Britton, J. May 4, 1912.

1. PARENT AND CHILD (§ I—8)—LIABILITY OF PARENT FOR PERMITTING INFANT TO USE FIREARMS.

Damages against one who negligently permits his infant child to have a dangerous weapon in his possession upon a public street may be recovered by any one, who, without negligence on his part, is injured by such weapon.

2. COSTS (§ I—10)—DISCRETION OF COURT IN GRANTING OR REFUSING—HIGH COURT SCALE.

Where a jury have assessed the damages at a sum within the jurisdiction of the County Court, but it appears to the Court that any solicitor advising that there was liability would have considered the case a proper one for the High Court, the Court may, in its discretion, award costs to the plaintiff on the High Court scale.

Statement

ACTION by James Moran and by his son John Adam Moran, for damages for injury to the latter, resulting, as it was alleged, from negligence on the part of the defendant in permitting his infant son, a boy of about twelve years of age, to have in his possession a rifle and ammunition therefor upon the streets of Smith's Falls.

Judgment was given for the plaintiff for $300 and costs.

J. A. Hutcheson, K.C., for the plaintiffs.

H. A. Lavell, for the defendant.

BRITTON, J.:—The plaintiff John Adam Moran is also an infant, of about the same age as the son of the defendant. While the son of the defendant was using the rifle to shoot at a mark, and permitting the infant plaintiff and other boys to shoot the same rifle, the infant plaintiff John Adam Moran was shot, causing him to lose completely his left eye. I asked the jury to answer certain questions, which they did, finding negligence on the part of the defendant, which negligence occasioned the accident, and injury to the infant plaintiff; and the jury assessed the damages at $300.

I put the further questions: "Was the boy plaintiff guilty of contributory negligence, that is to say, could he, by the exercise of reasonable care, have avoided the accident; and, if so, what was the negligence of the boy plaintiff which you find?" The jury answered that the infant plaintiff could, by the exercise of reasonable care, have avoided the accident—that he should have walked behind instead of in front. That answer can only mean that the boy plaintiff, at the time the firing was going on, walked in front of the firing line. There was no evidence that the gun was intentionally fired at the time of the accident. Upon the undisputed evidence, the gun was accidentally discharged when being held by the son of the defendant, and while a struggle was going on for the possession of the gun, between the son of the defendant and another boy—not the plaintiff.

If there was any evidence of contributory negligence which should have been submitted to the jury, the defendant is entitled to the benefit of the jury's finding. I am of opinion that there was no evidence that would disentitle the plaintiff to recover merely by reason of contributory negligence. The presumption should stand that this infant plaintiff is not responsible for negligence. To disentitle the infant plaintiff to recover, it would require to be shewn that the injury was occasioned altogether by his own so-called negligence.

The jury assessed the damages at $300—quite too small an amount if the plaintiffs are entitled to recover at all. Upon the facts, any solicitor advising that there was liability would think the case a proper one for the High Court. It is a case in which, in the exercise of my discretion, I should give the plaintiffs costs on the High Court scale. Judgment for the plaintiffs for $300 damages with costs, and no set-off of costs.

Judgment for plaintiff.

GALLAGHER v. ONTARIO PIPE CLAY CO.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Riddell, JJ.
May 6, 1912.

ONT.

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May 6.

1. MINES (§ II A—32)—REMOVAL OF SEWER CLAY—REFORMATION OF DEED.

Where a deed granting all the sewer pipe clay on a part of the grantor's farm made no limit as to the depth the grantees were to go in removing the clay and there was no other agreement as to that subject, the grantor is not entitled to have the deed rectified so as to conform to what both parties at the time of its execution contemplated would be the depth to which the grantees would go in getting the clay as the result of tests then made.

[*Okill* v. *Whittaker*, 1 DeG. & Sm. 83, and *Hoskins* v. *Jackson*, 2 Macn. & G. 372, applied.]

Statement

APPEAL by the plaintiff from the dismissal of the action at the trial.

The action was for an injunction restraining the defendant from removing any clay but that referred to in a deed from the plaintiff to the defendants or for reformation of the deed and for other relief.

Judgment for the defendants was affirmed on appeal.

C. W. Bell, for the plaintiff.

J. A. MacIntosh, for the defendants.

The judgment at trial appealed from was as follows:—

Teetzel, J.

TEETZEL, J.:—By deed, dated the 16th July, 1906, the plaintiff, in consideration of $2,277, granted to the defendants "all the sewer pipe clay" on the portion of his farm thereon particularly described, containing 7.59 acres, the defendants agreeing to remove "all the said clay to which they are entitled under these presents on or before the 1st day of April, 1913," and also "that they will leave the top soil on the said lands and as nearly level as practicable."

At the trial, I allowed the plaintiff to amend by setting up an alleged agreement between the parties, prior to the execution of the deed, to the effect that the defendants were only to remove the clay to an average depth of not more than three feet, and claiming a reformation of the deed to comply with such agreement, and damages for having, in violation thereof, removed a greater quantity of clay and other material.

I find upon the evidence that upon the negotiations for the clay it was contemplated by both the plaintiff and the representative of the defendants that, as the result of test pits dug upon the property and from the depth to which sewer pipe clay had been removed from adjacent properties, the quantity of sewer pipe clay upon the plaintiff's property was much less in depth than the defendants have actually removed from the plaintiff's land. I also find that the material which the defendants have removed at a greater depth than was originally contemplated is, in fact,

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sewer piper clay, although until 1910 the defendants had not been using that quality of material at their works, because it contained a small portion of gravel, and up to that date their machinery was not adapted for using clay with an admixture of gravel; but, having during that year installed machinery by which gravel could be ground, they proceeded to remove clay from the plaintiff's land, to a depth considerably greater than it was contemplated they would do when the bargain was made with the plaintiff, and which, notwithstanding the gravel, was profitably used as sewer pipe clay.

Beyond finding what both parties contemplated as above, I am unable to find that there was in fact any agreement arrived at whereby the defendants were to be limited in the depth they should excavate on the plaintiff's land, so long as they removed sewer pipe clay only; so that the plaintiff entirely fails to establish the first requisite to support an application to rectify the deed. The mere circumstance that the plaintiff sold more than he thought he was selling, and the defendants got more than they expected, is not, in the absence of unfair dealing, sufficient to entitle the plaintiff to have his deed rectified. See Kerr on Fraud and Mistake, 4th ed., pp. 511-512; *Okill* v. *Whittaker*, 1 DeG. & Sm. 83; and *Hawkins* v. *Jackson*, 2 Macn. & G. 372.

In this case fraud is not charged, nor can I find any satisfactory evidence of unfair dealing by the defendants.

Then again the consideration was paid, and the deed executed, and the defendants placed in possession, so that the peculiar doctrines of equity applicable to actions for specific performance are entirely beside the question.

I think that there is little doubt that, had the plaintiff known that the material he was selling as sewer pipe clay extended in fact to a greater depth than the bottom of the test holes, or that the defendants would be entitled to remove a greater depth of material than had been taken from adjacent properties, he would have demanded and been paid a greater price; but I am unable, in face of the unrestricted terms of his deed, to give him any relief against the defendants' claim to excavate to a greater depth than either party originally contemplated would be done.

The plaintiff also alleges an agreement in May, 1909, whereby, as he contends, in exchange for an additional strip of clay 10 feet wide, the defendants agreed to surrender to the plaintiff a certain portion of the land from which, under the deed, they were entitled to remove clay; and he alleges that the defendants have violated such agreement.

That there was a verbal agreement for exchange is admitted, but the quantity to be surrendered by the defendants is a matter of serious dispute, and the evidence as to it is most conflicting. I am not able to find that the portion claimed by the plaintiff was agreed to by the defendants; and, while it may have been more

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than that conceded by the defendants, I cannot say that in fact it was more. The very indefinite character of the defendants' letter of the 17th May, 1909, purporting to evidence the agreement, instead of clarifying the intention of the parties, makes it more difficult to accept in its entirety the oral evidence on either side as to what the true agreement was.

The plaintiff also charges that, in violation of the agreement contained in the deed, the defendants have removed from the lands a large quantity of top soil. As to this part of the claim, while there was some evidence of improper dealing with top soil, the defendants may, before their rights under the deed expire (the 1st April, 1913), restore and replace the top soil in compliance with the deed. So that, while the action will be dismissed, the judgment will be without prejudice to any action the plaintiff may bring after the 1st April, 1913, for any breach of the agreement respecting top soil.

Under all the circumstances, I do not think it is a case for awarding costs to the defendants.

Judgment

May 6, 1912. The Divisional Court (MULOCK, C.J.EX.D., CLUTE and RIDDELL, JJ.) dismissed an appeal from the above judgment.

Judgment for defendants.

HAWES, GIBSON & CO. v. HAWES.

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H. C. J.
1912
May 7.

Ontario High Court, Middleton, J., in Chambers. May 7, 1912.

1. DEPOSITIONS (§ II—6)—FOREIGN COMMISSION—ALTERNATIVE COURSES—TERMS.

Where the Court is not satisfied that a foreign commission is necessary, the applicant may be ordered to elect between giving security for the costs of the commission, and a refusal of the commission with liberty to obtain a commission at the trial if it appears necessary to the trial Judge, the party opposing the commission to be bound in that event to consent to a postponement of the trial for that purpose.

[*Macdonald* v. *Sovereign Bank of Canada*, 3 O.W.N. 1006, followed.]

Statement

APPEAL by the defendant from the order of the Master in Chambers (3 O.W.N. 1078).

The motion was by the plaintiffs for an order for the issue of a commission to Edmonton, Alberta, for the examination of certain witnesses, 3 O.W.N. 312. The Master said that, in view of the pleadings as they now appeared, it would seem that the plaintiffs might have the commission. The statement of defence should be amended as proposed, and the proposed reply should be delivered. The question would then be fairly raised, whether the agreement relied on by the defendant was made under such circumstances as would render it invalid. It would be for the

plaintiffs to consider whether this could be shewn without the evidence of James Hawes, with whom it was apparently made on behalf of the partnership. The costs of the motion and commission reserved for the Taxing Officer unless disposed of by the trial Judge.

The order below was varied.

F. R. MacKelcan, for the defendant.

H. D. Gamble, K.C., for the plaintiffs.

MIDDLETON, J.:—An application was made for a commission in this case before, and it was refused by a Divisional Court (3 O.W.N. 312), the majority of the Judges thinking that it had not been shewn to be necessary for the purposes of the record as it then stood. Since then the pleadings have been amended by both parties. The Master has taken the view that, upon this record, the applicant is entitled to the commission. Middleton, J.

I have considered the record with much care, and have consulted one of the Judges sitting in the Divisional Court which heard the former application. I cannot satisfy myself that the commission is really necessary; but, at the same time, it is impossible to say with certainty that some necessity may not be revealed when the case actually comes to trial. I have, therefore, concluded to give to the plaintiffs their election between two courses; and in doing so I am much influenced by the fact that the action is in the name of an insolvent firm, being brought under the authority of the receiver at the instance of one or more creditors, against the wishes of another creditor or other creditors.

Under these circumstances, the plaintiffs may have the commission if they give security in the sum of $200, by bond or cash deposit of that amount, for the costs of the commission; the question of the necessity of the commission being reserved to the trial. Or, if the plaintiffs so elect, the order for commission will be vacated, and the motion will stand until after the facts are developed at the hearing, when, if the trial Judge finds that it is necessary to have a commission, the plaintiffs are to be at liberty to have the evidence sought taken under a commission, and the defendant must assent to the case then standing over for judgment until the evidence is received.

The precise terms of this alternative may be as finally settled in the case of *Macdonald* v. *Sovereign Bank of Canada*, 3 O.W.N. 1006, where a similar order was made.

Order varied.

N. S.

S. C.
1912

May 10.

McGILLIVRAY v. CONROY.

Supreme Court of Nova Scotia, Graham, E.J., Meagher, Russell, Drysdale and Ritchie, JJ. May 10, 1912.

1. COSTS (§ II—28)—SCALE OF—DEFENDANT'S COSTS ON DISMISSAL.

In taxing costs in the County Court on the dismissal of the action, the defendant is entitled to tax his costs upon the scale determined by the amount of the plaintiff's claim.

[County Court Act, R.S.N.S. 1900, ch. 156, sec. 78, considered.]

2. COSTS (§ II—29)—REVIEW OF TAXATION—QUESTION OF PRINCIPLE.

A question of the scale of costs of the whole bill as distinguished from the separate consideration of items, is one of principle and may be brought up in a County Court case in Nova Scotia by a motion to review the taxation and an appeal from the refusal instead of by an appeal direct from the taxation itself.

[*Canadian Bank of Commerce* v. *Colwell* (unreported); *Sparrow* v. *Hill*, 7 Q.B.D. 362; and *Tupper* v. *Wright*, James' R. 303, specially considered.]

Statement

APPEAL from the judgment of MacGillivray, County Court Judge for District No. 6, dismissing an application to re-tax costs. The facts are fully set out in the judgment of GRAHAM, E.J.

Argument

H. Mellish, K.C., for defendant, appellant:—The claim is not for a debt or liquidated demand. The case should be remitted to the Judge of the County Court to be taxed on the higher scale: *Canadian Bank of Commerce* v. *Colwell*, January term, 1912. (Not reported.)

J. L. Ralston, K.C., for plaintiff, respondent:—The action was tried as for money had and received and judgment was given on that ground. The taxation should therefore be on the lower scale. *In re Terrell*, 22 Ch.D. 473; *Campbell* v. *Baker*, 9 O.L.R. 291. Objections to a bill of costs as taxed on a wrong principle are to be distinguished from objections as to amounts of items. *Re Cassell*, 36 Ch.D. 194; *Sparrow* v. *Hill*, 7 Q.B.D. 362; *Fletcher* v. *Dyson*, [1903] 2 Ch. 688.

Mellish, K.C., replied.

Graham, E.J.

May 10, 1912. GRAHAM, E.J.:—In this appeal from the Judge of the County Court for District No. 6 I am of opinion that the costs should have been taxed on the higher scale. They were taxed on the lower scale as if the action were for a debt or liquidated demand in money under $40.

The question is determined by the County Court Act, R.S. 1900, ch. 156, sec. 78, as follows:—

> In taxing costs on final judgment in an action to recover a debt or liquidated demand in money, the scale under which a plaintiff is entitled to tax shall be determined by the amount he recovers, and the scale under which the defendant is entitled to tax shall be determined by the amount of the plaintiff's claim.

To shew that this is not a debt or liquidated demand in money I extract the statement of claim:—

1. The defendant is a justice of the peace in and for Guysboro County.

2. In the year 1905 the plaintiff placed in the hands of the defendant as such justice of the peace for collection a claim amounting to $27 against one William O. Aikins, with instructions to sue the said claim.

3. The plaintiff deposited with the defendant the sum of ten dollars for his costs in prosecuting the said claim.

4. The said defendant has refused or neglected, and still refuses and neglects to account to the said plaintiff for the said sum of twenty-seven dollars or any part thereof.

5. The said defendant has refused or neglected and still refuses or neglects to return the papers in the said judgment to the plaintiff, though frequently requested to do so, and the plaintiff has suffered damage by not being able to realize on the said judgment.

6. The said plaintiff requires an accounting for the said sum of $27, the claim of the plaintiff against the said William O. Aikins, and the sum of $10 paid the said defendant for costs.

7. In the alternative the plaintiff claims the sum of $40 damages on account of the neglect or refusal of the defendant to prosecute the plaintiff's claim against the said William O. Aikins and has refused to return the papers in the said cause to the plaintiff.

These words a "debt or liquidated demand in money" are borrowed from another rule prevailing in England and Nova Scotia to determine when a plaintiff can proceed by a specially indorsed writ of summons instead of using a statement of claim after appearance, and that rule has to be considered every day.

There is no allegation from first to last in the statement of claim (and the pleader did proceed by statement of claim) that the magistrate recovered or collected the debt from the debtor, or it might have been contended that it was an action for money had and received. In form and substance the action is neither for a debt nor a liquidated demand.

The learned counsel for the plaintiff has raised another point. It appears that the defendant made up a bill on the higher scale but the learned Judge of that Court, who is the taxing officer for the Court, cut it down to a bill on the lower scale and that affected a number of items. Then the defendant moved the County Court Judge to review the taxation and he having refused to do so the defendant has appealed to this Court.

It is now contended by the plaintiff that the defendant should have appealed from the taxation itself without any application to review.

Order 63, r. 23, item 23, provides the procedure for reviewing the taxation of a bill of costs to be taken by the party against whom the bill is taxed, item 24 the procedure to be taken by the party opposing the bill.

> In case the party opposing the bill for taxation is desirous of having it re-taxed, he shall be entitled to do so—on giving 48 hours' notice—specifying the items or parts of items he claims to have added to the bill.

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Then item 24. "In causes in the Supreme Court a Judge of that Court shall be the re-taxing Judge and in causes in a County Court the Judge of that County Court."

It is nothing that in case of the County Court the taxing officer and the Judge happens to be the same person. That happened in the Supreme Court before there was any rule of this kind.

The items of the bill about which there was a controversy were brought before the Judge again by way of review.

This Court in the case of the *Canadian Bank of Commerce* v. *Colwell* (unreported) has just held that the procedure taken here was the proper procedure. But the plaintiff contends that that case was a case of mere items in a bill. Here there was a question whether the costs were to be taxed on the higher or lower scale and that he calls a question of principle. It is quite possible that in such a case the procedure of the rules quoted which require the items, etc., to be specified does not apply. In fact the case of *Sparrow* v. *Hill*, 7 Q.B.D. 362, granting a review of the taxation of the Master, decided that this was not required where the question, as it was in that case, was a question of principle.

But if the rules do not apply as to that requirement there must be some way of getting a bill of costs reviewed, and some decision to appeal from. Certainly no harm is done in applying to the Judge for a review. It is not easy to say when a principle is involved and when it is not. It is a convenient way of getting the Judge's views in concrete form and a decision from which to appeal.

And if there is no rule on the subject the old practice would prevail, and the Judge would have jurisdiction to review.

In *Tupper* v. *Wright*, James' Reports 303, this is said:—

> Fairbanks, Q.C., moved for re-taxation of costs upon an affidavit, which the Court refused as the application had not been first made to the Judge who taxed the bill.

I think that there was safety at least in favour of asking the Judge first to review his taxation before appealing to this Court.

The appeal should be allowed with costs and the bill be referred back to the Judge to be taxed on the higher scale.

Judgment

MEAGHER, RUSSELL and DRYSDALE, JJ., concurred that costs should have been taxed on the higher scale.

Appeal allowed.

Re RIDDELL.

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May 7.

Ontario High Court, Middleton, J., in Chambers. May 7, 1912.

1. COSTS (§ I—14)—SECURITY FOR COSTS—RESIDENCE OUT OF THE JURISDICTION—PLAINTIFF CLAIMING FUND IN COURT.

A claimant in an issue to determine the right to a fund in Court, if resident out of the jurisdiction, may be required to give security for costs.

[*Boyle* v. *McCabe*, 24 O.L.R. 313, followed.]

Statement

AN appeal by John Riddell from the refusal of the Master in Chambers to order the claimant Adelia Pray to give security for the costs of an issue with respect to certain moneys in Court.

The appeal was allowed.

C. A. Moss, for John Riddell.

T. N. Phelan, for Adelia Pray.

Middleton, J.

MIDDLETON, J.:—The fund in question is the proceeds of an insurance policy upon the life of the late James Riddell. By the original policy, the money was payable to his granddaughter, the claimant Adelia Pray. Subsequently, a new apportionment was made, by which the money was diverted to the claimant John Riddell. If Adelia Pray is the granddaughter of the assured, then the later apportionment is of no effect, because she would then be within the class of preferred beneficiaries, while the brother is outside of that class.

The real issue to be tried is the fact as to the relationship between Adelia Pray and James Riddell. It is said that she is not his grandchild, but was a child, by a former marriage, of the wife of John Riddell, son of James Riddell. She is resident out of the jurisdiction.

The case is governed entirely by *Boyle* v. *McCabe*, 24 O.L.R. 313. It is manifest that Adelia Pray is a real actor. She is a claimant upon the fund; and to succeed she must establish that she is a grandchild. It may be that the onus will shift when the document is produced in which the testator describes her as his grandchild; but this is not the test. If the insurance company had not paid the money into Court, and called upon her to prove her title, she would have had to sue. This shews that she is an actor, within the meaning of the rule established by the case referred to.

I recognise the hardship of the practice thus established, and would have preferred the view that, where the money is paid into Court, and those appearing to have claims upon it are brought before the Court for the purpose of establishing their claims or being for ever barred, security for costs should not be required; because the claim is not voluntarily put forth by the claimant, and it is contrary to natural justice to call upon a claimant to establish his claim, and then impose terms which

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it must sometimes be impossible to comply with, and, by reason of the failure to comply, to bar the right.

This view, however, has not been adopted by decisions which are binding upon me.

The appeal will be allowed, and security ordered. Costs in the cause.

Appeal allowed.

RE TOWN OF STEELTON AND CANADIAN PACIFIC R. CO.

ONT.

C. A.
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May 9.

Ontario Court of Appeal, Moss, C.J.O., in Chambers, May 9, 1912.

1. TAXES (§ III B—112) — ASSESSMENT OF RAILWAY PROPERTY — ASSESSMENT ACT (ONT.) 1904, SEC. 45.

The assessment of the real property of a steam railway company does not become fixed for the next following four years, under section 45 of the Ontario Assessment Act, 1904, upon the mere formal receipt by the clerk of the municipality of the company's annual statement of such property, and the transmission to the company of a notice of the amount of the assessment thereof, such amount being the same as the amount for the previous year; the only assessment which remains so fixed is an actual assessment after inspection and valuation.

Statement

CASE stated by the Lieutenant-Governor in Council, under sec. 77 of the Assessment Act, for the opinion of a Judge of the Court of Appeal.

Angus MacMurchy, K.C., for the railway company.

D. L. McCarthy, K.C., for the town corporation.

Moss, C.J.O.

MOSS, C.J.O.:—The question raised is as to the proper meaning and effect of sec. 45 of the Assessment Act, 1904, in relation to the assessment of the real property of steam railway companies.

The provisions of the Act dealing with the subject are secs. 44 and 45, under the heading "Railways."

Sub-section (1) of sec. 44 makes provision for every steam railway company transmitting annually to the clerk of the municipality in which any part of the roadway or other real property of the company is situated, a statement shewing in detail the various kinds of real property, whether occupied, in use, or vacant, belonging to the company, and the assessable value thereof. And the statement is to be communicated by the clerk of the municipality to the assessor.

Sub-section (2) prescribes the mode to be adopted by the assessor in assessing the various descriptions of land and property specified in the statement.

Sub-section (3) makes it the duty of the assessor to deliver or transmit by post to the company a notice of the total amount at which he has assessed the land and property, shewing the amount for each description of property mentioned in the state-

ment of the company. The company's statement and the assessor's notice are to be held to be the assessment return and notice of assessment required by secs. 18 and 46 of the Act to be made and given in the case of other assessments.

Sub-section (4) declares that a railway company assessed under this section shall be exempt from assessment in any other manner for municipal purposes except for local improvements.

Then follows sec. 45, which declares that, when an assessment has been made under the provisions of sec. 44, the amount thereof in the roll as finally revised and corrected for *that* year shall be the amount for which the company shall be assessed for the next following four years in respect of the land and property included in such assessment; with a provision for reducing in any year the fixed amount, by deducting the value of any land or property which has ceased to belong to the company, and for making a further assessment of any additional land or property of the company not included in such assessment.

The material statements of the case are: that in the year 1905 the lands of the Canadian Pacific Railway Company in the town of Steelton were assessed at $15,500 for the year 1906; that the assessment continued at the same amount annually until 1911, when the amount thereof was increased to $25,936 for 1912; that in 1910 the assessor, after consultation with the mayor, concluded, under a mistaken idea as to the effect of sec. 45 of the Act, that he could not make an increase in the company's assessment until 1911; and, therefore, assessed the property for 1911 at the same amount as in the preceding year; that the assessment made in the years 1906 to 1910, inclusive, were made without any inspection or valuation of the lands by the assessor; that the annual statements of the company's property in Steelton were duly furnished by the company, as required by sec. 44 of the Act, in the years 1906 and 1910, inclusive; that the company have paid the taxes for 1911, under the assessment made in 1910.

Upon these facts, the Judge of the District Court of the District of Algoma held, upon appeal by the company from the decision of the Court of Revision confirming the assessment of the land and property at the sum of $25,936, that the assessor was at liberty to assess in 1911 for 1912 for an amount greater than the amount of the assessment in 1910 for 1911.

The question submitted is, whether the judgment is right. I am of opinion that the learned Judge's conclusion is right.

There is, no doubt, much plausibility in the argument presented on behalf of the company, that what is provided for is quinquennial assessment, and that the amount of the assessment of which the company are notified upon the termination of a quinquennial period fixes the amount for the next following 4 years.

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But, taking sec. 45 in connection with sec. 44, it is apparent that the assessment which is to stand for the next following four years is an actual assessment made in compliance with and following the directions of sec. 44. That is what sec. 45 says in effect. The essential elements of an assessment, so far as the assessor is concerned, are that, upon receipt of the statement called for by sub-sec. (1), he shall proceed to assess by placing values upon the various kinds of land and property, in accordance with the principles declared by sub-sec. (2); and, having in this manner arrived at and ascertained the total amount, deliver or transmit a notice to the company of the particulars specified in sub-sec. (3). This is an assessment calling for inspection and examination of the land and property, and the exercise of judgment with regard to their values. Such an assessment being made, the amount thereof in the roll as finally revised and corrected for that year, i.e., the year in which such an assessment is made, is the amount that is to stand for the four following years.

I do not think that the mere formal receipt by the assessor of the annual statement, and the delivery or transmission of a notice to the company under sub-sec. (3), is an assessment that will bind either party to the amount thereof after the expiration of a quinquennial period. I see nothing to prevent the municipality and the company continuing the amount of an assessment made under sec. 44 beyond 5 years, and until another actual assessment is made. The effect of sec. 45 is to fix the amount for the four following years, at the expiration of which time either party is entitled to an actual assessment.

I think, therefore, that the formal proceedings taken by the assessor in 1910 were not such an assessment as fixed the amount for the four following years.

I answer the question in the affirmative.

I award no costs to or against either party.

Judgment accordingly.

N. S.

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May 10.

GRAHAM v. BIGELOW.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Russell and Drysdale, JJ. May 10, 1912.

1. SALE (§ II C—35)—WARRANTY—FRUIT NOT UP TO QUALITY—REMEDIES OF PURCHASER.

Where a quantity of fruit purchased by a dealer from the grower for export to the English market and re-sale at a profit was discovered upon inspection not to be of the grades and quality contracted for, the buyer has the right either to reject the lot and to go into the market and replace the fruit in accordance with the contract grade and hold the vendor responsible for the difference between the contract price and the market price; or he may retain the fruit, relying on the warranty or description of grade, and recover the loss sustained based on the market price at the time of the discovery of the fraudulent packing as compared with the confract price.

[*Smith* v. *Bolles*, 132 U.S. 125, and *Ashworth* v. *Wells* (1898), 14 Times L.R. 227, 78 L.T. 136, specially referred to.]

2. DAMAGES (§ III A 4—80)—SALE OF FRUIT—BREACH OF WARRANTY—DELAY IN SELLING—ASSESSING DAMAGES.

Where the evidence shewed that the buyer of fruit could have realized a higher price at the time he discovered the fraudulent packing and labelling of grades and in consequence had to re-pack and grade the fruit, the loss necessarily caused by the delay is properly taken into consideration in assessing damages.

[*Weir* v. *Bissett*, 3 N.S.R. 178, specially referred to.]

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Statement

Plaintiff, a fruit dealer residing at Belleville in the Province of Ontario, engaged in the business of buying apples for export in the Province of Nova Scotia, in or about the month of October, 1908, entered into an agreement with defendant, which agreement was partly verbal and partly in writing, whereby defendant agreed to sell and deliver to plaintiff, before December 1, 1908, a quantity of apples, consisting of Nos. 1 and 2 grades, at the price of $2 per barrel for certain varieties, and $1.75 per barrel for certain other varieties, said apples to be delivered to the plaintiff properly sorted and graded.

Plaintiff in this action sought to recover from defendant the sum of $913.25 damages, alleging that the apples delivered were falsely and fraudulently packed, by reason of which plaintiff was obliged to repack the apples and was put to expense and loss in having the apples properly graded and repacked; and further that after the agreement was entered into, there was a rise in the price of apples in the market and plaintiff had received orders for and could have sold a large quantity of apples at an advanced price, but in consequence of the condition of the apples when delivered he was unable to fill his orders and lost the profit which he would have made in consequence of the advance in price.

The cause was tried before Meagher, J., at Halifax, April 18, 1911. The learned Judge, September 7, 1911, found all the facts in favour of plaintiff. He then proceeded as follows:—

Meagher, J.

MEAGHER, J.:—It only remains to consider the question of damages. There cannot, I apprehend, be much if any difference between the measure of damages in cases of fraud or false and fraudulent representation and cases like the present, where a sale was made upon the faith of a warranty covering quality, condition and grade, and where there was as I believe a wilful breach of the warranty.

The defendant, knowledge or no knowledge, must be held liable for the acts of his employees who did the work of executing the contract for him. Willis, J., delivering the judgment of the Exchequer Chamber in *Barwick* v. *The English Joint Stock Bank*, L.R. 2 Ex. 259, used language which Benjamin refers to as a classical authority on the point:—

> With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business for his master's benefit, no sensible distinction can be drawn between the

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case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.

This view of the rule has time and again been referred to with approval by very high judicial authority.

It is but justice to Mr. Roscoe who conducted this case with his usual great ability and fairness to say that he did not take any ground in conflict with this principle unless it was in answer to the charge of fraud, where he urged that the averment of fraud, and of false packing, meant personal knowledge on defendant's part.

The Supreme Court of the United States in *Smith* v. *Bolles*, 132 U.S. 125, which was an action based on false and fraudulent representations, said:—

> In applying the general rule that the damage to be recovered must always be the actual and proximate consequence of the act complained of, those results are to be considered proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud or breach of contract.

Thoms v. *Dingley* (1879), 70 Maine 100, is an instructive case on the cost of re-packing, etc. The ordinary measure of damages where there has been a breach of warranty in regard to personal property is the difference between the actual value of the articles sold and what they would have been worth as warranted; but there are cases where a more liberal view is taken and larger damages may be recovered for special or exceptional losses; thus in *Thoms* v. *Dingley*, 70 Me. 100, where carriage springs were warranted as made of the best of steel and proved defective, the plaintiffs were held entitled to recover, amongst other damages, the necessary expenses of taking them out of the carriage in which they were placed and inserting others in place of them. So here, I think the cost of re-packing, etc., may be recovered. Both parties knew they would be inspected before being shipped to England or elsewhere and both must have understood that re-packing, etc., would be necessary if they were not substantially up to the statutory standard and, therefore, I conclude that item of damages was in the contemplation of the parties. The expenses the plaintiff was put to and without which he could not have put them on the market was it seems to me a natural result of the breach of warranty. Sutherland in his valuable treatise on damages says the party who breaks a contract is liable only for the direct consequences of the breach such as usually occur from the infraction of a contract and were within the contemplation of the parties when the contract was entered into as likely to result from its non-performance: *Ashworth* v. *Wells* (1898), 14 T.L.R. 227 (C.A.).

While there is not, so far as I remember, any specific evidence that this fruit was intended for shipment to England, I have very little doubt the defendant so understood the situation. At any rate the plaintiff was entitled to ship it there and rely upon that market as the basis for the measure of his damages. Just as in *Wier* v. *Bissett*, 3 N.S.R. 178, although there was nothing to shew the goods were intended for shipment to Boston yet the damages allowed was the difference between the price of fish at Boston of the quality they were represented to be under the bought note and of fish they were actually found to be. The items making the damages claimed and these which can only be properly allowed were not discussed at all fully and as I desire to arrive at a correct estimate, I shall hear counsel on the subject when the order is moved for and I fix Monday, the 18th, at ten a.m., for that purpose if convenient for counsel.

[Subsequently the learned Judge heard counsel on questions of damage other than the cost of re-packing and November 20, 1911, filed a further judgment as follows:]

Meagher, J.

MEAGHER, J.:—My previous decision left all open questions of damage other than the cost of re-packing, and counsel were heard thereon at the end of October. As to the cost of re-packing I may refer to Mayne on Damages (ed. of 1909), p. 21, to the effect that any increased cost to which a party is put by having to do what he had contracted others should do for him is recoverable, provided the fair and proper thing was done by him under the circumstances. I shall state my findings in relation to damages even at the risk of some repetition upon the situation at the time of the purchase and later. They are:—

1. The defendant had a large experience growing and selling apples, and was familiar with the trade in all its branches here and in England, and was aware that by far the largest proportion of Nova Scotia apples were sent to the latter market. He believed this lot was intended for that market and would be for sale there, about or during the holiday season when he knew the demand as a rule was greatest.

2. He knew the plaintiff was a large dealer purchasing for export and re-sale at a profit and would of course sell the apples in question upon his, the defendant's, warranty which appeared upon the head of each barrel under the sanction of his name.

3. He further knew if their condition was discovered before shipment the plaintiff in order to avoid prosecution for penalties under the statute and claims for damages by his vendees and to prevent very serious injury to his reputation as a dealer would be compelled to re-pack them under statutory inspection, with all that meant in the way of expenses, delay until the season was well advanced, consequent loss of market, injury to the fruit from re-handling and re-packing and any injury their greater age might occasion.

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4. He knew, too, the fruit was wholly unsaleable when delivered and had no practical commercial value anywhere and must so continue until re-packed and was under the ban of the statute, and it was dangerous for the plaintiff to have it in his possession because so large a quantity, nearly six hundred barrels, apart from other lots he would have, could only mean it was for sale and not for individual use. This knowledge embraces all facts necessary to afford grounds for the conclusion that damages arising through the breach complained of, and of the nature above indicated, were within the contemplation of the parties as the necessary or probable consequences of breaches such as I have found. See *per* Bowen, L.J., in *Grébert Borgn's* v. *Nugent* (1885), 15 Q.B.D. 85 at top of 93.

It was contended that as they were not held for sale in Canada the Inspections Statute did not apply to the plaintiff nor to them and that better results would have been obtained if they had been shipped and sold as they were when delivered, and in support of this it was said that those of them which were shipped before re-packing sold well. I shall discuss these points in the above order.

As to the first, it is not well founded as a matter of law and if I held they were not for re-sale in Canada I should deprive the defendant of his contention as to their non-liability to inspection.

As to the second, the defendant cannot be heard to make such a contention to avert or lessen the consequences to himself of his breach of warranty. The plaintiff was entitled to receive the article he bought and paid for and to recover the usual damages, at least if he did not with respect to the assertion of fact that part of the lot was sold without re-packing and sold well. I am quite unable to say it was sufficiently proved in either aspect. McNeill's evidence was relied on in this aspect: that is, his opinion as to a sale without re-packing, but in the view I have just expressed it cannot be given effect to even if correct.

If the plaintiff sold upon the faith of the defendant's branding he would have been subjected to claims for damages from his vendees, which the defendant must recoup: *Hecla Powder Co.* v. *Sigua Iron Co.*, 157 N.Y. 437; *Randall* v. *Raper* (1858), E.B. & E. 84; 1 Sedgwick on Damages, 8th ed., 220; while if their condition was known no one would purchase them or only at a merely nominal price.

In the result the plaintiff was without the use of the money he paid for them, and lost the market he would have gained had he been permitted to ship them when he was ready to do so early in December, as well as all other opportunities for sale offering at their intended destination between the time they were discovered to be unsaleable and unfit for shipment, and when they were actually sold.

The plaintiff did not return the fruit; he may not have had that right at any time unless perhaps for fraud. At any rate it was too late when their condition was discovered. The defendant did not seek their return although their condition was reported to him at an early stage of the re-packing.

The plaintiff, I find, was not guilty of any negligence or unreasonable delay in not discovering the defects earlier. He was dealing with a man of long experience in fruit, in a sense a public fruit official, whom he had a right to believe would live up to his contract and on whose good faith apart from the facts referred to—he was entitled to rely without question or doubt.

When their condition was discovered it became the duty of the plaintiff to make the best of the situation and I find he did so, and without undue delay he did all that one of reasonable care, skill and energy could have done to minimize the loss and to reach the market promptly: Sedgwick, vol. 1, 226. Meantime the defendant had the money which the plaintiff gathered for this purchase; the latter had the goods such as they were and could not be reasonably expected to go into the market and replace them. In that event he would have two lots, the latter when made fit for sale coming into competition with the other one.

Before they reached the market in ordinary course under the circumstances their value in England had fallen materially and that quickly reacted upon the market here and thus the plaintiff, through the defendant's breach, lost the gains he would have made if the defendant performed his contract fairly. The known facts have reduced this view to a certainty in a practical sense.

The defendant claims the measure of damages, if any, was the difference between the market value when purchased and the price which was paid later on. The concluding part of my next quotation shews that the element of price paid in fixing the standard of damages is exceptional. The case in any aspect I have viewed it does not fit the contention. See the note to *Loder* v. *Kekulé* (1857), 3 C.B.N.S. 128, at p. 136, American reprint, which deals with the element of price as distinguished from value.

It was further said if defendant knew they were intended for sale in a foreign market he might be held liable on the basis of market value, if they reached their destination within a reasonable time (which it was said they did not) and the prices they brought were known, but the latter because of the loss of identity in re-packing could not be ascertained.

I may in this connection add that the delay and expenses would probably have been greater if when re-packed they were kept by themselves.

Sedgwick on Damages, 8th ed., vol. 2, sec. 762, says:—

> The measure is the difference at the time of delivery between the value of goods of the quality contracted for and that of those delivered,

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provided the goods can then be resold. When there is a necessary or reasonable delay in the resale the difference is to be computed on the day of resale. . . . Where the goods were to be shipped abroad a fact known to the vendor and the defect could not be discovered until they reached their destination, it was held that the measure of damages was the difference between the market value of the article contracted for on the day of arrival and the price realized by the sale of the article received, together with the expenses of sale and where the goods were sold abroad before the breach of warranty was discovered and the plaintiff was compelled to take them back on account of the defect and sold them again at a lower price, he was allowed to recover the difference between the prices realized at the two sales. . . Where the property at the time of the sale had no market value and it is impossible to get at the real value at that time if it had been as warranted the price paid may be taken into account.

In this instance the market value at the sale was ascertainable and therefore the price paid cannot, I conceive, be resorted to.

The extent in value of the depreciation to the fruit caused by the extra handling in re-packing and through their greater age caused by the lapse of time needed to fit them for market, and all due to defendant's wrongful acts, as well as the loss in a large measure of the season for their sale, has not been shewn by a re-sale and could not well have been shewn because of the loss of identity, and therefore that method cannot be resorted to.

There is no rule to fit every class of case and this in the light of the facts seems to be an exceptional one owing to their value when resold not having been ascertained, their having no value when delivered and the place proper to be regarded as the correct one for delivery in the estimation of damages being more or less uncertain; and the further fact that if Wolfville is to be deemed for that purpose the proper place there is no proof of market value there when delivered nor at any other time unless the price paid is accepted for it. The general rule where the goods have not been returned is the difference between their value with the defects warranted against and the value they would have borne without them: Mayne on Damages, 8th ed., 228. It has been aptly expressed as the difference in value between the article as it is in fact and as it ought to have been under the warranty.

Benjamin says that at common law the value of goods is their intrinsic value and not any special value which they may have to the buyer. This may be subject to qualification and where as here the defendant was aware they were for sale in England it is fair to say that any special or intrinsic value that fact gave them in the plaintiff's hands was in the contemplation of the parties to the contract. A sale at their destination in such a case might fairly be regarded as fixing the value in the hands of the purchaser for the purposes of the warranty; and in such a case

Benjamin says the buyer may get the profits of a subsale. It might, however, be proper perhaps to consider the cost of carriage, etc., but in *Wier* v. *Bissett*, 3 N.S.R. 178, that item was not touched upon.

If I adopted either the price or the market value at delivery in Wolfville as the standard (assuming the presence of proof of such value), justice would not, it seems to me, be done to the plaintiff. He did not buy one week at Wolfville to sell there the next, nor for prices available there. He was not a vendor in that market. All this was common to both. If he offered them for sale there, being but a buyer for export that circumstance alone would excite suspicion and tend to depreciate them in the eyes of possible buyers. But if all this were absent it would not be fair to compel him to accept compensation upon a basis which never entered into the mind of either party and which would deprive him of all advantage from his purchase; and this assuming the fruit was all it ought to have been. The only purchasers there would be his rival buyers, in which case he might not get even the purchase price. Adverting again to the fact that the price the article brings on resale is not necessarily a controlling element in measuring the damages I may refer to Benjamin on Sales, 5th Eng. ed., p. 1017, where after referring to *Dingle* v. *Hare*, 7 C.B.N.S. 145 (in which the purchaser was allowed the difference in value between the article delivered and the article as warranted), proceeds:—

"And in *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, the same rule was applied and the plaintiff recovered as damages £765, although by reason of a rise in the market the inferior article sold for nearly as much as the price given in the original sale."

Sutherland on Damages, 3rd ed., sec. 670, says:—

> The general rule which I have mentioned is not affected by the fact that the vendee has sold the property at an increased price or paid for it in advance of its delivery or thereafter.

In *Wier* v. *Bissett*, 3 N.S.R. 178, the measure adopted was the difference between the value of fish at Boston of the quality they were represented to be and of the quality they were actually found to be in that market. The purchase was in Halifax from a local dealer. The goods were delivered here and subsequently shipped to Boston by the plaintiff for sale there. There was no evidence to shew the defendant knew they were intended to be sent for sale there, but the Court said the vendee had the right to send them there for resale. The delivery being in Halifax the breach occurred there and yet the damages were assessed upon the basis of the Boston market. Applying the same principle here the market value in England, where they were destined, would govern; it is the only market value proved. The difficulty arises, however, that I have no means of determining their value in the state they were in when delivered. I do not know as matter of evidence whether there is a statutable standard of grade

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or quality in England which would prevent their sale there. Their value, no matter where, could at best be altogether insignificant, while their value on resale is unknown because of loss of identity. It is worthy of note as a fact they lost much of their freshness in appearance through the handling, re-packing occasioned and were somewhat bruised besides and this with their greater age detracted from their saleability in England. They were delivered in lots at Wolfville covering some weeks or so. Some time had elapsed between the purchase and the first delivery and further time between that and payment; while the price paid is the only evidence of value there at any time. The price therefore cannot safely be accepted as a guide in any sense and in this dilemma, I must work my way out of the tangle as best I can.

In view of what I have said I cannot regard Wolfville where the breach no doubt occurred as the place to determine the relative values for the assessment of damages. I say this assuming the general rule calls for such a course. It seems to me the rule is founded upon the supposition that the goods have proceeded to their destination and the delivery is there and a market for them exists there distinct from that in which they were bought: *Wier* v. *Bissett*, 3 N.S.R. 178, and *Loder* v. *Kekulé*, 3 C.B.N.S. 128, *ubi sup.* prove that exceptions may exist and this in my opinion is a case out of the ordinary.

It is impossible to say with any shew of reason in the light of the defendant's knowledge he could have contemplated either a value or a resale at Wolfville in their then plight for the purpose of getting at the difference in value. If the case is so regarded the only guide I can think of is the price paid and interest, and perhaps nominal damages besides; that in effect would be a rescission of the contract while the action is based upon its existence and not upon its rescission.

In *Hinde* v. *Liddell*, L.R. 10 Q.B. 265 (a case of non-delivery), Blackburn, J., said at p. 267:—

> But there was no market for this particular description of shirting and therefore no market price. In such a case the measure of damages is the value of the thing at the time of the breach and that must be the price of the best substitute procurable.

That in this instance would mean at least what was paid for them, but whether obtainable at all was not shewn, though I assume they were up at least to the time when paid for.

Collard v. *S. E. Ry. Co.* (1861), 7 H. & N. 79, 30 L.J.Ex. 393, resembles this case in some particulars. But it was against a carrier for breach of duty and negligence under a contract to carry. Mayne on Damages, 8th ed., p. 21, seems to regard the same measure of damages applicable to that class of case and the present. The goods were unreasonably delayed and were wetted through exposure to the weather while in defendant's

custody. It was necessary to dry them to make them saleable. They were received by the consignee on October 29, but were not saleable until November 19, and in that interval the market price fell from £18 to £9 per hundredweight. The jury were instructed to award damages for injury by the wetting and for the difference in value between the time they ought to have been and when they were delivered and did so and the ruling was upheld. The opinion of Martin, B., is especially pertinent as to the loss being a direct and immediate consequence of defendant's breach of contract. See as to loss of season *Bauld* v. *Smith*, 40 N.S.R. 294, but only for the cases cited at 298 and 299.

In *Smeed* v. *Foord* (1859), 1 E. & E. 602, the Court refused to allow for a fall in the market. Mayne on Damages, 8th ed., p. 30, says it is difficult to see the distinction between it and the case just mentioned. Martin, B., in the latter points out a distinction in regard to *Smeed* v. *Foord*, 1 E. & E. 602, and so did Gray, J., in *Cutting* v. *The G. T. Ry.*, 13 Allen 381. See also Sutherland's criticism, Sutherland on Damages, 3rd ed., vol. 8, sec. 666, at p. 1947.

In *Loder* v. *Kekulé*, 3 C.B.N.S. 128 at p. 136, already cited, an action for breach of a contract by delivering inferior goods, the Court held the proper measure was the difference between the value of goods of the quality contracted for at the time of delivery and the value of the goods then actually delivered or their value as ascertained by a resale within a reasonable time. As to this latter, see *per* Tindall, C.J., and Bosanquet, J., in *Powell* v. *Horton* (1836), 2 Bing. N.C. 668 at 676, 678.

Two tests are given in *Loder* v. *Kekulé*, 3 C.B.N.S. 128 at p. 136. The first cannot, I think, be applied here because the plaintiff received nothing he could safely offer for sale or hold for sale for reasons already stated and owing to the identity being lost in repacking, the price they brought on resale is unknown, and therefore the second test cannot be resorted to. The nearest value would probably be the prevailing price for goods of their class in England at the time when under ordinary conditions they would have reached that market, provided they were seasonably shipped and no delay had been caused or arisen through defendant's fault.

Williams, J., in that case said:—

> The true measure of damages would have been if there had been nothing else in this case the difference between the value of the tallow of the quality contracted for at the time of delivery and the value of the tallow actually delivered. This, however, is on the assumption that the tallow delivered could be immediately resold on the market.

In *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199, the Court said:—

"In the case of contract special damages resulting from the breach of it may be considered within the contemplation of the parties."

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O'Hanlan v. *The G. W. R. Co.* (1865), 6 B. & S. 484, an action for the non-delivery of drapers' goods, decided that the measure of damages was the price at which goods could be obtained in the market if there was one at the place and time at which they ought to have been delivered; if not the damages must be ascertained by taking into consideration in addition to the cost price and the expense of transit the reasonable profit of the importer: Sedgwick, vol. 2, sec. 613.

I do not think that fruit of the class and variety this was could have been purchased in open market when the plaintiff first became aware of the deceit practised upon him in the execution of the contract.

Williams v. *Reynolds*, 6 B. & S. 495, follows next after *O'Hanlan* v. *The G. W. Ry. Co.*, 6 B. & S. 484, in the same volume and cannot be said to be in harmony with it unless there is a difference in the rule as against a carrier and against a defaulting warrantor. Benjamin, 5th ed., says *Williams* v. *Reynolds*, 6 B. & S. 495, and *Thol* v. *Henderson*, 8 Q.B.D. 457 (the latter was strongly insisted upon before me), can no longer, since *Hammond* v. *Bussey*, 20 Q.B.D. 79, be regarded as of authority.

I desire to refer especially to several leading and exceedingly instructive cases on the subject of the present enquiry and which have been almost universally accepted in England and America, namely, *Masterton* v. *Mayor of Brooklyn* (1845), 7 Hill N.Y. 61; *Fox* v. *Harding* (1851), 7 Cush. 522; *Griffin* v. *Colver* (1858), 16 N.Y. 489; *Howard* v. *Stillwell Co.* (1891), 139 U.S. 199; *Smith* v. *Bolles*, 132 U.S. 125, cited in my earlier judgment, and *Ward* v. *N. Y. Central* (1871), 47 N.Y. 29, and Sutherland on Damages, 3rd ed., vol. 1, sec. 50; *Comstock* v. *Hutchinson*, 10 Barb. 211.

The latter text-writer in vol. 3, sec. 662, says:—

> A vendor who knows that goods have been ordered for the purpose of being resold at a profit is chargeable with knowledge of such profits as the market price at the time delivery was due, would have brought the vendee. In restoring an injured party to the same position he would have been in if the contract had not been broken, account must be taken of losses suffered as well as of profits prevented.

Borries v. *Hutchinson*, 18 C.B.N.S. 445, and *Elbinger* v. *Armstrong*, L.R. 9 Q.B. 473, and some of the earlier American cases referred to above.

Sedgwick on Damages, sec. 174, says:—

> The allowance of profits when not unnatural or remote is wholly a question of the certainty of proof. If, therefore, it can be shewn that profits would certainly have been realized but for the defendant's breach, they are recoverable.

If permitted to regard the situation in the light of prices up to the early part of January, by which time they should have

reached the English market if no delay had been caused, it is clear substantial profits would have been made. They were defeated entirely by the defendant's conduct.

Sedgwick, sec. 243, says wherever the measure involves the question of value the resort to market value, though one of the commonest, is not a conclusive test, but an aid to getting at the real value the plaintiff is entitled to. Under some circumstances the value in the nearest market governs with, as a general rule, the cost of transportation to it, added thereto. See also sec. 244.

I have no strong idea where the nearest market was nor the cost of getting to it. The only market the evidence gives proof of is the English one. It was the market both must be taken to have had in view. There are some grounds for the conclusion it was the nearest available one of any extent and probably the best, but proof is lacking—I mean definite proof on which one might act with confidence. The plaintiff testified that shortly after he purchased the market price in England advanced materially and continued to advance until the holidays. He had daily advices from London of its condition. He would have overtaken that market but for the bad condition of the fruit and the action of the inspectors founded thereon. Early in January the prices began to decline and soon after fell four or five shillings a barrel. The average price would be fourteen shillings a barrel for the varieties bought from the defendant, which he says would have given him about one dollar a barrel gain. I assume when he names fourteen shillings he is referring to the period before the decline in prices spoken of began. At Christmas he was buying at $1.25 regarding that as a safe basis for the market then. There was, he said, a difference of 3/6 to 5/0 a barrel on the market between apples which would grade between numbers two and three. Generally speaking the difference in value between twos and threes, he said, depended upon the season, and the average values in that particular season in 1908 and since the difference between twos and threes was $1 a barrel. He claimed a difference of over nine per cent. for unmerchantable apples and culls. This was based upon what he described as the general average of what he saw in the warehouse at St. John which contained 32,884 barrels and on re-packing shewed a shrinkage of 3,088 barrels. The chief inspector, McNeill, said that the normal shrinkage in re-packing should not exceed two per cent. Upon this basis there was an improper shrinkage of seven per cent. in this lot of 584 barrels, equal to upwards of 40 barrels. Upon the basis of the proof according to counsel's contention which I have examined and tested as well as I could in the light of satisfactory evidence, disregarding that which was not direct nor founded on the witness' own knowledge, I came to the conclusion that their summary is substantially correct. I append it hereto:—

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Report No.	Number of barrels Inspected.	Proportion of entire delivery covered.	No. 3s and culls contained.
3148	28	210	94½
8462	4 (O.K.)	29 (O.K.)	
8462	3	22½	5¾
8465	6	45	15½
9539	8	60	22½
8751	8	60	22½
8755	9	67½	30
8510	12	90	33¾
Totals	78	584	224¾

The apportionment made was 184 barrels of threes and 40¾ of culls. One dollar was claimed as the difference in value per barrel under the warranty and $2 for the culls and the cost of re-packing besides. The packers' reports shewed a different result in quantity but according to the above claim only a difference of $7.75 in the result. These were claimed as direct losses due to a difference in quality to that extent. It would be an endless task to go through the evidence of each witness and test the accuracy or otherwise of the several reports and sum up what they shew coupled with the oral testimony. I have no doubt the inspector's reports and evidence are as fair and accurate as they could well be, depending as they did, and must do, upon judgment and estimates of the quality of the contents of the barrel before them. The estimates made by counsel thereon seem to me to be fairly deduced from the reports and evidence. There is of necessity a lack of precision and it could not be otherwise as to the proportion not up to the standard of the warranty; and one in weighing the evidence is forced to an endeavour to reach a fair average over all upon it. The reports and evidence so far as the latter seems founded upon the witnesses' knowledge are substantially harmonious and after the most painstaking examination I could bestow I am convinced the estimates submitted by counsel as to defects and loss are approximately correct.

The defendant's misconduct was the cause of all the trouble, labour, loss of time and market which have taken place. If he was present and saw as much of the packing as he says he must have seen that dishonest methods were followed by his servants in packing and I therefore do not feel he has much ground for demanding exact minuteness in detail or that all doubts should be resolved in his favour. I allow for loss on the quantity of culls and threes and for cost of re-packing the sum of $340. The prices claimed in this connection were not, as I remember, contested, though the quantities were disputed. What I have said in the earlier part of my judgment and in the former one shews the extent of the controversy before me. The general damages remain for determination.

The claim is $1 per barrel over the lot of 584. What I have

said as to the law and the evidence indicates the difficulty I experienced.

The amount is largely an estimate upon the facts shewn so far as there are any and necessarily so from the situation. I am quite persuaded the sum of $530 will afford the plaintiff no more than reasonable compensation for the loss he has sustained and will not unduly punish the defendant.

I was warned by counsel that conclusions such as I was asked to draw would have a most injurious effect upon the apple trade in the western part of Nova Scotia. I should be sorry for such a consequence from my judgment, but I am relieved by the belief it will only affect those dishonestly inclined and as to these they have no claim to sympathy. Costs follow the judgment.

March 22, 1912. The full Court was moved on behalf of defendant for an order that the said decisions, judgment and order be set aside and the action be dismissed.

Argument

Messrs. *W. E. Roscoe*, K.C., and *H. Mellish*, K.C., in support of appeal:—The computation as to the percentage of number threes could not be made from the reports in plaintiff's book, as there were a great number of apples besides those of defendant there, and for that reason the computation could not be used: Mayne on Damages, 8th ed., 221, 228; *Borries* v. *Hutchinson*, 18 C.B.N.S. 445; *Messmore* v. *N.Y. Shot and Lead Co.*, 40 N.Y.R. 422; *Hinde* v. *Liddell*, L.R. 10 Q.B. 265; *Broome* v. *Speak*, [1903] 1 Ch. 587 at p. 605; *Peek* v. *Derry*, 37 Ch.D. 541 at p. 592; *English* v. *Spokane Co.*, 57 Fed. Rep. 451 at p. 456; *Gregory* v. *McDonald*, 8 Wend. 435. The damage is the difference between what plaintiff paid for the goods and what they were actually worth. The agreed price is strong evidence of actual value: *Corey* v. *Drummond*, 4 Hill 627. The market place must be taken to be the place of actual delivery: *Rodocanachi* v. *Milburn*, 18 Q.B.D. 76; *Borries* v. *Hutchinson*, 18 C.B.N.S. 445. Defendant can only recover the difference between the market value of the article and the actual value of the article received: Benjamin on Sales, 5th Eng. ed., 972. The damages are only such as can reasonably occur under the circumstances. In order to make special damage it must be shewn that such special damage was clearly brought home to both parties to the transaction, at the time of forming the contract: *Grébert Borgnis* v. *Nugent*, 15 Q.B.D. 85; Sutherland on Damages, 3rd ed., 1930, 1932, 1935; *Smeed* v. *Foord*, 1 El. & Bl. 602; *Griffin* v. *Colver*, 16 N.Y.R. 493. Damages are calculated by the difference between the market price and the actual value of the article bought and all losses sustained which are within contemplation at the time the contract is made: *Elbinger* v. *Armstrong*, L.R. 9 Q.B. 473; *Williams* v. *Reynolds*, 6 B. & S. 495, 500. Negotiations some

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months after the receipt of the goods cannot be read into the contract to establish a claim to any higher damages, as they could not have been in contemplation at the time: *Rodoconachi* v. *Milburn*, 18 Q.B.D. 67, 76; *Borries* v. *Hutchinson*, 18 C.B.N.S. 465; *Carpenter* v. *Trustees National Bank*, 119 Ill. 352; *Rahm* v. *Deig*, 121 Ind. 283; *Booth* v. *Spuyten Duyvil Rolling Mill*, 60 N.Y.R. 487 at p. 492; *Thol* v. *Henderson*, 8 Q.B.D. 457; *Masterton* v. *Mayor of Brooklyn*, 7 Hill 61; Mayne on Damages, 8th ed., pp. 19, 21. Defendant knew that plaintiff bought the goods with the intention of making a certain resale. It is not material whether the market price rises or falls after the goods have been delivered; the only essential is the price at the time and place of delivery. As to conjecture, see *Williams* v. *Stephenson*, 33 Can. S.C.R. 323. As to notice, see Pease & Latter's Law of Contracts, p. 287. As to criminality, see *Macleod* v. *A.-G. of New South Wales*, [1891] A.C. 455. As to knowledge, see *Walsh* v. *Montague*, 15 Can. S.C.R. 495; *Regina* v. *Prince*, L.R. 2 C.C.R. 154; *The Queen* v. *Bishop*, 5 Q.B.D. 259; *Rex* v. *Chisholm*, 14 O.L.R. 178 at 183. As to interpretation of statutes, see *United States* v. *Philbrick*, 120 U.S. 59; *United States* v. *Johnston*, 124 U.S. 253. The plaintiff re-packed a large quantity of apples that he had in cold storage and no matter how good the defendant's apples were, they would all go in together and he would get the same price. According to the construction of the statute the inspector had no business to stop the apples from being shipped. The $340 claimed must in any event be reduced to $224, and on a proper construction of the evidence must be reduced to $132.

Messrs. *T. S. Rogers*, K.C., and *A. V. Pineo*, *contra*:—The apples were not graded up to a standard and contained unmerchantable and worthless fruit. We have the evidence of the packers and the government inspectors to sustain this. The apples were found by the government inspectors to be falsely packed, and for this reason they had to be re-packed before shipment. Defendant was summoned and paid a fine for falsely packing these particular apples without defending, thus admitting that the apples were not packed up to a standard. The defects were such as must have existed in the apples at the time they were packed and must have been known to the defendant or his men who packed the apples. Plaintiff claims, besides actual loss of $340 on re-packing, a loss of profit amounting to $584 by reason of delay in shipment, owing to the apples having to be re-packed. The apples were bought for the purpose of resale at a profit, and there is no doubt defendant understood they were intended for export to the English market. The market price advanced after the purchase but plaintiff was prevented from taking advantage of it by reason of defendant's bad packing. There is no evidence to shew that defendant's apples were the last to go into the warehouse.

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As to the law, defendant's sale was a sale by description of numbers 1 and 2 graded fruit, a kind of merchandise, and upon delivery plaintiff had a right to reject, or he could accept the goods and sue for his damages. The measure of damages in either case would be the same, that is the estimated loss directly resulting in the ordinary course of events from the breach, that is the difference between the contract price and the market price: Benjamin on Sales, 1906 ed., pp. 971 and 1016.

We rely on the ordinary rule as to the measure of damages, the first rule in *Hadley* v. *Baxendale*, 9 Ex. 354, not rule 2 or rule 3 as argued by the other side. See Halsbury's Laws of England, vol. 10, p. 333; Mayne on Damages, 8th ed., pp. 60 and 202; *Wier* v. *Bissett*, 3 N.S.R. 180; *Chaplin* v. *Hicks*, [1911] 2 K.B. 786-792, and cases cited by the trial Judge. Plaintiff could not be expected to reject until the fraud was discovered in the St. John warehouse and if in the meantime the market or current price went up, it was defendant's fault, not plaintiff's. See *Mitchell* v. *Seaman*, 43 N.S.R. 311; *Lauder* v. *Kekulé*, 3 C.B.N.S. 128 and Benjamin on Sales, 6th ed., p. 1023.

There was no negligence or carelessness in our not earlier discovering that the goods were not of the kind, description or quality we purchased.

Mellish, K.C., in reply.

May 10, 1912. SIR CHARLES TOWNSHEND, C.J.:—The findings in fact of the learned Judge are not in controversy on this appeal. The contention of the defence is that the mode or principle in which the measure of damages has been fixed is erroneous. It therefore becomes important to extract from the decision exactly what are the findings in fact. These are set forth very distinctly:— Townshend, C.J.

(1) That the defendant had a large experience growing and selling apples and was familiar with the trade in all its branches here and in England, and was aware that by far the largest proportion of Nova Scotia apples were sent to that market. He believed this lot was intended for that market, and would be for sale there about or during the holiday season, when he knew the demand as a rule was the greatest.

(2) He knew the plaintiff was a large dealer purchasing for export and a resale at a profit, and would, of course, sell the apples in question upon his, the defendant's, warranty, which appeared upon the head of each barrel under the sanction of his name.

(3) He further knew if their condition was discovered before shipment the plaintiff, in order to avoid prosecution for penalties under the statute, and claims for damages by his vendees, and to prevent very serious injury to his reputation as a dealer, would be compelled to repack them under the statutory inspection with all that meant in the way of expense, delay until the season was well advanced, consequent loss of market, injury to the fruit from rehandling and repacking, and any injury their greater age might occasion.

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(4) He knew, too, the fruit was wholly unsaleable when delivered and had no practical commercial value anywhere, and must so continue until repacked, and was under the ban of the statute, and it was dangerous for the plaintiff to have it in his possession because so large a quantity, nearly six hundred barrels, apart from the other lots he would have, could only mean it was for sale, and not for individual use.

This knowledge embraces all facts necessary to afford ground for the conclusion that damages arising through the breach complained of, and of the nature above indicated, were within the contemplation of the parties as the necessary or probable consequences of breaches such as I have found.

The learned Judge on these findings allows as damages to the plaintiff for the culls and threes and for cost of re-packing the sum of $340, and for the loss sustained in addition $530, calculated, as I understand, on the loss of $1 per barrel.

The question for our consideration is whether in thus estimating the damages suffered by plaintiff he has adopted a correct method.

After a very thorough and exhaustive review of the authorities on the subject of damages in cases of this character he says:—

> The nearest value would probably be the prevailing price for goods of this class in England at the time when under ordinary conditions they would have reached that market, provided they were seasonably shipped and no delay had been caused or arisen through defendant's fault.

Having reached these conclusions the damages have been awarded on the basis of the profit the plaintiff would certainly have gained had the apples come up to the standard stipulated for on the contract, and for the costs and expenses incurred in re-packing the same.

In support of this position he cites a number of authorities to shew that this is the proper measure of damages where the defendant must be taken to have known the object of the vendee in making the purchase. Some of these I now extract.

From Sutherland on Damages, 3rd ed., vol. 3, sec. 622:—

> A vendor who knows that goods have been ordered for the purpose of being resold at a profit is chargeable with knowledge of such profits as the market price at the time delivery was due would have brought the vendee. In restoring an injured party to the same position he would have been in if the contract had not been broken, account must be taken of losses suffered as well as of profit prevented.

Again in Sedgwick on Damages, 8th ed., sec. 174:—

> The allowance of profits when not unnatural or remote is wholly a question of the certainty of proof. If, therefore, it can be shewn that profits would certainly have been realized but for the defendant's breach, they are recoverable.

The learned Judge then says:—

> If permitted to regard the situation in the light of price up to the early part of January, by which time they should have reached the

English market if no delay had been caused, it is clear substantial profits would have been made. They were entirely defeated by the defendant's conduct.

Having considered the authorities on which the decision below is based, and which have therein been so fully and thoroughly discussed, I come to the conclusion that the judgment was right, and that the correct rule for the assessment of damages was adopted under the circumstances in evidence. It would be useless and mere reiteration to cite further extracts from cases on the subject, which, if necessary, are to be found in the decision. No doubt there are decisions to be found in the reports not altogether in harmony with those which form the basis of the decision, but the bulk of them, as well as the opinions of the best text-book writers, agree in the principle that prospective profits where reduced to reasonable certainty may be taken as the test. Having regard to the evidence and the findings of the learned trial Judge we cannot doubt (1) that the defendant well understood that the apples were bought to be sold in the English market, and (2) that had the fruit been up to the standard agreed upon the plaintiff was fairly certain to realize a profit equal to the damages allowed.

There were some other points discussed at the argument such as the contention of the defendant that the Fruit Act did not apply to fruit kept for sale elsewhere than in Canada.

In my opinion it certainly does apply to all sales whether in Canada or outside, but even if not it would not affect the question here. The defendant sold to the plaintiff fruit which he agreed should be of a certain well-defined character. He violated grossly that agreement to the injury of plaintiff and for that reason is liable to make good the loss.

Counsel for defendant made an elaborate argument to shew that the learned Judge erred in the calculations set forth in the decision as to the first item of general damages, $340, and contends that it should be materially reduced in amount. Without entering into the details it will be sufficient to say that we do not find the facts on which his argument is based sufficiently established to justify us in arriving at a different conclusion, or perhaps, more properly, to substantiate the result at which defendant asks us to arrive. It may be that there are some trifling errors but none such, as far as we can discover, as to induce us to interfere with his judgment founded on the evidence he had adopted and believed.

I have already observed that we think he adopted the right method of assessing the special damages of $530, and have referred to some of the authorities which support that view. I would expressly call attention to the case of *Wier* v. *Bissett*, in 3 N.S.R. 178, in our own Court, and referred to by the learned Judge as directly in point here. I think it unnecessary to say more in view of the exhaustive decision appealed from,

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in which all leading authorities are discussed, and differences commented on.

The appeal should be dismissed with costs.

DRYSDALE, J.:—The only point involved in this appeal is as to the measure of damages. The defendant is an apple packer at Wolfville in Kings County, N. S., and the plaintiff a dealer in fruit. The plaintiff purchased from defendant a quantity of apples intended for sale and export. The apples were to be graded fruit in accordance with the Dominion Act, to be delivered at Wolfville and stored in St. John, N. B., in cold storage until exported. The apples were put on cars in Wolfville and received by plaintiff in St. John, N. B., in due course and put in storage warehouse. They were not actually inspected until plaintiff undertook reshipment to the English market. At this time the inspectors under the Dominion Act examined the apples so shipped by defendant to plaintiff, when it was discovered that the fruit had been fraudulently packed. I use the word "fraudulently" because no such condition of packing could have honestly been performed as was discovered when the inspectors examined the fruit so delivered by defendant. At this time the plaintiff was taking advantage of a rising market and could have shipped to London to advantage had the fruit been properly packed and graded. Owing to its condition he was obliged either to then reject it or make the best of it under the conditions. He decided to keep the lot, re-pack it and make the best out of it for all concerned, which he did and suffered a loss that he now calls on defendant to make good.

In my opinion the plaintiff, at the time he discovered the fraudulent packing, that is to say, at the time he started to ship the fruit from St. John, had the right either then to reject the lot or accept it and make the best of it. In the former case he could go into the market and replace the fruit in accordance with the contract grade and hold defendant responsible for the difference between the contract price and the then market price; in the latter case he can rely on the warranty or description of kind and recover the loss he sustained based on the market price at the time of the discovery of the fraudulent packing as compared with the contract price. In other words, if the plaintiff elected to take the goods after the discovery of the fraudulent packing, he ought to be placed in the same position as to damages as if at the time of discovery he had been furnished with proper graded fruit according to the contract.

As I understand the case this is really the principle that guided the learned trial Judge in assessing the damages, and guided by this principle I am unable to say that the damages assessed were excessive.

Taking that portion of the fruit that could be graded when re-packed there is uncontradicted evidence that the plaintiff

could have realized $1 more per barrel at the time he attempted to ship, that is to say, at the time of the discovery of the fraud, and that the delay necessarily caused by re-packing cost plaintiff this loss. The learned Judge took this $1 per barrel loss into consideration and I think properly. The other elements of damage based on the loss by re-packing are, I think, also allowed on sound principle, and I am of the opinion that the appeal should be dismissed with costs. Counsel for defendant contended that the case disclosed the fact that only 401 barrels of the lot delivered required re-packing, or were re-packed, and that the assessment of damages proceeded on the theory that all the apples furnished were actually re-packed and that in this respect an injustice was suffered in the assessment of damages. An examination of the case, however, compels me to conclude that re-packing was necessary as to the whole lot and in fact took place, and I conclude that this point is not well taken.

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RUSSELL, J.:—I concur in the opinion just read.

Russell, J.

Appeal dismissed with costs.

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Ontario High Court. Trial before Kelly, J. April 25, 1912.

1. INJUNCTION (§ I J—78a)—AGAINST BOARD OF EDUCATION—CONDEMNATION PROCEEDINGS—9 EDW. VII. (ONT.) CH. 93, SEC. 20.

An action for an injunction restraining a board of education from proceeding with an arbitration under the School Sites Act, 9 Edw. VII. (Ont.) ch. 93, to fix the value of lands desired by the board for a school site, and from taking possession of the lands, and for a declaration that the board has no right to arbitrate and that the arbitration and award are irregular and void, and to set aside the award, is not maintainable in the High Court of Justice, but such relief can be obtained only upon a summary application to the County Judge under section 20 of the Act.

2. COSTS (§ I—2)—DISMISSAL OF ACTION—AMOUNT AWARDED DEFENDANTS.

Where an action is dismissed on the ground that the Court is deprived of jurisdiction by a statute, the defendant may be allowed only such costs as he would have been entitled to, if he had specially pleaded the statute and then moved for judgment on the pleadings.

Statement

ACTION by the improvement company and an individual against the board of education, Henry T. W. Ellis, John Curry and Samuel Stover, for an injunction restraining the defendants from proceeding with an arbitration to fix the value of lands of the plaintiffs which the defendants desired to expropriate for a school site, and from taking possession of the lands, and for a declaration that the defendants had no warrant or right to arbitrate and that the arbitration proceedings and award were irregular and void, and to set aside the award and vacate the registration thereof.

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SANDWICH LAND IMPROVEMENT CO. v. WINDSOR BOARD OF EDUCATION.

Kelly, J.

The action was dismissed.

J. L. Murphy, for the plaintiffs.

A. R. Bartlett, and *W. G. Bartlett*, for the defendants.

KELLY, J.:—The writ of summons was served on the defendants prior to the 25th October; and on that date the arbitrators considered the questions submitted to them and made their award.

The plaintiffs took no part in the arbitration, or in the proceedings leading up thereto.

On the opening of the trial, the defendants moved that the action be dismissed, on the ground that, under sec. 20 of the School Sites Act, 9 Edw. VII. ch. 93, the action is not maintainable.

Sub-section 1 of sec. 20 is as follows: "Any question touching the validity of proceedings taken or an award made under this Act, or, in the case of arbitrations other than those provided for in section 7, as to the compensation awarded, shall be raised, heard and determined upon a summary application by way of appeal to the County Judge and not otherwise."

I think the questions raised in this action are intended by this section to be heard and determined on summary application in the manner therein provided, and not by this Court. For that reason, I dismiss the plaintiffs' action.

I allow the defendants such costs only as they would have been entitled to had they specially pleaded this sec. 20, and then brought on the matter by way of motion for judgment on the pleadings.

Action dismissed.

QUE.

Court of Review. 1912

May 17.

SAMSON v. CITY OF MONTREAL.

Quebec Court of Review, Tellier, De Lorimier, Dunlop, JJ. May 17, 1912.

1. PLEADING (§ IX—113)—AMENDMENT SERVED—LONG DELAY IN PROCEEDING—GROUND FOR DISMISSAL.

Where an amendment is served under article 514 C.P. (*i.e.*, as of right without leave of the Court) the delays for peremption are not suspended pending the filing of the amended pleading, and if two years elapse without further proceedings being taken the suit will be dismissed on the motion of the defendant (C.P. 279).

Statement

APPEAL from a judgment of the Superior Court, Bruneau, J., rendered on December 23rd, 1909, dismissing a motion made by the city of Montreal to obtain a nonsuit.

The appeal was allowed.

J. H. Damphousse, for the city appellant.

L. G. A. Cressé, K.C., for the plaintiff, respondent.

Dunlop, J.

DUNLOP, J.:—The defendant inscribes in review from the judgment of the Superior Court, rendered on the 23rd Decem-

ber, 1909, dismissing the motion made by the defendant for peremption on that ground that the motion was premature. On the 7th November, 1906, the plaintiff sued the defendant in damages alleged to be caused by an accident which happened to him owing to the bad state of the roads of the city. On the 19th of the same month, defendant served and filed its defence and on the 23rd of said month served an amendment to its defence and returned it the next day (24th), according to article 514 C.P.

On the 5th December, 1908, as no proceeding had been taken by either of the parties since the 24th November, 1906, a certificate to that effect had been given, signed by the prothonotary, at the request of the defendant, who, on the same day, made a motion for peremption and instance, based on the said certificate and presentable on the 7th day of the same month, but which motion, after several adjournments, had not been presented until the 22nd December, 1909, and was dismissed on the next day by the Honourable Mr. Justice Bruneau for the reasons stated in his judgment, more especially on the ground that the defendant had never served after the 29th November, 1906, its amended defence. I am of opinion that there was error in the judgment. In my opinion, in the event of no proceedings being taken in a case after two years either party has the right to demand peremption.

According to article 279 C.P., which does not contain any exception, and reads as follows:—

> Suits are perempted when no proceeding has been had during two years.

The defendant was in no way in fault with respect to the proceedings taken by it to amend its defence, and even if it had been, it could not have been deprived of its rights to move for peremption.

In the present case, no such proceedings had been taken, and therefore, the motion for peremption, in my opinion, should be granted. I am, therefore, of opinion, that there was error in the judgment of the Superior Court, and that the judgment should be reversed and defendant's motion for peremption granted, and plaintiff's action dismissed, with costs against plaintiff in both Courts.

Appeal allowed.

ONT.

H. C. J.
1912

April 25.

Re PORT HOPE BREWING AND MALTING CO.; JOHNSON'S CASE.

Ontario High Court, Sutherland, J. April 25, 1912.

1. EVIDENCE (§ II F—211)—CORPORATIONS AND COMPANIES—WINDING-UP —ONUS—CONTRIBUTORIES.

In winding-up proceedings, the onus is on the liquidator who seeks to place a person on the list of contributories.

2. CORPORATIONS AND COMPANIES (§ V F 4—276)—LIQUIDATOR REALIZING ON UNPAID SHARES—UNDERTAKING OF PRESIDENT NOT TO CALL FOR PAYMENT.

Where one has entered into a binding agreement for the purchase of treasury shares from a company, he is not released therefrom, nor is the company or the liquidator thereof bound, by a promise by the president of the company that, so long as he should remain president, the purchaser should not be called upon for payments.

Statement

AN appeal by Harrison Johnson from an order of the Master in Ordinary, in a winding-up proceeding, placing the appellant on the list of contributories of the company.

The appeal was dismissed with costs.

W. R. Smyth, K.C., for the appellant.

D. O'Connell, for the liquidator.

Sutherland, J.

SUTHERLAND, J.:—The company had been in existence for years prior to the month of October, 1904, and were at that time in process of reorganisation. On the 3rd October, 1904, the plaintiff made application, in writing and under seal, for two shares of stock of the value of $100 each in the capital stock of the company, payable as follows: five per cent. in one month from the date of the application and the remainder in nine equal monthly instalments thereafter; and appointed the secretary of the company his attorney to accept the transfer of such shares as should be assigned to him.

On the 21st December, 1904, at a meeting of the "executive directorate," held at the company's office, a resolution was passed "that all stock already subscribed for be allotted." . .

Shortly after the date of the resolution, a notice of the allotment of the shares was sent by the company to the appellant; and, later, notices of the monthly calls for payment according to the terms of the application. These facts were proved to the satisfaction of the Master. I think he was fully warranted in accepting the testimony offered in support thereof. The onus is, of course, upon a liquidator, in winding-up proceedings, who seeks to shew that a person is a shareholder and liable to contribute. I agree with the Master, however, in thinking that the liquidator has reasonably satisfied that onus.

The Master found that there was a binding agreement between the company and the appellant with reference to the two shares of stock in question. I think he was right in so doing. Beyond what he says in his reasons, it may be added that, in

connection with the proceedings before him, the liquidator called the appellant to prove his signature to the application for the stock. He was cross-examined, but was not asked to deny the case made out as above. On re-examination, however, he did state that, a couple of years subsequent to his application for the stock, having lost his license as an hotel-keeper, he saw Mr. Elliott, the president of the company. What occurred between them is set out in his evidence as follows:—

"Q. I suppose you anticipated you would have some difficulties in making your payment under the agreement after you lost your license? A. Yes; I lost everything I had at that time.

"Q. And, knowing that, you saw Mr. Elliott about the matter? A. Yes.

"Q. And told him the difficulty you would have in making your payments? A. Yes; I told him I was not able to pay anything."

This evidence on his part would appear to confirm the claim of the company that there was an existing agreement. He was not repudiating his liability to pay, but stating his inability.

He said further in his evidence that Elliott then intimated that, so long as he (Elliott) was connected with the company, he (the appellant) would not be bothered; but such a statement, even if made, would not bind the company or liquidator or effect a release.

Reliance was placed by the appellant on an unreported case of *Smith* v. *Gowganda Mines Limited*, which is said to have decided that where a company "has allotted stock to a purchaser, and a call on it remains unpaid, and no forfeiture is declared, the company cannot sell, re-allot, or transfer that stock to another." I agree with the Master, however, that that case has no application here. In the present case, as the Master has properly found, the appellant applied for stock of the company, not for any particular stock, and certainly not for stock that had already been disposed of by sale or allotment to any one.

I do not think that I can usefully add anything to what has been said by the Master in his reasons. I think he was justified in placing Harrison Johnson on the list of contributories; and, therefore, dismiss the appeal with costs.

Appeal dismissed.

MAN.

K. B.

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May 17.

Re KOOTENAY VALLEY FRUIT LANDS COMPANY, Limited (JAMES COOPER'S CASE).

Manitoba King's Bench, Mathers, C.J.K.B., in Chambers. May 17, 1912.

1. MORTGAGE (§ V—68)—MODE OF PAYMENT—CONDITIONAL DEPOSIT IN BANK.

A mortgagor is not relieved from liability for subsequent interest by the deposit of the amount of the mortgage in a bank authorized to receive it as agents of the mortgagee, where the deposit was upon the condition that it was not to be withdrawn by the mortgagee, a limited company, until an assignment of the mortgage, or a discharge thereof, assented to by every stockholder of the company, was delivered to the bank, such deposit not being an unconditional one as required by the mortgage and being, in effect, a deposit in trust for the mortgagor until compliance with the condition.

[*Peers* v. *Allen*, 19 Grant 98; *McKenzie* v. *McLeod*, 39 N.B.R. 230; and *Lacey* v. *Waghorne*, 59 L.T.N.S. 208, specially referred to.]

2. CORPORATIONS AND COMPANIES (§ VI C—332)—WINDING-UP—POWERS OF LIQUIDATOR.

As money paid into a bank designated in a mortgage to receive payment thereof for the mortgagee does not become that of the mortgagee, a limited company, when accompanied by the condition that the money should not be paid out to the mortgagee except upon the delivery of either an assignment of the mortgage to a designated person, or a discharge, assented to by every stockholder of the company, a liquidator of the company could not take possession thereof as effects of the company and execute a discharge of the mortgage under sec. 33 of the Winding-up Act (Can.), notwithstanding that the condition requiring the assent of every stockholder appeared to have been imposed because of uncertainty as to the persons entitled to exercise the corporate powers of the company before the liquidator was appointed by the Court.

Statement

AN application by the liquidator of the Kootenay Valley Fruit Lands Company, Limited, for an order that he is entitled to interest on the moneys due the company on a mortgage where the mortgagee paid the money into a bank to the credit of the company but imposed certain conditions on the payment in.

An order was made directing the payment of interest to date at the rate specified in the mortgage.

F. M. Burbidge and *V. Gordon*, for James Cooper.

Edward Anderson, K.C., for the liquidator.

H. E. Swift, for the contributories.

Mathers, C.J.

MATHERS, C.J.K.B.:—Before the company went into liquidation it sold a large block of land situate in British Columbia to James Cooper, of Saginaw, in the State of Michigan, who gave a mortgage back to the company for $75,000. After providing for payment of this sum on specified dates and in specified instalments, with interest at six per cent. per annum, the mortgage contained this clause: "All payments herein provided for shall be duly made if paid to the credit of the mortgagee at the Eastern Townships Bank of Canada, Winnipeg, Manitoba."

On the 7th of September, 1911, there was due under this mortgage the sum of $49,213, and on that date the mortgagor's

solicitors sent to the Eastern Townships Bank their certified cheque for that sum, plus $10 to cover costs of assignment or discharge, endorsed for deposit in the bank to the credit of the Kootenay Valley Fruit Lands Co., Limited, to which was attached a letter of instructions.

The bank accepted the money and deposited it to the credit of the company, the terms of such deposit being shewn in a deposit slip dated September 7th, 1911: "Credit Kootenay Valley Fruit Lands Co., Limited, $49,223, subject to endorsement on undermentioned cheque and letter attached thereto." The letter contains a statement of the manner in which the amount paid in is arrived at, and then proceeds as follows:—

> Before the company is permitted to withdraw this money from your bank or to make any use of same you will kindly furnish us with an assignment of this mortgage from the company to D. W. Briggs, of the said City of Saginaw, in the State of Michigan, lumberman, in accordance with the by-law or resolution passed by the company on the 24th day of April, A.D. 1911, or if it should appear that Mr. Briggs is not entitled to such an assignment or for any other reason the company declines to furnish such an assignment then the company is not to be permitted to withdraw or use the said moneys without furnishing us with proper discharge of the said mortgage and handing over to us, together with such assignment or discharge, all title deeds and documents of title in respect of the lands mentioned in the said mortgage. As to these title deeds, we understand they are in the possession of one William Smith, who claims some right to them as equitable mortgagee, or otherwise. We are further informed, principally by Mr. J. T. Huggard, that the Kootenay Valley Fruit Lands Company, Limited, is in a somewhat disorganized condition, that there are apparently two sets of officers, that there are dissensions amongst the members of the company, that there are questions as to the validity of alleged transfers of the shares issued by the company, and other difficulties in regard to the company that make it very important for your protection and for our protection that these moneys should not be withdrawn from your bank until you are thoroughly satisfied that you have proper authority from the company to permit them to be withdrawn, in fact we think under the circumstances that you ought to have either a resolution of the shareholders of the company passed unanimously, or at all events, some consent or release from each shareholder of the company before taking the responsibility of allowing these moneys out of your hands. So far as we are concerned, and from information we have received about the disorganized state of the company, we would not be satisfied with any assignment or discharge of the mortgage which was not assented to by every shareholder of the company who has, or may have, some interest in the company."

On the 5th of October, 1911, an order was made for the winding up of the company and on that date a permanent liquidator was appointed.

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RE KOOTENAY VALLEY FRUIT LANDS CO.

Mathers, C.J.

It was stated on the argument that the liquidator upon his appointment applied to the bank for this money, but was refused because the conditions in the letter were not complied with. The question for decision is whether or not the liquidator is entitled to interest upon the money after it was paid into the bank and if so, at what rate and for what period.

The mortgagor contends that the money was paid into the bank in accordance with the terms of the mortgage and that the letter accompanying the cheque imposed no condition that he was not by law entitled to impose. I cannot agree with this contention. I think the fair reading of the letter of instructions to the bank is that the bank was to hold this money as a trustee for the mortgagor until the company delivered to the mortgagor's solicitors an assignment of the mortgage to one D. W. Briggs, or a discharge thereof assented to by every shareholder of the company who has, or may have, some interest in the company, and upon handing over to them therewith all title deeds and documents of title in respect of the mortgaged lands.

It appears that the mortgagor had not the right to stipulate that the money should not be handed over until a discharge of the mortgage together with the title deeds were handed over: *Peers* v. *Allen*, 19 Gr. 98; *McKenzie* v. *McLeod*, 39 N.B. 230; *Lacey* v. *Waghorne*, 59 L.T.N.S. 208; but even if he had such right, he was clearly going beyond the limit in insisting that the discharge be assented to by every shareholder "who has or may have, some interest in the company."

The payment to the bank permitted by the mortgage was an unconditional deposit of the money to the credit of the company. The mortgagor has not complied with this term of the mortgage and is in no better position than he would have been in had he kept the money in his own pocket.

It is said, however, that when the liquidator was appointed it was his duty to at once execute a discharge as he had power to do under sec. 33 of the Winding-up Act* and take into his custody this money as being property and effects of the company. In my opinion, this money was not property of the company available for the liquidator. The mortgagor had made the bank his trustee of the fund until the conditions which he imposed upon its payment were complied with. The liquidator had no greater right to insist upon its payment by the bank than the company itself had. He was not entitled, by the terms of the letter, to

*Section 33 of the Winding-up Act, R.S.C. 1906, ch. 144, is as follows:—

33. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding-up the business of the company as are imposed by the Court or by this Act.

receive it on giving a discharge executed by himself. He could only obtain possession or control over it upon tendering a discharge executed in the manner stipulated for in the letter.

It may be that the mortgagor would have accepted a discharge executed by the liquidator and released the money if he had been so requested. I cannot say that the liquidator was under any obligation to tender such a discharge in order to relieve the mortgagor of the payment of interest. If the mortgagor wanted to stop interest running it was his business to pay or tender the money. He has done neither. He has never withdrawn or modified the terms of his solicitors' letter of September 7th, 1911. In my opinion, the mortgage moneys have not been paid or tendered, and interest is still accruing thereon at the rate specified in the mortgage, and I so decide.

The liquidator is entitled to costs of the application.

Judgment for the liquidator.

MALO v. ROY.

Quebec Court of Review, Tellier, DeLorimier, Dunlop, JJ.
May 17, 1912.

1. CONTRACTS (§ II C—140)—CONSTRUCTION—RIGHT TO REDEEM WITHIN FIXED PERIOD—NOTICE OF INTENTION—ACQUIESCENCE OF BUYER.

Where the vendor of a property who has reserved in his favour a right of redemption of such property, exercisable within a certain stipulated delay, informs the buyer within such delay of his intention to exercise such privilege, and does as a matter of fact come to exercise such right on the day following the expiry of the delay and the buyer requests him to call later, the buyer will be held to have acquiesced in the exercise of such right of redemption.

2. TENDER (§ I—12)—ACCEPTED BANK CHEQUE—NO OBJECTION TO FORM—DECLINED ON OTHER GROUNDS.

A tender by means of an accepted cheque is not illegal and cannot be attacked subsequently as illegal when no objection to the form of such tender was made at the time, the tender having been declined on totally different grounds (*e.g.*, the expiry of delays).

3. TENDER (§ I—1)—PAYMENT INTO COURT—WHEN TO BE MADE.

When a tender has to be deposited into Court it is immaterial that such deposit be made at the time of the issue of the writ or at the time of the return thereof into Court, as no prejudice results therefrom to the defendant.

Statement

APPEAL from a judgment of the Superior Court, Demers, J., rendered on February 28th, 1911, ordering the defendant to sign a deed of retrocession in favour of the plaintiff of a property sold by the plaintiff to the defendant with the reserve of a right of redemption.

The appeal was dismissed.

Paul St. Germain, for the defendant, appellant.

J. L. St. Jacques, for the plaintiff, respondent.

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MALO v. ROY.

DeLorimier, J.

DELORIMIER, J.:—The defendant inscribes in review from the judgment of the Superior Court for the district of Montreal, rendered on February 28, 1911, and maintaining the plaintiff's action with costs.

This suit involves the decision of the exercise of a right of redemption which the plaintiff had stipulated in his favour in a deed of sale from the defendant to him, of date the 12th of July, 1910, and covering sub-division Nos. 694 and 695 of official lot No. 7 of Côte St. Louis.

In his action the plaintiff alleges that on July 12th, 1910, as he was indebted to the defendant in the sum of $960, he consented to give security to his creditor and this security took the form of a deed of sale of the aforesaid two lots with right of redemption, "le vendeur se réserve la faculté de réméré de ce que dessus vendu, et ce, d'ici a un mois de cette date, en par lui payent et remboursant au dit acquéreur pareille et même somme de $960 courant qu'il a reçue comme prix de la présente vente, avec intérêt au taux de 6 p.c. par année, le dit intérêt payable et acquittable en même temps que le capital."

He further alleges that on August 11th, 1910, through his wife, he informed the defendant that he would avail himself of such right of redemption, that on August 12th he personally repeated this declaration to the defendant who made no objection thereto; that on August 13th, he went, accompanied by his notary, to the defendant's domicile with an accepted cheque for $960 plus $8 interest and requested him to sign a deed of discharge and of retrocession. The defendant was busy and requested them to return at about two o'clock of the afternoon; that they did so and that the defendant refused to accept the said sums and to sign any deed on the ground that the delay for exercising such right of redemption had expired the day before; that the plaintiff then protested notarially the defendant and tendered the monies due and asked for deed of retrocession; that the defendant refused to comply with this demand.

The plaintiff has deposited these $968 into Court and prays that it be declared that he has exercised his right of redemption and that he is now proprietor of the said immoveables and that the defendant be condemned to sign a deed of retrocession within eight days from the rendering of the judgment, failing which that the judgment itself avail as a deed of retrocession.

By his plea the defendant denies the main allegations of the of the declaration, but admits the fact of the sale with a right of redemption, and he also admits that on August 11th, 1910, the plaintiff's wife called on him at his place of business and informed him that the plaintiff would pay on the morrow, the 12th, and also that the plaintiff himself called on the 12th and said: "I shall come to-morrow and pay what I owe." The defendant alleges he had no time to answer this last remark and that in any event the tender of the plaintiff is insufficient.

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Answer was made to this contention on the ground that the plaintiff had manifested within the stipulated delay his intention of exercising the right of redemption, and had begun to fulfil his obligations by paying the cost of the deed of retrocession; that the defendant admitted that at his interview with the plaintiff on the 12th—although he denied the question of delay had been broached—the notary who had prepared the deed of retrocession had overcharged him, and that he would pay him the next day; that it is proven that the defendant was to wait till the morrow, and that his refusal to accept the tender made to him on the 13th was in bad faith, and that the defendant did not object to the form of the tender—the accepted cheque being considered quite good by him—seeing he would have refused gold had it been offered to him.

The first question raised is as to whether or not the defendant, either before or after August 12th, 1910, acquiesced in the exercise of the right of redemption by the plaintiff. There can be no doubt as to the fact that the plaintiff notified the defendant on August 11th, of his intention to exercise this right. The plea itself admits that the plaintiff's wife went on August 11th to the defendant and declared that her husband would avail himself of this right and would pay the next day. The plaintiff's wife testified that she asked the defendant if he would accept a payment made within two or three days, and that the defendant answered in the affirmative. Moreover, in his plea the defendant further admits the call made by the plaintiff in person, and his statement to the effect that he would exercise his right and his promise to pay the next day what he owed. The plaintiff even paid to the notary the costs of a deed of retrocession, and complained to the defendant that the notary had overcharged him. There can be no doubt then that the plaintiff manifested within the stipulated delays his intention of exercising his right of redemption.

The plaintiff submits that such oral manifestations of his intention was, under the circumstances, sufficient and legal, and that the offer itself, although made on the 13th only, was also sufficient and valid, and in support of his contention he has referred us to the following authorities: Beaudry-Lancantinerie, Vente, vol. 17, p. 547; Marcadé, art 1660 C.N., p. 2; Dalloz, vo. Vente, No. 1500; 24 Laurent, No. 398; 2, Guillouard, Vente, p. 202; DeLorimier, 12 Bibl. C.C. on art. 550.

Be that as it may, I do not think it necessary for the Court to decide the question, as I am of opinion that the plaintiff has clearly established by the evidence and by the admissions of the adverse party that the defendant acquiesced in the exercise of such right of redemption. For the evidence shews that on August 12th the plaintiff told the defendant he would pay him the following day, and the defendant did not then and there

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declare he would not accept such payment. The defendant himself admits that the notary telephoned him for a copy of the deed of sale, and informed him that he had the money ready. Then on the 13th, in the morning, when the plaintiff and his notary called on the defendant with a cheque, he asked them to return in the afternoon. Why should the defendant ask them to return in the afternoon if not for the purpose of receiving the payment and allowing the plaintiff to exercise his right of redemption?

We are of opinion that this proof positively and clearly establishes the acquiescence of the defendant on August 13th, 1910, in the exercise of the right of redemption which had been granted to the plaintiff in the deed of sale of July 12th, 1910.

As to the second question. The defendant never complained as to the form or as to the sufficiency of the tender by accepted cheque, and his refusal is based solely on the ground that he considered the right of redemption as having lapsed. As to his contention that the tender should have been deposited in Court with the issue of the writ, instead of with the return of the action, we cannot see what prejudice he has suffered thereby. As stated by the trial Judge, the defendant would have refused an offer in whatever form made, even in gold.

In the third place the defendant contends that he was not obliged to sign a deed of retrocession and the plaintiff should have asked him to sign merely a deed attesting to the fact that the right of redemption was exercised, because, says the defendant, by the deed of July 12th, 1910, I had assumed the payment of a mortgage on the lots in question and under the circumstances it was to my interest to sign only a deed of redemption cancelling to all legal intents and purposes the deed of July 12th, 1910.

This contention of the defendant appears to me to be unfounded. In the first place it appears by the deed of July 12th, 1910, that the defendant assumed the mortgage in question only "in case the right of redemption herein mentioned is not exercised." In the second place this stipulation has never been accepted by the hypothecary creditor. And in the last place, as appears from the documents and as found by the trial Judge, the defendant was put *en demeure* to sign either the deed of retrocession tendered or any other deed to the same effect so that it was impossible for the defendant to suffer any prejudice on this score as he could have, had he so preferred, signed a deed acknowledging simply the exercise of the right of redemption by the plaintiff.

Finally, as his last ground, the defendant submits that the plaintiff should have exercised his rights at law before the expiry of the delay granted him by the deed of July 12th, 1910.

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DeLorimier, J.

As we have already seen, the defendant acquieseed in the exercise of such right after the expiry of the delay stipulated, to wit, in August 13th, 1910; this last contention of the defendant is, therefore, manifestly erroneous.

Under the circumstances, it becomes unnecessary for us to examine the legal problem raised by the defendant as to whether the provisions of art. 1550, C.C.; "If the seller fail to bring a suit for the enforcement of his right of redemption within the stipulated term" are to be understood in the sense that an action at law must be instituted by the vendor within the prescribed delay, or if, on the contrary, these words are to be interpreted as meaning that the vendor should within this delay manifest his intention of redeeming the property. The plaintiff on this point has referred us to the Codifiers' Reports, 11 Bib. C.C., p. 556; Huc., vol. 10, No. 177; Langelier on art. 1550 C.C.; 12 Bibl. C.C., on art. 1550.

I come to the conclusion, therefore, that the appeal of the defendant must fail and it is dismissed with costs.

Appeal dismissed.

MARTIN v. MUNNS.

ONT.

H. C. J. 1912

April 15.

Ontario High Court. Trial before Latchford, J. April 15, 1912.

1. DAMAGES (§ III P 2—342)—MEASURE OF COMPENSATION—BREACH OF CONTRACT TO SELL SHARES—EVIDENCE OF SELLING VALUE.

Where one agrees for good consideration with the owner of securities to sell the securities for him within a limited time for a certain price, and fails to fulfil his agreement, the owner of the securities is entitled to recover the agreed price less the amount for which the securities can be sold, and a statement of the last mentioned amount in a letter from the owner's solicitor to the registrar of the Court may be accepted as sufficient evidence thereof.

2. CONTRACTS (§ I C 2—33)—CONSIDERATION, SUFFICIENCY OF—PERFORMANCE OF EXISTING OBLIGATION.

Where one enters into an agreement to purchase certain shares of stock for cash, and subsequently substitutes for such agreement a new agreement to deliver certain bonds in exchange for the shares, and to sell the bonds within a certain time for the face value thereof, the agreement to sell the bonds is not without consideration, as being merely collateral to the main transaction, but is part thereof and can be enforced.

3. ESTOPPEL (§ III K—142)—ACCEPTANCE OF INTEREST—SURRENDERING COUPONS—WAIVER OF RIGHTS.

Where one agrees to sell securities for another within a limited time, for the face value thereof, or, if after the time agreed, for the face value thereof with accrued interest, and puts off the owner of the securities from time to time with promises to fulfil his agreement, the owner does not, by accepting interest and surrendering the coupons on the securities, waive his right to insist upon a sale.

Statement

ACTION to recover $1,000 upon an undertaking or agreement set out below.

Judgment was given for plaintiff.

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H. C. J. 1912

MARTIN v. MUNNS.

Latchford, J.

H. J. Martin, for the plaintiff.
W. D. McPherson, K.C., for the defendant.

LATCHFORD, J.:—In 1904, the plaintiff was induced by the defendant to subscribe for stock in a company then in process of formation; the defendant at the time agreeing that, if the plaintiff at any time wished to withdraw the $1,000 proposed to be invested, the plaintiff would, upon returning the stock subscribed for and $1,000 bonus stock that went with it, be entitled to receive from the defendant $1,000 in cash.

About a year later, the plaintiff desired to return the stock and receive back from Munns, as agreed, the money invested. Munns, even when threatened with a writ, declined to pay the plaintiff the $1,000. A new agreement was then made, as expressed in the following letter:—

"Toronto, Canada, Jan. 3rd, 1906.

"Arthur W. T. Martin, Esq.,

"Dear Sir:—Following up our several conversations regarding the $2,000 of stock that you hold in the Crown Manufacturing Company, I now hereby confirm my verbal understanding with you in writing, and agree to hand over to you two first mortgage bonds of the Eastern Coal Company Limited, bearing six per cent. interest, payable semi-yearly, of the denomination of $500 apiece, with the accumulated interest, for the $2,000 of stock you hold in the Crown Manufacturing Company Limited; it being understood and agreed that I will undertake to sell the said bonds for you, within a period of three months, for the face value of the same; in cash and accrued interest if the time exceeds three months; and it is further understood that you will not offer the same for sale to any person else during that period. To all of which I agree.

"Yours truly,

"W. Munns."

"I hereby agree to the foregoing. Arthur Wesley Thomas Martin."

The bonds were thereupon delivered to the plaintiff. He, however, urged the defendant to sell them, as had been agreed in the undertaking given by the defendant. But the defendant failed to sell, notwithstanding frequent urgings by the plaintiff; and in November, 1908, the plaintiff wrote to the defendant insisting that the bonds should be sold for their par value and the proceeds handed over to the plaintiff. A letter is in evidence which shews the position taken by the plaintiff at this juncture. He says: "I have allowed this matter to go on from time to time, owing to your repeated promises over the telephone and verbally in my presence that you were doing all you could to sell; but, as up to the present time I have received no definite proposition in reference to them (the bonds), I hereby

demand, as before, that I be paid the par value of these bonds at once."

The defendant still declined to sell the bonds; again putting the plaintiff off with specious promises; and the plaintiff was obliged to bring this action.

The agreement is admitted, but the defence is set up that the undertaking is collateral to the bargain between the parties, and that, as it is without consideration, it cannot be enforced.

I think this defence fails. The undertaking is part of the transaction which resulted in the transfer to the defendant of the plaintiff's $2,000 stock in the Crown Manufacturing Company. It was made for good consideration; and, as a matter of law, as well as of common honesty, is enforceable against the defendant.

The further defence is urged, that the plaintiff, by accepting interest from time to time on the bonds, waived his right to insist on their sale by the defendant. The plaintiff did accept interest from time to time and surrender the coupons; but, considering the position taken by the defendant in deferring the sale, the acceptance of interest by the plaintiff was not, in my opinion, any waiver of his right, and cannot be urged as estopping him from claiming performance by the defendant of his agreement.

Upon the evidence, the bonds are of no value. The company has gone into liquidation, and a sale of the assets of the company for a few thousand dollars by the receiver has not been carried out. Since the hearing, the Registrar has received a letter from the plaintiff's solicitor in which it is stated that the assets of the coal company have been sold under an order of the Supreme Court of Nova Scotia, and that, after deducting all charges, a first and final dividend will be paid to the bondholders of 3.45 cents on the dollar, upon production of the bonds. The defendant's solicitor protests against the acceptance of this statement; but, while it is not evidence, I am confident that an appellate Court would permit evidence of the amount realised upon the bonds. In that event, their value would be $37.20; and the defendant, if he desires, will be entitled to reduce his liability by that amount. Otherwise, the plaintiff will be entitled to judgment for $1,000, with interest from the 1st January, 1910, and his costs of suit, and the defendant will then be entitled to the bonds, which are now in Court.

Judgment for plaintiff.

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May 17.

CITY OF MONTREAL (plaintiff, contestant) v. **ALLARD** (defendant, opposant).

Quebec Court of Review, Tellier, DeLorimier, Dunlop, JJ. May 17, 1912.

1. TAXES (§ III D—137)—ASSESSMENT OF PROPERTY—FINALITY OF ROLL—UNLESS APPEALED AGAINST.

An assessment roll prepared in accordance with the provisions of the city charter, if not attacked before the board of assessors within the legal delays, is absolutely binding on all the ratepayers taxed and the legality thereof cannot be enquired into once it has been duly homologated.

2. TAXES (§ III I—164)—PAYMENT OF ONE INSTALMENT—EVASION OF SUBSEQUENT INSTALMENTS—ILLEGAL ASSESSMENT.

A ratepayer who pays without demur an instalment due under an assessment roll cannot subsequently evade payment of the other instalments on the ground that the assessment is illegal if the roll has become confirmed in default of statutory proceedings to vacate or set aside the same.

3. TAXES (§ III E—140)—SEIZURE FOR ARREARS OF TAXES—RAISING QUESTION AS TO LEGALITY OF ROLL.

Where vacant lots are comprised between the homologated lines of a projected avenue, and destined therefor to fall into the civic domain, and an assessment roll prepared taxing these lots for the purpose of constructing a drain and the proprietor has not objected thereto in time, he cannot raise, by opposition to a seizure of these lots for overdue taxes, the illegality of such roll.

Statement

APPEAL from a judgment of the Superior Court, Greenshields, J., rendered on September 20th, 1910, maintaining in part the defendant's opposition to the seizure by the city appellant of three lots of land for overdue taxes.

The appeal was allowed and the opposition dismissed.

W. H. Butler, for contestant appellant.

Chs. Champoux, for opposant respondent.

DeLorimier, J.

DELORIMIER, J.:—The plaintiff contestant inscribes in review from the judgment of the Superior Court at Montreal maintaining in part the opposition of the defendant opposant with costs against the plaintiff contestant.

On September 25th, 1905, the opposant acquired from one Lamarche sub-division numbers 460, 461 and 462, of official lot No. 325 of the village of Cote St. Louis. It appears from the plans of the city that these lots front on St. André street, and were then comprised between the homologated lines of a street called Palace street. Originally, in 1893, the lines gave this street a width of sixty feet, but on November 15th, 1905, this width was increased to one hundred feet, as a result of modifications brought to the said plan. On September 12th, 1905, a resolution was passed by the council of the city of Montreal providing for the construction of a drain on St. André street. In order to defray the cost of this drain a roll was prepared according to the provisions of the charter (Art. 456), and approved by the city inspector according to law on March 21st,

1907. By this roll the cost of the drain was made payable in ten equal annual and consecutive instalments. The opposant has never contested the said roll, by virtue of which the sub-division lots in question were taxed; on the contrary, he paid the first instalment due under this roll; and subsequently he refused to pay the other instalments. Hence the seizure made by the plaintiff under the provisions of the charter of the city of Montreal (62 Vict. ch. 58, sec. 387 *et seq.*).

Against this seizure the defendant opposant filed an opposition wherein he alleges that he is the owner of the immoveables seized; that the plaintiff has seized them without right as the opposant owed no tax nor assessment thereon; that these lots are entirely absorbed by the homologated lines, that he, the opposant, is deprived of the enjoyment of the said lots owing to the existence of the homologated lines, and that as a result the plaintiff has no right to levy any tax or assessment thereon; the opposant concludes, therefore, that the seizure be quashed and annulled and that it be declared that he does not owe any tax or assessment in connection with these lots. In its contestation of this opposition, the city sets up that the tax or special assessment in question due to it has been imposed according to law on the immoveables of the opposant by means of an assessment roll prepared in conformity with its charter and by-laws, a certified copy of which was deposited in the hands of the city treasurer on March 21, 1907. It alleges that the lots seized were comprised between the homologated lines of Palace street; that these lots were not vacant; that at the time of the signing of the assessment roll they were built upon and occupied and that the opposant made use thereof for his personal enjoyment and for revenue purposes.

The trial Judge dismissed the opposition without costs as to the seizure of sub-division lot 460, on the ground that before the homologation of the assessment roll this particular piece of ground was not a vacant lot.

The opposant did not inscribe in review from this part of the judgment of the Court below.

The judgment of the first Court maintained the opposition as to sub-division numbers 461-462 on the ground that the buildings erected on these two lots were so erected subsequently to the assessment roll and that, under these circumstances, in virtue of article 419 (a) of the city charter, 7 Edw. VII. ch. 63, art. 30, these sub-division lots were exempt from taxes and real estate assessments.

The plaintiff contestant complains of this part of the judgment and submits that the opposition should have been dismissed, not only as regards one lot, but as regards all three.

After a careful examination of the evidence of record and of the contentions of the parties, I have come to the conclusion

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DeLorimier, J.

that the opposition must fail because the assessment roll, under which the seizure was made, was then in full force; because the defendant never contested this roll and does not contest it even in the present action; and because the defendant acquiesced therein by the payment without reserve of the first instalment due to the city.

The charter of the plaintiff contestant contains very clear and very positive provisions as to the preparation and making of assessment rolls and as to the right of any person who believes himself aggrieved by any entry in such roll or appearing before the board of assessors and making his complaint. (Articles 453, 454, 378 *et seq.* of the charter). The charter regulates very clearly the procedure regulating the preparation and contestation of assessment rolls in connection with the building of drains. Article 454 of the charter states that the apportionment of the cost of construction of a drain is to be made, as in the case of a sidewalk, by means of a roll prepared by the city surveyor.

Article 379 of the charter prescribes what public notices are to be given upon the completion of this roll and where the said roll is to be revised.

Article 380 enacts that during the delays fixed by the said notices the board of assessors shall receive all complaints that may be brought before it respecting any entries or omissions in the said roll.

Article 381 requires that all complaints in respect of the valuation and assessment rolls must be made in writing, and it empowers the board of assessors to hear and examine upon oath the interested parties in respect of such complaints.

Article 383 gives to any ratepayer who has duly complained about such roll, and who thinks himself aggrieved by the decision of the assessors, the right to appeal from their decision to the Recorder's Court.

Article 384 further provides for an appeal from the Recorder's Court to any Judge of the Superior Court.

Then there is article 385 which says that as soon as the board of assessors shall have completed the revision of the valuation and assessment roll and the tax roll respectively, it shall deliver the same to the city treasurer, duly signed and certified . . . and therefore, except in respect of any case appealed from, the said rolls shall be binding upon all persons named or assessed therein for the amounts fixed by the said rolls respectively and shall remain in force until a new roll or rolls have been completed and put into force in accordance with the provisions of the charter.

Finally articles 387 *et seq.* regulate the right of the city to seize, and levy by means of a warrant in execution when a ratepayer neglects to pay the amount of such taxes or assessments.

In the present case the parties have admitted that the amounts claimed by the plaintiff contestant are exact and are due under the assessment roll. I, therefore, come to the conclusion that as the defendant has never filed any complaint against this assessment roll but has, on the contrary, recognized the legality thereof by paying the first instalment due thereunder, he is to-day no longer entitled to oppose himself to the levying of the balance of the instalments due as he has done by means of an opposition to the seizure made. For this reason I am of opinion that the opposition of the defendant opposant is unfounded, not only as regards sub-division lot No. 460, but also as regards the other two lots, and that the judgment of the Superior Court should be reversed, and the opposition dismissed *in toto* with costs.

Appeal allowed and opposition dismissed with costs.

MARTIN v. MADORE.

Quebec Court of Review, Tellier, DeLorimier, Dunlop, JJ. May 23, 1912.

1. LIBEL AND SLANDER (§ II F 4—78)—WORDS USED IN A PLEADING—PRIVILEGED COMMUNICATION.

Where allegations in a written pleading are relevant to the issues of the case and are made with reasonable and probable cause and without malice and are relied on in good faith and under the belief that they are true, and the correctness thereof can only be ascertained at the trial, such allegations are privileged, and even should the Court come to the conclusion that they have not been proven, no action will lie against the party making such allegations.

[*Scott* v. *McCaffrey*, 1 Que. Q.B. 523, specially referred to.]

2. DAMAGES (§ III A—162)—UNFOUNDED ALLEGATIONS IN PLEADINGS—SUBSEQUENT ACTION—LIBEL AND SLANDER—COSTS.

Apart from statements advanced maliciously or with knowledge of their falsity, the only penalty which the Court may impose on a party for making unfounded allegations in his pleading is the payment of costs of the suit which is dismissed as a result of the allegations being unproven; and a subsequent suit in damages for defamation and libel resulting from such allegations should be dismissed with costs, as otherwise the party who had a right to allege such facts would be twice punished therefor.

3. COSTS (§ I—2)—DISCRETION OF COURT—ABIDING THE EVENT.

It is only in exceptional cases for which the reasons should be given that the Court may exercise its discretion and avoid charging all costs to the losing party (C.P. 549).

[*Canadian Pacific R. Co.* v. *Couture*, 2 Que. Q.B. 502, specially referred to.]

Statement

APPEAL from the judgment of the Superior Court, Martineau, J., rendered on April 21st, 1911, which dismissed without costs the plaintiff's action in damages for alleged libellous statements in a written pleading in a previous case. The defendant inscribed in review on the question of costs.

The appeal was allowed.

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MARTIN v. MADORE.

DeLorimier, J.

J. A. Descarries, K.C., for appellant.

L. E. Beaulieu, for respondent.

Montreal, May 23, 1912. The opinion of the Court was delivered by

DELORIMIER, J.:—The defendant has inscribed in review from the judgment rendered by the Superior Court on April 21st, 1911, dismissing the plaintiff's action, but without costs. The plaintiff by his action claims $999 as damages on account of certain allegations in a written pleading which he considers libellous and defamatory. This pleading was produced in a case also inscribed before this Court for revision, wherein the present plaintiff is defendant and the present defendant plaintiff.

The action in which the allegations complained of were produced is an action to set aside the holograph will of the late G. A. Madore. In the said action the plaintiff—the defendant in the case now under review—alleged that the will of the said Madore was not the holograph will of the latter, that it had neither been written in its entirety nor signed by him and that long before such will was made the said Madore had been unable to make a will, as he was insane. And the declaration then alleged that at the time the so-called will was made the defendant had succeeded in obtaining the control of the will power and consent of the *de cujus* so as to substitute his own will to the will of the said Madore, and that the so-called testament was therefore obtained by means of the captious manoeuvres, representations and solicitations of the defendant; that as a result the said testament was not the result of the said Madore's will, but that of the fraudulent captation exercised by the defendant, and is the work of the defendant, who alone is responsible therefor, and who alone has suggested and decided the provisions contained therein.

The plaintiff herein, Martin, further alleges that he called upon Madore by letter to withdraw these allegations, and that as Madore did not comply with this request, he (Martin) is justified in proceeding by action in damages.

To the present action Madore has pleaded that the allegations attacked were drafted in the ordinary course of Court proceedings, that they were relevant to the issues and were made by him in good faith, without malice and with reasonable and probable cause, as he believed them to be true, and that they cannot be defamatory, but, on the contrary, are privileged and cannot give rise to an action in damages.

The trial Judge's reasons of judgment contain the following:—

"Considering that the said allegations were relevant to the issues as joined in the said case; that they were invoked in good faith, without malice and that the defendant believed them to be true;

"Considering that the said averments and allegations are, therefore, privileged:

"Considering, however, that the said averments and allegations have not been proven:

"Doth maintain the defendant's plea and doth dismiss the plaintiff's action 'without costs.'"

The defendant submits that this judgment is erroneous as to the adjudication of costs, and contravenes art. 549 C.P. because there is no special reason which could withdraw this case from the general rule which charges costs to the unsuccessful party. The defendant submits that the costs amount to a large sum and that he should not be called upon to bear them.

The plaintiff has not appealed from the judgment of the trial Judge, and the defendant interprets this as an admission that the trial Judge properly appreciated the evidence and properly dismissed the action after weighing the evidence.

The defendant submits: Firstly, that the allegations in question were relevant; that they were relied upon in good faith, without malice, and that the defendant believed them to be true; secondly, that, by law, such allegations are privileged and do not give rise to an action in damages; thirdly, that the trial Judge therefore should have condemned the plaintiff to pay the costs of his illegal demand.

On the first question we have to examine whether the defendant had reasonable and probable cause for believing and whether he did in good faith believe that the facts he alleged were true.

Probable cause is said to result from a certain number of facts and circumstances known by the informant and which are sufficient to justify a reasonable person in believing that what is charged is true: *Lemire* v. *Duclos*, Que. 13 S.C. 82.

After a careful examination of the evidence in this case I have come to the conclusion that, under the circumstances, the allegations complained of could have been made in good faith and were relevant to the issue raised concerning the setting aside of the will of the late G. A. Madore. As shewn by the evidence there were certain acts of Martin, the purport and intent of which could only be properly ascertained and appreciated after a most minute enquiry.

I concur with the trial Judge in his finding that the defendant in this case did not prove affirmatively the allegations of his declaration in the first case, but these allegations were nevertheless relevant to the issues, were relied upon in good faith, without malice, and under the belief that they were true.

The second contention of the defendant is that these allegations, having, under the circumstances, been made in good faith, without malice, and being relevant, constituted privileged averments which estopped Martin from obtaining any damages.

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The principles in point are clearly expounded by Fuzier-Herman Supplément, in arts. 1382 and 1383 C.N. vol. 2, p. 1648, Nos. 163 *et seq.*:—

> 163. L'action, de même que la défense en justice, est un droit dont l'exercice ne dégénère en faux que s'il constitue un acte de malice ou de mauvaise foi.
>
> 164. Il ne suffit pas, en effet, qu'une action soit jugée mal fondée pour justifier une allocation de dommages—intérêts contre le demandeur qui succombe; il faut, de plus, que le plaideur téméraire ait agi de mauvaise foi, ou par esprit de vexation. Dès lors, donc, que ces circonstances n'apparaissent pas dans la cause, et que, de bonne foi, le demandeur a pu se faire illusion sur l'étendue de son droit, la condamnation aux dépens est la seule sanction qu'il puisse encourir.

In the case of *Morrison* v. *The Western Assurance Co.*, Que. 24 S.C. 111, Rochon, J., said, at p. 118:—

> Considérant que ces allégations dans les plaidoiries de la défenderesse étaient pertinentes au litige entre les parties, et ne constituent pas, par conséquent, une allégation diffamatoire ou libelleuse, et ne pourraient être considérées comme libelleuses et diffamatoires, que si elles n'avaient pas été pertinentes au litige, entre les parties, ou si elles avaient été plaidées de mauvaise foi, sans cause probable et avec l'intention malicieuse de faire injure à la partie opposante.
>
> Attendu que ces allégations, dans les dites défenses, étaient de nature à repousser la demande du dit Garland, et que la défenderesse s'en est servi de bonne foi, les croyant vraies; l'action est renvoyée avec dépens.

See also in the same sense: *Legault* v. *Legault*, Que. 1 S.C. 528; *Lamarche* v. *Bruchesi*, Que. 7 S.C. 62; *Royal Institution for the Advancement of Learning* v. *Barsalou*, Que. 11 S.C. 345, cited by the defendant.

I think the defendant is right in this, his second contention. As stated by the trial Judge, the plaintiff had, under the circumstances, no right to obtain damages from the defendant. The judgment was right in dismissing the action: *Scott* v. *McCaffrey*, Que. 1 Q.B. 123; Dalloz, Vo. Responsabilité Supplément, Nos. 80, 81-112.

In the third place, and as a consequence of the foregoing, the defendant contends that the judgment *a quo* should have condemned the plaintiff to all the costs entailed by this action.

Article 549 C.P. lays down the rule as follows:—

> The losing party must pay all costs, unless for special reasons the Court reduces or compensates them, or orders otherwise.

The defendant in his factum refers us, as to the true intent of this article, to the remarks of Chief Justice Lacoste in *Déchêne et al.* v. *Dussault*, Que. 6 Q.B. 1, at pp. 7 and 9.

> L'article contient la règle et l'exception. La règle est que la partie qui succombe doit supporter les frais; l'exception que, pour des causes spéciales, le juge peut exercer sa discrétion. Mais il faut que ces causes existent, car, autrement, il n'y a pas lieu à l'exercise de la

discrétion, et une discrétion exercée sans cause est une violation du principe énoncé dans l'article. . . (p. 7). "Cette cause doit être juste, car une cause fausse est assimilée en loi à une cause non existante."

En se défendant, ainsi qu'ils l'ont fait, les appelants ont usé d'un droit que la loi leur accordait. . . . Si dans l'exercice de ce droit ils n'ont commis aucune faute et s'ils ont réussi sur tous les points, il semble logique qu'ils ne doivent supporter, aucuns frais, puisque c'est la partie qui succombe qui doit seule les payer (p. 9).

And the Court of Review in *Croteau* v. *The Arthabaska Water & Power Co.* v. *Boyle*, intervenant, Que. 31 S.C. 516, said:—

"La règle que la partie qui succombe doit supporter les dépens est impérative, et le tribunal n'a le pouvoir discrétionnaire de les mitiger ou de les compenser que pour des causes spéciales qui doivent apparaitre au jugement."

And see *Claude* v. *Claude et al.*, Que. 17 S.C. 130; *Daigle* v. *Nöel*, Que. 18 K.B. 573; *Patterson et al.* v. *Crépeau*, 8 R. de J. 404.

I am of opinion that the grounds invoked by the defendant are well founded and that no special reason can be found in this cause which would justify a derogation from the general rule relative to costs.

The fact that the defendant did not affirmatively prove the allegations complained of cannot constitute a special reason within the meaning of 549 C.P.

The defendant would have been liable in damages if he had alleged injurious grounds which he would have had no right to invoke, but as he was entitled to allege in good faith what he did allege, he cannot be condemned in damages nor to costs in an action in damages. To condemn the defendant to pay his costs is an injustice, it constitutes a punishment for alleging what he had the right to plead. But the proper punishment on the defendant is the payment of costs on the action to set aside the will, which was dismissed. I consider that the judgment constitutes a false application of principles and is, therefore, erroneous and unjust: *C. P. R.* v. *Couture*, Que. 2 Q.B. 502; *Van Felsen* v. *Boudreau*, 18 R. de J. 216.

As argued by the defendant, he would have won the action to set aside the will had he established his averments, and the present plaintiff, instead of being entitled to damages, would have had to pay the costs of the first action. As the present defendant did not succeed in proving these allegations he was condemned to pay the costs of the action to set aside the will; but there his punishment must end, because that is the only penalty enacted by article 549 which governs this case. To order the losing party to bear in addition his costs of a defence to an action in damages, as has been done by the judgment *a quo*, is to indirectly inflict upon him a penalty which does not flow from

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article 549, and which can only be a form of damages presupposing a fault: C.C. 1053.

To decide that the losing party is at fault simply because he loses is tantamount to saying that a person before suing is bound to anticipate the manner in which the Court will appreciate the evidence, not only of his own witnesses, but of those of the adverse party.

Lapensée v. *Wright*, 20 R.L. 482; *Déchêne et al.* v. *Dussault*, Que. 6 K.B. 1; *Canadian Atlantic Ry. Co.* v. *Trudeau*, Que. 2 Q.B. 514; *Lamarche et al.* v. *Banque Ville-Marie*, M.L.R. 1 S.C. 203.

I, therefore, come to the conclusion that the judgment *a quo* must be modified so as to condemn the plaintiff to pay the defandant's costs in the Court below and in this Court.

Appeal allowed, and judgment below varied.

ONT.

D. C. 1912

April 18.

TEW v. O'HEARN.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel, and Riddell, JJ. April 18, 1912.

1. REFORMATION OF INSTRUMENTS (§ I—1)—TRUE AGREEMENT AS TO FIXTURE—LANDLORD AND TENANT—EQUITABLE TITLE.

Where the true agreement between landlord and tenant is shewn to have been that the fixtures should become the property of the landlord at the expiration of the term, but the lease does not express that agreement, the landlord is entitled to reformation of the lease, and, after the expiration of the term, even though no claim for reformation has been made, the equitable title to the fixtures is in the landlord.

2. BILLS AND NOTES (§VI C—167)—FAILURE OF CONSIDERATION—SALE OF SHOP FIXTURES WITHOUT HAVING TITLE THERETO.

Where a promissory note is given for shop fixtures purchased from the assignee of a tenant, and the lease does not clearly entitle the landlord to the fixtures at the expiration of the term, but it appears that the landlord could obtain reformation of the lease so as to entitle him, there is a failure of consideration for the note, even though no claim for reformation has been made by the landlord.

3. EVIDENCE (§ II E 7—189)—PRESUMPTION AS TO MISREPRESENTATION—PROMISSORY NOTE ON SALE OF FIXTURES.

Where a promissory note is given in payment for tenant's fixtures on the faith of the vendor's representation that there will be no difficulty in getting possession thereof, the inference may properly be drawn that the promissory note would not have been given but for that representation.

Statement

APPEAL by the plaintiff from the judgment of the District Court of the District of Nipissing, dated the 19th May, 1911, after the trial before the Senior Judge on the previous 4th April.

The appeal was dismissed.

J. P. MacGregor, for the plaintiff.

McGregor Young, K.C., for the defendant White.

J. W. Mahon, for the defendants O'Hearn.

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TEW
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O'HEARN.

Meredith, C.J.

The judgment of the Court was delivered by MEREDITH, C.J.:—The action is against three defendants, Esther O'Hearn, M. J. O'Hearn, and Solomon White; as against the first-named two, to recover the balance alleged to be due on a promissory note made by the defendant M. J. O'Hearn and indorsed by the defendant Esther O'Hearn; and as against the respondent White, an alternative claim for the same amount as damages for the wrongful detention of the shop fixtures in respect of which the O'Hearns defend.

The defence of the O'Hearns, except as to $73.66, which they have brought into Court, is, that there was a partial failure of the consideration for which the promissory note was given.

The respondent White, besides delivering a statement of defence, counterclaimed for damages; but it is unnecessary to refer to the nature of the counterclaim, as it was abandoned at the trial and dismissed without costs.

The appellant's action was also dismissed as against all the respondents with costs.

The appellant is the assignee for the benefit of creditors of Thomas J. Toland, who was, at the time he assigned, tenant of the premises in which he carried on his business, under a lease dated the 15th April, 1909. The appellant put up for sale by public auction the stock in trade of the assignor, including the fixtures in question, and they were purchased by the defendant M. J. O'Hearn at 72 cents in the dollar on their value, as stated in an inventory which was prepared for the purposes of the sale.

At the time of the sale, the stock in trade and the fixtures were still in the premises of the assignor, and they appear to have been checked over by the respondents the O'Hearns, to whom the key of the premises was handed by an agent of the appellant.

Shortly after this occurred, the respondent M. J. O'Hearn began moving what he had purchased to other premises, when he was prevented by the respondent White from removing the fixtures in question, White claiming them as his property and denying the right of O'Hearn to remove them.

O'Hearn never did remove them, and they appear to have remained on the premises, and to have been taken possession of by White.

No reasons were given by the learned trial Judge for his judgment, and we are without any light from him as to the grounds upon which he proceeded.

In the view I take, it is unnecessary to determine what is the legal effect of the lease between the respondent White and Toland, or whether there is any inconsistency between the provision in the lease, which is on a printed form and is made under the Short Forms Act, "that the lessee may remove his fixtures," and the last provisions of the lease, which is in writing and reads as follows: "It is understood that all repairs, fixtures, plate glass

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and other things shall be and remain the property of lessor at determination of lease''—or, if there is an inconsistency, which of the provisions is to prevail.

There is evidence that the respondents the O'Hearns accepted the key and gave the promissory note on the faith of the representation of the appellant's agent that there would be no difficulty, as far as the respondent White was concerned, in their getting possession of all that they had bought, and from which the inference may properly be drawn that they would not have closed the transaction or given the promissory note but for that representation.

There is not the slightest ground for suspecting that there was any collusion between the O'Hearns and White, or for doubting that they did everything in their power, short of forcibly removing them or bringing an action, to obtain possession of the fixtures.

The examination for discovery of White was put in evidence by the appellant, and it shews that the understanding between Toland and him, at the time the lease was signed, was, that they should become the property of White at the determination of the lease, and that a less rent was fixed because of that understanding.

There was no contradiction of White's testimony, and I do not see why, upon the uncontradicted testimony, if the lease as drawn does not express correctly the terms agreed upon as to the fixtures, White would not be entitled to have it reformed so as to express the true agreement.

That no steps to that end had been taken by White, is, I think, immaterial for the purpose of this case—the question on this branch of it being, whether or not White was entitled to the fixtures; and, upon the facts as I have stated them, White was, in equity at least, entitled to them; and that is sufficient for the purpose of the defence.

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

Appeal dismissed.

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April 29.

Re GIBSON.

Ontario High Court, Boyd, C. April 29, 1912.

1. INCOMPETENT PERSONS (§ VI—33)—ADMINISTRATION OF LUNATIC'S ESTATE—RIGHTS OF COMMITTEE—SALE OF REAL ESTATE.

Where, under an order of the Court, lands of a lunatic are sold, and a mortgage thereon taken in part payment, Ont. Con. Rule 66 applies, and the mortgage should be taken in the name of the accountant of the Court, unless otherwise ordered, but it is the duty of the committee to look after the mortgage investment as though the mortgage had been taken in his own name.

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RE GIBSON.

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APPLICATION by the committee of a lunatic for an order authorising the applicant to sell lands of the lunatic and take a mortgage thereon in part payment.

The application was allowed.

W. Greene, for the applicant.

BOYD, C.:—Proceedings in lunacy are matters dealt with by the Court, and usually by orders made by a single Judge. They are within the scope of Con. Rule 66, which requires that all securities taken under an order or judgment of the Court shall be taken in the name of the Accountant of the Court unless otherwise ordered. This is the policy or practice of the Court with reference to sales of lands of the lunatic, when mortgages are taken to secure part of the purchase-money. The principal moneys of the mortgage will be paid into Court to the credit of the estate, as well as all moneys which are payments for interest, to be accumulated, unless these periodical payments are required for the maintenance of the lunatic, in which case proper directions are to be given in the order sanctioning the sale and the mortgage. In this case, I understand the estate is otherwise ample for maintenance, and the interest may be paid into Court. It is, nevertheless, the duty of the committee to look after the mortgage investment as if the mortgage had been taken to and in the name of the committee.

Application allowed.

LINDSAY v. LA PLANTE.

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June 10.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. June 10, 1912.

1. APPEAL (§ IV I—153)—FINDINGS OF FACT BY COURT BELOW.

A judgment for the defendant in an action on a promissory note given by him to the plaintiff will not be disturbed where the trial Judge found on the facts that it had been paid by the defendant conveying to the plaintiff land the former had agreed to sell to a third person, who had sold his equity therein to the plaintiff, the latter assuming payment of the former's indebtedness on the land to the defendant, under an agreement between the three that the amount due the plaintiff from the defendant on such note should be credited by the latter on the indebtedness the plaintiff had assumed.

Statement

A COUNTY Court appeal. The plaintiff sued to recover the balance due on a promissory note made by defendant. At the trial a verdict was entered in favour of the defendant and plaintiff appealed.

The appeal was dismissed, Perdue and Haggart, JJ.A., dissenting.

H. F. Tench, for plaintiff.

H. V. Hudson, for defendant.

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Howell, C.J.M.

HOWELL, C.J.M.:—It seems to me that the only question in this suit is one of fact, and the learned County Court Judge has decided on the facts in favour of the defendant.

The defendant was the owner of land which he had agreed to sell to Lyon, upon which there was still a large sum unpaid. The plaintiff wished to purchase from Lyon, and to carry this into effect the defendant must be paid before he would convey. The plaintiff held the note made by the defendant, the subject matter of this suit, and both sides in this suit agree that, by a special agreement made between the plaintiff and defendant, the moneys due by the defendant to the plaintiff thereon were to be applied towards paying the defendant for the land so as to procure a conveyance from him. The plaintiff asserts that the amount to be credited on the note was only the amount of the cash payment remaining after certain adjustments as to taxes and insurance between the plaintiff and Lyon had been made. The defendant asserts that the plaintiff agreed that the whole of the balance due on the note was to be applied upon the cash payment, so that he, the defendant, would thereby receive the full amount of the note as part of the moneys due to him. He apparently acted on this and conveyed the land. In his examination for discovery the plaintiff says:—

> Q. This calls for payment of $600 cash, to whom did you pay that?
>
> A. This note was in the possession of my solicitor which it was agreed between Lyon, La Plante and myself that that note should apply on the purchase price of the house.
>
> Q. You say that note was to apply on the purchase price of the house. Now which part of that note was applied on the purchase price of the house?
>
> A. The balance due.
>
> Q. The $500 you are suing for now?
>
> A. Yes.
>
> Q. That was to apply on the purchase price of the house?
>
> A. Yes.
>
> Q. That was the agreement with whom?
>
> A. That was the agreement with Mr. La Plante and with Mr. Lyon. I told Mr. Lyon there was the $500 note in my solicitor's possession and that it was agreed with Mr. La Plante that that should apply on the land, as it was understood among us Mr. La Plante was to be paid.
>
> Q. That cash payment was to be applied on the $500 you are suing for?
>
> A. Well, the balance of this note which Mr. La Plante owed me was to apply on the purchase price of the house.

The trial Judge evidently believed that it was agreed between the plaintiff and the defendant that the whole balance due on this note was to be applied on the purchase money of the land due to the defendant, and that he acted on this and conveyed, and I would certainly not reverse this finding of fact. No authority need be cited to shew that with such a finding of fact the plaintiff cannot recover.

The appeal must be dismissed with costs.

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

PERDUE, J.A. (dissenting):—The plaintiff Lindsay has sued the defendant La Plante to recover $500, the balance due on a promissory note made by the defendant. The defence is that the note has been paid through a transaction for the sale of land in which the parties and one Lyon were concerned. This transaction was as follows:—

Lindsay agreed to purchase a house from Lyon for $4,650. The purchase money was to be paid by the purchaser paying $600 in cash, assuming a mortgage for $2,150, and giving an agreement to pay $1,900. Lyon had purchased the land from La Plante and still owed him a considerable sum of purchase money. Lyon had payments to meet and was anxious to get in cash whatever interest he would have in the property. It was arranged between the parties that the $500 due from La Plante to Lindsay on the note should be deducted from the cash payment of $600 payable by Lindsay to Lyon, and that La Plante should give credit to Lyon for the $500 upon the amount due from Lyon to La Plante. Lindsay was, as La Plante states, not used to doing business of the kind. He believed he would require a sum of $100 to make up the cash payment to Lyon, evidently overlooking or being ignorant of the fact that there would be adjustments of taxes, insurance interest, etc., which would considerably reduce the amount of cash to be paid. He therefore borrowed of La Plante a sum of $100, which, with the $500, would make up the $600 cash payment. This $100 he paid to Lyon, having previously paid him $25 when the agreement was first made. These two payments left only $475 due to Lyon on the cash payment. Lindsay afterwards repaid La Plante the $100 loan.

In order to obtain cash for his interest, Lyon arranged with La Plante that the latter should take from Lindsay a mortgage for the $1,900 of deferred purchase money. This mortgage was signed by Lindsay and at the same time La Plante conveyed the land to him. The mortgage was cashed, La Plante receiving from Lyon what he claimed from the latter, and Lyon receiving the balance. Lyon's solicitors acted for the purchaser of the mortgage. When the adjustment between La Plante and Lyon was being made, La Plante instructed Lyon's solicitor to deduct $500, which he stated he had received on account. This was the $500 due on the note which La Plante assumed Lindsay had received by deducting the amount from the $600 cash payment payable to Lyon. La Plante assumed that the note had been so paid without communicating with Lindsay. Accordingly the $500 was deducted from the amount due by Lyon to La Plante, and the balance was paid to the latter.

When the transaction came to be closed as between Lindsay

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and Lyon it was found that on the adjustments between these two parties being completed and the necessary deductions made, there remained only $366.98 due from Lindsay to Lyon, and this was the only sum Lindsay had in hand to apply on the note. Even if the $125 previously paid by Lindsay had been retained by him there would not have been enough to pay the note.

La Plante has to prove that the note was paid. The arrangement as to how the $500 was to be paid was, no doubt, made in good faith and as a matter of convenience in carrying out the several transactions. It was made on the understanding that there would be enough money in Lindsay's hands coming to Lyon to pay La Plante's note. But, as between the plaintiff and defendant, there was no consideration sufficient to support a binding contract. The note made by La Plante was past due and the payment of an overdue debt was not a consideration which would support a promise by Lindsay to obtain that payment by taking it out of moneys due from him to Lyon: Leake on Contracts, 6th ed., 444.

There was no evidence to support a novation by which La Plante was discharged from his debt to the plaintiff. La Plante cannot claim that he was misled by the plaintiff into giving credit to Lyon for the $500. He neglected to communicate with Lindsay and ascertaining whether the latter had in hand enough to pay the note, before authorizing the deduction of the $500, and this, although La Plante knew, as he admits, that there were adjustments to be made between Lyon and Lindsay, and he, La Plante, was advising Lindsay and urging him to get the adjustments made. La Plante was not induced by any representation made by Lindsay to give credit for the $500 to Lyon. La Plante, by his own negligence, credited Lyon with the full amount of the note when he should only have given credit for the amount actually received by Lindsay. He has failed to prove payment of the note. Even if La Plante's whole contention were admitted, there was not enough of the $600 cash payment left in Lindsay's hands after the adjustments with Lyon were made to pay the note in full. There would still be a balance of some $8 remaining unpaid, so that in any event the County Court Judge should have entered judgment in the plaintiff's favour for that amount. But, in my opinion, the defendant negligently gave credit to Lyon for the full balance due on the note without asking Lindsay whether there was that amount in hand, and the defendant cannot make Lindsay suffer the loss which La Plante himself caused. La Plante has an action against Lyon for the amount credited by mistake to the latter. It is difficult to see how Lindsay could, as was suggested by defendant's counsel on the argument, sue Lyon for that amount. Lindsay has simply paid Lyon what was due to him.

I think the appeal should be allowed with costs, and judgment entered in the County Court for $133.02, with interest and the usual counsel fee.

HAGGART, J.A. (dissenting):—The defendant was indebted to the plaintiff for $500, the balance of a promissory note originally for $1,500.

One J. M. Lyon was indebted to the defendant in a larger sum. Lyon sold to the plaintiff a lot for $4,650. There was some arrangement or understanding that this note should be paid by Lyon giving credit to Lindsay, the plaintiff, for the sum of $500 on the purchase money. In giving the conveyance of the land, assuming incumbrances, making adjustments, and closing the deal, there appears to have been only $366 to apply in payment of this $500 indebtedness. It requires $134 more to pay the note.

It is admitted by both parties that Lyon is the party who has, either in cash or in his securities, $134 more than he should have.

The plaintiff is entitled to hold that note until it is satisfied by payment in full, and to sue for any balance owing on it. Payment of part of a simple contract debt is not a satisfaction of the debt. Until that note is paid in full the plaintiff can sue the maker, and as the record stands, the plaintiff would be entitled to a judgment for $134. I think the trial Judge should have directed that Lyon be made a party, and then such judgment or order could have been made as would do justice between all parties involved in the transaction.

I would allow the appeal and give the plaintiff judgment for $134.

Appeal dismissed, PERDUE *and* HAGGART, JJ.A., *dissenting.*

SLINGSBY v. TORONTO R. CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 29, 1912.

1. STREET RAILWAYS (§ III C—47)—CONTRIBUTORY NEGLIGENCE—CROSSING TRACK—EXCESSIVE SPEED APPROACHING STOPPING PLACE.

Where a street car approaches a stopping place at an excessive speed, and there are persons waiting to board the car, and the car slackens speed as though to stop, but does not stop, and the highway is in such a condition as to demand the close attention of any one making use of it, an attempt to cross in front of the car does not necessarily constitute contributory negligence, but the question must be left to the jury.

Statement

APPEAL by the defendants from the judgment of Meredith, C.J.C.P., upon the findings of a jury, in favour of the plaintiff.

The action was brought by Lizzie Slingsby, widow of Harry Slingsby, on behalf of herself and children, to recover damages for the death of her husband, who, when attempting to cross the defendants' tracks, riding a bicycle, was struck by a car and

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killed, owing, as the plaintiff alleged, to the negligence of the defendants or their servants.

The judgment was for $5,000 damages and costs.

The appeal was dismissed.

D. L. McCarthy, K.C., for the defendants.

W. D. McPherson, K.C., for the plaintiff.

MOSS, C.J.O.

MOSS, C.J.O.:—The jury found that the car which struck the deceased was running at an excessive rate of speed; and it is conceded that there is evidence upon which they could reasonably arrive at that conclusion.

The question is thus narrowed down to whether the deceased so conducted himself as to cause the accident, which, it is argued, he might have avoided had he exercised reasonable care. The jury have absolved him from the charge of negligence.

There is undoubtedly much room for argument against this conclusion, but it cannot be said that it is wholly without support from the evidence.

It appears that at or near the south-west corner of College and Shaw streets there is a white post, indicating a place at which cars stop to let down and take up passengers, at which, at the time in question, there was at least one if not more than one person standing, evidently intending to board the car when it came to a standstill. As the car approached Shaw street from the west, the brake was applied and the car's speed slackened to some extent, but, as it turned out, not with the intention of stopping for passengers.

It was allowed to proceed at a high rate of speed, and the deceased, who had come upon the crossing, was struck.

The condition of the roadway and the planking at the crossing evidently demanded the deceased's close attention at the moment, and may have prevented him from observing that the car had not stopped, as its earlier actions might not unreasonably appear to the deceased to indicate. He apparently did not discover that it was coming on until he had reached the rail, and he then made an ineffectual effort to clear the car.

It was for the jury to say whether, under all the circumstances, it was reasonable for him to conclude that the car would stop or had stopped, and that there was ample time for him to cross, or whether he deliberately took his chance of getting safely across before the car reached him.

Upon this their finding is adverse to the defendants' contention; and it cannot be said that there is not evidence upon which they could reasonably come to that conclusion.

The appeal must be dismissed.

MEREDITH, J.A.

MEREDITH, J.A.:—If the rule of the defendants requiring their motormen to reduce the speed of cars, and to keep them

carefully under control, when approaching crossings and crowded places where there is a possibility of accidents—only a reasonable, if not really a necessary, precaution—had been observed, this unfortunate accident would not have happened; and so the finding of negligence in the running of the car at too great a speed at the time of the occurrence is not now called in question; but it is said that it was the negligence of the unfortunate man, who was killed in the collision, which caused the accident; or, at least, that he was guilty of contributory negligence.

There is much to be said in favour of these contentions; but they involve only questions of fact proper for the consideration of the jury; and the jury has unequivocally found against the defendants on these very questions, very fully and clearly presented to them at the trial.

It can hardly be said that reasonable men could not find that the negligence of the defendants, before mentioned, was the proximate cause of the injury and loss complained of by the plaintiff in this action; there is more to be said in the defendants' favour upon the other point.

Concise and captivating logic such as that the unfortunate man either saw the car approaching and was guilty of negligence in attempting to cross in the face of it, or failed to see it and was guilty of negligence in that failure, does not cover the whole circumstances of such a case as this: the place where the accident happened was a level crossing of a much used highway: it was the duty of the motorman, under the rules of the defendants, to have reduced speed and kept his car carefully under control when approaching such a place; immediately west of it was a regular stopping place for all cars for letting down and taking up passengers, and there were persons there waiting to be taken up; and the highway at the place in question was being renewed, and was in such a condition that the attention of any one crossing over, especially on a bicycle, as the man was, might necessarily be taken up, in picking his way across, to a much greater extent than would have been necessary had the road been in its ordinary state; and that the motorman and his employers knew. These were all very material circumstances affecting the question, what would reasonable persons ordinarily do in such a case?

Under all the circumstances of the case, this question was also, in my opinion, one for the jury; and so the verdict must stand, whether in very truth right or wrong.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Garrow, J.A.
Maclaren, J.A.
Magee, J.A.

Appeal dismissed.

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April 2.

WINDSOR v. WINDSOR.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, J.J.A. April 2, 1912.

1. CORPORATIONS AND COMPANIES (§ IV G 6—157)—NOTICE TO DIRECTORS OF MEETING—STATE REQUIRING NOTICE.

The action of the board of directors of a company incorporated under the Imperial Companies' Consolidation Act of 1908 in appointing a managing director is not invalid because two of the directors, who were temporarily in British Columbia, did not receive notice of the meeting, as the requirement as to notice will be reasonably construed so as to facilitate the efficient carrying on of the business of the company.

2. CORPORATIONS AND COMPANIES (§ IV G 6—157)—NECESSITY OF GIVING NOTICE OF MEETING—DIRECTORS TEMPORARILY ABSENT.

The fact that the articles of association of a company provide for the payment of the travelling and hotel expenses of directors while attending meetings of the board, does not require that notice of meetings thereof to be held in England shall be given to directors who are temporarily in British Columbia.

3. CORPORATIONS AND COMPANIES (§ IV G 2—117)—POWERS OF DIRECTORS —REMOVAL OF MANAGING DIRECTOR.

The directors of a company are prevented by sec. 72 of the Companies (Consolidated) Act of 1908 (Imp.), from removing a managing director from office.

4. CORPORATIONS AND COMPANIES (§ V E 1—216)—RIGHTS OF SHAREHOLDERS—REMOVAL OF MANAGING DIRECTOR.

Under sec. 72 of the Companies (Consolidated) Act of 1908 (Imp.), only the shareholders of a company have power to remove a managing director from office.

Statement

AN appeal from the judgment of Murphy, J., dismissing an action brought to oust the defendant who was a duly appointed director of the company, from his position as managing director. The defendant was, pursuant to the provisions of section 72 of the Companies (Consolidated) Act, 1908 (Imp.), appointed managing director for the year 1911, and in November of that year by a resolution of the board of directors, passed in England, he was dismissed. Two of the members of the directorate who were in British Columbia at the time were not notified of the meeting. The two points in question were: (1) Can the directors (as opposed to the shareholders) dismiss the defendant from his position of managing director; (2) If there is power to dismiss, was the meeting of the directors in November, 1911, in England, at which the resolution rescinding the appointment of the defendant as managing director was passed, a valid meeting, no notice of the calling of the same having been sent to the two directors who were at that time temporarily in British Columbia.

The appeal was dismissed, Irving, J.A., dissenting.

W. B. A. Ritchie, K.C., for appellant.

E. P. Davis, K.C., for respondent.

MACDONALD, C.J.A.:—I concur with judgment of Galliher, J.A., dismissing the appeal.

IRVING, J.A. (dissenting):—The plaintiffs are seeking to oust the defendant, who is a duly appointed director, from his position as managing director.

The two points are:—

(1) Can the directors (as opposed to the shareholders) dismiss the defendant from his position of managing director.

(2) If there is power to dismiss, was the meeting of the directors on the 7th November at which the resolution rescinding his appointment as managing director was passed, a valid meeting, no notice of the meeting having been given to the defendant although a director of the company.

By No. 16 of the company's articles of association (which article is very similar to art. 71 of table A) the management of the business of the company is vested in the directors. In the *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame*, [1906] 2 Ch. 34, an article (96) was considered by Warrington, J., and the Court of Appeal. The effect of this article 16 is to give the management to the directors to such an extent that the shareholders cannot interfere with the exercise of those powers, even by a majority at a general meeting. The only way the shareholders can control the Board is by ousting the directors, or by inserting limiting clauses in the articles. Dismissal of a director requires an extraordinary resolution of the company, and therefore is a troublesome and lengthy process.

Bearing in mind, then, that the directors are the managers of the company, let us turn to article 24, which authorizes the directors to appoint a managing director, and to contract with him as to his remuneration. The words used are "to appoint from time to time." In my opinion, this power to appoint, carries with it the power to dismiss, if the directors shall think fit. How can it be said that they are to have the management of the company's business if they, seeing a managing director making ducks and drakes of the company's assets, are not at liberty to cancel his appointment at once? The directors, in my opinion, do not denude themselves of their authority to manage the affairs of the company by appointing a managing director.

It was argued that where the power of appointment has been exercised, a general meeting of the company was necessary to put an end to the engagement, and clause 72 of table A was referred to. That clause speaks of a resolution by the company in general meeting to determine his tenure of office. That provision was inserted to enable the shareholders to overrule the directors by a mere majority, and to avoid the necessity for an extraordinary resolution, with its special notice and

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three-fourths majority. It also serves another purpose. It declares and notifies the person about to accept the position of managing director that it is a term of the contract into which he is about to enter, that although the contract may appear absolute on its face for a definite period, the term is subject to determination by a vote of the shareholders.

In my opinion this clause does not deprive the directors of their power to dismiss.

I do not go into the question of the defendants' alleged misconduct. That seems to me beside the question for this Court, that is for the directors to decide. If they have removed Mr. Windsor without justification, he without doubt has his remedy.

Then as to the validity of acts done at a directors' meeting of which no notice has been given to one of the directors. The appointment of the plaintiff and the despatching of him to British Columbia to look after the company's business here, seems to me to be a plain intimation to the secretary that no notice to the absentee would be required. In the *Portuguese Consolidated Copper Mines Case* (1889), 42 Ch. D. 160, at p. 168, the opinion of Cotton, L.J., plainly shews that the decision went on the ground that there were easy means of summoning the absentee. In the following year, Stirling, J., in *Halifax Sugar Refining Co.* v. *Francklyn*, 59 L.J. Ch. 591, held that notice to a director abroad was not necessary.

The following note appears in the 1910 edition of Palmer's Company Precedents:—

> It was long since held that it is not necessary to serve notice on shareholders who have chosen to reside outside the United Kingdom. And this rule being entirely consistent with common sense and common convenience, has been acted on ever since.

I would allow the appeal.

Gallihe, J.A.

GALLIHER, J.A.:—There are really only two points for consideration in this appeal. First: Were the acts of the board of directors in England appointing Sherman a managing director, and the executing of a power of attorney to him, legal; and secondly: Had the board of directors power to dismiss the defendant from the position of managing director?

The objection to the first is that at the meetings at which Sherman was appointed, and the power of attorney executed, no proper notices had been sent out calling such meetings. It is admitted that two of the directors who were in British Columbia received no notices of these meetings, nor were any sent to them. I agree with Mr. Davis' contention that this was not necessary, and I do not regard the fact that the articles of association of the company provide for the payment of the

travelling and hotel expenses of directors attending meetings, or the further provisions of article 21 as, under the circumstances, in any way affecting the question.

The case cited by Mr. Davis I think clearly indicates that the provisions as to notice must be construed reasonably so as to permit of the proper and efficient carrying on of the business of the company.

The second point presents more difficulty.

Section 72 of the Companies (Consolidation) Act, 1908 (Imp.) under which the plaintiff company was incorporated, reads as follows:—

> The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

Under this section the directors appointed the defendant their managing director for the year 1911, and subsequently in November of the same year by resolution dismissed him.

It is objected by Mr. Ritchie that they cannot dismiss him, that that can only be done by the company in general meeting under section 72.

In the case of *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (1882), 23 Ch. D. 1, it was sought to remove two of the directors, and a resolution to that effect was passed at a special general meeting of the company. In appeal, Jessel, M.R., laid down the principle that where there is no power contained in the statute or in the articles of a statutory corporation to remove a director, there is no inherent power to do so; and Cotton, L.J., says, at p. 10:—

> In the present case there is not only the charter of incorporation and the memorandum, but there are the articles of association, which under the Act are a contract between the shareholders to comply with the regulations in them, and we find in the articles provisions as to the appointment of directors, and the rotation of directors, that they are to go out at a certain period; that, in my opinion, is a contract that those who may be duly appointed by the shareholders to be directors shall continue in the office till under the rotation they are to go out, or until they are to go out under the other provisions of those articles as to disqualification or otherwise.

In the present case there can be no doubt that the directors could not remove one of their number from the office of director.

Is a managing director or manager in a different position?

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The articles of association provide how the directors shall be appointed and how their office shall become vacant.

The directors are a board or committee appointed at a general meeting of the shareholders from among the shareholders of the company for the purpose of carrying on the business of the company.

Then section 72 provides they may appoint one or more of their body to act as managing director or manager, for such term as they may decide, and goes on to state how that term may be determined, viz., *ipso facto* if he ceases to be a director from any cause, or if the company in general meeting resolve to determine his tenure of office.

Mr. Davis argues that while this gives the company power in general meeting to dismiss a managing director, it does not take away the inherent right that the board of directors have to dismiss one whom they may have appointed manager among them.

It is to be noted in this case that what is sought to be taken away from the defendant is not his rights and privileges as a director, but his position as managing director. But does that make any difference? The board of directors here under the powers granted in the articles of association enter into a contract with one of their number for a term certain, and in the same section of the articles it is provided how that tenure of office may be determined.

This article 72 deals specifically with the office of managing director, and nowhere else do we find any reference to the manner in which a managing director can be dismissed.

It seems to me the words of Lord Justice Cotton above quoted as there applied to the office of director apply equally to the office of managing director in the case at bar, and that we must look to the articles of association to see if they have been complied with.

The appeal should be dismissed.

Appeal dismissed.

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H. C. J.

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May 16.

CARTWRIGHT v. PRATT.

Ontario High Court, Cartwright, M.C. May 16, 1912.

1. COSTS (§ I—14)—SECURITY—COUNTERCLAIM — NON-RESIDENT.

Where a counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is resident out of the jurisdiction, the case may be treated as if that person were a plaintiff and only a plaintiff, and the Court may order security for costs to be given by him.

2. COSTS (§ I—14)—SECURITY—DISCRETION OF COURT.

Where a counterclaim in respect of the same matter or transaction upon which the claim is founded the Court will consider

whether the counterclaim is not, in substance, put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and where the counterclaim is in substance a defence, the Court may in its discretion refuse to order security for costs against a non-resident plaintiff by counterclaim.

Motion by the plaintiff for an order requiring the defendant to give security for the costs of his counterclaim.

The order was granted.

Both parties were residents of Buffalo, in the State of New York.

The plaintiff, who had given security for costs, claimed from the defendant in all something over $9,000, with interest, in respect of three different joint adventures.

The defendant denied all the plaintiff's allegations, and counterclaimed in respect of an alleged agreement by the plaintiff to deliver to him 10,000 shares of stock in the Pan Silver Mining Company, and also for payment of one-half of a sum of $1,100 paid by the defendant on a joint venture of the defendant and the plaintiff, which was forfeited with the plaintiff's consent.

G. H. Sedgwick, for the plaintiff.

M. H. Ludwig, K.C., for the defendant.

Statement

THE MASTER:—This question was considered in two cases in the Court of Appeal, at the hearing of both of which Lord Esher, then Master of the Rolls, presided.

The Master.

In *Sykes* v. *Sacerdoti* (1885), 15 Q.B.D. 423, security was ordered. In *Neck* v. *Taylor*, [1893] 1 Q.B. 560, it was refused. In this latter case Lord Esher said (p. 562): "The rule laid down by the cases seems to be as follows. Where the counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a plaintiff and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counterclaim . . . arises in respect of the same matter or transaction upon which the claim is founded . . . the Court . . . will in that case consider whether the counterclaim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take. . . . The Court in that case will have a discretion."

Under which class the counterclaim in question comes does not seem doubtful on the material. The various transactions between the parties are dealt with in their respective pleadings as having been separate, and not items of a continuous course of dealing in the nature of a partnership. Had that been the fact, it would, no doubt, have been so alleged in the counterclaim, as it would have brought the case within the principle of *Neck* v. *Taylor*, [1893] 1 Q.B. 560, *supra*.

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The Master.

In view of the contradictory affidavits as to the value of the mining claim in which the defendant has a half interest, it does not seem a ground for refusing security, in the absence of the evidence of at least one qualified and disinterested person to support the estimate of the defendant.

An order will go for security to be given in the usual form —costs of this motion will be in the counterclaim to the successful party.

Security ordered.

ONT.

D. C.

April 10.

McCLEMONT v. KILGOUR MANUFACTURING CO.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel, and Kelly, JJ. April 10, 1912.

1. MASTER AND SERVANT (§ II A 4—71)—LIABILITY OF MASTER—GUARDING DANGEROUS MACHINERY—FACTORIES ACT, SEC. 20, SUB-SEC. 1 (*a*) (ONT.).

A violation of sub-sec. 1 (*a*) of sec. 20 of the Factories Act (Ont.), is sufficient to justify a verdict in favour of a servant, where it is shewn that he would not have been injured if a set-screw in a shaft, which was admittedly dangerous, had been securely guarded or sunk into the shaft.

2. APPEAL (§ VII L—476)—REVIEW OF FINDINGS—CONTRIBUTORY NEGLIGENCE.

A verdict in favour of an injured servant will not be disturbed where the evidence as to his contributory negligence is conflicting and not so conclusive and undisputed as to warrant the withdrawal of that question from the jury.

3. MASTER AND SERVANT (§ II B 3—144)—SERVANT'S ASSUMPTION OF RISK —UNGUARDED MACHINERY—STATUTORY DUTY—VOLENTI NON FIT INJURIA.

The maxim *volenti non fit injuria* has no application where a servant is injured as a result of a master's violation of a duty imposed by statute.

[*Baddeley* v. *Granville* (1887), 19 Q.B.D. 423, and *Rogers* v. *Hamilton Cotton Co.*, 23 O.R. 425, followed; *Thomas* v. *Quartermaine* (1887), 1 Q.B.D. 685; *Love* v. *New Fairview Corporation* (1904), 10 B.C.R. 330, and *Bell* v. *Inverness Coal and R.W. Co.* (1908), 42 N.S.R. 265, specially referred to.]

Statement

APPEAL by the defendants from the judgment of BRITTON, J., *McClemont* v. *Kilgour Manufacturing Co.*, 3 O.W.N. 446, upon the answers of the jury.

The appeal was dismissed with costs.

T. N. Phelan, for the defendants.

W. M. McClemont, for the plaintiff.

Teetzel, J.

The judgment of the Court was delivered by TEETZEL, J.:— The action was for damages under the Workmen's Compensation for Injuries Act, the negligence relied upon being a breach of the Ontario Factories Act, in not guarding dangerous machinery. The questions put to the jury and their answers were:—

(1) Were the defendants guilty of any negligence which occasioned the accident to the plaintiff, in not having the projecting set-screw in the collar upon the shaft in the defendants' factory guarded otherwise than it was guarded when the plaintiff was injured? A. Yes.

(2) If so, in what respect were the defendants so guilty? What was the negligence of which the defendants were guilty? A. In not having a separate guard over set-screw or in not having a collar on shaft with counter-sunk set-screw.

(3) Did the plaintiff know and appreciate the danger of the work at which he was employed at the time the accident happened, and did he, knowing the danger, voluntarily undertake the risk? A. Yes.

(4) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

Damages assessed at $1,000.

The grounds of appeal chiefly relied on by Mr. Phelan were: (1) that there was no evidence of negligence to warrant the case being submitted to the jury; and, if there was any negligence, it was that of the plaintiff, who failed in his duty as foreman, within the meaning of sec. 6 of the Workmen's Compensation for Injuries Act; (2) that the evidence established contributory negligence, and that the finding of the jury on that question was perverse; (3) that the maxim *volenti non fit injuria* applied; and the answer to the third question, therefore, entitled the defendant to judgment dismissing the action.

The set-screw by which the plaintiff's clothing was caught and which caused his injury, projected at least an inch and a quarter above the surface of the collar which it entered. The collar with the projecting set-screw surrounds a shaft which, when in operation, revolves very rapidly; and, having regard to its position and use, was, unless well guarded, manifestly, when in operation, a source of danger to the defendants' employees who might be required to work near it.

The plaintiff's case is founded upon the allegation that the defendants violated the provisions of the Ontario Factories Act in not, as far as practicable, securely guarding the set-screw in question. The defendants had provided a box-shaped guard or covering for the whole shaft, the top of which was removable; and the principal contest at the trial centred around the question whether, under all the conditions, that guard was sufficient; and that led to the first question being put to the jury, referring to the guard which had been provided by the defendants.

Before the accident, the plaintiff removed the top of the guard in question, to enable him to place upon the belt a mixture used to prevent the belt slipping around the pulley. For that purpose the plaintiff stepped inside the box-shaped guard; and, while putting on the mixture, his leg was necessarily near

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the collar in question, and the projecting screw caught his trouser-leg, and he was thrown down upon the revolving pulley, and his knee-cap was shattered and other injuries inflicted.

The plaintiff swore that in order properly to do the work he undertook it was necessary for him to get inside the box, although he knew the unguarded condition of the screw.

It was also manifest from the size of the box, that, while standing in it and putting the mixture on the belt, one of his legs would not be far from the revolving collar and screw.

There was evidence that the set-screw could have been securely guarded, or sunk into the collar, so that no part would have been projecting beyond the surface of the collar; and the jury, in answer to the second question, so found—a conclusion which, I think, is warranted by the evidence. The effect of this finding, coupled with the admittedly dangerous character of the machinery, is to find the defendants guilty of a violation of sub-sec. 1 of sec. 20 of the Factories Act.*

Evidence was given by the defendants that the plaintiff could have applied the mixture to the belt without getting in the box; and the jury were given a view of the machine in operation, and of tests made to apply the mixture, without the operator getting in the box.

As observed by the learned trial Judge, there certainly was very strong evidence of contributory negligence; but I agree with him that it was not so conclusive and undisputed as to warrant that question being withdrawn from the jury; nor, the jury having been permitted to view the machine and the tests made to demonstrate the plaintiff's alleged negligence, can I say that the finding was perverse.

Having thus a finding in effect that the defendants were guilty of a violation of the Factories Act, and a finding absolving the plaintiff from contributory negligence, the effect of the jury's answer to the third question remains to be considered.

The question of the applicability of the maxim *volenti non fit injuria* in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act, was settled by a Divisional Court in England in *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, where the decision was, that the defence arising from the maxim was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer. Mr. Phelan cleverly criti-

*Sub-section 1 (*a*) of section 20 of the Factories Act, R.S.O. ch. 256, is as follows:—

1 (*a*) In every factory, all dangerous parts of mill gearing, machinery, vats, pans, caldrons, reservoirs, wheel-races, flumes, water channels, doors, openings in the floors or walls, bridges, and all other like dangerous structures or places shall be as far as practicable securely guarded.

cised this decision as being at variance with the decision of the Court of Appeal in *Thomas* v. *Quartermain* (1887), 18 Q.B.D. 685, and as not reconcilable with recognised legal principles; and his argument was supported by the view of Mr. Beven, in an article on the maxim, published in 13 Law Magazine, p. 19, in 1888; also in his Law of Negligence, 3rd ed. (Canadian), p. 644; also by Mr. Labatt, at pp. 1512-14 of his book on Master and Servant.

It is to be observed, however, that the decision has never been overruled, and is treated by the following writers as settling the law that the defence of *volenti non fit injuria* is not available where the injury arises from breach of a statutory duty on the part of the employer for the benefit of the workman himself and others: Underhill on Torts, 9th ed. (1912), p. 190; Clerke and Lindsell's Law of Torts, Canadian ed. (1908), pp. 518 and 522 (*h*); Ruegg's Employers' Liability, 8th ed. (1910), pp. 235-6; Smith's Law of Master and Servant, 6th ed. (1906), p. 209; Dawbarn on Employers' Liability, 4th ed. (1911), p. 73; and Pollock's Law of Torts, 7th ed. (1904), p. 505.

The decision has also been followed by the Courts of this country. Citing it, in *Rogers* v. *Hamilton Cotton Co.*, 23 O.R. 425, at p. 435, Mr. Justice Street, in delivering the judgment of a Divisional Court, says: "The principle *volenti non fit injuria* has been held not to apply when the accident has been caused by the defendant's breach of a statutory duty. And, even if applicable, the knowledge of the workman of the existence of the defect has been considered to be merely an element in the question of contributory negligence: *Thomas* v. *Quartermain*, 18 Q.B.D. 685."

It has also been applied in British Columbia, by the Supreme Court, in *Love* v. *New Fairview Corporation* (1904), 10 B.C.R. 330; and by the Supreme Court of Nova Scotia in *Bell* v. *Inverness Coal and R. Co.* (1908), 42 N.S.R. 265.

The holding in *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, adopted in many subsequent cases, that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection, shews the strong judicial tendency to construe and apply such provisions so as effectually to secure the intended protection. See *Sault Ste. Marie Pulp Co.* v. *Meyers* (1902), 33 Can. S.C.R. 23, and *Siven* v. *Temiskaming Mining Co.*, 3 O.W.N. 695.

Lord Shaw of Dunfermline, in *Butler* v. *Fife Coal Co.*, [1912] A.C. 149, at pp. 178-9, said: "The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that,

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consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable." This is a most interesting case, and illustrates the view of the highest Court in the Empire as to the strictness with which employers of labour should be held to the observance of duties cast upon them by statute for the protection of their employees.

The judgment should be dismissing the appeal with costs.

Appeal dismissed.

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April 29.

HOULE v. ASBESTOS AND ASBESTIC CO.

Quebec Court of Review, Tellier, DeLorimier and Dunlop, JJ.
April 29, 1912.

1. DAMAGES (§ III—14—190)—WORKMEN'S COMPENSATION ACT (QUE.)—MAXIMUM AMOUNT—ACCIDENT CAUSED BY INEXCUSABLE FAULT OF EMPLOYER.

Under the Workmen's Compensation Act of Quebec an employer is responsible for a larger indemnity than the maximum of $2,000 when the accident is due to inexcusable fault, whether such inexcusable fault is that of the employer personally or that of his foremen or other representatives.

2. STATUTES (§ II A—98)—CONSTRUCTION—GIVING EFFECT TO ENTIRE STATUTE—C.C. 1053-1054.

Statutes are to be construed in accordance with the ordinary rules of the common law and are not presumed to make any alteration therefrom further than what the statute itself expressly declares: hence the Workmen's Compensation Act must be read together with C.C. 1053 and 1054, which lay down the general rules as to responsibility.

3. MASTER AND SERVANT (§ II E 5—256)—LIABILITY OF MASTER TO SERVANT—NEGLIGENCE OF FOREMAN.

It is inexcusable fault, involving the employer's liability, for a foreman to do a direct act of disobedience to the well-known rules of the establishment (*e.g.*, giving orders to a workman to enter a "cyclone" stone crushing machine without previously removing the transmission belt therefrom, and later putting the machine in motion without ascertaining whether such workman had left it).

Statement

APPEAL from a judgment rendered by the Superior Court for the district of St. Francis, Hutchinson, J., on January 13th, 1912, maintaining the action of the plaintiff in the sum of $2,085.68 for damages suffered by the death of her husband.

The defendant appealed to have the judgment reduced to $1,472.80, amount of its tender. The plaintiff appealed for a larger condemnation. The judgment was confirmed.

N. Garceau, for plaintiff, respondent, and cross-appellant.

J. P. Wells, for defendant, appellant, and cross-respondent.

DeLorimier, J.

DELORIMIER, J.:—This case is inscribed in review from the judgment rendered at Sherbrooke, Hutchinson, J., on the 13th

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of January, 1912, which condemned the defendant to pay plaintiff *es qual.* $2,805.68, under the Workmen's Compensation Act.

Plaintiff *es qual., par reprise d'instance*, inscribes in review on the ground that the amount granted is insufficient, and defendant also inscribes in review on the ground that defendant's confession of judgment should be maintained.

The original action was instituted by Dame Rose Anna Houle, and sets forth the following allegations: That Dame Rose Anna Houle was legitimately married to Oscar St. Louis, now deceased, on the 13th of May, 1902; that there was born issue of her said marriage three children presently living, and that the said plaintiff *es qual.* expects to give birth to a further child of the said marriage in the course of four months; that she was appointed tutrix to her said minor children and curatrix to her child yet to be born; that on the 18th of April, 1911, the said late Oscar St. Louis was working in the employ of the company defendant as a carpenter, and for several months previous thereto; that, on the said date, the said Oscar St. Louis received from his foreman, Joseph Boissé, orders to make certain repairs to a machine called a cyclone, used for the purpose of crushing stone and asbestos; that in obedience to said order the said Oscar St. Louis commenced to do the work required of him by his foreman, employed by the company defendant; that the said late Oscar St. Louis had hardly time to commence the work when another foreman of the defendant, Arthur Paradis, gave the order to start the machine; that the said Arthur Paradis knew at the time the dangerous position occupied by the said late Oscar St. Louis, but took no trouble to ascertain if all the precaution necessary was taken in order to prevent the movement of the said cyclone in which the said late Oscar St. Louis was working; that the order given to start the machine was executed, the said cyclone put in motion, and the said late Oscar St. Louis was immediately crushed to death; that the said accident was due to the fault and gross and inexcusable negligence of the defendant and its employees in charge; that the said Oscar St. Louis did not understand the working of the machine in which he was working, nor the mode of the transmission of the power of the said machines, and that to the knowledge of the foreman of the said company, who gave him the order to make the repairs required; that, it was the duty of the foremen, Boissé and Paradis, to see that all the precautions necessary were taken in order to safeguard the life of the said Oscar St. Louis, but especially Boissé should have taken the said precautions when he ordered St. Louis to do the dangerous work in a place and under conditions with which the said St. Louis was not familiar, and the said Paradis should have taken precautions before putting the said machine in motion. That the said Oscar St. Louis had good ground for believing that all the necessary precautions had been

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taken in order that the said cyclone should not be put in motion, inasmuch as the foreman Boissé had worked at the same place, and in the same machine, during the half hour immediately preceding; that the death of the said late Oscar St. Louis was consequently due entirely to the gross, culpable fault and negligence of the defendant and its employees and those in charge; that the said late Oscar St. Louis was only 31 years of age, and had enjoyed excellent health and was earning a good salary; that the damages caused by his death to the plaintiff *es qual.*, and her children are beyond calculation; that the plaintiff *es qual.* has the right under the above circumstances to claim for herself and her children born, and to be born, an indemnity more considerable than that fixed by sec. 3 of the law 9 Edw. VII. ch. 66, concerning the accident of workmen; that the plaintiff *es qual.* has the right to sue the company defendant for the sum of $10,000 as indemnity for the death of her husband, payable in the following proportion, namely, $6,000 to herself personally, and $4,000 to her children as well as those born and to be born and for an additional sum of $25 for funeral expenses and plaintiff *es qual.* prays that defendant be condemned accordingly with costs.

The defendant's plea admits the employment and the fact of the accident, and that the late Oscar St. Louis died in consequence of the accident, but denies the other allegations of the declaration.

The defendant offered a confession of judgment for $1,472.80, being four times the yearly wages of the deceased, plus $25. This confession of judgment was refused and the parties went to proof.

The original plaintiff *es qual.*, Dame Rose Anna Houle, died before the case came to trial, and also the child that was to be born at the time of the death of the late Oscar St. Louis, and the present plaintiff *es qual.*, Exilia St. Louis, has been authorized to continue the suit in his quality of tutor to the minor children to whom he has been appointed, issue of the marriage of the late Oscar St. Louis and the said Dame Rose Anna Houle.

The Court below held that the defendant was liable for $1,720.68 plus $25, making $1,805.68, and to this was added an award of $1,000 for inexcusable negligence, making a total of $2,805.68.

The facts relating to the accident are correctly stated in the judgment under review as follows:—

The evidence shews that Joseph Boissé was the foreman of repairs employed by the company defendant, and had under him two other foremen, namely, Emile Paradis and Arthur Paradis. This foreman, Boissé, on the 18th of April, 1911, had been working between twelve and one o'clock on the day at cyclone No. 1, and he had given orders to the new man working under him to take off the belt driving that machine. After he had worked

there for half an hour he went to cyclone No. 4, where two men, named Joseph Morisette and Joseph Legendre, were working making repairs to this machine (cyclone No. 4), as he admits, from five to seven minutes; and at this time the belt driving this cyclone was on, and was left on. Later, on going to dinner, Boissé met the witness Morel and Oscar St. Louis, and told them to get certain materials from the storehouse and take them to cyclone No. 4, and complete the repairs that had been begun by Morisette and Legendre. They did so, and placed the materials that they carried on a ladder, which was against the cyclone, and then entered the cyclone. Immediately after, Arthur Paradis, who had received instructions from the foreman, Emile Paradis, to start the machinery at one o'clock, and at that hour gave the signal, and the machinery started. The belt of cyclone No. 4 had not been removed. The cyclone started, struck Morel, but knocked him outside, and St. Louis, who was inside the cyclone, was crushed in a moment to death.

Considering that it was the invariable rule and instructions were given by the superintendent, as admitted by Boissé, to always throw off the belt, when any repairs were required to be made on a cyclone, Boissé, the foreman of repairs, and under whom the others acted, worked in this cyclone for some minutes between twelve and one o'clock of this day, noticed what these two previous workmen had done; and, further, must have noticed, or should have noticed, that the belt was on. A little later he orders Morel and St. Louis to continue these repairs at this cyclone, and they, knowing that others had worked on this cyclone, and that the foreman Boissé had been also there immediately before their going, and that the rule was always to throw off the belt when making repairs on a cyclone, and, as they say, did not notice that the belt was on. Arthur Paradis, who gave the signal, was only about six feet distant from the cyclone, but knowing that the rule was always to throw off the belt when making repairs to a cyclone, did not notice, or did not take the trouble to notice, that the belt was on, and gave the signal to start. He says that the materials that Morel and St. Louis had brought from the storehouse and placed on the ladder against the cyclone prevented him from seeing the belt, but he admits that, by moving his head one foot to one side he could have seen it. This cyclone was a most dangerous machine; it was in the form of a barrel standing on end with a shaft down the centre, to which were attached arms or beaters. This shaft revolved rapidly, and with great force. The stone mixed with the asbestos was fed into this machine from the top. The cyclone opened with hinges to admit of a man entering to make repairs to the arms, and the motive power was transmitted to the cyclone by the belt in question. There was no possible escape to a man inside after the machine was put in motion.

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Considering that there was inexcusable fault on the part of the foremen, Boissé and Paradis, but largely the fault was with Boissé. It was his duty to see that his men observed the rules which were necessary to protect them against accidents arising from the running and handling of these dangerous machines; but he himself disregarded the rule that was absolutely necessary to protect the lives of his men, and knowing that this belt was on the machine, he ordered St. Louis into this cyclone to make repairs. Paradis was also to blame. It was certainly his duty before giving the signal to start the machines to see for a certainty that the belt in question was off, especially as he admits he had noticed that there was a man within the cyclone commencing to work.

Considering that there was wilful indifference and neglect shewn on the part of both Paradis and Boissé in regard to the safety of their men, and that the company defendant must be held responsible for their fault.

Considering that the evidence shews that the fault of these foremen was inexcusable. Doth, therefore, condemn the company defendant to pay to plaintiff, in his said quality of tutor to the said minor children, the sum of $2,805.68, as being four times the average yearly wages of the deceased at the time of the accident; $25 as funeral expenses and further, the sum of $1,000 as the direct result of the inexcusable fault of the company defendant and its employees, the whole with costs.

Defendant offers for the consideration of the Court of Review three points:—

1st. The plaintiff's attempt to prove inexcusable negligence on the part of persons under defendant's control, is illegal and cannot bind the defendant;

2nd. That there was no inexcusable negligence;

3rd. That the confession of judgment is sufficient.

We may add under this point that plaintiff *es qual.* complains that the amount granted by the judgment is insufficient.

1st. Defendant's first contention is that the evidence of inexcusable fault on the part of persons under defendant's control is illegal. Plaintiff *es qual.* adduced evidence of negligence on the part of defendant's employees. To this evidence defendant made objection, but, after hearing their argument upon the point, the objection was dismissed.

Now defendant's contention is that such evidence of inexcusable negligence cannot bind defendant and is illegal. He quotes art. 7325 of the Revised Statutes of Quebec, which reads as follows:—

"No compensation shall be granted if the accident was brought about intentionally by the person injured.

"The Court may reduce the compensation if the accident

was due to the inexcusable fault of the workman, or increase it if it is due to the inexcusable fault of the employer."

He argues that, if there was any inexcusable negligence it was on the part of the foremen Boissé and A. Paradis, and on the part of the deceased himself, and he alleges:—

There is, therefore, no proof of inexcusable negligence on the part of the employer, but any negligence that is proved is the negligence of people under its control. Defendant respectfully submits that under the facts established by this evidence it is not liable for inexcusable fault under the Act.

Art. 1053 of our Civil Code makes a person responsible for the damage caused by his fault. Art. 1054 enacts that he is responsible, not only for the damage caused by his own fault, but also for damage caused by the fault of persons under his control. Without the second enactment a person would only be held responsible for the damage caused by his own fault.

The Workmen's Compensation Act is a special statute, and as such must be strictly interpreted. The terms of its enactment cannot be enlarged to include more than is actually stated by them. The theory of this Act is that in every case of accident the employer is liable to a certain limited amount. There is no question whatever of fault. The workman is entitled to compensation in every case. It is only in cases where this limit is exceeded that the question of fault arises at all, and the only case, as stated by the Act, in which the amount may be increased, is where the accident is due to the inexcusable fault of the employer.

As we said, the judgment itself admits that the employer did everything possible, gave all necessary instructions, and it is proved that its invariable rule was that the belt must be removed before any one went into the cyclone. There is, therefore, no inexcusable fault on its part.

Dean Walton, in his commentary on the Workmen's Compensation Act at page 112 says as follows: "The corresponding article of the French law (art. 20) says the employer or of those whom he has substituted for himself in the management—*du patron ou de ceux qu'il s'est substitués dans la direction.*—In the original draft of the French law the expression had been, *le patron ou ses préposés.* This would have made the employer liable to pay increased compensation when the accident had happened by the inexcusable fault of an ordinary fellow-workman of the victim. During the debates it was successfully urged that this was to impose upon the employer an unreasonable burden, and in place of the word *préposés* the rather curious phrase given above was substituted. It is evidently meant to exclude a mere workman, but to cover any person to whom the employer has delegated a duty of charge or oversight (someone whom the employer substitutes in his place). It appears to comprise not

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only persons in general control of the works, but those who have control merely of the operation during the performance of which the accident happens. Thus the Court of Cassation has held that the engineer and conductor of a train were persons whom the employer has substituted for himself in the sense intended. They had charge of the train, and while they were conducting it the employer could not exercise any control.

It is possible, as is suggested by an annotator of that case, that this decision goes too far, but it is not necessary for us to consider the question; because in our Act these words are deliberately omitted. It seems to me clear that our Legislature, having the French Act before them, by omitting these words clearly shewed their intention to limit the liability of the employer for an increased compensation to the case of his personal inexcusable fault.

Even the words of the French Act do not go so far as to say the employer is responsible for the inexcusable negligence of those under his control, or his *préposés*. It says, '*ceux qu'il s'est substitués dans la direction.*' The present judgment, therefore, would make our Act more severe than the French Act.

There is no enactment of our law and there is nothing under our jurisprudence which will warrant the words, 'the employer,' mentioned in art. 7325, being extended or enlarged so as to include within their meaning the persons under its control. This Act does not go any further than art. 1053 does, and it does not make the defendant responsible any further than art. 1053 would. It makes no provision for such a law as contained in art. 1054, and there being no article of the common law which may apply to the present case, the defendant contends the evidence of negligence other than that of the employer cannot bind the defendant for inexcusable fault."

I have given much consideration to this first and most important point submitted by defendant, as to the true construction which this Court is called upon to give to the terms of sec. 7325 of the Revised Statutes of the Province of Quebec, and I must say that I am unable to admit the conclusions defendant contends for. The terms or the said section are as follows:—

"7325.—No compensation shall be granted if the accident was brought about intentionally by the person injured. The Court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if it was due to the inexcusable fault of the employer."

Defendant's contention evidently is that these terms "inexcusable fault" of the employer must be so construed as to shew that the law intended to authorize the Court to increase the compensation, only when the accident was due to the "personal fault" of the employer.

As a matter of fact, the above quoted law mentions only the term "inexcusable fault," and not the "personal fault" of the

employer. This, in our opinion, is a very important distinction, the two terms are very distinct, and by assuming one for the other, the consequences which may follow may be absolutely different, as we shall see hereinafter.

The whole question is one of interpretation of a statute and we have therefore to follow and apply the ordinary rules of interpretation of statutes.

Now it is one of the well-known principles and rules governing the interpretation of statutes, that statutes are to be construed in accordance with the ordinary rules of the common law, and that they are not presumed to make any alteration in the common law further than the statute itself does expressly declare. On this point we quote the following authorities:—

"Statutes are not presumed to make any alteration to the common law further or otherwise than the Act does expressly declare": *Arthur* v. *Bokenham*, 11 Mod. 148, Trevor, C.J., at p. 150.

"It is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law": *The Queen* v. *Morris*, L.R. 1 C.C. 90, p. 95; 36 L.J.M.C. 84, p. 87, Byles, J.

"When an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law": *Rex* v. *Salisbury* (Bishop), [1901] 1 K.B. 573, 577, 70 L.J.K.B. 423, affirmed [1901] 2 K.B. 225, p. 427, Wills, J.

"A general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter": *Ibid.*, p. 579, L.J.P. 429, Channel, J.; Cardinal Rules of Legal Interpretation, Beal, 2nd ed., pp. 336, 337.

"To alter any clearly established principle of law, a distinct and positive legislative enactment is necessary": Craies on Statutes, 1906, pp. 95, 116, 278, 287.

Now, applying these rules to the interpretation of sec. 7325 of Revised Statutes of Quebec, I consider that defendant's contention that the word "inexcusable" fault, therein mentioned, is equivalent to the term "personal" fault of the employer is not well founded.

In my opinion there is a wide difference between the two terms. If the terms personal fault of the employer had been enacted, this, as defendant now contends, might have modified the common law principles on responsibility, so that no increased compensation could then have been granted except when the accident would have been due to a personal act, to a personal fault of the employer himself. But the terms "inexcusable fault of the employer," which are those contained in the law, are

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quite different, for these terms are to be construed, under the principles of the common law, as including, not only the employer's personal fault, but also that of such other persons, acting within the scope of their authority, whom such employer may have substituted, for his own purposes, in the performance of his work.

Defendant's contention is that the statute having simply enacted that the right to an increased compensation when the accident is due to the inexcusable fault of the employer, without adding "or of his substitutes or persons under his control," such a right must be limited to the personal inexcusable fault of the employer himself. He argues that, under the common law, one is responsible only for his personal fault, and that a special law is necessary to render one responsible for the inexcusable fault of another (pour le fait d'autrui). He refers to art. 1053 C.C. as regulating the common law personal responsibility, and to art. 1054 C.C. as regulating the responsibility resulting for the fault of other persons under one's control.

I do not consider this contention well founded. It is true that art. 1053 C.C. is declaratory of the general principles of the common law regulating personal responsibility, but what is equally true is that, even if art. 1054 C.C. was not enacted, one might be held responsible, under the general principles of the common law, not only for his personal act or fault, but also for the fault of such other persons he might have substituted for his own purposes in the performance of his work, provided always that such fault, so committed by such substituted persons, was committed within the scope of the authority of such substituted persons, and in the actual performance of the employer's undertaking. Art. 1054 C.C. contains much broader liabilities on the part of the employer than those which might result from art. 1053. Under art. 1054 the employer is made liable generally for damages caused by his servants and workmen in the performance of the work for which they are employed. Under the ordinary common law principles of responsibility an employer could not be made liable for damages caused by the personal act simply *à l'occasion de son travail*, whilst under the dispositions of art. 1054 an employer might be held to be responsible for such act, according to circumstances.

The principles of both the French and English common law are the same, and to the effect that an employer or master is responsible, not only for his own personal inexcusable fault, but also for that of such other person he may substitute directly for his own purposes, provided the latter's fault is committed in the actual performance of his work and within the scope of his authority.

"Le quasi-délit est le fait par lequel une personne, sans malignité, mais par une imprudence qui n'est pas excusable, cause quelque tort à une autre.

"Non seulement la personne qui a commis le quasi-délit est obligée à la réparation du tort qu'elle a causé, celles qui ont sous leur puissance cette personne, sont tenues de cette obligation.

"On rend aussi les maitres responsables du tort causé par les délits ou quasi-délits de leurs ouvriers qu'ils emploient à leur service. Ils le sont lorsque les quasi-délits sont commis par les ouvriers, dans l'exercice de leur fonctions auxquelles ils sont employés par leurs maitres, quoique en l'absence de leurs maitres; ce qui a été établi pour rendre les maitres attentifs à ne se servir que de bons domestiques": Pothier, Oblig. No. 116, 121.

"Le droit moderne part de cette idée rationelle que la conséquence normale de tout délit civil est une dette d'indemnité, et que, par suite, il doit y avoir indemnité dans tous les cas où sera constaté un dommage causé par un fait illicite.

"La faute est toute prouvée parce qu'elle consiste précisement dans l'inexécution d'une obligation qui subsiste.

"La responsabilité du patron repose sur la présomption de faute d'inexécution du contrat d'engagement en vertu duquel le patron est coupable d'une faute s'il choisit des substituts ou préposés qui se rendent coupables de faute envers l'ouvrier": 8 Guillouard, sur art. 1382, C. Nap. p. 533 *et seq.* Nos. 424, 433.

"La faute contractuelle comme la faute délictuelle créent également l'obligation de réparer par une indemnité le dommage causé": Fuzier-Herman Vo. Responsabilité, vol. 32, p. 865.

"On est responsable du dommage qui est causé par le fait des personnes dont on doit répondre. Le principe de cette responsabilité se fonde sur une présomption de faute et de négligence de la part des personnes auxquelles elle est imposée. A ce point de vue, et elle ne saurait être considerée autrement, elle est, tout aussi bien que l'autre, encourue pour un fait ou une faute personnelle. Elle est ainsi, dans son principe même, conforme à la théorie de la personalité des fautes": 5 Larombière, sur 1384, C.N. p. 738.

"Cet article 1054 du Code Civil est la conséquence du précédent (1054). En effet, toute personne est responsable du dommage causé par sa faute, or il y a certainement faute chez celui qui a le controle d'une personne ou d'une chose dans le fait de laisser cette personne ou cette chose commettre un délit, un quasi-délit": Langelier, sur art. 1054 C.C.

Under the English common law the principles are the same. Under the common law a person guilty of negligence is liable to make compensation for pecuniary damages resulting therefrom, if such damage is traceable to such negligence, and an employer is responsible for the negligence of his servant, while performing his work, and acting within the scope of his authority. Common law imposes upon every one the duty to govern his acts in such a manner that he shall occasion no injury to others. In the words of Bowen, L.J., in *Thomas* v. *Quartermaine*, 18

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Q.B.D. 685, 691: "For his own personal negligence a master was always liable and still is liable, at common law, both to his own workmen and to the general public, who come upon his premises at his invitation on business in which he is concerned."

It is an amplification rather than an extension of the principle that where a person, for his own purposes, brings into existence undertakings and industries, which if not controlled or governed with care, may be the means of causing injury to others, the legal duty arises to exercise such care. The breach of this common law duty so to use and govern one's own actions and undertaking, as not to cause injury to others, is in law called negligence: The Employers' Liability Act, Ruegg and Redden, 8th ed., pp. 2 and 3.

It is a well-known principle of the common law that an employer is responsible for the inexcusable fault of the person he substitutes in the execution of the enterprise or work. Corporations are liable for the torts of their servants done within the scope of their employment as any private employer: Beven on Negligence, vol. 1, 3rd ed., pp. 5, 18, 281.

It is a well-known maxim that he who does an act through another is deemed in law to do it himself: Broom's Legal Maxims, 7th ed., p. 623.

When the relation of master and servant exists, the principle upon which the master is in general liable to answer for accident resulting from the negligence or unskilfulness of the servant is that the act of the servant is, in truth, his own act: *Ibid.*, p. 645, 647; Foran on Workmen's Compensation Acts, p. 98 *et seq.*

The master is liable for the wrong and negligence of the servant, just as much when it has been done contrary to his orders and against his intent, as he is when he has co-operated in or known the wrong: *Strickney* v. *Munro*, 44 Me. 194, 204, 14 B. C.C. on art. 1731, note p. 199.

If the enactment in question was to be construed as limiting the liability of the employer for the increased compensation, to his personal, inexcusable fault only, it would practically exempt corporations or joint stock companies, in almost every case of inexcusable fault, because as a matter of fact they have necessarily to act through the medium of substitutes when carrying on their operations: Angell and Ames on Corp. Introd. p. 7; Beven on Negligence, vol. 1, p. 281 and notes; Broom's Legal Maxims, 7th ed., p. 648.

By art. 7334 Rev. Statutes (Que.) it is enacted: "The person injured or his representatives shall continue to have, in addition to the course given by this sub-section, the right to claim compensation under the common law from the persons responsible for the accident," other than the employer, "his servants or agents": 9 Edw. VII. ch. 66, sec. 14.

It will thus be seen that if art. 7325 R.S.Q. was to be construed so as to deprive the representative of a deceased workman for an increased compensation save when the cause of the accident would be due to the personal inexcusable fault of the employer himself, that under sec. 7334 above quoted such representative would also be deprived of all other recourse, even at common law, for such compensation, not only against such employer himself, but also against any persons in his employ as servant or agents, although the latter might have caused such accident by their inexcusable fault.

Surely this cannot be the sound interpretation of the dispositions of the Workmen's Compensation Act.

I presume there could be no doubt possible that, if the terms inexcusable fault of the employer were to be found in a contract of service, that such terms would be construed by the civil Courts as meaning the responsibility not only of the employer himself, for his own personal fault, but also as including the responsibility of the employer for the inexcusable fault of those persons he might have substituted for his own purposes in the performance of his undertaking.

It seems now to be a settled principle that the Workmen's Compensation Act established a "common law contract of service."

"The sound interpretation of the Workmen's Compensation Act establishes a 'common law contract of service' between the employer and the workman, and the common law obligation rests on the employer to make compensation for injuries happening to the workman in the course of the work": Ruegg and Redden, p. 2 *et seq.*

For these reasons, construing the terms of sec. 7325, R.S.Q. according to the above-mentioned rules of common law responsibility, I have come to the conclusion that the terms "inexcusable fault of the employer" are to be interpreted as meaning the inexcusable fault of the employer himself or of such other persons he may have substituted for his own purposes, in the performance of the work, provided such persons were acting within the scope of their authority and in the actual performance of the employer's work.

2nd. The second point presented by defendant is that there was no inexcusable fault on the part of defendant's foremen.

I consider that the evidence conclusively shews that there was culpable and inexcusable fault on the part of defendant's foremen. Their act was not one committed in a moment of distraction or forgetfulness, it was a direct act of disobedience to the well-known rules of the establishment. The history of the accident is well set forth in the judgment of the Court below as above stated, and it would be useless to repeat it.

On the general principles as to what is considered in law an

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inexcusable fault, I refer to the following authorities: Dalloz, Jurisp. 1897 à 1907, Travail, arts. 1248 *et seq.*; Ruegg and Redden, p. 6 *et seq.*; Foran, p. 94 *et seq.*

Under these circumstances I consider that defendant's second point is not founded, neither in fact nor in law.

3rd. The third and last point submitted for the consideration of this Court is as to the amount awarded by the judgment.

On this point we may consider the merit of both inscriptions in review, as well that of the defendant as that of the plaintiff *es qual., par rep. d'instance.* On defendant's inscription it is contended that there is error and that defendant's confession of judgment ought to have been maintained for the amount therein mentioned. It is in evidence that during the twelve months previous to the 18th of April, 1911, date of such accident, said Oscar St. Louis was entitled to an average yearly wage of $450.12½, and that plaintiff *es qualité, par reprise d'instance,* was therefore entitled to a compensation, under art. 7323 R.S.Q. of $1,800.50, plus $25 for funeral expenses, being a total of $1,825.50. On this first point defendant's confession of judgment being only for the amount of $1,472.80, is therefore insufficient.

As to the amount granted by the judgment under review of $1,000 for an increased compensation under art. 7325 R.S.Q., I consider that, under the evidence and circumstances of the case, this amount was properly and legally so granted by said judgment.

I am, therefore, of opinion that defendant's inscription in review is unfounded, and has to be dismissed with costs against defendant.

On the merit of the inscription of plaintiff *es qualité, par reprise d'instance,* I consider, as I have just stated, that under the evidence and circumstances of the case, the amount of $1,000 granted by the judgment under review, as an increased compensation, is just and sufficient.

As to the amount granted as compensation based on the average yearly wages of said Oscar St. Louis, on the 18th of April, 1911, time and date of the accident, under art. 7323 R.S.Q., I consider that it is substantially correct, save a small difference in the calculation which has to be slightly modified. The judgment under review has granted $2,805.68, and this amount has to be increased to that of $2,825.50.

Deceased has been paid 34 weeks, from 18th April, 1910, at $8.30	$282 65
Also 5 weeks before the 18th April, 1911	59 00
Also 5½ days	2 62½
He was idle 12 weeks at $8.30	99 60
Also 4½ days	6 75
	$450 12½

Plaintiff *es qual., par reprise d'instance*, is entitled to four times this amount	$1,800 50
And for funeral expenses	25 00
	$1,825 50
Adding the amount of increased compensation	1,000 00
Making a grand total of	$2,825 50

I am of opinion that this slight modification of said judgment is not, under the circumstances and seeing the contentions of plaintiff *es qualité, par reprise d'instance*, sufficient to entitle said plaintiff to costs of review against defendant.

I consider that under the circumstances said judgment has to be modified so as to grant plaintiff *es qualité, par reprise d'instance*, the sum of $2,825.50, with interest on $1,825.50 from the 28th day of July, 1911, and on $1,000 from the 13th day of January, 1912, and that on such plaintiff's inscription each party ought to pay his own costs in review.

Defendant's appeal dismissed with costs.

Plaintiffs' appeal dismissed without costs and judgment reformed as to amount.

COUNTY OF WENTWORTH v. TOWNSHIP OF WEST FLAMBOROUGH.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 15, 1912.

1. HIGHWAYS (§ V B—255)—DEVIATION OF ROAD—TOWNSHIP BOUNDARY LINE—NEW ROAD SUBSTITUTED—MUNICIPAL ACT (ONT.), 1903, SEC. 622.

Where it was impracticable because of physical obstacles therein to open a part of a road allowance between two townships, and, to take its place, another road running parallel thereto, but wholly within one township, was opened through private lands and dedicated by their owner to public use and his dedication was accepted by the council of the county in which the townships were located, and, in lieu thereof, the old unopened part of the boundary line allowance was conveyed to him by the council, and the public for more than fifty years used the new road to reach points which would have been reached over the original allowance if it had been opened, such road was, and is, a deviation of a town line road within the meaning of sec. 622 of the Ontario Municipal Act, 1903, giving jurisdiction to adjoining townships over a road lying wholly or partly between them, "although the road may so deviate as in some places to be wholly or in part within either of them," notwithstanding the fact that the new road did not actually terminate in the old line, if by means of some other public road, the old original line might be conveniently reached and its main purpose—a way into a certain city—accomplished.

[*Township of Fitzroy* v. *County of Carleton*, 9 O.L.R. 686, distinguished.]

Statement

APPEAL by the defendants from the judgment of a Divisional Court, *County of Wentworth* v. *Township of West Flamborough*,

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Argument

23 O.L.R. 583, holding a certain road to be a deviation of a town line road, within the meaning of sec. 622, Ontario Municipal Act, 1903.

The appeal was dismissed with costs.

G. Lynch-Staunton, K.C., for the defendants, argued that the judgment of the learned trial Judge should be restored, on the ground that the road in question was not a deviation within the meaning of the Municipal Act. Reference was made to *County of Victoria* v. *County of Peterborough* (1889), Cameron's Sup. Ct. Cas. 608, and the same case in (1888), 15 A.R. 617, especially *per* Osler, J.A., at p. 627.

J. L. Counsell, for the plaintiffs, relied upon the judgment of the Divisional Court and the cases therein referred to. The merits of the case are with the respondents, as the road is admittedly useful to the defendants, and the money in respect of which the claim is made has been properly expended.

Lynch-Staunton, in reply.

GARROW, J.A.

April 15, 1912. GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court reversing the judgment at the trial of Middleton, J., who dismissed the action.

The defendant applied for leave to appeal, and such leave was granted, but confined to one point, namely, whether the road in question was and is a deviation road. See 2 O.W.N. 1223, and note at p. 592 of the report in 23 O.L.R. [*Wentworth* v. *West Flamborough*, 23 O.L.R. 583.]

The defendants' objections to an affirmative answer to this question seem to be: (1) as to its origin, which it is said was the Carroll plan; and (2) that the road does not return to the line of the original boundary line road allowance.

These objections are not unlike those considered by this Court in *Township of Fitzroy* v. *County of Carleton* (1905), 9 O.L.R. 686. There is evidence here, slight it is true, that before the registration of the Carroll plan the travelling public had used a road in the nature of a trespass road upon or near the line of the road afterwards laid out upon that plan, just as in the *Fitzroy* case a trespass road had preceded the formal action of the township councils. And in that case, as in this, the deviation did not terminate in the boundary line between the two townships where it originated, but was carried across another township boundary, and thence through that township into the original line. The question there arose under sec. 617, sub-secs. (1) and (2), of the Municipal Act, 3 Edw. VII. ch. 19. Here it arises under sec. 622, which does not contain the condition in sec. 617 that the deviation must be only for the purpose of obtaining a good line of road. But, notwithstanding that difference, the question what, under the statute, is a deviation road, must, under both sections, in my opinion, be practically the same. The statute gives no definition. Its object, no doubt, was, first, to assist the public in obtaining a practical highway, by enabling

serious obstacles in the true line to be passed around; and, second, to make the general provisions as to maintenance, whereby the burden is fairly apportioned, apply. The question is really more one of fact than of law. There must have been a sufficient excuse in the nature of the ground to justify an abandonment of the original line of road. And it must appear that the deviation was intended to serve and is serving the public need, which would have been served if it had been reasonably possible to open and use the original allowance; but its origin and history are of less consequence than the facts existing when the question arises, when the main inquiry must be, is the road now a public highway, and is it in fact serving the public purposes which a road upon the original allowance would have served? Its direction and its nearness to the original line are, of course, not to be disregarded, for a new road at right angles could scarcely be called a deviation within the meaning of the statute. But, while the general trend of the new road should be in the direction of the old, it is not, I think, imperatively necessary that the former should actually terminate in the latter. The statute does not say so, nor, in my opinion, does reason, so long as by means of some other public road the original line may conveniently be reached.

The facts here seem to be sufficient to justify the judgment of the Divisional Court. For over half a century the public, in passing and repassing along the boundary line road so far as it was opened, have used the new road, or deviation, to reach points which would have been reached over the original allowance if it had been opened. And that that was the intention is also, I think, established by the circumstance that the county council, before conveying the original allowance to Carroll, required a report from an engineer, which was furnished, that the new road was sufficient for public use. At that time, township boundary lines were under the jurisdiction of county councils; and, if the new road was not intended to be in substitution for the old, and therefore a deviation within the meaning of the statute, the matter in no way concerned the county council.

I would dismiss the appeal with costs.

MEREDITH, J.A.:—The single question raised upon this appeal is, whether, for the purposes of maintenance and improvement, that part of the public road in question in this action is or is not to be declared part of the town-line lying between the townships of East and West Flamborough; it is not upon the original allowance for that highway; but, for the plaintiffs, it is contended that it is a deviation from it such as is mentioned in the various municipal enactments and in respect of which the duty of maintenance and improvement attaches in the same manner as if it were actually upon such an allowance for such a road.

Meredith, J.A.

In considering such a question, regard must be had to the

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purposes of the legislation involved; and such purposes seem to me to contain the controlling influence in the consideration of this case.

The purpose of the legislation was to provide convenient roads for those to whom the Crown granted lands adjacent to them, as well as for all others who might lawfully use them; and, in such a case as this, the statute-imposed obligation to open, maintain, and improve town-lines, including all such deviations, is, in very plain words, put upon the adjoining townships.

So that it was the duty of the defendants, jointly with the Township of East Flamborough, to open, maintain, and improve the town-line in question; but, by reason of natural obstructions and difficulty in the way of such a work, that has hitherto been quite impracticable; and the law is not unreasonable; it gives power, upon certain conditions, to open a new road, in lieu of that laid down in making the original allowance for roads, and to close it; and it also provides for deviations; the result of all this seems to me to leave the defendants in this predicament: if that part of the road in question has not, for the purpose of maintenance and repair, become part of the town-line, the defendants are, jointly with the other township, under the statute-imposed obligation to open, maintain, and improve it—an alternative which they would no doubt gladly flee from, even though in so doing they ran into that which has been imposed upon them in this action.

I can perceive no good reason why that part of the road in question may not properly be deemed part of the town-line for the purposes of maintenance and improvement: it is co-extensive only with that part of the original allowance which is impassable; if the town-line had to be opened, it was necessary that there should be either as extensive a deviation, or the expenditure of money vastly exceeding the amount required in making such a deviation; and, whether that is essential or not, this deviation leads back again to the original allowance, although its main purpose—a way into the city of Hamilton—is fulfilled before going as far as that. So, too, the main purpose of the original allowance for road, if opened, would be to give a way into that city.

The piece of road in question answers all the purposes of a deviation; and I am unable to perceive anything that materially stands in the way of that view of the case; unless it be that it is now not a deviation, but actually part of the line by reason of the closing of it, where naturally impassable, and the adoption of this piece in lieu of it; an alternative which would not be helpful to the defendants.

The trial Judge seems to me to have taken quite too narrow a view of that which a deviation may be.

I would dismiss the appeal.

Moss, C.J.O.
Maclaren, J.A.
Magee, J.A.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

THE KING v. MONTMINY.

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Quebec King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross, Carroll and Gervais, JJ. June 17, 1912.

1. EVIDENCE (§ IV G—422)—DEPOSITIONS—PRELIMINARY INQUIRY—LEAVE TO USE AS EVIDENCE.

The depositions taken before justices on a preliminary inquiry are not part of the trial proceedings, though in certain circumstances the Court may give leave to have them read as evidence at the trial.

2. TRIAL (§ I—6)—WHEN TRIAL OF DEFENDANT BEGINS.

The actual procedure of trying the defendant commences with the preferring of the bill of indictment.

3. INDICTMENT, INFORMATION AND COMPLAINT (§ IV—70)—ABSENCE OF PROPERLY PROVED COPY OF DEPOSITIONS—SAME CHARGE—GROUND FOR QUASHING.

The absence of a properly proved transcript of the depositions is not a ground for quashing the indictment, provided such indictment sets out the same charge as the one contained in the commitment.

[*R.* v. *Lepine*, 4 Can. Cr. Cas. 145; *R.* v. *Traynor*, 4 Can. Cr. Cas. 410 and *R.* v. *Jodrey*, 9 Can. Cr. Cas. 51, specially referred to.]

4. INDICTMENT, INFORMATION AND COMPLAINT (§ III—65)—JOINDER OF DIFFERENT COUNTS.

The Crown Prosecutor may prefer indictments for as many different offences as he finds disclosed by the depositions, and also for the charge set out in the commitment for trial.

Statement

CROWN case reserved by way of appeal from a conviction upon indictment.

P. Bouffard, K.C., for the Crown.
Gust. Hamel, K.C., for defendant.

Quebec City, June 17, 1912. The unanimous opinion of the Court was delivered by

Cross, J.

CROSS, J.:—The defendant appeals by way of a stated case. Two questions have been reserved by the learned trial Judge.

The first question to be decided is whether the defendant's motion to quash the indictment, on the ground that the charge was not based upon facts disclosed in the depositions taken at the preliminary inquiry, should have been granted or not.

The defendant was committed for trial and the indictment is for the charge on which he was committed. The evidence at the preliminary inquiry was taken in shorthand by a stenographer. The stenographer was sworn before having acted.

Amongst the papers transmitted to the clerk of the trial Court there was a transcript of the depositions of three witnesses signed by the justice and accompanied by the affidavit of the stenographer called for by sec. 683, and there was also a transcript of what purported to be the depositions of three other witnesses as to which there was no affidavit of the stenographer.

The depositions of the three witnesses which were authenticated by the proper affidavit cannot be said to have disclosed the

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facts of the charge laid in the indictment. The material facts are to be found in the papers which purport to be the depositions of the other three witnesses, but, as already stated, the stenographer's affidavit as to those was not transmitted to the clerk of the trial Court before the finding of the indictment.

Is it to be said that the indictment ought to have been quashed because the depositions of three of the witnesses had not been authenticated and put of record?

At the hearing of the appeal it appears to have been thought by counsel that the depositions taken before the justice formed a sort of record and should have been available to be read by the grand jury. That, of course, is a mistake. Depositions taken before justices in the preliminary inquiry are not part of the trial proceedings, though in certain circumstances the Court may give leave to have them read as evidence at the trial. The purpose of the taking of such depositions is to enable the justice to decide whether or not the accused should be put on his trial, and if he "thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment." (Sec. 690.) They do not constitute part of the trial procedure.

The actual procedure of trying the defendant commences with the preferring of the bill of indictment.

The grand jurors are the initiators who "on their oath present" the defendant to be tried. If they do this in disregard of the requirements of the vexatious indictment enactments contained in the Code, their finding or bill should be quashed, but if the accused person does not apply to have the indictment so quashed before commencement of the trial, any right to do so is held to have been lost.

Before the enactment of the vexatious indictment legislation any person could submit a bill to the grand jury, and every person was exposed to be so proceeded against without prior notification of the charge.

That freedom of bringing charges was taken away for a time in respect of charges of any of an enumerated number of offences and afterwards in respect of charges of all indictable offences by what are now sections 870, 871, 872 and 873 of the Code.

The general rule now is that—

> The counsel acting on behalf of the Crown at any Court of criminal jurisdiction may prefer against any person who has been committed for trial at such Court a bill of indictment for the charge on which the accused has been so committed, or for any charge founded on the facts or evidence disclosed in the depositions taken before the Justice: Code, sec. 872.

If counsel, acting on behalf of the Crown, in framing the bill of indictment here in question, had gone outside of the commitment by basing it upon other matter disclosed in the depositions, it is clear that, against a motion to quash, it would be for

him to establish, by reference to the transcript, that the depositions had been regularly taken and authenticated.

But is he bound, against such a motion, to go behind a commitment and support the regularity of the indictment by the production of transcribed depositions, when the indictment does not go outside of the commitment?

The argument for the appellant is in substance that, if the commitment is not based upon depositions regularly taken, there is no valid commitment and that it is consequently necessary to see if the depositions have been taken in conformity with the requirements of the Code.

Stated in that general way, the argument would seem to be supported by the decisions in the *Lepine* and *Traynor* cases, 4 Can. Cr. Cas. 145 and 410.

It might, however, be seriously answered that, having regard to the object of the vexations indictment enactments, and to the fact that, in the form in which they were introduced by 32-33 Vict. (Can.) ch. 29, sec. 28, and 40 Vict. (Can.) ch. 26, secs. 1 and 2, no reference was made to depositions taken in the preliminary inquiry, the preferring of the indictment being merely forbidden "unless the person accused has been "committed to or detained in custody," etc., these decisions proceed upon the erroneous view that the taking of the depositions constitutes a step in the trial of the defendant.

There would seem to be ground for the criticism of one of these decisions, made in *R.* v. *Jodrey*, 9 Can. Cr. Cas., at p. 481, where it was said:—

> I am unable to follow Mr. Justice Würtele in *The King* v. *Traynor*, 4 Can. Cr. Cas. 410, nor do I believe that he correctly states the law if he means that an indictment found by the Grand Jury ought to be quashed because the depositions have been improperly taken.

While the grand jury may take upon themselves to read such depositions, it is not the regular course for them to do so.

> A Grand Jury may make a presentment of their own knowledge, and, in considering a preferred indictment, may take into account any outside knowledge they may have: Bowen-Rowlands on Criminal Proceedings on Indictment and Information, 2nd ed. 1910, p. 100, rule 104.

For the decision of the present case, however, it is unnecessary to express an opinion as to whether the cases of *Lepine* [*R.* v. *Lepine*, 4 Can. Cr. Cas. 145] and *Traynor* [*R.* v. *Traynor*, 4 Can. Cr. Cas. 410] were rightly decided or not, and this for reasons which I will now state.

It appears to me that we should not lose sight of the distinction between the "evidence" and the "transcript" of the evidence taken by the justice in a case in which the evidence has been taken in shorthand. In this case the stenographer was sworn at the outset.

The real record of the evidence is what he took down in shorthand as it was uttered by the witnesses. As pointed out

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in *The King* v. *Bond*, 19 Can. Cr. Cas. 96: "If the depositions are taken in Chinese characters, they are none the less depositions."

It is to be assumed that the magistrate did his duty. The presumption *omnia rite* applies to the acts of justices other than convictions. Having heard the witnesses, it was for the magistrate to decide whether to commit or not. He did decide to commit, after having had the defendant's consent to dispense with the reading of the testimony.

It follows that, the evidence having been regularly taken, the subsequent acts of extending it in ordinary handwriting and transmitting it to the clerk of the trial Court "as soon as may be after the committal of the accused" (sec. 695) were mere matters of directory procedure, the neglect of which could not necessitate the quashing of the bill of indictment, though, as already stated, if the prosecutor, in framing the indictment, had gone outside of the committal, the trial Court might have considered it right to quash the indictment if an intelligible or legible transcript of the evidence were not forthcoming.

In accordance with this view, I find the following expression of opinion:—

> The absence of statutory formalities in the transcript of the evidence taken at the preliminary examination constitutes no objection to an indictment based on the transcript, where it appears that it was the identical transcript of the examination: Cyc. "Criminal Law," vol. 12, p. 320.

In a note, 12 Cyc. 320, a decision is cited to the effect that "an order of commitment being made after examination, the transcription of the notes of the shorthand reporter is not essential to the jurisdiction to proceed by information"—meaning indictment under our system: *People* v. *Riley*, 65 Cal. 107, 3 Pac. 413.

In the case before us, the charge set out in the indictment is the same as is set out in the commitment, and the depositions were not resorted to to find or frame the charge. The appellant cannot say that he was not charged before a magistrate. Neither can he say that he was not committed. The vexatious indictment law has not been infringed. The terms of sec. 872 have been complied with.

I, therefore, conclude that the defendant's objection, based upon the absence of a properly proved transcript of the depositions, is not well-founded.

The other ground of appeal is that the defendant was tried and acquitted upon another indictment for an offence, the matter of which was said to have been disclosed by the depositions taken by the magistrate. This other indictment was returned by the grand jury at the same time as the one upon which the defendant was convicted, but the trial of the latter took place after the acquittal on the other.

The argument for the appellant is that, inasmuch as the disjunctive "or" is made use of in sec. 872, the prosecuting counsel could not indict both for the charge set out in the committal and for another charge founded on matter disclosed in the depositions, and that, having gone to trial on one charge, he could not put the appellant in jeopardy on the other.

I consider it clear that the prosecutor was not so restricted but could prefer indictments for as many different offences as he might find disclosed by the depositions, and also an indictment for the charge set out in the committal, and that this ground of appeal is also not well founded.

My conclusion (speaking in the foregoing observations for myself only) is that the verdict should be affirmed.

Conviction affirmed.

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Ontario High Court, Sutherland, J. May 6, 1912.

1. ANNUITIES (§ I—8)—INCOME AND REVENUE—APPORTIONMENT BETWEEN CAPITAL AND INCOME.

Where a testator gave all his estate, real and personal to his executors in trust, and directed them to pay the income therefrom, to his widow and children, until the death or marriage of the widow, and, upon the happening of either of those events, to divide the estate and give to each child absolutely an equal share thereof, and his executors purchased a release of the equity of redemption of certain lands mortgaged to their testator in his lifetime, and subsequently the mortgagors were, in an action brought by them for that purpose, permitted to redeem the property upon the payment, with interest, of the full amount secured by the mortgage and of the full amount paid by the executors for the release of the equity of redemption, together with all proper allowances for taxes and for other necessary expenditures, the moneys received by the executors for the redemption of the mortgaged lands are to be charged with the amounts advanced from time to time by the executors with five per cent. on the balances from time to time due, with annual rests, and the balance of the redemption money then remaining is to be apportioned between the capital and income of the testator's estate by ascertaining the sum which put out at interest at the date of the testator's death and accumulating with compound interest with yearly rests, would, with the accumulations of interest, have produced, on the day of receipt, the amount actually received in payment of the redemption, the sum so ascertained to be treated as capital and the residue left after deducting such sum from the amount received for the redemption to be treated as income.

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MOTION by the plaintiffs for judgment on the pleadings.

The plaintiffs were Mary I. Leadlay and Percy Leadlay, executrix and executor of the will of Edward Leadlay, deceased, Percy Leadlay, in his own right, and Gertrude Beemer and Annie Gertrude Parry, beneficiaries under the will; and the defendants were the other beneficiaries under the will.

The plaintiffs asked for a declaration as to what portion of the moneys received by the executors was principal or capital

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and what portion was income or revenue, and as to the effect of certain agreements.

The statement of claim sets out the material facts which were not in dispute and is as follows:—

STATEMENT OF CLAIM.

1. The said plaintiffs Mary I. Leadlay and Percy Leadlay are the executrix and executor and trustees under the last will and testament of Edward Leadlay, late of Toronto, merchant, deceased, and the said Percy Leadlay and the remaining plaintiffs and the defendants are all the beneficiaries under the said will of the said Edward Leadlay, deceased, who are interested in the matters in question herein.

2. By indenture dated 5th July, 1893, the Saskatchewan Land and Homestead Company, Limited, mortgaged certain lands now situate in the provinces of Alberta and Saskatchewan, comprising some 66,000 acres of land to the said Edward Leadlay, deceased and one Thomas Hook to secure the payment of $100,000 and interest at six and one quarter per cent. per annum.

3. The said Edward Leadlay died on or about 17th September, 1899, and up to the time of his death, no interest or principal had been paid under said mortgage.

4. On the 17th September, 1899, the date of the death of said Edward Leadlay, the amount due on said mortgage for principal and interest was the sum of $148,109.52.

5. After the death of the said Edward Leadlay, the said plaintiffs, Mary I. Leadlay and Percy Leadlay, as executors of the estate of the said Edward Leadlay, deceased, bought out the interest of the said Thomas Hook in said mortgage for the sum of $9,347.00.

6. After the death of the said Edward Leadlay, the said plaintiffs Mary I. Leadlay and Percy Leadlay as said executors and trustees procured a release of the equity of redemption in said mortgaged lands from the said company by paying to or for or on behalf of the said company, the sum of $44,638.00, being the amount of the indebtedness of the said company which had priority over the said mortgage indebtedness by reason of a certain postponement agreement dated 27th November, 1895, and made between the said Edward Leadlay, Thomas Hook, the said Saskatchewan Land and Homestead Company, Limited, and one John T. Moore.

7. Shortly after procuring the said release of the equity of redemption from the said company, and the release of Thomas Hook's said interest, the said plaintiff Mary I. Leadlay and Percy Leadlay as such executors entered into an agreement, dated 3rd November, 1900, with one John T. Moore, whereby the said John T. Moore undertook the sale of the said lands for the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors, the agreement being among other things that after the claim of the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors against or in respect to the said mortgaged lands should be paid in full, the balance to be derived from the sale of said lands should be divided equally between the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors and the said John T. Moore.

8. Subsequently by agreement, dated 13th February, 1902, the said

plaintiffs Mary I. Leadlay and Percy Leadlay as such executors entered into a further agreement with the said John T. Moore, whereby the said agreement of 3rd November, 1900, was varied by providing that in case the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors should receive from the said John T. Moore the sum of $125,000 and interest at four per cent. per annum, in addition to the moneys already received by the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors, the same to be paid in certain yearly instalments, the said John T. Moore should then be entitled to the whole of the surplus of the said lands.

9. The said John T. Moore assigned the said agreements to Annie A. Moore.

10. After obtaining the said agreements of the 3rd November, 1900, and the 13th February, 1902, the said Annie A. Moore and John T. Moore proceeded to obtain purchasers for portions of the said lands and sales were made from time to time and transfers and agreements executed and handed over by the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors to the said John T. Moore as their agent, and the said John T. Moore collected all such purchase moneys and deposits and instalments on behalf of said Mary I. Leadlay and Percy Leadlay as such executors as agent under the terms of the said two agreements, and the said John T. Moore, also opened up an office at Red Deer and got together a livery equipment and made other payments and incurred other expenses advertising and for taxes and in other ways, and also from time to time made payments to the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors on account of the payments due to them under the terms of the said two agreements, but no full or complete accounting was ever made by the said Annie A. Moore or John T. Moore to the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors shewing all moneys received by the said John T. Moore and Annie A. Moore from sales and expended or remaining in the hands of the said John T. Moore and Annie A. Moore.

11. Subsequently in or about June, 1903, the said Saskatchewan Land and Homestead Company, Limited, brought an action at Toronto against the said plaintiffs, Mary I. Leadlay and Percy Leadlay, and the said John T. Moore and Annie A. Moore to have said release of the equity of redemption in said lands and said two agreements set aside and amongst other things for the redemption of said mortgaged premises; and the said action came on for trial in or about June, 1905, and was dismissed at the trial and an appeal was brought first to the Divisional Court and then to the Court of Appeal which gave judgment on the 23rd day of September, 1907, whereby the said company were allowed to redeem the said mortgaged lands upon payment to the said plaintiffs Mary I. Leadlay and Percy Leadlay, of the full amount secured by the said mortgage and interest, the full amount paid for the release of the said equity of redemption and interest thereon, together with all proper allowances for taxes and other expenditures including payments and expenses made or incurred in and about the care and sales of the mortgaged lands and premises disposed of or undisposed of, together with the taxed costs of the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors of the

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action and appeals and all subsequent proceedings directed to be taken and by the said judgment of the Court of Appeal a reference was directed to the Master-in-Ordinary to ascertain the said redemption amount, which judgment further provided that the said judgment should be without prejudice to the rights and remedies (if any) as between the respondents in the said action, being the said John T. Moore and Annie A. Moore and the said plaintiffs Mary I. Leadlay and Percy Leadlay, in regard to the actions hereinafter mentioned.

12. Subsequently on or about 30th January, 1911, the said company paid into Court the sum of $167,864.47, being the full amount of said redemption moneys as found by the final report of the Master-in-Ordinary as subsequently confirmed, and the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors thereupon re-transferred and assigned the residue of said mortgaged lands and current sale agreements in respect thereto to the said company.

13. Subsequent to the trial of said action by writ dated on or about 31st January, 1906, the said Annie A. Moore brought an action against the said plaintiffs Mary I. Leadlay and Percy Leadlay, for the specific performance of the said two agreements of the 3rd November, 1900, and the 13th February, 1902, and for damages in which action the said plaintiffs, Mary I. Leadlay and Percy Leadlay counterclaimed, setting up among other things a release by the said John T. Moore and Annie A. Moore of the said two agreements and asking for an injunction restraining the said Annie A. Moore or John T. Moore from in any way dealing with the said lands or collecting any moneys in regard thereto, and also asking for an account of all dealings of the said John T. Moore and Annie A. Moore in respect to the said lands.

14. Subsequently on or about the 2nd February, 1906, the said plaintiffs Mary I. Leadlay and Percy Leadlay, brought an action against the said John T. Moore and Annie A. Moore for an account of the dealings of the said Moores with the said mortgaged property and for an injunction.

15. Neither of the above two actions ever came on for trial and both were still pending at the time the judgment of the Court of Appeal was delivered on the 23rd September, 1907, as aforesaid.

16. The total moneys received by the said Annie A. Moore and John T. Moore from or on account of the sales of the said mortgaged lands as shewn by the accounts and books filed on the said reference before the Master-in-Ordinary, was the sum of $184,552.77, and the total amount expended by or allowed to the said John T. Moore for commission or salary or otherwise upon the taking of the accounts on said reference was the sum of $39,403.99.

17. The total moneys paid or accounted for to the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors by the said John T. Moore and Annie A. Moore in respect of said mortgaged lands and sales thereof made under the terms of the said two agreements of the 3rd November, 1900, and the 13th February, 1902, was the sum of $92,131.95, of which amount the sum of $19,708.87 was paid to the said plaintiffs Mary I. Leadlay and Percy Leadlay prior to the second agreement of the 13th February,1902, coming into effect, and the balance of $72,423.08 was paid by the said Annie A. Moore and John T. Moore to the said plaintiffs Mary I. Leadlay and Percy Lead-

lay under the terms of the second agreement of the 13th February, 1902, which latter amount was made up of $60,000 principal and the sum of $12,423.08 interest up to the 1st day of January, 1905, paid under the terms of the said agreements of the 3rd November, 1900, and the 13th February, 1902, and which payment of $60,000 deducted from the said sum of $125,000 left a balance of $65,000 still due for principal under the terms of the said two agreements of the 3rd November, 1900, and the 13th February, 1902.

18. Deducting the said sum of $92,131.95, being the moneys paid by the said John T. Moore and Annie A. Moore to the said plaintiffs Mary I. Leadlay and Percy Leadlay as well as the said sum of $39,403.99, being the amount otherwise accounted for by or allowed to the said John T. Moore and Annie A. Moore on the said reference from the said sum of $184,552.77, being the total received from the said sales by the said John T. Moore and Annie A. Moore, leaves a balance of $53,016.83 in the hands of the said John T. Moore and Annie A. Moore, all of which balance so remaining in the hands of the said John T. Moore and Annie A. Moore, said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors necessarily gave credit for on said reference.

19. While the said reference was going on the said plaintiffs Mary I. Leadlay and Percy Leadlay, entered into an agreement, dated the 30th September, 1909, and hereinafter called the agreement of settlement with the said John T. Moore, Annie A. Moore and one W. A. Moore, whereby the said plaintiffs Mary I. Leadlay and Percy Leadlay and the said Moores arrived at a settlement of all matters in dispute between them by paragraph 3, of which agreement of settlement it was provided that in case the said the Saskatchewan Land and Homestead Company, Limited, should redeem, the said plaintiffs Mary I. Leadlay and Percy Leadlay as in the said judgment of the Court of Appeal provided, and should pay over to the said plaintiffs Mary I. Leadlay and Percy Leadlay, the amount finally found due, as the sum to be paid for redemption of the said lands and premises, then and in such case, there should be retained and accepted in full out of the moneys paid by the Saskatchewan Land and Homestead Company, for redemption of the said lands and premises by the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors, the sum of $130,000, together with such further sums as should have been paid out by the said plaintiffs Mary Isabel Leadlay and Percy Leadlay, since the first day of January, 1907, for taxes; together with interest on the said sum of $130,000 from the 1st day of December, 1907, and on the sums paid out for taxes since the 1st day of January, 1907, from the time of such payments at the rate of six per cent. per annum, together with all the plaintiffs Mary I. Leadlay and Percy Leadlay's solicitor and client costs of the said reference, directed under the said judgment of the Court of Appeal (such costs to be taxed) together with the amount of the voucher of Kappele & Kappele's costs filed on the said reference to the extent the same should be allowed; and that the balance, if any, of the said redemption moneys should be paid over to the said Annie A. Moore or her executors, administrators or assigns forthwith after the receipt thereof, without any deduction or abatement thereout or therefrom, for or on any account whatsoever.

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20. The amount which as hereinafter mentioned in pursuance of the provisions of the said paragraph 3, of the said agreement of settlement, was afterwards retained by the said plaintiffs Mary I. Leadlay and Percy Leadlay, out of the said redemption moneys is considerably more than the amount which would have been due for principal and interest or otherwise under the terms of the said two agreements of the 3rd November, 1900, and the 13th February, 1902.

21. In accordance with the terms of the said agreement of settlement the said plaintiffs Mary I. Leadlay and Percy Leadlay after making all deductions from said redemption amount as is provided for by the said paragraph, three, of the said agreement of settlement had on hand a surplus of $5,520.60, which amount the said plaintiffs Mary I. Leadlay and Percy Leadlay in accordance with the terms of the said agreement of settlement have paid to the said Annie A. Moore.

22. Adding the said last-mentioned sum of $5,520.60 paid to the said Annie A. Moore, to the said balance of $53,016.83, not accounted for by the said John T. Moore and Annie A. Moore, and which by reason of the said agreement of settlement are to be retained by them makes a total of $58,537.43 paid to or received by the said John T. Moore and Annie A. Moore, out of the proceeds of the sales of the said mortgaged lands and out of the amount paid or which would otherwise have been paid by the said company on redeeming said mortgaged lands to the said plaintiffs, Mary I. Leadlay and Percy Leadlay.

23. Under the will of the said Edward Leadlay the income from his whole estate after payment of an annuity of $10,000.00, to the said Mary I. Leadlay is to be divided among his beneficiaries, who at the present time are the plaintiffs, Percy Leadlay, Gertrude Beemer and Annie Gertrude Parry, and the defendants, Edward Leadlay, William Edward Ogden, Mary Alberta Ogden, Albert Uzziel Ogden, Isaac Leadlay Ogden, Eva G. I. Leadlay and Charles Erskine Ogden, and the principal moneys are to be retained and invested until the death or marriage of the said Mary I. Leadlay when the principal moneys of the said estate are to be divided among the above-mentioned beneficiaries other than the said Mary I. Leadlay, and also excepting the said defendant Edward Leadlay, who is to receive only the income from a one-fifth portion of the said estate during his life.

24. Of the said sum of $184,552.77 received from the sales of portions of the said mortgaged lands by the said Annie A. Moore and John T. Moore, the sum of approximately $18,000.00 consisted of interest collected under said agreements for sale.

25. The plaintiffs' claim is:—

(1) For a declaration as to what portion of the said moneys received by the said plaintiffs, Mary I. Leadlay and Percy Leadlay as such executors, from, or in regard to the said mortgage from the said the Saskatchewan Land and Homestead Company, Limited, to the said Edward Leadlay and Thomas Hook, is principal or capital moneys and what portion is income or revenue moneys of the said estate of Edward Leadlay, deceased.

(2) For a declaration as to whether or not the said two agreements of the 3rd November, 1900, and the 13th February, 1902, and the

settlement agreement of the 30th September, 1909, govern the method in which the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors are to apply the said mortgage moneys under the terms of the will of the said Edward Leadlay, deceased.

(3) If the said two agreements of the 3rd November, 1900, and the 13th February, 1902, and the said settlement agreement of the 30th September, 1909, govern the method in which said moneys are to be applied under the terms of the said will, then for a declaration that the balance arrived at by deducting the sum of $65,000 (being the balance due under said two agreements of the 3rd November, 1900, and the 13th February, 1902), together with any other capital expenditures made under the terms of the said two agreements, together with interest thereon at four per cent. per annum, in accordance with the terms of the said two agreements up to the 1st day of December, 1907, from said sum of $130,000 is to be treated as an increase of principal moneys under the said two agreements of the 3rd November, 1900, and the 13th February, 1902, brought about by reason of the terms of the said agreement of settlement of the 30th September, 1909.

(4) If the said three agreements do not govern the method in which the said moneys are to be applied, then for a declaration as to whether or not the said moneys are to be treated and applied as in the said three agreements had not been entered into and exactly as if there had been nothing but a simple redemption of the said mortgaged lands, and in such a case whether or not the said sum of $58,537.43 retained by or paid to the said Annie A. Moore and John T. Moore under the terms of the said settlement agreement of the 30th September, 1909, is chargeable to, or is to be borne by capital moneys or by revenue moneys of the said estate, derived from or under the said mortgage security, or by both, and if the latter in what proportions.

(5) For a declaration that all the legal charges and expenses of every description of the said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors in connection with the said action of the Saskatchewan Land and Homestead Company against the said Mary I. Leadlay, Percy Leadlay, John T. Moore and Annie A. Moore, and of the action of the said Annie A. Moore against the said plaintiffs Mary I. Leadlay and Percy Leadlay, and of the said action of the plaintiffs Mary I. Leadlay and Percy Leadlay against the said John T. Moore and Annie A. Moore, and of and in connection with the said settlement agreement of the 30th September, 1909, and of and in connection with the present action as well as the legal costs and expenses which may be allowed to any of the other parties to this action, are chargeable to and are to be paid by the said plaintiffs Mary I. Leadlay and Percy Leadlay out of the capital moneys of the said estate.

(6) And for such other findings or relief as the nature of the case may require, or to the Court may seem meet.

(7) For their full costs of this action as between solicitor and client.

C. Kappele, for the plaintiffs.

W. D. McPherson, K.C., for the defendants Ogden (except Charles E. Ogden, one of the infant defendants).

R. G. Smyth, for the defendant Edward Leadlay.

E. C. Cattanach, for the infant defendants.

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SUTHERLAND, J. (after setting out the facts and referring to the will and the agreements and the proceedings in the redemption action of Saskatchewan Land and Homestead Co. v. Leadlay):—It is clear from the will that, after payment of the annuity to the widow, the surplus income of the estate was intended to be divided annually among the children and grandchildren, as set out in paragraph 7 thereof.

The judgment of the Court of Appeal (in *Saskatchewan Land and Homestead Co.* v. *Leadlay* (1907), 10 O.W.R. 501) was for redemption, and in pursuance thereof the Master found as follows:—

"(1) Balance of principal money due on the said mortgage, and of the moneys paid by the said defendants Leadlay under and upon the postponement agreement, and for the release of the equity of redemption, and of all proper allowances for taxes and other expenditures, including payments and expenses made or incurred in or about the care and sales of the mortgaged lands (the defendants Leadlay having accounted for lands sold as by said certificate is provided), and of all other principal moneys which the said defendants are entitled to recover under the said certificate of the Court of Appeal, together with interest thereon respectively at 6½ per cent. per annum," etc.

The moneys received by the executors must be treated, I think, simply as received on a redemption of mortgaged lands.

The agreements referred to were, no doubt, entered into in good faith by the executors and in the interests of the estate. They are not questioned in this action by any of the parties; yet I do not see how they can be held to affect in any way the disposition of the moneys of the estate when they have come into the hands of the executors. It is conceded by every one that a considerable loss on the said security has occurred, and the question to be determined is, how and by what portions of the estate this is to be borne.

It is a case in which neither the capital nor the income should bear the entire loss: *In re Moore* (1885), 54 L.J. Ch. 432; *In re Atkinson*, [1904] 2 Ch. 160.

There will be a declaration that the amounts advanced from time to time by the executors, with 5 per cent. interest on the balances from time to time due, with annual rests, form a charge upon the money received by the executors, and that the net balance then remaining be apportioned between capital and income, upon the principle laid down in *Re Cameron*, 2 O.L.R. 756. The amount allowed for interest on the advances made by the estate will be income, as well as the amount allowed on the apportionment. Reference may be made also to *In re Earl of Chesterfield Trust* (1882), 24 Ch. D. 643; *In re Hangler. Frowde* v. *Hangler*, [1893] 1 Ch. 586. There will be a reference to the Master in Ordinary to take the account as indicated. The

"legal charges and expenses" incurred by the executors previous to this action will be taken into account in determining the amount of the loss to be apportioned and before such apportionment is made. The costs of all parties to this action will be out of the estate, those of the executors as between solicitor and client.

Declaration accordingly.

NADEAU v. CITY OF COBALT MINING CO.

Ontario High Court. Trial before Middleton, J. April 19, 1912.

1. ANIMALS (§ I A—8)—LIABILITY OF OWNER TO SERVANT FOR INJURIES FROM VICIOUS HORSE—PROOF OF SCIENTER.

In an action for injuries caused by a vicious horse belonging to a corporation, scienter is established against the corporation, if it be proved that the servant of the corporation having charge of the horse was informed of its vice.

[*Stiles* v. *Cardiff Steam Navigation Co.*, 33 L.J.Q.B. 310, applied.]

Statement

ACTION for damages for injuries sustained by the plaintiff by being kicked by a horse owned by the defendants, while cleaning it for the defendants, by whom he was employed.

Judgment for the plaintiff for $1,250.00, and costs.

A. G. Slaght, for the plaintiff.

A. E. Fripp, K.C., for the defendants.

Middleton, J.

MIDDLETON, J.:—The plaintiff, Edward Nadeau, was employed by the defendants; and, at the time of the accident, he had, among other things, the duty of attending a horse owned by the defendants. Upon entering the stall for the purpose of cleaning it, he received a severe kick, which broke his leg. The jury, in answer to questions submitted, have found that the plaintiff was guilty of no negligence; that the horse was vicious, in that it was accustomed to kick, as described by several witnesses; and that the teamster Hausie, who had charge of the animal before it was given into the plaintiff's care, was told of this habit before the occurring of the accident. Save in this way, the defendants had no knowledge of the vice of the animal.

The sole question remaining is, whether this is sufficient proof of scienter. I think it is; because Hausie was the person who had the care of the horse.

In *Baldwin* v. *Casella*, L.R. 7 Ex. 325, Blackburn, J., says: "So all dogs may be mischievous; and, therefore, a man who keeps a dog is bound either to have it under his own observation and inspection, or, if not, to appoint some one under whose observation and inspection it may be. The defendant has appointed his coachman to that duty. The coachman knew of the mischievous propensities of the dog, and his knowledge is the

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knowledge of the master." This view is concurred in by Martin, B., and Channell, B.

In *Stiles* v. *Cardiff Steam Navigation Co.*, 33 L.J.Q.B. 310, Crompton, J., dealing with a similar case—in which knowledge had to be brought home to a corporation—says: "They cannot contend that, because they are a corporation, it is impossible that they can have knowledge of such a matter; and such a doctrine would be very dangerous; and I quite agree with what was said by my brother Blackburn in *Penhallow* v. *Mersey Docks Co.*, 29 L.J. Ex. 21: "If a corporation cannot know anything except by its servants, it would seem that the corporation must be liable for the knowledge of its servants and the acts of its servants, or not liable at all." Upon this point there is no difference between a corporation and an individual; and I quite agree that the knowledge of a servant representing his master, and acting within the scope of his delegated authority, may be competent to affect his master with that knowledge."

In that case the plaintiff failed because he did not bring any knowledge home to those in care of the dog in question or in care of the yard, but only to servants in no way in charge of either the beast or the premises.

In *Applebee* v. *Percy*, L.R. 9 C.P. 647, the plaintiff failed on precisely the same ground, as it was not "shewn that either of the two men spoken to had the general management of the defendant's business or had the care of the dog."

Judgment will, therefore, be for the plaintiff for the sum awarded by the jury, $1,250, and costs.

Judgment for plaintiff.

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May 7.

Re THE BERLINER GRAMOPHONE CO.
(File 16453.1.)

Board of Railway Commissioners. April 11, 1912, and May 7, 1912.

1. COMMERCE (§ II C—32)—RAILWAY TOLLS—"MUSICAL INSTRUMENTS"—GRAMOPHONES.

Gramophones and graphophones are "musical instruments" and therefore may be shipped over Canadian railways in mixed car load lots with pianos and other musical instruments at the general carload rate applicable to musical instruments generally under the tariff of tolls fixed by the Canadian freight classification with the approval of the Railway Commission.

Mr. Mills

Ottawa, April 11, 1912. MR. COMMISSIONER MILLS:—In re the application of the Berliner Gramophone Company, Limited, Montreal, for an order directing the railway companies subject to the jurisdiction of the Board, to add gramophones, boxed, to the "musical instruments" list in the Canadian freight classification, it may be observed as follows:—

The applicant company calls attention to the fact that these instruments are already provided for in the said classification, not as musical instruments, but under a separate heading as "gramophones and graphophones," adding that "gramophones are analogous to music boxes and instruments similar to the "Regina" and small-sized "orchestrion," both of which are operated by perforated steel discs, which, in principle, are not unlike the flat composition disc known as the "record" in gramophones; and that piano parts, music boxes, drums, etc., are all embraced in the "musical instruments" list, while gramophones are excluded. Hence the application in this case.

The railway companies, through the Advisory Committee of the Canadian Freight Association, represented by its chairman, John Pullen, Esq., refused to grant the said application, mainly on two grounds:—

1st. That the gramophone is not, strictly speaking, a musical instrument.

2nd. That gramophones are not shipped in carloads between points in Canada; that a carload rating is asked for, solely for the purpose of obtaining a classification which will permit the loading of these machines in the same car with musical instruments, and securing the advantage of the carload rating of second-class on what is properly a less than carload shipment, instead of the present first-class rating; and that, if granted, this would simply pave the way for similar applications for additions, not only to the "musical instruments" list, but also to other lists, resulting in the reduction of the carriers' revenues, without accomplishing any good purpose in so far as the ultimate consumer is concerned.

If a music box, operated by a spring, and the pianola, used to produce music by attachment to a piano, are musical instruments—and they are so classified by the freight association—it seems difficult to avoid the conclusion that the gramophone is also a musical instrument. In fact, it is, in my opinion, scarcely necessary to argue the question; for it is manifestly proper to name a thing from its chief function or most striking characteristic; and while the gramophone reproduces all kinds of sounds, its chief function is to reproduce vocal, band, violin and orchestral music. I think we may properly say that it is the most wonderful musical instrument ever invented; and I need only add that almost the only people who deal in gramophones, buying and selling them, are wholesale and retail dealers in musical instruments.

Admitting that gramophones are musical instruments, we are unable to give any good reason for excluding them from the "musical instruments" list in the freight classification. It is true that hitherto they have not been shipped in carloads between points in Canada—for the simple reason that there has been no carload rating for them. The rate on carloads and on less-than-carload lots being the same, there is nothing to be gained by

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shipping in carloads; and it should not be forgotten that there are now in the "musical instruments" list several instruments which are never, or scarcely ever, shipped in carloads between points in Canada—music boxes, violins, and drums, for instance.

The chief traffic officer of the Board, in his report on this case, quotes from a compromise agreement entered into December, 1905, by the railway companies and a representative of "The Canadian Manufacturers' Association," as follows:—

> The Canadian Manufacturers' Association withdrew their application for the open or unrestricted mixing of commodities, in carloads, at the highest rating, to and between points west of Port Arthur, as in effect in the territory east of Port Arthur, in consideration of the railway meeting the needs of the situation by providing for the special cases brought before them, and in view of their expressed willingness to give equal consideration to any similar cases which may arise in the future.

And he adds that—

> In these various trade lists scores of articles that do not move in carloads are, nevertheless, given carload ratings, that they may be shipped as items of mixed carloads, and for no other purpose.

It is no doubt true, as stated by Mr. Pullen, that there are defects and anomalies in the classification; but it should be borne in mind that the trade-list system (the grouping of commodities with a view to shipping in mixed carloads) was voluntarily introduced by the railway companies—no doubt after careful consideration, and as long as it continues so important a part of the classification, I am unable to see how the companies can refuse to make reasonable additions to the lists, without leaving themselves open to charges of discrimination and violation of the underlined portion of the agreement quoted above.

On a gramophone weighing 300 lbs. gross the freight from Montreal to Calgary is $9.57 under the present less-than-carload (L.C.L.) rating, and $8.04 under the carload (C.L.) rating asked for. To Revelstoke the figures are respectively $11.34 and $9.51. The difference on a single instrument is not very much; but it may amount to a considerable sum in the aggregate.

The gramophones in question are sold f.o.b. at the factory: so the parties directly affected by the freight rates are the jobber, the retailer, or the consumer—or all three; and I fail to see why a change in the rating is not as likely to benefit or injure "the ultimate consumer" in the case of gramophones as in the case of hundreds of other commodities of which the freight on a single article is a comparatively small amount.

Further, it does not necessarily follow that a railway company secures less net revenue from carload than from less-than-carload shipments of goods.

The carload rate is nearly always less per 100 lbs. than the rate on less-than-carload lots; but, in the case of a carload, no

freight-shed accommodation is required either at the initial point or at destination; the shipper does the loading at his own expense; the consignee generally does the unloading at his expense; the railway company is paid for a full capacity carload, whether the car is filled, half filled, or third filled; the car is simply hauled from one point to another fixed point, involving little or no outlay in transit similar to the heavy expense incurred by the frequent shunting of the same car and the handling (loading and unloading) of L.C.L. way-freight; and the loss to the company from breakage or other damage to goods is comparatively little, because the shipper (a directly interested party) does the arranging, packing, and staying of his goods in the car, and the consignee, another directly interested party, generally does the unloading.

In the case of less-than-carload shipments, the railway company frequently bears a part of the cartage charges for collecting and delivering the goods; the company has to provide freight-shed accommodation, and it does the loading and unloading at its own expense; the car is rarely filled—in fact it often goes half empty for a considerable part of the way, while the company is paid only for the actual weight carried: the company has to bear the expense of frequent stopping and shunting at stations, and the loss to the company from breakage and other damage to goods in transit is relatively heavy—(1) because cars carrying L.C.L. traffic have to be frequently stopped and shunted; (2) on account of hurried loading and unloading at stations, and (3) as a result of the goods being hurriedly dumped into a car with other goods therein, and left to slide about and be broken or otherwise damaged by the well-known slamming and banging of freight cars in coupling, starting and stopping, especially in the hurried movements necessary in shunting.

The application in this case is supported by the Canadian Manufacturers' Association: it is also supported by jobbers in Ontario and in the Western Provinces; and my opinion, concurred in by the chief traffic officer of the Board, is that the said application is a reasonable one and should be granted—that gramophones and graphophones (under their various styles and names), gramophone and graphophone records, phonographs and phonograph cylinders, boxed, should be added to the "musical instruments" list and be given a second-class carload rating in the Canadian freight classification.

MR. COMMISSIONER MCLEAN (dissenting):—So far as the Canadian Freight Association objects to the amendment of the classification asked for on the ground that gramophones are not musical instruments and therefore should not be included in the musical instrument list, I think that nothing of any importance depends on this. Gramophones are as musical as a great many other instruments which are apparently recognized as musical

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instruments. What the Board is concerned with is not the mere abstract question of the logic of classification. I have devoted some time to the study of different classifications, and have not yet been able to work out an inclusive logical principle on which they are based. Mr. Walsh has put the position of the applicants succinctly when he says if the instrument is a musical instrument it is entitled to the same treatment as all other items on the musical instrument list. But is this the only question?

Mr. Chilvers frankly stated that the application, if successful, would only be of indirect advantage to his company. The goods are handled by jobbers. The chief jobbers who deal in these instruments are located in Halifax, St. John, Quebec, Montreal, Ottawa, Toronto, Port Arthur, Fort William, Winnipeg, Calgary, Regina, Edmonton, Vancouver and Victoria. He stated that he had taken the matter up on the application to him of various jobbers. He further undertook to send in copies of the various applications which he had received from these jobbers, and which led to the present application. While a few letters have been received, it so happens that Mr. Chilvers is not able to supply all the material which he promised. The reason for this is readily apparent. On account of the illness of Mr. Chilvers it has not been possible for him to take the matter up until recently. The case has been standing for this information. In the meantime it being the practice of his company to clear its files from time to time, so that these files may not be unnecessarily loaded up with correspondence, a considerable part of the correspondence which he promised has been destroyed.

The jobbers being in reality the persons interested, their position as developed in the correspondence on file is of importance. In a letter written on August 8th, 1911, Walter F. Evans and Company of Vancouver stated that in November, 1909, they had been compelled to ask the Berliner Gramophone Company to permit them to raise the retail price of the Victor Victrola XVI owing to the high freight rate which existed. Three letters from the Mason and Risch Company of Toronto, under date of May 29th, May 30th and August 4th, 1911, are on file. The first of these devotes itself to the inconsistency of the classification as it at present exists. It is claimed that it is a very great injustice that at the present time carload shipments can be made up consisting of pianos, organs, cabinet players, stools and benches, while at the same time the dealers are debarred from enclosing musical instruments such as gramophones. The same position is developed in the other two letters referred to.

It would appear then that the two features to be dealt with are the question of the alleged inconsistency of the classification, and the question of rates. I do not consider it necessary to devote time to the inconsistency of the classification. The classification is inconsistent in this, and in many other respects, and

life is too short to engage in the correction of the classification on purely abstract grounds. The matter which is fundamental in this application is that of the rate, and of the circumstances connected therewith.

While the applicant company did not directly challenge the rate, the most important reason given in the letter of the Evans Company is the burden of the rate. In this letter reference was made to the fact that this company found it necessary to apply to the Berliner Company for permission to raise the sale price of the instrument. It was stated by Mr. Chilvers in his letter of March 24th, 1911, that "we are obliged to allow our dealers to advance the price of the largest of the Victrola types of instruments from $240 to $250." While Mr. Chilvers said that they gave the dealers the privilege of advancing, which they unanimously accepted, it points to the fact which was more definitely developed later on, that the company has entire control over the selling price of the instruments. In answer to a question he testified that the retail price of the instrument was controlled entirely by his company. When asked what his company would do if one of the dealers cut the price named, Mr. Chilvers replied, "we cut him off our list; we won't supply him." It may further be noted that while the increase of $10 was stated to be made on account of the burden of freight rates, the only points from which we have any allegations as to the burden of freight rates are in British Columbia. At the same time the increase of $10 applied generally on this type of instrument as sold at the different jobbing points regardless of the distance from the initial point of distribution by the Berliner Company, and so far as the Board is informed, without any computation based upon the pressure of freight rates at these points. Certainly if the $10 increase was necessitated at Vancouver on account of the pressure of freight rates, it would follow that such increase being made general would, in various instances, simply mean an additional profit to those handling the instrument.

The Board is constantly told, in connection with applications made to it for revision of freight rates, that if a reduction is ordered it will result in the consumer receiving the article at a lower price. The consumer certainly should participate in the advantage flowing from the reduction by the Board of rates on the ground that they are unreasonable. But to the consumer—who deserves a consideration he does not always receive since he is the end of the distributive process, and the silent partner in it—the advantage of the rate reduction filters slowly, and I am satisfied that in many instances the advantages legitimately flowing from rate reduction never reach him.

The function of the Board is not to ensure the shipper or producer profits on his commodity. The factors affecting production and distribution at a profit are many and diversified.

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The rate factor, which is one of them, is the only one with which the Board is concerned. If the Board finds the rate unreasonable it is its duty to direct a proper reduction. But in so reducing it it is not to be assumed that the inability of a producer or shipper to compete in a given market in every instance measures the proper rate reduction. Rate reduction, in so far as the rate is found to be unreasonable, is the duty of the Board, and the right of the producer or shipper. But it is only in so far as the rate is unreasonable and not as the insurer of business profit, that the Board has authority to interfere. It follows that it is not within the scope of the Board's functions to readjust the balance of profit between the shippers or producers and the railway. Its intervention, it is true, may, by directing rate reduction, affect this balance; but its action is concerned with the particular facts affecting the reasonableness of the particular rate or rates.

In the present application the Board is confronted with a situation in which the retail price of the article produced is entirely controlled by the producing company. The price is uniform regardless of local conditions, length of haul, or freight charges. The price cannot be increased without the permission of the Berliner Company, and if the price is reduced by a dealer, the penalty is that the dealer will no longer be permitted to carry the instruments in question. It is not within the scope of the Board's jurisdiction to pass any opinion upon the legitimacy of the arrangement above outlined. It is justifiable to recognize the fact.

It would appear upon the facts of the application before the Board that it is in essence simply a question of readjusting profits between the railway and the producer, jobbers, and retailers concerned, and that the consumer in no way stands to gain from any change in the situation. It has not been established that the rates are unreasonable, and I am therefore of the opinion that a case has not been made out for the interference of the Board.

MR. SCOTT

Ottawa, May 7, 1912. THE ASSISTANT CHIEF COMMISSIONER (MR. D'ARCY SCOTT):—This application for the classification of gramophones and graphophones with "musical instruments" in the Canadian freight classification was heard by my brother Commissioners, Dr. Mills and Commissioner McLean, at a sittings on the 18th April, 1911. The matter was allowed to stand for some time to give the applicants an opportunity of putting in some further information.

The file now comes to me with a memorandum from Dr. Mills, dated April 11th, 1912, recommending that the application be granted, and a memorandum from Commissioner McLean, dated April 22nd, 1912, expressing the opinion that a case has not been made out for the interference of the Board. I have read these, and have also read the report of the chief traffic officer of the Board of the 28th March, 1912.

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As my brother Commissioners who heard this matter do not agree, it is incumbent upon me to decide the matter. It appears to me to be a question of classification only. My view is, that gramophones and graphophones are quite as much musical instruments as music boxes, which the railway companies have voluntarily placed in this classification. I therefore concur with Dr. Mills in the granting of the application.

Application granted.

Judgment

N.B.—By a subsequent general order of the Board (May 10, 1912) it was directed that in the Canadian freight classification the following articles be transferred from their present positions to the "musical instruments list," and that they be also included in the second-class rating applicable to "musical instruments, all kinds, not otherwise specified, carloads, minimum 12,000 pounds," namely, "gramophones, graphophones, phonographs and records."

HOOVER v. NUNN.

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May 6.

Ontario High Court. Trial before Falconbridge, C.J.K.B. May 6, 1912.

1. INCOMPETENT PERSONS (§ II—11)—DEEDS—ONUS OF SUPPORTING CONVEYANCE—LUCID INTERVAL.

Where a conveyance is attacked on the ground of the insanity of the grantor, and a condition of insanity which is not merely temporary is proved to have existed from a time prior to the execution thereof, the onus is upon those supporting the conveyance to shew that such execution took place during a lucid interval such that the grantor was capable of understanding the nature of the act he was performing.

[*Russell* v. *Lefrancois*, 8 Can. S.C.R. 325, followed.]

2. EVIDENCE (§ XI D—777)—MENTAL CAPACITY OF GRANTOR—AFFIDAVIT OF EXECUTION—STATEMENTS IN DISCHARGE FROM ASYLUM—RELEVANCY.

Where a conveyance is attacked on the ground of the insanity of the grantor, and a *primâ facie* case of insanity is made out, so as to cast upon those supporting the conveyance the onus of proving that it was executed during a lucid interval, an affidavit of execution in the ordinary form attached to the conveyance, and formal statements in printed discharges from an asylum, not borne out by the material which should interpret them, are not sufficient evidence that the conveyance was so executed.

3. STATUTE OF LIMITATIONS (§ II D—51)—WHEN STATUTE RUNS—POSSESSION UNDER VOID DEED—TRUSTEES FOR GRANTOR.

One who is in possession of land under a conveyance, which is void by reason of the insanity of the grantor, is a trustee for the lunatic and his representatives, and the Statute of Limitations does not run in his favour as against them.

4. STATUTE OF LIMITATIONS (§ II M—95)—POSSESSION OF LUNATIC'S LAND BY INSPECTOR OF ASYLUM—INTERRUPTION OF RUNNING OF STATUTE.

Possession of a lunatic's land by the Inspector of Asylums acting as such, is possession by the lunatic, and will interrupt the operation of the Statute of Limitations against the lunatic.

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ACTION by the administrator of the estate of Mary Augusta Hoover, deceased, to set aside a conveyance of land made by the deceased in 1870 and to vacate the registry thereof.

Judgment was given for plaintiff as prayed.

McGregor Young, K.C., and *J. A. Murphy*, for the plaintiff.

T. A. Snider, K.C., and *S. E. Lindsay*, for the defendants.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—Mary Augusta Hoover was born in 1845 or 1846. By patent from the Crown, dated the 17th November, 1851, she became owner of the north half of lot 3 in the 4th concession of Rainham. A deed dated the 6th April, 1870, and registered the 18th March, 1875, was executed by her, purporting to convey to her mother, Jane Walker, the said lands. Jane Walker, by her will bearing date the 2nd March, 1875, professed to devise the said lands, some of the defendants being beneficiaries under this will. Mrs. Walker died on the 21st March, 1887. Mary Augusta Hoover died on the 1st November, 1908, in the Asylum at Hamilton; and letters of administration of her estate were granted to the plaintiff, who is the eldest surviving uncle of the said Mary Augusta Hoover. The plaintiff brings this action, charging that the intestate was of unsound mind, and incapable of making a valid contract from 1869 to the time of her death, and claiming vacation of the registration of the deed to Jane Walker, and the vesting of the title of the said lot in the plaintiff as administrator.

Very clear evidence is given by Dr. T. T. S. Harrison, and others, of a condition of insanity existing from about the 16th November, 1869. Several cousins place it as far back as November, 1868; and the plaintiff from about the same time.

I find, on a review of the whole testimony, that Mary Augusta's insanity was not merely temporary, at least up to the date of the execution of the impeached deed; and, therefore, the burden is upon the defendants to shew that this deed was executed during a lucid interval: *Attorney-General* v. *Parnther*, 3 Bro. C.C. 441; *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, at p. 570; *Russell* v. *Lefrancois*, 8 Can. S.C.R. 335.

The question would be, as stated by Pope, Law of Lunacy, 2nd ed., p. 262: "Was the alleged lunatic, at the date in question, capable of understanding the nature of the act she was performing?"

There is no direct evidence of any lucid interval. The plaintiff accompanied her mother (the grantee), not to Cayuga, their own county town, but to Goderich, a remote part of the Province, and there the deed was drawn in the office of a reputable firm of solicitors, both of whom are dead. One of them was the witness to the deed, and made the affidavit of execution.

I am asked, on the authority of Pope, p. 411, and *Towart* v. *Sellers*, 5 Dowl. P.C. 245, to hold that this

is equivalent to the witness to the deed standing in the box and swearing that when she executed the deed she was sane. I decline so to hold. I know with what facility, in my own experience, decent solicitors and solicitors' clerks have acted as witnesses to deeds, and sworn that they "knew the said party," upon the faith of a mere introduction by an apparently respectable person.

I also disregard the formal statements in the discharges from the Asylum. They are on printed forms, and I do not think they are borne out by the material which should interpret them.

Therefore, I find that Mary Augusta Hoover never had a lucid interval from the 1st January, 1869, up to the end of her days—to the extent of being able to understand the nature of the execution of the deed. Mrs. Walker was, therefore, in possession of the lands under a void deed made by a lunatic; so that she was a trustee for her daughter; and the Statute of Limitations did not run against the lunatic or her representatives.

In 1887, after the death of the mother, the Inspector of Asylums entered into possession, taking out letters of administration of the will of Jane Walker, and he made five leases as administrator of the will annexed, and the consent of the Attorney-General for the time being was obtained, indicating to me that the Inspector was acting qua Inspector, and not as administrator. This would, I take it, in any event, be a possession by Mary Augusta Hoover before the expiry of the twenty years.

I give judgment setting aside the deed, and further as prayed in the statement of claim.

The defendant Nunn was authorised by the Court to defend the action on behalf of and for the benefit of all the beneficiaries under the will of Jane Walker; and, therefore, he should have his costs as between solicitor and client out of the estate. He should not use this provision as ammunition further to attack this small estate. There is not much margin in it after debts due or paid by the plaintiff to the Asylum are deducted; and, if the defendant should appeal, the Court above may consider all the circumstances in dealing with the question of costs.

Judgment for plaintiff.

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H. C. J.
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April 6.

REYNOLDS v. FOSTER.

Ontario High Court. Trial before Teetzel, J. April 6, 1912.

1. FRAUD AND DECEIT (§ IV—19)—KNOWLEDGE AND RELIANCE OF PARTIES—MISUNDERSTANDING THROUGH WANT OF CARE.

A charge of fraud, deception or misrepresentation by a vendor as to the income derived from property the defendant agreed to purchase, or as to any other matter inducing the contract, cannot be sustained where any misunderstanding by the purchaser in relation thereto was the result of his own stupidity or want of care, and was not induced by any act or representation of the vendor.

2. SPECIFIC PERFORMANCE (§ I E—30)—CONTRACTS FOR REAL PROPERTY—VENDOR READY AND WILLING TO COMPLETE—REPUDIATION BY PURCHASER.

Where, to the knowledge of a vendee, a vendor was ready and willing as well as in a position to carry out a contract for the sale of land, but the vendee repudiated the contract before the time fixed for its completion, the vendor may maintain an action for specific performance of the agreement.

3. CONTRACTS (§ II D 2—173*a*)—DESCRIPTION OF LAND SOLD—EXTRINSIC EVIDENCE TO IDENTIFY PARCEL.

A description of the premises in a contract for the sale of land as having a depth of about 130 feet to a lane 20 feet wide more or less is not so defective as to render the contract void where the purchaser knew before the contract was executed that such lane extended but part way across the premises so as to leave the remainder with a greater depth than 130 feet, which, however, was incumbered with a right of way, as under such circumstances extrinsic evidence would be admissible to identify the premises sold.

[*Foster* v. *Anderson* (1908), 16 O.L.R. 565; *Plank* v. *Bourne*, [1897] 2 Ch. 281, and *Lewis* v. *Hughes*, 13 B.C.R. 228, referred to.]

4. CONTRACTS (§ I D—52)—OMISSION OF TERMS OF MORTGAGE FROM CONTRACT—INCOMPLETE CONTRACT—STATUTE OF FRAUDS.

The omission from a contract for the sale of lands of the terms of a mortgage to be given thereon by the purchaser as security for payment of a portion of the purchase price, other than to mention the amount and the rate of interest, is of such a material portion of the agreement as to render it incomplete in a particular that could not be supplied by implication, and therefore void under the Statute of Frauds.

[*Green* v. *Stevenson* (1905), 9 O.L.R. 671; *South Wales R. Co.* v. *Wythe* (1854), 5 DeG. M. & G. 880, and *Bayley* v. *Fitzmaurice* (1857), 8 E. & B., referred to.]

5. MORTGAGE (§ I E—24)—AGREEMENT FOR MORTGAGE—FORM AND TERMS.

In the absence of any stipulation to the contrary in an agreement to give a mortgage on lands, the general form and terms of the mortgage must be in conformity with the form provided in the Short Forms of Mortgages Act.

Statement

AN action by the vendor for the specific performance of a contract for the sale of the King George Apartments in Bloor street, Toronto, for $60,000; and, in the alternative, for damages for breach of contract. It was admitted at the trial that since the action the plaintiff had resold the property for $53,000; and he claimed as damages the difference in price and certain expenses; also a large sum for special damages.

The action was dismissed without costs.

The defences chiefly relied upon were: (1) fraud and misrepresentation by the plaintiff and his agents as to the income

derived from the property; (2) no sufficient tender of conveyance by the plaintiff; and (3), that the whole agreement was not in writing, as required by the Statute of Frauds.

C. A. Moss, for the plaintiff.

W. Nesbitt, K.C., and *E. E. Wallace*, for the defendant.

TEETZEL, J.:—I have no difficulty in finding as a fact, upon the evidence, that there was no fraud, deception, or misrepresentation practised by either the plaintiff or his agents as to the income derived from the property or any other matter inducing the contract; and that, if the defendant misunderstood the statements as to income or other matters, it was due to his own stupidity or want of care.

I also find that, before the time fixed for completion of the contract, the plaintiff was ready and willing and in a position to carry out all its terms which were imposed upon him, of all of which the defendant had knowledge. I also find that, before the time fixed for completion, the defendant repudiated the contract, and did not intend to perform any of its terms; and that what the plaintiff did in the way of formally tendering his conveyance was all that, under the circumstances, was necessary for him to do to entitle him to maintain this action, assuming that the contract meets the requirements of the Statute of Frauds.

Counsel for the defendant relied upon two items in respect of which he argued that the contract is incomplete, and, therefore, does not comply with the statute: (1) the description of the property; and (2) the provision that the defendant, as part of the consideration, was to "give a third mortgage on King George Apartments for $4,000 at 6 per cent."

The property is described as follows: "All and singular the premises situate on the north side of Bloor street west, known as 'King George Apartments,' known as No. 568 and 570, Bloor street west, plan No. , as registered in the registry office for the said city of Toronto, having a frontage of about 50 feet by a depth of about 130, to lane 20 feet, more or less." Now, the fact is, that, at the rear of the premises, the lane referred to extends only 26 feet, and then turns north, and that the remaining 24 feet, instead of having a depth of about 130 feet, has a depth of 149 feet 5 inches; but, over the rear section of 19 feet 5 inches by 24 feet, the owners to the east have a right of way from the lane to Bathurst street at the east.

Before the purchase, the defendant inspected the premises, and his attention was called to this section and to the right of way over it; and, while he asserts that he was told by the plaintiff that the right of way was limited to the right of the owners to the east to take garbage over it, I find as a fact that he is mistaken as to this, and that he was informed that the right of way was general to those owners. Under these circumstances, I am of

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opinion that the error in the agreement in stating the property as having only a "depth of about 130 feet to a lane 20 feet more or less," is not fatal to the agreement; and I think the general description, coupled with the knowledge of the defendant that the section 19 feet 5 inches by 24 feet, subject to the right of way, formed part of the premises he was buying, coupled also with the discussion and inspection of it, bring the case within the principle of such cases as *Foster* v. *Anderson* (1908), 16 O.L.R. 565; *Plant* v. *Bourne*, [1897] 2 Ch. 281; and *Lewis* v. *Hughes* (1906), 13 B.C.R. 228; and that, therefore, extrinsic evidence would be admissible for the purpose of identifying the land and shewing the subject-matter of the negotiations between the parties.

As to the other objection, the question is, whether the omission to state the terms of the mortgage to be given back by the defendant, other than the amount of the mortgage and rate of interest, renders the agreement incomplete without recourse to oral testimony.

I am not able to find, upon the evidence, that the terms of payment of this mortgage were even orally agreed upon; for, although, when examined in chief, the plaintiff says that it was agreed to be a five years' mortgage, he recedes from this on cross-examination, and the defendant swears that there never was any such agreement. If it had been orally agreed upon and not put in the writing, the judgment in *Green* v. *Stevenson* (1905), 9 O. L.R. 671, would probably bar the plaintiff from enforcing the agreement. It is possible that, when the plaintiff's agents prepared the agreement for signature by the defendant, they thought no difficulty would arise in fixing the terms of the mortgage and that it would be safe to leave the matter as a subject of future treaty, or they may have assumed that, in the absence of other stipulation, the principal would be payable in five years. Giving the mortgage as part of the consideration was such a material part of the agreement, that I think it is necessary, in order to satisfy the Statute of Frauds, that the agreement should contain such particulars as would enable the Court, in the event of specific performance being asked, to declare the terms of the mortgage which the defendant should execute. While the Court will carry into effect a contract framed in general terms where the law will supply the details, it is also well-settled that, if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced: Fry, 5th ed., sec. 368. See *South Wales R. Co.* v. *Wythes* (1854), 5 DeG. M. & G. 880; *Bayley* v. *Fitzmaurice* (1857), 8 E. & B. 664.

No difficulty would, of course, arise as to general form and terms of the mortgage to be given; as, I think, in the absence of any provision to the contrary, the law would imply a mortgage in terms of the Short Forms of Mortgages Act. See Fry, 5th ed., secs. 372-379, and cases cited.

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I can find no authority indicating that, in the absence of express provision, the law will imply the terms upon which the principal money of a mortgage, agreed to be given, shall be payable. In sec. 369 of Fry, 5th ed., a number of instances, upon authorities cited in the notes, are given, where it has been held that the contract was incomplete, such as when it was not stated from what time an increased rent was to commence; where the contract did not state, either directly or by reference, the length of the term to be granted; where a contract for a lease for lives neither named the lives nor decided by whom they were to be received; where there was a contract for a partnership which defined the term of years, but was silent as to the amount of capital, and the manner in which it was to be provided.

I think that the matter of when and how the principal money was to be payable was such a material part of the agreement that its omission rendered the agreement incomplete, and that it is impossible by implication to supply the omission; and that, therefore, neither judgment for specific performance nor for alternative damages can be awarded.

The action must be dismissed; but, the defendant having failed to support his charge of fraud, there will be no costs.

Action dismissed.

ATTORNEYS-GENERAL FOR THE PROVINCES of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta, v. ATTORNEY-GENERAL FOR THE DOMINION OF CANADA and the Attorney-General for the Province of British Columbia.

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Judicial Committee of the Privy Council, Earl Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw, and Lord Robson.
May 16, 1912.

1. CONSTITUTIONAL LAW—STATUTE AUTHORIZING REFERENCE OF QUESTIONS TO THE FEDERAL SUPREME COURT BY EXECUTIVE FOR OPINION—VALIDITY—BRITISH NORTH AMERICA ACT, 1867, SECS. 91, 92, 101 SUPREME COURT ACT, R.S.C. 1906, CH. 139, SEC. 60.

Section 60 of the Supreme Court Act, R.S.C. 1906, ch. 139, which empowers the Governor-in-Council to refer to the Supreme Court of Canada for their opinion questions either of law or of fact, is within the legislative jurisdiction of the Parliament of Canada.

[*Re References by the Governor-in-Council* (1910), 43 Can. S.C.R. 536, affirmed on appeal.]

Statement

THIS was an appeal from a judgment of the Supreme Court of Canada (Justices Girouard and Idington dissenting) of October 11, 1910.

Sir Robert Finlay, K.C., *Wallace Nesbitt*, K.C., (of the Canadian Bar), *A. Geoffrion*, K.C., (of the Canadian Bar), and *Geoffrey Lawrence*, for the appellants.

E. W. Newcombe, K.C. (Deputy-Minister of Justice for Canada), and *A. W. Atwater*, K.C., for the Dominion of Canada.

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Statement

The suit raised an important question—namely, whether the Governor-General of Canada has power under the Constitution of the Dominion to frame and refer to the Supreme Court for their opinion questions as to the Constitutional powers of the Provinces, the effect of Provincial statutes, and other matters of importance.

The Governor-General in Council, purporting to act under section 60 of the Supreme Court Act, 1906, referred to the Supreme Court certain questions as to the powers *inter se* of the Canadian Parliament and the Legislatures of the Provinces to incorporate companies, and as to the effect of such incorporation. The questions thus propounded were framed to obtain the opinion of the Supreme Court as to whether companies incorporated under Provincial statutes have power or capacity to do business outside the territorial limits of the incorporating Province. They affect the standing of a great number of companies incorporated by the Provinces since the Confederation in 1867, and now carrying on business in two or more Provinces, and they may also concern the legislative control over companies incorporated in the several colonies before their entry into Confederation. Although the questions are of such vital importance to the Provinces, they complain they were not consulted in the framing of them. Every previous reference under section 60 of the Supreme Court Act has been made with the consent of the Provinces concerned, but the question of jurisdiction has never before been directly raised or decided. At the same time the Governor-General in Council referred to the Supreme Court certain other questions as to the competency of the Provincial Legislature of British Columbia to authorize the Government of that Province to grant exclusive fishery rights in certain inland waters and parts of the sea, and as to the validity and effect of the Insurance Act, 1910, passed by the Parliament of Canada.

The Attorneys-General for seven of the Canadian Provinces protested against the jurisdiction of the Supreme Court to entertain any of those references, and applied that they should be struck out. They contended that the British North America Act did not authorize the Parliament of Canada to enact section 60 of the Supreme Court Act, which, they submitted, was therefore *ultra vires* and was a direct interference with the exclusive power bestowed on the Provincial Legislatures by the British North America Act. The Dominion, on the other hand, contended that no such conflict or difficulty arose.

The matter was argued before the Supreme Court which, by a majority of four Judges against two, decided that they had jurisdiction to entertain and answer the references submitted to them by the Governor-General in Council. From that opinion the present appeal was preferred.

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London, May 16, 1912. The LORD CHANCELLOR in delivering their Lordships' judgment said the real point raised in this

most important case was whether or not an Act of the Dominion Parliament authorizing questions either of law or fact to be put to the Supreme Court and requiring the Judges of that Court to answer them on the request of the Governor in Council was a valid enactment within the powers of that Parliament. Much care and learning had been devoted to the case, and their Lordships were under a deep debt to all the learned Judges who had delivered their opinions under this anxious controversy.

In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. There could be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the Provinces on the other hand covered the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points had arisen, and might hereafter arise, upon these provisions of the Act which drew the dividing line between what belonged to the Dominion or to the Province respectively. An exhaustive enumeration being unattainable (so infinite were the subjects of possible legislation), general terms were necessarily used in describing what either was to have, and with the use of general terms came the risk of some confusion, whenever a case arose in which it could be said that the power claimed fell within the description of what the Dominion was to have, and also within the description of what the Province was to have. Such apparent overlapping was unavoidable, and the duty of a Court of Law was to decide in each particular case on which side of the line it fell in view of the whole statute.

In the present case, continued his Lordship, quite a different contention is advanced on behalf of the Provinces. It is argued, indeed, that the Dominion Act authorizing questions to be asked of the Supreme Court is an invasion of Provincial rights, but not because the power of asking such questions belongs exclusively to the Provinces. The real ground is far wider. It is no less than this—that no Legislature in Canada has the right to pass an Act for asking such questions at all. This is the feature of the present appeal which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a Provincial Legislature within its own Province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of Canada and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of government in all civilized countries.

Broadly speaking, the argument on behalf of the Provinces proceeded upon the following lines. They said that the power

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to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its terms as to admit of a gross interference with the judicial character of that Court and, therefore, of grave prejudice to the rights of the Provinces and of individual citizens. Any question, whether of law or fact, it was urged, can be put to the Supreme Court, and they are required to answer it with their reasons. Though no direct effect is to result from the answers so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal.

When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions; whereby may ensue not merely a distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biassed. The appellants further insist that although the Act in question provides for requiring argument, and directing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced without so much as an opportunity of stating their objections before the Supreme Court has arrived at what will virtually be a determination of their rights. This view, which was most powerfully presented, has a twofold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no sense concerned.

A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the Judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament. It is true that from time to time the Courts of this and of other countries, whether under the British flag or not, have to consider and set aside, as void, transactions upon the ground that they are against public policy. But no such doctrine can apply to an Act of Parliament. It is applicable only to the transactions of individuals. It cannot be too strongly put that with the wisdom or expediency or policy of an

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Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the Constitutional law of Canada.

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of his Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For, whatever belongs to self-government in Canada belongs either to the Dominion or to the Provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and, obviously, bestowed by the British North America Act. Indeed, it might ensue from the breach of almost any power.

It is then to be said that a power to place upon the Supreme Court the duty of answering questions of law or fact when put by the Governor in Council does not reside in the Parliament of Canada? This particular power is not mentioned in the British North America Act, either explicitly or in ambiguous terms. In the 91st section the Dominion Parliament is invested with the duty of making laws for the peace, order, and good government of Canada, subject to expressed reservations. In the 101st section the Dominion is enabled to establish a Supreme Court of Appeal from the provinces. And so when the Supreme Court was established it had and has jurisdiction to hear appeals from the Provincial Courts. But of any power to ask the Court for its opinion, there is no word in the Act. All depends upon whether such a power is repugnant to that Act.

The provinces by their counsel maintain, in effect, the affirmative. They say that when a Court of Appeal from all the Provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body, according to the conception of judicial character obtaining in civilized countries and especially obtaining in Great Britain, to whose Constitution the Constitution of Canada is

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intended to be similar, as recited in the British North America Act, 1867. And they say that to place the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the maintenance of such judicial character or of public confidence in it or with the free access to an unbiassed tribunal of appeal to which litigants in the Provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court liable to be so treated ceases to be such a judiciary as the Constitution provides for.

The argument on behalf of the provinces was presented substantially as just stated, though not in identical words. But, however presented, no argument which falls short of this could claim serious attention. If, notwithstanding the liability to answer questions, the Supreme Court is still a judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is *ultra vires*. In the course of the discussion both here and in the Canadian Courts full reference was made to the law and practice observed by the Judicial Committee, House of Lords, and His Majesty's Judges.

It appears that the idea of questions being put by the Executive Government to the Supreme Court of Canada was suggested in the first instance by the fourth section of the Act of William IV. For the earliest Canadian Act on this subject (that of 1875) adopts in effect the words of the fourth section. This analogy, no doubt, has some value, inasmuch as this Committee, exercising most important judicial functions, is undoubtedly liable to be asked questions of any kind by the authority of the Crown, and the procedure is used from time to time, though rarely and with a careful regard to the nature of the reference. On the other hand, it must be remembered that the members of the Judicial Committee are all Privy Councillors, bound as such to advise the Crown when so required in that capacity. Upon the whole, it does seem strange that a Court, for such in effect this is, should have been for three-quarters of a century liable to answer questions put by the Crown, and should have done it without the least suggestion of inconvenience or impropriety, if the same thing when attempted in Canada deserves to be stigmatized as subversive of the judicial functions.

In regard to the House of Lords, there is no doubt that when exercising its judicial functions as the highest Court of Appeal from the Courts of the United Kingdom, that House has a right to summon the Judges and to ask them such questions as it may think necessary for the decision of a particular case. That is a very different thing from asking questions unconnected with a pending cause as to the state or effect of the law in general. But there is also authority for saying that the House of Lords

possesses in its legislative capacity a right to ask the Judges what the law is, in order to better inform itself how if at all the law should be altered. The last instance of this being done occurred some 50 years ago, when the right was expressly asserted by Lords of undoubtedly high authority. It is unnecessary further to consider this latter claim of the House of Lords, which in fact has very rarely been put to use, because it is a claim resting upon the unwritten law of the Constitution and said to be within the privilege of one branch of the Legislature, whereas the point to be decided in the present appeal is whether under a particular written Constitution a Parliament can entrust to the Executive Government a similar power. Still it has a bearing upon the supposed intrinsic abhorrence with which their Lordships are asked to regard the putting of questions, otherwise than by litigation, to a Court of law.

Very little assistance is afforded by the almost or altogether obsolete practice of his Majesty's Judges in England being questioned by the Crown as to the state of the law, if indeed it can be said that there ever was any legitimate practice of that kind. Since 1760, when Lord Mansfield on behalf of his Majesty's Judges did furnish an answer, though with evident reluctance, as to the Crown's right to summon Lord George Sackville before a Court-martial, no instance of such a proceeding has been adduced. Earlier practice in bad times is of no weight, and as the unwritten Constitution of England is a growth, not a fabric, it may be that desuetude for 150 years has rendered unconstitutional, in the sense in which that term is understood in England, any attempt to repeat such an experiment. If the point ever arises it must be settled upon the Judges of England either assenting or refusing to comply with the request. It will then be a question what is the duty appertaining to their office, which is a very different question from that now before the Board. It is more to the purpose to consider what has been the practice in Canada under the British North America Act, and how that practice has been regarded by Courts and the Judicial Committee. The needs of one country may differ from those of another, and Canada must judge of Canadian requirements.

The first step towards authorizing the Executive Government of the Dominion to obtain the opinion of the Supreme Court by a direct request was taken in 1875 by the Canadian Parliament. By the terms of the 1875 Act any question might be put to the Supreme Court. Since then, in 1891, and again in 1906, fresh Acts were passed, providing for the same thing with more detail, though not in wider terms, and it is the 1906 Act which gave rise to the present appeal. Between 1875 and to-day the Supreme Court from time to time has been asked and has repeatedly answered questions put to it in accordance with these

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Acts of the Canadian Parliament. And it is very important that in six instances, between the years 1875 and 1912, the answers given by that Court have been the subject of appeal to the Judicial Committee, under a power to appeal which was comprised in the Canadian Acts, and which gave authority to this Board to entertain such appeals, as though they were appeals from the ordinary jurisdiction. In all cases the appeal was entertained; in some cases the answers of the Supreme Court were modified by their lordships; and in one case Lord Herschell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular interests of individuals.

These circumstances were much and legitimately dwelt upon on behalf of the Canadian Attorneys-General, as shewing that the Acts now alleged to have been *ultra vires* were in fact acted upon, and so treated as valid, not only by the Court in Canada, but also on appeal in Whitehall. It was urged, on the other hand, for the Provinces, and with perfect truth, that in no one of these cases was this point ever raised, and that the Judicial Committee would be indisposed to raise it when the parties to the appeal concurred in desiring a determination. It seems that this does not dispose of the argument. The Board would certainly be at all times averse to taking any objection which would hinder the ascertainment of any point of law which the parties desired in good faith to have determined. But it is not easy to believe that, if there is any force in the contention of the now appellants, the Judicial Committee would have so often failed even to advert to a departure so serious as is now maintained, from what is due to the independence and character of Courts of Justice. It is clear, indeed, that no such apprehension ever occurred to any of the great lawyers who heard those cases. And that circumstance militates very strongly against the view now put forward, that it is repugnant to the British North America Act and subversive of justice to require the Court to answer questions not in litigation.

Great weight ought also to be attached to another significant circumstance. Nearly all the Provinces have themselves passed provincial laws requiring their own Courts to answer questions not in litigation, in terms somewhat similar to the Dominion Act which they impugn. If it be said, as it was said, that section 101 of the British North America Act forbids this being done by the Dominion Parliament, this argument cannot apply to the Provincial Legislatures, because section 101 does not apply to the Provinces. Either then these Provincial Acts are valid, while a similar Act passed by the Dominion is invalid, which seems very strange, or the Provincial Acts as well as that of the Dominion are *ultra vires* upon the general ground already dwelt upon—that a Court of Justice ceases in effect to be a Court of Justice when such a

duty is laid upon it. Certainly it is remarkable that for 35 years this point of view has apparently escaped notice in Canada, and a contrary view, now said to menace the very essence of justice, has now been tranquilly acted upon without question by the Legislatures of the Dominion and Provinces, by the Courts in Canada, and by the Judicial Committee ever since the British North America Act established the present Constitution of Canada.

It is difficult to resist the conclusion that the point now raised never would have been raised had it not been for the nature of the questions which have been put to the Supreme Court. If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (*e.g.*, must Justices of the Peace and Judges be re-sworn after a demise of the Crown?), no one would ever have thought of saying it was *ultra vires*. It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV., applicable to the Judicial Committee, has resulted in asking questions affecting the Provinces or alleged to do so. But the answers are only advisory, and will have no more effect than the opinions of the Law Officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can, however, either point out in its answers these or other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put. And the Parliament of Canada can control the action of the Executive.

Yet the argument that to put questions is *ultra vires* must be the same whether the power is rightly or wrongly used. If you say that it is *intra vires* to put some kinds of questions but *ultra vires* to put other kinds of questions, then you will have to draw the line between what may be asked and what may not. That must depend upon what it is judicious or wise to ask, and can in no sense rest upon considerations of law. What in substance their Lordships are asked to do is to say that the Canadian Parliament ought not to pass laws like this because it may be embarrassing and onerous to a Court, and to declare this law invalid because it ought not to have been passed.

Their Lordships would be departing from their legitimate province if they entertained the arguments of the appellants. They would really be pronouncing upon the policy of the Canadian Parliament, which is exclusively the business of the Canadian people and is no concern of this Board. It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to

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the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter. Their Lordships will therefore humbly advise his Majesty that this appeal ought to be dismissed.

Appeal dismissed.

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MERCANTILE TRUST CO. v. CANADA STEEL CO.

Ontario High Court. Trial before Riddell, J. April 4, 1912.

1. MASTER AND SERVANT (§ II B 3—139)—SERVANTS' ASSUMPTION OF RISK—WALKING UNDER DANGEROUS PLATFORM.

Where a servant was killed by a brick falling through an opening in a platform under which his work did not take him the master is not answerable therefor where the servant had been warned as to and knew the danger of going under the opening, and had been expressly directed to keep away therefrom.

2. MASTER AND SERVANT (§ II A—63)—DUTY OF MASTER—SAFETY OF PLATFORMS—IMPRACTICABILITY OF SAFETY APPLIANCES.

The fact that a certain appliance might have prevented the death of a servant will not render a master liable therefor where the jury found that its use would have been impracticable, and that its absence did not amount to a defect.

3. DEATH (§ IV—26)—CONTRIBUTORY NEGLIGENCE—WORKMAN—ASSUMPTION OF RISK.

A master is not liable for the death of a servant, notwithstanding the jury found that the use of a certain appliance would have prevented it, although unable to agree that its absence amounted to a defect, where, at the time the servant was killed, he was in a place where his work did not take him, and he had been warned as to, and knew, the danger he ran, and had been expressly warned to keep away therefrom.

4. MASTER AND SERVANT (§ II C—185)—LIABILITY OF MASTER—WORKMAN'S DEATH CAUSED BY HIS INADVERTENCE.

In the absence of an express finding by the jury that a servant at the time he was killed was guilty of contributory negligence a master will not be liable therefor on the theory that his death was the result of a mere act of inadvertence upon the servant's part during the course of his employment.

[*Laliberte* v. *Kennedy* ((Ont.) not reported), and *Wilson* v. *Davis*, 10 O.W.R. 315, specially referred to.]

Statement

ACTION brought by the administrators of a deceased Italian labourer for damages for negligence resulting in his death.

The action was dismissed with costs.

A. M. Lewis, for the plaintiffs.

J. W. Nesbitt, K.C., for the defendants.

Riddell, J.

RIDDELL, J.:—The defendants were building a blast furnace—this consisted of a steel jacket, in the form of what may, with sufficient accuracy, be described as a vertical cylinder. This jacket was over 60 feet high, and was being lined with firebrick at the time of the accident. The lining was effected in this way. Beginning at the bottom with the firebrick, when the lining had

been inserted to a certain height, a new floor was put in at a height of 4 ft. 6 in. above the bottom floor, and from this another ring of firebrick was put in place—then another floor was put in 4 ft. 6 in. above the second floor, and so on, a new floor being made at each 4 ft. 6 inches. In order to permit of the firebrick, fire clay, etc., being sent up to the bricklayers, a square shaft was inserted, running from the bottom to the floor upon which operations were being carried on—this shaft could not be put in the centre, as there required to be at that place a rod from which as a centre the workmen could carry a cord, which, being carried around, kept the inside of the brick circular. This shaft was built at one side of the centre, and up the shaft came the tubs containing the materials for the bricklayers.

The operations above being carried on in a contracted space, it is obvious that there was always danger of some substance, brick, etc., falling down the shaft—and indeed it was to be feared that some substance might fall from the tubs in their ascent, as they sometimes oscillated, struck the shoulder of the shaft, etc.

The deceased was working at the bottom of the shaft when a portion of a brick fell down the shaft and inflicted such injuries that he died shortly after.

An action was brought on behalf of the widow and children of the deceased as well as on behalf of the administrators (for doctor's bill).

At the trial before me at Hamilton it appeared that the brick which caused the injury had been thrown down on the platform or floor by a bricklayer, and, rolling over and over, at length reached the shaft, and so fell down.

It was contended that the employers should have had one or other of two appliances to prevent the possibility of such an occurrence: (1) A pair of butterfly valves level with the floor which would be shut at all times except when a tub was passing the floor. This the witnesses for the defence prove to be impracticable—and the jury have negatived the proposition of the plaintiff. (2) A continuation of the sides of the shaft up beyond the level of the floor or platform. This, it was said, would be very inconvenient, and in any case it would not prevent the falling of material from ascending tubs. The jury found that the accident would not have happened had the appliance been present, but were unable to agree whether the absence of it was a defect.

It appeared in evidence that the foreman, recognising the danger of material falling down the shaft, directed the deceased, when he first was put on the job, to keep from under the shaft—the workman said that he had been on the job before and would stand on one side. At the side there was a small platform, built either by himself or by another, for him to stand upon; and this is where he should have stood, there being no necessity for his

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being under the shaft at all. Moreover, very shortly before the accident, a fellow-workman had seen him crossing under the shaft and had warned him of the danger. This same workman said that occasionally he himself went under the shaft, but that this was forbidden, and he knew quite well how dangerous it was, and took the risk.

The jury found, in answer to questions, that these warnings were given; that the deceased was not in his proper place; that he knew the danger; and that, had he been in his proper place, he would not have been injured.

I relieved the jury from further answering.

It is obvious that, unless the answers to the latter questions are sufficient to dispose of the case, there should be a new trial. It is not enough that a suggested appliance would have prevented the accident, if the absence of the appliance is not a defect.

But where the questions answered are sufficient to dispose of the case, there is no need of further proceedings: *Findlay* v. *Hamilton Electric Light and Cataract Power Co.*, 11 O.W.R. 48, discussed in *D'Aoust* v. *Bissett*, 13 O.W.R. 1115; *Dixon* v. *Ross*, 1 D.L.R. 17 (Nova Scotia); and here I think such is the case.

I have again considered the law, and can arrive at no other conclusion than that at which I arrived in *D'Aoust* v. *Bissett*, *supra*, followed as it has been in the King's Bench Divisional Court recently: *King* v. *Northern Navigation Co.*, 24 O.L.R. 643, 3 O.W.N. 172; *Pettigrew* v. *Grand Trunk R. Co.*, 2 O.W.N. 709.

The very recent case of *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44, shews that, even under the Imperial Act, more favourable to the workman as it is than our own, there can be no recovery where the accident took place when the workman was doing a prohibited act.

In the present case, as in that just mentioned, it is not the fact that the dangerous act, while prohibited in form, was really "winked at," as was the case in *Robertson* v. *Allan* (1908), 77 L.J.K.B. 1072.

In addition to the cases already mentioned, the following are in point: *Deyo* v. *Kingston and Pembroke R. Co.*, 8 O.L.R. 588; *Markle* v. *Simpson*, 9 O.W.R. 436, 10 O.W.R. 9; *Grand Trunk R. Co.* v. *Birkett*, 35 S.C.R. 296; *Best* v. *London and South Western R. Co.*, [1907] A.C. 209; *Brice* v. *Edward Lloyd, Limited*, [1909] 2 K.B. 804; *Mammelito* v. *Page-Hersey Co.*, 13 O.W.R. 109.

It is strongly urged by Mr. Lewis that all the default of the deceased might be due to inadvertence, and that, in the absence of an express finding of contributory negligence, the plaintiffs might still recover.

This argument is completely met by a decision of the Chancery Divisional Court in *Laliberté* v. *Kennedy* (not reported), sustaining a judgment of Mr. Justice Teetzel at the trial, dismissing the

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action upon the plaintiffs' own shewing. In that case (I was of counsel both at the trial and in the Divisional Court) the deceased's work was to feed blocks to a circular saw, wholly unguarded. The blocks were placed upon a car, which itself ran to the saw upon a tramway. The car was so arranged that, whenever any weight was placed upon it, it inevitably ran to the saw. By reason of the arrangement of blocks, etc., there was a great likelihood of the person feeding putting his foot upon the car and being carried at once to the saw—and the deceased was warned accordingly by the foreman not to put his foot upon the car. After working for some time in safety, he was observed by a fellow-workman to put his foot upon the car—the anticipated result occurred; he was carried to the saw and cut in two. It was perfectly apparent that his act was by pure inadvertence—a mere temporary forgetfulness when he was busy at his master's work. The case was tried by Mr. Justice Teetzel without a jury at Lindsay, on the 2nd and 3rd June, 1904, and that learned Judge held that the fact that the act of the deceased was by inadvertence did not relieve his representative, and dismissed the action. The Divisional Court (The Chancellor, Meredith and Magee, JJ.) dismissed an appeal from this judgment on the 13th December, 1904. This case is, in my humble judgment, good law, and I follow it.

Wilson v. *Davies*, 10 O.W.R. 315, in the Court of Appeal, may also, in some respects, be in point.

The action will be dismissed with costs.

Action dismissed.

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Quebec Superior Court, Weir, J. March 19, 1912.

1. CONTRACTS (§ IV E—367)—BREACH OF CONTRACT TO PURCHASE TIMBER —PURCHASER'S IMPROVEMENTS—FORFEITURE.

Not only property sold under a contract for the sale of timber rights but also the purchaser's lumbering plant found on the land at the time of the seller's re-entry for the purchaser's default, belongs to the former under a stipulation of such contract that upon such default "all plant and timber cut" as well as "all improvements shall remain the property of the" seller "without recourse or claim of any nature whatsoever in damages for compensation against" him.

2. JUDGMENT (§ II D—117)—RES JUDICATA—JOINT DEFENDANTS—DEFENDANT IN PRIOR ACTION.

Res judicata cannot be claimed as to the construction of a contract in a prior action in which the defendant in the second action was a joint defendant, but as to whom such contract was not in issue.

3. CONTRACTS (§ II D—175)—CONSTRUCTION OF CONTRACTS FOR SALE OF PERSONALTY—C.C. 1027.

Where two persons are entitled to personal property by virtue of instruments of different dates the one whose right is superior in point of time is entitled to preference under C.C. 1027 where he was the first to reduce the property into possession.

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4. EXECUTORS AND ADMINISTRATORS (§ II B—43*a*)—TRANSFERRING PROPERTY AS SECURITY FOR DECEDENT'S DEBT.

An executor has no authority under Quebec law to transfer property of an estate to secure the payment of an unsecured debt of his decedent.

5. BANKS (§ VIII—160)—STATUTORY SECURITY TO BANKS—BANK ACT, R.S.C. CH. 29, SECS. 76 AND 90.

Under paragraph (*a*) of sub-sec. 2 of sec. 76, and also sec. 90 of the Bank Act, a bank cannot acquire goods, or take security, by an indenture made by an executor to secure a previously unsecured debt of his testator.

6. TIMBER (§ I—6)—RIGHT OF VENDOR—SALE BY VENDEE TO INNOCENT PURCHASER.

A vendor who, under the provisions of a contract of sale of timber rights, was vested with the title to all property of the vendee found upon the land upon the vendor's re-entry for the vendee's default, cannot recover the value of property sold by the vendee before such re-entry from the person to whom the vendee turned over the proceeds of such sales, where the sales were made without fraud to *bonâ fide* purchasers.

Statement

ACTION to recover a lumbering stock and plant and for damages for the value of other lumbering stock and plant received by defendant from one Hurdman in his lifetime or from the Hurdman estate after Hurdman's death.

Henry Aylen, K.C., for plaintiff.

Messrs. *E. Lafleur*, K.C., and *H. J. Hague*, for defendant.

Weir, J.

WEIR, J.:—The writ of saisie-revendication in this cause, issued on the 2nd September, 1911, and was authority for the seizure of "all the shanty and lumbering stock and plant of the value of $16,829.66" in the possession of defendant on certain described timber berths on a farm near the said timber berths, known as Ross Lake Farm, and on lands and waters near said timber berths and farm, which effects are said to comprise all the shanty stock and plant on said properties, and are described in detail in the affidavit and fiat on which the writ of seizure issued. The seizure was duly made on the 8th and 16th September, 1911.

By his declaration, the plaintiff sets forth:—

1st. That on the 19th September, 1901, by an agreement in writing he promised to sell to the late Robert Hurdman (herein represented by his heirs) his rights in and to the said timber berths, and the stock, plant and improvements thereon, together with all his right, title and interests in and to the said Ross Lake Farm, and that pending complete payment the said Hurdman was entitled to enter upon said property and cut timber and logs;

2nd. That said Hurdman did enter on the said property, but did not meet the payments subsequently due according to agreement and became subject to the forfeitures and penalties stipulated in the agreement, which provided that all the plant and improvements should become the property of plaintiff in such event;

3rd. That on the 6th April, 1909, plaintiff instituted an action against executors or legal representatives, the whole with costs, *distraits* to enforce his rights under said agreement, and for other purposes;

4th. That by judgment rendered on the 14th February, 1911, the said agreement was cancelled and plaintiff declared to be, as regards the Estate Hurdman, the proprietor of the said timber berths and of the stock, plant and creek improvements thereon and of the said Ross Lake Farm;

5th. That at the date of the said judgment the said Estate Hurdman had in its possession, on said limits, on Ross Lake Farm and near thereto, the stock and plant seized herein, valued at $16,829.66;

6th. That in the premises and by virtue of the said judgment, the plaintiff is the owner of said stock and plant;

7th. That the defendant is illegally and fraudulently detaining by refusing to deliver to plaintiff the said stock and plant;

8th. That since the 19th September, 1903, the defendant, illegally and without right, received and took from the said Hurdman and his heirs other stock and plant of the value of $20,000 that were in the said timber berths and farm and on the lands and water near thereto of which plaintiff, by the terms of the said agreement and of the said judgment and from other causes, was the proprietor, to defendant's knowledge.

Plaintiff concluded that he be declared the proprietor of the stock and plant seized and valued at $16,829.66, and that defendant be condemned to pay him the sum of $20,000, the value of the other stock and plant received by defendant from the said Hurdman and his heirs.

Defendant, by its plea, in effect denies all the pretensions of the declaration and sets up that, by an indenture executed on the 17th August, 1906, the goods seized were transferred to it by the Estate Hurdman.

Plaintiff, by answer to plea, says, in reference to said indenture, that John F. Hurdman had no authority to sign it as executor and the defendant had no right, under the Bank Act, to become a party thereto; that the said indenture is contrary to public policy, *ultra vires*, illegal, null, fraudulent and simulated; that defendant never had legal possession of the effects mentioned in said indenture.

Plaintiff replicates generally.

It appears, from the evidence, that the timber berths in question are situate remote from the highways of ordinary travel, and that plaintiff kept thereon, and particularly at Ross Lake Farm, a stock of the supplies necessary for working the extensive limits by lumbering operations. When Hurdman took possession of the limits plaintiff had a stock list of these supplies, as made up in the month of May or June, 1901, but he swears it is now lost. Hurdman, however, made a partial list of these

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effects on the 30th October, 1901, which is produced with a copy of a letter from one of his clerks forwarding it to Hurdman, as exhibit D—4 and D—5 at Enquête. Exhibit p. 16 at Enquête also refers to this list. These supplies were not sufficient for Hurdman's necessities, whose supplies account shews a balance of $28,386.15 worth of goods subsequently sent, on his account, into the limits of which Ross Lake Farm was the distributing centre. Some of the goods left by plaintiff, such as hay, oats and tobacco, were consumable, and as for the balance, he has not been able, apart from a few articles, to identify them as the effects seized under the writ herein.

He bases his claim of ownership, however, mainly on the stipulations of the agreement with Hurdman, dated the 19th September, 1901, and which he interprets as decreeing forfeiture to him of all the plant on the limits or farm if and when Hurdman defaulted on the conditions of the sale.

It is hardly necessary to say that the defendant, pretending to be in the rights of Hurdman, denounces this interpretation as without foundation. It is necessary, therefore, to ascertain the meaning of the agreement in question.

The agreement to sell states, as the main object of the contract, the timber berths, giving their description, and adds:—

> Together with all stock and plants and creek improvements therein, and together with all the right, title and interests (squatter's rights) of the party of the first part in and to the clearance and farm known as Ross Lake Farm, the whole subject to the terms and conditions hereinafter set forth.

Thereafter paragraph (*h*) of clause 2 sets up as follows:—

> (*h*) It is expressly understood and agreed that, should the party of the second part fail to pay any of the sums of money instalments of one hundred and forty-two thousand five hundred dollars each and interest, promissory notes, extra stumpage, above mentioned, and the Crown and other dues, taxes and charges aforesaid, at the time and within the periods by this agreement fixed, then at any time thirty days after the lapse of such period the party of the first part will have the right to re-enter the timber limits and the real estate and property above mentioned and take possession of the same without any process of the law whatsoever, and the party of the second part shall no longer have right or authority to cut or work thereon, and all works and operations begun or actually proceeding shall at once stop and all plant and timber cut remain the property of the party of the first part, and this agreement be at an end. And all monies had and received from the party of the second part shall then be considered as forfeited and as representing the value of such timber as may have been during preceding seasons cut and removed from the limits, the whole without recourse or claim of any nature whatsoever in damages or for compensation against the party of the first part, and all improvements shall also remain the property of the party of the first part.

A difficulty in connection with this paragraph arises in connection with the use of the word "remain." In the declaration plaintiff substitutes for it the word "become," which defendant maintains is not its equivalent. Defendant argues that, as the title to the property in question was not to pass until complete payment of the consideration price, the meaning of "remain" in this clause is equivalent to "continue to be," and it applies only to the effects originally belonging to plaintiff.

The primary meaning given to the word by the Standard Dictionary, which, of course, is not an absolute authority, is as follows:—

> Remain. 1. To stay or be left behind after some act or process of separation, removal or destruction.

Applied to the circumstances of Hurdman being obliged to abandon his operations on the property in question, this definition favours the interpretation of plaintiff that, on Hurdman's default the plant owned by him should be left behind to be confiscated as a penalty for the default or in compensation for his use of plaintiff's plant. Such an interpretation would throw light upon the conduct of the parties to the agreement. Neither of them thought it necessary or advisable to have a signed list made up of the "plant" plaintiff left on the limits. It was only about two months after the signing of the deed that Hurdman's clerk sent him a list, entitled "Inventory of Ross Lake Plant," shewing the estimated value of such effects to have been $3,005.99 apart from a barnful of unpressed hay estimated by a witness as probably worth about $1,300 or $1,400. He never asked plaintiff to accept or approve of this inventory. On his part, plaintiff never discussed the matter with Hurdman. This conduct would seem to indicate that both considered a "plant list" as unnecessary in view of the terms of their agreement. It could only be unnecessary if the agreement did not contemplate a separation of plaintiff's "plant" from Hurdman's plant, but that the two "plants" were thereafter to have a common owner.

A consideration of the terms of the contract bears out this idea. Plaintiff agrees to sell his limits to Hurdman with all stock and plants and creek improvements and his rights in and to the Ross Lake Farm. Hurdman pays $100,000 in cash, promises to pay the balance at stated terms and, in the meantime, has the right to operate the limits. If, however, he fails to comply with the conditions, plaintiff may "re-enter the said timber limits and the real estate and property above mentioned" without any process of law. This clearly covers the re-possession of the "plant" left by him on the limits of the farm, so that, when the deed goes on to say "and all plant and timber cut remain the property" of plaintiff, it refers to other "plant" to which Hurdman had a proprietary right of which he was to be deprived in the same way as he was to lose the value of his labour in the timber cut.

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The word "remain" is also used in the last clause of the last sentence of paragraph (*h*) now in question as follows: "And all improvements shall also remain the property of the party of the first part." This cannot refer to the improvements plaintiff agreed to sell, as he has already stipulated in the same paragraph that he shall have the right to re-enter and take possession of the "said timber limits and the real estate and the property above mentioned," which clearly includes the improvements he agreed to sell; so that the word "remain" here again means that Hurdman shall leave behind and forfeit something of his own, to wit, any improvements made by him.

Unless this be the meaning attachable to the words "and all plant and timber cut remain the property" of plaintiff, it is difficult to give a proper meaning to this other clause of said paragraph, to wit, "the whole without recourse or claim of any nature whatsoever in damages or for compensation against the party of the first part."

The prospective default of Hurdman to make due payment is under contemplation. Plaintiff is given the right to re-enter upon his property, and the moneys paid by Hurdman are to be forfeited "as representing the value of such timber as may have been during preceding seasons cut and removed from the limits." Apparently, then, the "recourse or claim of any nature whatsoever in damages or for compensation" does not refer to the operations of preceding seasons, which are provided for, but must refer, under such circumstances, to his "plant and timber cut"; and this is the recourse in compensation abandoned by the clause.

Under the circumstances, the Court has come to the conclusion that the intent and meaning of the parties to the agreement are that "all plant" of Hurdman or plaintiff found upon the limits and real estate in question after he had defaulted and plaintiff had exercised his right of re-entry thereon, should be and remain thereafter the property of plaintiff.

It appears from the evidence, and is not disputed, that this "plant" was mainly stored at Ross Lake Farm, as a point conveniently central for the working of the limits in question.

Plaintiff avers that the Superior Court has already decided in this sense in case No. 80 of the records of the district of Montreal, wherein he was plaintiff and the Estate Hurdman and the present defendant were the defendants: (see exhibits Nos. 1 and P—3 at Enquête).

Referring to the plea of the Estate Hurdman therein, the Court gave judgment as follows:—

> Doth dismiss the said plea; doth maintain the plaintiff's action as far as the defendants, Harry L. Hurdman, John F. Hurdman, Robert A. Hurdman and Allan G. Hurdman, are concerned; doth declare the agreement of the 19th September, 1901, cancelled, annulled and at an

end; doth declare and adjudge that the said late Robert Hurdman, his legatees, heirs, executors and legal representatives, long before the institution of the present action had forfeited all rights in and to the said limits, to wit: the limits known as Kippewa River Limits, for the year 1873-4, comprising about 226 square miles in the Upper Ottawa division, and in the stock, plant and creek improvements thereon, and in and to the farm on and in the neighbourhood of the said limits, known as the Ross Lake Farm, and all rights and interest in and to the said limits and properties covered by the agreement between the late Robert Hurdman and the plaintiff, of date the 19th September, 1901. Doth declare and adjudge that all sums of money paid in connection therewith by the said late Robert Hurdman or by the present defendants as representing him, forfeited. Doth declare and adjudge the plaintiff to be, so far as the defendants are concerned, the proprietor of the said limits, of the stock, plant and creek improvements thereon, and of the said Ross Lake Farm, free and clear from all claims or demands of the said late Robert Hurdman, his legatees, heirs, executors or legal representatives, the whole with costs *distraits* to Messrs. Aylen & Duclos, attorneys for plaintiff.

As regards the Molsons Bank its plea in said case No. 80 had reference mainly to certain monetary claims of present plaintiff set up therein against it and it pleaded ignorance to plaintiff's proprietary claims against the Hurdmans based on the agreement of the 19th September, 1901. Plaintiff's conclusions as against the said bank in said case were dismissed *sauf recours* and the bank's plea maintained.

Plaintiff has filed herein certified copies of the pleadings in said case No. 80, and it is notable that on the 31st May, 1909, the date of its plea therein, the Molsons Bank, now defendant herein, did not set up in opposition to plaintiff's proprietary claim, based on the same deed as is herein set up against the bank, its rights now alleged under the indenture of date the 17th August, 1906, but stated only that it was ignorant of the allegations of plaintiff in regard to his rights from and under the Hurdman deed. However, in view of the terms of the judgment on the issue between plaintiff and the Molsons Bank, plaintiff does not and cannot claim *choses jugées* as against the present defendant, and the proceedings of case No. 80 can only avail herein as evidence of record.

As regards the indenture between John F. Hurdman, testamentary executor of the late Robert Hurdman, and the Molsons Bank, dated 17th August, 1906, under which defendant claims that the effects seized in this cause were transferred to it, it may be said at once that the identity of the goods so transferred with the goods so seized has not been established.

The indenture purports to transfer the effects mentioned in inventory marked "A" and produced as exhibit D—10. The only dates therein are of August, 1904, and a total valuation is given of $39,976.82.

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The uncertainty of the transfer of the effects mentioned in the said inventory is emphasized by the following paragraph of the indenture:—

> It is agreed and understood that the said bargain and sale is so made without any guaranty as to precise measurements or contents, and that the said party of the first part shall in no way be held bound to account for any of the said plant, provisions and goods detailed in said document, marked "A," which may have been consumed, sold or otherwise disposed of since the making of the said inventory, and that the party of the second part accepts of the said plant, provisions and goods as the same are or may at present be.

There is no evidence of the taking possession by defendant of the said effects, but the exhibits P—13, D—6 and D—7, with the evidence of R. A. Hurdman and C. W. Bangs, amply demonstrates that the Estate Hurdman was selling portions of these goods in 1907 and 1908 and making entries in the books of the estate in reference thereto, just as if the said indenture had never been passed. In fact, on October 7th, 1911, the debit balance of the plant account shewed only $28,386.15 worth of goods there after sales and transfers of some thousands of dollars' worth of effects.

It is noteworthy, too, that the indenture D—9 is remarkable for its disdain of formalities. The place of execution is not stated. The estate of the late Robert Hurdman does not sign but simply "John F. Hurdman, executor." The Molsons Bank does not sign but in lieu thereof its local manager at Ottawa affixes merely his personal name, thus, "A. B. Brodrick," and makes no pretence of representing the Molsons Bank.

Apart from these considerations, the authority of John F. Hurdman as testamentary executor and of the Molsons Bank to enter into such a contract will be considered later. It is important, at this point, leaving aside also the question of the identity of the goods pretended to have been transferred with those seized herein, to ascertain whether the bank had legal possession of the goods so alleged to have been transferred.

It is admitted that the said goods were in and about the limits in question and the Ross Lake Farm. Until after the judgment in case No. 80, a man named Boudriau was in charge of the plant for the Estate Hurdman and not for defendant. His wages were paid by the Estate Hurdman: see exhibits P—8 and P—9. He was dismissed by the following letter, exhibit P—11:—

> March 13th, 1911.
>
> Mr. Auguste Boudriau,
> Hunter's Point, Que.
>
> Dear Sir.—This will be delivered by Isaac Hunter who goes to the depot as the representative of the Molsons Bank and to remain there to look after their interests and to act as the fire ranger during the

fire ranging season. This is also to notify you that your services with the estate of Hurdman are no longer required and we have arranged with the Molsons Bank that you remain on in the same capacity and at the same wages, your time to commence on March 1st, 1911, and they are sending you full instructions by this mail. Hoping that you have had a good winter, and all enjoying the best of health.

Yours truly,
(Sgd.) J. F. Hurdman.

This letter was delivered to Boudriau on the 20th March, 1911. Previous to that date George B. Klock, representing the plaintiff, had arrived at Ross Lake Farm and took an inventory of the plant, which is filed as exhibit P—1. George B. Klock engaged the said Boudriau to serve the plaintiff, as appears by exhibit P—2, which is in these terms:—

Ross Lake Depot,
March 6th, 1911.

Having delivered stock and plant over to J. B. Klock, per Geo. B. Klock, I agree to remain with my woman in the employ of James B. Klock at $35 per month, whom I agree to obey. Time begins Feb. 15th, 1911.

his
Auguste X Boudriau.
mark

Witness:
Geo. B. Klock.

One John Coghlan arrived at Ross Lake Farm on the 22nd March, 1911, and took charge in the place of Geo. B. Klock who left. After Klock's departure, Robert A. Hurdman, who armed with written instructions from the bank, exhibit P—12, had arrived with Hunter, the bank's representative, induced Coghlan to desert his trust and leave the district. It does not appear distinctly that Boudriau also broke his engagement to plaintiff, and, at all events, he remained on the farm. Even if he had done so, it would not improve defendant's position. Plaintiff took possession of the effects seized therein, made an inventory thereof, and remained in possession through his representatives, George B. Klock, Boudriau and Coghlan, from the 4th March till the 25th March at least. He did so in virtue of the right of re-entry and re-possession stipulated in the deed between him and Hurdman, and in virtue of the judgment thereon in case No. 80, defendant's possession, even if admitted, was subsequent to plaintiff's and is ineffective as regards him: C.C. 1027.*

*Section 1027 of the Civil Code (Que.) is as follows:—

The rules contained in the two last preceding articles, apply as well to third persons as to contracting parties, subject, in contracts for the transfer of immoveable property, to the special provisions contained in this code for the registration of titles to and claims upon such property.

But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred and remains owner of the thing although his title be posterior in date; provided, however, that his possession be in good faith.

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The attempted transfer by John F. Hurdman to the bank was also ineffective and illegal inasmuch as he had no power or authority, as testamentary executor, to make such a transfer. He received nothing from the bank as consideration, and the estate was not even credited in the books of the bank with the value of the goods referred to in the indenture. There is nothing in the law which authorizes an executor to make a contract of this kind.

Nor is the defendant in any better a position. The witness Brodrick, its manager at Ottawa, examined as to the indenture, gave evidence as follows:—

Q. What about the good and valid considerations for that sale?

A. The considerations were because the bank's money paid for the plant and we wished security for the money advanced.

Q. How long ago had the bank given the money?

A. During Mr. Hurdman's operating the limit.

Q. Between 1901 and 1903?

A. Yes, sir.

Banks are not authorized to acquire goods or to take security for old debts in this way. The transaction is both *ultra vires*, illegal and null: paragraph (*a*) of sub-division 2 of section 76 and section 90 of the Bank Act*, and C.C., art. 13.

There remains to be considered plaintiff's claim for the value of the lumbering plant, including horses, etc., sold from the limits by the Estate Hurdman and the proceeds of which were handed over to the bank. The plaintiff claims $20,000 on this

*Section 76, 2 (*b*) of the Bank Act, R.S.C. 1906, ch. 29, is as follows:—

2. Except as authorized by this Act, the bank shall not, either directly or indirectly—

(*b*) purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank.

Section 90 of the Bank Act, R.S.C. is as follows:—

The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted—

(*a*) at the time of acquisition thereof by the bank; or

(*b*) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank:

Provided that such bill, note, debt or liability may be renewed, or the time for the payment thereof extended, without affecting any such security.

2. The bank may—

(*a*) on shipment of any goods, wares and merchandise for which it holds a warehouse receipt, or any such security as aforesaid, surrender such receipt or security and receive a bill of lading in exchange therefor; or,

(*b*) on the receipt of any goods, wares and merchandise for which it holds a bill of lading, or any such security as aforesaid, surrender such bill of lading or security, store the goods, wares and merchandise, and take a warehouse receipt therefor, or ship the goods, wares and merchandise, or part of them, and take another bill of lading therefor: 53 Vict. ch. 31, sec. 75; 63-64 Vict. ch. 26, sec. 18.

head. In the first place, it is not proved that effects approaching that amount were sold off the limits, but the value involved has little to do with the decision of this part of the case.

Upon the default of Robert Hurdman or his representatives to make the payments specified in the deed passed between plaintiff and Robert Hurdman, the former had the right, according to the deed and the judgment already passed thereon, to re-enter the limits and take possession of all the plant thereon and thereafter the plant became his property. Hurdman made default under the deed in 1903, but plaintiff made no attempt to exercise his rights under the deed until 1909, when he entered the action No. 80. He made no physical attempt to re-enter or take possession. It was entirely optional with plaintiff whether or not he should put an end to the deed after Hurdman's default and claim the stipulated forfeitures. Until he exercised these rights, the Estate Hurdman remained in possession of its plant as owner and had a right to dispose of the same in the absence of fraud, and no fraud whatever is shewn in the sale thereof to genuine purchasers. As a matter of fact, plaintiff recognized this right by purchasing certain of the effects from the Estate Hurdman. The cash received from such sales was deposited in defendant's bank in the usual course of business, and plaintiff has failed to prove any claim thereto.

His action is maintained as to the effects seized and valued at $16,829.66, and the seizure thereof is declared good and valid, the whole with costs *distraits* to Messrs. Aylen & Duclos, plaintiff's attorneys.

Judgment for plaintiff accordingly.

N.B.—An inscription in review has been made in this case.

HITCHCOCK v. SYKES.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel, and Middleton, JJ. April 18, 1912.

1. BROKERS (§ II B—14*a*)—JOINING WITH THIRD PARTY IN PURCHASING PROPERTY—COMPENSATION TO BROKER—RIGHTS OF VENDOR.

Where an agent, employed to sell property on commission, himself joins with a third person in purchasing, the vendor is not bound to enquire into the relationship between his agent and the third person in respect of the purchase, or to inform the third person of the existence of the agency or of the payment of the commission, but may pay his agent the stipulated commission without losing his right to specific performance or rendering the transaction liable to rescission.

Statement

APPEAL by the defendant Webster from the judgment of Falconbridge, C.J.K.B., 3 O.W.N. 31, after trial without a jury, in favour of the plaintiffs, in an action for specific performance

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of a contract for the sale of mining lands, with a counterclaim for rescission.

The appeal was dismissed, MIDDLETON, J., dissenting.

G. H. Kilmer, K.C., for the appellant.

C. H. Cline, for the plaintiffs.

MEREDITH, C.J.:—The respondents were the vendors of a mining property which they sold to the appellant and the defendant Sykes for $167,500; $20,000 of which were paid on the 12th April, 1910, when an agreement embodying the terms of the sale was executed by the contracting parties.

The appellant paid the $20,000, and it was arranged between him and Sykes that the latter was to repay one-half of it.

After the agreement was executed and the $20,000 were paid, the respondents paid to Sykes $2,000 on account of a commission of 10 per cent. which they had agreed to pay him if he effected a sale of the property for them, on the sums paid by the purchaser as and when the same should be paid.

The fact that Sykes was to receive this commission, or that he actually received the $2,000 on account of it out of the $20,000 paid on account of the purchase-money, was not communicated by Sykes or by the respondents to the appellant; but there is nothing in the evidence to lead to the conclusion that the respondents had in mind, or did anything, knowingly at all events, to conceal from the appellant the fact that Sykes was to receive the commission, or that he was being paid the $2,000 on account of it.

It is, however, contended by the appellant that, Sykes being, as is also contended, a partner with the appellant in the purchase, the principle of the cases as to the effect of an agent for one of the contracting parties receiving a bribe from the other contracting party is applicable; and that the appellant is, therefore, entitled to repudiate the agreement and to have it rescinded, as he sought to do by his counterclaim.

Upon the facts as developed in the evidence, that principle is not, in my opinion, applicable.

The respondents were desirous of selling part of the property, and had arranged with an insurance and real estate agent named Robert Corrigan to pay him a commission of ten per cent. on the purchase-price of the property if he should find a purchaser for it at the price for which they were willing to sell.

Sykes was at Corrigan's office in connection with another matter, when the latter laid before Sykes, as Corrigan states it, "the proposition of Mr. Hitchcock's silver mine," and told him that "there was ten per cent. in it, provided that a purchaser could be introduced to Mr. Hitchcock." "Sykes seemed to be quite taken up with the proposition," and Corrigan made an appointment with him for the same evening, and "had Mr.

Hitchcock come in." At this interview, further discussion took place, when, according to Corrigan's testimony, he told Sykes that, "if he would secure a purchaser, that possibly he was in touch with some moneyed men in Montreal, that possibly he might be, a deal might be brought about, and, if so, there would be ten per cent. in it."

Hitchcock's account of the transaction, upon his examination for discovery, was, that Sykes had gone to Corrigan "to get him to 'handle' some stock in another mining company, and Corrigan told him of our proposition, and asked him if he couldn't find a buyer, and he said, 'If you can, there is ten per cent. commission in it for us, and it is a good property.'"

That, up to the time that Sykes introduced the appellant to the respondents, Sykes was acting as the agent of the respondents to find a purchaser, appears to have been the view of counsel for the appellant; for, upon Wilbur R. Hitchcock's examination, the following question was put to him: Question 48: "Up to that time he (i.e., Sykes) was looking around as an agent would or somebody acting in that capacity for a prospective purchaser, and when he came there and brought someone with him you knew that the two of them were going to buy the property jointly or as partners?" And again, question 56: "Then I am right in understanding that your bargain with Sykes was to pay him ten per cent. of the purchase-price from time to time as it was paid to you under the agreement?" To which the answer was, "That was the bargain."

Again, question 203, Hitchcock is asked: "Was there any arrangement in writing with Mr. Sykes about commission?" To which he replied: "No, there was no arrangement in writing; it was verbal."

After the meeting in Corrigan's office, Sykes saw the appellant and applied to him to join him in the purchase; and, after some negotiation between them, the appellant agreed to do so, and the respondents and Sykes and the appellant met on the 12th April, 1910, at the office of Mr. Cline, who acted as solicitor for the respondents; and an arrangement was there concluded for the purchase of the property which Sykes had been commissioned to find a purchaser for, and for the surface rights of an adjoining property, which Sykes appears to have thought it necessary to acquire as a means of access to and for the purpose of transporting the product of the mine.

Until this meeting the respondents had not seen and did not know the appellant, either in connection with the purchase of the property or otherwise.

Upon this state of facts, however unfair it may have been on the part of Sykes not to have disclosed to his partner the fact that the respondents were to pay him a commission for finding a purchaser of the property, I am unable to see that any

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duty was cast upon the respondents to disclose that fact to the appellant.

They had employed Sykes to find a purchaser for the property, and Sykes had introduced as the purchasers the appellant and himself: they knew nothing of the arrangements between the appellant and Sykes, and were not, I think, called upon to make any inquiry as to them. Surely an owner of property who employs an agent to find a purchaser of it, upon the terms that the agent is to be paid a commission on the purchase-price, is under neither a legal nor a moral duty, when the agent comes to him with a third person and tells him that he and that third person are willing to purchase the property on the terms proposed, to ask the third person whether he is aware that the person with whom he is joining to make the purchase is his (the owner's) agent to find a purchaser, and that the agent is being paid a commission for having done so, or to inform of those facts.

I fully recognise the importance of adhering to the rules which Courts of Equity have established for promoting fair dealing, and would not wittingly depart from them; but I am unwilling to set up an artificial standard of morals which the average honest man is unable to reach, and to undo transactions which have been entered into because the acts of one of the contracting parties do not square with that artificial standard.

I venture to think that an honest business man in the position of the respondents would be surprised to be told that he had been guilty of fraud because he had not done that which the appellant asks us to hold that it was the respondents' duty to do.

It was also contended that the appellant was entitled to a return of the $20,000, because, as it was urged, the respondents have rescinded the contract.

This contention is, in my opinion, untenable. The agreement provides that, in the event of failure by the purchasers to pay any of the instalments of purchase-money, the moneys previously paid on account of it are to be forfeited; and, default having been made in the payment of the instalments, the respondents are entitled to retain the $20,000.

There is some question as to liens which have been registered against the property, and it was arranged by counsel upon the argument that that question should not be dealt with until the lienholders' actions have been disposed of; and, subject to that arrangement, the appeal should, in my opinion, be dismissed with costs.

Teetzel, J.

TEETZEL, J.:—I agree.

Middleton, J.

MIDDLETON, J. (dissenting):—As soon as the plaintiffs knew that Sykes and Webster were partners, that moment they ought

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to have appreciated that Sykes could not in honesty receive a part of the price paid without Webster's full assent, and it became their duty to ascertain that Webster knew and assented. Failing in this, they were guilty of fraud, both in morals and law: *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.*, L.R. 10 Ch. 515; *Grant* v. *Gold Exploration and Development Syndicate Limited*, [1900] 1 Q.B. 232, 248. The contract should be rescinded, and the money paid under it refunded, with interest, if Webster can reconvey or cause to be reconveyed the lands free and clear of all incumbrances done or suffered by him or any one claiming under him.

Appeal dismissed; MIDDLETON, J., *dissenting.*

LEVI v. LEVI.
(Decision No. 2.)

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May 21.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. May 21, 1912.

1. ESTOPPEL (§ III B—53)—SEPARATION AGREEMENT—PREVENTING COMPLIANCE WITH CONDITION.

Where it is provided by a separation agreement that the husband shall obtain a religious separation in another country and if not procured within three months by reason of any default or neglect on the part of the wife the allowance for separate maintenance shall cease, it becomes the duty of the wife to facilitate the obtaining of such religious separation, and if she declines to go to the foreign country which she knew when making the agreement would be necessary to the obtaining of the religious separation and thereby prevents her husband from fulfilling that condition of the agreement, and thereafter makes no claim thereon for many years, she will be estopped from claiming that her husband was in default in respect of maintenance payable by the terms of the agreement "until the separation is procured."

[*Levi* v. *Levi* (No. 1), 1 D.L.R. 776, affirmed on appeal.]

Statement

APPEAL from decision of Macdonald, J., *Levi* v. *Levi*, 1 D. L.R. 776, dismissing an action upon a separation agreement.

W. S. Morrisey, for plaintiff, appellant.

E. J. Thomas, for defendant, respondent.

Judgment

The Court by an oral judgment dismissed the appeal. No order as to costs.

Appeal dismissed.

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KENNEDY v. KENNEDY.

Ontario High Court. Trial before Teetzel, J. March 28, 1912.

1. PERPETUITIES (§ III—20)—SUSPENSION OF ABSOLUTE POWER OF ALIENATION FOR INDEFINITE PERIOD.

Any gift not of a charitable nature the purpose of which is to tie up property for an indefinite time is void as creating a perpetuity.

2. WILLS (§ III G 4—139*a*)—BEQUEST TENDING TO CREATE A PERPETUITY.

A bequest is void, as tending to create a perpetuity, by which the residue of an estate was given to executors or trustees to be used and employed by them in their discretion in maintaining and keeping up, until sold and disposed of, the testator's residence, as a home for his son, his son's family and descendants, or for whomsoever it should by the son be given by will or otherwise.

3. WILLS (§ III E—111)—RESIDUARY CLAUSE—PERPETUITY CREATED—RIGHT OF DISPOSAL.

The residue of an estate, except such as is honestly necessary in the discretion of the executors or trustees, for the upkeep and maintenance of the testator's residence, until sold or disposed of, as a family home for his son, his son's family and descendants, or for whomsoever the son should give it by will or otherwise, is so tied up as to create a perpetuity where neither the trustees nor the owner of the residence had the right to dispose of the fund for any other purpose under the terms of the will.

4. TRUSTS (§ II B—48)—RIGHTS AND POWERS OF TRUSTEES—SALE OF PROPERTY WHERE PERPETUITY HAS BEEN CREATED BY WILL.

Where, by will, executors or trustees were clothed with discretion to devote the residue of an estate to keeping up and maintaining the testator's residence, until sold or disposed of, as a family home for his son, his family and descendants, or for whomsoever the son might give it by will or otherwise, the bequest is void as a perpetuity, and cannot be saved on the theory that the trust was imperative, and, as the amount to be expended was left to the discretion of the trustees, they could at once appropriate the whole of the fund, regardless of the amount thereof or of the necessity for its expenditure, for the benefit of the present owner of the residence, as, like all trusts, it must be executed in good faith.

5. WILLS (§ III K—187)—ANNUITY CHARGED ON LAND—SALE FREE FROM CHARGE—PROCEEDS LIABLE.

Where wide powers as to the disposal of property are vested in trustees they may make a title free from a charge of an annuity, but the proceeds of the sale will be charged with the payment thereof.

6. WILLS (§ III F—116)—PARTIAL INTESTACY—WHERE PERPETUITY CREATED IN RESIDUE.

Where a perpetuity is created in the residue of an estate bequeathed for other than charitable purposes, an intestacy as to such portion results.

Statement

THE plaintiff, one of the next of kin of David Kennedy, deceased, brought this action to obtain a construction of the will of the deceased, and for a declaration that the gift therein to the trustees to keep up and maintain the residence of the testator was void as tending to create a perpetuity.

The action was dismissed.

J. Bicknell, K.C., and *W. A. Baird*, for the plaintiff and the defendants Robert Kennedy and Joseph H. Kennedy.

E. D. Armour, K.C., and *A. D. Armour*, for the defendant James H. Kennedy.

W. M. Douglas, K.C., for the defendants the Suydam Realty Company and Henry Suydam.

T. P. Galt, K.C., *A. J. Russell Snow*, K.C., and *W. A. Proudfoot*, for the other defendants.

Teetzel, J.

March 28, 1912. TEETZEL, J.:—The principal question for determination is, whether or not a provision contained in the will of David Kennedy, deceased, is good, or void as creating or tending to create a perpetuity.

The clause containing the provision in question reads as follows:—

> The rest residue and remainder of my estate both real and personal I give devise and bequeath to my executor, executrices and trustees aforesaid to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy with full power and authority to them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sales to devote as in their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon any such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will.

This clause and other parts of the will have been the subject of much judicial consideration during the last three years, beginning with *Kennedy* v. *Kennedy* (1909), 13 O.W.R. 984, and in *Kennedy* v. *Kennedy* (1911), 24 O.L.R. 183, and *Foxwell* v. *Kennedy* (1911), 24 O.L.R. 189; the last pronouncement being an unreported judgment of the Chief Justice of the Common Pleas, in January last, in *Foxwell* v. *Kennedy*, on the counterclaim of the defendants the Suydam Realty Company and Henry Suydam, decreeing in their favour specific performance of a contract for the sale of a portion of the residuary estate in consideration of $97,000.*

By the judgment in *Kennedy* v. *Kennedy*, reported in 24 O.L.R. 183, it was held by Mr. Justice Latchford that the provision in the above clause in favour of the pecuniary legatees was void, on the ground that it created a perpetuity. This judgment was affirmed by a Divisional Court (p. 189 of the same volume);

*An appeal from this judgment was dismissed by a Divisional Court on the 6th May, 1912. See 3 O.W.N. 1225.

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and a judgment of mine in *Foxwell* v. *Kennedy*, formally adopting the judgment of my brother Latchford, was affirmed by a Divisional Court (p. 198 of the same volume).

The plaintiff is one of the next of kin of the testator, and in this action claims, not only that the gift of what may remain of the residuary estate, but also that the gift in its entirety to the trustees to keep up and maintain the residence of the testator, is void as tending to create a perpetuity.

The testator gives his dwelling-house and premises in the city of Toronto, together with the chattels therein or thereon at the time of his decease, except a number specifically bequeathed, to the defendant James Harold Kennedy, "but subject nevertheless to the provisions hereinafter made for Gertrude Maude Foxwell and Annie Maud Hamilton."

The will contains provisions in favour of each of these ladies, to the effect that each is given a bed-room suite in a specified room in the house, together with the contents and furnishings thereof, with a right to live in said residence as a home as long as she remains unmarried, and to occupy said room with free and full ingress, egress, and regress thereto and therefrom, with all other privileges, rights, conditions, and conveniences necessary to the full enjoyment thereof, but on no condition is she to be looked upon to do or to be compelled to do any work or have any household duties or responsibilities except to look after her own apartment, and a right to remove the chattels when she leaves the premises; and his son James Harold Kennedy is to supply her with a key to the front door, with all necessary maintenance and board, all of which is expressly made a charge upon his residence and premises.

I think it is plain from all the provisions of the will with reference to his residence that the testator's scheme was to have the same maintained as a family residence for these two young ladies as long as they lived and for his son James Harold Kennedy and his family and descendants or whomsoever James Harold Kennedy might will or otherwise give the said residence to, and that as to such residence it should, until sold and disposed of, be kept up and maintained by the trustees and those succeeding them in the trust in the manner in which it had been kept up and maintained by him.

This being, as I think, the scheme which the testator had in his mind, the question for consideration is, whether, in making the provision for carrying out that scheme, he has not infringed the rule of law against perpetuities.

As the result of the best consideration I have been able to give to the numerous authorities cited in argument and others, I am of opinion that the gift in question is void as creating or tending to create a perpetuity. I am unable to distinguish this case in principle from such cases as *Thomson* v. *Shakespear*

(1860), 1 DeG. F. & J. 399; *Carne* v. *Long* (1860), 2 DeG. F. & J. 75; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381; and *Rickard* v. *Robson* (1862), 31 Beav. 244.

In *Thomson* v. *Shakespear* (1860), 1 DeG. F. & J. 399, the provision of the will analogous to the provision in question was, that the testator gave his trustees £2,500:—

> to be laid out by them as they shall think fit, with the concurrence of the trustees of Shakspeare's house, already sanctioned by me, in forming a museum at Shakspeare's house, in Stratford, and for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes.

In that case, as in this, the money was taken out of the estate, and was directed to be spent for the maintenance of the premises, and the period over which the expenditure should extend was likewise indefinite, and, not being for a charity, was held to be void as in violation of the rule against perpetuities.

In *Carne* v. *Long* (1860), 2 DeG. F. & J. 75, the testator gave his mansion house and premises, with the appurtenances thereunto belonging, unto the trustees for the time being of the Penzance Public Library, to hold to them and to their successors forever for the use, benefit, maintenance and support of the said library. The Lord Chancellor in giving judgment in that case said (p. 79):—

> My objection to it is, that it tends to a perpetuity. . . . The clear intention of the testator, as expressed by the will, is, that this should be a gift in perpetuity to this institution at Penzance. The gift is to the trustees for the time being of the society and their successors, to be held by them and their successors for ever, they holding it for the use, benefit, maintenance and support of the library. If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided, that the society is not to be broken up so long as ten members remain. The devise, therefore, is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property comprised in the devise is therefore to be taken out of commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but for so long as ten members of the society shall remain. This seems to me a purpose which the law will not sanction as tending to a perpetuity.

Now, in this case, the testator in effect says that his trustees shall spend such sums out of his residuary estate as they may deem necessary to keep up and maintain his residence until it is sold and disposed of; and, while such keeping up and maintenance is for the benefit of James Harold Kennedy and those

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who may succeed him as devisees and donees, they have no control over or power of disposition of the residue not appropriated by the trustees to keeping up and maintaining the residence. Nor have they the power, upon selling the residence, to dispose of any part of the fund set aside for its maintenance.

In *Yeap* v. *Ong*, the case reported in L.R. 6 P.C. 381, a gift "of the upper storey of four specific houses or shops, to be occupied by the several members and descendants of K.S.C. and L.K.W. as already proposed," that is, as the context shewed, as a family house for the use of two separate families, was held to be void for uncertainty, and as denoting an intention to create a perpetuity.

The analogy in this case is not, of course, the giving of this residence for the occupation of the son James Harold and the two ladies, but for its perpetual maintenance or until "it should be necessary that the said residence should be sold and disposed of."

In *Rickard* v. *Robson* (1862), 31 Beav. 244, it was held that a bequest of money, the interest of which was to be applied in keeping up the tombs of the testator and of his family, is void as a perpetuity. It is difficult to draw a distinction between a provision for keeping up a tomb as a resting place of the deceased members of the family and a provision for the indefinite keeping up of a residence as a habitation for the living members of the family. See also *Hoare* v. *Osborne* (1866), L.R. 1 Eq. 585; *Fowler* v. *Fowler* (1864), 33 Beav. 616.

In *In re Gassiot* (1901), 70 L.J.N.S. Ch. 242, a bequest of £4,000 to the Vintners Company on condition that they accept a bequest of a portrait with certain obligations, and enjoining the company out of the income of the £4,000 to keep in due and proper repair the portrait, cleaning and regilding its frame not less than once in every four years, the surplus income to be applied for the benefit of individuals answering a particular description, etc., was held to be void as infringing the rule against perpetuities.

See also *In re Dutton* (1878), 4 Ex. D. 54.

I think the general proposition of law to be drawn from the above cases is, that any gift, not being charitable, the object of which is to tie up property for an indefinite time, is void.

It seems to me that there can be no question in this case as to the indefiniteness of the time during which the residuary estate was to be tied up, inasmuch as many generations of owners may continue to occupy the residence before the happening of the event upon which further expenditures are to cease, *i.e.*, when it shall "be necessary that the said residence should be sold and disposed of."

Nor do I think that, upon a fair interpretation of the testator's language, it can be held that the residue, except such as,

in the honest discretion of the trustees, it is necessary to expend for up-keep and maintenance of the residence according to the standard fixed by the testator, is not tied up and taken from commerce, within the meaning of the authorities. Neither the owners of the residence nor the trustees have any right to dispose of the fund for any other purpose. The trustees are bound to hold the whole fund for the purpose of the up-keep and maintenance until the happening of the event when, according to the testator's wish, the residue was to be distributed among his pecuniary legatees; and I cannot conceive how the fact that, because it has been held that the testator's wish in that regard has been defeated by reason of his language contravening the law, any advantage therefrom is to accrue to the owner of the residence.

I am unable to yield to the argument by Mr. Armour, that, because the trust is in its nature imperative, and the amount to be expended is left to the discretion of the trustees, they can at once appropriate the whole fund, regardless of the amount thereof or of the necessities for expenditures, for the benefit of the present owner, as, by his deed poll (exhibit 4), the defendant James H. Kennedy, the owner and sole trustee, has attempted to do. Like any other trust, it must be executed in good faith; and the Court will exercise its control to prevent a dishonest exercise of discretion. Whether or not the defendant James H. Kennedy, in the exercise of his discretion as evidenced by the deed poll, has acted honestly, I am unable, upon the evidence, to say; because the actual amount of the fund in his hands or the necessities for up-keep and maintenance were not disclosed in evidence before me; so that, if my judgment as to the total invalidity of the gift is not maintained, the plaintiff and other next of kin should be at liberty, in another action, if so advised, to contest the good faith of James H. Kennedy in the exercise of the discretion as evidenced by the deed poll.

The whole estate was charged with the payment of an annuity of $400 to the plaintiff, and he claims that the lands embraced in the residuary gift cannot be sold except subject to that charge. In view of the wide power of sale vested in the trustees, it is, I think, perfectly plain that they may make title to the purchaser free from the charge, but the proceeds will be charged with the annuity.

At the trial, I dismissed the action as against the defendants Suydam and the Suydam Realty Company, but reserved the question of costs. I now think that there is no good reason why the plaintiff should not pay them.

The judgment will therefore be:—

(1) Declaring that the gift of the residue is void as creating a perpetuity, and that the lands embraced therein may be sold

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free from the plaintiff's annuity; declaring that the proceeds of the sale are charged therewith; and that, as to the whole residuary gift, there is an intestacy; reserving to the plaintiff and other next of kin, in the event of it being held that my judgment is wrong, the right to impeach, in another action, the good faith of the defendant James H. Kennedy in the exercise of his discretion as evidenced by the deed poll.

(2) That the action be dismissed with costs as against the defendant Suydam and the Suydam Realty Company.

(3) Except as to those costs, the costs of all parties shall be paid out of the residuary estate.

Action dismissed.

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DULMAGE v. LEPARD.

Ontario High Court, Britton, J. April 6, 1912.

1. TENDER (§ I—7)—RELIEF FROM MAKING—LESSOR INTIMATING HIS INTENTION OF REPUDIATING CONTRACT.

The payment or tender of the amount agreed to be paid down on a lease is dispensed with where the lessor informed the lessee that he did not intend to carry out the contract.

2. SPECIFIC PERFORMANCE (§ I C—24*b*)—CONTRACT TO LEASE.

The failure to carry out an agreement to lease a hotel for a year and to sell its furniture and fixtures does not present a case for specific performance of contract, there being an ample remedy in damages.

3. DAMAGES (§ III A 3—64)—MEASURE OF COMPENSATION ON LESSOR'S BREACH.

Where the plaintiff in an action for breach of an agreement to lease a hotel and sell its furniture and fixtures does not shew that his bargain was a good one, or the amount he lost by the defendant's refusal to fulfil his agreement, seventy-five dollars damages only was awarded.

4. DAMAGES (§ III P—343)—MEASURE OF COMPENSATION—LOSS OF PROFITS—FROM BREACH OF CONTRACT.

Supposed or estimated profits that might have been made had the defendant performed his agreement to lease a hotel and sell its furniture and fixtures, are too uncertain to be made the basis for a recovery of damages for the breach of the agreement.

Statement

ACTION for the specific performance by the defendant of an agreement for leasing to the plaintiff the hotel of the defendant at Wingham; or, in the alternative, for damages for breach of the agreement.

There was judgment for the plaintiff with costs.

W. Proudfoot, K.C., for the plaintiff.

Charles Garrow, for the defendant.

Britton, J.

BRITTON, J.:—Negotiations for this agreement were carried on between the plaintiff and defendant, and on the 31st July,

1911, having arrived at a clear understanding, they went to the office of Mr. Holmes, the solicitor for the defendant, where the agreement was reduced to writing and signed by the parties.

The defendant agreed to let to the plaintiff the Exchange Hotel and premises in the town of Wingham for five years from the 1st September, 1911, at the yearly rental of $700 and taxes, payable monthly in advance, and to sell to the plaintiff the household goods and furniture in the hotel at a valuation. The purchase-price was to be paid in cash at the conclusion of the valuation.

After the agreement was signed by both parties, and apparently all completed, the defendant suggested that there ought to be a deposit, or something paid "to bind the bargain." The plaintiff agreed to this at once, and promised to pay or make a deposit of $100 on the following Saturday—the 5th August.

The defendant's son, William Lepard, was living with the defendant at the time, and assisting the defendant, more or less, in the hotel business. He was present when the agreement between the parties was entered into.

On the 3rd August, the son William wrote to the plaintiff a post-card, as follows: "In regard to renting the hotel, father has changed his mind and does not care to rent. Would sell—but not rent. Hoping he has not put you to much trouble, remain, yours sincerely, W. C. Lepard, Wingham." The plaintiff received this card in due course at the Gorrie post-office.

So far there is practically an entire agreement between the parties. Now the conflict begins.

The plaintiff says that on the 5th August he went to Wingham with a marked cheque for $100 to pay to the defendant as promised; that he saw the defendant, and asked him if he had notified the inspector. The defendant said "no," that it, the agreement, was off, and asked the plaintiff to wait until Billy would come home: . . . but the plaintiff could not and did not do so, but returned to his home in Gorrie without paying or making any actual tender of the $100.

The defendant denies that the plaintiff was at his house on the 5th August, and denies that he had any conversation with or even saw the plaintiff after the 31st July, until the 19th August, when he admits that the plaintiff was at his (the defendant's) hotel at Wingham, and that on that day the son was not at home, and that the plaintiff desired to see the son. The plaintiff said that the day he was at Wingham with the cheque was the day of the Borden meeting at Harriston. It was established that the Borden meeting at Harriston was on the 19th August. The plaintiff was in error as to that; but he could not be mistaken about being at Wingham on that day, and about having the cheque for $100. If it is not true that the plaintiff had the cheque at Wingham on the 5th, the plaintiff has sworn falsely; it was not any

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mistake about that. I do not think that the plaintiff swore falsely. . . . He was, in my opinion, at Wingham on the 5th and on the 19th August, and the son of the defendant was absent on each day. The defendant knew of the post-card written by his son to the plaintiff shortly after it was written, and he adopted it and confirmed it, on the 5th, 19th, and 31st August. I am of opinion that there was a complete waiver of any tender of payment or deposit of the $100 on account, as promised by the plaintiff.

The plaintiff's solicitor, Mr. Vanstone, was consulted by the plaintiff on the 7th August; and, after that, all that took place was consistent with the breach by the defendant, and with the defendant's determination, arrived at on or before the 3rd August, that he would not carry out his agreement.

The plaintiff avowes a readiness and willingness and ability on his part to do all that was required of him.

I do not understand how the defendant can truthfully say that he was willing to carry out his part, and only refused to do so because of the non-payment of the $100. He admits that he did not ask the plaintiff for the $100, or put forward to him the non-payment as a reason, either on the 19th or 31st August.

This action was commenced on the 16th October, 1911.

The defendant, in his statement of defence, which was filed on the 3rd February, 1912, said that he was willing to carry out the agreement, although not liable in law for any breach on his part.

This is not a case for ordering specific performance of the agreement. Counsel for the plaintiff said, on the argument, that he would be quite willing to limit his damages to those sustained by reason of not having the hotel for the five months prior to the 1st February, 1912; and he thinks his loss was $1,000.

It is difficult to measure the plaintiff's damages and to fix any amount he has really lost by the defendant's breach of contract. No evidence was produced that would shew that the plaintiff's bargain as a whole was a good one. The defendant has not attempted to sell for any higher price than the plaintiff was to pay.

The plaintiff's estimate of $1,000, at least, is a mere optimistic guess. The prior owner and occupant of these premises—Mr. Hill—thinks he made as net profit for eighteen months, $1,500, but then he says, "Wingham was different from last autumn." Even Mr. Hill's evidence was not satisfactory. He qualified every answer by stating his uncertainty.

The defendant states that he not only did not make money, but lost money, during the time from the 1st September last; but the account-book, in itself, in my opinion, is hardly consistent with his statement. It was stated by the defendant that the book correctly shews the amount of his income and output for

these months. If I have correctly understood the entries, and correctly made the computation, the book shews for these months about $1,500 receipts over disbursements. Some accounts—particularly the coal account—are not yet paid; then, of course, the amounts received, to some extent, represent stock on hand, which the plaintiff would have been obliged to pay for. Then, taxes, wear and tear of furniture, and the plaintiff's time, should be taken into account.

The plaintiff cannot recover for supposed or estimated profits. Very much of an hotel-keeper's business depends upon the personal character and demeanour and habits of the proprietor and his serving staff. The extent of his business will depend upon the work going on in the town where the hotel is kept. The weather, the price of supplies, the careful looking after the little details, all combine to help or hurt hotel business; so it cannot be said whether the venture would have turned out profitably or otherwise had the plaintiff secured the hotel in question.

The plaintiff incurred some legal expenses before the commencement of this action.

On the whole, I think it can be fairly said that the plaintiff lost by the defendant's default $75, and I assess the plaintiff's damages at that amount.

There will be judgment for the plaintiff for $75, with costs on the County Court scale, and there should not be allowed to the defendant any set-off of costs.

Judgment for plaintiff.

TRITES-WOOD v. WATERS.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 2, 1912.

1. APPEAL (§ VII L—485)—REVIEW OF FACTS—FINDINGS OF COURT.

The appellate Court should not reverse the finding of fact of the trial Court where the same is based upon preponderating evidence unless the Court hearing the appeal is of opinion that the evidence relied upon to support the finding of the Court below is absolutely inconsistent with a reasonable view of the circumstances, and not merely that there are phases in the transaction pointing strongly against the finding appealed from.

Statement

AN appeal by the defendant from the judgment of Wilson, Co.Ct.J.

The appeal was dismissed.

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

C. W. Craig, for respondent.

Macdonald, J.

MACDONALD, C.J.A.:—I concur in judgment of Galliher, J.A.

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Irving, J.A.

IRVING, J.A.:—The defendant undertook to prove that he had in June, 1908, executed in favour of the plaintiffs a quit claim deed which they had accepted in satisfaction of the amount he was then owing them, and that they were also to pay him $400.

The member of the plaintiff company with whom this arrangement was made, denies all knowledge of any such transaction. The solicitor who, it is said, prepared the document, denies having done so. Apart from these contradictions, I would not accept the defendant's story. His evidence seems to me to be inconsistent with the other established facts of the case, and it is not corroborated in any way by the documentary evidence.

Gallihier, J.A.

GALLIHER, J.A.:—There are phases in the transaction in question in this case which seem to point strongly to the truth of the defendant's contention, but on the other hand, the evidence on behalf of the plaintiff preponderates, and unless I am prepared to say that that evidence is absolutely inconsistent with a reasonable view of the circumstances, I would not be justified in reversing the finding of the learned trial Judge.

I have weighed the evidence carefully from every view point, and had the defendant succeeded in establishing his giving of a quit claim of all his interest in the property in question to the plaintiff, I would have had little difficulty in disposing of this case. This fact was found against him by the learned trial Judge, and I am unable to say he came to a wrong conclusion.

The appeal must be dismissed with costs.

Appeal dismissed.

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WALLACE v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.
(Decision No. 2.)

Ontario High Court, Middleton, J., in Chambers. April 29, 1912.

1. COSTS (§ I—18)—AMOUNT OF RECOVERY AS AFFECTING SCALE—INSTALMENTS OF INSURANCE TO ACCRUE.

Where, in an action in the High Court to recover weekly instalments under an accident insurance policy, the total amount of the instalments accrued at the date of the issue of the writ is a sum within the jurisdiction of the County Court, but the plaintiff has not, at that date, recovered from his injuries, and the judgment in his favour deals also with the instalments yet to accrue, costs may be awarded on the High Court scale.

Statement

APPEAL by the defendants from the ruling of the Senior Taxing Officer at Toronto, that the plaintiff was entitled to tax costs on the High Court scale and that the defendants were not entitled to tax the excess of their costs over and above County Court costs, under Con. Rule 1132.

Irving S. Fairty, for the defendants.

D. Urquhart, for the plaintiff.

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MIDDLETON, J.:—The action was brought to recover weekly payments due upon an accident insurance policy. The defendants disputed all liability; but, in addition to the question of liability, there was a question whether the plaintiff should recover single or double liability.

The action came on for trial before the Chief Justice of the Common Pleas, who gave judgment in favour of the plaintiff, but reserved the question as to the scale of liability. Some discussion then took place, in which the Chief Justice stated that, if he came to the conclusion that the plaintiff was entitled only to single liability, he would award costs upon the High Court scale, as, although the amount recovered would be within the jurisdiction of the County Court, the action in truth determined a larger question, as the plaintiff had not recovered from his injuries at the time the action was brought, and would be entitled to receive weekly instalments falling due after the issue of the writ.

After consideration, the Chief Justice came to the conclusion that the plaintiff was entitled to recover upon the double liability scale, and, therefore, gave judgment for him for $1,300 with costs: *Wallace* v. *Employers' Liability Assn.*, 25 O.L.R. 80, 3 O.W.N. 232. Recovery being for an amount clearly beyond the jurisdiction of the County Court, no order was made or could then properly be made under Rule 1132.

An appeal was had from that judgment to the Court of Appeal; and that Court, on the 6th March, 1912, varied the judgment by reducing the amount of recovery to the scale of single liability, thus cutting down the amount of money recovered from $1,300 to $650, 3 O.W.N. 778, 2 D.L.R. 854. No costs of the appeal were given, and no order was sought or made under Con. Rule 1132 to prevent a set-off.

Some time thereafter, the learned Chief Justice added to the indorsement upon the record these words: "If it is ultimately held that the plaintiff is entitled only to the single indemnity, the costs will nevertheless be taxed on the High Court scale."

The defendants brought in before the Taxing Officer a bill for taxation, and contended that the plaintiff was entitled to tax only County Court costs, and that the defendants were entitled to the set-off provided by Con. Rule 1132.

The Taxing Officer overruled this contention, considering that he was bound to give effect to the amended indorsement upon the record; and from this ruling the present appeal is had.

The defendants place their contention before me upon two somewhat different grounds. First, it is said that the learned trial Judge had no jurisdiction to alter his judgment; that the judgment had been settled and issued; it was in conformity with the judgment actually pronounced; and, upon the principles

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indicated in *Port Elgin Public School Board* v. *Ely*, 17 P.R. 58, and *McIlhargey* v. *Queen*, 2 O.W.N. 781, 916, the trial Judge was *functus officio*; and that, for the same reason, the Court of Appeal, if applied to, would be unable to afford any relief.

In the second place, it is said that, while Rule 1132 enables a trial Judge to deal with the question of costs when he gives judgment for an amount within the jurisdiction of an inferior Court, it does not enable him to make an anticipatory order dealing with the question of costs in a case where he gives a judgment for an amount beyond the jurisdiction of the inferior Court, but which may be reduced by an appellate Court. It is said that the appellate Court, and the appellate Court alone, has power to "order to the contrary," when it so reduces the amount as to place the plaintiff in jeopardy.

Both these contentions appear to me to be exceedingly formidable; but, upon the best consideration I can give to the matter, I do not think it necessary to determine either of them in this case; because the judgment, as varied by the Court of Appeal, is not, in my view, one within the proper competence of a County Court. The action was not merely for a money recovery —it was also for a declaration; and, as modified by the Court of Appeal, it contains, first, a declaration "that the injuries which the plaintiff received on the occasion mentioned in the statement of claim resulted in temporary total disability, but were not received while he was a passenger within the meaning of the policy sued on;" and then follows a recovery for $650, "26 weeks' benefit accrued at the time of the issue of the writ herein." This is followed by an award of costs, which will carry costs upon the High Court scale, unless it can be said that the action is within the competence of the County Court.

It may well be that the effect of an action to recover the accrued instalments would be to determine all the matters in issue so as to bind the parties litigant in any action for instalments which subsequently accrue; but the judgment here does not leave the rights with respect to the subsequent instalments to be determined upon any principle of res judicata; it makes them the subject of a substantive adjudication; so that it cannot be said that this action was concerned merely with the past-due instalments: it is in form, as well as in substance, an action dealing with the instalments yet to accrue. The learned trial Judge thought—and apparently the Court of Appeal agreed with him—that this made the case one in which the plaintiff was entitled to have his full costs, even though he failed in recovering the full amount sued for; as the defendants, instead of admitting liability to the extent of the single indemnity, denied liability altogether.

For this reason, the appeal should be dismissed; and I can see no ground for withholding costs.

Appeal dismissed.

McMURTRY v. LEUSHNER.

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April 26.

Ontario High Court. Trial before Clute, J. April 26, 1912.

1. MORTGAGE (§ III—47)—VENDEE OF MORTGAGOR—GRANTEE'S LIABILITY TO GRANTOR.

Where land is conveyed subject to a mortgage, and the grantee assumes and covenants to pay and to indemnify the grantor against the mortgage, the grantor, if sued upon his covenant in the mortgage, is entitled, in third party proceedings against the grantee, to immediate judgment and execution for the amount of the judgment obtained against him, by the mortgagee, with costs, but the grantee, if he has disposed of the equity of redemption, is entitled to notice of proceedings for foreclosure.

A mortgage action.

Frank McCarthy, for the plaintiff.

J. S. Fullerton, K.C., for the defendant Leushner.

Statement

The pleadings were noted as against the defendants Thompson, Ballantyne, and Campbell.

Before the close of the case, Campbell was represented by *F. H. Thompson*, K.C.

Clute, J.

CLUTE, J.:—The action is brought by the plaintiff as mortgagee, and he asks for judgment against the original mortgagor, the defendant Leushner, upon the covenant, and foreclosure against the defendant Thompson, the present owner of the equity of redemption. Leushner added Campbell as a third party. It does not appear why Ballantyne was made a party defendant, and no case was made out against him, and as to him the action is dismissed without costs. The plaintiff is entitled to judgment upon the mortgage for $2,103.33, with interest on $2,000 from the date of the writ, and to the usual judgment for foreclosure.

Counsel for the defendant Campbell, while not disputing Leushner's right to judgment and costs, contended that execution should be stayed until Leushner had paid the judgment against him.

In an agreement between Campbell and Leushner, which is under seal, the land Campbell is to receive in exchange is stated to be subject to the mortgage in question, and Campbell covenants to assume the incumbrance. In the deed made pursuant to the agreement, it is stated that the land conveyed is subject to the mortgage in question, which Campbell "assumes, covenants, and agrees to pay as and when the same becomes due and payable, and hereby undertakes and agrees to save harmless the said party of the first part from all loss, costs, and damages that may arise in connection therewith" This is a covenant of indemnity; and, under the cases, Leushner is entitled to judgment for the amount of the judgment obtained against him and his costs in this action. See *Boyd* v. *Robinson* (1891), 20 O.R. 404; *British Canadian Loan Co.* v. *Tear*

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(1893), 23 O.R. 664; *English and Scottish Trust Co.* v. *Flatau* (1887), 36 W.R. 238; *Clendennan* v. *Grant* (1885), 10 P.R. 593; *Mewburn* v. *MacKelcan* (1892), 19 A.R. 729.

Judgment will, therefore, go against Campbell for the debt and costs; but he should have notice of the proceedings for foreclosure.

Judgment accordingly.

ONT.

D. C. 1912

April 25.

BELL ENGINE AND THRESHING CO. v. WESENBERG.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. April 25, 1912.

1. SALE (§ III A—57)—RIGHTS OF PARTIES ON BREACH OF WARRANTY OF PART OF MACHINERY.

Where a contract for the sale of several articles of machinery is expressed to be divisible, and the warranty given thereon is expressly made applicable to each article, separately, though the articles are intended to be used together and to form one outfit, a defect in one article will not entitle the purchaser to rescind the whole contract or to refuse payment for the articles which are not defective, but relief will be confined to the defective article.

Statement

APPEAL by the plaintiffs from the judgment of Barron, Co. C.J., upon the second trial, with a jury, of an action in the County Court of the County of Perth, brought to recover the amount of two promissory notes and interest, and a counterclaim for rescission of the contract in respect of which the notes were given, for the return of the notes, and for other relief. The judgment appealed from was in favour of the defendant, upon the findings of the jury.

The appeal was allowed in part and judgment below varied.

R. S. Robertson, for the plaintiffs.

Glyn Osler, for the defendant.

Middleton, J.

MIDDLETON, J.:—This action comes before us, even after a second trial, in a most unsatisfactory shape.

The plaintiffs' claim is upon two promissory notes: one for $125, due the 1st January, 1911; the other for $362, due upon the same date. These notes bear interest at ten per cent. per annum after maturity until paid. The defendant, by his defence and counterclaim, sets up that these notes and other notes were given in payment for a threshing outfit, consisting of a traction-engine, separator, band-cutter, wind-stacker, drive-belt, and straw-cutting attachment; that these were purchased under an agreement of the 17th August, 1910, which contained, among other things, a very narrow and limited warranty; that this machinery was delivered but failed to answer the warranty; and that, nevertheless, the plaintiffs refuse to allow the defendant to return the outfit, and also refuse to return to him the second-

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hand threshing outfit which was turned over to the plaintiffs at $1,200, and which sum was allowed as part payment on account of the purchase-price. Upon this statement, the defendant asks rescission of the contract and a return of his notes and the value of the second-hand outfit turned over to the plaintiffs.

Neither party appears to have paid sufficient attention to the terms of the contract. In it is provided, among other things, "that this contract is divisible, and that each article herein ordered is ordered and sold at a separate fixed price." The contract further provides that any credit for machinery taken in exchange is to be apportioned pro rata between the several items.

The individual machines above enumerated have each a separate price attached: the separator being sold at $425, out of a total of $3,150. The contract further provides that the warranty "is hereby made to apply separately to each machine or attachment herein ordered."

At the trial, no defect was alleged as to any of the machines or attachments save the separator. This was stated to be defective by reason of its swaying while in operation and choking.

The whole outfit was apparently treated as an entirety at the trial, the provisions of the contract above referred to being ignored; but from the plaintiffs' own evidence it is clear that the only defects charged were those indicated in the separator itself.

We are not altogether satisfied with the findings of the jury; but do not see our way clear to disregard them or to direct a third trial; and probably, in view of the conclusion at which we have arrived, the plaintiffs would not desire to have a new trial ordered.

The result is, that the plaintiffs should recover the amount due upon the two promissory notes sued upon; and, upon the defendant returning the separator, he should be allowed $425 upon his counterclaim, which may be set off against the plaintiffs' recovery; the plaintiffs recovering for the balance. This will leave the defendant with the traction engine and the remaining machinery, and will leave him liable to pay the four remaining notes as and when they mature.

The situation will probably be most unsatisfactory to the defendant, because he will be left in the possession not only of the traction-engine but of the other separate articles, which are probably more or less adapted for use with the plaintiffs' separator; but he has chosen to sign a contract in which the articles are separated, and which treats each article as sold for the price placed opposite to it. With this in view, we urged the parties to endeavour to come to some arrangement; but we are now advised that it is impossible to hope for any settlement; and we have, therefore, to do the best we can with this intricate and somewhat one-sided contract.

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With reference to costs, the plaintiffs have succeeded in their action upon the notes; tthe defendant has succeeded in his claim upon the defective character of the machine. We think that the plaintiffs should have the general costs of the action, and that the defendant should have the costs of his counterclaim, including therein the entire costs of the controversy respecting the non-compliance of the separator with the terms of the warranty; these costs and the plaintiffs' recovery to be set off pro tanto. No costs of appeal.

BOYD, C., and LATCHFORD, J., agreed in the result.

Judgment below varied.

QUE.

K. B. 1912

Feb. 6.

TREMBLAY (defendant, appellant) v. The Rector and Church Wardens of the PARISH OF ST. ALEXIS de la Grande Baie (plaintiffs, respondents).

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. February 6, 1912.

1. POSSESSORY ACTION (§ I—3)—EXCLUSIVE POSSESSION.

The possession required to support a possessory action for re-possession (*en réintégrande*) must be uninterrupted, unequivocal and exclusive.

2. ADVERSE POSSESSION (§ II—63)—SEPARATE CLAIMANTS BY POSSESSION.

Where two parties claim to be entitled to land as possessing it, and the possession of neither has been uninterrupted, unequivocal and exclusive, the proper remedy consists in a petitory action, or an action to determine boundaries (*en bornage*) and not a possessory action (*en réintégrande*).

Statement

THE judgment appealed from, and which is reversed, was rendered by the Superior Court, Pelletier, J., on May 20, 1911. The material part of it reads as follows:—

> Considering that the plaintiffs have proved the allegations of their declaration and the fact that they have possessed openly and without contestation, as owners, for many years, the said strip of land between St. Augustine street on the south and the defendant's emplacement on the north as bounded by a fence and by posts adjoining the south-east corner of the defendant's house.
>
> Considering that in the months of June, July, August, and September, 1910, the defendant took possession of this strip of ground and deprived the plaintiffs of their possession thereof; For these reasons, doth declare, etc.

Belley and Gagné, for the appellant.
Lapointe and Langlais, for the respondents.

Quebec, February 6, 1912. The judgment of the Court was delivered by

Lavergne, J.

LAVERGNE, J.:—This is a case of a possessory action for repossession taken by the respondents against the appellant. By a judgment of the Superior Court rendered at Chicoutimi on the 20th May, 1911, the action was maintained with costs.

The appellant purchased the emplacement which he now occupies at St. Alexis 28 years ago. At that time there was a railing for tying up horses a few feet north of the public road known as St. Augustine street. The land forming St. Augustine street is a public road to which the appellant has always had free access.

About seventeen years ago as the railing in question was in a delapidated state, the *fabrique* had it reconstructed and placed it about eight feet further back towards Tremblay's land. As Tremblay had still easy access to the street, because a passage was left him at the corner of his property, he tolerated the thing.

Later the railing fell down through age and disappeared completely. More than a year before the institution of the action it was in this state and there only remained a single post near his property.

In the interval, namely, on February 22, 1899, the appellant obtained a grant from the Government of the Province of Quebec of letters patent for his land described as follows:—

> Lot No. 112 containing 20 perches as well as lot No. 113, containing 1 perch; both situated in block "D" in the said village of Grande Baie.

In the month of August or the beginning of September, 1910, the respondents who were unaware of what title they had to the land on which the church and its dependencies were built applied for information to the Crown Department and learned that on the 14th September, 1863, the Government of Canada had issued letters patent in favour of Mgr. Charles François Baillargeon, bishop of Tloa, representing the archipiscopal corporation of Quebec, for a property containing eight acres and one perch *more or less* and described as follows:—

> All that certain tract or parcel of land situate in the eastern part of the village of Grande Baie, comprising the tracts known as block letter "C" and block letter "L"; together with the ground formerly known as that part of St. Augustine street, extending from St. John street to St. Andrew street, and the ground formerly known as that part of Victoria street, lying between St. John street and St. Andrew street; the said tract or parcel of land being bounded as follows, to wit: to the north by the southerly line of block letter "D"; or northerly line of St. Augustine street, as originally projected; to the south by Albert street, to the east by St. Andrew street, and to the west by St. John street; the said tract or parcel of land containing in all eight acres and one rood, being exclusive of the space covered by St. Augustine street as now existing on the ground which is hereby expressly reserved for public purposes.

As will be seen the land adjoins the southerly line of block "D" and does not appear to contain any part of it, it is also described as being bounded on the northerly line by St. Augustine street as originally projected.

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The respondents who had virtually abandoned the railing allowed it to disappear altogether opposite the appellant's land; having discovered the letters patent granted to Mgr. Baillargeon from whom, moreover, they do not pretend to have ever obtained a title, they re-built the railing in the month of September, 1910, and extended it not only opposite the appellant's land but also opposite the land of his neighbour, Dr. Duhaime, leaving the appellant no access to St. Augustine street, shutting in his land and leaving him no outlet to the public road.

The appellant pretended that for more than a year before the institution of the action, the respondents had no possession of the land where they had re-built their railing and he removed it and continued his line fences on each side of his property as far as the street line and then fenced the street opposite his land.

According to the respondents' pretensions the dispute in question only relates to a strip of land six or seven feet wide at one end and two or three feet at the other.

In my humble opinion it is only a petitory action or an action for boundary that can determine the rights of the parties. The respondents never obtained a title from Mgr. Baillargeon and were even ignorant until the month of August that Mgr. Baillargeon had obtained one. It was not, therefore, the letters patent granted to Mgr. Baillargeon which regulated their possession since they were ignorant of the existence of these letters patent.

As to the possession by the parties it has always been common and promiscuous. The railing was formed of posts with a horizontal piece upon these posts and was interrupted at several places to allow access for everybody to the public road on one side and to Grande Baie on the other side and it was never a separation line between the property of the *fabrique* and the property of the neighbours on the north of St. Augustine street. It was displaced and removed back several feet from the side of the appellant's property and was tolerated in this position because it was useful and nobody suffered by it.

This pretended possession by the respondents was on several occasions interrupted and it has not been continuous. The railing was never fixed at a definite place to establish a separation line. There was wood belonging to private individuals at different places on each side of the railing and finally the railing had ceased to exist more than a year before the institution of the action and the appellant was in possession of the ground as far as the street without obstruction.

The pretended possession by the respondents had in no respect the qualities required by article 2193 of the Civil Code. It has always been a non-exclusive possession, common for everybody up till the time the appellant had it for himself alone. After the railing disappeared there was no longer a means of tying up

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the horses of people coming to church in front of Tremblay's house. Yet this is the only fact of possession which the respondents could invoke and this possession never had the necessary character to give rise to an action.

There seems to me to have been a malicious purpose in the proceedings of the respondents who simply wished to shut in the appellant's ground and cause him trouble.

For these reasons I would maintain the appeal and dismiss the respondents' action with costs.

I refer to the cases of *Delisle* v. *Arcand*, 37 Can. S.C.R. 668; *Parent* v. *The Quebec North Shore Turnpike Road Trustees*, 31 Can. S.C.R. 556, and *Fraser* v. *Gagnon*, 4 Que. L.R. 381.

Appeal allowed and action dismissed.

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Jan. 26.

Ontario Divisional Court, Clute, Latchford and Middleton, JJ.
January 26, 1912.

1. PRINCIPAL AND SURETY (§ II—16)—ADVANCES BY ONE SURETY—ASSIGNMENT OF CONTRACT—RIGHT OF CONTRIBUTION FROM OTHER SURETIES.

One of several co-sureties on a contractors' bond, who has made advances to the contractors for materials and labour which enabled the contractors to continue the work, and who has obtained an assignment of all moneys due or to become due under the contract, has no greater or higher rights than the contractors had, and he cannot, apart from contract, claim contribution from his co-sureties for such advances even though these, by enabling the contractors to proceed with the work, lessened the liability of the sureties.

[*Ludd* v. *Chamber of Commerce*, 60 Pac. R. 713, followed.]

2. PRINCIPAL AND SURETY (§ II—15)—AGREEMENT BETWEEN CO-SURETIES—NEW OBLIGATION—SURETIES COMPLETING WORK ABANDONED BY CONTRACTORS—CONTRIBUTION.

Where co-sureties upon a contractors' bond for the due performance of work, prior to the abandonment of the work by the contractors, in order to protect themselves, appoint one of their number to represent all with authority to do all things necessary for the carrying on of the work, and on their completion of the work a loss results, the co-sureties are liable to the managing surety for contribution for advances made under the new obligation created by the agreement so made between themselves.

3. PRINCIPAL AND SURETY (§ II—15)—ABANDONMENT BY CONTRACTOR—COMPLETION OF WORK BY SURETY—CREDIT OF ALL MONEYS RECEIVED INCLUDING DRAW-BACK.

Where co-sureties on a contractors' bond entered into a written agreement between themselves prior to the abandonment of the work by the contractors under which they jointly completed the work, the draw-back of 20 per cent. returned by the owner as the work proceeds from the value of all the work from the commencement of the contract is, when finally paid, to be considered as salvage attributable to the joint efforts of the sureties, and where the amount owing for the work on completion is received by one of the sureties, who was both the assignee of the contractors' rights under the contract, and the agent of his co-sureties for completing the contract, he is liable to account to his co-sureties for the draw-back of twenty per cent.

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4. CONTRACTS (§ I B—6)—IMPLIED AGREEMENT TO PAY FOR SERVICES.

Where three co-sureties on a contractors' bond enter into an agreement in writing, appointing one of their number to represent all and authorizing their appointee to do all things necessary for the carrying on of the work, a contract will be implied to pay the active surety a reasonable remuneration for his services.

APPEAL by the defendants from the judgment of Boyd, C., in favour of the plaintiff, in an action for contribution, upon a bond given by the plaintiff and defendants to the Municipal Corporation of the Town of Sandwich for $5,000 for the due fulfilment of a contract between John Lorne & Son and the town corporation for the construction of a sewer.

On the 12th May, 1909, John Lorne & Son contracted with the corporation to construct a sewer, upon certain terms and conditions. One clause of the contract provided for weekly payments during the progress of the work, under progress certificates of the engineer "of 80 per cent. on account of work done and materials supplied under this contract and for duly authorised extras, the value of such work to be in proportion to the amount payable for the whole work and authorised extras, and the balance of the said contract and all duly authorised extras within thirty days after the contractors shall have rendered to the engineer a statement of the balance due and shall have obtained and delivered to the corporation the final certificate of the engineer shewing the net balance payable to the contractors."

Prior to the 28th September, 1909, the contractors became involved and applied to the plaintiff for financial assistance. Up to that date, the plaintiff had furnished material for the work, amounting to $595,63, and had advanced in cash for labour and material $1,265.98; and the contractors, requiring still further advances, applied to the plaintiff, who agreed to advance for wages the further sum of $933, upon the contractors assigning to him all sums of money due or accruing due under the contract, and they expressly authorised the corporation to pay the sum to the plaintiff, who was authorised to give the corporation "full and ample releases and discharge for the further payment of any such money under the said contract."

On the 6th October, 1909, the plaintiff and defendants, desiring to save themselves as far as possible from liability under their bond, entered into an agreement. This agreement refers to the original contract and the bond, and further recites that the contractors "have failed to carry out the provisions of the said contract and have been obliged to apply to the said party of the second part, one of the said sureties as aforesaid, for financial assistance, and credit, work, and assistance in the carrying out of the said contract." And

> whereas all of the parties to this agreement are equally responsible on said bond, and this agreement is entered into for the purpose of

appointing the party hereto of the second part to represent all the parties to this agreement in seeing that the said contract is carried out and performed by the said John Lorne & Son so as to save the parties hereto from any loss or costs or damage in connection therewith, and the parties of the first part hereby appoint the party of the second part, and authorize him to continue to do all things necessary that he may think in the interests of himself and the parties of the first part as co-sureties on said bond and to protect them respectively from any liabilty or loss in connection therewith and to do all things necessary and to advance money necessary for the carrying out of the said work so as to protect the parties thereto. And the parties of the first part and the second part mutually agree to become responsible for their respective shares or proportion of one-third each for any money that may be necessary to be advanced, or any loss that may be occasioned under the said bond, or expenses in connection therewith.

On the 9th October the contractors entered into a further agreement with the plaintiff. This agreement refers to the assignment of the 28th September and recites that "whereas since the said assignment the party of the second part has been compelled to advance the further sum of $1,000 for material and expenses, and the further sum of $781.10 for wages in connection with the said contract work, on the understanding and agreement that the parties hereto of the first part would further assign all moneys due and accruing due under the said contract for the repayment of the said moneys so advanced." It then proceeds: "In consideration of the recitals above made and the further advance of money aggregating $1,781.10, the contractors assign to the plaintiff all moneys due and accruing due under the said contract for the repayment of both the $2,794.63 advanced and referred to in the assignment, and also the further advance of $1,781.10, with authority for the corporation to pay and for the plaintiff to receive all such sums.

The judgment of the Chancellor was, that the plaintiff should be allowed all his outlay in money and materials to the contractors which went into the work in question, and all his outlay in work and materials upon the completion of the contract after it was assigned to him; that in taking the account all just allowances should be made for expenses of litigation incurred in protecting the various assignments and for the personal supervision of the plaintiff in the work; that, after deducting all moneys received from the contract, the balance should be borne equally by the three bondsmen, the plaintiff and the defendants, to the extent of the liability created by the bond.

The judgment was varied, CLUTE, J., dissenting.

E. S. Wigle, K.C., for the defendants.

A. H. Clarke, K.C., for the plaintiff.

Middleton, J.

MIDDLETON, J.:—The effect of the contract between Lorne & Son and the town corporation was to entitle Lorne and

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Son to receive on progress certificates eighty per cent. of the value of the work done. The remaining 20 per cent. was to be retained by the town corporation, and would be answerable for any deficiency arising from Lorne & Son's default.

The assignment by Lorne & Son to Cadwell would operate on this 20 per cent., subject to this right of the town. The sureties would be entitled to require the town to apply this 20 per cent. in the way indicated, and their right would be paramount to any right which Cadwell would acquire as assignee of Lorne & Son. Cadwell, as assignee, would have no greater or higher right than his assignors; and clearly Lorne & Son could not demand this 20 per cent. from the town corporation, to the prejudice of their sureties.

When Cadwell made advances to Lorne & Son for the purpose of enabling them to carry on their contract, he had no right to claim contribution from the co-sureties, even though the making of these advances enabled Lorne & Son to that extent to carry on their contract work. It seems to me quite immaterial that Cadwell made the advances because he was surety. The contract of the sureties with the town corporation made them liable for the loss which the town corporation might suffer from Lorne & Son's default. The right to contribution is a right with respect to any sums paid the town corporation. We cannot make this right any greater or wider; to do so would be to impose upon these defendants a liability which they never assumed, and this cannot be justified merely because the liability may be no greater than the liability which they did assume, had it not been for the voluntary action of Cadwell.

This precise point is well determined in *Ludd* v. *Chamber of Commerce*, 60 Pac. R. 713. The facts were precisely similar. The obligation of the defendants

> was to the insurance company alone (*i.e.*, to the building owner), and there is neither allegation nor proof that it ever made or had any claim for damages under the bond. But, it is argued, a breach of the bond and consequent damages to the insurance company would have occurred if certain of the sureties had not pledged their individual credit for money with which to complete the building. . . . It does not follow that the action of a part of the sureties in borrowing money for the Chamber of Commerce (*i.e.*, the contractors) to use in the construction of the building will bind a non-participating surety. . . . Each surety had a right to stand upon the letter of his contract, and, in case of a breach or threatened breach of the bond, to exercise his own judgment as to whether it was better for him to suffer default and answer in damages to the obligee in the bond or to become liable on a new obligation.

When it became apparent that Lorne & Son were about to make default, a new obligation was, on the 6th October, entered into. The sureties agreed that the work should be completed by Cadwell; and for the loss in the completion of the work under

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that agreement they are all responsible, and the defendants must contribute. I cannot construe that agreement as in any way an assumption of the liability of Lorne & Son to Cadwell for advances theretofore made, but its operation is entirely in the future.

Upon the outgoings under that agreement, Cadwell must credit the money received from the town for work done under it, and also the 20 per cent. retained from the value of all work done before that date. This 20 per cent. is salvage saved by the joint efforts and liability of the sureties under this agreement.

The money paid on the 8th October was, no doubt, the 80 per cent. on work done prior to that agreement; and, if so, Cadwell had the right to this under the prior assignment, and need not bring this into account.

The judgment should be varied by making declarations in accordance with the above, and directing a reference upon this footing.

There may also be a declaration that Cadwell is entitled to reasonable remuneration for his services under the agreement. As each party claimed too much, there should be no costs up to this time, and the costs of the reference may be reserved. For the guidance of the Court the parties should now name sums which the one is ready to pay and the other to receive, so that the blame of any further litigation may be duly apportioned.

Latchford, J.

LATCHFORD, J.:—I agree.

Clute, J.

CLUTE, J. (after setting out the facts as above):—On the argument, counsel for the defendants contended that the plaintiff was not entitled to the material and advances prior to the agreement of the 6th October; that, having regard to the work then done and to the balance still in the hands of the corporation, there was sufficient to complete the contract; and that the reference should proceed upon these lines.

The plaintiff in his evidence states that the advances made subsequent to the assignment of the 28th September were upon the understanding and agreement with the contractors that he should be paid out of the funds still in the hands of the corporation. It will be seen that, under the assignment of the 28th September, all moneys due and to become due were assigned; and, having regard to the evidence and the surrounding circumstances, I think there can be no doubt that it was the understanding between the plaintiff and the contractors that out of the fund in the hands of the corporation he should be paid for all material and advances made by him, and that the assignment on the 9th October was simply carrying out what had been previously agreed upon.

Although there is no special finding upon this point, this I take it to be the meaning of the judgment pronounced at the

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trial. I can see no reason to impugn the validity of these assignments or the plaintiff's right to apply the moneys received by him from the corporation in payment of material and advances so made by him; and, in this view, the plaintiff's claim to contribution is sufficiently supported.

I am strongly inclined to the view that, upon the true construction of the agreement of the 6th October, the plaintiff is also entitled to recover. That agreement recites the contract and the bond and the failure of the contractors to carry out the provisions of the contract, and an application to the plaintiff, one of the said sureties, for financial assistance, credit, and work in carrying out the said contract. It recites that the agreement was entered into for the purpose of appointing the plaintiff to represent all the parties to the agreement in seeing that the contract is carried out so as to save the parties from loss, "and the parties of the first part hereby appoint the party of the second part and authorise him to continue to do all things necessary that he may think in the interests of himself and the parties of the first part as co-sureties on said bond," etc.

This, I think, clearly shews that all he was about to do under this agreement was simply a continuation of what had been done by him with a view to carrying out the agreement.

It then provides that the parties of the first and second part agree to become responsible for their respective shares or proportions of one-third each for any moneys that may be advanced or any loss that may be occasioned under the said bond or expenses in connection therewith. Having regard to the facts of the case, I think that what the agreement means is this, that the plaintiff was to continue to do all things necessary to complete the contract, and the defendants would be responsible for their proportion of any loss in so completing the work. The wording in the last clause is obscure. It says, "For any loss that may be occasioned under the bond or expenses in connection therewith." I think the fair meaning of that is, for any loss arising under the bond by reason of the contract not being completed or in the endeavour to carry it out.

I prefer, however, to rest my judgment upon the first ground.

The appeal should be dismissed with costs.

Judgment varied, CLUTE, J., *dissenting.*

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Re CITY OF TORONTO AND TORONTO R. CO.

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April 15.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 15, 1912.

1. CARRIERS (§ IV B—521)—GOVERNMENTAL CONTROL—COMPULSORY CONNECTION AND INTERCHANGE OF BUSINESS—ONT. RAILWAY ACT, 6 EDW. VII. (ONT.) CH. 30, SEC. 57, SUB-SEC. 4.

Sub-section 4 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, applies only to railways actually in existence and operation at the time of the application to the Ontario Railway and Municipal Board thereby provided for, and there is no difference in this respect when the railways in question, or any of them, are street railways.

2. CARRIERS (§ IV A—519)—GOVERNMENTAL CONTROL—ORDERS OF THE RAILWAY AND MUNICIPAL BOARD—JURISDICTION—6 EDW. VII. (ONT.) CH. 30, SEC 57, SUB-SEC. 6.

Where under sub-section 6 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, the Railway and Municipal Board makes an order declaring that section 57 shall apply to two railways, as to one of which it has jurisdiction to make such an order, but not as to the other, the intention being to bring about an interchange of traffic between them, the Court of Appeal will not strike out that part of the order which is beyond the Board's jurisdiction and let the remainder stand, when the effect of so doing would be to name a different order from that which the Board intended to make, and, in fact, made.

3. CARRIERS (§ IV A—519)—POWER OF ONTARIO RAILWAY AND MUNICIPAL BOARD—6 EDW. VII. CH. 30, SEC. 57.

Upon the proper construction of sub-section 6 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, the Ontario Railway and Municipal Board has power only to declare that that section shall apply to a particular railway, without any limitation as to the railways with which such railway may thereby become liable to interchange traffic, but such a declaration does not restrict the power of the Board to refuse subsequently to order an interchange of traffic between such railway and any other railway, or to impose such terms of interchange as it may see fit. (*Per* Magee, J.A.; Meredith, J.A. *contra.*)

4. CARRIERS (§ IV B—521)—GOVERNMENTAL CONTROL—COMPULSORY INTERCHANGE OF BUSINESS—MUNICIPAL OWNED RAILWAY—6 EDW. VII. (ONT.) CH. 30, SEC. 57.

Section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, does not apply to a railway owned by a municipal corporation. (*Per* Magee, J.A.)

Statement

By an order made by the Court of Appeal on the 17th November, 1911, the Toronto Railway Company were allowed to appeal to that Court from an order made by the Ontario Railway and Municipal Board on the 24th June, 1911.

The order of the Board was made upon the application of the Corporation of the City of Toronto, which application was as follows:—

"The applicant hereby makes application for an order of the Ontario Railway and Municipal Board, directing and ordering the respondent to afford all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the respondent, and those to

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be constructed by the applicant upon St. Clair avenue and Gerrard street, in the city of Toronto; and providing for the return of cars, motors, and other equipment belonging to either the applicant or the respondent, and used for the purpose of receiving or forwarding such traffic, so as to afford all passengers on the cars of the municipal system passage over the tracks of the respondent company as a continuous line of communication without unreasonable delay and without prejudice or disadvantage in any respect whatsoever, and so that no obstruction may be offered in the use of the Toronto Railway system and lines to be laid by the applicant as a continuous line of communication, and so that all reasonable accommodation may at all times be mutually afforded by and to the said applicant and the said respondent.

"And for an order that the respondent company and its railway system shall be subject to and governed by the provisions of sec. 57 of the Ontario Railway Act, 1906."

The order made by the Board was as follows:—

"1. This Board determines, orders, and declares that section 57 of the Ontario Railway Act, 1906, shall apply to the Toronto Railway Company and the street railways owned and operated by the said company.

"2. This Board further determines, orders, and declares that section 57 of the Ontario Railway Act, 1906, shall apply to the Corporation of the City of Toronto and the street railways to be constructed by it."

Section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, is as follows:—

57.—(1) The directors of any railway company may at any time, and from time to time, make and enter into any agreement or arrangement with any other company, either in this Province or elsewhere, for the regulation and interchange of traffic passing to and from the railways of the said companies, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and appointment of tolls, rates and charges in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway in connection therewith, for any term not exceeding twenty-one years, and to provide, either by proxy or otherwise, for the appointment of a joint committee or committees for the better carrying into effect such agreement or arrangement, with such powers and functions as may be considered necessary or expedient, subject to the consent of two-thirds of the shareholders, voting in person or by proxy.

(2) Every railway company shall, according to their respective powers, afford all reasonable facilities to any other railway company for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked

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by such companies respectively, and for the return of carriages, trucks, and other vehicles; and no such company shall give or continue any preference or advantage to or in favour of any particular company, or any particular description of traffic, in any respect whatsoever, nor shall such company subject any particular company or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever; and every railway company having or working a railway which forms part of a continuous line of railway, or which intersects any other railway or which has a terminus, station or wharf of the one near a terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by the one of such railways, all the traffic arriving by the other, without any unreasonable delay and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered in the using of such railway as a continuous line of communication, and so that all reasonable accommodation may at all times, by the means aforesaid, be mutually afforded by and to the said several railway companies.

(3) If any officer, servant or agent of a railway company, having the superintendence of the traffic at any station or depot thereof, refuses or neglects to receive, convey or deliver at any station or depot of the company for which they may be destined, any passenger, goods or things, brought, conveyed or delivered to him or to such company, for conveyance over or along the railway from that of any other company, intersecting or coming near to such first-mentioned railway, or in any way wilfully contravenes the provisions of the next preceding sub-section—such first-mentioned railway company, or such officer, servant or agent, personally, shall, for every such neglect or refusal, incur a penalty not exceeding $50 over and above the actual damages sustained.

(4) In case any company or municipality interested is unable to agree as to the regulation and interchange of traffic or in respect of any other matter in this section provided for, the same shall be determined by the Board.

(5) All complaints made under this section shall be heard and determined by the Board.

(6) This section shall apply to such street railways as may from time to time be determined by the Board.

Argument

H. S. Osler, K.C., for the appellants, argued that the Board had no power under sec. 57 (6) of the Ontario Railway Act to make the order in question. The language of the Act could only refer to railways in existence, and was not intended to enable a corporation desirous of building a railway to ascertain in advance the terms upon which it could interchange traffic with an existing railway. The statute shews that the Board must have all the facts before it before making such an order, and the necessary evidence has not been obtained in the present case.

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H. L. Drayton, K.C., and *G. A. Urquhart*, for the respondents, argued that the question at issue was merely an academic one, as the city's railways would soon be finished. The jurisdiction of the Board to make the order appealed against is plain under sec. 57 (6) of the Act, and the appellants are not entitled to rely on the absence of evidence which they could have supplied at the hearing, if they had desired to do so.

Osler, in reply, argued that the question was not merely academic; and, even if it were, the statute should not be construed in the way suggested by the respondents, in the absence of clear and specific words to the effect contended for.

The appeal was allowed.

MOSS, C.J.O.

April 15. MOSS, C.J.O.:—In the view which I take of the question raised by this appeal, it is not necessary to discuss or consider at length many of the arguments which were forcibly presented against and in support of the order appealed from.

As a practical operative order, it works no substantial advantage to the city and it imposes no real disadvantage upon the company. It settles nothing of a practical nature, and, as a declaratory order, does nothing towards making effective the provisions of sec. 57 of the Ontario Railway Act, 6 Edw. VII. ch. 30, as between the parties hereto.

Whether, if the Board had the power to issue the order, it rightly exercised it, is a question with which we have no concern. It is right to assume that, when its power to determine is invoked, the Board will not undertake to determine without having first informed itself of all the existing conditions, and considered whether the circumstances shewn make it just and proper to put the provisions of the section into effect as between the street railways then before it.

The question of power turns, as it appears to me, upon the proper view to be taken of sub-sec. (6) of sec. 57 of the Railway Act, read, of course, in connection with and in the light of the other portions of the section.

I am unable to satisfy myself that in this case the circumstances had arisen which, upon a careful study of the section, I think must occur before the power under sub-sec. (6) is called into action.

It is, of course, undeniable that primarily the provisions of the section deal only with steam railways, and are intended to govern the regulation and interchange of traffic between transportation agencies of that character. And it is also quite plain that the legislation contemplates existing operating companies actually engaged in carrying traffic, which includes, no doubt, passengers, as well as goods. Thus sub-sec. (1), providing for agreements between companies, speaks of "traffic passing to and from the railways of the said companies," of "the working of

the traffic over the said railways," of "the division and apportionment of tolls, rates and charges in respect of such traffic," and of "the appointment of a joint committee or committees for the better carrying into effect such agreement." So, too, sub-sec. (2), imposing upon a company an obligation to afford facilities to other companies, speaks of "the receiving and forwarding and delivering of traffic," of "the return of carriages, trucks, and other vehicles," of a company "having or working a railway which forms part of a continuous line of railway, or which intersects any other railway," of the duty of such a company to "afford all due and reasonable facilities for receiving and forwarding by the one of such railways, all the traffic arriving by the other." Again, sub-sec. (3), dealing with penalties, speaks of refusal or neglect "to receive, convey or deliver at any station or depot of the company for which they may be destined, any passenger, goods or things, brought, conveyed or delivered . . . for conveyance over or along the railway from that of any other company, intersecting or coming near to such first-mentioned railway."

All these point plainly and unmistakably, not to projected or contemplated railways, but to railways actively engaged in the business of conveying passengers and goods upon and over their lines. It is only when they are found in that condition that they can be usefully rendered available for carrying out the objects aimed at.

Sub-section (4) brings the Board into requisition where there is a failure or inability to agree as to the regulation and interchange of traffic or any other of the matters provided for, and empowers it to determine upon an agreement according to the terms of which the mutual services prescribed by the previous portions of the section shall be performed by the parties interested.

But, before the Board's powers can come into play, it must find, and be prepared to deal with, a case of (a) at least two existing operating companies engaged in receiving, forwarding, and delivering traffic with railways forming parts of a continuous line or intersecting each other or having termini, stations, or wharves near to each other; in fine, operating and carrying on the business of transportation of passengers or freight or both under the circumstances detailed in the preceding portion of the section; and (b) inability to agree as to the regulation and interchange of traffic or in respect to the other matters provided for.

Now, is there anything in sub-sec. (6) to shew that in the case of street railways there is to be any different mode of treating the matter?

It says "this section," that is, the preceding provisions of the section, "shall apply to such street railways as may from time to time be determined by the Board." Is it intended by this enactment to do more than to apply the provisions of the section to street railways which the Board shall find holding towards

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each other, relatively at least, the same position as steam railways? That it was not so intended seems to be manifest from the language. Under sub-sec. (4) the powers of the Board arise only when there has been inability to agree upon the matters there specified. And these powers are confined to determining in respect of these matters. Sub-section (6) enables the Board to deal with street railways, but does not say that it is to do so under circumstances different from those under which they deal with steam railways, by virtue of sub-sec. (4). In other words, the Board, when it finds two or more existing operating street railways before it, upon application made by one or more of the parties interested, is to determine whether, as regards the street railways before it, there is a case proper for intervention under sub-sec. (4). It may be that the Board should have regard, upon such an application, to the differences in methods of transport and the conduct of business between the two systems; but there does not appear to be any warrant for such a wide departure from the manifest object and scope of the section as to adapt it to a case where there are not two existing and operating lines before the Board upon the application.

The application is intended to result in something practical in the form of an order determining the terms and conditions upon which the regulation or interchange of traffic is to take place. There is no indication anywhere that the Board is to deal with any but a state of circumstances outlined in sub-sec. (4).

For these reasons, I think that, under the then existing circumstances, the order made was not within the scope of the Board's powers under sec. 57, and that it should not stand.

The appeal should be allowed, with the usual result as to costs.

Garrow, J.A.

GARROW and MACLAREN, JJ.A., concurred.

Maclaren, J.A.
Meredith, J.A.

MEREDITH, J.A.:—The main part of the respondents' application to the Board makes manifest its premature character; it is in these words:—

"The applicant hereby makes application for an order of the Ontario Railway and Municipal Board, directing and ordering the respondent to afford all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the respondent, and those to be constructed by the applicant upon St. Clair avenue and Gerrard street, in the city of Toronto; and providing for the return of cars, motors, and other equipment belonging to either the applicant or the respondent, and used for the purpose of receiving or forwarding such traffic, so as to afford all passengers on the cars of the municipal system passage over the tracks of the respondent company as a continuous line of communication without unreasonable delay and without prejudice or disadvantage in any

respect whatsoever, and so that no obstruction may be offered in the use of the Toronto Railway system and lines to be laid by the applicant as a continuous line of communication, and so that all reasonable accommodation may at all times be mutually afforded by and to the said applicant and the said respondent."

To an ordinary mind it must seem extraordinary, at the least, for any one to apply for an interchange of passenger traffic, cars, motors, and other equipment, not only without having any to interchange, but without having even a railway to run them over; indeed, so extraordinary that, although the Board was plainly anxious to aid the applicant all it could, this part of the application is not even adverted to in the formal order made by it upon the application.

The earlier provisions of the enactment in question—the Railway Act, sec. 57—make it clear to me, upon their face, that they relate only to existing railways. The agreement which railway companies may make is for the "interchange of traffic passing to and from the railways" of such companies: evidently existing railways capable of actually making such an interchange; and in practice almost necessarily so. Then every railway company is to afford reasonable facilities to any other railway company for receiving, forwarding, and delivering traffic upon and from the several railways belonging to or worked by such railway companies respectively; again, existing railways, of course. And then a penalty is provided for refusal or neglect to forward traffic over, necessarily, an existing railway.

All this seems to be so plain, and so, for practical purposes, necessary, that there was little, if any, controversy over it: but it was urged, for the respondents, that, under sub-sec. (6) of sec. 57, the Board had power to determine that that section should apply to the appellants' railway: Mr. Drayton seemed to take refuge in this last ditch; but, for several reasons, in my opinion, he cannot hold it: in the first place, the order in question was not made upon the Board's own motion, but was based entirely upon the respondents' application, upon which they can take nothing and which they had no power to make; and, therefore, the order was made without jurisdiction: in the second place, the Board had no intention to make, and did not make, any such order; its order was intended to embrace, and does in terms embrace, both parties to the application and the railway of the one and the proposed railway of the other: to strike out that part of the order which relates to the respondents, and their proposed railway, and to let the rest stand, would be to make a new, and different, order, of a very different character and effect, from that intended to be made, and actually made, by the Board; and one which, I can hardly think, they would have thought of making; and which, if they had made it, could not, in my opinion, stand. The purpose of the Board was to make provision so that there should be an interchange of traffic between the railway of the appellants and that of the respondents,

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when it comes into existence; and that alone was the purpose of the application to them by the respondents. Take away the order against the respondents, and what remains is something never contemplated by the parties or the Board, and which, I should imagine, no one desires. It would give the prospective railway of the respondents nothing: they would be obliged to apply again to the Board when they have a real railway, not merely power to build it; whilst the effect upon the appellants and their railway would be this, that they would be bound to interchange traffic, including carriage trucks and other vehicles, with every "steam" railway under the legislative power of the Legislative Assembly; and also with any other street railway, municipal or otherwise, which the Board might see fit to bring into the provisions of sec. 57, or which is already within them, under sub-sec. (6); that is, of course, if the Board's power be as wide under that sub-section as the respondents contend for; but, lastly, its power under that sub-section is, in my opinion, much narrower than that, and does not extend to the making of an unlimited order of that character. Reading the whole section together, and having due regard to the purpose of the Legislature, gathered from the whole Act, sub-sec. (6) applies only to interchange between existing street railways: it does not authorise the making of an omnibus order against any street railway company, putting upon it an obligation to interchange with every sort of a railway under provincial legislative power, with the limitation only that, as to other street railways, an omnibus order shall be made respecting them. The very nature of the thing seems to me to require that the order shall be limited to two or more definite existing railways, to be made only after a consideration of the particular case in the public interests, as well as of the interests of the companies directly concerned. The respondents cannot want—indeed, it would be obviously against their interests to want—the appellants' railway thrown open to others and not to them: their need is, interchange between their railway when built and that of the appellants, but only if that can be beneficially accomplished; and they ought not, merely to save themselves from the position of having failed altogether in their application, to catch at and try to hold on to something that does them no good, but harm, as well as grievously and needlessly hampering the appellants' already overloaded railway. It is quite true that the applicants ought not to be delayed until the last spike of their construction is driven; but, on the other hand, it is at least equally plain that they ought not to begin their application before the first spike is driven; it can hardly be that even the first spike constitutes a "railway." The pitiful picture painted by the Chairman, of waste in the duplicating of works, is almost, if not altogether, a fanciful one only; and one which, if there really could be anything in it, would not be got rid of, or even ameliorated, by the order in question,

which gives nothing to the respondents: until the final agreement, or order, for interchange, should be made, there would be just as much uncertainty as there is now; an uncertainty which cannot really affect materially, if in any way, the mode of construction of the proposed railway.

A much more real picture of that character might be drawn from a study of the effect of an unlimited order adding to the burden of already overcrowded cars, and overburdened rails, complaint, inconvenience, and bad feeling, as well as to the danger to life and limb which that burden already carries.

There is obviously a vast difference, in this respect, between "steam" railways and street railways; to the former, with their comparatively infrequent trains and the matter of merely attaching other cars to them, the freest interchange is, generally speaking, manifestly in the public interests, as well as in the interests of all else concerned; between street railways, with already overcrowded rails, as well as cars, cars which are run separately, and when it may be practically necessary to send not only the car but also the crews of the one company over the lines of the others, a very different, and a much more difficult, problem arises, and one which can be fairly dealt with only when the railways are in existence and after the most careful consideration of all the then existing circumstances—circumstances which are changing, in some respects, from time to time, and with especial regard to lesening rather than running any risk of increasing the already terrible toll of lost life and limb in street railway accidents.

I can have no manner of doubt that, if the position of the parties were reversed, if the municipality were the owners and operators of the central system, and some private corporation were projecting the outlying railway, this particular application would be generally scoffed at.

I am in favour of allowing the appeal, and discharging the order in question altogether.

Magee, J.A.

MAGEE, J.A.:—The by-law and orders of the Ontario Railway and Municipal Board under which the City of Toronto Corporation is acting were not before us on the argument, but were before that Board, or at least within its cognizance upon the city corporation's application for the order now in appeal. A copy of by-law No. 5626, which will be referred to, has since been put in, and also a copy of the opinion of the Board, dated the 23rd June, 1911, approving of the plans and profiles submitted by the city as to car lines on Gerrard street and Coxwell avenue and on St. Clair avenue.

The appellants, the Toronto Railway Company, own and operate the street railway within what was formerly the city of Toronto, but new territory has since been added to the city, and the proposed street railways of the city or some of them are to be within the new territory.

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As a municipal corporation, the city would be enabled under sec. 569 of the Consolidated Municipal Act, 1903 (as amended in 1906 by 6 Edw. VII. ch. 34, sec. 21, and in 1910 by 10 Edw. VII. ch. 81, sec. 4), to pass, with the assent of the electors, a by-law for building, equipping, maintaining, and operating street railways along such streets and subject to and upon such terms as the Lieutenant-Governor in Council might approve, and for leasing the same from time to time, and for levying an annual special rate to defray the interest and principal of the expenditure. No other statutory authority is referred to as empowering the city to construct or operate a street railway. By the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 53, that Board is given the powers of the Lieutenant-Governor in Council as to approval or confirmation of such by-laws. By the Ontario Railway Amendment Act, 1910 (10 Edw. VII. ch. 31, sec. 3), a railway company shall not, without first obtaining the permission of the Board, begin the construction of a railway upon a highway, and this shall apply to a street railway; and by the Ontario Railway Act, 1906 (6 Edw. VII. ch. 30), sec. 2 (21), a "street railway" is declared to mean a railway constructed or operated along a highway under or by virtue of an agreement with or by-law of a city or town. Thus the Board's approval of the by-law (or that of the Lieutenant-Governor in Council) would be necessary, and also the Board's permission, before beginning the construction on the streets.

A by-law was passed by the city council with a view to the construction of some street railway lines. In the Board's reasons for the order, of the 24th June, 1911, now in appeal, it is stated that "the city submitted a by-law to the ratepayers to authorise the issue of debentures to the amount of $1,157,293, to pay for the construction and equipment of street railways upon certain streets to be selected by the council, with the approval of this Board. The by-law was carried by an overwhelming majority." The Board then goes on to state: "On the 25th April last, the city made an application to the Board for the approval of the plans for the construction of the civic car lines on Gerrard street and Coxwell avenue from Greenwood avenue to Main street, and on St. Clair avenue from Yonge street to the Grand Trunk Railway crossing. The Board, in an opinion dated the 6th May, 1911, declined to approve the plans and profiles until the city furnished us with particulars of the whole scheme for building, equipping, maintaining, and operating the civic car lines. We stated in that opinion that we required to know all the streets the city intended to use for the lines, the mileage, the kind of rail, the character of the construction, kind of car barns and repair shops, the number and kind of cars to be operated, and an estimate of the cost of construction, operation, and maintenance, and of the revenue to be derived from the enterprise. The city have complied with this demand of the Board, and

have furnished us with the required particulars and details of the scheme. The Board have approved of the plans and profiles and of the scheme generally. We are informed that the city have ordered the rails and other material necessary for the construction of the lines."

We find in the statutes of 1911 (1 Geo. V. ch. 119, sec. 8) that a city by-law No. 5626, passed on the 23rd January, 1911, for the raising of $1,157,293, the amount mentioned by the Board, was declared valid.

In the letter of the 5th May, 1911, to the company's manager, counsel for the city stated: "As you know, the different routes under contemplation by the city, and for which the by-law has been passed by the people, are as follows: (1) St. Clair avenue . . . (2) Davenport road and Bathurst street . . . (3) Rosedale loop . . . (4) Danforth avenue . . . (5) Gerrard and Main street. . . ." The letter goes on to state the estimated cost of constructing a double track with an 80 lb. rail on each of these routes.

So far as appears, by-law No. 5626 is the only by-law passed. It recites that by a report of the board of control, adopted in council, "it is recommended that a by-law should be passed to provide for the issue of debentures to the amount of $1,157,293 for the purpose of building and equipping street railways, and of laying permanent pavements upon the railway portions upon certain streets of the city;" and that the council had determined to issue debentures to that amount, "for the purpose of raising the amount required to pay for the construction and equipment of street railways upon certain streets to be selected by the council, with the approval of the Ontario Railway and Municipal Board, in those parts of the city annexed thereto since September, 1891, and for the laying down of permanent pavements upon the railway portions of such streets." The by-law then authorised the issue and sale of the debentures, "and the proceeds thereof . . . shall be applied for the purposes above specified, and for no other purpose."

It would thus appear that the by-law does not specify any street for the railway, but leaves that to future selection by the council. The issue of debentures is made valid by the statute, and no objection is taken here as to the validity or sufficiency of the by-law otherwise, or to the right of the city to proceed with the construction and operation of the proposed lines. Objection is made, however, that the mere right to construct, and even an authorised plan for construction, does not suffice for the application now in question.

On the 5th June, 1911, the city gave the company notice of the application out of which this appeal arises, and the application was heard on the 21st June. No evidence was offered beyond putting in some letters which had passed between the parties, each inviting proposals from the other.

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The permission of the Board for the construction had not been given when the application was heard. The information which the Board had required was received by it only on the previous day, the 20th June, and the company's counsel was not aware that it had been furnished. The Board's approval is dated the 23rd June. The order appealed from, though not dated, is stated to have been made on the 24th June.

The city notified the company of its intention to apply to the Board for two things: an order to the company to afford all proper facilities for what may be called interchange of passenger traffic and cars between the company's street railway and two of the city's lines, namely, those on St. Clair avenue and Gerrard street; and an order that the company and their railway system shall be subject to and governed by the provisions of sec. 57 of the Ontario Railway Act, 1906. The Board did not grant the application for an order for interchange. It was hardly asked for, but recognised as premature, and indeed asserted by the city to be a matter for subsequent action. But the Board did make an order declaring that sec. 57 should apply to the company and its street railways, and also declaring that it should apply to the city corporation "and the street railways to be constructed by it." The latter declaration had not been specifically asked for.

The company appeal, on the ground that the Board had no jurisdiction to make such an order against them, at the instance of the city, or with a view to interchange with the non-existent city railways.

The Ontario Railway Act, 1906 (6 Edw. VII. ch. 30), in sec. 3, incorporates the Act with the special Act, and declares that it applies to "all persons, companies, railways (other than Government railways) and (when so expressed) to street railways within the legislative authority of the Legislature of Ontario;" but no section of the Act shall "apply to street railways unless it is so expressed and provided." Section 5 is to the like effect.

Section 57, in sub-sec. (1), provides that "the directors of any railway company may at any time, and from time to time, make and enter into any agreement or arrangement with any other company, either in this Province or elsewhere, for the regulation and interchange of traffic passing to and from the railways of the said companies, and for the working of the traffic over the said railways respectively, or for either of those objects . . . for any term not exceeding twenty-one years," and to "provide . . . for the appointment of a joint committee or committees for the better carrying into effect such agreement or arrangement . . . subject to the consent of two-thirds of the shareholders, voting in person or by proxy." Sub-section (2) provides that "every railway company shall . . . afford all reasonable facilities to any other railway company for the receiving and forwarding and delivering of traffic upon and from

the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks, and other vehicles;" and no such company is to give any preference or advantage to any particular company or description of traffic, or subject any to prejudice or disadvantage; and "every railway company having or working a railway which forms part of a continuous line of railway, or which intersects any other railway or which has a terminus, station or wharf of the one near a terminus, station or wharf of the other," shall afford facilities for receiving and forwarding by the one all the traffic arriving by the other and so that no obstruction may be offered "in the using of such railway as a continuous line of communication." Sub-section (3) imposes penalties on the employees of a "railway company" refusing or neglecting to receive, convey, or deliver traffic from the railway of "any other company." Sub-section (4) declares that "in case any company or municipality interested is unable to agree as to the regulation and interchange of traffic or in respect of any other matter in this section provided for, the same shall be determined by the Board." And sub-sec. (5) reads: "All complaints made under this section shall be heard and determined by the Board." If the section stopped there, it would not apply to street railways. But sub-sec. (6) is added, which declares that "this section shall apply to such street railways as may from time to time be determined by the Board."

The word "company," in the expressions "any railway company," "every railway company," and "any other railway company," used in sec. 57, is not, I think, governed by the interpretation given in sec. 2 to the expression "the company," and should, therefore, be interpreted in its natural sense, and would not include a municipal corporation. And, as only companies are mentioned, it could not be intended that municipalities or their railways could be made subject to it. But then, it may be said, that, under sec. 569 of the Municipal Act, the municipality has the same rights, powers, and liabilities as street railways and companies (which must mean all, not some, of such railways and companies) under the Street Railway Act (R.S.O. 1897, ch. 208), which is now replaced and repealed by the Ontario Railway Act, 1906. By the Interpretation Act, R.S.O. 1897, ch. 1, sec. 8 (now 7 Edw. VII. ch. 2, sec. 7), the sections of the Ontario Railway Act, 1906, corresponding to those of the Street Railway Act, would be applicable. In the Street Railway Act and the amendments before 1906, there was no provision requiring interchange, though there was a right to agree to interchange. Section 57, apart from sub-sec. (6), does not relate to street railways at all, and even with sub-sec. (6) does not relate to all but only to some street railways—perhaps to none in the Province other than these two. It cannot then be said that sec. 569 makes interchange a right or liability of the municipality. The only view in which it might be claimed that the municipality would

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be made subject to sec. 57 is, that it is subject to the jurisdiction of the Board, and liable to have an order made by the Board under that section—but that is not, I think, in any sense, one of the "liabilities" contemplated by sec. 569. I am, therefore, of opinion that a municipality is not liable under sec. 57, any more than a Government railway, to be compelled to interchange traffic with any street railway or other railway company. I may here add that the use of the word "municipality" in sub-sec. (4) does not help a contrary view; it is manifestly used in respect of rights other than as proprietors of a railway, and its use there, as contradistinguished from "company," when it is not used elsewhere in the section, rather supports the view that "company" does not include "municipality."

It is noticeable that sub-sec. (6) of sec. 57 uses the words "street railways." "Street railway" is defined in sec. 2 (21) as meaning a railway "constructed or operated" along a highway, as already mentioned. Had sub-sec. (6) used the words "the company," they are defined as meaning "the company or person" (which would, under the Interpretation Act, include "corporation") "authorised by the special Act to construct." The city's street railway is authorised, but it is not yet commenced, much less constructed or operated. But, as the interchange of traffic could not take place till constructed and operated, I do not see that the Board must wait until that stage before making the declaration that sec. 57 shall apply to it, when constructed and operated. As pithily put by the Board, "that the proposed civic lines will be built is as certain as taxes." The Board do not make such a declaration in the dark. As appears from the quotation above made from their reasons, they know the routes and the gauge, and sufficient particulars to enable them to judge whether it is proper that a particular street railway should be made liable to interchange at all. The Legislature has constituted the Board for the very purpose of exercising its discretion, and it is not to be assumed that the Board would in any case act in the dark or without full information on all points necessary for arriving at a decision. The liability to interchange is one thing, the terms of the interchange another.

I have been dealing with the question of the power of the Board to determine that the city or its street railway shall be subject to sec. 57. That it has such power with regard to the street railway of the appellant company is not disputed. That power it may exercise of its own motion or on the application of any one interested, and, under sec. 17 of the Ontario Railway and Municipal Board Act, it can decide conclusively who is a party interested; and I do not see anything in the Act to prevent the city corporation, owning or not owning a street railway, or a Board of Trade, or a body of merchants, or an individual, from being considered by the Board to be a party interested sufficiently to set the Board in motion if the Board did not choose to take action itself.

We then come to consider the order appealed from. It is in fact two orders combined in one. It is not an order that sec. 57 shall apply as between these two street railways, or shall apply to each as regards the other. It contains an absolute and unlimited declaration that the section shall apply to the company and its street railway. And then it contains an equally absolute and unlimited declaration as to the city and the "street railways to be constructed by it." It is not restricted to those coterminous with the company's railway nor to those on St. Clair avenue and Gerrard street, nor even to those to be constructed under the existing by-law; but this appeal has no concern with any objection on that score. The effect is that, if sec. 57 is to apply to the company, it applies to it not merely to require interchange with the city's street railway, but with all street railways, if not all railways of any sort to which sec. 57 from time to time applies.

That brings us again to consider sub-sec. 6. Several meanings may be put forward for it. One is that the Board may apply sec. 75 not to one or more specified street railways, but to a class or to such as answer certain requirements. This order would not comply with that interpretation. Another meaning might be argued for—that the Board could apply sec. 57 not to any one or more certain specified street railways, but only as between two or more specified street railways—so that, in fact, it would not wholly apply to any one of them—that is, it would not apply to it as regards railways not mentioned. This order does not comply with that meaning.

Then the only remaining construction, and the one which is, in my opinion, the correct one, is, that the Board may do what, if we could judge only by the formal order, it has done here, that is, decide whether or not sec. 57 shall apply to a particular railway, whatever the result may be.

If the Board chooses to do that with regard to the street railway of the appellant company, or any other company to which the Ontario Railway Act applies, I do not see anything to prevent it. What the effect upon that company may be is another question. Does it become liable to interchange with all railways which are subject to sec. 57, or only with street railways? The section is to be construed not merely with reference to Toronto alone, but with reference to the whole Province. There might well be places in which a street railway would be the only connecting link between two lines of steam railways, and in which it might be constructed with a view to being a connecting link, as street railways are not limited to carriage of passengers, and street railways continue to be street railways for a mile and a half outside the city or town. It might be to the public interest that such a street railway should be both entitled and liable to interchange with lines of steam railway.

In my opinion, the Board cannot limit the application of

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sec. 57, if it declares that that section applies to the appellant street railway or any other. It cannot say how far that section shall apply, or that it shall apply only to a limited extent, or with regard to one railway or one street railway.

If two companies to which the section applies are subsequently unable to agree, and the intervention of the Board becomes necessary, it may find interchange impracticable, and decline to make an order between them, or may have to require conditions which would not be acceptable to an applicant. But that is a different matter from assuming to exercise, under sub-sec. (6), the right to limit the application of the section.

Although the order appealed from, in form, purports to be separate applications of sec. 57 to each of these street railways, it is not stated just what view the members of the Board took of the meaning of the sub-section. But in their reasons they in every instance couple the two roads together. For instance, it is stated: "The application is made by the city against the Toronto Railway Company for the purpose of securing an interchange of traffic between the civic car lines and the company's street railway system, and with that view to have it declared that sec. 57 of the Ontario Railway Act of 1906 applies to the company and the city street railway . . . We do not think we require to wait until the last spike is driven before determining that sec. 57 . . . shall apply to the city's and the company's street railways. To do so would result in useless and wasteful duplication . . . There should be an interchange of traffic; and, therefore, we make the determination asked for by the city." The Board also expressed its opinion that it would be in the public interest, when the city had completed and equipped the railway, to arrange for its operation with the present street railway as one system. Nowhere does the Board deal with the propriety of making sec. 57 applicable to any one road alone.

It is, I think, evident that, although the city had only asked for the application of sec. 57 to the company's street railway, the Board was not considering the application of the section to either railway apart from the other—and was making the declaration only with respect to the company's railway, because it was also making a similar declaration with regard to the city's railway. The reasons of the Board for its decision are signed by all the members, and are before this Court, and it is evident that, if the city was not to be liable to interchange, no order would have been made in respect of the company alone, and that the order was only made for the purpose of interchange between these two railways. Taking, as I do, the view that the Board could not apply sec. 57 to the city railways, it follows, I think, that, although the order with respect to the company's railways would, if it stood alone, be quite within the powers of

the Board, yet, being made upon a non-existent basis, and with a view to an impossible result, and made without consideration of its effect upon the company with regard to any other railway or street railway, it was not warranted in law and should be declared invalid.

Whether, in view of the provisions of sec. 21 of the Ontario Railway and Municipal Board Act, 1906 (6 Edw. VII. ch. 31), restricting the Board's power to interfere with a company's rights or duties under an agreement, any practical beneficial result would be attained by the application of sec. 57 of the Ontario Railway Act, may give rise to serious consideration. The Board have a very desirable end in view, and it is to be hoped that the good sense and public spirit of both parties will lead them to it.

Appeal allowed.

MERCHANTS BANK OF CANADA v. THOMPSON.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 15, 1912.

1. BILLS AND NOTES (§ VI—167)—WHAT AMOUNTS TO FAILURE OF CONSIDERATION—NOTE FOR PREMIUM TO ENTER PARTNERSHIP—WRONGFUL EXPULSION OF MAKER OF NOTE.

Where a promissory note is given in payment of a premium upon the admission of the maker into a partnership in the business of the payee, and a partnership between them is in fact created, but no term for its duration is agreed upon, the subsequent dissolution thereof, or even the wrongful expulsion therefrom of the maker of the note, does not give rise to a total failure of consideration for the note, so as to make it unenforceable in the hands either of the payee or of a holder, though the maker may be entitled as against the payee to a return of a proportion of his premium.

[Judgment of a Divisional Court, *Merchants Bank of Canada* v. *Thompson*, 23 O.L.R. 502, reversed; Lindley on Partnership, 7th ed., p. 625 *et seq.*, specially referred to.]

2. EVIDENCE (§ II K—318)—NEGOTIABLE INSTRUMENT—ONUS OF PROVING FAILURE OF CONSIDERATION OR PAYMENT.

Where one defendant in an action upon a negotiable instrument relies upon a failure of consideration, either total or partial, or upon payment of the instrument or any part thereof, the onus is upon him to prove such failure or payment.

3. BANKS (§ IV B—101)—LIEN OF COLLECTING BANK—NOTE ENDORSED FOR COLLECTION—RIGHTS OF CUSTOMER.

Where a negotiable instrument is endorsed to a bank by a customer for collection, the bank is entitled to a lien thereon for all debts then payable to it by the customer, and for all debts which may become so payable while the instrument is in its possession, but the customer is entitled to take up the instrument from the bank whenever he is free from any obligation to the bank and even (*semble*) when he is free only from debts presently payable, though there may be debts due but not yet payable, *e.g.*, negotiable instruments discounted by the bank which have not yet matured.

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4. BANKS (§ IV B—101)—LIEN OF COLLECTING BANK—RIGHTS AS HOLDER IN DUE COURSE.

Where a negotiable instrument is endorsed to a bank by a customer as security for such debts as may from time to time be due by the customer to the bank, the instrument is good in the hands of the bank against the maker thereof for the amount of the indebtedness of the customer to the bank, and the fact that at some times during the bank's possession of the instrument there is no such indebtedness existing, will not deprive the bank of its rights or of its position as a holder in due course. (*Per* Meredith, J.A.; Maclaren, J.A., *contra.*)

[*Atwood* v. *Crowdie*, 1 Stark. 483, followed.]

5. EVIDENCE (§ II K—318)—NEGOTIABLE INSTRUMENT—ENDORSATION BY CUSTOMER TO BANK—COLLATERAL SECURITY—COLLECTION.

Where a negotiable instrument has been endorsed to and left with a bank by a customer thereof, the proper conclusion, in case of a conflict of evidence as to the terms upon which the instrument was so indorsed and left, will usually be that it was as collateral security for any advances by the bank to the customer, and not for collection only. (*Per* Meredith, J.A.; Moss, C.J.O., *dubitante;* Maclaren, J.A., *contra.*)

Statement

AN appeal by the plaintiffs from the judgment of a Divisional Court, 23 O.L.R. 502.

Argument

J. F. Orde, K.C., for the plaintiffs. There was not a total failure of consideration. Living got what he agreed to pay for: Lindley on Partnership, 7th ed., p. 626. The failure of consideration (if any) was at most but partial, entitling Living to a partial return of his premium: Chalmers on Bills of Exchange, 7th ed., p. 108; *Kilroy* v. *Simkins* (1876), 26 C.P. 281. The note was, prior to its maturity, pledged to the bank as collateral security for advances theretofore made and thereafter to be made to Fox. Consequently, notwithstanding that the loans to Fox were from time to time paid off, the plaintiffs' right to the security would attach from the date of the pledge, September, 1907; *Atwood* v. *Crowdie* (1816), 1 Stark. 483. But the plaintiffs' right to recover does not depend upon an express pledging of the note. The plaintiffs, in any event, held the note for collection, and were consequently entitled to exercise their banker's lien, which has the effect of creating a pledge without any conscious pledging: Paget on Banking, 2nd ed., pp. 297, 298; Grant on Banking, 6th ed., pp. 301 and 305; Hart on Banking, 2nd ed., p. 744; *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787; and by virtue of their lien they became holders for value and are entitled to recover to the extent of the lien: Bills of Exchange Act, sec. 54; Maclaren on Bills, 4th ed., pp. 174, 175; Falconbridge on Banking, pp. 449 *et seq.*; Chalmers on Bills of Exchange, 7th ed., pp. 93 *et seq.* No state of facts has been shewn by the defendants which constituted an "equity attaching to the note" or rendered Fox's title defective within the meaning of sec. 70 of the Bills of Exchange Act: *Oulds* v. *Harrison* (1854), 10 Ex. 572; *In re Overend Gurney & Co., Ex p. Swan* (1868), L.R. 6 Eq. 344. The cases of *Holmes* v. *Kidd* (1858), 3 H. & N. 891, and *Ching* v. *Jeffery* (1885), 12 A.R. 432, are clearly distinguishable from the present case. What took place in both these cases amounted in effect to payment or part payment, and the amount

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was in each case liquidated and ascertained. The appellants also rely upon the reasons given by the Chancellor and Mr. Justice Britton.

Travers Lewis, K.C., and *J. W. Bain*, K.C., for the defendants. The note represented the purchase-price of a half share in Fox's manufacturing agencies, which half share Living never got; and, consequently, the consideration for the note wholly failed. Section 54 of the Bills of Exchange Act, relied upon by the learned trial Judge, we submit, does not extend to the case of a dishonoured note: Hart on Banking, 2nd ed., p. 480; *Giles* v. *Perkins* (1807), 9 East 12; *Thompson* v. *Giles* (1824), 2 B. & C. 422; *Dawson* v. *Isle*, [1906] 1 Ch. 633, 637. The evidence shews that the note was deposited for collection only. There is no doubt that the defendants were sureties; and the bank manager, after the note matured, must have known that such was the case. The note was repledged after maturity, and the bank had no property in it, but only a lien at most, under sec. 54 of the Bills of Exchange Act. As soon as the indebtedness of Fox was wiped out, the lien was discharged; and, when a new lien accrued, it would be subject to the intervening equities: Chalmers on Bills of Exchange, 6th ed., p. 120. Sections 54 and 70 of the Bills of Exchange Act ought not to be read together: Falconbridge on Banking and Bills of Exchange, pp. 477, 478; *Ching* v. *Jeffery*, 12 A.R. 432, especially at pp. 434, 436; *Polak* v. *Everett* (1876), 1 Q.B.D. 669, *per* Blackburn, J., at p. 674; *Britton* v. *Fisher* (1867), 26 U.C.R. 338, at pp. 339, 340. The evidence shews that there was a binding agreement by Fox to give time to Living; and the learned trial Judge erred, we submit, in thinking that there was no sufficient variation to alter the position of the parties: *Canada Permanent Loan and Savings Co.* v. *Ball* (1899), 30 O.R. 557, and particularly at pp. 568, 572, 573, and the authorities there collected; *Bonar* v. *Macdonald* (1850), 3 H.L.C. 226, 238. Making an agreement with the principal debtor for 8 per cent. interest on the overdue note is a giving of time sufficient to discharge the sureties: *Blake* v. *White* (1835), 1 Y. & C. (Ex.) 420, 426; DeColyar on Guarantees, 3rd ed., pp. 422, 424; Brandt on Suretyship (1905), vol. 1, secs. 389, 394; *Lime Rock Bank* v. *Mallett* (1856), 42 Me. 349, 358; Rowlatt on Suretyship (1899), p. 245. On the point of banker's lien, see *Lloyd* v. *Davis* (1824), 3 L.J.O.S.K.B. 38; Falconbridge on Banking, p. 460, and cases there cited. The respondents also rely on the reasons given by the Chief Justice of the King's Bench.

Orde, in reply.

Moss, C.J.O.

April 15. MOSS, C.J.O.:—This is an appeal by the plaintiffs from a judgment of a Divisional Court reversing (Britton, J., dissenting) a judgment of the Chancellor of Ontario at the trial without a jury.

The case is reported in 23 O.L.R. 502, where the facts are fully stated in the judgment of the Chief Justice of the King's Bench.

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The plaintiffs sue as the holders of a promissory note for $2,000 made by one A. H. Living and the defendants in favour of one C. H. Fox, and by him indorsed to the plaintiffs' order. The note is in form joint and several. The action was brought against the two defendants alone, and no steps were taken by them to bring or cause the plaintiffs to bring Living and Fox into the action.

They were, of course, not bound to do so unless they considered it material to their defence; but, in one aspect of the case, it might have been to their advantage to have had them before the Court.

The defences relied upon, as shewn by the record upon which the parties went to trial, as well as those afterwards permitted to be set up, are set forth on p. 508 of the report.

As regards the answers to the action alleged in the first paragraph of the original defence and repeated in substance in two paragraphs of the further defences, viz., an agreement for extension of time and neglect to give notice of dishonour to the defendants, there is no difference of opinion between the trial Judge and the Divisional Court. These defences failed for lack of proof that the plaintiffs had notice that the defendants were sureties for Living.

The other defences, viz., that the note was made without consideration and was indorsed to the plaintiffs without consideration and after maturity; that the consideration for the note as between Fox and Living failed, and that at the time of the commencement of the action the plaintiffs' title was no higher than Fox's, and the note was held subject to the existing equities between him and Living, are those upon which the differences of opinion have arisen. It is now beyond question, upon the evidence, that the defendants became parties to the note as sureties for Living upon a transaction between him and Fox for the acquisition by the former of a half share or interest in the business of manufacturers' agent carried on by Fox in the city of Vancouver, and the formation of a partnership between them in the business. The nature of the transaction is to be gathered from the evidence of these parties and the memorandum of agreement signed by them. In effect, it was the not unusual transaction of a person purchasing his way into an established business, paying a bonus or premium to the owner, and entering into partnership with him, upon terms arranged between them.

The bonus or premium to be paid was $2,000; but, as Living was unable to provide the money, and Fox was willing to accept the promissory note of the defendants, Living prevailed upon them to join him in the note in question. It is dated the 1st July, 1907, payable three months after date, and therefore fell due and payable on the 4th October, 1907. It was received by the plaintiffs from Fox on the 12th September, 1907, and has been in their possession ever since.

At the time when the note was received, the plaintiffs had under discount a note for $500 made by Fox dated the 4th September, payable in thirty days, but beyond this he was not indebted to the plaintiffs.

There is upon the testimony a far from satisfactory account of the terms or conditions under which the note was left with the plaintiffs. Fox was positive that it was left for collateral and collection. The plaintiffs' manager would not use the term "collateral." He said it was left "for what it was worth;" and the records shew that it was entered in the collection and not in the collateral register. The learned Chancellor found as a fact that it was left as collateral security and also for collection; while, in the Divisional Court, the learned Chief Justice said that, notwithstanding Fox's evidence, the impression made upon him was that the note was indorsed to the plaintiffs merely for collection, and not as collateral. The conclusion I have reached upon the question of consideration renders it unnecessary finally to decide between these conflicting views; but, on the whole, I incline to the latter. Even so, in my view, it still leaves the plaintiffs entitled to the judgment awarded to them by the Chancellor.

As indorsees for collection of the note, they were entitled to a lien on it for debts that were then presently payable and from time to time thereafter becoming payable. The claim now made is in respect of an indebtedness of Fox which became payable from and after the 24th November, 1908. Prior to that date, there was a period in which Fox was free from direct indebtedness, although there were some outstanding notes or drafts under discount; a time during which, according to the plaintiffs' manager, Fox was at liberty to take the note out of the plaintiffs' possession had he chosen. But Fox did not take it away, and it remained with the plaintiffs until the debts now due and payable had accrued. And, unless something had occurred between Fox and Living prior to the 24th November which furnished the latter with a defence to an action on the note, the plaintiffs are entitled as holders to a lien for the amount of Fox's indebtedness to them.

The defence set up is want of consideration and total failure of consideration. Upon the evidence, it seems to me to be plain that there was good consideration for the note when it was given. Living obtained an interest in Fox's agency business which he then had and which he might thereafter acquire, and became a partner on equal terms with Fox. He was and acted as a partner for at least fifteen months, during which time he says he earned or become entitled to several thousand dollars as profits, and actually received about $1,000 for his own use. He was known to at least some of the customers or persons with whom or on whose behalf he and Fox executed commissions, and drafts in the firm name had been drawn upon some of them.

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Upon the facts, it would be impossible for Fox to deny that Living was a co-partner or legally to refuse him his rights as such. Neither could Living be heard to say, as against persons dealing with the firm, that he was not a partner. When, therefore, the note was received by the plaintiffs, it was a note for good consideration, not overdue.

But then it is said that a failure of consideration accrued by reason of what took place between Fox and Living in July, 1908, when Living left the firm's place of business. What occurred at that time could have no greater effect than a dissolution of the partnership. If, as Living seems to think, it was a wrongful expulsion, that could not alter his right to be restored, or, if the conditions appeared to be such as to render impossible a continuance of the partnership, to a judgment for dissolution, upon such terms as the circumstances justified. Whether Living considered that a dissolution was effected by what occurred, or considered that he was wrongfully expelled, he seems to have acquiesced, and to have taken no steps either to be restored or to procure a taking of the partnership accounts.

The circumstance that Living paid or was paying a premium or bonus could make no difference in this case, where there was no stipulation or agreement as to the time of the duration of the partnership.

Whether through oversight or inadvertence, there was no agreement that the partnership should continue for a specified time or definite period. But the partnership was in fact created; and, that being so, its subsequent termination would not create a total failure of consideration so as to affect the validity of the note in the hands of either Fox or the plaintiffs; although, upon taking the partnership accounts, Living might be able to shew himself entitled to a return of part of the premium. The question is discussed at length in Lindley on Partnership, 7th ed., p. 625 *et seq.* At p. 626 it is said: "In the first place, assuming the partnership to have been in fact created, it is clear that there has not been a *total* failure of consideration for the premium; and, consequently, it cannot be recovered as money paid for a consideration which has failed. In the next place, persons who enter into partnership know that it may be determined at any time by death and other events; and unless they provide against such contingencies, they may fairly be considered as content to take the chance of their happening, and the tendency of modern decisions is to act on this principle." It does not necessarily follow that no part of the premium is to be returned in any case. On the contrary, it appears from many authorities that in cases where the dissolution was not brought about by wrongful conduct on the part of the partner who paid the premium, or under circumstances for which he is responsible, a return of part may be awarded. But as to what part, the learned author says (p. 630): "There is no definite rule for deciding in any particular

case the amount which ought to be returned;" and instances are given of the circumstances which are to be taken into consideration.

The defendants' difficulty in this case is, that they have not shewn the circumstances attending the dissolution sufficiently to enable a decision to be given as to whether Living is entitled to a return of part of the premium. There are charges and counter-charges of misconduct on the part of Fox and Living; but they are not before the Court; and it was for the defendants, if they desired to avail themselves of the defence of partial failure, to have put the case in proper train for inquiry. Neither is there material upon which can be ascertained what, if any, proportion of the premium should be returned—nothing to reduce the amount of the indebtedness as represented by the note. The burden of shewing this was on the defendants, and it was not for the plaintiffs to shew the state of the accounts. Payments, either by reduction of the amount of the premium or receipt by Fox of profits of the business, were to be proved by the defendants, and they failed to shew either.

The appeal should be allowed and the judgment at the trial restored with costs of the appeal to the Divisional Court and this Court.

MEREDITH, J.A.:—The first question involved in this case is one of fact, namely: What was the nature and effect of the transaction between the bank and Fox by which the bank became the holders of the promissory note in question, of which he was the payee, by virtue of the indorsement of it by him over to their order, and the delivery of it at the same time, by him to them. Meredith, J.A.

We are, of course, not bound by the present impressions, of either of the parties to that transfer, as to its true nature and effect; memory, at best, is likely to be more or less treacherous, and none the less because one of the persons was the manager of a bank, upon whose mind impressions of banking transactions were being continuously made in large numbers. In such a case as this, the surrounding circumstances and the probabilities are very useful witnesses.

Fox was a customer of the bank, and a man whose business affairs, or other exigencies, made it necessary or expedient for him to borrow money from time to time, and the note in question was, at least, likely to be helpful and to be used in obtaining the necessary credit in such an institution as this bank—one of the several foremost in this country.

There are really only three purposes for which it is possible that the transfer of the note could have taken place: (1) for safe-keeping; (2) as security for money advanced or to be advanced; or (3) for collection.

Safe-keeping—mere custody—is out of the question: no one suggests it; it ought not to have been indorsed over if that were the intention of the parties.

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Collection alone seems to me to be also out of the question; no one testifies to it; and no one, having regard to all the circumstances of the case, could reasonably conclude that such was the full nature and effect of the transaction. It was the note of the man's partner, transferred while they were carrying on business together, many months before the rupture between them: it was not a note of the ordinary mercantile character usually paid and taken up through the payee's banker. What reason can be suggested for placing the promissory note of one's partner in a bank for collection: this partner was the principal debtor, and he was at hand: if it be suggested that the payee knew or expected that the partner would resist payment, then it is almost certain that it would be transferred so as to give the bank higher rights than the payee's.

The testimony of the bank's manager is that the note was taken by the bank, through him, for what it was worth; that is, of course, for what it was worth in Fox's dealings with the bank and his obligations to the bank in connection with them, not for the small commission to be had for collection if it were paid at maturity. The testimony of Fox at the trial was that the purpose of the transaction was that the bank should hold the note as collateral security for moneys advanced to him from time to time; and, he added, "from drafts going through;" words which do not seem to me to have been intended to put any express limitation upon the extent of the security, but rather to indicate that which was in the mind of the witness at the moment of making the statement; and was his way of expressing the character of the business which he did with the bank and for which they would need security; strictly speaking, they must have meant more than they literally convey. No security would be needed for drafts going through for collection; security would be needed only for money advanced, whether on "paper" strictly called drafts or not.

It is quite obvious that, if the manager had regard for his masters' interests, or for his own reputation as a banker, he would have taken the note as security for such sum as might from time to time be advanced by the bank to Fox, especially as there can be no manner of doubt that Fox was quite willing that the bank should so acquire and hold it; that is, that it should be held as security for the amount of Fox's indebtedness to the bank from time to time in his account with them. If we draw the conclusion, from circumstances fully warranting it, that the banker would take all the security he could get, and would try to get more, we shall be very much nearer the truth in almost, if not quite, every case, than if, from the same circumstances, we conclude that he would reject security which he might as easily have had and would reject it without rhyme or reason.

So that we have a customer, hungry for credit on the best terms obtainable, with a negotiable instrument by which he can

get more credit and better terms if he pledge it as a standing security; and a banker always hungry of every available security; and so you might as well expect two hungry men to put aside, instead of eating, good food set before them to be eaten, as to expect this note under the circumstances to be laid aside for collection only: I accept Fox's statement as to the purpose of the transfer of it without any sort of doubt.

There is really nothing, that militates against this view of this case, in any of the circumstances relied upon by the respondents: it was quite right in any case to enter the note in the bank's collection docket: why not? It was in the bank's interests, and no doubt their duty, to send it through the regular process for collection. It was not discounted: the proper course of the bank seems to me to have been taken in taking the usual steps to enable the makers to pay at maturity: and would have been taken in placing the proceeds of the note to the credit of Fox's account, if it had been paid.

If for collection only, it would be odd that, for many weeks after it became payable, no steps of any kind were taken respecting it: remaining as it did is, of course, that which was entirely right if it were a subsisting security. And, beside all this, as I have before mentioned, if there were any likelihood of the defences which are now being set up, it would have been better for Fox that the bank should become and remain throughout holders for value, unaffected by any equity in respect of it, to the extent of his indebtedness to it.

The fact that no "hypothecation paper" was taken with it has little, if any, weight. It was a single note, and the course of business of the bank in that respect, at the branch where the transaction took place, is testified by the manager to have been as follows, in this respect:—

"Q. And you took a hypothecation, I suppose, at the time? A. No.

"Q. Isn't that usual when notes are left at a bank, except when they are left for mere safe-keeping? A. It is more regular. Sometimes one way and sometimes the other."

And I cannot think that the testimony of the bank manager warrants any such conclusion as that Fox might have taken up this note at any time when he was under any liability to the bank: he could, of course, have taken it up at any time when no such obligation existed; but, of course, at the risk of not getting credit when he next sought it.

If Fox were making, and if in law he could make, an appropriation of the proceeds of the note to the payment of the balance of his account by the bank, on the ground that the bank never acquired or held the note in this way, would he be likely to succeed? We must not let sympathy for the man who made the note, and got others to join with him as makers, and who plainly has not come very well out of his co-partnership experience with

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Fox, affect the strict legal rights of the parties. If it may be said, to the bank, why did you not take a writing evidencing the fact, if it were a fact, that you were to hold the note as your continuing security? might it not, with much greater force, be said to Fox, why did you not take a receipt for the note shewing that it was transferred for collection only? and why not take the note up, or do something in regard to it, after failure of the makers to pay?

The disinclination of the bank to have the note sued on in their name does not help the respondents; if they were collectors merely in the sense of a collecting agency, they would be less likely to have such a disinclination. Such a disinclination is natural in any case, and the more so at the instance of another and for his benefit; but, in this case, the bank have been driven to sue in their own interests now.

My conclusion upon the first question involved is, that the note was taken and always held by the bank as security for the repayment of all that might from time to time be owing by Fox to the bank: see *Atwood* v. *Crowdie*, 1 Stark. 483.

If I am right as to the facts, there can be no doubt that the note is good, in the bank's hands, against the makers of it, for the amount of the indebtedness of Fox to the bank, for which judgment was entered in favour of the bank at the trial: the fact that at some times there was nothing due from Fox to the bank would not cut out that right or deprive the bank of the position of a holder in due course; there would not be by implication a new transfer of the note as security for each separate indebtedness or advance; there would be but the one transaction, to which all changes in the account between Fox and the bank would be referable; everything would relate back to the one transfer, made while the note was current; although, of course, it was quite competent for Fox to have taken up the note at any time when there was no obligation on his part to the bank: see *Atwood* v. *Crowdie*, 1 Stark. 483—a case extremely like this case in substance.

I would allow the appeal and restore the judgment to the extent of the amount of the plaintiffs' claim proved at the trial.

Garrow, J.A.
Magee, J.A.

GARROW and MAGEE, JJ.A., agreed in allowing the appeal.

Maclaren, J.A.

MACLAREN, J.A. (dissenting):—This action was brought by the bank against two of the three makers of a joint and several promissory note for $2,000 to the order of one C. H. Fox, who indorsed it over to the bank before maturity. It was not protested, and has not been paid. The action was tried by Boyd, C., who held that, under sec. 54, sub-sec. 2, of the Bills of Exchange Act, the bank was entitled to recover against the makers the sum of $1,116.39, being the amount of their lien for the indebtedness of Fox. The defendants having appealed to the Divisional Court, the judgment was reversed and the action

dismissed, on the ground that the bank was not a holder in due course, but acquired its lien after maturity and dishonour and after a total failure of consideration. Britton, J., dissented.

The note in question was given under the following agreement:—

"I agree to buy one-half interest in the manufacturers' agency of Mr. Chas. Fox, in the city of Vancouver; to have one-half interest in all agencies controlled by him and any agencies which he shall secure: Mr. Fox to have one-half interest in all agencies which I shall secure—for the sum of two thousand dollars ($2,000).

"That Mr. Fox and myself to each put into the business the sum of one thousand dollars ($1,000).

"That I shall work my way to Montreal, returning to Vancouver as soon as possible.

"Mr. Fox and myself to each draw a stated salary agreeable to each other.

"Balance of commissions, after salary and general expense accounts are deducted, to be equally divided.

"Dated at Vancouver, in the Province of British Columbia, this 19th day of March, 1907. C. H. Fox. Alf. H. Living."

On the same day, Fox gave Living the following letter: "Vancouver, Canada, March 19th, 1907. Mr. A. Living. Dear Sir: Confirming our agreement of to-day, it was understood that I will at my own expense take a trip to England and Germany during the next year to secure better agencies, particularly cutlery, household furnishings, and fire-arms. Yours truly, C. H. Fox."

Living had not the $2,000 to pay Fox; but, after getting a note that was not satisfactory and was returned, he finally persuaded the two defendants, his uncle Thompson, and his mother-in-law Mrs. Turley, both of Ottawa, to join him in a joint and several note dated Vancouver, July 1st, 1907, for $2,000, payable in three months after date, to the order of Fox.

Early in August, Fox tried to discount this note at the Merchants Bank, Vancouver; but, after inquiry, the manager, Harrison, declined to discount it. Fox took it away, but on the 12th September, 1907, he brought it back and left it with the manager. There is a question as to the terms on which it was left, which will be considered presently.

The defendants urged in the Courts below and before us that Fox, when he was the legal holder of the note after maturity, had given time to Living, who was his only debtor, the defendants being merely sureties, and that on this account the defendants were released. It was held by both Courts that this defence was not proved; and I am of opinion that they were clearly right.

It was also argued before us that, as the defendants were mere accommodation makers, the bank could not, after maturity and dishonour, acquire a good title to the note as against the sureties, and that they were released by not being notified of

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the dishonour. Being makers, they were not entitled to notice, and the mere fact of their being accommodation makers was not alone sufficient to prevent the bank acquiring a good title after maturity for value, as this is not an equity attaching to a note. See Chalmers on Bills of Exchange, 7th ed., p. 130; 1 Daniel on Negotiable Instruments, sec. 726; *Sturtevant* v. *Ford* (1842), 4 M. & G. 101.

When we come to deal with the main question, we find the situation a very unsatisfactory one, as the business between Fox and Living was done in the most slipshod and irregular manner, as were also the dealings between Fox and the bank with respect to the note in question. Neither Fox nor Living was made a defendant in the present action; but they were both witnesses at the trial; and, wherein they differ in their testimony, the Chancellor does not express any preference. Harrison, the manager of the bank, who personally made the arrangements with Fox regarding the note, was not at the trial, he having been previously examined at Vancouver under a commission; so that, as regards his testimony, we are in the same position as was the Chancellor. Where his testimony conflicts with that of Fox, I prefer to accept his version of the facts, especially as he is corroborated by the books and by the entries and records made at the time. As to the terms on which Fox left the note with him, Harrison simply says, "He left it with me for what it was worth."

From the evidence of Harrison it appears that on the 4th September, 1907, he had discounted for Fox a $500 note, which was current on the 12th September, when the note now sued on was left with him at the bank. He also discounted another note for $300 for Fox on the 29th September, 1907. From this time onward until the 25th November, 1908, Fox was from time to time indebted to the bank in varying amounts; and at times, sometimes for weeks at a time, he was free from such indebtedness. From the 25th November, 1908, until this action was brought on the 2nd March, 1909, he was indebted continuously. Harrison's evidence as to the position of the note during these periods is given as follows: "Q. And at any time during this period, when Fox was indebted to the bank, he could have taken the note out of your possession and done whatever he chose with it? A. Yes, had he chosen." As a banker, he knew that this correctly described the position of the bank with respect to a note left with it by a customer, as he says this one was, simply "for what it was worth," and without any special pledging or hypothecation, and the rights which the bank had under the banker's lien, whereby it has the right to retain any such note for any debt due to it; but has not the right to retain it for any liability which has not yet become due or payable. See Grant on Banking, 2nd ed., p. 306; 1 Halsbury's Laws of England, sec. 1258.

It was urged on behalf of the bank, on the authority of *Atwood* v. *Crowdie*, 1 Stark. 483, that, although there was no lien when there was nothing due, yet, on the $450 note becoming due on the 25th November, 1908, the lien of the bank would revive as of the 12th September, 1907, the date of the original delivery of the note to the bank.

Such is not the effect of *Atwood* v. *Crowdie*. Lord Ellenborough's holding was not what is claimed, but was that the lien on the accommodation bills having ceased to attach when the debt was paid "by allowing them to remain in the hands of the plaintiffs, the lien revested, when upon fresh advances made, the balance turned in favour of the plaintiffs." What the case really decided was that the lien would revive as of the date of the fresh advances, and that a party might acquire a lien on accommodation bills after their maturity. This case, so far as it is in point, is entirely in favour of the defendants, as it would shew that the bank is in the position of any other holder taking a bill after maturity—it takes it subject to its equities. The legal position of the bank in this case is the same as though it had returned the note to Fox when there was nothing owing by him, and he had redelivered it to the bank when he again became indebted to the bank on the 25th November.

The next question is, whether there was such a failure of consideration as between Fox and Living as would prevent the bank from recovering, as was held by the Divisional Court. In order to decide as to this, we have to look at their agreement of the 19th March, 1907, set out above, and to consider their relations and the dealings between them, in so far as they may affect this note up to the 25th November, 1908.

A glance at the agreement will shew how crudely and inartificially it is drawn; and a perusal of the agreement and the evidence will shew how completely each of the parties appears to have failed, in almost every particular, to carry out the terms and stipulations binding upon them respectively.

The evidence shews that Fox never made over or gave to Living the one-half or any other interest in any of the agencies he then had or secured afterwards, and that Living never gave him the $2,000 or any part of it; that neither of them paid in any part of the $1,000 which they were each to contribute as capital; that Fox kept sole control of the business premises, his own name alone appearing on the sign; that no partnership books were ever opened or kept; that the bank account remained in the name of Fox individually; and that he did not go to England or Germany, as he undertook to do, in order to secure better agencies. The nearest approach to anything like a partnership appears to have been their getting a few months after the agreement some stationery with the name of "Fox & Living" upon it. Fox says this was used for some of their correspondence, which Living denies. Their proposed partnership amounted to

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so little that, when they quarrelled and Fox put Living out, all the latter had to do was to pick up a few private letters off the desk and walk out. Up to the time of the trial (nearly two years) neither of them had taken any further steps to settle up their business. The only question, however, with which we have to deal at present is that of the consideration or the failure of consideration for the note. This was the $2,000 which Living was, under the first paragraph of the agreement, to pay Fox for a one-half interest in all the agencies then controlled by Fox, and in any he might thereafter secure, possibly including his undertaking to go to England and Germany at his own expense, no part of which was carried out by Fox, so that there was a total failure of consideration. This being a defect of title within the meaning of sec. 70 of the Bills of Exchange Act, or equity attaching to the note, and existing before and at the time that the lien upon which the bank sued had its origin, which was long after the maturity of the note, the bank could acquire no better title than Fox then had; and the note was void for want of consideration.

If the parties were going into matters beyond this, it could only be done, as the learned Chancellor suggested, in proceedings to which Fox and Living were parties.

For these reasons and others given by Falconbridge, C.J., I am of opinion that the judgment of the Divisional Court was right, and should be affirmed.

Appeal allowed; MACLAREN, J.A., *dissenting.*

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June 14.

In re a CAVEAT, No. P. 3385, as to Lots 21 to 40, Blk. 13, Plan F.V., Saskatoon.

Saskatchewan Supreme Court, Newlands, J., in Chambers. June 14, 1912.

1. COURTS (§ II A 4—165)—JURISDICTION OF DISTRICT JUDGE AND SUPREME COURT JUDGE—CONTINUING A CAVEAT—LAND TITLES ACT, R.S.S. 1909, CH. 41, SECS. 129 AND 130.

A Judge of the Supreme Court only, and not a Judge of the District Court acting as District Judge or as Local Master, can grant an order under sec. 129 of the Land Titles Act continuing a caveat under sec. 130 of such Act.

[See also *Nicholson* v. *Drew*, 3 D.L.R. 748.]

2. LAND TITLES (§ IV—40)—CAVEATS—DELEGATION BY JUDGE OF SUPREME COURT TO MASTERS.

An application for the continuance of a caveat under sec. 130 of the Land Titles Act is neither an action nor a proposed action, therefore power to grant an order for that purpose cannot be delegated by the Judges of the Supreme Court to Local Masters, as it does not come within the authority conferred upon the former to make rules delegating their powers to Local Masters in respect to action brought or proposed to be brought in their respective districts.

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3. LAND TITLES (§ IV—40)—CAVEATS—LAPSING NOTICE—VOID ORDER EXTENDING TIME.

A caveat will lapse where the caveator, after proper lapsing notice had been given the caveator by the registrar, obtained a void order under sec. 130 of the Land Titles Act from a Judge of the District Court acting as a Local Master, which he was without jurisdiction to grant, extending for more than thirty days the time for the lapsing of the caveat.

4. LAND TITLES (§ IV—40)—CAVEAT—ERRONEOUS NOTICE OF LAPSING.

A caveat will not lapse where the notice given for that purpose by the registrar to the caveator recited that it was sent out under the provisions of sec. 141 of the Land Titles Act, which, however, did not relate to caveats, since the notice was not such as was required by sec. 130 of the Act in order to terminate a caveat.

Statement

A request was made to the registrar of land titles to remove two caveats, one No. P. 3385, and one No. P. 3386, the proper notices of lapse of caveat were sent out by the registrar, except that notice of lapse of caveat No. P. 3385 was stated to be given under sec. 141 instead of under sec. 130. As a result of having been served with this notice, the caveator applied to a Local Master for an order continuing the caveat, as required by the Land Titles Act. This order was granted by a Local Master, Judge MacLean, and the order was in due course and within the time required filed in the land titles office; the applicants then moved to have the caveat set aside, contending that the Land Titles Act conferred authority on a Judge of the Supreme Court only, to grant an order continuing a caveat under sec. 130, and that a Local Master has no authority to grant such an order.

Caveat No. P. 3385 remains in force against the lands until the merits have been passed upon; Caveat No. P. 3386 was removed.

T. D. Brown, for applicant.

J. N. Fish, for caveators.

Newlands, J.

NEWLANDS, J.:—This is an application under sec. 129 of the Land Titles Act to remove the above mentioned caveat. The defence is that on the 17th day of February, 1912, Judge MacLean, the Local Master of this Court, granted an order continuing this caveat under the provisions of sec. 130 of the Land Titles Act.

The first question, of course, is as to whether the Local Master had authority to grant this order. Sec. 130 provides that the owner or any person claiming an interest in the land may require the registrar, by notice in writing, to notify the caveator that the caveat will lapse at the expiration of thirty days from the mailing of such notice unless within such time the caveator files an order made by a Judge extending the caveat beyond that time. In the "interpretation" of the Land Titles Act the "Court" is expressed to be the Supreme Court of Saskatchewan, and "Judge" a Judge of that Court, so that Judge MacLean, by virtue of his position as a Judge of the District Court, would have no power to grant that order. Neither, I think, had he any

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power to make it as a Local Master. The Land Titles Act, in putting those duties upon a Judge of the Supreme Court, gives them to him in that name as *persona designata*, and not to the Supreme Court, and it is only in matters in that Court where the Judges have power to make rules conferring upon the Local Masters the jurisdiction which they have as Judges of the Court. Quite apart from this, the Judicature Act confers upon the majority of the Judges of the Court the power to make rules altering or amending any of the present rules of the Court or for carrying the Judicature Act into effect, and particularly in reference to the following matters: As to Local Masters it confers upon the Judges the power to make rules in respect of actions brought or proposed to be brought in their respective districts, subject to certain exceptions. Now, this application under the Land Titles Act, in which Judge MacLean acted, was neither an action nor a proposed action, and therefore it does not come within the powers conferred upon the Judges of the Supreme Court for making rules to delegate their powers to the Local Masters. There is nothing in this Act which would allow them to delegate to the Local Masters the duties imposed upon the Judges of the Supreme Court by the Land Titles Act, and therefore I am of opinion that the order granted by Judge MacLean is not such an order as is required by sec. 130 of the Land Titles Act, and therefore did not continue the caveat above mentioned. Therefore, if sec. 130 was not complied with, and the proper notice was sent out by the registrar, the above mentioned caveat lapsed by virtue of that section. However, in the material before me I find that instead of sending out the notice required by sec. 130, which is specified as Form Y in the schedule to the Act, the registrar sent out a notice which recites that "under the provisions of sec. 141 of the Land Titles Act this notice is sent out." Now, sec. 141 has nothing to do with caveats, and the notice that was sent out is therefore not the notice required by sec. 130, and it not being the notice required by sec. 130, the effect of sending out the proper notice does not follow the sending out of the notice which was sent out in this case, and the caveat did not therefore lapse, because the order of the Judge was not filed within thirty days.

That leaves this matter in the position that the caveat is still against the land, and this application being under sec. 129, I have to consider the question on the merits of the case. Now, on account of the objections which were made to the order of the Judge, which had been registered in the case, the merits were not gone into, and therefore a date will have to be fixed by a Judge in Chambers to take up this particular case on its merits.

With this same application was another application to remove caveat No. P. 3386 against lots 1, 2 and 3 in block 2 according to plan F. V., Saskatoon. In this case the facts are the

same as the above, with the exception that the proper notice was sent out under sec. 130, and therefore the caveat lapsed at the expiration of thirty days from the sending out of such notice, because an order of a Judge of the Supreme Court was not registered for the purpose of continuing the same. Therefore the caveat P. 3386 must be removed by the registrar from the title to lots 1, 2 and 3 in block 2.

Order accordingly.

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OUIMET (plaintiff, appellant) **v. BAZIN et al.** (defendants, respondents).

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May 7.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. May 7, 1912.

1. CONSTITUTIONAL LAW (§ II A 5—248)—SUNDAY LAWS—THEATRES—B.N.A. ACT, SEC. 91, SUB-SEC. 27.

The Act, 7 Edw. VII. (Que.) ch. 42, as amended by the statute 9 Edw. VII. (Que.) ch. 51, which, among other things, prohibits, under penalty, the giving of theatrical performances on Sunday for gain except in case of necessity or urgency, is void because it is criminal legislation which, under sec. 91, sub-sec. 27 of the British North American Act, is exclusively within the power of the Dominion Parliament to enact.

[*Attorney-General* v. *Hamilton Street R. Co.*, [1903] A.C. 524, followed; 9 Halsbury's Laws of England 233; *Russell* v. *The Queen*, 7 A.C. 829; *Re Sunday Legislation*, 35 Can. S.C.R. 581; *Pringle* v. *Napanee*, 43 U.C.R. 285; *Cowan* v. *Milburn*, L.R. 2 Ex. 230, and *Vidal* v. *Girard's Executors*, 43 How. U.S. 198, referred to.]

2. CONSTITUTIONAL LAW (§ II A 5—248)—SUNDAY LAWS—DOMINION LORD'S DAY ACT—R.S.C. 1906, CH. 153, SEC. 16.

The statute, 7 Edw. VII. ch. 42, as amended by ch. 51, 9 Edw. VII. of Quebec, which, among other things, prohibits, under penalty, the giving on Sunday of theatrical performances for gain, is prohibitive and not permissive, and cannot be upheld under sec. 16 of the Dominion Lord's Day Act, R.S.C. 1906, ch. 153, which permits provincial legislatures to except from its operation any act which provincial legislation, existing at the time the Federal Act came into force or which might be subsequently enacted, "permitted" to be done.

Statement

AN appeal from the Court of King's Bench, appeal side, for the Province of Quebec.

This case raises the question whether or not the Quebec statute 7 Edw. VII. ch. 42, as amended by the Act 9 Edw. VII. ch. 51, is within the constitutional jurisdiction of the Provincial Legislature. The legislation in question enacted regulations to prevent the profanation of the Lord's Day. The appellant was convicted on a complaint charging him with carrying on the business of theatrical representations on Sunday for profit, without necessity or urgency. He obtained the issue of a writ of prohibition against the police magistrates by whom he was convicted in the city of Montreal upon several grounds, of which the important question in dispute on the appeal to the Supreme Court of Canada was as to the constitutionality of the statutes

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mentioned. The magistrates and the Attorney-General for Quebec contested the action and the writ was quashed, in the Superior Court, by Pagnuelo, J., on the ground that the Federal Lord's Day Act had the effect of validating the Provincial legislation. This judgment was affirmed, on appeal, by the Court of King's Bench, by a majority of that Court, Trenholme and Cross, JJ., dissenting.

The appeal was heard on the 26th of October, 1911.

Aimé Geoffrion, K.C., and *J. O. Lacroix*, K.C., for appellant.
E. Lafleur, K.C., and *D. Brodeur*, K.C., for respondents.

Judgment

Judgment was delivered 7th May, 1912, by which the appeal was allowed with costs, BRODEUR, J., dissenting.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The object of this appeal is not to ascertain whether on some technical ground the information, which is the basis of these proceedings, can be sustained; but to test the constitutional validity of sec. 2 of the Quebec Act 7 Ed. VII. ch. 42, as amended by 9 Ed. VII. ch. 51. That section is in these words:—

> No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions.

The contention of the respondent is that it was competent to the Quebec Legislature to enact that section on the ground that it is in the nature of a municipal or police regulation of a purely local character. It is also argued that an act or default may be forbidden by statute in such a way that the person guilty may be liable to a pecuniary penalty which is recoverable as a debt by civil process by a private person, or, in some cases, only by an officer of the Crown. Such an act, or default, is an offence against the statute but not a crime: Halsbury's Laws of England, vol. 9, p. 233, note.

I most regretfully have come to the conclusion that the section in question is not a local, municipal or police regulation, but legislation designed to promote public order, safety and morals; and that it purports to deal with a subject, "the observance of the Sunday" which is not within the legislative jurisdiction of the Provincial Legislature, and which is already the subject of criminal legislation: 29 Charles II. ch. 7, part of the criminal law of England declared to be in force by the Quebec Act, 14 Geo. III. ch. 83. It must be accepted as settled that "criminal law," in the widest and fullest sense, is reserved for the exclusive legislative authority of the Dominion Parliament. This statement must of course be taken subject to an exception of the legislation which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment, any of the laws validly

made under the "enumerative heads" of section 92 of the British North America Act. In *Attorney-General of Ontario* v. *Hamilton Street Ry.*, [1903] A.C. 524, their Lordships, it is quite true, gave no opinion with respect to the validity of the section of the Act they were considering (R.S.O. 1897, ch. 246) by which tramway companies were, subject to certain exceptions, prohibited from working their trains on Sunday; but they held the phrase "criminal law" in section 91 of the British North America Act free from ambiguity and that construed by its plain and ordinary meaning, it would include every such law as purports to deal with public wrongs, that is to say, with offences against society rather than against the private citizen. Apply this test: assuming a breach of the prohibition, what private right could possibly be affected and for what conceivable violation of the section would a private citizen have recourse? In *Russell* v. *The Queen*, 7 A.C. 829, at p. 838, their Lordships say: "Laws of this nature (Canada Temperance Act) designed for the promotion of public order, safety and morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. Austin tells us, Jurisprudence, Lect. XXVII.:

> In short the distinction between private and public wrongs or civil injuries and crimes would seem to consist in this:—
>
> Where the wrong is a civil injury, the sanction is enforced at the discretion of the party whose right has been violated.
>
> Where the wrong is a crime, the sanction is enforced at the discretion of the Sovereign.

Applying this rule to the section, in what respect can it be said that working on Sunday, or attendance at theatrical performances or excursions on that day, the things that are forbidden, constitute a civil injury for which the private individual has a remedy? The penalty, in case of breach, belongs to the Crown and can only be recovered under the summary conviction sections of the Criminal Code. It would appear also as if section 7 of the Provincial Act was intended to prevent the enforcement of the penalty, except at the discretion of the Sovereign acting through the Attorney-General. It appears to me on the whole abundantly clear that the intention of the Legislature was to forbid certain things which, in its opinion, are calculated to interfere with the proper observance of Sunday. In the *Hamilton Street Ry.* case their Lordships hold, impliedly at least, that Christianity is part of the common law of the Realm; that the observance of the Sabbath is a religious duty; and that a law which forbids any interference with that observance is, in its nature, criminal: see also *Pringle* v. *Napanee*, 43 U.C.R. 285; *Cowan* v. *Milburn*, L.R. 2 Ex. 230; *Vidal* v. *Girard's Executors*, 43 Howard's Reports S.C. at p. 198.

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It is impossible for me to believe that the Legislature intended, by the enactment in question, to regulate civil rights. On the contrary, the evident object was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. I am confirmed in this belief by the title of the Act, which is described as "A law concerning the observance on Sunday," and, as Sedgewick, J., speaking for the majority of this Court, said in *O'Connor* v. *N. S. Telephone*, 22 Can. S.C.R. 276, at p. 293: "We cannot with propriety shut our eyes . . ." *Vide* also *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1, where it was held that "The title of an Act of Parliament is to be read as part of the enactments."

The profanation of the Lord's Day was an indictable offence at common law: 2 Chitty's Criminal Law (2nd ed.) p. 20; Encyclopaedia of the Laws of England, vbo. Sunday (vol. 13). Blackstone classifies those laws under the criminal law (offences against religion, morals and public convenience) and says: "Profanation of the Lord's Day vulgarly but improperly called Sabbath-breaking is another offence of the class now in question": 4 Stephens Com. Bk. VI., ch. 9. In the enumeration of offences which may be tried summarily, Halsbury (vol. 9, No. 161) includes at p. 80 those arising out of breaches of the Sunday observance law (29 Chas. II. ch. 7): see also *Rawlins* v. *Ellis* (1846), 16 M. & W. p. 172. In the Report of the Commissioners on Criminal Law, vol. 2, at p. 81, under the general heading of "Offences Against Religion," the Commissioners say:—

> Certain religious observances, such, for instance, as that of the Sabbath, may properly be conceived as exercising so important and beneficial an influence on moral conduct, that the wanton violation of them ought to be prevented by penal laws. The other general principle which we have above referred to as furnishing a legitimate foundation for all laws of the class we are now considering may also, to a certain extent, be applicable, namely, that with respect to institutions and observances which carry strongly with them the opinions and feelings of the community, and open defiance of them may justly be the subject of punishment.

In the absence of Provincial enactments which make sections 889, 1124 and 1125 of the Criminal Code applicable to prosecutions under the Quebec Laws—and we have not been referred to any—I would hesitate to hold with Mr. Justice Cross that the charge

> although set out and made as for offences against the ineffective provincial Acts . . . . should not fail merely because of its having been laid as a violation of a wrongly cited statute, if it were in other respects a charge of an offence known to the law and triable by a magistrate.

I have always understood the rule to be that a prosecutor could not ground the one charge in his information upon two

Acts passed one by Parliament and the other by a Provincial Legislature which contain separate and distinct provisions, no more than a statutory offence could be blended in the same count with one at common law.

I would allow the appeal with costs.

DAVIES, J.:—This is an appeal from the judgment of the Court of King's Bench of the Province of Quebec quashing a writ of prohibition issued against the police magistrates of the city of Montreal prohibiting them from proceeding further in certain prosecutions against appellant, Ouimet, for having had on the first and eighth days of August "for profit without necessity and urgency carried on a business and given theatrical representations on Sunday."

The complaint was made and the prosecutions instituted under the Quebec Acts, 7 Ed. VII. ch. 42, and 9 Ed. VII. ch. 51. The former is entitled "Law Concerning the Observance of the Lord's Day."

The principal sections are as follows:—

1. The laws of this Legislature, whether general or special, respecting the observance of Sunday and in force on the twenty-eighth day of February, 1907, shall continue in force until amended, replaced or repealed; and every person shall be and remain entitled to do on Sunday any act not forbidden by the Acts of Legislature, in force on the said date, or subject to the restrictions contained in this Act, to enjoy on Sunday all such liberties as are recognized by the customs of this Province.

2. No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions.

Sections 3 and 4 provide for punishment for offence against the Act by fines and imprisonments.

Sec. 5. Nothing in the present Act shall repeal the Acts of this Legislature now in force concerning the observance of Sunday, nor any by-laws passed thereunder, which laws and by-laws shall continue in full force and effect until amended, replaced or repealed according to law.

The amendment of 1909 increases the fines and imprisonment for subsequent offences.

The question raised for our consideration is as to the constitutionality of these Acts; that is, whether they were as a whole *ultra vires* of the Legislature of Quebec.

I was one of the Judges of this Court who on a reference from the Governor-General in Council, "In the matter of the jurisdiction of a Province to legislate respecting abstention from labour on Sunday," advised him in answer to a question submitted to us as to whether the Legislature of a Province had

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authority to enact a statute in the terms of a draft bill annexed to the question [*Re Sunday Legislation*, 35 Can. S.C.R. p. 581].

> That we were unable to distinguish the draft bill then submitted for our opinion from the Act pronounced as *ultra vires* of the provincial Legislature by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that Province in the matter of the Hamilton Street Railway Company, reported in appeal to the Judicial Committee of the Privy Council, [1903] A.C. 524.

The Judges of this Court who joined in giving that answer were of opinion that

> the day commonly called Sunday, or the Sabbath, or the Lord's Day, is recognized in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference before referred to and is within the jurisdiction of the Dominion Parliament.

Turning for a moment to this decision of the Judicial Committee in which it was held that the Act there in question, R.S.O. 1897, ch. 246, intituled "An Act to prevent the Profanation of the Lord's Day," treated as a whole was beyond the competency of the Ontario Legislature to enact, it will be seen that this Act was originally enacted by the late Province of Upper Canada before 1867, the Legislature of which was competent for the purpose, but was consolidated and amended by extending and enlarging its provisions by the Act of the Province of Ontario passed in 1897. It was the validity or constitutionality of the consolidated Act that their Lordships were called upon to determine. Had the Legislature of Ontario the power to re-enact the original Act in its original form or to re-enact it, enlarging its scope and extending its provisions prohibiting work on Sunday? The answer of their Lordships shortly was that the Legislature had no such power because the Act treated as a whole was beyond its competency to enact. The reasons for their conclusion given by the Lord Chancellor are short and to the point. He says:—

> The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sec. 91, sub-sec. 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of Courts of criminal jurisdiction." It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation

at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of Courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law in its widest sense is reserved for the exclusive authority of the Dominion Parliament.

The pith of this judgment lies in the meaning they gave to sec. 91, sub-sec. 27, of the British North America Act, 1867, reserving for the exclusive authority of the Parliament of Canada "the criminal law except the constitution of Courts of criminal jurisprudence," and in their judgment the words "criminal law" as used in sec. 91 of our constitutional Act, means criminal law in its widest sense.

I have heard nothing to induce me to change the opinion which I joined with my brother Judges in giving to the Governor-General in Council on the draft bill for prohibiting on Sunday the performance of work and labour, transaction of business, engaging in sport for gain and keeping open places of entertainment. Nor am I able to discover any substantial distinction between the Act of the Legislature of Quebec we are now considering and the draft bill upon which this Court in 1905 gave its opinion.

The object and purpose of each was to prohibit on Sunday the performance of work and labour, transaction of business, or giving or taking part in theatrical performances, etc.

I do not mean to say that the Quebec legislation now in question and the draft bill on which the opinion I have referred to cover the same ground. The prohibitions in one differ somewhat from those in the other and those in the draft Act are doubtless broader and more extensive than in the Quebec Act.

That, however, cannot affect the right to legislate on the subject matter dealt with which is the same in both cases. I am of opinion that they are both beyond the competence of the Provincial Legislature as being within the exclusive right of the Parliament of Canada under sub-sec. 27 of sec. 91 of our constitutional Act, "the criminal law except the Courts of criminal jurisdiction."

I add this qualification that the first and sixth sections of the Quebec Act now before us, 7 Ed. VII. ch. 42, may be said to permit certain things or acts to be done on Sunday prohibited by the Federal Act of 1906, and in so far as it does so permit these sections may be *intra vires* the Quebec Legislature under the powers delegated and conceded to it by the Dominion legislation.

But it is contended that the Legislature derived from the above Federal Act power to legislate on the subject of Sunday observance and that such provincial legislation "validated" and gave life to legislation which might otherwise be *ultra vires*.

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My construction of the Federal Act is that it was an attempt to enact generally prohibitive legislation with regard to the proper observance of Sunday or the Lord's Day for the whole of Canada. But that recognizing the different circumstances, habits, customs and religious beliefs which prevailed in the several Provinces of the Dominion, Parliament determined to delegate to each provincial Legislature the power to declare that any act or thing prohibited by the Dominion Act might be excepted from the operation of such Act and permitted to be done by provincial legislation existing at the time the Federal Act came into force or subsequently enacted.

As to the power of the Parliament of Canada so to delegate its power I have no doubt whatever our statutes are full of legislation of a similar kind and holding the Parliament of Canada to be a Sovereign Parliament within its powers as defined by our constitutional Act, I cannot doubt that legislating within these powers it can delegate to another person, body or authority the power to make a law as binding and effective as if embodied in one of its own statutes.

If I have properly construed the power of the Parliament of Canada to legislate exclusively on this subject of the observance of Sunday or the Lord's Day and have also properly construed the Federal Act of 1906 on that subject, the only question to be answered respecting the validity of the provincial legislation on the subject now before us is whether it is legislation permitting something to be done on Sunday which has been prohibited by the Dominion Act. If it is, such legislation is valid because power so to legislate is given by the Federal Act. If on the contrary the provincial legislation is in itself prohibitive and not permissive, and just so far as it is of that character it is *ultra vires*.

Applying this rule to the second section of the Act now before us and under which the prosecutions were brought and limiting my opinion to the one point desired by counsel to be determined, I conclude that it is legislation beyond the competence of the Legislature and that therefore this appeal must be allowed and the judgment quashing the writ of prohibition vacated with costs.

Idington, J.

IDINGTON, J.:—The appellant seeks to have respondents prohibited from proceeding with the trial of charges laid before the police magistrate of Montreal alleging an infringement of 7 Ed. VII. ch. 42, as amended by ch. 51 of 9 Ed. VII., passed by the Legislature of the Province of Quebec.

The second section of the latter Act is as follows:—

> 2. No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions.

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The question raised is as to the power of the Legislature to so enact.

It is claimed this is criminal legislation within the meaning of sec. 91, sub-sec. 27, of the British North America Act, which assigns the exclusive power of legislation on the subject of "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters" to the Parliament of Canada.

There are two summonses in the appeal case presented; one of the 14th of August and the other of the 21st of August. The former makes the charge without specifying the statute it infringes. The latter specifically assigns a contravention of the statutes above referred to. Singularly enough both allege as if a single offence what to my mind clearly covers two offences against the Act.

The above quoted statute clearly constitutes a distinctly independent offence or perhaps two in prohibiting the doing of "any industrial work or business" and by the following words other independent offences. Each is thus described and separated by the disjunctive "or."

But in the summons they are coupled together by the conjunctive "and" which is not the language of the Act.

The parties desire to have the constitutional question determined and raise no point regarding this objectionable misjoinder or offences which in itself is possibly amenable by the magistrate if objected to.

It is therefore not in that sense I refer to this minor matter but to bring out in relief or so far as I can the real meaning of the statute as I read it.

If objection had been taken to this misjoinder and the magistrate had refused to amend and convicted and made his conviction follow the exact language of the summons or of the statute, his conviction would have been bad in form and liable to be quashed for thus embracing two offences in one conviction or bad from uncertainty arising from its alternative form which would therefore cover neither offence.

Tested thus we have in the same section a number of new offences created of which one is doing or causing "to be done any industrial work" and another is pursuing "any business or calling."

This latter is said and I assume it to be a bad translation of the French version, "un . . . négoce."

That being assumed does not mend matters much for the present argument. It still leaves an enactment of a very wide comprehensive meaning and I venture to think almost if not altogether as much so as the Ontario enactment, R.S.O. ch. 246, sec. 1, which was before the Judicial Committee of the Privy Council in the case of *The Attorney-General of Ontario* v. *The Hamilton Street Ry. Co. and others*, [1903] A.C. 524, and which reads as follows:—

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1. It is not lawful for any merchant, tradesman, farmer, artificer, mechanic, workman, labourer or other person whatsoever on the Lord's Day, to sell or publicly show forth, or expose, or offer for sale, or to purchase, any goods, chattels, or other personal property, or any real estate whatsoever, or to do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted).

The first question submitted to the Court of Appeal for Ontario and brought by way of appeal therefrom under the consideration in said case of the Judicial Committee was as follows:—

1. Had the Legislature of Ontario jurisdiction to enact ch. 246 of the Revised Statutes of Ontario, 1897, intituled "An Act to prevent the Profanation of the Lord's Day," and in particular sub-secs. 1, 7 and 8 thereof?

The Court speaking through the Lord Chancellor disposed of it as follows:—

The Lord Chancellor:—Their Lordships are of opinion that the Act in question, Revised Statutes of Ontario, 1897, ch. 246, intituled "An Act to prevent the Profanation of the Lord's Day," treated as a whole, was beyond the competency of the Ontario Legislature to enact, and they are accordingly of opinion that the first question which was referred to the Court of Appeal for Ontario by the Lieutenant-Governor, pursuant to ch. 84 of the Revised Statutes of Ontario, 1897, ought to be answered in the negative.

Then the Court intimates the opinion so expressed rendered it unnecessary to answer the second question, which rather looked to future legislation, and declined to answer further the remaining hypothetical questions submitted.

In order to estimate properly the effect of the expression "treated as a whole" in the above opinion we must look at the remaining sections of the said Act.

Section 2 deals with political meetings, tippling, brawling, etc.; sec. 3 with games and amusements; sec. 4 with hunting; sec. 5 with fishing; sec. 6 with bathing in exposed situation, and each of these things if done on Sunday is declared to be unlawful.

Sections 7 and 8 prohibit steamboat and railway excursions for hire, and the running of street cars on Sunday.

Condensing them thus each offence may not be accurately described, but I think they are sufficiently so to shew the nature of the Act when I add that there were penal clauses and prosecutions therefor provided in the Act.

The recovery of these penalties before a justice of the peace was provided for and he, so far as the Act could, was enabled thereby to direct a warrant to levy on the goods of the offender and in default of realizing the penalty and costs to imprison for a term not exceeding three months.

When we compare the sweepingly comprehensive language first quoted of the Quebec statute with this, wherein lies the difference?

There is a greater multiplicity of words in the Ontario Act than in the other. But when condensed each reaches to almost every activity of mankind in their daily avocations. The specific things in the Ontario Act not embraced in this comprehensive language used in the Quebec Act are comparatively unimportant as a test relative to criminal legislation by which to distinguish the one act from the other.

So comprehensive is the language in question here that it runs athwart the courses of business and transactions of men which they are only enabled to do by virtue of Dominion legislation. Counsel for respondent says that is not intended. But the Act discriminates not and covers the case of the banker and the railway manager or superintendent and all under him or them, as well as the case of the corner grocer or village blacksmith.

The Quebec farmer or professional man might work and possibly escape the operation of the Quebec Act whilst the Ontario Act leaves less chance of such escape from its drag net.

But in that what can enable us to distinguish between them? And so distinguish as to say the ruling does not bind us? I confess I cannot see my way clear to do so.

The argument for a power of delegation from the Dominion Parliament may be good or bad. I need express no opinion for I fail to see the existence of any delegation in regard to this legislation now in question. Nor do I find anything by way of reference that can constitute its adoption by Parliament directly or indirectly. All I do find is that exceptions to be presumed by us here as quite proper exceptions are made in the Lord's Day Act, R.S.C. ch. 153, by secs. 5, 7 and 8, which cannot help here where that Act, by consent of the parties, is in its direct operative effect excluded from our consideration. Admittedly there exists no consent of the Attorney-General to this prosecution.

In sec. 16 of that Act there is said to be something to get round all this.

That section in its first part guards against being held to repeal provincial legislation then existing. It is said that this proper exception in order to prevent vexatious meddling is a something that creates. I cannot think so. Nor do I think the second part of the section declaring that an offender against the Act who is on the facts violating "any other Act or law" may be prosecuted under either helps.

It is to be observed that this obviously presupposes "the Act or law" to be a law and not a nullity. Each Act is intended by this section to be independent of any other.

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In touching such a complex subject as this has become by the mass of legislation and judicial decision bearing upon it, this section is eminently proper for the purpose it was framed. That was to avoid friction and confusion.

I would not hold any man liable to prosecution on any provincial legislation resting solely upon this language of said sec. 16 to give it a vitality it did not carry in its own language when resting on the powers of the legislature of the province enacting it.

So far as these prosecutions rest on the comprehensive legislation in the first part of the section consisting of the two members thereof covering trade or business, and which I have dealt with, I think they should be prohibited.

But is there not presented in same section another offence of giving or organizing theatrical performances for gain which is something severable as the disjunctive "or" indicates, and entirely different on its face and gives rise to entirely different considerations from those applicable to the preceding parts I have just disposed of?

I do not know what conceivable cases of necessity or urgency can exist in relation to running a theatre on Sunday. I will assume that exception relates only to the cases falling under the part of the section with which I have dealt. But I cannot help remarking as I pass that the existence of this exception debars us from being able to make of the whole section one enactment prohibiting work or business only when relative to giving on Sunday theatrical performances or excursions where intoxicating liquors are sold and helps me to so sever these two prohibitions from the rest of the Act and permit of them being considered on their several legal merits.

I think the giving on Sunday of theatrical performances or excursions of the kind described may well be prohibited by provincial legislation. The prohibition of such a specific act as either might well find a precedent in the many cases recognizing the right of a province to make such mere police regulations as the social habits and conditions existing in that province may require.

It is said by counsel for appellant that these precedents rest upon the licensing power, but I do not think the principles observed in reaching the conclusion rested there in all of them.

I do not propose analyzing the cases in detail but select as utterly free from this suggestion of dependence on the licensing power the case of *Regina* v. *Wason*, 17 O.A.R. 221, and Cartwright's Cases on the British North America Act, p. 578, when the Court of Appeal for Ontario, then composed of Chief Justice Hagarty, Mr. Justice Burton, later Chief Justice of the same Court, Mr. Justice Osler and Mr. Justice Maclennan, later and till recently a member of this Court, upheld legislation prohibiting the knowingly and wilfully selling to a cheese or

butter manufactory milk diluted with water, or adulterated, or from which the cream had been taken, without notifying the owner or manager of the factory, and subjecting the offender to a penalty.

I had previous to the legislation thus enacted and passed upon, formed the opinion it was competent for a provincial Legislature to pass it. I see no reasons to change the opinion I then formed.

The decision is of course not binding upon us but the principles upon which that Court proceeded seem to me sound and the relation of the subject to then existing Federal legislation gives it a peculiar aptness to be considered in this case.

The reported argument of Mr. Blake in appeal as well as the reasons of the several Judges in giving judgment are certainly instructive if not binding.

The case of *Hodge* v. *The Queen*, 9 A.C. 117, shews the regulation there in question dealt with a prohibition against playing billiards in a licensed hotel on Sunday.

But though as suggested by appellant's counsel that arose out of the licensing power or regulation we are only carried back a step further for the licensing power itself was, by sub-sec. 9 of sec. 92, only for the raising of revenue.

Another and a broader reason lies at the foundation of this and all the other decisions upholding the power of regulation and prohibition of the liquor selling business.

The powers assigned by sub-secs. 8, 13 and 16, as well as sub-sec. 9, have in turn had to be relied upon.

The preventing of playing billiards in a licensed hotel on Sunday does not seem very closely related to the licensing power. The decision in that regard rather shews that circumstances or conditions may arise which render it a proper thing for the consideration by a local legislature and foundation for doing something to eradicate an evil which is not likely to be dealt with by Parliament.

I should pause before saying it was powerless to do so for I can conceive a legislature of a province being confronted with conditions which it alone would be likely to deal with and which the ordinary scope of the criminal law would not reach.

A great deal of our municipal legislation is and must, as our cities grow, be still more of this character.

True this is not a municipal regulation, but suppose the legislature chose to assign the power to city municipalities to make such regulation respecting theatrical exhibitions as that here in question, can it be said it would then be legislating *ultra vires?*

We at least in *Montreal* v. *Beauvais*, 42 Can. S.C.R. 211, have gone quite as far in upholding a by-law enacted by the legislature for closing shops after certain hours. That was for a closing of shops and rested upon the powers given by the sub-sections to which I have referred, and this is for a closing of a

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house of another kind for a whole day. I may add that leave to appeal from our decision in that case was refused by the Judicial Committee.

Each was no doubt intended to promote by such police regulations the health and moral well-being of the people.

Neither is necessarily within the criminal law.

The remarks of Lord Davey in *Toronto* v. *Virgo*, [1896] A.C. 88, at p. 93, point in the direction of what I am trying to reach in that regard.

And this now in question being I think of the character I have referred to as being within the power of the legislature I do not think it should be held null because of the constitutionally evil company it is found in.

The latter circumstance of course makes its maintenance more difficult. And though I am unable to see how any of the Act can rest directly upon the Federal legislation pointed to, it is clear that the circumstance of Parliament desiring to maintain local legislation of such a character is not against the maintenance of its validity.

In the view I have taken it is almost needless to add it is not a well-drawn Act, or at least not as effective as one might now be made if the draughtsmen were set to work with the present state of the Federal legislation, or the licensing power and its consequent power of regulation might be resorted to.

What can be done thus indirectly I submit may be upheld when done directly.

I think the prohibition should not extend to a charge properly confined to the prohibition of any theatrical representation on Sunday for gain. It seems severable from the *ultra vires* part of the Act.

The appeal should therefore be allowed in part and that being a divided success should carry no costs.

Duff, J.

DUFF, J.:—The Quebec statute which is impeached on this appeal professes to create offences which, in my opinion, if validly created, would be offences against the criminal law within the meaning of sec. 91, sub-sec. 27, of the British North America Act, 1867. The enactment appears to me in effect to treat the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day and to declare them punishable as such. Such an enactment we are, in my opinion, bound to hold, on the authority of the *Attorney-General for Ontario* v. *The Hamilton Street Ry. Co.*, [1903] A.C. 524, to be an enactment dealing with the subject of the criminal law.

It is perhaps needless to say that it does not follow from this that the whole subject of the regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion Parliament. It is not at all necessary in this case to express any opinion upon the question and I wish to

reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion Parliament; but it may be noted that since the decision of the Judicial Committee in *Hodge* v. *The Queen* (9 App. Cas. 117), it has never been doubted that the Sunday closing provisions in force in most of the provinces affecting what is commonly called the "Liquor Trade" were entirely within the competence of the provinces to enact, and it is, of course, undisputed that for the purpose of making such enactments effective when within their competence the legislatures may exercise all the powers conferred by sub-sec. 15 of sec. 92 of the British North America Act, 1867.

The view above expressed makes it impossible, I think, to hold that the statute in question can derive any efficacy from the Lord's Day Act, R.S.C. 1906, ch. 153. This latter enactment appears to be founded upon the theory that the provinces may pass laws governing the conduct of people on Sunday; and, by the express provisions of the Act, such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature to do what a province under its own powers of legislation cannot do, viz., to create an offence against the criminal law within the meaning of the enactment of the British North America Act, 1867, already referred to. We should, I think, be going beyond what is justified by the guarded language of the Dominion statute if we were to construe it as giving validity to such legislation.

Anglin, J.

ANGLIN, J.:—The question to be determined on this appeal is the constitutionality of the prohibitive provisions of the Quebec statute, 7 Ed. VII. ch. 42, as amended by the statute 9 Ed. VII. ch. 51.

The validity of this legislation is supported by the respondents on two different grounds: (a) that it is within the legislative jurisdiction conferred upon the provinces by the British North America Act; (b) that, if otherwise unconstitutional, it has been validated by certain provisions of the Federal Lord's Day Act, ch. 27 of the Dominion statutes of 1906.

(*a*) I am unable to find any real distinction between the Quebec legislation now under consideration and that of the Province of Ontario held to be *ultra vires* by the Judicial Committee in the *Hamilton Street Ry. Case*, [1903] A.C. 524.

The history of the Quebec legislation is no doubt different from that of the Ontario Act. The pre-confederation legislation of Quebec (Con. Stat. L.C. 1860, ch. 23) was much narrower in its scope than the ante-confederation statute in force

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in Ontario (C.S.U.C. 1859, ch. 104). But, whatever might be said of an Act of a provincial legislature similar to the earlier Lower Canada legislation, the Quebec statute now before us, because indistinguishable in substance and principle from the Ontario legislation condemned by the Privy Council, must be held by us to be *ultra vires* as an invasion of the domain of criminal law assigned by the British North America Act to the legislative jurisdiction of the Parliament of Canada.

Although enacted by a provincial legislature not empowered to deal with criminal law, the Ontario legislation was, in the view of the Privy Council, so distinctly criminal in its character that it could not be upheld as an exercise of provincial jurisdiction under any of the powers conferred by sec. 92 of the British North America Act, notwithstanding the cogency of the presumption that a legislature always means to set within its jurisdiction. I do not regard the decision of the Judicial Committee as depending on the fact that the Upper Canada Lord's Day Act (C.S.U.C. ch. 104) had been originally enacted by a legislature clothed with authority to pass criminal laws. Neither can I accede to an argument which involves the view that legislation held to be criminal in one province of Canada may be regarded as something different in another province, or that the phrase "the criminal law" used in sec. 91, sub-sec. 27, of the Imperial British North America Act may have a meaning different from that which would be attached to it in other legislation of the Imperial Parliament. Lord Chancellor Halsbury says that it is "the criminal law in its widest sense that is reserved" to the Dominion Parliament.

In the criminal law of England in 1867 was embraced the Sunday Observance Act, 29 Car. II. ch. 7, and other restrictive legislation: 13 Encyc. Laws of Eng., p. 707. Indeed a person who kept open shop on Sunday would appear to have been indictable at common law as "a common Sabbath-breaker and profaner of the Lord's Day commonly called Sunday": 2 Chitty's Criminal Law (2nd ed.), p. 20. Legislation of a prohibitive character, to infractions of which punitive sanctions are attached, passed for the purpose of preventing profanation of the Sabbath, would therefore appear to be within the purview of sub-sec. 27 of sec. 91 of the Imperial British North America Act, conferring on the Dominion Parliament exclusive jurisdiction to legislate in respect to "the criminal law."

I abstain, however, from attempting to enunciate a criterion for the determination of the broader question when a prohibitive enactment, carrying penal sanctions for its infraction, should be regarded as so far partaking of the nature of criminal law that it is within the exclusive legislative power of the Federal Parliament. I rest my opinion in the present case chiefly upon the judgment of the Judicial Committee already adverted to.

It was suggested at bar that the Quebec statute might be

defended as legislation merely affecting civil rights, or as legislation in the nature of a local or municipal police regulation, with sanctions, authorized by clause 15 of sec. 92 of the British North America Act, appropriate to ensure obedience to its prohibitions. But the very first section indicates unmistakably that the purpose of the legislation is to make what the legislature deemed suitable provision "respecting the observance of Sunday" in the province. To carry out this purpose we find in the second section a prohibition couched in wide and sweeping terms. Sec. 6 further confirms this view of the character of the statute, making it still more apparent that to prevent profanation of the Sabbath is its object. It is such legislation that their Lordships of the Judicial Committee, as I understand their judgment, have held to be criminal law and as such beyond the competency of a provincial legislature.

I do not refer to the fact that the informations in this case each charge more than one offence further than to say that any objection on that ground was waived. Counsel for both parties asked our decision upon the validity of sec. 2 of the Quebec statute as a whole and of the subsequent sections providing sanctions for infractions of sec. 2. I do not attempt to distinguish between the several matters and things forbidden by sec. 2. Forming part of an Act of which the purpose was to prevent profanation of the Sunday, each of the prohibitions must, I think, under the decision in the Hamilton Street Ry. case, be regarded as criminal legislation.

(*b*) The Dominion Lord's Day Act excepts from the operation of its prohibitive clauses everything which is, by provincial legislation, past or future, declared to be lawful. While reserving to or conferring upon provincial legislatures the power to make exceptions from the operation of the Dominion statute—and thus in effect *pro tanto* to amend it—and recognizing and maintaining in force, if not validating, provincial legislation already passed declaring certain acts to be lawful on Sunday (provisions made, no doubt, to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy), there is not a word in the federal statute confirming or authorizing anything in the nature of provincial prohibitive legislation past or future. On the contrary, sec. 14 declares that

> Nothing in this Act shall be construed to . . . in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any Province of Canada when the Act comes into force.

The provincial legislation, in so far as it is prohibitive, must, therefore, depend for its force and efficacy upon the powers of the legislature which enacted it. In so far as it provides for the exception of acts and things which would otherwise fall under

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the prohibition of secs. 2, 5 and 6 of the Federal Act (sub-secs. 5, 7 and 8, R.S.C. 1906, ch. 153), Parliament has made that Act inoperative. But beyond these saving exceptions the Dominion statute does not "in any way affect" provincial legislation.

In this view it is unnecessary to consider the question debated at bar as to the power of the Dominion Parliament to delegate its legislative functions to a provincial legislature.

The latter part of sec. 1 of the Quebec statute may be within the saving provisions of the Federal Act; but the prohibitive clauses of the Quebec statute are, I think, *ultra vires* of a provincial legislature.

The appeal should, in my opinion, be allowed.

Brodeur, J.

BRODEUR, J. (dissenting):—We have to decide whether the Act of the Legislature of the Province of Quebec respecting the observance of Sunday, 7 Edw. VII. ch. 42, is constitutional.

The present case related in the first instance to the closing of theatres on Sunday; but a consent which is in the record shews that this is a test case and that by common accord the legality of the whole statute itself is submitted to the decision of the Courts. These are the exact terms of the consent:—

> The parties in this action consent to limit their argument and their pretensions to the single question whether the law respecting the observance of Sunday passed by the Legislature of Quebec in virtue of the statute 7 Edw. VII. ch. 42, of 1907, is constitutional, *ultra vires* or *intra vires*, and the grounds of prohibition are not to be discussed, the whole to avoid costs and loss of time.
>
> The same arrangement is agreed on for the other actions of Sharpe, Richardson and Applegath.

To understand properly the purpose of this legislation it is important, I think, to know the circumstances which give rise to it.

The Province of Ontario had among its statutes a Sunday law based on the Statute of Charles II. It was entitled "An Act to prevent the profanation of the Lord's Day." Passed under the Union of Upper and Lower Canada, it was reproduced in the Revised Statutes of Ontario and later it was thought fit to extend its provisions by prohibiting the running of street cars on Sunday. The Courts were seized of the question, and the Privy Council in the case of *Hamilton Street Railway* v. *The Attorney-General for Ontario*, [1903] A.C. p. 524, decided in effect that this provincial legislation was criminal in its nature and was as a whole unconstitutional. The Federal Parliament was then asked to legislate on the subject. The Government thought fit before adopting general legislation to refer the matter to this Court, and to this end certain questions were submitted, to which replies were given. It is quite evident from the nature of the replies that the Federal Parliament could not get out of the obligation to act. But it remained for it to decide what form

it would give to its legislation. It might proceed under the provisions of the British North America Act (sub-section 27 of article 91) to declare criminal every act of service or every act of commerce and its authority could not have been contested. But it found itself confronted with laws existing for centuries in certain Provinces. It had to face secular customs which by their character contributed to the sanctification of Sunday or to the growth of religious feeling in the people, or which had been rendered necessary in consequence of the widely scattered settlements. I might cite among other customs the pilgrimages which from time immemorial have taken place on Sunday in the Province of Quebec. It is the same in regard to the peasants' custom of bringing the first fruits of his produce to church and having them sold at public auction after divine service, in order to consecrate the product to the support of religious works.

A law adopted by the Federal Parliament which would have declared any excursion on Sunday criminal, or which would have prohibited the sale of produce on that day, would naturally have struck at these very commendable customs.

In the face of these difficulties Parliament did not proceed to amend the Criminal Code, but it passed a law which by its title, "An Act concerning the Observance of Sunday" and by its provisions in general, should be classed among those adopted for the peace, order and good government of the country under the dispositions of the first paragraph of section 91, which reads as follows:—

> It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

This Sunday observance law adopted by the Federal Parliament is chapter 153 of the Revised Statutes of Canada, 1906.

Upon examining it we find that Parliament, far from wishing to encroach upon provincial rights, has, on the contrary, expressly recognized them by declaring in sections 5, 7, 8 and 16 that its provisions would only take effect if the Provinces have no law covering the case.

Sunday legislation strikes at civil rights, which as we know are within the scope of the Provinces, and there is no reason for surprise in seeing the Federal Parliament respect provincial autonomy in this regard.

In our laws and in our jurisprudence we have the question of temperance which may serve as a guide in the interpretation of the Federal and Provincial law regarding Sunday. The Federal Parliament, as we know, passed the Canada Temperance Act, which provided for the prohibition of liquor in certain districts. This law was attacked and the Privy Council in 1882,

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in the case of *Russell* v. *The Queen*, 7 A.C. p. 829, decided that the Federal Parliament, in virtue of its powers to make laws for the peace and good order of Canada, could pass this Act. It is a law tending to restrain the abuse of intoxicating liquors. The Provinces had also legislated on the subject and had ordered, for instance, the closing of bars on Sundays or during certain hours on week days. These provincial laws were also attacked as unconstitutional and the Privy Council on different occasions maintained their validity: *Hodge* v. *The Queen*, (1883), 9 A.C. p. 117; *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] A.C. p. 348; *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A.C. p. 73; *Poulin* v. *Corporation of Quebec* (1883), 9 Can. S.C.R. p. 185; *Huson* v. *South Norwich*, 24 Can. S.C.R. p. 145.

In the second of these cases their Lordships say at page 365:—

> In section 92, No. 16, appears to them (their Lordships) to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada so far as supplementary of the enumerated subjects fulfils in section 91.

In the case of *Russell* v. *The Queen*, 7 A.C. 829, the Privy Council also declared that under its powers to legislate for peace and good order the Federal Parliament had a right to pass a law prohibiting the use of liquors. The Provinces have also power to exercise the same authority.

If the Provinces can close the bars on Sunday I cannot understand why under the exercise of their powers to make police laws they would not have the right to shut theatres on Sunday.

The provincial legislation in question in this case after all only amounts to a police regulation. Moreover, this prohibition of theatrical representations on Sunday only occurs incidentally in the statute. This latter has for its principal purpose to clothe with authority of law the usages and customs of the Province of Quebec.

The first section of this statute is as follows:—

> The laws of this Legislature, whether general or special, respecting the observance of Sunday and in force on the twenty-eighth day of February, 1907, shall continue in force until amended, replaced or repealed; and every person shall be and remain entitled to do on Sunday any act not forbidden by the Acts of this Legislature, in force on the said date, or, subject to the restrictions contained in this Act, to enjoy on Sunday all such liberties as are recognized by the customs of this Province.

It enumerates among these restrictions useless works of service, theatrical performances and excursions where liquor is sold, in enacting art. 2, which reads as follows:—

> No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or

excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions.

It could not be pretended that these latter provisions render the whole law null and unconstitutional; and as I said at the outset, we are called upon to pronounce upon the validity of the whole Act itself in view of the consent signed by the parties at the trial.

We should, therefore, enquire what is the dominant idea of the law. For my own part, I find it in the first section, and the latter section was only enacted to prevent proprietors of theatres, persons organizing excursions, or those engaged in commerce or industry, from invoking such customs as might exist and which had been legalized by the first section.

Moreover, even supposing these prohibitions stood alone, I say they should be considered as police regulations falling under the jurisdiction of the Province.

Work on Sunday in the Province of Quebec has from the early days of the colony always been considered as a subject for regulation by the police authority. As we know the Intendant under French rule had the right to make police regulations. Criminal legislation, on the other hand, belonged to the *Conseil Souverain* or to the *Conseil Supérieur*. In accordance with this distribution of legislative powers the Intendant Raudot prohibited on May 25, 1709, every act of service on Sundays and holidays. We can find the text of this ordinance, as well as several others which he made for preventing noise in the vicinity of the churches, at pp. 421 and 426 of vol. 3 of "Ordonnances des Gouverneurs et des Intendants sur la voirie et la police," compiled in 1856.

The Federal Parliament by its law of 1906 did not wish to make criminal legislation. If it had wished to give this character to the legislation it would not have called it simply "An Act respecting the Lord's Day"; but adopting the terms of the Ontario statute which had just been considered by the Privy Council, it would have called it "An Act to prevent the profanation of the Lord's Day." It would have amended its Criminal Code. There already existed Part 22 of the Code, which relates to offences against religion. But in this law there is no question of the Criminal Code.

The act which is marked as criminal by the Legislature should apply to all the citizens of the same country. It seems strange that an act could be a crime in one part of the country and would not be so in another. Nevertheless, this would be the effect of the Federal statute which we are examining. Indeed in sections 5, 7, 8 and 16 certain things are prohibited provided that no Provincial law has been passed on the subject.

Thus, in one Province some certain kinds of work would be forbidden by the Federal law, while under the Provincial law it would be allowed in another Province.

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If we consult section 6 of the Federal statute relating to telegraphers, we see in the same way that this statute cannot be criminal legislation because it has in view the creation of a day of rest.

It is quite evident to me that this Federal statute should not be considered as a criminal statute, but as a law relating to the peace and good order of the country.

Then all Provincial legislation which is not incompatible with the provisions of this statute is valid because it relates to civil rights and to matters of local interest and because its regulation of the subject partakes of the nature of police laws under the provisions of sub-sections 13 and 16 of art. 92 of the British North America Act.

The appellant has invoked in his favour the opinion given by the Supreme Court upon the reference made by the Governor-in-Council. The legislation which was subsequently adopted by the Federal Parliament and by the Provincial Legislature of Quebec shews, as I have just said, that neither in one Parliament nor the other was there a wish to enact criminal legislation. It seems, on the contrary, as if the Federal Parliament and the Provinces had come to an understanding to avoid the difficulty which had been pointed out by the Supreme Court.

For all these reasons I am of opinion to dismiss the appeal with costs.

Appeal allowed with costs.

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April 11.

Ontario High Court, Riddell, J., in Chambers. April 11, 1912.

1. PARTNERSHIP (§ IV—17)—SALE UNDER DIRECTION OF FOREIGN COURT OF PARTNERSHIP REAL ESTATE IN ONTARIO—CAUTION—DEVOLUTION OF ESTATES ACT, 10 EDW. VII. CH. 56, SEC. 15 (1) (*d*).

Where the executors of a deceased partner who carried on a business with a surviving partner, upon being ordered by a Michigan Court of Chancery after the latter's death, to wind up the business, became the purchasers of partnership lands situated in Ontario, the sale being confirmed by such Court and the executors directed to make and execute conveyances thereof to themselves, they may convey title to such lands, and, where the beneficiaries of the estate have received the purchase money, it is unnecessary for an administrator who was appointed by the Court of Ontario of the estate of the surviving partner, to join in such conveyance, therefore he will be denied leave to file a caution under sec. 15 (1) (*d*) of the Devolution of Estates Act, 10 Edw. VII. ch. 56, after the proper time for filing it had expired.

2. EXECUTORS AND ADMINISTRATORS (§ II A—41)—PARTNERSHIP REAL ESTATE—PURCHASE BY EXECUTOR—AUTHORITY OF FOREIGN COURT.

Where the executors of a deceased member of a partnership are empowered by a Michigan Court of Chancery to sell to themselves partnership lands situated in Ontario and to execute the necessary conveyance thereof, the administrator of the surviving partner, who was appointed by the Surrogate Court of Ontario, need not join in such conveyance.

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3. COURTS (§ I B 3—26)—JURISDICTION OVER REAL PROPERTY IN OTHER COUNTRY.

A Michigan Court of Chancery may empower the executors of a resident of that State to sell and execute the necessary conveyances to themselves of land of their testator situated in Ontario.

[*Penn* v. *Lord Baltimore* (1750), 1 Ves. Sr. 444, referred to.]

4. CONFLICT OF LAWS (§ I H—137)—DECREE OF FOREIGN COURT—CONFIRMATION OF SALE OF LAND—ABSENCE OF ACTUAL CONVEYANCE.

Upon confirming a sale of lands by an executor a Michigan Court of Chancery cannot make its decree effective as a conveyance of land situated in Ontario without a conveyance signed by the executor as directed by the decree.

[*Norris* v. *Chambres* (1861), 29 Beav. 246, 3 DeG. F. & J. 583; *Re Hawthorne, Graham* v. *Massey* (1883), 23 Ch. D. 743, and *Companhia de Mocambique* v. *British South Africa Co.*, [1892] 2 Q.B. 358, referred to.]

5. PARTNERSHIP (§ VI—28)—RIGHT OF SURVIVING PARTNER—FOREIGN PARTNERSHIP—SALE OF PARTNERSHIP LANDS IN ANOTHER COUNTRY.

The surviving member of a foreign partnership, although an alien may, if the countries are at peace, sell and convey partnership lands situated in another country without any representative of a deceased partner joining in the conveyance.

[Comm. Litt. 129, C.; and Bacon's Abr. Aliens, D., referred to.]

6. EXECUTORS AND ADMINISTRATORS (§ II A 2—43)—PURCHASE BY EXECUTOR—DECREE OF COURT—PURCHASE MONEY PAID TO BENEFICIARIES.

A decree of a Court of competent jurisdiction directing the sale of lands of a deceased person to his executors will protect the purchasers where all or a part of the purchase money has been received by the testator's beneficiaries.

[*Maple* v. *Kussart*, 53 Pa. St. 343, referred to.]

7. ESTOPPEL (§ III K—139)—BENEFICIARIES RECEIVING PURCHASE MONEY—ESTOPPED FROM CLAIMING SALE VOID.

Beneficiaries of a testator who have received all or part of the purchase money on the sale of the land of the estate cannot subsequently set up the claim that the sale was void or voidable.

[*Steen* v. *Steen* (1907), 9 O.W.R. 65, 10 O.W.R. 720 (C.A.), and *Clark* v. *Phinney* (1895), 25 Can. S.C.R. 633, referred to.]

Statement

MOTION by the administrator of the estate of Barney Mills, deceased, for an order allowing the applicant to file a caution, under sec. 15 (1) (*d*) of the Devolution of Estates Act, 10 Edw. VII. ch. 56, after the proper time for filing had expired.

The motion was refused with costs.

J. D. Montgomery, for the applicant.

F. W. Harcourt, K.C., Official Guardian, for certain absentees.

Riddell, J.

RIDDELL, J.:—Nelson Mills and Barney Mills, both of the county of St. Clair, Michigan, and citizens of that State, were in partnership under the firm name of N. & B. Mills, in which Nelson Mills had a three-fourths and Barney Mills a one-fourth interest. Amongst other firm assets, the partnership owned Stag Island, in the county of Lambton, and Province of Ontario.

Nelson Mills died in 1904, having made a will and codicil whereby he appointed M.W.M and D.W.M. his executors, and directed them to carry on the partnership. They did so until the

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death, in 1905, of Barney Mills; then, in 1908, they were directed by the proper Court in that behalf in Michigan to wind up the partnership within the year ending the 4th May, 1909. They sold, in 1909, certain of the real property of the firm, including Stag Island (with certain property, personal and mixed) to themselves as executors for over a quarter of a million. By a decree of the Circuit Court for the County of St. Clair (in Chancery) the sale was confirmed, and it was "ordered, adjudged, and decreed that said M.W.M and D.W.M., executors of the estate of Nelson Mills, deceased, surviving partner of the co-partnership of N. & B. Mills, make, execute, and deliver to M. W.M. and D.W.M., executors and trustees of Nelson Mills, deceased, the necessary conveyances, deeds, and other papers to convey all the property, real, personal, and mixed, of the co-partnership of N. & B. Mills, and more particularly the following descriptions of property as are hereinafter more fully set forth; and that, in case said executors do not make, execute, and deliver the necessary conveyances to transfer and vest in M.W.M. and D.W.M., executors and trustees of the estate of Nelson Mills, deceased, all the property . . . of said co-partnership . . . then this decree is to stand and operate as such conveyance, and a certified copy thereof placed on record in the register of deeds offices in the various counties and States of the United States of America and the Province of Ontario, Canada, wherein the real property is located, will be a proper conveyance to pass the title of said real property to M.W.M. and D.W.M., executors and trustees of the estate of Nelson Mills, deceased, to receive said property free and clear from all claims and liabilities of N. & B. Mills co-partnership; the description of said property being as follows . . ." Amongst the lands described, appears Stag Island.

It would appear that all the beneficiaries of the Barney Mills estate have received their shares of the estate, including a share of the proceeds of this sale.

Barney Mills died intestate in 1905, and his administrators have distributed his estate, with the approval of the Michigan Court having jurisdiction in the premises.

It is desired that a valid conveyance of Stag Island be made; and W. J. Barber, of Sarnia, has taken out (October, 1910) letters of administration from the Surrogate Court of Lambton. He, however, neglected to register a caution within the proper time.

A motion is made by him to be allowed to file a caution now, under 10 Edw. VII. ch. 56 (1) (*d*).*

*Section 15 (1), (*d*) of the Devolution of Estates Act, 10 Edw. VII. ch. 56, is as follows:—

15 (1). Where a personal representative has not registered a caution within the proper time after the death of the deceased, or has not re-registered a caution within the proper time, he may register or re-register the caution, as the case may be, provided he registers therewith:—

(*d*) In the absence and in lieu of such consent, an order of a Judge of

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The beneficiaries are so scattered that it is impracticable to obtain their consent. The Official Guardian is not willing to give consent without some intimation by the Court that he should do so. Moreover, the applicant desires that an order be made dispensing with the payment of money into Court: Con. Rule 972(*e*). In fact, the purpose is, simply, that the Ontario administrator shall make a conveyance to M. W. M. and D. W. M., executors and trustees of the estate of Nelson Mills, in accordance with and to carry out, in a manner which will give them a valid and registrable title to the Ontario land, the sale they made under authority of the Michigan Court.

I do not think the order should be made under the circumstances set out. It is not the ordinary case of a personal representative in good faith desiring to sell land of his estate which has gone from him under 10 Edw. VII. ch. 56, sec. 13(1), but a wholly different case.

The purchasers were willing to pay the purchase-price, and did so, on the title which they had or could themselves make.

And I see no necessity for any proceedings by the Ontario administrator.

Of course, the vesting order granted by the Circuit Court is wholly invalid to affect land in Ontario considered as land; and, no doubt, so far as that land is concerned, was either *per incuriam* or granted *quantum valeat*. All the formalities for passing title to real property are those prescribed by the *lex rei sitæ*: Story on Conflict of Laws, secs. 435 sqq., and cases noted. So that while, upon the doctrine of *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sr. 444, and like cases, the Michigan Court had full power to direct the executors to make a conveyance of Ontario land, that Court could not make its own decree effective as a conveyance: *Norris* v. *Chambres* (1861), 29 Beav. 246, 3 DeG. F. & J. 583. *In re Hawthorne, Graham* v. *Massey* (1883), 23 Ch. D. 743, and *Companhia de Mocambique* v. *British South Africa Co.*, [1892] 2 Q.B. 358, may also be looked at on similar points.

But it appears that the land was really partnership assets. It further appears that, between the deaths of Nelson and Barney Mills, they carried on the partnership business as partners of Barney Mills. They had no right to become such partners simply because they were executors of the deceased partner: *Pearce* v. *Chamberlain* (1750), 2 Ves. Sr. 33. Accordingly, Barney Mills must have assented to such partnership;

the High Court or of the county or district wherein the property or some part thereof is situate, or the certificate of the official guardian authorizing the caution to be registered, or re-registered, which order or certificate the Judge or official guardian may make with or without notice on such evidence as satisfies him of the propriety of permitting the caution to be registered or re-registered; and the order or certificate to be registered shall not require verification and shall not be rendered null by any defect of form or otherwise: R.S.O. 1897, ch. 127, sec. 14; 2 Edw. VII. ch. 17, sec. 10.

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and the decree of a Court of competent jurisdiction, in an action to which the administratrices of Barney Mills are parties, not only finds that such partnership did exist till the death of Barney Mills, but also that the executors of Nelson Mills became at such death "the surviving partner entitled to wind up the said co-partnership," and ordered that they should do so. As surviving co-partners, they were entitled to sell all the partnership property, and they did so. Whether a sale by them to themselves would be permitted under our practice, we need not inquire—a Court having jurisdiction in the premises, in an action to which the administratrices and all beneficiaries of Barney Mills were parties, has approved the sale.

In my view, under these circumstances, there is no necessity of any representative of Barney Mills joining in the conveyance. The land was partnership assets, and the surviving partner could sell it—and there is no difference in the powers of a surviving partner in a foreign partnership and in a domestic partnership: Co. Litt. 129, C; Bacon's Abr., Alien, D.; so long as the foreigner is not an alien enemy, and the countries are at peace.

It is not, I presume, necessary to elaborate the doctrine that, according to our law, land owned as partnership assets is personal property.

All difficulty about the two (M. W. M. and D. W. M.) conveying to themselves can be got over by an appropriate form of conveyance—as to which any Ontario solicitor could advise. If it be feared that at some time some of the beneficiaries of Barney Mills may make some claim, the decree of the Circuit Court may be appealed to; and, moreover, "it has been ruled uniformly, that if one receive the purchase-money of land sold he affirms the sale, and he cannot claim against it whether it was void or only voidable:" *Maple* v. *Kussart* (1866), 53 Pa. St. 348, at p. 352. And the same rule applies where the claimant has received part of the purchase-money only: *Steen* v. *Steen* (1907), 9 O.W.R. 65, 10 O.W.R. 720 (C.A.); and, in the Supreme Court of Canada, *Clark* v. *Phinney* (1895), 25 Can. S.C.R. 633, and cases cited by Sedgwick, J. And ignorance of the facts could not be alleged, since all parties were represented by counsel.

Upon both grounds—(1) that the purchasers were content to pay their purchase-money upon the authority of the Circuit Court, and did not deal with the representatives of the Barney Mills estate; and (2) that the order sought is wholly unnecessary—I refuse the motion. The Official Guardian will have his costs.

It may be that a declaration of ownership could be obtained in the High Court of Justice for Ontario, in an action properly framed; but that is not a matter upon which I pass; on the present application, that would be impossible.

Motion refused.

JOSEPH BENTLEY, et al. (defendants, appellants) v. SAMUEL N. NASMITH (plaintiff, respondent).

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Canada Supreme Court, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. March 21, 1912.

1. BROKERS (§ II A—6)—REAL ESTATE AGENT—OPTION TO "PURCHASE OR SELL."

Where a real estate agent in the ordinary course of his business listed certain property for sale on commission at the request of the owners and afterwards, without severing his relation as agent, secured from the latter an option "to purchase or sell" the same which also provided for a commission to the agent "in the event of a sale being made," and he found a purchaser willing to pay a price much greater than the figure placed on the property by the owners plus the agent's commission and gave him a receipt for his deposit which stated that it was "given by the undersigned as agent and subject to the owner's confirmation," he continued to be the agent of the owner and was bound to disclose all information he had of circumstances that pointed to an enhanced price for the property and he is not entitled to specific performance of the option.

[*Nasmith* v. *Bentley*, 16 B.C.R. 308, 19 W.L.R. 273, reversed.]

Statement.

APPEAL by the defendants from the judgment of the British Columbia Court of Appeal, *Nasmith* (*sub nom. Naismith*) v. *Bentley*, 16 B.C.R. 308, 19 W.L.R. 273, affirming by a divided Court the judgment of Clement, J., on the trial of the action, which was for the specific performance of an option for the purchase of land, which was as follows:—

Vancouver, Nov. 21st, 1910.

In consideration of the sum of $50 (fifty dollars), receipt of which is hereby acknowledged, we, the undersigned, agree to give Samuel J. Naismith, of the city of Vancouver, the exclusive right to purchase or sell for the term of one month from date that property consisting of 46 acres more or less, situated and described as the westerly 46 acres of the south half of the south-east quarter of section seven (7), township forty (40), municipality of Coquitlam, New Westminster district, the price asked being ($200) two hundred dollars per acre. Terms: quarter cash, balance payable Feb. 22nd, 1915, with interest on balance payable on the 22nd day of February of each year till principal is paid at the rate of 7 per cent. per annum. We agree to pay Mr. J. S. Naismith 2½ per cent. commission in the event of a sale being made.

BENTLEY & WEAR,
JOSEPH BENTLEY,
TOM WEAR.

The appeal was allowed with costs in the Supreme Court and Court of Appeal, and the action was dismissed with costs.

J. E. Bird, for appellants.

E. A. Lucas, for respondent.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The facts are fully set out in the notes of the other Judges. By the memorandum of 21st November, the appellants gave to the respondent "the exclusive

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right to purchase or sell for the term of one month" the property in question in these proceedings. This memorandum of itself undoubtedly established a very peculiar relation between the parties. In my opinion, Nasmith became thereunder an agent for sale and he also had an option to purchase. He could have sold the property as agent or, finding himself unable to sell, he could have purchased it for himself. The dual relation should have been severed, however, before the option to purchase was exercised; otherwise, Nasmith continued to be an agent obliged, as such, to make full disclosure up to the very moment that he exercised his option to purchase. The confusion in the legal relations between the parties resulting from such conditions is quite sufficient to shew how necessary it was to regularize his position towards the appellants. Not having done so, Nasmith was bound to them by the rule of law which regulates the relations of principal and agent as to disclosure, etc., and the exercise of his option to purchase did not relieve him of that obligation. In the peculiar circumstances of this case it would require but very slight evidence to justify the conclusion that the respondent was dealing as agent.

In answer to a question from me during the argument, Mr. Lucas admitted that the entry on the regular listing card made as the result of the first interview was just such as would have been made by Nasmith, he being a real estate agent, if he had taken the property to sell as the agent of the appellants. In case of doubt it might fairly be assumed from the way the respondent treated the transaction at the time that he considered himself as agent for sale. That he did not, as he says, make any effort to sell the property cannot in any way affect the character of the relations established previously with the appellant. On the other hand, if he did not try to sell, what is the meaning of his reference to a prospective buyer; and why did he mutilate the listing card by taking off the owner's name? Finally, in the bill of sale of 25th November, there is quite sufficient to satisfy me that the relations of principal and agent still existed at that time between the parties and that the vendees might, on discovery of that agency have their recourse against the appellants on the ground that the sale was made under the terms and authority of the memorandum: *Bryand et al.* v. *Banque du Peuple*, [1893] A. C. 170, at page 180.

I would allow this appeal with costs.

Davies, J.

DAVIES, J.:—This action was one brought to enforce specific performance of an agreement for the sale to plaintiff by the defendants of certain lands.

The main questions debated on the argument in the appeal to this Court were whether at the time the plaintiffs obtained the option for the purchase of the land they were the agents of

the defendants for the sale of such land and bound to disclose to them before obtaining the option all material facts which had come to them or were within their knowledge respecting the selling value of such lands.

I have no difficulty on the facts in reaching the conclusion that at the time the plaintiff obtained the option for the purchase, which he afterwards sought to have enforced, he was the defendants' agent for the sale of the same land. It seems to me equally plain that being such agent and having become possessed of material information affecting the selling value of the lands it became his duty to disclose such information to his principals before attempting to purchase for himself. This disclosure he did not make. He deliberately concealed the facts within his knowledge, facts which largely affected the selling value of the land in their opinion and would in all probability have affected the judgment of the owners of the land in giving them the option.

Having reached these conclusions as to the agency of the plaintiff and his neglect to disclose material facts affecting the selling value of the land before obtaining an option to purchase for himself, it seems to me to follow as of course that a Court of Equity would not lend its aid to enforce at his instance such an agreement for the purchase of the land by himself obtained under such circumstances.

I would allow the appeal and dismiss the action with costs in all Courts.

IDINGTON, J.:—The respondent as a real estate agent had in August agreed with appellants to list their property, consisting of forty-six acres of land, for sale at a price of $210 an acre. On the 19th November following he induced them to sign, in consideration of $50 then paid, an agreement giving him the exclusive right for thirty days to sell or purchase said lands at $200 per acre. This was done so late in the afternoon of that day that the agreement was dated as of the 21st, being the Monday following. On the 23rd or 24th of November he had the assurance to ask the first man enquiring $500 and then $400 an acre. On the 25th he sold to another at the latter price. He admits that he made no disclosure of anything he knew relative to the material circumstances which if known to appellants might have changed their minds and led to their refusing him this option.

Idington, J.

He says, or rather tries to lead the Court to believe, in the first place that he did not know anything material, and in the next place that what he did know was of the nature of suspicion or mere rumours which were common property. He has not given anything in evidence to explain why, in two or three days, he had the assurance to demand $400 or $500 an acre from the

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first men he met likely to become a purchaser. If he could have satisfied the Court, by reference to some sudden discovery after making the bargain that would have removed the suspicion of unfair dealing, I have no doubt he would have given it.

The evening newspaper announcements may account for much, but I do not think the whole.

It is clear to my mind that if the appellants had known all respondent knew, or had reason to know or to excite his expectation, he never would have secured the option.

It is also pretty clear that there was a something that induced the respondent suddenly to change his attitude of apathy taken relative to this property, from August, to that taken on the 19th November as one of zealous anxiety.

He swears he did not know of the C. P. R. developments. He may not actually have known, but I have not the slightest doubt he had good reason to suspect important developments. And especially so as he has failed to contradict or explain the evidence of Williams who tells of the respondent saying someone had given a tip or hint. Indeed he himself tells much that shews he had some reason to suspect things were moving, as it were.

The appellants were entitled to have these reasons that moved him disclosed to them. In saying so I have not overlooked the remark of Dart's Vendors and Purchasers, at page 39 of 5th ed. (46 of the 7th ed.), that an agent

> need not have pointed out a merely speculative advantage (such as the possibility of an unplanned though contemplated railroad running near the property) which might be reasonably supposed to be equally in the knowledge of both parties.

This is in substance a quotation from the judgment of Vice-Chancellor Wigram in the case of *Edwards* v. *Meyrick*, 2 Hare 60, and is, therefore, as well as from its adoption by the author, entitled to great respect in every case involving similar conditions of fact.

This case has only a very slight sort of resemblance in its facts to that, but, nevertheless, the dictum has given me such concern as to lead me to seek for authorities wherein it may have been applied in cases exhibiting facts more closely resembling those here in question. I have failed to find any. It is, of course, desirable that the doctrine of fiduciary relationship binding an agent for sale should not be stretched to cover cases where disclosure has taken place and through honest oversight an incidental circumstance presumably known to both parties has been overlooked in the disclosure made.

In this case there was no attempt at disclosure or recognition of the duty requiring it, and the respondent frankly says he would not have told appellants if they had asked him.

Indeed the case, at the trial and throughout, has been treated as if the disclosure had not been made. But it seems to have

been held that the mere listing of property with an agent for sale created no fiduciary relation.

With respect I cannot accept this latter view of the matter. The business of the respondent was to procure for those (listing property in other words) entrusting him with the sale of property, purchasers thereof.

The naming of the rate of commission to be paid or terms upon which it is to be paid has nothing to do with the legal question as to what will constitute the relationship of principal and agent between the parties.

The sole question in such cases must always be whether or not the alleged agent has, by his language or conduct, or both, constituted himself the agent of a principal assenting thereto and has undertaken the duty flowing therefrom.

In *McPherson* v. *Watt*, 3 A.C. 254, at 263, the Lord Chancellor points out in effect that it mattered not whether Watt was a gratuitous adviser or paid adviser; the sole question being whether or not, in fact, he had become the adviser.

In the case before us, I have no doubt the question of commission was as well understood by both parties as it was by the respondent when the entry was made by him on his listing card, shewing what is admitted to have been *primâ facie* the usual rate.

There are some curious features in the case. Amongst others one is tempted to doubt whether or not the respondent did not in truth hesitate to take the position he now does.

The receipt given the sub-purchaser for the deposit got on the resale contains the following: "This receipt is given by the undersigned as agent, and subject to the owner's confirmation."

The respondent himself signed his firm's name to this with a doubtful "*pro* S. J. Nasmith." What owner did he mean? Or was it that the printed form merely said what he ought to have thought?

When one looks at it thus and considers the facts and that the respondent seems to have been far from clear in his own mind when speaking to appellants later on the point of whether or not he should set up a claim to the commission, some curious speculations float across one's mind.

I think the appeal must be allowed with costs here and in the Courts below, and the action be dismissed with costs.

ANGLIN, J.:—The plaintiff, a real estate agent, sues for the specific performance of an agreement for the sale to him of certain lands of the defendants which he says resulted from his exercise or acceptance of an option to purchase such lands procured from the defendants on the 19th November, 1910, in consideration of a cash payment of $50, which he then made to

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him. The document, under which the plaintiff claims, gave him for one month an exclusive agency to sell as well as an option to purchase the property in question at a stipulated price, $200 per acre, and upon terms specified. He effected a sale of it on the 25th November, he alleges on his own behalf, at $400 per acre.

In answer to the action the defendants plead that the plaintiff did not, in fact, exercise his option to purchase and that the sale of the property at $400 per acre was effected by him on their behalf and as their agent. They also assert that in August, 1910, the plaintiff became their agent for the sale of the property in the ordinary way, that he was still such agent when he procured the option in November, and that, when seeking the option, he concealed from them certain material information, which it was his duty to disclose. They maintain that the option which he obtained was thus vitiated and was voidable at their election.

It appears that the plaintiff sought the option to purchase in November because, as he himself says, he had reason to expect and did expect "a sharp rise in real estate values there." He had heard rumours of prospective industrial developments in the neighbourhood, the announcement of which he believed would precipitate a marked increase in the market price of this property. He knew that an adjacent property which had been in his hands for sale had been "taken off the market for some good reason." These were circumstances which admittedly influenced his judgment as to the probable market value of the property in question. He must have known that they would be likely to influence the judgment of the defendants in deciding whether they should accede to his request for an option to purchase. "This excitement that was on," he says, "was the prime cause for my going there," *i.e.*, to the defendants to secure the option.

Instead of imparting this information to the defendants (he says he would not have given it had they asked for it), the plaintiff apparently sought to mislead them. Although he had in view no purchaser other than himself or his partner, he talked to them as if he had a prospective purchaser and discussed the agricultural possibilities of the land. He practically admits that he did this in order "to throw the defendants off the track."

If, when he went to them on the 19th November, the plaintiff was the defendants' agent to procure offers for the purchase of the property in question, he was, in my opinion, bound to disclose to them all material information which he had before taking from them for his own benefit an option to purchase it, and his deliberate concealment of such information—if not active misrepresentation of the situation—rendered the option, which he secured, voidable at their election. The materiality of that,

which he admits, influenced his own judgment and action in the matter he cannot very well dispute.

But he insists that prior to the 19th November, he was not the defendants' agent in any such sense as would impose upon him this duty of disclosure. The plaintiff first saw the defendants in August, 1910, with a view to purchasing another property from them. In the course of the negotiations about this other property, which came to naught, the defendants informed him that they owned the property now in question and wished to sell it. He admits that he told them that he handled outside properties and will not deny that he stated that his business was that of a real estate broker. The defendant Wear says that he made this statement and that he then understood from him that he "sold on commission." The defendant Bentley also says that he knew the plaintiff was a real estate agent. I have no doubt that this was the fact and the evidence makes it abundantly clear to me, not only that the character of the plaintiff's business was known to the defendants, but that, to the knowledge of all parties, it was in his character as a real estate agent that the defendants offered to place with him the sale of their property and that he took the "listing" of it. His own story is that, when the defendants told him he might sell it if he could, he took a memorandum of the description of the land and of the price and terms of sale on the spot. When he returned to his office he immediately "listed" the property on a card in the following form:—

EXHIBIT 1.

DISTRICT LOT	BLOCK	LOT	STREET AND NUMBER	PRICE, INCLUDING 5% COMMISSION	TERMS
Westerly	46 Acres of	S ½ of	S.E. ¼ of		¼ Cash
Section Line	7 Tp. Above Govt.	40 Dyke	Gp 2N WD	8210	Balance in 4½ years
	46 Acres	Cleared	Soil A1	Ditched all around	

Remarks: Give as full particulars as possible on the other side.

I hereby give you the exclusive sale of the above property for ."

This he admits is precisely the course he always takes with properties placed in his hands as an agent for sale. He also says he thought later of offering the property under the authority thus given him to a prospective buyer.

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Upon these facts, I have no doubt that the plaintiff took the listing of the property in the ordinary course of his business as a real estate agent, intending the defendants to understand, as they did, that he was assuming towards them the duties and obligations which such an agent undertakes when an owner of property places it in his hands to secure a purchaser. While such an agent has no implied authority to enter into binding contracts on his principal's behalf, while he may not be entitled to his commission, although he submits an offer in the terms stated by his employer, unless he procures the latter to accept it, it is his duty to exercise all reasonable diligence in procuring offers for the purchase of the property and to submit them to his principal. He is in his principal's employment from the moment of his retainer to procure offers. The consideration for the promise of the contingent remuneration or commission, which is implied, if not expressed, in the placing of the property in his hands, or the listing of it with him, is his undertaking not that he will merely sit idle and bring to his principal such offers as may come his way, but that he will exert his skill and energies to procure such offers, and that he will in every respect conduct the business entrusted to him to the best advantage and in the best interests of his employer, giving to the latter the benefit of all information which he has or may obtain that might influence his judgment in regard to the price or terms at or upon which the property should be sold. These, in my opinion, were the obligations which the plaintiff assumed towards the defendants as a result of their August interview, and the defendants had the right to rely upon his discharging them. That whatever relationship was then constituted between the parties continued until the 19th of November, the plaintiff himself admits. He says that nothing had occurred to change it. In fact, by the very document which he then procured he continued his agency on somewhat different terms. It follows, I think, that without disregarding a duty of his employment as a real estate agent, the plaintiff could not procure a binding contract for the purchase of his employers' property for his own benefit unless he first placed them in as good position as he himself occupied to form a sound judgment as to the present and prospective value of such property.

This is an action for specific performance. In order to succeed in obtaining that equitable relief the conduct of the plaintiff in bringing about the contract upon which he claims, must have been irreproachable from the point of view of a Court of Equity. The Court will refuse this relief if it appears that there is, in the circumstances surrounding the making of the contract, anything which renders it not fair and honest to call for its execution. This is so in the case of unintentional unfairness. *A fortiori*, is it the case when the unfairness results from

the plaintiff having intentionally failed to discharge a duty which he owed to the defendant. Even if the facts established should be deemed insufficient as a defence to a common law action for damages for breach by the defendants of their agreement to sell, or to support an action by them for rescission (questions upon which I refrain from expressing an opinion), they are, in my opinion, clearly sufficient to require the Court, in the exercise of its ample discretion in regard to granting or withholding the relief of specific performance, to dismiss this action

In the view which I have taken it is unnecessary to determine the question whether, if he had an enforceable option to purchase, the plaintiff exercised it in such a manner that he would be entitled to assert the rights of a purchaser from the defendants.

With respect, I would, for the foregoing reasons, allow this appeal with costs in this Court and in the provincial Court of Appeal, and would dismiss the action with costs.

Brodeur, J.

BRODEUR, J.:—The first question that we have to consider is whether the respondent was the agent of the appellants when they gave him an option on their property.

It appears by the evidence that a few months before the respondent, who is a real estate agent, met the appellants and as a result of that interview the property in question was listed with them.

It was entered on a card which he was using in his office for the lands he had for sale and the price was entered on that card under the heading, "Price including 5 per cent. commission." $210. The sum represented the price of $200 asked for by the proprietors and the $10 were for the commission. It was impossible for me to come to any other conclusion than that the respondent was the agent of the appellants.

Once that relation established, it became the duty of the respondent to acquaint his principals with all the information he had as to the value of the land. An agent is bound to disclose to his mandator all the circumstances that might alter his views.

The vital principle of all agencies is good faith, for without loyalty the relation of principal and agent could not well exist.

The agent must make a full and fair disclosure of all the facts and circumstances within his knowledge in any way calculated to enable the principal to base his opinion.

In this case Nasmith, when he approached the appellants to have an option on their property, should have disclosed the knowledge he had of a rise in the value of that land; and, not having done so, he will be responsible to the appellants for the sum obtained. The appeal should be allowed with costs.

Appeal allowed.

JEWER v. THOMPSON.

Ontario High Court, Britton, J. April 19, 1912.

ONT.

H. C. J. 1912

April 19.

1. CONTRACTS (§ II D 2—173*a*)—CONSTRUCTION—SALE OF REAL PROPERTY—QUANTITY OF LAND.

Where an agreement for the sale of a specified number of feet of land more or less for a lump sum, provides that, upon any valid objection to title being made which the vendor is unable or unwilling to remove, the agreement shall be null and void, and an objection is made by the purchaser on the ground that parts of the land are subject to rights of way, the vendor, if he acts in good faith, and promptly under the circumstances, and not unreasonably or capriciously, and does not waive his rights, or omit anything which the ordinary prudent man, having regard to his contractual relations with other parties, is bound to do, is entitled to rescind the agreement.

[*In re Jackson and Haden's Contract*, [1906] 1 Ch. 412; *Wilson Lumber Co. v. Simpson*, 22 O.L.R. 452; and *In re Dames and Wood*, 29 Ch. D. 626, referred to.]

2. VENDOR AND PURCHASER (§ I D—21)—RIGHTS OF PARTIES TO RESCISSION—DEFICIENCY IN QUANTITY.

Where a vendor properly rescinds an agreement for the sale of land, and thereafter the purchaser registers the agreement, and the vendor, without knowledge of such registration, agrees to sell the land to another, the first purchaser will be compelled to execute a release of the registered agreement.

Statement

ACTION to vacate the registration of an agreement for the sale of a house and land, after the plaintiffs had cancelled the contract, as they alleged, and for a mandatory injunction to the defendant to execute a release or discharge of the agreement, and for damages.

Judgment was given for plaintiff.

F. E. Hodgins, K.C., for the plaintiffs.

J. J. Maclennan, for the defendant.

Britton, J.

BRITTON, J.:—The plaintiffs were the owners of house No. 761 on the east side of Gladstone avenue, in the city of Toronto. The defendant, desiring to purchase this, made an offer in writing to A. Jewer, one of the plaintiffs, which offer is in part, and so far as seems to me material, as follows: "I, W. Thompson, of the city of Toronto (as purchaser), hereby agree to purchase all and singular the premises situate on the east side of Gladstone avenue, in the city of Toronto, known as house No. 761, plan No. , as registered in the registry office for the said city of Toronto, having a frontage of about 19 feet by a depth of about 62 feet more or less, at the price of $3,000, as follows. . . . The vendor shall not be required to furnish abstracts of title or to produce any deeds or copies of deeds not in his possession or control. The purchaser to be allowed ten days to examine title at his own expense. All objections to title to be made in writing within that time. Any valid objection which the vendor is unable or unwilling to remove, the agreement to be null and void, and deposit, if any, returned . . . ."

The offer or agreement, on the part of the defendant, was dated the 24th November, 1911. On the same day, the plain-

tiff A. Jewer signed an acceptance, and agreed to and with the defendant to carry out the same, on the terms and conditions above mentioned, and he accepted $50 as a deposit.

The plaintiffs gave the names of Messrs. Morine & Morine as their solicitors. The defendant employed Mr. Robert Wherry as his solicitor. On the 1st December, the defendant's solicitor made requisitions on title, of considerable length and of great minuteness and particularity. These were answered in part, but the answers were deemed by the defendant's solicitor to be unsatisfactory. The property is, in fact, subject to two rights of way, one over a small part at the north end, and another over a small part at the south end. Both were put forward as serious objections by the defendant, but more stress seems to have been laid upon the right of way over the southerly one foot and some inches. Upon the land immediately adjacent to the south, which land was formerly owned by the plaintiffs, is erected a building used and occupied as a store. The distance between the southerly wall of 761, and the northerly wall of the store, is about 3 feet. In selling the store lot, the plaintiffs' conveyance reserved a right of way over the northerly 1 foot 6 inches of the store lot, and granted a right of way over the southerly one foot 6 inches of 761. Apart from this right of way, it was established that the defendant would have got the full 19 feet frontage; but the defendant insisted upon getting title to all of what was called 761, freed and discharged from these rights of way—and particularly the right of way over the southerly part, of about 18 inches. The plaintiffs, not being able to satisfy the defendant, treated his objection as a valid objection, which the plaintiffs were unable or unwilling to remove, treated the agreement as null and void—declared it to be so, and tendered to the defendant his deposit of $50. The plaintiffs then again offered the property for sale, and subsequently they received an offer from Robert Garbutt, which offer the plaintiffs accepted. After the plaintiffs had cancelled the agreement, the defendant caused the agreement to be registered, and refused to release or discharge it. Garbutt insisted upon having the defendant's alleged agreement removed from the registry; hence this action, which was commenced on the 15th February last. The plaintiffs ask for judgment vacating and discharging the registration of the agreement referred to, made between Alfred Jewer and the defendant, and a mandatory injunction compelling the defendant to execute a release or discharge of it. The defendant denies the plaintiffs' right to cancel the agreement, and he sets up as objections to the plaintiffs' title the right of way mentioned, and asks for specific performance of the agreement or performance of it, subject to these rights of way, with an abatement in the purchase-price. The determination of this action depends upon the plaintiffs' right to rescind, under the words in the contract itself.

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Britton, J.

I find, as it seems to me clear upon the evidence, that the plaintiffs did not have in mind the existence of any right of way over the southerly end of this lot until after the defendant's offer and the plaintiffs' acceptance of it. The plaintiffs did not personally give instructions as to the survey, and they really thought that the land belonging to 761 extended to the northerly wall of the store mentioned.

The defendant could see for himself the position at the northerly end. If he was innocently misled as to the southerly end, he was not as to the northerly end. I find that the plaintiffs had the right to treat the defendant's objection as a valid objection to the title; and, being unable and unwilling to remove this objection, the plaintiffs could, as they did, annul the agreement and declare it void and of no effect.

The plaintiffs, in doing this, did not act unreasonably or capriciously, but acted in good fatih, and acted promptly under the circumstances.

The right of way over the southern part was not actually used by the occupant of the store; and, by reason of this, the plaintiffs might well not bear in mind the fact that such right of way existed. There was no pretence at the trial that the plaintiffs wilfully concealed or intended to conceal anything from the defendant.

In entering into this contract, I do not think that the plaintiffs or either of them "omitted anything which the ordinary prudent man, having regard to his contractual relations with other parties, is bound to do:" *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412.

There was no waiver of the plaintiffs' right to rescind.

The case *In re Dames and Wood*, 29 Ch. D. 626, seems to me authority for the plaintiffs' contention.

The purchase-price was a bulk sum; the sale was not by the foot. The number of feet frontage was "more or less," and the defendant would get at least all the agreement called for in measurement, exclusive of the right of way. See *Wilson Lumber Co.* v. *Simpson*, 22 O.L.R. 452.

Apart from the correspondence between the solicitors, I find that the plaintiff Alfred Jewer saw the defendant on the 19th December, 1911, and told him in substance that he would not comply with the requisition as to those rights of way, and that the defendant could "take the property or leave it," and that the defendant then said that he would not take the property subject to the right of way. Nothing was then said about abatement of price. The defendant, by his solicitor, registered the agreement on the 21st December, 1911. The plaintiffs did not know of this, and again offered the property for sale; and on the 3rd January, 1912, the plaintiffs accepted the offer of Robert Garbutt, and are bound to convey to him. Garbutt and the

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plaintiffs both acted in good faith—Garbutt had no notice of the defendant's offer. Garbutt is not a party to this action. It is clear from the conduct of the defendant that, had not the plaintiffs cancelled the offer and acceptance as they did, the plaintiffs would have been involved in expensive and protracted litigation.

The plaintiffs are entitled to judgment vacating and discharging the agreement mentioned in the statement of claim, registered in the registry office of the western division of the city of Toronto, as No. 19076 D., on the 21st December, 1911, and to a declaration that on that date the defendant had no right, title, or interest under the said agreement in the said property.

A mandatory order will go, compelling the defendant to execute a release or discharge of the said agreement, so far as it affects the land in question and forms a cloud upon the title thereto.

The judgment will be with costs, payable by the defendant to the plaintiffs. The $50 deposit may be applied by the plaintiffs upon the costs payable by the defendant.

The defendant's counterclaim will be dismissed with costs.

Judgment for plaintiff.

Re SWAYZIE.

Ontario High Court, Riddell, J. January 30, 1912.

ONT.

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Jan. 30.

EXECUTORS AND ADMINISTRATORS (§ IV A 4—90)—DEBTS INCURRED FOR MAINTENANCE—FUNERAL EXPENSES.

Where the effect of a will is to give to the testator's widow her maintenance for life out of the whole estate, and debts are incurred by her for maintenance on default of the executors to furnish her with sufficient means to provide for herself the amount of such debts must be reimbursed to her estate by her husband's estate as being maintenance but the expenses of the widow's funeral are not maintenance and must be paid for out of her own estate.

2. WILLS (§ III B—80)—MISNOMER IN DEVISEE—IDENTITY.

A misnomer of a church society will not defeat a devise or bequest to it, if its identity is otherwise sufficiently certain.

[*Tyrrell* v. *Senior*, 20 O.R. 156; and see Theobald on Wills, 7th ed., page 268.]

Statement

MOTION by the executors of the will of William Swayzie, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the construction of the will.

Casey Wood, for the executors.

E. C. Cattanach, for the Official Guardian representing the heirs and next of kin.

George Kerr, for the Methodist Church.

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RE SWAYZIE.

Riddell, J.

RIDDELL, J.:—The testator made his will in 1903, whereby, after revoking all former wills, etc., and directing his debts to be paid, he made the following provisions:—

1st. I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say: I give devise and bequeath to my wife Sarah Swayzie all my real and personal effects also my money, mortgages, bank accounts, notes or any other real and personal effects that I may die possessed of (*sic*) for her sole and only use forever, subject nevertheless to the consent and advice of my executors hereinafter named.

2nd. My will is further: If the interest on my real and personal effects be not sufficient for the maintenance of my wife Sarah Swayzie then I instruct my executors to take sufficient of the principal money to meet her needs.

3rd. After the decease of my wife Sarah Swayzie all the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto the King Street Methodist Church of Ingersoll to be held by the said King Street Methodist Church in trust to be disposed of as follows, the proceeds to be paid, expended and applied for the benefit of the Woman's Home Missionary Society of the King Street Church, Ingersoll, and for no other purpose only for home missions exclusively, my executors to co-operate with the Woman's Home Missions of King Street Church, Ingersoll, to assist said Woman's Home Missionary Society to divide said proceeds.

4th. Should it be deemed necessary to sell the house and lot on King street west before the decease of my wife, my executors hereinafter named may determine.

I give devise and bequeath all my household furniture and wearing apparel, bedding and so forth to my wife for her sole and only use forever.

All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my wife Sarah Swayzie.

And I nominate and appoint my wife Sarah Swayzie my executrix and N. H. Bartley, of Ingersoll, my executor of this my last will and testament.

N. H. Bartley has been relieved of the trust, and R. T. Agar appointed in his stead.

Sarah Swayzie died on the 19th January, 1912, intestate, leaving heirs and next of kin.

There is on hand in the estate $3,382.39.

Cash on hand	$869.19
Real estate	1,000.00
Chattels	200.00
Securities, notes, and interest	1,313.20
	$3,382.39

A motion is made to determine the meaning of the will and its effect. I ordered the Official Guardian to represent all heirs and next of kin.

Bearing in mind the two rules for the interpretation of a will of moment upon this inquiry, I do not think there is any real difficulty, although it was quite proper to ask a judicial interpretation. The two rules referred to are: 1. Where two clauses in a will are contradictory and inconsistent, the latter *primâ facie* prevails. 2. The will should be read as a whole, and effect should be given so far as possible to all parts thereof.

It is plain that the clause giving the "household furniture and wearing apparel bedding and so forth" to the wife, is to be given full effect to—the "and so forth" referring to the beds, etc., used with or as part of the property specifically bequeathed. These, then, belong to Sarah Swayzie's estate.

Then clause 1 is modified by clauses 2 and 3. The last part of clause 2 shews that the executors are really to have the management of the estate.

The effect of these three clauses is, that Sarah Swayzie is to have her maintenance out of the whole estate for her lifetime—and, if the revenue should not be sufficient for that purpose, the corpus was to be cut in upon. But, after her death, everything was to go to the Society, except the articles spoken of later in the will.

The residuary clause is, of course, nugatory, there being nothing left undisposed of.

Then as to the debts of Sarah Swayzie, it is obvious that, if the estate did not furnish her sufficient to pay her way, the amount of the debts she incurred for maintenance must be paid to her estate as being maintenance.

Funeral expenses are not maintenance—these must be paid for out of her own estate, not out of the estate of her deceased husband.

It appears that there is no such society as "the Woman's Home Missionary Society of the King Street Church, Ingersoll." but there is a Women's Missionary Society of the Methodist Church, and this Society has an "Auxiliary" in the King Street Methodist Church, Ingersoll. This "Auxiliary" is the Society meant—and the executor has both the right and the duty of assisting the Auxiliary to divide the bequest.

Order accordingly. Costs out of the estate.

Order accordingly.

B.C.

C. A.
1912

June 4.

LAWRENCE v. PRINGLE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 4, 1912.

1. CONTRACTS (§ I D 4—61)—ACCEPTANCE OF OPTION TO PURCHASE LANDS—"ACCEPTANCE OF OPTION"—"EXERCISE OF OPTION."

The phrases "acceptance of option" and "exercise of option" as used in a written agreement giving an option to purchase land, mean one and the same thing, that is, the time when an election is made to buy upon the terms specified.

2. CONTRACTS (§ I D 4—62*b*)—OPTION TO PURCHASE LAND—TIME AS ESSENCE OF FAILURE TO MAKE PAYMENT OR "EXERCISING THE OPTION."

Where, in an option to purchase land, time was declared to be of the essence of the agreement, which stipulated that 25% of the purchase money should be paid at the time of "exercising the option," the failure to make such payment when an election was made to buy upon the terms stated in the option, will permit the owner of the property to treat the agreement as broken and ended.

Statement

THE plaintiffs obtained from the defendant a written option to buy her land, paying a small consideration therefor. They were to have until the 15th May, afterwards extended to the 15th November, to "accept the option" which might be done by letter. They posted the letter of "acceptance" in time, but the option agreement provided that 25% of the purchase-money should be paid at the time of "exercising the option." This sum was not paid or tendered either at the time of "acceptance" by letter, or on or before the 15th of November. Time was declared to be of the essence of the agreement, and the defendant contended that failure to make this initial payment entitled her to put an end to the transaction.

The appeal was dismissed, IRVING, J.A., dissenting.

W. B. A. Ritchie, K.C., for appellant.

F. J. Fulton, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The agreement is inartistically drawn, and some confusion arises by reason of the phrase "acceptance of option" being sometimes used, and other times the phrase "exercise of option." It is, however, clear to my mind that "acceptance" of the option means the election of the plaintiff to buy the property on the terms specified, and that "exercising the option" means the same thing. When that election was made, the option was "exercised" and the 25% then became payable, and in view of the time clause in the agreement, it does not appear to me to matter whether payment of this money was an essential part of the "exercising of the option" or was merely an agreement to pay it at that time. If it were to be part of the exercising of the option then clearly the option was not exercised in accordance with the agreement. If it were an independent

term in the agreement, then it was not complied with, and thus gave the defendant the right which he exercised to treat the agreement as broken and ended.

Mr. *Ritchie* contended that the whole context of the agreement points to the conclusion that the "exercising of the option" was intended by the parties to mean the final closing after title had been settled. If that were the true construction, then the plaintiff had the right to elect twice, first, on or before November 15th, and again within the thirty days after that date, that is to say, within the period allowed for searching the title. I am unable to take that view of the intention of the parties as manifested by the writing, and would therefore dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal. The letter of 29th November, 1910, seems to me to make it unnecessary for us to discuss the sufficiency of the tender made to Mrs. Pringle on the 12th December.

The agreement is not, at first sight, clear, but after the wording has been studied for some time the difficulties fade away.

The word "deposit" in the agreement seems to me to be the $100, paid for the option, and afterwards to be accepted as part payment of the consideration money.

The 25% would go back to the purchasers on rescission by the vendor, as of right; there would therefore, be no object in the draftsman providing for its return. For this reason, I take it, that he was dealing with the $100. The only objection to that, is that Mrs. Pringle would get nothing for the option, but why should she if she cannot make a title to the property.

The agreement speaks of the "option being open for acceptance," and also of "exercising the option." These different term seem to me to denote two different things. The option is to be, or may be, accepted by letter, and thirty days is given from the mailing of the letter.

By the agreement, if the option is exercised, the $100 is to be regarded as payment on account of the purchase-money; 25% of the purchase-money is to become payable and a new agreement for the sale of the lands is to be drawn up. By clause 7, thirty days for examining the title is given; those thirty days date from the mailing of the letter.

In my opinion, the plaintiffs were not called upon to pay the 25% until the thirty days given to examine the title had expired. My conclusion is based on the following grounds:—(1) There are two different expressions used. (2) There being no place or mode appointed for the payment of the 25%, it would be necessary for the plaintiff to make the tender to the defendant personally, and not by cheque in a letter.

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Irving, J.A.

So we have these anomalous conditions. The acceptance may be by letter, but the payment which according to Mr. Fulton ought to be simultaneous with, or within a reasonable time (*Brighty* v. *Norton*, 32 L.J.Q.B. 38), of the acceptance, would be personal: *Jones* v. *Wilson*, 4 B. & S. 442; *Massey* v. *Sladen*, L. R. 4 Ex. 13, 38 L.J. Ex. 34. The agreement should be read most strongly against the vendor: see cases, Fry on Specific Performance, 5th ed., p. 586, Dart on Vendors and Purchasers, 7th ed., p. 116.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the interpretation placed upon the option by the learned trial Judge, and would dismiss the appeal.

Appeal dismissed; IRVING, J.A. *dissenting.*

CONNORS v. REID.

ONT.
D. C.
April 22.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Sutherland, JJ. April 22, 1912.

1. MALICIOUS PROSECUTION (§ II B—16)—WANT OF PROBABLE CAUSE—NECESSITY OF FORMAL FINDING BY JURY.

In an action for malicious prosecution, a formal finding by the Judge of absence of reasonable and probable cause may be unnecessary, if such a finding can be necessarily inferred from what took place at the trial.

2. NEW TRIAL (§ II—8)—CHARGE OF JUDGE PREJUDICIALLY TO DEFENDANT—INCREASING VERDICT—REDUCTION TO AMOUNT OF FORMER VERDICT.

Where, upon the second trial of an action with a jury, the charge of the trial Judge is such that it may have prejudiced the defendant as to the amount of damages, and larger damages have been awarded than at the former trial, a new trial may be refused, upon the plaintiff consenting to a reduction of the damages to the amount awarded at the former trial.

Statement

APPEAL by the defendant from the judgment of the Judge of the County Court of the County of Ontario, upon the second trial of the action, upon the verdict of a jury, in favour of the plaintiff, for the recovery of $250 damages for malicious prosecution.

At the first trial, there was a verdict for the plaintiff for $175. This was set aside by a Divisional Court and a new trial ordered: 25 O.L.R. 44, 3 O.W.N. 209.

The defendant now asked to have the second verdict and judgment set aside and for a third trial.

The appeal was allowed.

L. F. Heyd, K.C., for the defendant.

J. M. Ferguson, for the plaintiff.

Britton, J.

The judgment of the Court was delivered by BRITTON, J.:—The only points for consideration in this case are: (1) was there a finding of the trial Judge of absence of reasonable and probable cause? and (2) was the charge to the jury so objectionable as to entitle the defendant to a new trial?

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Britton, J.

As to the first: the learned Judge in a roundabout way did in fact tell the jury that, if they found that the defendant did not himself believe, at the time he laid the information against the plaintiff, that the plaintiff stole his milk, he, the Judge, would decide that there was an absence of reasonable and probable cause; so the jury, upon their finding against the defendant's belief in the plaintiff's guilt, could go on and assess the damages. As the jury assessed the damages, it must be assumed that the jury, understanding the charge, found upon the evidence that the defendant did not believe in the plaintiff's guilt. There was no necessity of any formal announcement by the Judge of his finding an absence of reasonable and probable cause.

As to the second point: no doubt, the learned Judge in his charge quite improperly referred to the defendant as a wealthy farmer and to the plaintiff as a poor woman, etc. This could, of course, only affect the damages. It would naturally prejudice the defendant as to amount. It must be borne in mind that there was a former trial, and at that the damages were assessed at $175. It is not an unusual thing, where, in an action for damages such as the present, a new trial is granted, to have the damages increased. The standing of the parties, apart from the circumstances of the case and from the evidence given, must have been very well known to the jury, but the charge was improper, and the defendant may have been prejudiced.

If the plaintiff consents to reduce the damages to $175, being the amount of the former verdict, I would dismiss the appeal without costs. If not, there should be a new trial; and, in that event, the costs of the appeal will be costs to the defendant in any event.

Judgment accordingly.

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April 20.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. April 20, 1912.

1. COURTS (§ II B—181)—TERMS—STATUTORY DATE FOR COMMENCEMENT—ADJOURNED DATE FOR TRYING.

The dates fixed by the Surrogate Courts Act, 10 Edw. VII. (Ont.), ch. 31, sec. 29 (1), for the commencement of the four annual sittings of the Court for the hearing of contentious business must be adhered to; but there is no provision that these sittings shall end on any fixed dates, and it is, therefore, not improper for the Surrogate Judge to appoint for the trial of a contentious case a day subsequent to the statutory date for the commencement of a sittings, as part of the sittings commencing on that date.

2. ESTOPPEL (§ III J 3—130)—COUNSEL APPEARING AT AN IRREGULAR TRIAL—WAIVER OF IRREGULARITY.

The trial of a contentious case in a Surrogate Court upon a date upon which, under the Surrogate Courts Act, 10 Edw. VII. (Ont.),

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ch. 31, sec. 29 (1), such a case cannot properly be tried, is not a nullity, but an irregularity only, and one who, by his counsel, appears at the trial, cross-examines witnesses, and argues as to costs, will be held to have waived the irregularity. (*Per* Riddell, J.)

Statement

APPEAL by the defendant W. H. Rhora from the judgment of the Judge of the Surrogate Court of the County of Haldimand directing the issue of letters probate of the will of Menno Rhora, deceased.

J. E. Jones, for the appellant.

C. A. Moss, for the plaintiff.

Riddell, J.

RIDDELL, J.:—The Judge of the Surrogate Court of the County of Haldimand sat at Cayuga on the 9th February, 1911, to try this action. The plaintiff was applying for letters probate of the will of the late Menno Rhora; the defendant W. H. Rhora had filed a caveat and defended the action upon the usual grounds, incapacity, undue influence, etc.; one of his co-defendants admitted the validity of the will; M. E. Rhora did not.

At the opening of Court, and before the trial proceeded, counsel for the defendant W. H. Rhora objected to proceed—alleging several grounds, amongst them that the Court had no power to sit at the time.

The objection was overruled, and the trial proceeded, counsel for the defendant W. H. Rhora, cross-examining witnesses called for the plaintiff, at the close of the plaintiff's case renewed his objection, and, after consultation with counsel for M. E. Rhora, announced that he would call no witnesses, but argued that the plaintiff should pay the costs. His Honour decreed probate of the will, with costs against W. H. Rhora, but no costs against M. E. Rhora or the submiting co-defendant.

W. H. Rhora now appeals.

It is not pretended that any injustice has been done, or that there is any ground for the appeal, unless the objection to the Court sitting as and when it did is fatal.

The statute in force was the Surrogate Courts Act, 1910, 10 Edw. VII. ch. 31, which by sec. 29 (1) provided that "there shall be four sittings in each year for hearing and determining matters and causes in contentious cases and business of a contentious nature, which, except in the County of York, shall commence on the second Monday in January and the first Monday in April, July, and October."

We have nothing to indicate that the Court sat on the second Monday in January, *i.e.*, the 8th January—the date for the trial of the action was fixed as the 12th January, apparently without objection, although that is disputed most vigorously. I do not think it is of the slightest importance.

By sec. 30 of the Act, it is provided that "with respect to all matters within the jurisdiction of the Surrogate Courts,

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such Courts and the Judges and officers thereof respectively shall have and may exercise all the powers of the High Court and of the Judges and officers thereof."

"The Judges of the High Court . . . shall appoint the days upon which the . . . sittings for trials shall be held:" Con. Rule 113. And I see no reason why the Judge of the Surrogate Court has not the power to appoint a day for the sitting for the trial of cases in his Court. True, the statute fixes four sittings in each year, to begin upon a fixed date; but there is no provision that these sittings shall end at any particular date; and I see no objection whatever to a Surrogate Court Judge setting a particular day in February as part of the sittings beginning on the second Monday in January.

I cannot think that the trial was a nullity; if an irregularity, the act of the present appellant in appearing at the trial, cross-examining witnesses, and arguing as to costs, would be a waiver of the irregularity.

The appeal should be dismissed with costs.

Nothing I have said should be considered an approval of a disregard of the express directions of the statute that the sittings "shall commence" at certain fixed dates.

Falconbridge, C.J., and Britton, J., agreed in the result.

Falconbridge, C.J. Britton, J.

Appeal dismissed.

LEMIEUX v. SEMINARY OF ST. SULPICE.

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April 29.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. April 29, 1912.

1. BROKERS (§ II B—11)—REAL ESTATE AGENT—COMPENSATION CLAIMED AGAINST BOTH PARTIES.

A real estate agent employed by a prospective purchaser for the purpose of buying a property is not, in the absence of a special contract to that effect, entitled, after the sale has been concluded, to claim a commission on the purchase price from the vendor who did not retain his services, any custom obtaining amongst real estate brokers notwithstanding.

[*Carroll* v. *O'Shea*, 18 N.Y. Supp. 146, approved.]

Statement

THIS was an appeal from the judgment of the Superior Court, Tellier, J., dismissing with costs plaintiff-appellant's action to recover the sum of $2,875.00 commission in connection with a land sale and purchase.

The appeal was dismissed.

Argument

G. Désaulniers, K.C., for appellant:—Appellant was the determining cause of the sale and devoted six months' time to bring it about and according to the custom of the trade is entitled to a commission of two and a half per cent. from the vendor, even in the absence of proof of direct mandate. Without appellant's

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intervention and services the seminary would never have sold their property. And the seminary knew that appellant was acting as a real estate agent since he had disclosed the name of the purchasers. In any event the record discloses a commencement of proof in writing sufficient to allow appellant to complete this by parol evidence and this proof is to be found in the letter of offer and the seminary's letter of information: *Roy* v. *Gibeau*, 16 R.L. 411; *Hurteau* v. *Bergeron*, 4 Rev. de Jur. 9.

Argument

V. Cusson, for respondents:—Parol evidence of a contract of mandate and of a promise to pay in a non-commercial matter as in the present case is inadmissible. And even if the transaction were commercial as far as the appellant is concerned it is certainly not commercial as against the respondents: Sirey, 1863-1-29; *ib.*, 1875-1-365; *ib.*, 1878-2-247; Dalloz Pér., 1893-2-331; 30 Demolombe, No. 104; 8 Aubry and Rau, No. 326; *Trudeau* v. *Rochon*, 8 Que.S.C. 387; *Baillie* v. *Nolton*, 12 Que.S.C. 534; *Angers* v. *Dillon*, 15 Que.S.C. 438; *Metivier* v. *Levinson*, 13 Que. S.C. 41. Now the writing discloses agency as between appellant and the purchasers and this contract makes no mention of commission. As to the usage of trade, the evidence is contradictory, but, even admitting it to be proved, this cannot bind other persons than real estate agents in the absence of conclusive proof that the public generally admitted and recognized this usage.

Désaulniers, in reply.

Judgment

The judgment of the Court was rendered by TRENHOLME, J. Mr. Justice CROSS, J., also handed down an opinion, concurring in the result.

Trenholme, J.

TRENHOLME, J.:—The appellant in this case is a real estate agent. He sued the seminary for a commission on a sale made by the seminary to the firm of Glickman & Glickman, a clothing manufacturing company. The trial Judge has dismissed the action on the ground that he has not established that he was entitled to a commission.

After a number of interviews between appellant, Lemieux, and Mr. Hebert, the procurator, or attorney, of the seminary, Lemieux sent the following letter to this gentleman:—

> Montréal, octobre 26, 1910.
>
> Je suis autorisé par mes clients de vous offrir, $115,000 pour votre propriété située sur la rue Ste. Catherine ouest, ayant un front de 84 pieds . . . etc.

Lemieux, therefore, writes out this offer to purchase and sends it to Mr. Hebert, the procurator of the seminary, and he says he is authorized to do so by his clients. Mr. Hebert, authorized by his superiors, accepts it, and so do the principals of Mr. Lemieux, Messrs. Glickman & Glickman.

So we have here the complete contract between the parties inaugurated by Lemieux's offer as agent, duly authorized by his

clients, the Glickmans. A deed of sale was passed accordingly. And not a word has been said about commission.

After everything is over Mr. Lemieux turns to the seminary and says: "I want my commission," a commission amounting to $2,800 and some odd dollars. Mr. Hebert answers:—

> I never employed you. I never authorized you to sell my property; I simply accepted, authorized by my principals, the offer made to us by you acting as agent for the Glickmans. And we delayed the sale of it a long time in order to find another property that would suit us.

Now the appellant, who is claiming his commission, must found his right thereto upon this contract. He contends that by the custom of the trade in the real estate business the commission is due "*de plano*" by the vendor. He takes the ground that when a person accepts from a proposed purchaser acting through an agent an offer to purchase, then the agent becomes entitled "*de plano*" to his commission. We cannot accept this doctrine. Otherwise, if an agent called at a private house and said to the owner, "I offer you $50,000 for your property on behalf of John Smith," and the owner answered, "I accept his offer," then the owner would have to pay the agent a commission.

In order to be entitled to a commission the agent must be employed by the vendor, he must have been authorized by the vendor to make a sale.

In the present case Lemieux had no authorization whatsoever from the seminary. He came to Mr. Hebert as the agent of the purchaser and said this: "Je suis autorisé par mes clients . . ." He appears as the attorney of the purchaser during the whole transaction, he represents the interests of the purchaser and acts in this capacity throughout. And under these circumstances he claims a commission from the vendor!

The custom as alleged by plaintiff is not established. Mr. Cradock Simpson, who is one of the best known real estate agents in Montreal, says:—

> We invariably stipulate in our contracts that the acceptance of the offer is subject to the payment of a commission.

We are, therefore, of opinion on this ground that there is no ground of action for the recovery of the commission.

Finally, the appellant claims there is a commencement of proof in writing in his favour.

Now the contract in this case makes no mention of a commission nor was any such mention made in the *pour parlers* between plaintiffs and Mr. Hebert. Plaintiff contends that the letter above referred to contains this commencement *de preuve*. Not at all, quite the contrary. There is no commencement *de preuve* therein to shew that it ever was intended that a commission should be paid, and we do not find therein anything which

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could justify us in referring the case back to the Superior Court to allow the plaintiff more latitude in his parol evidence.

We, therefore, think it our duty to confirm the judgment of the Court below.

CROSS, J.:—The appellant is a real estate broker. He discovered certain persons who desired to buy a piece of the respondents' land, and waited upon the respondents to ascertain if they would sell. The respondents were having a school carried on on the land and they answered that they would not sell unless they secured another site on which to carry on the school.

The appellant found another site for the school and the respondents bought it. The appellant, thereupon, again sought to get the respondents to sell the land which they had previously refused to sell. After some interviews had taken place the respondents agreed to accept a price proposed by the appellant. The preliminary contract took the form of a written offer addressed by the appellants to the respondents' procurator, which opens with the words: *Je suis autorisé par mes clients de vous offrir,*" etc.

At the foot of the original of the offer the respondents' procurator wrote the words, "*L'offre est acceptée,*" and signed for the respondents. The respondents wrote to the appellant asking him the names of the purchasers, and the purchasers came forward and confirmed the transaction. The formal deed was signed at a latter date.

By this action the appellant seeks recovery from the respondents—the sellers—of a commission upon the price of sale. The defence is that the respondents did not engage the services of the appellant.

Upon the facts above recited, it is clear that the defendants did not request or engage the services of the appellant. The testimony of their procurator in that sense is confirmed by the wording of the offer, which the plaintiff made to them on behalf of other persons.

The appellant, nevertheless, contends that the respondents are liable, upon the grounds that they agreed to a sale proposed by him and that the custom is that the commission is payable by the seller out of the price.

It is a startling thing if it be true to say that a landowner who sits at home, contenting himself with simply answering the proposals which an agent puts forward, until, finally, upon an acceptable offer being made, he answers, "I accept that offer," thereby subjects himself to liability to pay the agent for his services for bringing about the sale.

If it be true that he does subject himself to such a liability, it is clear that he does not get the price offered to him, but only that price less a commission.

It would also follow that the buyer who has employed the broker would, in the absence of a different agreement, stand free of liability to pay for the services which he had himself engaged, in other words: that a buyer is not expected to pay his agent's charge otherwise than by taking it out of the price agreed to be paid to the seller. Either that would follow or the broker would be entitled to collect a commission from the seller and another commission from the buyer.

In the terms of article 1735 of the Code:—

> A broker is one who exercises the trade and calling of negotiating between parties the business of buying and selling or any other lawful transactions. He may be the mandatory of both parties and bind both by his acts in the business for which he is engaged by them.

In general, a person cannot, at one and the same time, be the mandatory of two persons to effect a contract between them. That is both a legal and an intellectual impossibility. With a person who carries on business as a sales-broker, however, it will naturally happen that an intending seller will give him a price at or above which he is willing to sell a commodity, and that an intending buyer will give him a price at or below which he is willing to buy the same commodity.

In such a case, the broker, acting as much for the seller as the buyer, may be the agent of both parties and explain the proposal of each one to the other and bring them together into a contract with each other, because, having in advance, the announced consent of each, his function is merely declaratory of such consent. It is that peculiar relation which makes it possible for the particular class of mandatories called brokers to be the agents of both parties, but apart from such a special relation dependent upon a specific consent of each party, it holds true that a person cannot at one and the same time represent both of two persons adverse in interest to one another so as to make a contract between them.

The legal relation is described in a modern treatise as follows:—

> A broker is primarily the agent of the party by whom he is originally employed, and he becomes the agent of the other party only when the bargain or contract is definitely settled as to its terms between the principals, in which case he may act as the agent of both parties in making the memorandum of sale. A broker cannot act as the agent of both parties when their interests are conflicting. Thus a broker employed to sell cannot act at the same time as the agent of the purchaser, for, in that case, the duty he owes to one principal to sell for the best price obtainable, is essentially inconsistent with and repugnant to the duty he owes to the other to buy at the lowest possible price, and there would necessarily be danger that the rights of one principal would be sacrificed to promote the interests of the other. (Am. and Eng. Enc. of Law, 2nd ed., vol. Brokers, p. 966.)

And further on, in development of the legal consequences, it is said in the same treatise:—

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> A broker, to be entitled to commissions, must be actually employed by the principal as broker. (*Ib.*, p. 970.)

And in further amplification it is said:—

> As has already been stated, a broker cannot act as the agent of both parties, when their interests are adverse, without their knowledge and consent . . . It is well settled that when the double agency is unknown to either party, the broker cannot recover from both; that is, he cannot enforce the payment of commissions from the party ignorant of his double employment, even upon an express promise. . . . Nor is evidence of a custom for brokers in such cases to claim commissions from both parties admissible in favour of the broker, such custom being invalid as against public policy. (*Ib.*, p. 984.)

And in a note, the case of *Carroll* v. *O'Shea*, 18 N.Y. Supp. 146, is cited as being a holding that a "broker, employed by the purchaser only, has no right to claim commissions from the seller."

The above stated propositions, taken from English law writers, are quite in accord with our law. The formation of any contract must necessarily be accomplished by a meeting of the wills of two parties, and the process of approach to that meeting or mutuality of consent cannot, in the nature of things, proceed through the agency of one intermediary.

While it is true, as declared in the Code, that a broker may be the agent of both parties, one can accordingly readily see that it is only to a very limited extent that he can thus be the agent of both parties. He cannot be the agent of both buyer and seller where their interests conflict, as in settling the price, but, as stated in Benjamin on Sale (7th ed., p. 284), "as soon as the bargain is struck, he is, as a general rule, the agent of both parties to make and sign a memorandum of the terms." Reference may also be made to Blackburn on Sale (2nd ed., p. 78).

Now, upon the facts above stated, the services rendered by the appellant in this action and which brought about the sale were rendered to the buyers and not to the defendants.

While it was legally possible within the narrow limits above indicated to have been agent at the same time both for the plaintiffs and the defendants, that is to say, to see that the preliminary contract was put in proper form, it happens that he did not act for the defendants in formulating the contract, but, on the contrary, he put it in the form of a proposal to the defendants and the defendants formulated their own acceptance. It thus appears that the plaintiff did not at any stage of the matter really or even professedly act for the defendants. He acted for one party, but not for both.

Now, as regards the effect of the alleged custom, it is true that Mr. Laflamme has testified that the custom of the Montreal real estate market is as alleged by the plaintiff. The only other

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real estate broker who gave evidence upon the matter was Mr. Simpson. His testimony does not agree with that of Mr. Laflamme, but is to the effect that when he brings about a sale, at the instance of a buyer-customer, he does not feel that he can exact a commission from the seller unless the seller has agreed in advance to be chargeable with it. The alleged custom is consequently not satisfactorily proven, but even taking it as proved, it would involve the consequence that a person could be subjected to the obligation to pay for services not requested by him and in fact rendered to another. As above pointed out, it is laid down that the services for which a broker may charge must have been rendered pursuant to employment. They are, in fact, treated in the Code as a form of lease of work. To subject a different party to liability to pay for them would vary the nature of the legal relation of mandatory to mandator. Usage cannot so change the intrinsic character of the contract. *Mollett* v. *Robinson* (1875), L.R. 7 H.L. 802.

My conclusion is that the appeal should be dismissed.

Appeal dismissed.

PEACOCK v. CRANE.

Ontario High Court, Britton, J. April 29, 1912.

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H. C. J. 1912

April 29.

1. PRINCIPAL AND AGENT (§ II C—20)—SECRET COMMISSION ON PURCHASE OF MINE—RECOVERY OF SAME.

A secret arrangement between the respective agents of the vendor and of the purchaser of property that a price larger than that which the vendor is willing to accept shall be demanded from the purchaser, and that the surplus shall be paid by the vendor to the agents, will not be countenanced by the Court, and the purchaser, having paid the full price demanded without knowledge of the secret arrangement, is entitled to recover such surplus.

Statement

AN issue directed by an order.

McConnell and others, the owners of the Silver Cliff mine, desired to sell it for $500,000, and promised to pay the defendant Moore a commission of $25,000 should Moore sell it at the price named. The defendant Jeffery was associated with Moore. Moore and Jeffery became acquainted with the defendant Eames, who was the private secretary of the plaintiff Peacock, and they, Moore, Jeffery, and Eames, formed the plan of selling the Silver Cliff mine to the plaintiffs. Moore then saw the owners, and asked for a larger commission than $25,000. The owners refused to pay any larger sum. Moore then suggested that the owners should call the price $550,000, upon the distinct understanding and agreement that only $500,000 should be paid to them, and that, out of this sum of $500,000, a commission of $25,000 would be paid. An agreement was arrived at, between Moore and the owners, that Moore should have authority to sell

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the mine at $550,000, upon terms and conditions fully set out. This authority was limited to negotiating a sale to the plaintiffs upon the terms mentioned, and before the 12th June, 1909. The owners agreed that, upon payment to them of the whole sum of $550,000, $50,000, out of that sum, should be paid to Moore by way of additional commission. Eames represented to the plaintiffs, to the knowledge of Moore and Jeffery, and with their consent, if not at their suggestion, that the actual purchase-price of this mine was $550,000; and the plaintiffs bought at that price, without notice or knowledge of the secret arrangement between the vendors and Eames, Jeffery, and Moore, until after the completion of the purchase and the payment over of the purchase-money. Moore transferred his claim for commission to Eames, and notified the owners, who substituted Eames for Moore.

The vendors received all of the purchase-money except an amount rebated because of payment being made before due. The vendors paid the $25,000 commission, and they were afterwards ready to pay the $50,000; but, in the meantime, the plaintiffs had become aware of the real transaction, and they demanded the $50,000 from the vendors, alleging that they had been defrauded out of that amount by Eames, Moore, and Jeffery.

Another claimant for this so-called commission money appeared. The defendant Crane, on the 3rd August, 1909, notified the vendors that the commission of $50,000 was payable to him, as the sale had been negotiated by his, Crane's, representative. Later on, the defendants Crane, Otis, Morse, Bruce, and Cotton, commenced an action against the defendants Moore, Jeffery, Eames, and the vendors, to recover this commission.

The vendors in that action applied for leave to pay the money into Court. On the 24th January, 1910, an order was made by the Master in Chambers directing: (1) that the defendants the owners should be at liberty to pay into Court $50,000 and interest; (2) that, upon such payment in, that action would be dismissed as against the owners; (3 and 4) dealing with the matter of costs; and (5) that, without the issue of any new writ, Peacock and others, the purchasers, should proceed to the trial of an issue in which they should be plaintiffs, and the plaintiffs in that action, namely, Crane, Otis, Morse, Bruce, and Cotton, and Moore, Jeffery, and Eames should be defendants, to determine whether the plaintiffs in the issue, or some or one of them, or the defendants in the issue, or some or one of them, were or was entitled to the money to be paid into Court. Then followed directions as to proceedings which should be taken for the trial of that issue.

The money was paid into Court. The plaintiffs delivered their statement of claim, pursuant to the directions contained

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in the order. The defendants Jeffery and Moore, in their statement of defence, expressly admitted: (1) that the purchase-price of the mining property in question was $500,000, and that the sum of $50,000 was added to the same in order to provide for payment of a further $50,000 commission to the defendant Eames; (2) that they had satisfied themselves that the sum of $50,000 was improperly added to the true purchase-price, without the consent or knowledge of the plaintiffs; and these defendants made no claim as against the plaintiffs to the money standing in Court in this matter. The defendant Eames, by his statement of defence, simply denied all allegations in the statement of claim. He did not appear at the trial.

The defendants Crane, Otis, Morse, Bruce, and Cotton, in their statement of defence, alleged that the defendant Moore was their agent and instructed by them to endeavour to effect a sale of the Silver Cliff mine property to the plaintiffs. They alleged a bona fide sale by Moore to the plaintiffs, through Eames, the agent of the plaintiffs, and that the plaintiffs now held the $25,000, part of the commission, in trust for Moore, and desired to get the $50,000 for the purpose of benefitting themselves and Moore, and in fraud of those defendants.

The issue was tried before BRITTON, J., without a jury.

M. K. Cowan, K.C., and *G. H. Sedgewick*, for the plaintiffs.

I. F. Hellmuth, K.C., and *G. B. Balfour*, for the defendants Crane and Cotton.

Britton, J.

BRITTON, J.:—This is an action to determine whether the plaintiffs or any of them, or the defendants, or any of them, were, are, or is entitled to the sum of $50,000, and interest, paid into Court under the following circumstances.

Rinaldo McConnell, I. E. H. Barnett, I. W. Hennessy, and H. S. Hennessy, prior to the 12th June, 1909, were the owners of certain mining property called the Silver Cliff mine, situate in the Cobalt mining district, which property they desired to sell for the price of $500,000. These owners, after considerable negotiation, promised to pay to the defendant, John I. Moore, a commission of $25,000, should Moore sell this property for the owners at the price named. The defendant, Jeffery, was associated with Moore—although Moore was acting in his own name. Moore and Jeffery became acquainted with the defendant Albert H. Eames, who was the private secretary of the plaintiff A. B. Peacock, and they, Moore, Jeffery and Eames, formed the plan of selling the Silver Cliff mine to the plaintiffs. Moore then saw the owners of the property and stipulated for a larger commission than $25,000. The owners refused to pay any larger sum. Moore then suggested that the owners should call the price $550,000, upon the distinct understanding and agreement that only $500,000 should be paid to them, and that out of this sum

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of $500,000 a commission of $25,000 would be paid. Passing over details of the negotiation, an agreement was arrived at, between Moore and the owners, that Moore should have authority to sell the mine at $550,000 upon terms and conditions fully set out. This authority was limited to negotiating a sale to the plaintiffs, upon the terms mentioned, and the authority was limited in time to the 12th June, 1909. It was agreed that in the event of a sale, the owners would pay a commission out of the proceeds of the sale from time to time as received, as follows:—

On payment of 2nd instalment of purchase money..	$ 4,411.75
On payment of 3rd instalment of purchase money..	2,941.20
On payment of 4th instalment of purchase money..	5,882.35
And on last payment	11,764.70
Making the sum of	$25,000.00

which the owners were to pay out of the purchase price they were willing to accept; but the owners further agreed that upon payment to them of the whole sum of $550,000, $50,000 out of that sum should be paid to Moore by way of additional commission. Eames represented to the plaintiffs, to the knowledge of Moore and Jeffery, and with their consent if not at their suggestion, that the actual purchase price of this mine was $550,000, and the plaintiffs had no notice or knowledge of the secret arrangement between the vendor and Eames, Jeffery and Moore, until after the completion of the purchase by them, and the payment over of the purchase money.

The agreement for sale was completed as of the 12th June, 1909. Moore, on that day, or as of that day, signed a letter addressed to the vendors which read as follows:—

"Referring to the sale negotiated by me of the Silver Cliff property to Alexander B. Peacock, Daniel M. Clemson and Alvn C. Dinkey, I have transferred my claim to commission to Mr. Albert H. Eames, of Pittsburg, Pa., and I hereby request and authorize you to give him a commission note, instead of giving it to me, and I hereby release you from all claims of every nature and kind, which I may have against you in connection with the sale of the property, the same having been transferred to Mr. Eames before the completion of the sale."

Thereupon the vendors, by a letter dated 12th June, 1909, addressed to the defendant, Albert H. Eames, gave to him precisely the same authority as had been given to Moore; in fact, substituting Eames for Moore.

The purchase was completed. Payments were anticipated. The vendors received all of the purchase money except an amount rebated because of payment before due. The vendors paid the $25,000 commission—and they were afterwards ready to pay the $50,000, but, in the meantime, the plaintiffs had become

aware of the real transaction and they demanded the $50,000 from the vendors, claiming that they had been defrauded out of that amount by Eames, Moore and Jeffery.

Another claimant for this so-called commission money appeared. The defendant Crane, on the 3rd August, 1909, by his attorneys, Beament & Armstrong, notified the vendors that the commission of $50,000 was payable to him, as the sale had been negotiated by his, Crane's, representative. Later on the defendants Crane, Otis, Morse, Bruce and Cotton, commenced an action against the defendants Moore, Jeffery, Eames and the vendors, to recover this commission.

The vendors in that action applied for leave to pay the money into Court. On the 24th day of January, 1910, an order was made by the Master in Chambers, directing: (1) That the defendants in that action, McConnell, Barnett, I. W. Hennessy, and H. S. Hennessy, be at liberty to pay into Court the sum of $50,000 and interest thereon at the rate of three per cent. per annum, from the 10th day of September, 1909, until payment into Court; (2) upon such payment in, that action would be dismissed as against the defendants, vendors; 3 and 4 of that order deals with matters of costs; then (5) that, without the issue of any new writ, the said Peacock, Clemson and Dinkey, shall proceed to the trial of an issue in which they shall be plaintiffs, and the plaintiffs in that action, namely, Crane, Otis, Morse, Bruce and Cotton, and Moore, Jeffery and Eames, shall be defendants to determine whether the plaintiffs in said issue, or some or one of them, or the defendants in said issues, or some or one of them, are or is entitled to the money to be paid into Court.

Then followed directions as to proceedings which should be taken for the trial of that issue.

The money was paid into Court.

The plaintiffs delivered their statement of claim pursuant to the directions contained in the order mentioned.

The defendants, Jeffery and Moore, in their statement of defence, expressly admit: (1) that the purchase price of the mining property in question was $500,000, and that the sum of $50,000 was added to the same in order to provide for payment of a further $50,000 commission to the defendant Eames; (2) that they have satisfied themselves that the sum of $50,000 was improperly added to the true purchase price, without the consent or knowledge of the plaintiffs, and these defendants make no claim as against the plaintiffs of the money standing in Court in this matter. The defendant Eames, by his solicitors, filed a statement of defence, simply denying all allegations in the statement of claim.

He did not appear at the trial. He resides at Pittsburgh, in

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the State of Pennsylvania, and, according to the evidence of the plaintiff, Peacock is a defaulter to a large amount as to money of Peacock.

The defendants Crane, Otis, Moore, Bruce and Cotton, in their statement of defence, allege that the defendant Moore was their agent and instructed by them to endeavour to effect a sale of Silver Cliff mine property to the plaintiffs. They allege a *bonâ fide* sale by Moore to the plaintiffs through Eames the agent of plaintiffs, and that plaintiffs now hold the $25,000 part of the commission in trust for Moore, and desire to get the $50,000 for the purpose of benefiting themselves and Moore and in fraud of these defendants.

Upon the evidence, the allegations in the plaintiffs' statement of claim are substantially established. Angus W. Fraser was the solicitor for the owners of the mine, and acted for them in the transactions now under consideration. An option had been given to the defendant Otis to purchase—negotiations for this had been carried on by the defendant Moore. This option expired—the owners would not renew it. Then negotiations commenced between Mr. Fraser, acting for the owners, and Moore and Jeffery. About the 27th May, 1909, Moore made it plain that he had interested these plaintiffs—or Peacock, one of the plaintiffs—in this property, and as possible purchasers or a possible purchaser of it. It is quite clear that Moore's dealings were with Eames, the trusted private secretary of Peacock.

The scheme was devised as between Moore and Eames to have the nominal price changed from $500,000 to $550,000, with the object of getting $75,000 for themselves, instead of only $25,000, which the owners were willing to pay in case the sale was made at their price of $500,000.

The only inference that can be drawn from the clear and undisputed evidence is, that Moore and Eames, or Moore, Jeffery, and Eames, connived, so that Eames would get, either for himself, or for himself and the others, the additional $50,000 of the money of the plaintiffs. This was called commission. It was a secret commission. It was kept from the knowledge of the plaintiffs. The transaction would be bad enough, very bad, if paid by the vendors out of their own money to the agent of the purchasers, but what can be said in support of it by any one, when, by arrangement between the vendors and their agents, and the agent of the purchasers, a scheme was devised to get an additional large commission out of the purchasers?

The story is bluntly told by Eames in his letter of the 7th June, 1909, to the plaintiff Dinkey. Eames, after explaining the situation, as to the first payment, says: "If you care to go along, one-fifth interest will cost $15,000, plus about $2,000 for working capital. This is $5,000 more than we talked about. However, the owners had an offer of $550,000 spot cash, which

they would have accepted if they had not given this option to Mr. Moore; so do not think there is any use in trying to do better." This was a deliberate falsehood—not a particle of evidence that the vendors had any such offer. They did not ask more than $500,000. This case is a stronger one for the plaintiffs than was the case of *Myerscough* v. *Merrill*, 12 O.W.R. 399, and stronger than *Manitoba and North-West Land Corporation* v. *Davidson*, 34 Can. S.C.R. 255.

The evidence of the defendant Crane established that the defendants Otis, Morse, and Bruce have no right to any part of this money. The only claimants, therefore, against the plaintiffs, are Crane and Cotton, and they claim only because, as they allege, Moore and Jeffery were or Moore was their agents or agent. Crane and Cotton cannot claim money paid over through the fraud of their own agents. In so far as these agents by fraud assisted Eames in getting money from the plaintiffs, the defendants as principals are in no better position than the agents themselves. There was a fraud upon the plaintiffs. The rights of Crane and Cotton are no higher than the rights of Moore or Jeffery or Eames. In any view of the case, whatever rights, if any, Crane and Cotton can have to commission, it can only be as to the $25,000, or part of it. That sum was paid over by the vendors. That money is not in Court. This issue is as to the $50,000 obtained from the plaintiffs by calling it part of the purchase-money, but intending to get it, calling it commission. The rights of Crane and Cotton, if any, against the vendors are reserved by the order. This issue is not as to the $25,000, or any part of it, but only as to the $50,000, which never belonged to the vendors.

I find that the plaintiffs A. R. Peacock, D. M. Clemson, and A. C. Dinkey are entitled to the money paid into Court under the order of the Master in Chambers dated the 21st February, 1910, namely, the $50,000 and interest thereon, less the costs deducted thereout, and also interest allowed by the Court upon the money so paid in, and I find that the defendants, namely, A. F. Crane, Theodore E. Otis, Bryan K. Morse, F. G. Bruce, George A. Cotton, John J. Moore, W. H. Jeffery, and Albert H. Eames, are not, nor is any one of them, entitled to the said money or any part of it. Pursuant to the order above-mentioned, I order and direct that the costs of the issue and the trial thereof shall be paid by the defendants other than the defendants John J. Moore and W. H. Jeffery, in the said issue, to the plaintiffs in the said issue. No costs to be paid to or by the defendants Moore and Jeffery.

Judgment accordingly.

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H. C. J.

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April 18.

EASTON v. SINCLAIR.

Ontario High Court, Teetzel, J. April 18, 1912.

1. FRAUD AND DECEIT (§ IV—17)—RELIANCE OF PARTY DEFRAUDED—OVERMATCHING AND OVERREACHING BY ONE PARTY—CONTRACT RESCINDED—ABSENCE OF ACTUAL FRAUD.

Where there is great disparity in intelligence between two persons, and the one, without proper information and advice, is overmatched and overreached by the other, so that he enters into an improvident bargain, he is entitled to have the bargain rescinded, even though there be no actual fraud.

[*Waters* v. *Donnelly*, 9 O.R. 391, followed.]

Statement

ACTION for the rescission of a contract for the exchange of lands and for damages.

The transaction was rescinded and the property ordered to be retransferred.

E. H. Cleaver, for the plaintiff.

R. Wherry, for the defendant.

Teetzel, J.

TEETZEL, J.:—I have no difficulty in finding, upon the evidence and from the appearance and manner of the plaintiff in the witness-box, that the plaintiff is a man of a lower degree of intelligence than most men: he is unacquainted with and unskilled in business matters, and could easily be persuaded and deceived, and would be very much like wax in the hands of the witnesses Baker and Connors, who are exceedingly bright and intelligent men, employed by the defendant to sell vacant lots in a subdivision adjoining the city of Brandon.

The plaintiff owned six lots in a subdivision in the city of Calgary.

I also find that, in the exchange of properties between the plaintiff and defendant, negotiated and effected by Baker and Connors, the plaintiff was overmatched and overreached by them, without proper information and without advice; and that, as affecting the plaintiff, the exchange was a most improvident one; and, apart from any question of actual fraud, I think the facts bring the case within the principle of *Waters* v. *Donnelly* (1884), 9 O.R. 391, and that the plaintiff is entitled to have the transaction rescinded.

But I further find, upon the evidence, that many of the representations made to the plaintiff, both with respect to the plaintiff's property and to the property given in exchange for it, and as to Baker having been sent to the plaintiff by his brother Charles, as to all which representations I accept the plaintiff's evidence, were untrue and were made recklessly and without honest belief in their truth, and under such circumstances as entitle the plaintiff to relief under *Derry* v. *Peek* (1889), 14 App. Cas. 337; *White* v. *Sage* (1892), 19 A.R. 135; and other well-known cases in the same line.

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The transaction should be rescinded, and the property re-transferred; but, as the defendant had sold four of the lots obtained from the plaintiff before the plaintiff repudiated the exchange, it is impossible to place the parties in statu quo, so that the judgment will be in favour of the plaintiff awarding damages against the defendant, which I fix at $825; and the judgment will further direct that the defendant shall protect the plaintiff against any liability to the Alliance Investment Company under his agreement of the 1st August, 1911, to purchase the Calgary lots; and, upon payment of $825 and the costs of action to the plaintiff, he must transfer to the defendant the lots obtained from the defendant.

Judgment for plaintiff.

MacKISSOCK v. BLACK.

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May 31.

Manitoba King's Bench. Trial before Robson, J. May 31, 1912.

1. CONTRACTS (§ II D 4—188) — CONSTRUCTION — BUILDING CONTRACT — MEANING OF "ABOUT."

A statement in a written agreement by a contractor to build a house at a cost of "about" $3,500 is a mere expression of judgment and does not amount to a warranty or a condition limiting its cost to that figure.

2. CONTRACTS (§ II D 4—188)—BUILDING CONTRACTS—SUB-LETTING PORTION—PAYMENT OF FIXED ADVANCE ABOVE COST.

A written agreement to build a house at a fixed advance above the cost of material will not prevent the contractor sub-letting such portions of the work as are usually undertaken by special trades, and from recovering the cost thereof from the person for whom the work was done.

3. CONTRACTS (§ II D—186)—LIABILITY OF OWNER PAID BY CONTRACTOR TO SUB-CONTRACTOR FOR EXTRAS.

A contractor who agreed to build a house for a fixed advance above the cost of material cannot recover from the owner money paid a sub-contractor for extra work the contractor should have done.

4. ESTOPPEL (§ III E—72*a*)—BY TAKING POSSESSION AND OCCUPYING HOUSE —FROM DENYING LIABILITY FOR ALTERATIONS IN PLAN.

An owner who takes possession of and occupies a house upon its completion cannot escape payment for alterations made by the contractor because, in building, the contractor had departed from the owner's instructions or from the pattern of house he had indicated when making the contract for its erection.

Statement

ACTION to recover an amount claimed to be due plaintiffs on the erection of a house for defendant.

Judgment was entered for plaintiff for $313.12.

Messrs. *H. Phillipps* and *C. Blake*, for plaintiffs.

Messrs. *A. Monkman* and *J. B. Coyne*, for defendant.

Robson, J.

ROBSON, J.:—On 2nd May, 1911, plaintiffs addressed to defendant a writing as follows:—

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Winnipeg, Man., 2nd May, 1911.

Thos. B. Black, Esq., Winnipeg.

Dear Sir,—We agree to build for you house to be erected on your lot (a lot of your selection which we will secure for you) on the terms "of cost plus a fixed sum."

We estimate the cost of building the house, as shewn on the plans submitted to us, to be about three thousand five hundred dollars ($3,500.00) and a fixed sum payable to us in addition to the net cost of the building is to be five hundred dollars ($500.00).

This sum of $500.00 to include all plans and specifications, all office charges, and management, accident insurance policy, you to have access to our vouchers and payroll.

As a guarantee of good faith you are to pay us on receipt of this agreement a sum of seven hundred and fifty dollars ($750.00), receipt of which is hereby acknowledged.

Yours faithfully,

MacKISSOCK & THOMAS, LTD.

Per Peter MacKissock. (Seal)

Accepted: Thomas B. Black. (Seal)

Witness: J. Ogilvie.

The house to be ready by 1st Aug. 1911. P. MacK.

This offer was accepted by the defendant.

There were no paper plans submitted, but the parties had in mind as a model a house on Ruby street.

On June 5, 1911, defendant submitted a list of alterations.

Plaintiffs secured a lot approved by defendant and proceeded with the work.

A house was built and defendant took possession. The title to the lot is in the name of the plaintiff, Peter MacKissock, who holds it for the purpose of this transaction.

The present dispute is as to the amount payable by defendant to the plaintiff company.

The claim of the plaintiffs is as follows:—

Paid for lot	$1,608 05
Fire insurance	39 00
Loan company's charges	10 50
Solicitors' fees, etc.	35 50
Survey and permits	15 70
Sewer connections	31 50
Cost of building	5,475 82
Plaintiff's remuneration	500 00
	$7,716 07

Against this they credit defendant:—

Cash	$ 750 00	
Proceeds of mortgage	2,750 00	
Other land conveyed	3,000 00	
		6,500 00
		$1,216 07

The plaintiffs were to be paid on a basis of "cost plus a fixed sum." The question is, what did it cost plaintiffs to secure the lot and furnish the work and materials used in the erection of the building?

The estimate of cost at about $3,500 was given before the alterations were specified. Plaintiffs say the difference of nearly $2,000 was accounted for to some extent thereby. Defendant says that is impossible. It is my view that the estimate is not a condition limiting the plaintiffs as to amount, nor a warranty. It was merely an expression of plaintiffs' judgment.

But defendant says that the building did not cost $5,475.82. The trial was virtually a reference to ascertain what the building did cost.

Plaintiffs make up the amount as follows:—

Plastering	$ 338 00
Heating	530 00
Painting	390 00
Brick mantel	55 00
Plumbing (admitted)	260 00
Plumbing extras (denied)	41 98
Hardware	167 98
Lumber	1,776 66
Lime, gravel, sand, brick, etc	236 10
Wages	1,540 30
Smaller items admitted	139 90
	$5,475 82

Except as stated, defendant contests these items.

The items in respect of plastering, heating, painting and brick mantel represent the amounts incurred by the plaintiffs to sub-contractors. Defendant says that each of these items includes a sub-contractor's profit and contends that there was no right to sublet any part of the work, as it means that he is paying two sets of profit, the plaintiffs' $500 and the sub-contractor's profit. My view is that this question simply depends on what was reasonable in the circumstances. Defendant was at the time about to leave Winnipeg for a period. He entrusted to plaintiffs the securing of a lot and the undertaking and completion of every detail of the work. I think the plaintiffs were quite entitled to sublet the branches of the work usually undertaken by special trades. The evidence of defendant's own witnesses supports this idea. So, if the sub-contracts were entered into in good faith plaintiffs would be entitled to recover amounts paid. A sub-contract at an unreasonable price would be evidence of want of good faith or, in short, negligence. While it may be suggested that in some instances the work let to sub-contractors might have been accomplished at less cost, there was no evidence to convince me of any want of good faith or even carelessness of plaintiffs in letting the sub-contracts in question.

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On this basis I allow the items of plastering, $338, and heating, $530.

Plaintiffs paid the $390 for the painting. There was evidence entitled to respect that the exterior job was not three-coat work as charged for. Yet it was said to be impossible to tell with certainty. I cannot hold that the painter who did the work was untruthful in saying that it was done according to contract. While not entirely satisfied, I do not think I would be justified in disallowing this item.

The item, brick mantel, $55, I allow.

The plumbing sub-contract of $260 was not contested, but the item of $41.88 extras was strongly opposed. The wording of the written tender by the plumber to plaintiffs was very general and would include everything ordinarily required. If the plaintiffs paid the plumbers extra for work which they were already bound to do, they must bear the loss themselves. There was a suggestion of an additional hot water appurtenance, but I get nothing specific regarding it. If it was expected to hold defendant for this bill of extras there should have been some evidence in explanation upon which one could act and arrive intelligently at the amount. The only evidence of that kind was adduced by the defence and supports a $2 item as an extra. The plumbing items are allowed at $262.

The item hardware is charged at $167.98. It is sworn on behalf of plaintiffs that this material to that value went into the building. This general statement is, in view of the evidence of John Farquhar, open to doubt. Nails for the building, which are charged at $42.30, he says should not exceed $14. Evidently $21 will be ample, and I allow that sum. There will be a deduction of $7.20 for four sets Caldwell balances not supplied. The item for paper is disputed, but I will not interfere with it. The hardware item is allowed at $139.48.

The charge for lumber, $1,776.66, is open to question. Plaintiffs' employees swear that lumber representing that sum was used and deliveries are sworn to with slight exceptions. I was impressed with the evidence of Barrow and Farquhar as to this. They are both competent men and made independent inspections of the house. Their figures almost agreed. I adopt generally Farquhar's estimate. This requires deductions amounting to $314.47. A discount of 15 per cent. was allowed, or might have been taken advantage of by plaintiffs in respect of lumber other than that supplied by Murray or from plaintiffs' own plant. This discount I compute at $179.80. So that the allowance to plaintiffs in respect of lumber is $1,282.39.

On the evidence I see no reason for interfering with the item for lime, gravel, sand, brick, etc., $236.10.

The item wages, $1,540.30, which covers carpentering and foundation work, strikes one as being very high. One practical man, McDonald, estimated the wages on the whole work at $1,000. Latimer, likewise practical, estimated the carpenter work at $750

to $800 at the outside. Farquhar estimated the latter work at $715. I do not think the alterations made during the progress of the work would at all account for the large difference between these estimates and the plaintiffs' claim. I incline to think that, both in this and the lumber items, owing to the plaintiffs having had many other buildings under construction at the same time, mistakes have inadvertently crept in. The large amount of plaintiffs' demand upon this item, with the evidence of the practical men referred to, renders it impossible to allow the $1,540.30, which plaintiffs say they paid for labour. I have no other specific figures to act upon. The best I can do upon the evidence is to allow $1,200 in respect of labour.

The deductions from plaintiffs' claim are as follows:—

Hardware	$ 28 50
Lumber	494 27
Wages	340 30
Plumbing	39 88
	$902 95

Plaintiffs claimed $1,216.07. The deductions leave a balance due plaintiffs by defendant of $313.12.

I do not consider that the defendant made out any case for damages for delay.

There was a discussion raised by defendant of departure by plaintiffs from his instructions or from the pattern of house indicated. I failed to see anything in this. The defendant saw the house and took possession. He accepted it. It was not the case of an owner merely going upon his own land, in which circumstances taking possession would not necessarily imply acceptance. Having accepted the house, defendant is bound to pay the cost.

The result at which I have arrived will not be satisfactory to either party. They can attribute it, with the expense and loss of time this suit has involved, to the loose nature of the contract into which they entered.

For future purposes I may say that there was nothing in the demeanour of any witness to influence me.

There will be judgment for plaintiffs for $313.12. On payment of this amount and costs as hereafter mentioned, the plaintiff MacKissock shall transfer the land to the defendant, subject to the mortgage above referred to. If the amount due be not paid within six months from the entry of judgment, the land shall be sold under the direction of the Master to realize the amount and costs. The plaintiffs will have costs, excluding the examination of defendant for discovery. The costs of trial will be merely such as would have been allowed in respect of a reference to ascertain the cost of the building. Further directions and costs reserved.

Judgment for plaintiff.

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April 11.

KARCH v. KARCH.

(Decision No. 1.)

Ontario High Court, Riddell, J., in Chambers. April 11, 1912.

1. EVIDENCE (§ X C—696)—ADMISSION UNDER OATH—APPLICATION FOR INTERIM ALIMONY.

As on an application by a wife for interim alimony proof of marriage is all that is necessary, her cross-examination on the motion as to matters which might disentitle her to permanent alimony will not be considered where the plaintiff alleges cruelty.

[*Cook* v. *Cook* (1892), 12 C.L.T. Occ. N. 73, followed; *Nolan* v. *Nolan*, 1 Ch. C. 368; *Campbell* v. *Campbell* (1873), 6 P.R. 128, and *Keith* v. *Keith* (1876), 7 P.R. 41, specially referred to.]

2. DIVORCE AND SEPARATION (§ V B—50)—INTERIM ALIMONY—OFFER OF DEFENDANT TO RENEW CO-HABITATION.

Where desertion only is charged by a wife who is residing in her husband's house, interim alimony will not be granted where the husband, by his defence and affidavit, offers to resume co-habitation with her.

[*Snider* v. *Snider* (1885), 11 P.R. 140, specially referred to.]

3. DIVORCE AND SEPARATION (§ V B—50)—INTERIM ALIMONY—DESERTION—REFUSAL TO RESUME CO-HABITATION.

Interim alimony will be granted, although desertion only is charged by a wife, where the husband does not shew by his defence or affidavit that he is willing to resume co-habitation with her.

4. DIVORCE AND SEPARATION (§ V B—50)—INTERIM ALIMONY—OFFER TO MAINTAIN CHILDREN.

An allegation in a husband's affidavit and defence to a wife's claim for alimony on the ground of desertion, that he is ready and willing to support and maintain his children is insufficient to defeat the wife's application for interim alimony in which she charges cruelty on his part.

Statement

APPEAL by the defendant from an order of the Local Master at Guelph allowing the plaintiff $10 a week interim alimony and $40 for disbursements.

The order was allowed to stand but the interim alimony was reduced to $6 per week.

W. E. S. Knowles, for the defendant.

C. A. Moss, for the plaintiff.

Riddell, J.

RIDDELL, J.:—The plaintiff in this action for alimony alleges: marriage in 1899; birth of two children still living; residence at Hespeler; refusal by the defendant since the spring of 1911 to provide her with sufficient money for household expenses and clothing for herself and children; since that time till he left her "a very bad temper and disposition towards" her; "on the 20th November, 1911, without any warning, the defendant left the house wherein he had up to that time resided with the plaintiff and their children, and has not returned to the said house or offered to return to it or corresponded with the plaintiff, and has in fact deserted the plaintiff." Since that day he has stopped the children on their way to school and endeavoured to excite dis-

trust on their part toward the plaintiff; she has no means of support for herself and children; and she claims alimony, interim alimony at the rate of $12 per week, the custody of her children, an order that the defendant maintain the children by paying such sum as may be awarded, costs, etc.

The defendant admits the marriage, etc., but says that from even before 1905 the plaintiff assumed mastership in all things, and after that time she exhibited an increasingly bad temper and disposition toward him, and continuously scolded him and used bad language toward him, treated him contemptuously, and encouraged the children to do the same; she kept large sums of money coming to him from his debtors and used it for other than household purposes and gave away large quantities of household supplies to members of her own family—all this against his wishes. He treated her properly and put up with her abuse for the sake of the children and to avoid public scandal till the 20th November, 1911; he has provided a suitable dwelling-house and furniture for her, and made an arrangement, which he has kept, to pay all accounts which she incurred for clothing and coal and wood, and, in addition, has paid her $6 a week out of his wages for household expenses. For three years she neglected and refused to prepare breakfast for him, and he had to get his own breakfast before going to his work—for two years she refused to cohabit with him and occupied a separate bed-room. Unable to stand her abuse and neglect and refusal to cohabit with him, he on the 20th November, 1911, went to Dundas on a visit, remained there six weeks, and then went back to Hespeler and worked for and boarded with his brother; the plaintiff and children residing in the house formerly occupied by them but excluding the defendant; the plaintiff making no offer of reconciliation. He has continued to pay all accounts incurred by the plaintiff for clothing and household expenses which have been presented to him, and has given instructions to the tradesmen to call and take her orders for goods and supply them—and he denies tampering with the children. He is 55 years old, his wife 11 years younger, strong and healthy—he asks the custody of the children.

An application was made for interim alimony. The plaintiff set up that the defendant had in money and securities, etc., some $18,500, besides a house worth $1,700. The defendant sets out in detail his income; wages $2 per day, $600; various investments $372.85; in all, $972.85.

Both parties filed affidavits on the application before the Local Master, and both were examined at length, and without objection, upon their affidavits. Were I not bound by authority I may not disregard, *Cook* v. *Cook* (1892), 12 C.L.T. Occ. N. 73, 28 C.L.J. N.S. 95, I should think these examinations so taken might be read upon the application. From the wife's examination it is plain that the ostensible reason for bringing the action

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is "because he left me without reason;" that she has continued living in the defendant's house with her children, using his furniture, running bills for groceries, food, and clothing, which he never objected to paying. The only complaint is: "He is living down with his brother. Why didn't he come home and live with me and the children?" She never asked him to do so, "because I thought it was his place to come back and make the first offer toward reconciliation." In June, 1911, the husband and wife made a bargain that he was to give her $6 a week to run the house on and pay the bills for clothing and fuel. When he left she had $43 in cash, and she had still when examined $11 left. She thinks he swore at her this summer "in front of people," but she did not hear the words and judges by the tone of voice. The sole reason for bringing this action is, that he went away and didn't come back—it is his duty to come back and start the reconciliation. She has not wanted for anything since he went away; the flour and feed man calls for orders and the grocer is near-by. Nothing like cruelty is alleged, but the husband and wife seem to have had from time to time the not unusual jangles about her spending too much money, and an occasional "tiff" over other matters.

Of course no one but the wearer knows where the shoe pinches, but I can see nothing in all the allegations which would prevent two persons of ordinary common sense living together in a fairly comfortable manner. And it is an infinite pity that the defendant did not take up the implied challenge and at once make the advance toward reconciliation. He says, "Well, I thought, as she wouldn't make any steps towards me, I don't need to make none toward her." But authority by which I am bound says that the examination of the wife cannot be looked at upon an application for interim alimony, as that would be going into the merits of the case.

It has been laid down from the earliest time in our Courts that upon an application for interim alimony proof of the marriage is all that is necessary: *Nolan* v. *Nolan*, 1 Ch. Ch. 368.

The defendant was not allowed to shew that the plaintiff was living wantonly in adultery apart from her husband: *Campbell* v. *Campbell* (1873), 6 P.R. 128.

And where the plaintiff had admitted facts which, when proved, at the hearing, would disentitle her to the relief sought, the defendant was not permitted to make use of the examination as an answer to the application. The Referee could "see no difference in principle between considering an uncontradicted affidavit alleging adultery on the part of the plaintiff, and considering this examination extracted by compulsion at the instance of the defendant for the purpose of being used as part of his defence." The decision was affirmed by Proudfoot, V.-C., and by that I am bound: *Keith* v. *Keith* (1876), 7 P.R. 41.

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The statement of claim alleges desertion. Whether the plaintiff can at the trial establish a case for alimony is immaterial; the order for interim alimony must be made unless the defendant can shew some bar such as is spoken of in *Snider* v. *Snider*, *Snider* v. *Orr* (1885), 11 P.R. 140. The decision in these cases is, that, if there be no cruelty pleaded, nothing but desertion, and the husband is willing and offers by defence and affidavit to resume cohabitation with his wife—she living in his house—an order for interim alimony will not go.

Nothing of the kind appears here—the only approach to it is the allegation in defence and affidavit that he is ready and willing properly to support and maintain his children.

The order for interim alimony and disbursement must stand.

But, under the circumstances, the amount ordered is rather excessive, and the interim alimony should be reduced to $6 per week. The amount of interim disbursements may stand, as they must be accounted for at the conclusion of the action. No costs.

It is not, I trust, too late to urge upon the parties to do their best to bring about a reconciliation, without regard to who should make the first advance. A stubborn persistence in their present attitude will most certainly be disastrous to themselves and to their children's future. The children they should consider before themselves, and make every endeavour to prevent calamity for them.

Order varied.

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April 10.

Ontario High Court, Teetzel, J. April 10, 1912.

1. EASEMENTS (§ II B—14)—PRESCRIPTIVE RIGHT OF WAY—HOW CREATED.

A prescriptive right of way is not lost by the occupancy of the dominant estate by another person where, during such occupancy, there was no suspension of the use and enjoyment of the way by the dominant owner.

2. EASEMENTS (§ II B—14)—LEASE BY DOMINANT TO SERVIENT TENANT—RESERVATION OF WAY.

A unity of possession of a dominant and servient estate, which will prevent the assertion of a right to a prescriptive way over it, is not created by a lease of the dominant estate to the owner of the servient estate where the dominant owner reserved to himself the use and enjoyment of the way.

3. EASEMENTS (§ II C—29)—WAY OF NECESSITY—LEASE OF RIGHT TO CUT TIMBER.

The right to use a prescriptive way over demised premises is included within a reservation in a lease of the right to cut and remove timber therefrom, as, of necessity, it implied the reservation of the usual means of ingress to and egress from the demised premises.

[2 Halsbury's Laws of England, 272, referred to.]

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4. EASEMENTS (§ IV—49)—WAY—RIGHT TO, HOW LOST—LIMITATIONS ACT, 10 EDW. VII. CH. 34. SEC. 36.

No such unity of possession is created by a lease of a dominant estate to the owner of a servient estate as to render sec. 36 of the Limitations Act, 10 Edw. VII. ch. 34 (Ont.) applicable to an action by the dominant owner to establish his right to use a prescriptive right of way, the use of which he reserved in such lease.

AN action for a declaration that the plaintiff was entitled by prescription to a right of way over the defendant's farm.

There was judgment for the plaintiff with costs.

W. J. Elliott, for the plaintiff.

K. F. Mackenzie, for the defendant.

Teetzel, J.

TEETZEL, J.:—I find upon the evidence that the right of way in question has been used by the plaintiff and his predecessors in title for fully seventy years, although prior to the 5th October, 1852, both the dominant and servient properties were occupied by Andrew D. Thompson as a locatee from the Crown.

On or about that date, as appears from a document on file in the Crown Lands office, Thomson assigned his right to the land comprising the servient tenement to James Maxwell, the defendant's father.

Mrs. Isabella Mosher, a daughter of Andrew D. Thomson, deceased, now 79 years old, but possessing a very bright mind and a wonderful memory, gave very satisfactory evidence as to the early history of the right of way and of its enjoyment by her father and brothers, and of the occupation of the dominant property. I accept her evidence when it conflicts with evidence given for the defendant; and from it conclude that, for some time prior to 1873, the defendant's father did not, as contended by the defendant, enjoy the exclusive occupation of the land now owned by the plaintiff. The defendant's father and his family did occupy the house upon the plaintiff's land, for a period prior to 1873, but I am unable to find that the tenancy extended to the whole farm, or that there was any suspension of the use and enjoyment of the right of way by the owner of the dominant property during that period.

The most serious objection raised by the defendant to the plaintiff's claim rests upon the existence of a lease by the plaintiff to the defendant, dated the 1st November, 1910, of the dominant property. The lease is for one year.

The action was commenced on the 3rd May, 1911, during the currency of the lease, and Mr. Mackenzie argued that, by virtue of the lease of the dominant property to the owner of the servient property, a unity of possession of the two properties is constituted; and, therefore, the plaintiff cannot maintain the action, because, under sec. 36 of the Limitations Act, 10 Edw. VII. ch. 34, it is provided that "each of the respective periods of years in the next preceding two sections mentioned shall be deemed and taken to be the period next before some

action wherein the claim or matter to which such period relates was or is brought into question," etc. Without deciding what would be the result to this action if the lease in question gave the exclusive possession of the dominant property to the defendant during the term of the lease, I think this lease does not do so, because of the express reservation in it, which reads, "The lessor reserves the right to cut and remove timber."

This reservation necessarily implies the reservation of the right to so much of the possession of the property as may be required for the purpose of cutting and removing timber, and also the reservation of the right to use the usual means of ingress to and egress from the property for those purposes.

It is laid down in Halsbury's Laws of England, vol. 2, p. 272, "that, in cases where enjoyment as of right is necessary, a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatsoever portion of the period the cessation occurs; and, on the other hand, a cessation of user which does not exclude such inference is not fatal, even although it occurs at the beginning or the end of the period."

While as a general proposition it is true that where there is unity of possession there can be no enjoyment of an easement as of right, and consequently during the period of such unity of possession there is such a cessation of user which ordinarily excludes an inference of actual enjoyment as of right during the full statutory period, I am of opinion that in this case there was not, under the lease in question, such a complete unity of possession as should exclude an inference of actual enjoyment as of right by the plaintiff at the time this action was brought.

Judgment will, therefore, be declaring that the plaintiff has acquired by prescription the right of way in question over the defendant's lands, subject to the right of the defendant to maintain a gate at the southerly end thereof, and to the duty of the plaintiff to maintain a gate at the northerly end, and to an injunction restraining the defendant from interfering with the plaintiff's user of the right of way. Costs to be paid by the defendant.

Judgment for plaintiff.

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April 12.

SINCLAIR v. PETERS.

Ontario High Court. Trial before Sutherland, J. April 12, 1912.

1. DEEDS (§ II C—33)—ERRORS AS TO QUANTITY, OCCUPANCY, NAME, LOCALITY—IDENTITY AS TO PROPERTY INTENDED TO BE CONVEYED.

In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect.

[*Cowen* v. *Truefitt*, [1899] 2 Ch. 309, followed.]

2. HIGHWAYS (§ I A—7)—DEDICATION INTENTION MUST BE SHEWN.

In order to establish the dedication of land as a public highway, an intention to dedicate must be shewn, and, though there may be facts indicating a dedication, yet, if, in the light of all the circumstances, there appears to have been an absence of any intention to dedicate, dedication is not established.

3. DEDICATION (§ I B—10)—WHAT AMOUNTS TO—MAP SHEWING STREETS ATTACHED TO REGISTERED DEED—NON-COMPLIANCE WITH REGISTRY ACT.

The registration with a deed of land of a sketch of the land attached to the deed, without the formalities required by the Registry Act, in the registration of a plan, does not constitute a dedication as public highways of those parts of the land which are shewn in the sketch as streets or roads.

4. DEDICATION (§ II—23)—WHAT CONSTITUTES ACCEPTANCE—ASSESSMENT OF LAND AS STREET.

Where a strip of land used as a street but privately owned was treated by the assessor of the municipality as a street and was not assessed for nine years, but there was no direct assertion by the municipality of any claim to dedication of the land, nor were any municipal improvements made thereon, such facts do not establish a dedication thereof as a highway.

[*Hubert* v. *Township of Yarmouth*, 18 O.R. 458, referred to.]

Statement

IN this action the plaintiff complained that the defendant, his servants and workmen, entered upon his lands on or prior to the 11th October, 1910, and broke down and removed his fence and dug up and removed curbing; and sought an injunction restraining him from a repetition of such acts, and damages.

The defendant, in answer, said that the acts complained of were done on land known as "Ancroft Place," a public place and highway, in the city of Toronto, of which he was entitled to a "free and uninterrupted user and enjoyment;" and that, furthermore, by a deed of grant of lands to him and successive deeds of grant to his predecessors in title, he is entitled to a right of way in common with others entitled thereto over the way or road known as "Ancroft Place." He also alleged that he and his predecessors in title had used and enjoyed and acquired prescriptive rights of way over Ancroft Place as appurtenant to his lands and premises, by user thereof for twenty years and upwards, and pleaded the Limitations Act, 10 Edw. VII. ch. 34. He likewise denied that the plaintiff was the owner of Ancroft

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Place, and said that the plaintiff had unlawfully endeavoured to obstruct it, and to prevent the defendant's full user and enjoyment thereof. By way of counterclaim he asked for an injunction restraining the plaintiff from obstructing his (the defendant's) user and enjoyment of Ancroft Place, and damages.

Judgment for plaintiff as asked.

M. H. Ludwig, K.C., for the plaintiff.

J. D. Montgomery, for the defendant.

Sutherland, J.

SUTHERLAND, J. (after setting out the facts and referring to various quit-claim deeds and other conveyances):—The defendant has put up an iron fence on the south side of his property on the northerly line of Ancroft Place, with a gate therein. The plaintiff placed a wooden gate in front of the iron gate, and this was taken down by the defendant. The writ was issued on the 13th October, 1910.

At the commencement of the trial of the action, and in pursuance of a notice previously given by the plaintiff to the defendant, an application was made on behalf of the former to amend the statement of claim, in which, in describing Ancroft Place in paragraph 2, the same description was used as in the first-mentioned quit-claim deed, by allowing the point of commencement in the description as set out in paragraph 2 to read 147 ft. 9 in, instead of 200 feet. This application was opposed by the defendant, and was reserved by me until the evidence had been taken. I think it should be allowed, and do allow it. The description in the first-mentioned quit-claim deed, in itself, is, I think, sufficient for the purposes of this suit, notwithstanding the error. "In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect:" *Cowen* v. *Truefitt*, [1898] 2 Ch. 551, affirmed, [1899] 2 Ch. 309; *Barthel* v. *Scotten*, 24 Can. S.C.R. 367.

The plaintiff was, in any event, the equitable owner under the quit-claim deed, he having bought the rights of Mrs. Patrick in Ancroft Place, and she having intended by her quit-claim deed to convey the same to him. On the property owned by the defendant, there is a residence, situated towards the north-west corner, not far from the corner of Sherbourne street and Maple avenue. The property has a considerable frontage on both streets. There is a stable on it, near the northerly limit of Ancroft Place, and towards the rear thereof. Considerable evidence was given on behalf of the defendant to prove that, in connection with the ingress to and egress from the stable, and also in connection with repairs and improvements to the residence, there had been a continuous user of Ancroft Place as

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associated with or appurtenant to the defendant's property for the statutory period. I am unable to find that this has been made out. There were undoubtedly gaps in the period, and the user was, at best, a discontinuous one. In the first instance, the land known as Rachel street and later as Ancroft Place was used and intended to be used to serve the occupants of the double house situated on the Elwood and Davis properties and furnish a right of way thereto—and later to serve Mr. Henderson and his property. There was evidence that at one time the access to the stable was from Maple avenue. There can be no doubt, I think, that by far the greater part of the traffic upon Ancroft Place was in connection with the properties to the south and east thereof. There was nothing to shew that there was in connection with the land now owned by the defendant any user of Ancroft Place to the knowledge of Mrs. Patrick or adverse to her ownership. There was no grant of a right of way to the defendant or his predecessors in title on the strength of which he can claim. With some hesitation, I have also come to the conclusion that there was no dedication of the land as a public street or highway. When Mrs. Patrick made the deed to Henderson, the latter obtained only a right of way over Ancroft Place or Rachel street, as it was then called. The reference to it, in the conveyances to Henderson and Elwood, as a street or road have no conclusive significance, as in each case they are in the deeds shewn to have been associated with a right of way over the land, which was all the owner of it was yielding up to the grantee. Mr. Henderson testified that, when he obtained his deed, there was a definite understanding between Mrs. Patrick and himself that Rachel street was to be a private street or road and to be kept and continued as such. He also said that, after he purchased, he had given instructions to his gardener to keep up the fences on the north side of Rachel street to prevent user or trespass with respect to the said street or lane. It is true that in his deed he was by Mrs. Patrick given a right to make Rachel street (Ancroft Place) a public street, by the registration, after one year, of a plan, in the preparation of which he could use her name. Such a plan would, of course, before it could be registered, be required to be prepared with the formalities and in the manner provided by the Registry Act. He registered his deed on the 16th August, 1884. Its registration with the sketch attached could not and did not accomplish this. In the deed to Henderson, Mrs. Patrick reserved to herself the right to make a plan of the land then owned by her lying to the north of Rachel street, and now owned by the defendant, and agreed that, if she did, she would shew the said street on it; she could thereafter have made it a street if she had desired to do so—she never subsequently made or registered a plan shewing it as a street, private or public. In her subsequent deed to Helen

E. McCully, of the land which was later acquired by the defendant, she made no reference to Rachel street in any way and gave no right of way over it. Under these circumstances, she still owned the fee in Ancroft Place, subject to the rights of way which she had granted. I think the reference in the deed to Henderson "in common with said Rachel Patrick, her heirs and assigns, and the persons to whom she or her said late husband has already granted or may hereafter grant any part of said lot 22 abutting on said street," must be construed to mean abutting on said street and to whom she would grant such right of way.

The defendant and his predecessors in title are not in that position nor parties in any way to that deed nor entitled to take advantage of it. Subsequent to her deed to Henderson, Mrs. Patrick never did anything, so far as the evidence disclosed, from which the city corporation or any one else could claim or infer a dedication, nor inconsistent with the agreement, which Henderson said they had made, that Rachel street should be continued as a private road. It is true that she was not assessed nor did she pay taxes on Ancroft Place for many years. It is not much wonder that she did not volunteer to do so, nor that the city corporation, seeing the place being used as a right of way for those to the south and east of it, should for a long time have overlooked its assessment. The city corporation have never directly asserted any claim to dedication, unless the alleged assessment of Ancroft Place as a street since 1903 can be so considered, and have not attempted to do corporation work on it: *Hubert* v. *Township of Yarmouth*, 18 O.R. 458, at p. 467.

Mrs. Patrick was not called as a witness at the trial. The fact, however, that she executed the quit-claim deed in favour of the plaintiff, for a consideration, would indicate that she considered that she had not dedicated Ancroft Place as a street. There must be an intention to dedicate; and I cannot, from the evidence, come to the conclusion that such has been satisfactorily made out: *Simpson* v. *Attorney-General*, [1904] A.C. at p. 493; Halsbury's Laws of England, vol. 16, sec. 53; 13 Cyc. 475, 476.

In this case there is no such thing as a way of necessity in question, for the reason that the defendant has abundant access to two public streets from his property. The user of Ancroft Place has been largely in connection with properties, other than the defendant's, with respect to which rights of way have been given by the owner. No one, until the defendant since his recent acquisition of the property, ever in any formal way claimed to use as of right Ancroft Place in connection with and as appurtenant to the land lying north of it. No adverse claim is shewn to have been brought to the notice of Mrs. Patrick. The

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mere fact that some of the defendant's predecessors in title at odd times used this private way, lane, road, or street, without her knowledge or objection, does not establish a dedication.

The plaintiff will, therefore, have, as asked, an injunction restraining the defendant from a repetition of any of the acts complained of. The damages which the plaintiff has suffered are slight, and I assess the same at the sum of $10. If either party is dissatisfied with that amount, he may have a reference as to the same, at his risk. The plaintiff will also have his costs of suit.

Judgment for plaintiff.

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D. C. 1912

March 9.

WADSWORTH v. CANADIAN RAILWAY ACCIDENT INS. CO.

Ontario Divisional Court, Falconbridge, C.J.K.B., Riddell and Latchford, JJ. March 9, 1912.

1. INSURANCE (§ VI B 3—290)—ACCIDENT POLICY—DEATH RESULTING FROM INJURIES SUSTAINED FROM BURNS WHILE IN A FIT—CLASSIFICATION OF LOSS.

In an accident insurance policy, insuring against bodily injuries caused solely by external, violent, and accidental means, and insuring also against disability from certain illnesses including fits, the injury sustained by an assured through being severely burned while lying unconscious in an epileptic fit, and from which injury his death resulted, is to be classified under such insurance policy as a loss of life caused solely by external, violent and accidental means, and the amount of insurance upon that classification is not cut down under a clause of the policy stating that in cases of injuries happening from fits the insurers will pay one-tenth of the amount payable under the general proviso for bodily injuries.

[*Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42, *Lawrence* v. *Accidental Ins. Co.*, 7 Q.B.D. 216, and *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 58 Fed. Repr. 945, distinguished.]

2. INSURANCE (§ VI D 2—364)—ACCIDENT INSURANCE—DOUBLE LIABILITY—ASSURED BURNED—DEATH RESULTING.

A double indemnity clause in an accident insurance policy whereby *inter alia* the amount of insurance was doubled if the injury insured against was "caused by" the burning of a building if the assured was in it at the commencement of the fire, does not apply to fix the insurers with liability where the injury was caused by the explosion of a coal-oil lantern, brought into the building by the assured for temporary personal purposes only, nor to the fire resulting therefrom which badly scorched the building and so severely burned the assured that he died from the shock.

[*Houlihan* v. *Preferred Accident Ins. Co.*, 145 N.Y. St. Repr. 1048, dissented from.]

3. INSURANCE (§ III D 2—71)—CONSTRUCTION OF POLICIES—LIMITING LIABILITY.

Where an insurance policy contains a clause the language of which is intended to limit the liability of the insurers under certain circumstances to a fractional amount of the sum payable in other circumstances, such clause is to be construed strongly against the insurers.

[*Re Etherington and Lancashire and Yorkshire Accident Ins. Co.*, [1909] 1 K.B. 591, followed; *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 58 Fed. Repr. 945, specially referred to.]

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4. PROXIMATE CAUSE (§ II A—15)—DEATH FROM BURNS—EPILEPTIC FIT.

Where an epileptic fit leaves a man unconscious and while in that condition he is so severely burned that death results, the proximate cause of death is the fire and not the epileptic fit.

5. PROXIMATE CAUSE (§ I—8)—CAUSE OF EFFICIENT CAUSE—CAUSA CAUSANS.

A cause of an efficient cause of injury is not itself an efficient cause or *causa causans*.

[*Hawthorne* v. *Canadian Casualty Co.*, 14 O.L.R. 166, and in appeal, *Canadian Casualty Co.* v. *Hawthorne*, 39 Can. S.C.R. 558, considered; *Boulter* v. *Canadian Casualty Co.*, 14 O.L.R. 166, and in appeal, *Canadian Casualty Co.* v. *Boulter*, 39 Can. S.C.R. 558, considered.]

Statement

APPEAL by the plaintiff from the judgment of MIDDLETON, J., who tried the action without a jury at Ottawa, in so far as the judgment was against the plaintiff.

The action was brought to recover the amounts due under two policies of accident insurance issued by the defendants to John Allen James Wadsworth, in favour of his wife, the plaintiff.

The two policies were in the same form. The insurance was stated to be "against bodily injuries caused solely by external, violent, and accidental means," as specified in a schedule, and "against disability from sickness." The principal sum of each policy was stated to be, in the first year $5,000, with 5 per cent. increase annually for ten years, amounting to $7,500. Under "Schedule of Indemnities," it was stated in "Part A" that, "if any of the following disabilities shall result from such injuries alone, within ninety days from the date of accident, the company will pay in lieu of any other indemnity . . . for loss of life, the principal sum." For loss of both hands, loss of entire sight, etc., the principal sum was also payable. "Part C," headed "Double Payments," stated:

> Part C: If such injuries are sustained while riding as a passenger . . . or are caused by the burning of a building in which the insured is therein (*sic*) at the commencement of the fire, the amount to be paid shall be double the sum specified in clause under which the same arises.
>
> Part G: In case of injuries happening from any of the following causes . . . fits, vertigo, sleep-walking, duelling . . . causing . . . the company will pay one-tenth of the amount payable for bodily injuries as stated in Part A.
>
> Part H: In case of the happening of injuries mentioned in special indemnity clauses D, E, F, and G, claims shall be made only under said clauses, and the amount to be paid under said clauses shall be the full limit of the company's liability, and such claim shall not be entitled to double benefit as provided in Part C.

The policies were dated respectively the 24th December, 1907, and the 30th July, 1909, and all the premiums were paid by Wadsworth until his death on the 24th October, 1910.

The plaintiff alleged that the case came within "Part C," death being "caused by the burning of a building in which the insured is . . . at the commencement of the fire," and

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claimed $11,000 and $10,500 under the policies respectively. The defendants tendered $1,075, which was refused. The defendants took the position that "Part G" and "Part H" applied, and that the utmost to which the plaintiff was entitled was $550 under one policy and $525 under the other.

The trial Judge found that the death of the assured resulted from a fit, which caused the upsetting of a lantern, whereby the building in which the assured was was set on fire, and the assured received the injuries from which he died; and the judgment at the trial in favour of the plaintiff was, therefore, limited to the two sums of $550 and $525; and the plaintiff appealed.

Argument

R. V. Sinclair, K.C., and *H. Aylen*, K.C., for the plaintiff, argued that the evidence did not justify the findings of the learned trial Judge that the death of the deceased was caused by a fit, and that he was subject to the form of epilepsy known as *petit mal*. The latter finding was based on the evidence of a medical witness, and was a mere inference from a previous attack, which the Judge found to have been a faint. Probably the deceased became unconscious owing to his weak condition, and the lantern exploded, the result being that the building was set on fire, and the insured suffered the injuries which were the cause of his death. Even if the deceased did have a fit, that was not the efficient cause of his death. As regards the double liability clause, they argued that the injuries were "caused by the burning of a building," within the meaning of the policy, and that it was not necessary that the building should have been wholly burned, in order to sustain the plaintiff's claim. The following cases were referred to: *Lawrence* v. *Accidental Insurance Co.* (1881), 7 Q.B.D. 216; *Winspear* v. *Accident Insurance Co.* (1880), 6 Q.B.D. 42; *Wicks* v. *Dowell & Co. Limited*, [1905] 2 K.B. 225; *Clover Clayton & Co. Limited* v. *Hughes*, [1910] A.C. 242; *Canadian Casualty and Boiler Insurance Co.* v. *Boulter*, *Canadian Casualty and Boiler Insurance Co.* v. *Hawthorne* (1907), 39 S.C.R. 558; *Mardorf* v. *Accident Insurance Co.*, [1903] 1 K.B. 584; *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; *Reynolds* v. *Accidental Insurance Co.* (1870), 22 L.T.N.S. 820; *Houlihan* v. *Preferred Accident Insurance Co. of New York* (1908), 145 N.Y. St. Repr. 1048; *Manufacturers' Accident Indemnity Co.* v. *Dorgan* (1893), 58 Fed. Repr. 945, especially at pp. 954, 955, where the English cases are considered.

I. F. Hellmuth, K.C., and *J. G. Gibson*, for the defendants, argued that, as to the question of fact, the finding of the learned trial Judge that the injuries sustained by the insured, causing his death, happened from "fits," within the meaning of the policy, was fully warranted by the evidence, and should not be disturbed. As regards the construction of the policy, it was submitted that "Part G" was not a clause exempting the defendants from liability in certain cases, but was one of several clauses

fixing their liability at different sums according to the different risks, so the cases cited by the appellant, all of which deal with exceptions or exemptions from liability, had no application to the case at bar.

Sinclair, in reply.

March 9, 1912. FALCONBRIDGE, C.J.:—After long and careful consideration, in the course of which I have many times perused the numerous authorities cited (citations from which appear in my brother Riddell's judgment), I have come to the conclusion (with great respect and after much hesitation) that I do not agree with the judgment appealed from, and think that it ought to be reversed.

"Part G" of the policy which has to be construed is as follows:

> In case of injuries happening from any of the following causes, viz., intentional injuries inflicted by the insured or any other person (other than burglars or robbers) fits . . . sleep-walking . . . causing death, loss of sight or limb . . . the company will pay one-tenth of the amount payable.

It is by no means easy to construe; and, as my brother Middleton says, in none of the cases is there any attempt to construe such a clause.

I do not know whether there is any light shed on the subject by consulting the dictionaries as to the meaning of the verb "to happen" (same root as "capio"). The Imperial defines it: "1. To come by chance; to come without one's previous expectation; to fall out. . . . 2. To come; to befall." Murray (Oxford Dictionary) says: "To come to pass (originally by 'hap' or chance); to take place; to occur, betide, befall. The most general verb to express the simple occurrence of an event, often with little or no implication of chance or absence of design."

While the clause does not aim to destroy absolutely the liability of the company, yet its language is intended to limit that liability to a fractional amount of the sum payable under other circumstances, and so it ought to be construed strongly against the company. The insurer accepts the policy with the view and for the purpose of covering all accidents which may "happen" to him. In *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, Vaughan Williams, L.J., says, at p. 596:

> I start with the consideration that it has been established by the authorities that in dealing with the construction of policies, whether they be life, or fire, or marine policies, an ambiguous clause must be construed against rather than in favour of the company.

Farwell, L.J., at p. 600, expresses the same view.

The cases of *Winspear* v. *Accident Insurance Co.*, 6 Q.B.D. 42, and *Lawrence* v. *Accidental Insurance Co.*, 7 Q.B.D. 216,

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followed in the United States in *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 58 Fed. Repr. 945, would be absolutely in point if in the *Lawrence* case the fit had started the train which passed over the deceased, and in the *Winspear* case the fit had set loose the flow of water which drowned the insured. But, on a consideration of the numerous cases on the subject of proximate cause and *causa sine quâ non*—*e.g.*, the illustration that the birth of the insured was a cause of the accident, inasmuch if he had never been born the accident could not have happened—I have arrived at the conclusion that, notwithstanding the finding of the trial Judge, which we are bound to accept, that it was the fit that caused the upsetting of the lantern and the subsequent fire, the injuries "happened" not from the fit but from the fire.

Therefore, I agree with my brother Riddell in thinking that the appeal should be allowed in part, and judgment entered for the plaintiff for $10,750 and interest from the teste of the writ; the plaintiff to have costs of the trial; no costs of appeal to either party.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment at the trial by Mr. Justice Middleton, without a jury, at Ottawa, June, 1911. John Allen James Wadsworth, a man of some means, living in Ottawa, procured from the defendants two policies of accident insurance of date the 24th December, 1907, and the 30th July, 1909, respectively, in favour of his wife, the plaintiff. The material part of the policies—they are in the same form—is here subjoined:—

> The Canadian Railway Accident Insurance Company, Ottawa, Can., in consideration of the statements, agreements . . . in the application and of the annual premium of.....payable.....does hereby insure John Allen James Wadsworth . . . against bodily injuries caused solely by external, violent and accidental means, as specified in the following schedule (subject, however, to the terms and conditions hereinafter contained), and against disability from sickness, as follows:—
>
> This policy may be renewed from year to year upon payment of the annual premium, payable as aforesaid in each year during the continuance in force thereof, and the payment of each consecutive full year's renewal premium of this policy shall add five per cent. to the principal sum of the first year until such additions shall amount to fifty per cent., and thenceforth so long as this policy is maintained in force the insurance shall be for the original sum plus the accumulation of fifty per cent., as aforesaid.
>
> The principal sum of this policy in the first year is $5,000; with five per cent. increase annually for ten years will amount to $7,500.
>
> SCHEDULE OF INDEMNITIES.
>
> Part A.—If any of the following disabilities shall result from such injuries alone, within ninety days from the date of accident, the company will pay in lieu of any other indemnity:—

	IN ONE PAYMENT
For Loss of Life	the principal sum
For Loss of Both Hands by severance at or above the wrist	the principal sum
For Loss of Both Feet by severance at or above the ankle	the principal sum
For Loss of One Hand at or above the wrist, and One Foot at or above the ankle	the principal sum
For Loss of Entire Sight of Both Eyes, if irrecoverably lost	the principal sum
For Loss of Either Hand by severance at or above the wrist	½ of " "
For Loss of Either Foot by severance at or above the ankle	½ of " "
For Loss of Entire Sight of One Eye, if irrecoverably lost	⅓ of " "

The payment of one principal sum in any case shall end this policy.

DOUBLE PAYMENTS.

Part C: If such injuries are sustained while riding as a passenger in any passenger steamship or steamboat, or in any steam, cable or electric passenger railway conveyance, or in a passenger elevator, or *are caused by the burning of a building in which the insured is therein at the commencement of the fire*, the amount to be paid shall be double the sum specified in clause under which the claim arises.

Part G: *In case of injuries happening from any of the following causes*, viz., intentional injuries inflicted by the insured or any other person (other than burglars or robbers), *fits, vertigo*, sleep-walking, duelling, war or riot, exposure to unnecessary danger, engaging in bicycle, automobile or horse racing, or while under the influence of intoxicating liquors or narcotics, *causing death*, loss of sight or limb as stated in Part A, *the company will pay* ONE-TENTH *of the amount payable for bodily injuries as stated in Part A*, under which claim arises; or, if such injuries result in total or partial disability as provided in Part B, the company will pay ONE-TENTH of the amount payable for weekly indemnity as stated in said Part B, under which claim arises.

Part H: In case of the happening of injuries mentioned in special indemnity clauses D, E, F and G, claims shall be made only under said clauses, and the amount to be paid under said clauses shall be the full limit of the company's liability, and such claim will not be entitled to double benefit as provided in Part C.

(The italics are mine).

Wadsworth paid all premiums due until his death on the 24th October, 1910, under circumstances which will be set out later in this judgment. The widow claimed that the case came within Part C, as being "caused by the burning of a building in which the insured is therein (*sic*) at the commencement of the fire," and claimed $11,000 and $10,500 under the policies respectively; the company tendered $1,075, which was refused. The position taken by the company was, that Parts G and H applied,

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and that the whole amount (if anything) to which the plaintiff was entitled was $550 under the one policy and $525 under the other.

On action brought, the defendants pleaded that Wadsworth had in the application represented that he had never had and was not subject to fits, or disorder of the brain, or any bodily or mental infirmity, which the company alleged was untrue, as he had had and was subject to fits or vertigo; and these misstatements were material.

At the trial, it was decided, on satisfactory evidence, that the only instance of illness or anything which could be considered as coming under the description did not take place till long after the issue of the policies; and there is nothing to indicate that there was any misrepresentation. The other defence the learned trial Judge gave effect to; and this forms the subject of the present appeal.

The facts surrounding the death of the insured are not complicated. In October, 1910, the insured went, with other members of a hunting club, to their club-house in the township of Hincks. On the 23rd October, some of the members of the club were out all day hunting; and, when they came in comparatively late and after supper-time, Wadsworth, who does not seem to have been out that day in the afternoon, said he was not feeling well and did not feel like eating—he did not have any supper and went and lay down upstairs. About 8.20 or 8.30 he came downstairs, declined an offer of something to eat, and asked the chore boy to open a bottle which he had. This the boy did; and the deceased, dissolving a tablet in some fluid out of this bottle, drank the solution. He then left the room and went outside. A dog was heard barking shortly after; and, when the boy went out to investigate, he noticed the water-closet on fire. The alarm was raised, and a number of persons ran to the burning building with water; after the fire was extinguished at least in part, the deceased was found sitting at one end of the building and on the opening of the seat of the closet, or perhaps the boards of the seat, leaning back against the well, his trousers not lowered. He was taken out moaning, apparently in pain, carried limp as he was to the club-house and put on a table. He was found to be rather badly burnt about the feet, up the back of the buttocks, and around the face and head; also a patch on the chest and on the shoulders.

He received treatment from a medical man who was one of his club-mates, and was shortly thereafter removed to Ottawa and placed in the Carleton General Hospital, where he died the next day, of shock.

The closet was a small building, some 4½ or 5 feet long and about as much in depth, with no front but with wooden sides and back, and with two holes in the seat.

Next day, the boy found in the bottom (*i.e.*, as we are informed, the pit) the side of an ordinary stable lantern, such as was in

use at the club for going out with; and, while Wadsworth had not taken a lantern out with him, so far as the witness could say, there was one noticed missing next day. It seems fairly clear that Wadsworth took the lantern with him to light him to the closet, it being quite dark when he went out, and it being usual to take a lantern on such occasions.

The building was not burnt, not even badly scorched, and there was no smell of oil on the day after the accident, when Labelle found the lantern; no considerable part of the lantern seems to have been found except the "side" which was found in the pit—the globe was not found, but one witness saw, on the night of the casualty, broken glass, the shape of a globe, lying on the platform or floor of the closet opposite one of the seats. We are told that this was at the opposite end of the closet from where Wadsworth was found, but I do not find this made clear upon the evidence, and I cannot say that it is material one way or the other.

In July of the same year, Wadsworth, at the same club-house, after dinner, "seemed to faint away;" it was very warm, but he did not seem to be suffering from the effects of the heat.

The medical man who attended him at the club gave a certificate on the 29th October, saying, amongst other things: "I can only account for his getting burned by believing that he must have taken a fit or fainted and in so doing upset the lantern, thus setting himself on fire. Everything in connection with the burning seems to indicate this."

From the evidence of this medical man and another called at the trial, my brother Middleton came to the conclusion that the unfortunate man "took a fit when he was in the closet, and that, while in that fit, he either dropped or knocked over the lantern, the lantern exploded or was spilled or was broken by the fall, the result was that the oil escaped, and there was almost immediately a very extensive flame, which enveloped him and inflicted the very severe injuries from which he died." And the deceased was affected with a "malady . . . known as minor epilepsy or *petit mal*."

I think my learned brother's conclusion amply sustained by the evidence; and I have arrived at the same conclusion from an independent consideration of the facts as proved.

It seems to me also clear that the injuries were not "caused by the burning of a building" at all.

What is said about the building is, indeed, that it was on fire, not very badly scorched; the cook told others of the fire; that the closet was on fire; but, as one of the witnesses threw a pail of water upon the roof, it may perhaps be inferred that the building did burn—that it was a "burning building" within the meaning of the policy—as in law (*Regina* v. *Parker* (1839), 9 C. & P. 45, *per* Parke, B.), it is sufficient that it be scorched and charred in a trifling way.

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But the condition of Part C is not that the injuries be sustained while in a burning building; the language is not the same as in the former part of Part C," "sustained while riding . . . in any . . . . steamboat . . . railway conveyance . . . ."—the words are not "sustained while in a burning building," but "caused by the burning of a building." We are referred to *Houlihan* v. *Preferred Accident Insurance Co. of New York*, 145 N.Y. St. Repr. 1048, as deciding that the two expressions are synonymous. In that case the leading judgment by Clarke, J. (in which all but one of the other Judges concurred, and he agreed in the result), says (p. 1050): "It must be that what was attempted to be guarded against was injury in the insured resulting from fire while in a building." In this conclusion I am unable to agree—the words "caused by the burning of a building" have a clear and unambiguous meaning, and a meaning distinctly differing from that of the words employed by the learned New York Judge. Nor, in my view, does the case of *Northrup* v. *Railway Passenger Assurance Co.* (1871), 43 N.Y. 516, cited as supporting the conclusion, assist, even if it be well decided—that being simply a decision that, where a passenger had to walk from a railway station to a steamboat landing, 70 rods distant, she did not cease to be "travelling by . . . public conveyance provided for the transportation of passengers."

But, if we were to give full authoritative weight to the *Houlihan* case, [*Houlihan* v. *Preferred Accident Ins. Co.*, 145 N.Y. St. Repr. 1048], I do not think that, even then, the plaintiff would have made out her case. There the bedclothes and mattresses of the bed upon which the deceased slept were burned, her night clothes were burned from her and other circumstances shewed that it was the burning of permanent or quasi-permanent furnishing and contents of the room which set fire to her—it was not, as in this case, the blazing up and burning of oil brought by the deceased into the room for a purely temporary purpose. Whatever may be the law in the case of the burning being caused by the ignition of permanent or quasi-permanent contents of a room, I venture to think that no stretch of language can reasonably make injuries caused by the burning of oil which is brought into the room by the insured for a temporary personal purpose only come within the meaning of the words "caused by the burning of a building."

This claim of the plaintiff is, in my view, not well founded.

Then, as to the application of Parts G and H. The meaning of G, so far as affects the present case, is: "In case of injuries which happen from fits or vertigo, and which injuries cause death, the company will pay one-tenth of the amount stated in Part A"—the participle "causing," in the third line, being in the same grammatical relation as the participle "happening" in the

first line. The clause does not mean, "In case of injuries which happen from fits or vertigo, which fits or vertigo cause or causes death," etc., etc.

The only question then is, whether the injuries happened from fits or vertigo, because they undoubtedly did cause death.

In considering this question, we must look at the case from a common sense, business point of view, avoiding metaphysical subtlety; ever having in mind that such agreements, being in the language selected by the company, should, where there is a real ambiguity, be construed most strongly against the company, we are not, by too refined or unnatural an interpretation of the language employed, to conjure up an ambiguity where none really exists.

"It is only a fair rule . . . which Courts have adopted to resolve any doubt or ambiguity in favour of the insured and against the insurer:" *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 58 Fed. Repr. 945, at p. 956, *per* Taft, J. (now President Taft); but it would not be a fair rule to invent or imagine doubt or ambiguity where none can be found.

In view of the law as laid down by the decisions, I do not think, however, that there can be said to be any ambiguity or doubt.

The injuries which caused the death are the burns—did these happen from fits or vertigo?

I do not lay any stress whatever on the use of the plural "fits"—nor do I think that if the cause were an epileptic fit, the plaintiff could recover because the plural is used in the policy instead of the singular. "Fits" is colloquially the same as "fit:" *cf.* Murray, New English Dict., *sub voc.* "Fit," pp. 262 *ad fin.*, 263 *ad. init. c, d.* Also in the English cases of epilepsy, which will be cited, the words "fits" is used in the policy, but the insured had only the one fit—indeed, in case at least of death, it would scarcely appear that more than one fit was to be considered. The burns were caused primarily and immediately by the fire—the fire was the proximate cause. In philosophy it is said "*causa causæ causantis, causa causans ipsa*"—and if, in law, the cause of the proximate cause were itself an efficient cause, there would be no difficulty in the present case. No doubt, the fire was caused by the fits and vertigo. Does that make these an efficient cause?

Two recent cases in England are strongly pressed upon us. In *Winspear* v. *Accident Insurance Co.*, 6 Q.B.D. 42, the policy did not extend to "any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease." W., being the insured, was overtaken by an epileptic fit when fording a shallow stream; he fell down in the stream and was drowned. It was argued that "it was the fit which caused the drowning, for even after the insured had fallen into the stream he could have got his head out of the water but for the fit." The

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Court of Appeal (Lord Coleridge, C.J., Baggallay and Brett, L.JJ.), however, held that the insurance company was liable, and that the death was not caused by any natural disease or weakness, but by the accident of drowning—that "those words in the proviso . . . point to an injury caused by natural disease, as if, for instance, in the present case, epilepsis had really been the cause of death." There are two points of distinction between the *Winspear* case and ours: (1) there the cause of death was being considered; in ours, the cause of the happening of injuries; (2) there the epilepsy was not the cause of the presence of the water which drowned; here, the epilepsy was in a sense the cause of the fire which burned.

The *Winspear* case is referred to and followed in an American case, *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 58 Fed. Repr. 945, in which an elaborate and careful judgment is given by the present President of the United States, then Mr. Justice Taft. The deceased had been "overtaken by some temporary trouble," which caused him to fall into a brook, upon whose banks he was at the time; he was drowned. The insurance company was held liable, although the policy provided that they should not be liable for "accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo," etc., etc., "nor to any cause excepting where the injury is the sole cause of the disability or death." This case goes no further than the *Winspear* case. [*Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42.]

The other English case most strongly relied upon is *Lawrence* v. *Accidental Insurance Co.*, 7 Q.B.D. 216. The policy did not insure in case of death arising from fits. The insured, standing at a railway station, was seized by a fit and fell forward off the platform when a train was passing—this went over his body and killed him. It was argued for the company that "the accident actually arose from the disease" (p. 218), but the Court, Denman, J., held them liable. He says (p. 219): "Now, the immediate cause of death is not in the least disputable, but there is no doubt that if he had not fallen there in consequence of the fit he would not have suffered death, and in that sense the fit led to his death. The question is whether that was merely one of several events which brought about the accident, in the sense that it caused the accident to happen by causing him to be there, or whether it was, within the meaning of this proviso, a cause of death which would prevent the policy applying to the case." In other words, was the fit a *causa causans* or a mere *causa sine quâ non* (so-called) or condition? Watkin Williams, J., agreed. Quoting Lord Bacon's Maxims of the Law, Reg. 1—"It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause"—he says:

> According to the true principle of law, we must look at only the immediate and proximate cause of death, and it seems to me to be

impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened. The true meaning of this proviso is that if the death arose from a fit, then the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes. . . . It is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so, because you can shew that another cause intervened and assisted in the causation.

The same remarks apply to this as to the case in 6 Q.B.D.—[*Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42], the fit did not cause the train to come along; it was not the cause itself of the *causa proxima*.

To the same effect are the remarks of Collins, M.R., in *Wicks* v. *Dowell & Co.*, [1905] 2 K.B. 225, at p. 228, which case does not assist—nor am I able to derive any assistance from *Mardorf* v. *Accident Insurance Co.*, [1903] 1 K.B. 584.

If, in the case in 6 Q.B.D., the falling of the insured had let in the water which drowned him—or, in the case in 7 Q.B.D., the falling had automatically brought on the engine, the cases would be parallel with the present—but that is not the case; and, as a consequence, these cases are not conclusive.

But there are cases in which the proximate cause is not accompanied by another cause (*causa sine quâ non*), but has been actually caused itself by another cause, and it has been held that this last-named cause is not to be considered as the *causa causans*—to use Lord Bacon's terminology, we are not to look to the causes of causes.

In *Busk* v. *Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73, the servants of the assured negligently lighted a fire in the insured ship, whereby she was burned. The case was elaborately argued by Campbell and Bosanquet. Bayley, J., says, giving the judgment of the Court (p. 80): "In our law at least, there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners." The very learned Judge refers to many authorities also in foreign laws, and holds "that the assured are entitled to recover, as for a loss by fire, although that fire was produced by the negligence of the person having the charge of the ship at the time."

Walker v. *Maitland* (1821), 5 B. & Ald. 171, at p. 175, *Bishop* v. *Pentland* (1827), 7 B. & C. 219, at p. 223, *Phillips* v. *Nairne* (1847), 4 C.B. 343, at pp. 350, 351, *Patapsco Insurance Co.* v. *Coulter* (1830), 3 Peters (S.C.) 222, at p. 233, *Columbia Insurance Co.* v. *Lawrence* (1836), 10 Peters (S.C.) 507, at p. 517, *General Mutual Insurance Co.* v. *Sherwood* (1852), 14 How. S.C. 351, at p. 366, may also be looked at upon the general principle, but

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must be read with caution, as they have not the so-called remote cause, always the cause itself of that which is proximate.

A nice distinction is indicated by Story, J., giving the judgment of the Supreme Court of the United States, in *Waters* v. *Merchants' Louisville Insurance Co.* (1837), 11 Peters (S.C.) 213. In that case, barratry not being insured against, the Circuit Court divided in opinion, and the Supreme Court was asked, amongst other things: (1) Does the policy cover a loss of the boat by a fire, caused by the barratry of the master and crew? (2) Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness, or unskilfulness of the master and crew of the boat, or any of them? The learned Judge says (p. 219), upon the first question: "It assumes that the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents. . . . In this view of it, we have no hesitation to say, that . . . such a loss is properly a loss attributable to the barratry, as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced." But, as to the second question, it was held that the negligence could be only *causa remota*.

In our own Courts the case *Canadian Casualty and Boiler Insurance Co.* v. *Boulter*, *Canadian Casualty and Boiler Insurance Co.* v. *Hawthorne*, 39 Can. S.C.R. 558, and in the Court below, *Hawthorne* v. *Canadian Casualty and Boiler Insurance Co.*, *Boulter* v. *Canadian Casualty* (1907), 14 O.L.R. 166, are in point. There the policies contained a clause that they did not cover loss or damage resulting from freezing. A pipe connected with the sprinkler-tank system burst from freezing, and the water ran down upon and injured the stock. The trial Judge, the Chief Justice of the King's Bench, gave judgment for the insured, and this was sustained by the Court of Appeal and the Supreme Court—one Judge dissenting in each Court. The Chief Justice of the King's Bench does, indeed, suggest that the freezing was the cause of the injury, though not of the damage; but that must be read in connection with the facts of the case. It would appear also that the use of the word "immediate" had some influence on the Supreme Court. But, taking the case as a whole, I think it is authority for saying that the cause of an efficient cause is not itself an efficient cause or *causa causans*.

I think the appeal should be allowed in part, and judgment entered for the plaintiff for $10,750 and interest from the teste of the writ. The plaintiff should also have the costs of the trial; success being divided, there should be no costs of the appeal.

The following have a more or less indirect bearing upon the matters discussed: *Trew* v. *Railway Passengers Assurance Co.* (1860), 5 H. & N. 211; *S.C.* (1861), 7 Jur. N.S. 878 (Cam. Scacc.); *Reynolds* v. *Accidental Insurance Co.*, 22 L.T.N.S. 820; *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; *Clover Clayton & Co. Limited* v. *Hughes*,

[1910] A.C. 242; *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284; *Accident Insurance Co.* v. *Crandal* (1887), 120 U.S. 527; *Canadian Railway Accident Insurance Co.* v. *Haines* (1911), 44 Can. S.C.R. 386.

LATCHFORD, J. (dissenting):—I think the finding of the learned trial Judge, that the accident to the deceased happened because of a fit, is amply warranted by the evidence.

It is urged, however, that the death of Wadsworth resulted from burns, and not from fits; and that, therefore, Part G should not have been considered in determining the amount payable by the defendants.

The insurance is expressed to be "against bodily injuries caused solely by external, violent, and accidental means," as specified in a schedule.

In the first part of the schedule, under the heading "Schedule of Indemnities," it is provided—"Part A"—that, "if any of the following disabilities shall result from such injuries alone, within ninety days from the date of accident, the company will pay, in lieu of any other indemnity, for loss of life . . . hands . . . . feet . . . entire sight of both eyes . . . the principal sum." This sum is $5,000 under each of the two policies sued on, with an annual increase at the rate of five per cent.

Loss of life is thus defined as "a disability."

A disability, to form the basis of any claim against the company, "shall result from . . . bodily injuries . . . caused solely by external, violent, and accidental means."

The foundation of the plaintiff's action is, that her husband's death resulted from or was caused by injuries which were themselves caused by specified means. Mrs. Wadsworth was obliged to establish and did establish that external, violent, and accidental means caused injuries to her husband, and that injuries caused by such means caused his death.

So much it seems to me necessary to premise before coming to the consideration of the particular provisions of the contract around which the parties are contending.

The defendants allege and the plaintiff denies that Part G of the schedule affects, in the circumstances of the case, the amount to which Mrs. Wadsworth is entitled. If it does apply, the appeal fails; and the question whether it applies or not is, upon the facts as found, merely one of construction.

Part G has on principle to be construed upon a consideration of the whole contract. A policy of insurance is, in the words of Lord Ellenborough in *Robertson* v. *French* (1803), 4 East 130, at pp. 135, 136, "to be construed, according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless . . . the context evidently points out that they must in the particular instance,

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and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

The main object and intent of the contract may be regarded as limiting any general words used having in view that object and intent: Lord Herschell, L.C., in *Glynn* v. *Margetson & Co.*, [1893] A.C. 351, at p. 355.

Part G cannot in any way be considered as in derogation of the object and intent of the contract. It is, as it purports to be, a part of the contract, and fixes the amount payable when death (*inter alia*) occurs from injuries resulting in certain ways from any of certain stated causes. If the language is clear, it may be construed upon the principles I have referred to; and there is no good reason why it should be given what is sometimes called a benign interpretation.

So far as material here, the provisions of Part G have reference to the "case of injuries happening from any of the following causes, viz., intentional injuries . . . fits . . . causing death, loss of sight or limb." "Causing" appears from the context of the whole clause to be in the same grammatical relation to "injuries" that "happening" is.

Part G clearly applies whenever injuries which cause death "happen" by accidental means from any of the specified causes, including a fit or "fits."

The injuries from which Wadsworth died happened from "fits," according to the finding of the trial Judge.

For the plaintiff it is contended that the "fits" must be shewn to be the immediate, proximate cause of death, before the defendants can invoke the provisions of Part G in their favour. So to construe Part G is, in my opinion, to subject it to a strain which, upon consideration of the whole contract, it cannot bear.

"In case of injuries," in Part G, has reference manifestly to injuries of the kind insured against—injuries resulting in disability, and "caused solely by external, violent, and accidental means." The succession of events directly resulting from the paroxysm—the overturning and breaking of the lighted lantern, the escape and ignition of the oil, the flames which enveloped Wadsworth, his inability owing to unconsciousness to give any alarm or extinguish his burning clothing—all are, in my opinion, but "means," within the true intendment of the policy, lying between the fit as a cause and the injuries as an effect of that cause. This conclusion appears all the more reasonable if one considers some of the "causes" enumerated in the same category as "fits." "Sleep-walking," for instance, cannot be the immediate cause of "injuries causing death, loss of sight or limbs." Some accident must intervene; some means must lie between the mere somnambulism and any serious injury caused while in that state.

No support is, I think, given to the plaintiff's contention by the cases which have been cited on her behalf. They are but illustrations of the application of the maxim, *In jure non remota causa sed proxima spectatur;* and they apply, in matters of contract, wherever the agreement either expressly or by implication provides that the immediate cause must be looked to.

The many cases in which liability of insurers for loss caused by fire has been considered are authority for the proposition that, where such a loss has been insured against, it is immaterial that the fire itself was caused by the negligence of the agents or servants of the assured. The fire was the proximate cause of the loss sustained, and the cause of that cause could not be regarded. But, if the policies had provided that there should be no liability in case the fire resulted from such negligence, the decisions referred to would have been given for the defendants.

The case is not, to my mind, one in which it is necessary to consider whether the epileptic paroxysm was or was not the *immediate and proximate* cause of death. If it were, I should feel myself bound by *Winspear* v. *Accident Insurance Co.*, 6 Q.B.D. 42, and *Lawrence* v. *Accidental Insurance Co.*, 7 Q.B.D. 216. In both of these cases, as Lord Justice Collins points out in *Hensey* v. *White*, [1900] 1 Q.B. 481, at p. 485, there was a fortuitous unexpected element—the presence of a stream in the one case and of a moving railway train in the other—which turned a normal condition of affairs into a catastrophe. The fit did not cause the stream to drown Winspear. His condition did not cause the stream to flow where it was flowing when he fell into it. Lord Justice Collins points out that it was just as though the epileptic had been struck by lightning while lying on the ground. Nor did the fit in the *Lawrence* case cause the train to run which passed over the neck and body of the deceased. The decision in *Hensey* v. *White*, as to what is an "injury by accident," within the meaning of the Workmen's Compensation Act, 1897, was overruled in *Fenton* v. *Thorley & Co. Limited*, [1903] A.C. 443; but that circumstance in no way affects the force of the observations I have quoted.

And the reason occurs to me why the *Winspear* and *Lawrence* cases are distinguishable. In both (as here) the insurance was, *inter alia*, against death by accident. But in each there was an exception, that there should be no liability in certain circumstances. The defendants were obviously liable unless they could clearly bring themselves within the exceptions which, upon well recognised principles, were to be construed most strongly against the defendants. The exceptions were held not to be open to the defendants, because the accidents were not caused directly and proximately by the excepted causes. In the present case, the clause Part G, relied on by the defendants, is not in the nature of an exception. It is as much a term of the contract as the "face," as it has been called, of the policy, and simply states

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circumstances in which the amount of the company's liability is to be one sum, instead of another fixed by a different term of the policy. Moreover, the fit, as I have stated, was the *causa causans* of the breaking of the lantern and of the consequent injuries and death. If, in the *Winspear* case, [*Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42], the assured had, because of the fit, let loose a flood of water which overwhelmed him, or, in the *Lawrence* case, [*Lawrence* v. *Accidental Ins. Co.* 7 Q.B.D. 216], the assured had, because of the fit, started the engine which killed him—the decisions, notwithstanding the rules of construction applicable to exceptions, would have been different.

I am unable to see any reason, either upon principle or authority, why the judgment appealed from should not be affirmed.

Appeal allowed in part; LATCHFORD, J., *dissenting*.

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March 18.

WILLIAMS v. BOX.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. March 18, 1912.

1. COSTS (§ II—31)—LIMITATION—BLOCK TARIFF.

The limitation of the amount of costs taxable upon an appeal under a statute (7 & 8 Edw. VII. (Man.) ch. 12, sec. 2), whereby no greater sum than $100.00 and disbursements shall be allowed for costs of appeal to the successful party in any appeal to the Court of Appeal, applies not only to costs ordered directly by the Court of Appeal, but to costs ordered in favour of the ultimately successful party upon the reversal of the judgment of the Court of Appeal upon a further appeal to the Supreme Court of Canada.

Statement

APPEAL from a decision of Mathers, C.J.K.B., affirming a ruling of the taxing officer.

The appeal was dismissed.

The plaintiff was mortgagor and the defendant was mortgagee of certain property in the city of Winnipeg. The defendant obtained a foreclosure order in the land titles office and a certificate of title of absolute ownership was then issued to him. The mortgagor shortly subsequent asked to be allowed to pay up and redeem the property. Upon the mortgagee's refusal, the plaintiff brought her action to redeem. At the trial, judgment was given against the plaintiff. Upon appeal this judgment was confirmed by the Court of Appeal: *Williams* v. *Box*, 19 Man. R. 560. Upon further appeal, this judgment was reversed by the Supreme Court of Canada, 44 Can. S.C.R. 1, with costs of trial and both appeals, and judgment was entered allowing the plaintiff to redeem as prayed in the usual manner. Upon petition to the Privy Council, leave to appeal from the judgment of the Supreme Court of Canada was refused: *Williams* v. *Box*, 44 Can. S.C.R., preliminary page x.

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Argument

Upon taxation of the plaintiff's costs of appeal to the Court of Appeal, the taxing officer ruled that the statutory limitation of costs applied, and that under section 2, of chapter 12, 1908,* the plaintiff was entitled to tax only $100 and disbursements. The plaintiff appealed from the taxing officer to Chief Justice Mathers, who affirmed the taxing officer's ruling. The plaintiff thereupon appealed to the Court of Appeal.

J. B. Coyne, for plaintiff, appellant. The Act does not impose a general limitation upon costs in the Court of Appeal. It does not provide that no greater sum than $100 and disbursements shall be taxed. It only imposes that limitation in certain cases. Its language is,

> No greater sum than $100, exclusive of disbursements shall be taxed and allowed for costs of appeal. . . . . to the successful party in any appeal to the Court of Appeal.

The limitation upon the right to costs ordinarily taxable is only in the case of taxation of the bill of the party who succeeds in the Court of Appeal. If the party is not successful in the Court of Appeal, and later obtains the right to tax costs, the limitation does not apply. A limitation upon an ordinary right is construed strictly. This statute is also an inference with the previous law, and on that account also will be construed strictly. The successful party in the appeal to the Court of Appeal was the defendant, not the plaintiff. The limitation does not apply to the plaintiff. The Act further provides that in cases of special importance, or difficulty, the Court shall have discretion to order that the costs be taxed without the limitation. A case in which the judgment of the Court of Appeal for Manitoba is reversed by the Supreme Court of Canada is on the face of it a case of special importance or difficulty. It is superfluous to ask the Court to exercise a discretion as to costs in such a case. The Legislature intended that the limitation should not be imposed in such case. It effected its intention by imposing the limitation only upon the successful party in the Court of Appeal, thereby leaving the costs, where the Manitoba Court of Appeal is reversed and the unsuccessful party before that Court taxes his costs therein, those ordinarily taxable without the limitation.

*Section 2 of 7 & 8 Edw. VII. (Man.) ch. 12, is as follows:—

2. Subject to the proviso at the end of this section, no greater sum than one hundred dollars, exclusive of disbursements, shall be taxed and allowed for costs of appeal from the final disposition of an action or proceeding in the Court of King's Bench, to the successful party in any appeal to the Court of Appeal, as against any other party thereto, and counsel fees shall not be deemed to be disbursements for the purpose of any such taxation. Provided that the Court of Appeal shall have a discretion to order the allowance of any greater amount, within the limit of costs ordinarily taxable in cases of special importance or difficulty, or in any case in which the Court shall be of opinion that costs have been increased by vexatious or unreasonable conduct on the part of the plaintiff or defendant.

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To defeat the plaintiff's contention the language of the section must be radically changed; a new section must be substituted in place of the one now in the statute.

G. W. Baker, for defendant, respondent. The Act is intended to refer to the costs, in the Court of Appeal, of the ultimately successful party. The limitation applies to every case of taxable costs in the Court of Appeal.

Judgment

THE COURT dismissed the appeal with costs.

Appeal dismissed.

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UNION BANK v. CRATE.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, JJ.A., Latchford, J. April 15, 1912.

April 15.

1. HUSBAND AND WIFE (§ II D—73)—MARRIED WOMAN'S SEPARATE ESTATE —MORTGAGE EXECUTED BY WIFE TO SECURE DEBT OF HUSBAND.

Leave to adduce further evidence as to the circumstances under which a married woman executed a mortgage upon her separate property to secure a debt of her husband so as to shew that she acted without independent advice, was properly denied where it appeared that the money secured by such mortgage was applied largely to building a number of houses upon the wife's property, and that she had knowledge as to the condition of such indebtedness, and that, on account of the husband's ill-health, she took an unusually active part in looking after his business while the account secured by such mortgage was current.

[*Stuart* v. *Bank of Montreal*, 41 Can. S.C.R. 516, and *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, distinguished.]

2. WAIVER (§ I—1)—THAT CAUSE OF ACTION PREMATURELY BROUGHT— AGREEMENT AND PRODUCTION OF EVIDENCE ON REFERENCE.

An agreement between the parties to an action on a mortgage that the Referee should consider and determine all matters in difference between them, and the production of evidence in relation thereto, constitutes a waiver of an objection that, because some of the collateral notes were not due when the writ was issued, the action was prematurely begun.

Statement

APPEAL by the defendants from the judgment of a Divisional Court, *Union Bank* v. *Crate*, 2 O.W.N. 1147, 19 O.W.R. 299.

The appeal was dismissed with costs.

F. E. Hodgins, K.C., and *C. M. Garvey*, for the defendants.

J. A. Hutcheson, K.C., for the plaintiffs.

Moss, C.J.O.

MOSS, C.J.O., concurred in dismissing the appeal.

Garrow, J.A.

GARROW, J.A., also concurred.

Maclaren, J.A.

MACLAREN, J.A.:—The defendants have appealed from a judgment of the Divisional Court dismissing their appeal from the report of the County Court Judge at Brockville, on a reference to him for trial of certain actions brought by the bank against the defendants (husband and wife), based upon certain notes and a collateral mortgage, and upon an overdraft

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Before proceeding with the appeal, the defendants' counsel applied to this Court for leave to adduce further evidence as to the circumstances under which the wife had executed the mortgage in question. They stated that this evidence had not been produced before the County Court Judge, as her counsel was then relying upon the law as laid down by the Supreme Court of Canada in the case of *Stuart* v. *Bank of Montreal*, 41 Can. S.C.R. 516, to the effect that the wife should have had the benefit of independent advice; and, in consequence, did not bring out the evidence that would have shewn that the circumstances of this case were in fact similar to those on which the judgment of the Privy Council in the *Stuart* case, *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, was based. The evidence taken before the Referee, however, shews clearly that the facts of this case are widely different from those of the *Stuart* case. The moneys borrowed from the bank were in large part applied to the building of a large number of houses erected for the female defendant on her private property. She herself says that she was kept pretty well informed in the office as to the indebtedness, and she discussed the course of the business with her husband. She appeared to have taken a more than usually active part in looking after the business, on account of the ill-health of her husband during a portion of the time the account was current. The application to re-open the case and adduce further evidence may, I think, be fairly described as not only unusual, but extraordinary. The circumstances are not such as are contemplated by the Rules; and no precedent was cited to us of any case at all analogous to the present, and I do not think any such precedent can be found. Not even a shadow of a case has been made out for a re-opening.

It was next urged that the action on the mortgage was premature, inasmuch as some of the notes to which it was collateral were current and had not matured when the writ in the mortgage action was issued on the 12th February, 1908. The mortgage was dated the 13th July, 1906, and set out that the defendants were indebted to the bank in the sum of $31,674.70 on certain notes and $3,778.75 on an overdraft, and that the mortgage was taken as collateral security for the payment of the said notes, or of those that might be accepted in renewal of or in substitution for them. It was made payable in one year from its date, with interest at the rate of seven per cent., payable every three months in advance.

I am of opinion that this objection ought not to be allowed to prevail. The defendants executed this mortgage under seal, promising to pay the amount on a day named, and such payment was seven months overdue when the writ was issued. At that time, at least two of the notes, amounting in the aggregate to

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$11,620.75, had been dishonoured, and were still unpaid. Besides this, when the action was referred to the County Court Judge to take the accounts between the parties, it was well understood between them that the whole accounts were to be taken. When the parties appeared before the Referee, and the counsel for the bank had stated the wide scope of the reference, the counsel for the defendants stated that he went a step further, and his understanding was, that not only all matters arising in the actions, but anything else that might crop up, any outstanding differences between the parties, might be included in the reference, so that the reference might be a final adjustment of the dealings of the defendants with the bank. This was acquiesced in, and the parties proceeded with the reference on this basis, producing all their witnesses and documents. So that, even if the objection ever had any force, it was formally waived, and the defendants would now be estopped from setting it up.

As to the merits of the report, a perusal of the evidence satisfies me that the learned Referee allowed the defendants all that they were entitled to, and that the latter have failed to shew error in the report in this respect. The accounts are very much confused by the fictitious entries made in the books of the bank, by the then manager, with the knowledge and connivance of the male defendant, to impose upon the inspectors of the bank and to keep his superior officers in ignorance of the real condition of the defendants' account. The defendants' counsel, however, has failed to shew that they were entitled to any greater reduction than that made by the Referee, and the present appeal from the judgment of the Divisional Court, which dismissed their appeal from the report of the Referee, should be dismissed with costs.

Meredith, J.A.

MEREDITH, J.A.:—There is nothing substantial in this appeal. The facts of the case were carefully elicited by the Local Referee, a learned Judge of a County Court, and were carefully considered by him; upon an appeal from a single Judge, to a Divisional Court—after the dismissal of an appeal from the Referee to the single Judge—the facts were again fully considered and the Referee's findings unhesitatingly affirmed; so that in so far as there has been any controversy as to such facts it can hardly be expected that that can be a reversal of such findings.

But if the case were being dealt with now for the first time, upon the evidence which has been adduced in it, there would be no difficulty in coming to the same conclusions as those reached by the Referee. The appellant seeks relief as an innocent person imposed upon and seeking to save her separate property from the rapacity of wealthy creditors of her husband; but that

position is greatly handicapped by the incontrovertible facts that that property was built out of the moneys of these creditors, which, they are in this action, seeking to recover moneys borrowed from them for that purpose; and that the appellant was not only acquainted with business affairs sufficiently to see that the hardship would not be on her in any case, but would be upon those through whose money she has benefited so much if they should have no right to look to the fruits of it for compensation; as well as to have known a good deal about her husband's business affairs, perhaps as much as he did himself, which was not unnatural in any case and certainly not in this case in which that business seems to have consisted largely of borrowing money from the respondents and building upon and looking after the mortgaged property in question.

The Referee would not, as I find, upon the evidence adduced before him, have been justified in coming to a conclusion that the mortgage in question is invalid by reason of fraud of any character. And I cannot think that it would be proper, at this stage of the case, to permit the appellant to adduce further evidence on that branch of the case; nothing like a case for granting such an indulgence has been made out; and the incontrovertible facts are so much against such a defence that, as I think, it would be but a waste of time for the appellant to again enter upon such a forlorn hope.

It is quite too late to give effect now to the contention that the action is premature; if it were, there should not have been a reference such as was made at the trial. If in truth the reference was made against the appellant's will, she should have appealed against the order directing; but instead of doing that, the parties have fully fought the case out on the merits, and none of them should be heard not to say that all was abortive. Besides this, it is admitted that one or two of the promissory notes was or were overdue when the writ was issued, and as admitted, that the action was not altogether premature. It was in the interests of all parties, and all parties desired, that the real question between them—whether the mortgage is or is not valid against the appellant—should be determined, and having had that considered now before four tribunals, the judgments must stand or fall upon the merits.

I would dismiss the appeal in all respects.

LATCHFORD, J., concurred in dismissing the appeal. Latchford, J.

Appeal dismissed with costs.

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April 22.

McILVENNA v. GOSS.

Saskatchewan Supreme Court, Wetmore, C.J. April 22, 1912.

1. VENDOR AND PURCHASER (§ I B—5)—SUB-PURCHASER'S RIGHT TO EVIDENCE OF PAYMENT BY HIS VENDOR.

The vendee in a contract for the sale of lands cannot, as a condition precedent to paying the stipulated instalments of the purchase money, require the vendor, who had only an equity in the lands, to shew that he had paid all instalments of the purchase money actually due from him to his vendor.

2. CONTRACTS (§ V C—390)—NON-PAYMENT OF INSTALMENTS DUE ON LAND CONTRACT—RIGHT TO HAVE CANCELLED—IPSO FACTO VOID.

Where a contract for the sale of lands does not provide for its cancellation by the vendor but that it shall be *ipso facto* void upon non-payment of instalments of purchase money, a Court will not declare a cancellation thereof for non-payment.

3. VENDOR AND PURCHASER (§ I C—10)—DELAY IN REPUDIATING TITLE—FAILURE TO DELIVER ABSTRACT—PRESUMPTION AS TO ACCEPTING SAME.

A vendee in a contract for the sale of lands who does not promptly repudiate the agreement because of the vendor's failure to deliver an abstract of title, or of the delivery of one that is unsatisfactory, will be deemed to have accepted such title as his vendor actually had.

4. REFERENCE (§ I—1)—REFERENCE AS TO TITLE PRIOR TO PAYING INSTALMENTS.

In an action to recover instalments of purchase money due on a contract for the sale of lands the vendee is entitled to a reference, and to have the vendor's title manifested before being ordered to pay any of the instalments.

[*Mayberry* v. *Williams*, 3 Sask. L.R. 350, referred to; *Cameron* v. *Carter*, 9 Ont. R. 426, especially referred to.]

5. REFERENCE (§ I—3)—AS TO TITLE—WHAT INCLUDED IN.

In an action for an instalment of purchase money due on a contract for the sale of lands the Court will order a reference to ascertain what right or interest was held therein by the vendor, who, at the time and immediately before the commencement of the action was in actual possession thereof, and under what right he holds, as well as what taxes are outstanding against it; and also require the vendor to produce all documents and writings in his possession that shew his title or interest therein; and that upon the filing of the report of the registrar either party may apply for such judgment as he may deem himself entitled to.

Statement

AN action for possession of land and a declaration that a land contract between the parties is cancelled and that all payments and improvements are forfeited.

An order of reference was made.

C. E. Armstrong, for plaintiff.

W. F. Dunn, for defendant.

Wetmore, C.J.

WETMORE, C.J.:—Upon carefully reading the evidence in this case, I find myself wondering why the parties got into litigation. They both expressed themselves willing to carry out the agreement, and I can discover nothing whatever that would prevent their doing it if the plaintiff had the interest he claimed

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in the land in question and had acted reasonably. I must frankly state, that in my opinion, the trouble entirely arose through the captiousness of the plaintiff unless there is something which has not been disclosed. These parties entered into an agreement dated the 3rd June, 1910, whereby the plaintiff agreed to sell to the defendant section 17, township 24, range 5, west of the 3rd meridian, for the sum of $8,640, of which $1,640 was paid on the signing of the agreement, and the balance was agreed to be paid in seven equal annual instalments of $1,000 each on the 31st day of May in each year, with interest at 7 per cent. payable both before and after default, to be paid at par at Sudbury. The defendant covenanted that he would pay and discharge all taxes, rates and local improvement assessments wherewith the land might be rated and charged after the date of the agreement, and that he would observe and keep—

> All terms, conditions, agreements, and covenants, contained in certain contracts of sale respecting said lands at one time made between the Canadian Northern Prairie Lands Co., Ltd., and the party of the first part (plaintiff) dated the 10th of August, 1910 (as to the first payment of the purchase moneys in said agreement mentioned and which are to be paid by the party of the first part);

and it was set forth that the lands were sold by the plaintiff to the defendant subject to such contracts and agreements. The plaintiff covenanted that on payment of the purchase money with interest he would—

> convey and assure or cause to be conveyed and assured to the said party of the second part (defendant) his heirs or assigns, by a good and sufficient deed in fee simple, subject, however, to the terms and conditions of said agreements mentioned.

The agreement contained the following clauses:—

> It is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect, and the said party of the first part shall be at liberty to re-sell the land, and it is further agreed that if the party of the second part shall not observe and keep the terms and conditions of said agreements mentioned the whole of the unpaid purchase moneys and interest shall forthwith become due and be payable.
>
> It is hereby expressly agreed that the said party of the first part is not to be bound to furnish any abstract of title, or produce any title deeds or other evidence not in his possession or control, or to give copies of any title deeds, but that the party of the second part to search the title at his own expense.
>
> And the said party of the second part hereby declares himself satisfied with the title the party of the first part shall receive from the said Canadian Prairie Lands Co., Limited, and the party of the first part shall not be required to give any other or better title than he shall so receive.

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It is a peculiar circumstance that the agreement of the Canadian Prairie Lands Co. referred to is stated to be dated two months after the agreement between the plaintiff and defendant and that was not explained.

The defendant assigned his interest in one-quarter of this land to one Arbogast, and in another quarter to Lydia Bettcher, and in another quarter to one McGill. McGill assigned to one Wilbur, and Arbogast and Bettcher assigned to one James W. Armstrong, and the defendant assigned the remaining quarter to Dr. Pennington. It does not appear by the oral evidence that these assignments were made. I should judge, from the abstract of title put in evidence, that Wilbur was clothed with his interest on the 1st August, 1911, and from the correspondence put in evidence, that Armstrong was clothed with his interest as far back as 30th May, 1911, because on that date Messrs. Caldwell and Dunn commenced a correspondence with the plaintiff in respect of his interest; and moreover, I am of opinion that I can find, and do find, that Armstrong was clothed with his interest on 26th July, 1911, and therefore, before action brought, because the plaintiff treated with Armstrong's agent, Scivell, on that date as if Armstrong was so clothed. There is no evidence to shew when Pennington got his interest, or that the defendant had yielded up possession of the land to any of these assignees.

A somewhat lengthy correspondence, commencing on 30th May, 1911, took place between Caldwell and Dunn (acting at the start for Armstrong and later on for Armstrong and the defendant) and the plaintiff's Ontario solicitor, Mr. McGaughey. It did not result in anything except that the plaintiff exhibited some quite uncalled-for and unnecessary insolence to Messrs. Caldwell and Dunn, and that by letter dated 14th June, in which Caldwell and Dunn purported to act for both Armstrong and the defendant, they made a formal demand upon the plaintiff for a copy of the agreements or a statement shewing how his interest in this land is made up. Some question may arise whether under the clause of the agreement, which I have cited the plaintiff was bound to furnish a copy of any agreements, at any rate at his own expense. I merely mention this in passing, it is not material at this stage, because the plaintiff, on June 19th, complied with the request by furnishing a statement in writing as follows:—

> Section 17-24-5-W3 stands thus, C.N.R. to Dr. Arthur; Dr. Arthur to Jas. McIlvenna, Jas. McIlvenna to J. E. Goss. That is as far as I can go. Dr. Arthur has made all payments to the C.N.R. I have made the same payments that Mr. Goss makes to me less my commission. Goss refuses to meet his payments when due, so also do I to Dr. Arthur.

It would be observed that the plaintiff complied with the alternative requests in the letter of 14th June. On the 7th

July, the plaintiff caused notice of cancellation of the agreement to be served on the defendant, but I find that this notice was subsequently waived. Therefore, it is not necessary to deal with it.

Later on in July the plaintiff came to this province, and interviewed the defendant at Elbow, where he resided, and the two came into Moosejaw, and on or about the 26th July, a meeting was held at the Maple Leaf Hotel there between the plaintiff and the defendant McGill and one Seivell, who was a partner of Armstrong, and in his absence from the city represented him. I find that the plaintiff's interest in the land was of a character that required investigation. In the first place it is open to question whether there were any agreements between the plaintiff himself and the Canadian Northern Prairie Lands Co., Limited, mentioned in the statement of claim. It appeared at the trial that this company was what the plaintiff called a subsidiary company (subsidiary to what does not appear). He, Dr. Arthur, and one Wright formed a syndicate and purchased land from this company, of which the land in question formed a part. The equity, I presume, in that part in some way or other—it is not clear how—became vested in the plaintiff, who assigned it to Dr. Arthur in 1905, four years before the agreement between the plaintiff and the defendant. The agreement with the company is not in existence—according to the plaintiff it has become of no use.

Messrs. Caldwell and Dunn, in their letter of 30th May, state that in searching the title to this land they found that it still stood in the name of the Canadian Northern Railway Company, and this is repeated in another letter of theirs at a later date; and on reading a couple of letters of the plaintiff, I should judge that the title did at one time stand in that company, but I cannot understand how Caldwell and Dunn made that statement in their letters because the registrar's abstract of title shews that Dr. Arthur was registered owner on 21st March, 1911. It will be seen that in the plaintiff's letter of 19th June before referred to he claims through Dr. Arthur, and he swore at the trial that he was bound to Dr. Arthur the same as Goss was bound to him—that his agreement with the defendant is an exact copy of Dr. Arthur's agreement with him. No agreement between him and Dr. Arthur was produced at any time. All that it is necessary for me to say at present is that under his agreement as given in cross-examination, I have very grave doubts whether there is any written agreement of sale from Dr. Arthur to him at all, whether the plaintiff is anything more than an agent of Dr. Arthur to sell the land, if he is that; that is, whether the agreement between the plaintiff and the defendant is sufficient to carry any interest or equity in the land to anybody.

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When the parties met at the Maple Leaf Hotel, as before stated, on or about the 26th July, it was arranged in effect that the money due on the 31st May would be deposited in a bank at Moosejaw and remain there subject to the plaintiff satisfying the defendant as to his interest. He was to send up his agreement of purchase from Dr. Arthur and other evidences of interest. The money was to be paid to him when he produced good title. They went to the Imperial Bank to carry that arrangement out, but it was not carried out. Possibly the reason for not doing so is not material to the question arising in this case, but what I have just recited discloses a fact that is important, namely, that the defendant was pressing, I will not say for an abstract of title, but for evidence of the plaintiff's title in equity in the land. I may say, however, that I find the arrangement went off because the defendant desired that the money should not be paid over until his solicitors, Caldwell and Dunn, were satisfied with the title, and the plaintiff would not agree to that. He wanted the manager of the bank to take that responsibility, which the manager very properly refused to take, and so the plaintiff walked out of the bank. Afterwards, on the 7th September, the plaintiff sent a letter of cancellation by registered mail to the defendant which was received in due course, and on the 12th September this action was commenced. No documentary evidence of the plaintiff's title or interest was produced either before action brought or at the trial. The instalment due 31st May, 1911, has not been paid, but the defendant was ready and willing to pay it upon the plaintiff shewing to the satisfaction of his counsel that he had an equity in the lands of a satisfactory nature. Messrs. Caldwell and Dunn seem to have been under the impression all along that the plaintiff was bound to shew that all instalments of purchase-price actually due from the plaintiff to his vendor down to and including the 31st May must be paid before the plaintiff could insist upon payment by the defendant to himself of the instalment in question. No authority was cited for that proposition, and I cannot find any. My present view is that the authorities are the other way.

The plaintiff claims:

1. Possession of the land.

2. A declaration that the contract between himself and the defendant is cancelled and all payments made thereunder and improvements on the land forfeited.

In the alternative he claims payment of the instalment of principal and interest falling due 31st May, 1911.

I will deal first with the question of the cancellation of the contract. I am very much inclined to the opinion that I am not in a position to deal with that question. In the first place it is not a question of cancelling. The agreement does not provide for a cancelling by the act of the vendor at all; it provides

that it shall become *ipso facto* null and void and of no effect unless the payments are punctually made. This question was not raised at the trial, and possibly I should treat the relief asked for now under consideration as asking that the agreement be declared null and void. The question arises what is the consequence of an omission to deliver an abstract of title or one that is not satisfactory? Apparently in England it merely puts the purchaser in a position to repudiate the agreement, and that is all, and if he intends to repudiate, he must do so promptly, otherwise he will be held as accepting such title as the vendor may have. See 1 Dart on Vend. and Purch., 7th ed., 341, and 1 Williams on Vend. and Purch., 134.

A practice has grown up in the Ontario Courts where an action is brought to recover purchase-money on an agreement for the sale of land and in a proper case to make a reference of inquiry as to the title, and it has been held there that a purchaser is entitled, even when the purchase-money is payable by instalments, to have a reference and to have the title manifested before he makes a single payment. Upon this question I refer to the cases cited in the judgment of the Court in *Mayberry* v. *Williams*, 3 Sask. L.R. 350, especially *Cameron* v. *Carter*, 9 Ont. R. 426. I am disposed under the circumstances of this case, if I can do so legally, to make such a decree as will prevent the defendant losing the land if the plaintiff has the interest which he asserts he has; it would be a great hardship to do otherwise. I think I can take steps towards that end. I am of opinion that the practice followed in Ontario is most suitable to this country, especially in this western part of it, where such large and numerous deals are being made in real estate, and where we have no Vendors and Purchasers Act as they have in England. The enormous and rapid rise in the value of lands would only throw the temptation in the way of the vendor to escape his sale; and the only consequence of a refusal to give an abstract of title was that the purchaser would have to repudiate his contract, that would just be what the vendor would want done. This is especially true when one considers that in a very great many cases of these deals the vendor only has an equity.

The plaintiff has asked as an alternative relief for payment of the instalment of the purchase-price due on May 31st, 1911. I feel, therefore, that that being so, I can grant either of the reliefs prayed for which I consider most equitable. Without, however, determining at present what relief the plaintiff is entitled to, if any, I will direct a reference to the local registrar to inquire and report.

(1) As to the right or interest of the plaintiff in the land in question, at which inquiry the plaintiff shall produce all documents and writings shewing his title or interest in such land.

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(2) Who at the time of and immediately before the commencement of this action was in actual possession of the land in question, and of what part thereof, and in what right.

(3) What taxes were outstanding against the property on the 3rd day of June, 1910, and for what years.

On the local registrar's report being filed, either party to be at liberty on ten days' notice to the other to apply to a Judge in Chambers for such judgment as he may deem himself entitled to.

Judgment of reference.

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April 20.

PEEL v. PEEL.

Ontario High Court, Boyd, C. April 20, 1912.

1. INCOMPETENT PERSONS (§ I—2)—WHAT CONSTITUTES INCOMPETENCY—LUNACY ACT, 9 EDW. VII. (ONT.) CH. 37, SEC. 7.

One who is free from any mental disease cannot be regarded as of unsound mind within the meaning of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, sec. 7, if, notwithstanding his lack of mental acuteness, he has sufficient understanding for the handling of his business according to the ordinary usages of the neighbourhood in which he lives.

[*In re Barber*, 39 Ch.D. 187, referred to.]

2. INCOMPETENT PERSONS (§ I—3)—TEST AS TO INCOMPETENCY—PROCEEDINGS TO DETERMINE—1 GEO. V. (ONT.) CH. 20.

The Act, 1 Geo. V. (Ont.) ch. 20, amending the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, deals with cases on the border line between sanity and insanity, and mental disease need not be established in an enquiry under that Act, but the test is whether the person is so weak-minded as not to be able to manage his affairs.

3. INCOMPETENT PERSONS (§ I—2)—WHAT CONSTITUTES INCOMPETENCY—ORDINARY USAGE OF NEIGHBOURHOOD.

The policy of the law is that the liberty of no man shall be interfered with on the ground of mental infirmity, if he have sufficient understanding for the handling of his business according to the ordinary usages of the neighbourhood where he lives.

4. COSTS (§ I—2)—UNSUCCESSFUL APPLICANT—IN LUNACY PROCEEDINGS.

The unsuccessful applicant for an order declaring lunacy may be ordered to pay the costs of an issue directed upon his application.

Statement

ISSUE under 9 Edw. VII. ch. 37, sec. 7, as to the mental condition of John James Peel, the defendant, directed upon the application of his brother, Charles Alfred Peel, the plaintiff, for an order declaring lunacy; and inquiry under 1 Geo. V. ch. 20 as to capacity for managing affairs.

The issue and inquiry came before BOYD, C., at Lindsay.

The application was refused.

I. E. Weldon, for the plaintiff.

F. D. Moore, K.C., for the defendant.

Boyd, C.

BOYD, C.:—An issue being directed to be tried at Lindsay, pursuant to the provisions of the Lunacy Act, 9 Edw. VII. ch.

37, sec. 7,* I found upon the evidence that John James Peel was not of unsound mind and incapable of managing himself or his affairs, and thus disposed finally of that issue except as to costs.

I also then considered an application under the Act of 1911, 1 Geo. V. ch. 20, permitted (by the order directing the issue) to be made before the Judge who tried the issue, as to whether the same person was "through mental infirmity, arising from disease, age, or other cause, or by reason of habitual drunkenness, or the use of drugs, incapable of managing his affairs:" sec. 1.

This Act is apparently an adaptation from and an extension of the provision in the English Lunacy Act of 1890, 53 & 54 Viet. ch. 5, sec. 116 (1 d), intended for the protection of persons who, "through mental infirmity arising from disease or age," are incapable of managing their affairs. Our Act is not limited to "mental infirmity arising from disease or age," but is couched in wider terms. The present case would not come under the terms of the English Act, for the peculiarities of John James Peel arise neither from disease nor age, nor are they referable in any respect to drunkenness or the use of drugs: the infirmity

*Section 7 of the Lunacy Act, S.O. 1909, ch. 37, is as follows:—

7. (1) Where, in the opinion of the Court, the evidence does not establish beyond reasonable doubt the alleged lunacy, or where for any other reason the Court deems it expedient so to do, instead of making an order under sub-section 1 of section 6, the Court may direct an issue to try the alleged lunacy.

(2) Subject to the provisions of section 8, the issue shall be tried with or without a jury as the Court directing it or the Judge presiding at the trial may order.

(3) The trial shall take place at such time and place as the Court may direct.

(4) On the trial of the issue the alleged lunatic, if within the jurisdiction of the Court, shall be produced, and shall be examined at such time and in such manner, either in open Court or privately (and where the trial is with a jury before the jury retire to consider their verdict) as the presiding Judge may direct, unless the Court by the order directing the issue or the Judge presiding at the trial dispenses with the production of the lunatic or with his examination.

(5) On the trial of the issue the inquiry shall be confined to the question whether or not the person who is the subject of the inquiry is at the time of the inquiry of unsound mind and incapable of managing himself or his affairs, and the presiding Judge shall make an order in accordance with the result of the inquiry.

(6) The practice and procedure as to the preparation, entry for trial and trial of the issue and all the proceedings incidental thereto shall be the same as in the case of any other issue directed by the Court or a Judge.

(7) The alleged lunatic and any person aggrieved or affected thereby shall have the like right to move against a verdict or to appeal from an order made upon or after the trial as may be exercised by a party to an action in the High Court, including the right of appeal which shall lie without leave from the Divisional Court to the Court of Appeal; and the Court hearing any such motion or appeal shall have the same powers as upon a motion against a verdict or an appeal from a judgment entered at or after the trial of an action.

(8) Subject to the provisions of section 10, the order or judgment of the Court, or, where the issue is tried by a jury, the verdict of the jury shall be final unless set aside upon appeal or motion under the next preceding sub-section.

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or weakness of his mind arises from "other cause." Both Acts deal with cases on the border line between sanity and insanity: *In re Brown*, [1894] 3 Ch. 416.

At the trial it abundantly appeared that he was free from any mental disease, and so could not be regarded as of unsound mind: *In re Barber*, 39 Ch. D. 187; and it was also well proved that he was neat, clean, and careful in all his habits, and far from being incapable of managing himself. The strongest medical witness against him described his condition as one of "imbecility" or of arrested development which was not capable of improvement. Thus used, "imbecility" is synonymous with the expression of the statute "mental infirmity," a term or phrase of flexible meaning, indicating various degrees of weak-mindedness. The test called for by the statute is, whether the person is so weak-minded as not to be able to manage his affairs. The policy of the law is, that the liberty of no man should be interfered with if he has sufficient understanding for the handling of his business according to the ordinary usages of the neighbourhood where he lives.

I gave my opinion provisionally on this man's capacity at the close of the hearing, subject to a further consideration of the whole, after I had read a great body of evidence taken upon his examination before the Master at Lindsay on the 10th and 11th May, 1911. Having perused this bulk of material, consisting of 811 questions and answers on the first day and of 614 on the second, I am confirmed in my conclusion that this is not a case for the interference of the Court. The examination, no doubt, shews his limitations; he has lived in a narrow world, and his geographical and other knowledge extends no further than to the three townships which he has been in, Verulam, Ops, and Emily; in this locality he lived at home with his mother till her death, eleven years ago. He was then emancipated, and he is now fifty-one years of age. "Home-keeping youths have ever homely wits." He was a dull, slow-witted boy, afflicted also with imperfect eyesight, so that he got little or no schooling. But he was far from being what the old statute calls a "natural fool;" he is "one who hath had beforetime wit and memory, and hath not failed of his wit, but hath of late improved the same," so that his farm and money (worth in all $3,000) can be by him "safely kept without wasting or destruction." See R.S.O., vol. 3, ch. 341, secs. 1 and 2, from ancient statutes of uncertain date. His answers as a whole are intelligent, some even shrewd and sane; few, rather astray; but this was more from ignorance than from lack of comprehension. Some subjects broached were not of his ken, and yet his definition of "overdraft" as "a good pile of money" was not a bad guess. He said, sagaciously enough, that, if he were left to himself, "he would not get rattled, like as if there was a dozen around ripping and

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teasing and cross-questioning." I am satisfied that he has a modicum of practical sense and judgment sufficient for the handling of his affairs in his own way. His mind has markedly improved since the death of his mother, when he has had to fend for himself, and he will not only be better in mind but will do better in business if left to look after his own little property, uncontrolled by the Court.

His own view of this application is, that he regards his brother, the applicant, as a man who is after his property, and he does not want to have the Court put any man above him. I had a short and satisfactory interview with him, and he is looking forward to the investment of the $1,000 now in Court so that it will yield him 6½ per cent., and would not be content to take 4½ per cent. from the Court. I see no reason why this money should not be paid out to the joint order of himself and his solicitor, Mr. Moore, which will be the first step towards its proper investment.

As to the costs, I have conferred with my brother Riddell, who directed the issue; and I think the right disposition of these is, that there should be no costs of proceedings prior to the application which resulted in the order of the 7th June, 1911; but that all the subsequent costs, including the costs of that order, should be paid by the applicant to the defendant. The applicant, having failed in satisfying the Judge beyond reasonable doubt as to the unsoundness of mind, might well have retired at that point; but he urged the matter on to a further large expenditure of cash; and these lost costs should be paid by the unsuccessful party.

Application refused.

BROOM v. TORONTO JUNCTION.

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May 7.

Ontario High Court, Middleton, J., in Chambers. May 7, 1912.

1. PARTIES (§ II B—115)—JOINDER OF DEFENDANTS—APPLICATION OF THE STATUTE OF LIMITATIONS.

A motion to add a party defendant may be refused, when there appears to be a substantial question as to the application of the Statute of Limitations, which might be affected by the order, unless the applicant consents to a term that the Statute of Limitations shall apply for the benefit of the added defendant up to the date of the order and not merely to the date of the writ against the original defendant.

[*Broom* v. *Toronto Junction*, 3 O.W.N. 1158, affirmed on appeal.]

2. APPEAL (§ IX)—APPLICATION FOR RE-HEARING—OTHER AVAILABLE REMEDY—SUBSTANTIVE MOTION.

Where an interlocutory order adding a party defendant was made on default of the appearance of the added party at the hearing of an appeal from an order refusing to add him as a defendant, but the order

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in appeal contained terms for the protection of the added party as to pleading the Statute of Limitations up to the date of his being added, the Court may properly decline to re-open the appeal where the added party is at liberty by a substantive application to move against the order adding him.

Statement

APPEAL by the plaintiff from the order of the Master in Chambers, 3 O.W.N. 1158, refusing to add A. J. Anderson as a party defendant in the plaintiff's action taken against the municipal corporation of Toronto Junction.

The appeal was dismissed.

The circumstances out of which this action arose took place in August, 1905, when Mr. Anderson was solicitor for the corporation of the town of Toronto Junction and acted for them in regard to the plaintiff's claim. On the 1st October, 1908, the town corporation paid the plaintiff $200 in full settlement of all matters in question in the action, as against the town corporation; and the action was thereupon discontinued as against the corporation. It was now sworn by the plaintiff in his affidavit in support of this motion that he had since discovered that the goods in question were handed over by Anderson to the Grand Trunk Railway Company (against whom the action was still pending) "in a loose and unsafe condition, for the sole purpose of getting rid of them from the municipal storehouse of the town of Toronto Junction, where they had been stored for me by direction of the mayor of said town." The Master said that it did not appear how this cause of action (if any) could be joined with the existing action. And if any joint cause of action existed in August, 1905, it would now be barred, as the new action (as it would then be) would not have arisen within six years. It would, therefore, seem, under the decision in *Clarke* v. *Bartram*, 3 O.W.N. 691, that the order should not be made, "when this would result in an improper joinder." The plaintiff was allowed to file an affidavit in reply to that of Mr. Anderson; but this only made it clearer that any action against Anderson would be against him personally. The Master thereupon dismissed the motion and ordered that the dismissal should be with costs, if asked for.

The plaintiff in person.

W. A. McMaster, for Anderson.

Middleton, J.

MIDDLETON, J.:—I think the judgment is correct, and ought to be affirmed. Mr. Anderson relies upon the Statute of Limitations. It appears to me that there is much to be said in favour of its application. Mr. Broom says that, with much research, he has been unable to find any case like this, and that he thinks the statute has no application. I do not think that this question should be determined upon an interlocutory application; and that there is sufficient reason for refusing the application when it appears that there is a substantial question as to

the application of the Statute of Limitations which might be affected by the order.

It would be quite possible to protect Mr. Anderson as to this, by imposing a term that the action, as far as he is concerned, is not to be deemed to have been begun until the date of his addition as a party. But I do not think it is fair to add a party where the action has been pending so long and there have been so many interlocutory proceedings.

I find it impossible to understand the supposed cause of action; but it is clear that it differs altogether from the cause of action alleged against the other defendants, and that to add Anderson now would result in an improper joinder of parties.

Appeal dismissed with costs.

May 10, 1912. Upon the application of the plaintiff for leave to appeal from the order of Middleton, J., *supra*, affirming the order of the Master in Chambers, 3 O.W.N. 1158, refusing the plaintiff's application to add A. J. Anderson as a party defendant, Britton, J., made an order in the following terms: "Leave granted to the plaintiff to appeal from the order of Mr. Justice Middleton, dated the 7th May, 1912; the plaintiff consenting that, of the appeal be allowed, and if A. J. Anderson be added as a party defendant, and if he pleads any statute of limitations as a bar to the plaintiff's recovery, such statute shall be a complete bar as against Anderson, if such statute would have been a bar in case an action against him had been commenced by writ of this date. Let the case be set down for Tuesday the 14th May, 1912." On the 14th May, 1912, the appeal came before a Divisional Court composed of Boyd, C., Teetzel, and Kelly, JJ. The plaintiff appeared in person. No one appeared for the defendant. The Court pronounced an order adding Anderson as a defendant, upon the terms contained in the order of Britton, J.; costs in the cause.—On the 15th May, 1912, W. A. McMaster appeared for Anderson, and asked the same Court to reopen the appeal, stating that he had made a mistake as to the day. The Court refused to reopen the appeal, saying that Anderson was protected by the terms of the order, and that, if he wished to move against the order pronounced, he must launch a substantive application.

Appeal dismissed.

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May 27.

KYLES & CHESTER v. WILSON.

Saskatchewan Supreme Court. Trial before Johnstone, J., May 27, 1912.

1. ESTOPPEL (§ III J—120)—MEASUREMENT OF GRAIN—TACIT ACQUIESCENCE—WEIGHTS AND MEASURES ACT, R.S.C. 1906, CH. 52, SEC. 33.

The accuracy of the weighing apparatus of a threshing machine that complied with the requirements of sec. 33 of the Weights and Measures Act, cannot, even if the question could be raised without being pleaded, be attacked on the ground that the manner of ascertaining the number of bushels of grain threshed was contrary to the provisions of such Act, by one who tacitly assented to the use of such method of measurement by taking the grain from the separator, and afterwards, without attempting to ascertain the quantity under the Weights and Measures Act, broke the bulk thereof by drawing some of the grain to market.

[*Conn* v. *Fitzgerald*, 5 Terr. L.R. 346, specially referred to.]

Statement

THE plaintiffs in this action are the owners of a threshing outfit, and in the course of their threshing operations threshed the defendant's grain. The plaintiffs sued them for the amount of their threshing bill, and the defendant set up in his defence the incorrectness of the plaintiff's weighing apparatus attached to their separator, contending that the plaintiffs had not threshed the number of bushels claimed in their statement of claim.

Judgment for the plaintiff for $565.43.

H. E. Sampson, for plaintiffs.

H. Y. MacDonald, for defendant.

Johnstone, J.

JOHNSTONE, J.:—The weighing attachment used by the plaintiffs on their separator, and from which the quantities of grain threshed were ascertained by them, was proved to be fairly accurate. The defendant took the grain from the machine knowing the quantities were being ascertained in this manner, and conveyed the threshed article from the machine to his granaries, and broke bulk through hauling some of the grain to market (how much he could not say) without in any way having attempted to have the quantity known under the provisions of the Weights and Measures Act, or in any other way.

The plaintiffs' weighing attachment was one answering the requirements of sec. 33 of the Weights and Measures Act (Can.) as amended by 3 Edw. VII. (Can.) ch. 72, sec. 4. The defendant tacitly assented to its use, and he should not now be permitted to say, even if he could raise the question without pleading it, that the manner taken to ascertain the number of bushels threshed was contrary to the provisions of the Act.

The circumstances of this case are in several respects similar to those arising in *Conn* v. *Fitzgerald*, 5 Terr. L.R. 346, the decision in which gave rise to the amendment referred to.

The plaintiffs will have judgment for the sum of $565.43 (together with their costs of the action), made up as follows:—

Wheat threshed, 5,173 bush. at 9c per bush.		$465 57
Barley threshed, 3,187 bush. at 5c per bush.		159 35
		$624 92
Less:		
Teams and men	$51 24	
3 forks	2 25	
Feed of spare team	6 00	
		59 49
		$565 43

Judgment for plaintiff.

FOXWELL v. KENNEDY.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. May 6, 1912.

1. APPEAL (§ IV D—125)—AMENDING NOTICE OF APPEAL—MISTAKE.

An amendment of the grounds of appeal in a notice of motion by way of appeal is not allowed in every case, and, while it is as of course in an ordinary case, it will not be allowed simply because a mistake has been made.

2. APPEAL (§ IV D—125)—GROUNDS ON WHICH COURT WILL ALLOW AMENDMENT OF NOTICE OF APPEAL.

Where no mistake has been made, but the grounds of appeal set out in a notice of motion by way of appeal are untenable, and an amendment of such grounds is sought for the purpose of enabling new points to be argued, the Court will have regard to the nature of the litigation and to the possibility of ending it by a decision upon the new points sought to be raised, in determining whether the amendment should be granted.

Statement

APPEAL by Robert Kennedy, a defendant by counterclaim, from the judgment of MEREDITH, C.J.C.P., in favour of James H. Kennedy, the counterclaiming defendant.

The appeal was dismissed.

F. R. MacKelcan, for the appellant.

W. M. Douglas, K.C., for the Suydam Realty Company, defendants by counterclaim.

E. D. Armour, K.C., and *A. D. Armour*, for James H. Kennedy, plaintiff by counterclaim.

Riddell, J.

RIDDELL, J.:—In the counterclaim, James H. Kennedy is plaintiff; Gertrude Maud Foxwell, Madeline Kennedy, Robert Kennedy, David Kennedy, and the Suydam Realty Company are defendants. The claim sets out that James H. Kennedy is sole executor of the will of the late David Kennedy; that by the will James H. Kennedy was devised a residue of the estate of David Kennedy, consisting largely of unimproved lands, with power to sell, etc.; that he was thereafter entered in the land titles office as absolute owner in fee simple of all the lands of the estate, being all the lands sold to the Suydam Realty Company and others; that he, in September, 1910, contracted to sell certain lands, fully described, to the Suydam Realty Company;

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that they accepted title on the 1st November, 1910, and asked for a short delay, which was granted; that, before the sale could be completed, and on the 12th November, Madeline Kennedy registered a caution, which was set aside on the 2nd December, 1910, at a cost to the plaintiff; that on the 12th November, 1910, Robert Kennedy filed a caution, which was removed on the 9th December, at a cost to the plaintiff; that Gertrude Maud Foxwell registered a caution on the 8th December, which still stands; that the succession duty amounts to $1,976.79, and the plaintiff has no funds to pay it; he claims interest from the Suydam Realty Company for the delay; and, if not, then from those who prevented the sale going through; he claims an order against the Suydam Realty Company to complete the sale and pay the balance of the purchase-money: he says that David Kennedy alleges that he, the executor, has no right to sell the land, and claims a lien thereon for an annuity left him by the said will; but that he (James), while admitting David's right to the annuity, claims the right to sell the land for the purposes of the estate, including paying David's annuity.

Robert Kennedy denies that the plaintiff is executor, and alleges that he has no right to sell the land; says that he (Robert) registered the caution to protect his own rights, and that the plaintiff has used the cash of the estate to pay his own solicitor, and to pay legacies, when he should have paid the succession duties.

To this there is a reply setting up an adjudication that Robert Kennedy had no interest in the land and an order vesting the lands in the plaintiff.

Madeline Kennedy denies the devise to the plaintiff; says that the entry of the plaintiff in the land titles office was by mistake and inadvertence; that the sale to the Suydam Realty Company is void; that she is entitled to a share in the proceeds of the sale of the land, and registered the caution to prevent a sale at a gross undervalue.

Upon this the plaintiff joins issue.

David Kennedy alleges that the lands belong to him and the other heirs at law of David Kennedy, deceased; that the sale is at a gross undervalue; that he has an annuity charged upon the lands, and the lands cannot be sold without his consent. He also sets up that the counterclaim should not be tried until the will be construed.

Upon this the plaintiff joins issue.

The Suydam Realty Company say that the plaintiff represented himself to be the owner in fee simple of the land; that they did not accept title; that they are ready and willing to complete the purchase, and are not in default, but by reason of the delay they have been put to heavy loss.

Upon this the plaintiff joins issue.

All parties were represented by counsel at the trial before the Chief Justice of the Common Pleas.

Evidence was adduced shewing the facts as to title, cautions, etc.; and also the value of the lands.

After reserving judgment, the learned trial Judge made the following indorsement upon the record (we are informed that the learned Chief Justice made certain findings of fact at the time of the trial, but that for some reason the reporter did not take them down):—

"Upon my findings of fact, I direct that judgment be entered on the counterclaim as follows:—

"1. Declaring that the sale by the plaintiff to the Suydam Realty Company is not an improvident one or made at an undervalue.

"2. For specific performance by the last-named defendants of the agreement in the counterclaim mentioned.

"3. Ordering the defendants by counterclaim other than the defendants the Suydam Realty Company to pay to the plaintiff by counterclaim the costs of the counterclaim forthwith after taxation.

"4. And making no order as to costs between the plaintiff by counterclaim and the defendants the Suydam Realty Company."

Robert Kennedy (and he only) appeals.

The notice alleges as grounds: (1) that the judgment was contrary to evidence; (2) that no notice of trial was given him, and so he was taken by surprise, and failed to have his witnesses present; (3) that the plaintiff and the Suydam Realty Company are conspiring to defraud him and the other parties; (4) that the Chief Justice reserved judgment till an action now pending was tried, but that counsel for the plaintiff and the Suydam Realty Company attended the Chief Justice and made allegations (what, we are not told), and by consequence of these allegations the Chief Justice gave judgment; (5) that such delivery of judgment was irregular; (6) that the plaintiff and the Suydam Realty Company are conniving so that the said company can acquire the lands.

Perhaps a more extraordinary notice of motion never was filed (the present counsel is not responsible for it).

Upon the motion coming on for argument, no attempt was made to support the motion on the grounds set out in the notice, nor was leave asked to amend the notice.

Con. Rule 789 provides: "Every notice of motion or appeal to a Divisional Court shall set out the grounds of the motion or appeal." "The Court . . . may, at any time, amend any defect or error in any proceeding; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute . . :" Con. Rule 312. An amendment is not allowed in every case—and, while it is as of course in the ordinary case, it will not be made simply because

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a mistake has been made—and still less where no mistake has been made, but it is supposed that an opportunity will be afforded to hang an argument upon a different peg if the amendment be made.

From the notorious course of litigation in connection with this land, which is rapidly becoming and has indeed already become a scandal, it is perfectly plain that a number of the descendants of David Kennedy are acting together and in concert harmoniously to a common end, i.e., to embarrass the executor in his administration of the estate. And nothing we could do by allowing or directing an amendment to the present notice of motion, and giving judgment upon the new points, would be at all of advantage in putting an end to the litigation.

I, therefore, think we should simply dispose of the appeal upon the grounds set out in the notice of motion—and that the appeal should be dismissed with costs.

I have seen no reason to change the view formed during the argument, that, even if an amendment were allowed, the appeal could not succeed.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I agree in dismissing the appeal with costs.

Britton, J.

BRITTON, J.:—I cannot usefully add anything to what my brother Riddell has written. I agree in the result—that the appeal should be dismissed with costs.

Appeal dismissed.

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June 4.

IN RE PERCY E. HAGEL, a barrister-at-law.

Manitoba King's Bench, Mathers, C.J.K.B. June 4, 1912.

1. BARRISTERS (§ I B—11)—DISBARMENT—UNPROFESSIONAL CONDUCT.

The fact that a barrister who was not a solicitor, was guilty of unprofessional conduct while performing work or services properly pertaining to the duties of a solicitor and not to those of a barrister, will not, under sec. 74 of the Law Society Act of Manitoba, prevent him being stricken from the rolls of barristers or being disciplined in the latter capacity.

[*Re J.B.*, an attorney, 6 Man. R. 19, distinguished; *Re Hulse & Lewis*, [1892] 2 Q.B. 261; *Re Hurst & Middleton*, 56 Sol. Jour. 520, specially referred to.]

2. BARRISTERS (§ II C—34)—AGREEMENT FOR COMPENSATION—SETTING ASIDE FOR MISREPRESENTATION—EVIDENCE OF UNPROFESSIONAL CONDUCT.

It does not necessarily follow that, because the senior taxing officer has, under the provisions of the recent amendment to the Manitoba Law Society Act, set aside an agreement for compensation obtained by a barrister or solicitor from his client by misrepresentation, that the conduct of the barrister or solicitor will be regarded as unprofessional, as each case must depend upon its own circumstances.

3. BARRISTERS (§ I B—11)—GROUNDS FOR DISBARMENT—TAKING ADVANTAGE OF IGNORANT CLIENT.

The removal of a barrister from the rolls for unprofessional conduct, is justified where he entered into a contract with a man without business experience and of very moderate understanding, whereby the barrister was to receive one-third of about £500 that was due the client from an estate in Scotland, and where the barrister knew at the time such agreement was made that the money was ready for remittance, and that all the client had to do to obtain it was to execute a discharge therefor, notwithstanding which the barrister grossly exaggerated the difficulties in the way of obtaining the money, and stated that it might involve litigation, and be some time before the money could be obtained.

4. BARRISTERS (§ I B—14)—DISBARMENT—EXORBITANT COMPENSATION—RESTITUTION—DEFENCE.

While the fact that a barrister, who was charged with unprofessional conduct in obtaining exorbitant compensation from a client, has made restitution, will afford no defence to an application to strike him from the rolls, it may be taken into consideration in awarding punishment for his unprofessional conduct.

[*Re Solicitor*, 62 L.T. 446; and *Hands* v. *Law Society of Upper Canada*, 16 O.R. 625, referred to.]

5. BARRISTERS (§ I B—14)—EXORBITANT COMPENSATION—RESTITUTION—SUSPENSION FROM PRACTICE.

Where a barrister, a young man, who was found guilty of unprofessional conduct in obtaining exorbitant compensation from a client through misrepresentation of the difficulties involved in a matter entrusted to him, had made restitution, and it was his first offence, the Court, on that account, ordered that instead of striking him from the rolls, he be suspended from practice for nine months.

Statement

AN application under sec. 74 of the Law Society Act to strike Percy E. Hagel off the roll of barristers for unprofessional conduct.

An order was made suspending Percy E. Hagel from practising for the period of nine months.

R. M. Dennistoun, K.C., for the Law Society.

E. J. McMurray, for Hagel.

Mathers, C.J.

MATHERS, C.J.K.B.:—The facts are briefly these: One Alexander Fyfe, a teamster, was entitled to a sum of money under the will of a Miss Edwards, of Forfar, Scotland. He had received from the Scottish solicitors of the estate a letter dated the 28th of April, 1911, stating that they hoped shortly to send him a statement of his share and a discharge for his signature, and that they would send the balance of his share on receiving a discharge, and that such balance amounted to between £400 and £500. He went to Mr. Hagel on the 6th June, 1911, with this letter and retained him to act as his solicitor in the transaction. Mr. Hagel first stipulated that he should be paid one-half of the amount received as his fee, but on Fyfe objecting that that was too great an amount, reduced his demand to one-third. Mr. Hagel then drew an agreement, dated 7th June, 1911, which Fyfe signed on that day, agreeing to pay as his retainer one-third of any moneys recovered by way of action, compromise or otherwise.

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On the 6th September, 1911, the Scottish solicitors sent to Mr. Hagel a letter of credit on the Bank of Montreal for £502 5s. This amount was duly received by Mr. Hagel. He retained one-third, amounting to $817, and paid over to Fyfe the balance, about $1,622.

Fyfe, being dissatisfied with the amount he received, applied to another solicitor, who took proceedings under the recent amendment to the Law Society Act to have the agreement of the 7th June, 1911, reviewed by the senior taxing officer, Mr. Walker. Mr. Walker, after taking evidence and hearing the parties, set the agreement aside.

An appeal was taken from this decision, which appeal was dismissed by Mr. Justice Robson.

The foregoing brief outline of the principal facts I have taken from the depositions, letters and papers admitted in evidence before Mr. Walker, which, by consent of counsel, were used on this application.

In order to understand the whole circumstances it is necessary to make a more detailed reference to the evidence.

At the time Mr. Hagel obtained from Mr. Fyfe the agreement to pay him for his services one-third of the amount to be received, he had before him a letter of the Scotch solicitors to Fyfe, dated the 28th of April, and had written them a letter on the 6th June. The former letter is very important as shewing that the amount to be received was between £400 and £500; that it would shortly be remitted, and that all the legal work necessary to be done on this side would be to attend to the execution of a discharge to the trustees when it should be sent out for that purpose. The letter written by Mr. Hagel of the 6th of June is important because it shews that he must have read the letter of the 28th April and then knew exactly how the matter stood. In that letter he says:—

> We (sic) have been retained by Mr. Alexander Fyfe to act for him in the above matter and have been instructed by him to ask you to remit us the £500 or thereabouts as stated in your letter to him, which is the amount coming to him under the above. On receipt of this amount we will have Mr. Fyfe sign the necessary documents discharging and releasing the trustees. Yours truly, P. E. Hagel.

Mr. Hagel produced all other letters received and copies of letters sent, but that of the 28th April and 6th June. He pretended that he had not seen the letter of 28th April, and it is not difficult to infer his reason for withholding his copy of the letter of June 6th. But he did not stop there. When asked to state the purport of the letter he had read but did not produce, he answered, as appears by the stenographer's notes of the proceedings before Mr. Walker: "Letter from Messrs. J. & R. H. Anderson, a firm of solicitors, with reference to some estate matters, Miss Edwards' estate and Dr. Edwards, saying that the possibilities are that there will be some money left to him; that

they didn't know whether they could wind up the estate now or not or if it would be held over for some years on account of some law in vogue at that time." No letter written by Messrs. Anderson contained any such statements. I am forced to the conclusion that Mr. Hagel not only suppressed the letter of the 28th April, but deliberately mis-stated its contents for the purpose of misleading the taxing officer. He is not proceeded against for that offence, but it has an important bearing on the value to be attached to his evidence. Fyfe was asked if he had read the letter and he replied that he had but could not understand it. He was brought to Mr. Hagel's office by a friend of his, apparently a bartender. He says Mr. Hagel read the papers (*i.e.*, the letters) and

> told me he would require may be a half and then he considered and he said, I will take a third of it, and as I didn't know but just I had to do what he told me when I signed my name to this paper.

I would infer from Fyfe's evidence that he was a man with no business experience and of but very moderate understanding. It is quite apparent that Mr. Hagel did not explain to him the nature of his rights as it was his duty to do, but on the contrary he invented or grossly exaggerated the difficulties in the way of his getting the money. He admits he told Fyfe he might have expensive litigation before it was secured. He told him that although he knew at the time the fair value of the legal work incident to procuring this money could not exceed $50. In this way he procured the agreement which the senior taxing officer very properly set aside as unfair and unreasonable.

It does not necessarily follow that because an agreement has been set aside as unfair the conduct of the solicitor or barrister who obtained it must be regarded as unprofessional. Each case must depend upon its own circumstances. The facts of this case leave no room for doubt or hesitation. The conduct of the accused member in obtaining the execution of the agreement in question under the circumstances stated was extortionate and in my opinion highly unprofessional.

Mr. Hagel is not a solicitor and it is contended that as the work or service which he performed was that of a solicitor and not a barrister, there is no power to strike him off the rolls or discipline him in the latter capacity.

In support of this contention *In re J. B., an Attorney*, 6 Man. R. at 19, is relied upon. That was an application to strike a member of the Law Society off the rolls both as a barrister and an attorney. The ground of complaint was that he had collected certain mortgage moneys, which he retained and appropriated to his own use, representing to his client that the moneys had not been received by him. The full Court of Manitoba held that as the conduct complained of was conduct as a solicitor and not as a barrister there was no power to strike him off the rolls as a barrister, and an order was made striking him off as an attorney.

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That application was made under the Act then in force, which provided that

> It shall be lawful for the Court of Queen's Bench upon a rule nisi to hear and determine any complaint that may be made against any member of the Law Society in discharge of his duties as barrister or an attorney-at-law and such member of the society may according to the gravity of the offence and the discretion of the Court of Queen's Bench be either suspended from practising in any Court of this Province or struck off the rolls and disabled from practising either as an attorney or solicitor or barrister in any of the said Courts.

Since that decision and in consequence of it, the law was amended and sec. 74, before referred to, now enacts as follows:—

> It shall be lawful for the Court of King's Bench upon notice of motion to hear and determine any complaint made against any member of the Law Society for unprofessional conduct or misconduct as a barrister, attorney or solicitor and such member of the Law Society may, according to the gravity of the offence and in the discretion of the Court of King's Bench, be either suspended from practising in any Court of this Province or struck off both or either of the rolls and disabled from practising either as an attorney, solicitor or as a barrister in all of said capacities in any of the said Courts.

In Ontario the power to discipline members of the profession is vested in the Law Society, and not as in Manitoba, in the Court. The Ontario statute then in force provided that whenever a member of the Society had been found by the Benchers after due inquiry by a committee of their number or otherwise guilty of professional misconduct or of conduct unbecoming a barrister, solicitor, etc., it should be lawful for them to debar such barrister and resolve that such solicitor is unworthy of practising: R.S.O. ch. 145, sec. 44.

In *Hands* v. *Law Society of Upper Canada*, 16 O.R. 625, the facts were briefly as follows: Hands, a barrister and solicitor, obtained from a young woman, aged 23 years, a power of attorney to sell $1,500 worth of bank stock, which represented about one-half her worldly substance. He used this power of attorney to transfer the stock to himself in trust for her, and afterwards to himself absolutely. One-third of this stock he then sold and paid the proceeds to the credit of his wife in another bank and the remaining two-thirds he pledged to a bank for advances to himself as such stockholder. The young woman was an orphan and at the time a guest in the solicitor's house, and she relied on him as a friend and as a member of the legal profession. After some months, getting no satisfaction as to what was being done with her property, she brought an action for its recovery and was met by defences denying all liability. The matter was brought before the Law Society and the committee found that the complaint was fully established, and that Hands had been guilty of conduct unbecoming a barrister and solicitor and recommended that he be debarred and his name erased from

the roll of solicitors. He then brought an action against the Law Society to have it declared that the resolution of the Benchers founded upon the committee's report should be declared void and to restrain them from taking further proceedings. The action was tried before Chancellor Boyd and dismissed. At page 636 he said: "Speaking generally, any misconduct which would prevent a person from being admitted to the society, justifies his removal, because it indicates that he is unsafe and unfit to be entrusted with the powers and privileges of an honourable profession and a confidential office. The conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister, a degree of greater rank and honour in the law; and where practitioners, as in this Province, usually combine the functions of both branches of the profession, it is impracticable to discipline the solicitor and let the barrister go free. In the case in hand the broad question presented itself: Was the solicitor's conduct unbecoming and unprofessional?"

This decision was reversed by the Divisional Court, 17 O.R. 300, but was restored by the Court of Appeal, 17 A.R. 41. It appears from the judgment of Chief Justice Taylor, *In re J. B., an Attorney*, 6 Man. R., at p. 23, who refers to the *Hands* case, just then decided in the Court of Appeal, but not reported, that he was under the impression the Divisional Court's judgment had been sustained in the Court of Appeal and not reversed and the Chancellor's judgment restored, as the fact was. Whether or not the conclusion he arrived at would have been different had he been aware of the fact that the Chancellor's judgment was restored, it is impossible to say. The judgments of Killam and Bain, JJ., make no reference to the *Hands* case, but go entirely upon the fact that the Act as then in force only gave the Court power to deal with a complaint made against a member of the Law Society in discharge of his duties as a barrister or as an attorney, and as no charge had been brought against the attorney in his capacity as a barrister, but only against him in his capacity of an attorney, there was no power to discipline him as a barrister.

Mr. Justice Killam in his judgment at p. 25, and Mr. Justice Bain in his judgment at p. 28, make this quite clear. The judgment of Mr. Justice Bain at the page named contains the following passage:—

> With us the two professions are usually combined in one and the same person, and in cases like the present where dishonesty or other personal misconduct is proved, and the Court strikes the offender off the attorneys' roll, because it can no longer accredit him as one worthy of confidence, it is absurd that the same individual should still be accredited to practise in the higher and more honourable position of a barrister. Such an anomaly could never have been intended, and I regret that the wording of the section compels me to put the

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construction I have upon it. In Ontario, a barrister may be disbarred, or a solicitor struck off the rolls, not only for professional misconduct, but for conduct unbecoming a barrister or solicitor, and we should have a similar provision in our statutes.

The work that Mr. Hagel undertook was possibly not such as an unqualified person is prohibited, by sec. 52 of the Law Society Act, from undertaking. It was a class of work which, however, in this Province is usually transacted by solicitors. The business is entrusted to them because of their profession. The client in this instance went to Hagel because of his professional character and in that capacity he dealt with him. The summary jurisdiction of the Court over solicitors is not confined to those who are *de jure* such, but extends also to those who assume to act as solicitors without having the necessary qualifications: *In re Hulm & Lewis*, [1892] 2 Q.B. 261, recently followed *In re Hurst & Middleton*, 56 Sol. Jur. 520. It is pointed out by Taylor, C.J., *In re J. B., an Attorney*, 6 Man.R. at p. 23, that under the English authorities where a person is employed to do business because of his being an attorney he will be dealt with summarily by the Court even where the misconduct is in matters in which he was not acting strictly as an attorney. I am therefore of opinion that the summary jurisdiction of the Court extends to Mr. Hagel as fully as if he were a duly qualified solicitor and the business with which he was engaged was strictly solicitor's work.

The question is, under these circumstances, can he be disciplined as a barrister.

The Ontario Act under which the *Hands* case was decided permitted the offending member to be dealt with not only for professional misconduct, but for conduct unbecoming a barrister or solicitor. Our Act only enables the Court to deal with cases of unprofessional conduct or misconduct as a barrister or solicitor. It is apparent that the Ontario Act is, in that respect, wider than the Manitoba statute. Any disgraceful or dishonourable conduct, although in no way connected with his professional character, would be conduct unbecoming a barrister although it might not be unprofessional conduct, which must necessarily be conduct in relation to his profession. In another respect, however, I think the Manitoba Act confers upon the Court as wide powers as the Ontario Act confers upon the Benchers. Sec. 74 gives the Court power to entertain a complaint against a member of the Law Society for unprofessional conduct or for misconduct as a barrister or as a solicitor. It goes on to provide that according to the gravity of the offence the Court may strike the offender off one or both of the rolls. That means, I think, that if a member has been guilty of an offence in either character he may be disciplined in one or both characters. I think this is the result of a fair reading of the section. I am confirmed in the opinion that such was the legislative intention by the fact that

the legislation was enacted to meet a similar difficulty pointed out by the Court, *In re J.B., an Attorney*, 6 Man. R. 23.

I entirely agree with the statement of Chancellor Boyd in the *Hands* case that

> The conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister, a degree of greater rank and honour in the law.

And if a solicitor, who is also a barrister, has been guilty of an offence justifying his suspension or expulsion in the former character, the same misconduct would justify his suspension or expulsion in the latter character also. The fact that Mr. Hagel is not a solicitor cannot save him in his character of a barrister. It would be a strangely anomalous situation if the fact that he does not happen to be a *de jure* solicitor should save him as a barrister from the consequences of misconduct in the assumed character of a qualified solicitor, whereas he would enjoy no such immunity if he were in fact a solicitor.

For these reasons I think the application of the Law Society is entitled to succeed.

The fact that Mr. Hagel has made restitution affords no defence to the application. It is a matter, however, which may properly be taken into account when considering the question of the punishment to be awarded. The rule of the Court is stated by Mr. Justice Grove, *In re a Solicitor*, 62 L.T. 446, and quoted with approval by Boyd, C., in *Hands* v. *Law Society of Upper Canada*, 16 O.R. 625, at 638:—

> An immediate payment, when first asked, may be something upon which to appeal to the consideration of the Court; but merely raising money at the last moment, when being struck off the rolls is imminent, does not alter the question.

The disciplining power conferred upon the Court is not alone for the purpose of satisfying the individual client who has suffered by the member's misconduct. It is conferred for the general protection of the public against an unsafe member of a privileged class.

So far as the evidence disclosed this is Mr. Hagel's first offence. He is a young man who has yet his way to make in the profession and I do not think this, his first lapse from the path of rectitude, should be visited by the extreme penalty of striking him off the rolls, although under other circumstances the gravity of his offence would justify that course. I think the case will be met by an order suspending him from practising in all Courts of this Province for a period of nine months and judgment will go to that effect.

Order suspending barrister from practice for nine months.

ONT.

H. C. J. 1912

May 16.

BISSETT v. KNIGHTS OF THE MACCABEES.

Ontario High Court, Riddell, J., in Chambers. May 16, 1912.

1. TRIAL (§ II C 9—168)—STRIKING OUT JURY NOTICE—INSURANCE MATTERS—CON. RULE 1322.

A motion to strike out a jury notice should be granted by a Judge in Chambers, under Con. Rules 1322, in an action on a policy of life insurance where the issues to be tried are, whether the action is barred, the insufficiency of the proof of death of the insured, the non-payment of premiums, and the violation by the insured of the rules of the company.

2. COURTS (§ II A I—150)—JURISDICTION OF A JUDGE IN CHAMBERS—CON. RULE 1322—JUDICATURE ACT (ONT.) SEC. 110.

Under Con. Rule 1322, on an application to a Judge in Chambers, pursuant to sec. 110 of the Judicature Act (Ont.), he must exercise his judgment as to whether a case shall be tried with or without a jury, as he cannot pass that responsibility over to the trial Judge, and if it appears to him that a case should be tried without a jury he must so direct.

[Ont. C.R. 1322 (6 January, 1912) construed.]

3. JURY (§ I D—31)—JUDICIAL DISCRETION IN TRIAL JUDGE—CON. RULE 1322 (2).

The granting of a motion by a Judge in Chambers to strike out a jury notice, under Con. Rule 1322, will not interfere with the discretion of the Judge who presides at the trial, in directing a trial by jury under Con. Rule 1322 (2).

[*Stavert* v. *McNaught*, 18 O.L.R. 370, specially referred to.]

Statement

MOTION by the defendants to strike out a jury notice filed and served by the plaintiff.

Order was made directing that the action be tried without a jury.

J. A. Paterson, K.C., for the defendants.

W. D. McPherson, K.C., for the plaintiff.

Riddell, J.

RIDDELL, J.:—In this case the plaintiff alleged: (1) that C. B. was insured in the defendant society; (2) that he paid all assessments, etc.; (3) that he died; (4) that the plaintiff became administratrix by letters of administration from the Surrogate Court of the County of Lambton, August, 1910; (5) that she furnished the defendants in January, 1911, satisfactory and sufficient proof of the death of C. B.; (6) that the defendants refuse to pay. The defendants do not admit any of the above, and plead specially: (1) no sufficient proof of death; (2) if C. B. be dead, the action is barred; (3) if C. B. be dead, the proofs should have been furnished within 12 months, and were not; (4) that C. B. did not pay dues up to time of his death (if he is dead), but omitted so to do for several months, and the insurance is, therefore, void; (5) that C. B. removed from his usual home in July, 1897, remaining away one year, and did not report to the secretary of his "Tent" his location, and the insurance is, therefore, void; (6) that until conclusive proof of death is furnished no benefits are payable, and none such has been given. The plaintiff replies: (1) that, if default was made

in furnishing proofs of death, this was waived; (2) that, if the dues were not paid, this was assented to by the defendants, and, therefore, the defendants are estopped; (3) that, if the condition that the insured must report to the secretary of his "Tent" applies to this insurance, it is unreasonable and not binding; and (4) that, if conclusive evidence of death be required under the contract, that provision is unreasonable.

A motion is made to strike out the jury notice. If the jury notice stand, the case cannot come on for trial until the autumn (the venue being at Sarnia, and the jury sittings being now over at that town); but, if the jury notice be struck out, the case can come on before vacation.

Much difference of opinion was expressed in reference to striking out jury notices, by various Judges. The cases may be seen collected and referred to in *Stavert* v. *McNaught* (1909), 18 O.L.R. 370. In that case, if I understand it, the principle laid down by the Divisional Court was to let the jury notice stand unless it was a clear case of the jury notice being improper. The Chancellor says: "The direction in actions merely of a common law character, and in which a jury would be the recognised forum, if sought by either party, as to the method of trial, should not be taken out of the hands of the trial Judge." Con. Rule 1322, passed 23rd December, 1911, and promulgated 6th January, 1912, has, in my view, changed the practice. This provides that, when an application is made to a Judge in Chambers under sec. 110, if "it appears to him that the action is one which ought to be tried without a jury he *shall* direct that the issues be tried . . . without a jury." Con. Rule 1322(2) provides that such an order shall not "interfere with the right of the Judge presiding at the trial to direct a trial by jury."

The law, therefore, is now changed—the Judge in Chambers is called upon to exercise his judgment as to how the case ought to be tried; he cannot pass that responsibility over to any one else—and, if it appears to him that the case should be tried without a jury, he must—"he shall"—direct accordingly.

I have no kind of doubt that this action should be tried without a jury. I think, moreover, that no Judge would try the issues upon the record with a jury (though that does not seem to be important)—and I must, therefore, direct the action to be tried without a jury.

This disposition of the motion will not interfere with the discretion of the trial Judge: Con. Rule 1322(2). Nor in this particular instance will it change the sittings at which the case may be tried (but that fact does not enter into my reasons for allowing the motion).

Costs will be in the cause unless otherwise ordered by the trial Judge.

Order accordingly.

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Court of Review.
1912
Jan. 27.

LECLAIRE v. LAVIOLETTE.

Quebec Court of Review, Guerin, Bruneau and Greenshields, JJ.
January 27, 1912.

1. CONTRACTS (§ II D—173a)—PURCHASE OF TIMBER—PERSONAL INSPECTION—DEFICIENCY IN QUANTITY—LIABILITY FOR PURCHASE PRICE.

One who, after personally examining a piece of land, purchased the right to cut and remove the timber therefrom, cannot, after removing the timber without complaint as to the extent of the land, in an action for the balance of the purchase money, assert that there were not as many acres in the property as called for in the deed thereof, where the Court found that he purchased it as he found it on examination, entirely independent of an exact or approximate measurement or acreage.

Statement

APPEAL by defendant Desmarteau, in his capacity as curator to the estate of defendant Laviolette, by way of inscription in review from the judgment of the Superior Court, Dugas, J., rendered on June 29, 1910, in favour of plaintiffs against Laviolette's estate for $450 balance of contract price on the sale to Laviolette of the right to cut certain timber.

The appeal was dismissed and the judgment below affirmed.

P. J. A. Cardin, for the plaintiff.

Pelletier, Letourneau & Beaulieu, for defendant.

Greenshields, J.

GREENSHIELDS, J.:—The defendant *en reprise d'instance* seeks by the present inscription the reversal of the judgment (Dugas, J.) by which, in his quality of curator to the abandoned estate of the defendant, Laviolette, he was condemned to pay to the plaintiffs the sum of $450, and a *saisie conservatoire* accompanying the issue of the writ, was, by the same judgment, maintained and declared valid.

The relevant allegations of the plaintiffs' declaration may be briefly stated as follows:—

On the 12th March, 1908, by deed of sale, passed before Richard, notary, the plaintiffs sold to the defendant, Laviolette, the property described as follows:—

> la coupe de bois leur appartenant, située dans lanoraie, concession "La Pinière," laquelle se trouve sur un fonds de terre appartenant a Jean Baptiste Beauparlant, et cette propriété complète appartenait anciennement à George Boisvert, et *contient environ soixante arpents de terre boisée*, en superficie, plus ou moins, sans garantie de mesure précise. M. Laviolette aura jusqu'au ler mai, 1909, pour couper et enlever tout le bois de cette propriété, excepté les arbres isolés qui restent au propriétaire de ce fonds,

for the price and consideration of $900 of which the sum of $450, was payable before operations were commenced upon the property by the defendant, and the balance of $450, payable before the removal of any part of the logs or timber resulting from such operations; that the first payment was made; operations were commenced, and a complete cutting of the wood on

the property was made, and, without paying the balance, the defendant, Laviolette, commenced the removal of a considerable quantity of the logs and timber resulting from his operations, and thereby the balance became due and payable, and, say the plaintiffs, they are entitled to *saisie conservatoire* to secure the payment of the balance due.

The action is met by the defendant, Laviolette, alleging, that under the deed of sale of the 12th day of March, 1908, he purchased for the price mentioned therein "*une coupe de bois*," of *sixty arpents*, more or less, in superficies, and as a matter of fact, the acreage or superficies was only about *twenty-one* arpents, and did not exceed, in value, the sum of $300.

Answering the defendant's plea, the plaintiffs state that they did not sell, nor did they intend to sell, "*une coupe de bois*" on sixty arpents of land, but sold only the "*coupe de bois*" on a larger extent of land, belonging to one Beauparlant, which had been previously owned by one Boisvert, and that the deed of sale of the 12th of March, 1908, was merely executory of a promise of sale, made between the same parties, dated the 21st of February, 1908, in which no mention whatever was made of its extent in arpents.

The proof clearly establishes, that before the execution of the promise of sale of the 21st of February, 1908, the defendant, Laviolette, visited the property and examined the same.

It is equally clear, from the proof, that the defendant, Laviolette, entered upon the possession of the property, on or about the 26th of November, 1908; paid, without complaint the first instalment of $450, and commenced the operation of cutting the wood purchased by him, continued the same until the end of January, 1909, when the operations were completely terminated by the complete cutting of the wood on the property. All this without a word of complaint as to the extent or acreage of the property. As already stated the balance of the purchase price was due when and so soon as the defendant, Laviolette, commenced the removal of the timber. This removal was commenced and a substantial quantity was removed without the payment of the balance due.

A demand for payment being made, even then the defendant, Laviolette, did not complain of the superficial area of the property or "*coupe de bois*," but declared his willingness to pay the balance, provided the sum of $50 should be deducted, which he stated had been expended by him on a trip made by him, with his notary, which was rendered necessary, and which is properly chargeable, as he pretends, to the plaintiffs.

It should be here stated, that this amount of $50 in no way is in issue, and cannot under the present proceedings be allowed, as against the plaintiffs' claim.

QUE.

Court of Review. 1912

LECLAIRE v. LAVIOLETTE.

Greenshields, J.

Coming back to the 21st of February, 1908: The promise of sale was entered into, and the property or "*coupe de bois*" described therein is exactly the same as described in the deed of sale of the 12th of March, 1908, with one exception, to which I will refer later.

As before stated, the defendant, Laviolette, had previously visited and examined the property.

The deed of sale was entered into to give effect to, and in execution of the promise of sale.

As originally prepared, the deed of sale made no mention of the extent or acreage of the property. The notary, who prepared it, testifies, that in the absence of a knowledge of the cadastral number of the property, he wished to make the description more exact, and in a marginal note, put in the *contenance* as being sixty arpents, more or less.

I have no doubt whatever, that the defendant, Laviolette, bought the "*coupe de bois*," as he found it on a previous examination, and entirely independent of exact or approximate measurements or acreage.

Were I convinced from the proof that the defendant, Laviolette, bought or intended to buy a cut of wood covering sixty arpents, and only was able to obtain possession of twenty-one arpents, I would not hesitate to say, that he is entitled to relief; but convinced, as I am, that he bought the "*coupe de bois*" situated upon the land belonging to Beauparlant, and previously owned by Boisvert—which he had previously visited and examined, and commencing, carrying on and terminating his operations without complaint, as to the extent of the property, his first complaint appearing in his defence, I have no hesitation in deciding that the finding of the learned trial Judge was correct in law and in fact, and I am of opinion to confirm the judgment with costs.

Appeal dismissed.

ONT.

H. C. J. 1912

April 22.

Re SOLICITOR.

Ontario High Court, Cartwright, M.C. April 22, 1912.

1. SOLICITORS (§ II C—30)—TAXATION OF BILL—JURISDICTION OF MASTER.

The Master in Chambers has no jurisdiction to entertain a motion by a client for delivery and taxation of a bill of costs under the Solicitors Act, 9 Edw. VII. (Ont.) ch. 28, sec. 33.

2. COURTS (§ I A—2)—STATUTORY JURISDICTION OF MASTER.

The Master in Chambers has no jurisdiction under a statute, unless he is expressly named therein.

Statement

MOTION by the client for an order for delivery of a bill of costs and for taxation of the same, in the circumstances set out below.

The application was referred to a Judge.

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RE SOLICITOR.

Cartwright, M.C.

J. D. Falconbridge, for the client.
F. Arnoldi, K.C., for the solicitor.

THE MASTER:—The client, being in gaol and awaiting transportation to the Central Prison, instructed the solicitor to take proceedings to have the conviction quashed. At the time of such engagement, an agreement was drawn by the solicitor as follows: "October 20th, 1911. I hereby retain" (the solicitor) "to make application for my release from gaol, and herewith deliver to him cheque for $300 as retainer." This is produced, signed by the prisoner, and witnessed in pencil by the gaoler. The gaoler makes affidavit of execution in his presence, and also says that the contents of the agreement "were carefully explained to the (client) before he signed the same." In a second affidavit, he says that the cheque for $300 was filled in before signature by the prisoner. The client is very positive that he gave the solicitor a blank cheque, and that he never understood that he was to pay as much as $300 for his solicitor's services.

The client is a foreigner, and says he has a very imperfect knowledge of the English language. From his signature to the affidavit and agreement, he seems to be of an ordinary education.

The application to quash the conviction failed; and the client was informed of that by the solicitor on the 23rd January, 1912, by letter, which also said: "The cheque of $300 that you gave to me, in accordance with our agreement, covers your part of the transaction."

On the 6th February, the client replied repudiating any such agreement or signature of cheque for $300 and asking for a bill of costs.

On the 8th February, the solicitor wrote refusing the client's request.

After another month, the present solicitors took the matter up without result—and the present motion was thereupon launched.

Looking at what was said in the similar case, *Re Solicitor*, 21 O.L.R. 255, affirmed by a Divisional Court, 22 O.L.R. 30, it would seem that, if the view of the solicitor is accepted by the Court, he can retain what he has been paid, on stating his willingness to accept that in full of any claim for costs.

But, looking at the provisions of 9 Edw. VII. ch. 28, sec. 24 *et seq.*, it does not seem that, in a case like the present, where the client is a prisoner in close custody, a foreigner and without independent advice, the use of the word "retainer" in the agreement would be conclusive.

Section 25 seems to require a solicitor not to receive any sum under an agreement for his professional services until it has been allowed by a Taxing Officer of the Court. If he confirms it, then it would seem to be binding on the client. If the officer is in doubt, he may require the opinion of the Court or a Judge to be taken thereon.

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RE SOLICITOR.

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If the solicitor does not conform to sec. 25, but takes the risk of the question being raised later, then, by sec. 33, even after judgment by the client within twelve months of such payment, "the High Court Division or a Judge thereof" may require the agreement to be re-opened and order a taxation in the usual way—if a case for so doing is made out.

It was objected by Mr. Arnoldi that, under sec. 33, this application should be made to a Judge of the High Court Division, that is, at present, to a Judge of the High Court.

The power of the Master in Chambers is limited, in regard to making an order such as is asked for here, to the ordinary case under the old practice. The change made by the recent Act is statutory, and the procedure must be strictly followed. My view has always been that the Master in Chambers has no jurisdiction under a statute unless he is expressly named, as, e.g., in the Insurance Act.

I have thought it well to express an opinion on the Act, as it was discussed on the hearing. But the only course to be adopted now is to refer it to a Judge. If he thinks it cannot be heard in Chambers, he can enlarge it into Court before himself, as is not unusual.

Motion referred to a Judge.

MAN.

C. A. 1912

May 1.

REX v. KERR.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. May 1, 1912.

1. APPEAL (§ III E—91)—NOTICE OF APPEAL IN CRIMINAL CASE—SERVICE ON COUNSEL—ATTENDANCE OF ACCUSED.

The Court of Appeal hearing an appeal by the Crown by way of reserved case from a ruling in favour of the accused on a criminal trial will hesitate to hear the appeal of which notice has been served on his counsel but not on the accused personally, although counsel for the accused is present to argue the appeal and admits that he had shewn the accused the notice of appeal; but an adjournment for personal service will not be necessary if the accused attends in person at the argument of the appeal.

2. TRIAL (§ III E 5—263)—CORRECTNESS OF INSTRUCTION TO JURY—SHOOTING WITH INTENT TO MURDER.

On the trial of an indictment for shooting with intent to murder, it is proper that the jury be directed that if the evidence so warrants, a verdict may be rendered of shooting with intent to maim or to do grievous bodily harm.

3. NEW TRIAL (§ II—8)—ERRONEOUS RULING—DISCRETION OF COURT AS TO GRANTING NEW TRIAL.

Where on a trial for shooting with intent to murder the jury returned a verdict of acquittal after an erroneous ruling by the trial Judge that the jury could not be directed, on such indictment, to bring in a verdict for the lesser offence of shooting with intent to maim or to do grievous bodily harm, if they found such lesser offence proved, a new trial will not necessarily be granted by the Appellate Court on reversing such erroneous ruling on an appeal by the prosecution, but the Court will exercise its discretion in refusing a new trial if it considers that the evidence does not warrant it.

RESERVED CASE stated by METCALFE, J., as follows:—

Robert Kerr was tried before me with a jury at the spring assizes for the northern judicial district, on a charge of having at the rural municipality of Minto, in the Province of Manitoba, on the ninth day of November, one thousand nine hundred and eleven, shot at Alexander Miller with intent to murder; on which indictment the jury returned a verdict of not guilty.

On the trial counsel for the Crown asked me to direct the jury that, if the evidence justified it, a verdict of shooting with intent to maim, disfigure or disable, or to do some other grievous bodily harm, might be found on the indictment as laid.

There was evidence which, if believed by the jury, would have justified such a verdict.

I refused to so direct the jury. Was I right?

(Sgd.) THOMAS L. METCALFE, J.

Dated at Winnipeg this 18th day of April, 1912.

Argument

R. B. Graham, Deputy Attorney-General, for the Crown, stated that he had served notice of the application upon G. A. Eakins, counsel for the accused, but that he had not been able to effect personal service upon the accused himself. The cases shew that the retainer of counsel ends with the verdict of the jury, therefore the accused would have to be served personally.

G. A. Eakins admitted that he had shewn the accused a copy of the notice served upon him.

The Court seemed to be of opinion that that was not sufficient, and as Mr. Eakins stated he could have his client present in Court the next morning, the case was allowed to stand.

The case was argued the next day, when the accused was present in Court.

R. B. Graham, Deputy Attorney-General, for the Crown.

G. A. Eakins, for the accused.

Judgment

THE COURT held that the question should be answered in the negative, but refused to grant a new trial as asked for by the Crown, holding that the evidence was not such as to warrant a new trial being granted. Moreover, the accused had been tried once, and the Court would not direct a second trial on the same state of facts as those on which he had been tried before.

Ruling below reversed, but new trial refused.

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May 22.

HOLLAND v. HALL.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ.
May 22, 1912.

1. LIBEL AND SLANDER (§ II D—46)—CHARGE OF "HOLDING UP THE TOWN" FOR EXORBITANT PRICE—CANDIDATE FOR COUNCIL.

A charge that a candidate for the office of municipal councillor had "held the town up for an exorbitant price" for property required by the town for a public street, does not imply a criminal act, and is not actionable *per se*.

2. LIBEL AND SLANDER (§ II D—46)—CANDIDATE FOR MUNICIPAL COUNCIL —"ANOTHER OF HIS HOLD-UP GAMES."

A charge that a candidate for the office of municipal councillor appealed from an assessment of his property on the ground that it was excessive, and that he afterwards sold it for an amount greater than for what it was assessed, which was described as "another of his hold-up games," is not actionable *per se*.

3. TRIAL (§ II C 7—105)—CHARGE OF MISFEASANCE IN OFFICE—SUBMISSION OF QUESTION TO JURY.

A count in a claim for slander which charges a person with misfeasance in office should not be submitted to the jury where the truth of the allegation is shewn.

4. NEW TRIAL (§ V F—60)—GRANTING NEW TRIAL OF SOME ISSUES—SOME WRONGFULLY SUBMITTED TO JURY.

Where, in an action for several alleged slanders some of them should not have been submitted to the jury, and damages in the plaintiff's favour were not separately assessed, a new trial will be granted with reference to the remaining charges.

Statement

APPEAL by the defendant from the judgment of Kelly, J., in favour of the plaintiff in an action for slander, the defendant seeking to have the action dismissed or a new trial ordered.

The appeal was allowed and a new trial ordered.

R. McKay, K.C., and *J. H. Coburn*, for the defendant.

E. S. Wigle, K.C., and *J. H. Rodd*, for the plaintiff.

Middleton, J.

The judgment of the Court was delivered by MIDDLETON, J.:—The action is for slander. Five distinct counts are set out in the statement of claim. At the trial the case was submitted generally to the jury, and they returned a verdict in favour of the plaintiff for $1,000. The defendant has throughout contended that the slanders set forth in paragraphs 4, 5, 6, and 7 of the statement of claim are not actionable without proof of special damage. He moved before the Master in Chambers to have these paragraphs struck out; this was refused; and at the opening of the trial the motion was renewed. Again, before the case went to the jury, the same objection was taken; and, after the charge of the learned trial Judge, the charge was objected to upon the same ground.

The plaintiff was a candidate for re-election to the office of municipal councillor for the town of Walkerville, in January, 1911. At a meeting of the electors the defendant spoke; and

all the slanders complained of but one consist of statements said to have been made in the course of that address. The slander contained in the third paragraph of the statement of claim is admitted to be capable of the meaning attributed to it by the innuendo; and it is clearly actionable per se.

The statement complained of in the fourth paragraph is as follows: "Holland held the town up for an exorbitant price for his property when the town wanted to open up Assumption street. He swore that his lot that the town wanted was worth $850, when it was only assessed for $360, and which he bought for $350 the year before, because he heard the town was going to open up the street and wanted that property."

The innuendo is: "That the plaintiff had falsely sworn to the value of his property for the purpose of cheating the municipality of Walkerville and getting money he was not entitled to."

At the time of the transaction referred to, the plaintiff was not a municipal councillor. He owned certain property which the town required for the purpose of opening a street. Expropriation proceedings were taken, and $750 was awarded. During the course of the arbitration the plaintiff stated on oath that the property was worth $850.

It is clear that the slander complained of is not capable of the meaning charged in the innuendo. Perjury is not in any way implied in the statement. The fair meaning of the statement is, that the plaintiff, owning land required by the municipality, which had cost him $350 the year before, sought an excessive price from the municipality, and in support of this claim stated on oath that the property was worth $850.

Upon the argument counsel sought to support the claim by the suggestion that the use of the expression "held the town up" implied some criminal act. We cannot assent to this. It is true that this Americanism has now received recognition in standard dictionaries as being equivalent to "stop and rob upon a highway;" but it is obvious that in this context the words were not used with that significance, but as a figurative expression to indicate that the plaintiff had availed himself of the necessities of the municipality to drive a hard and perhaps unconscionable bargain. The words, taken in their natural significance, are not capable of a meaning actionable per se.

The same remarks apply to the fifth count. What is there complained of is the statement—somewhat modified in the evidence—that the plaintiff had appealed from the assessment of certain property as being too high and afterwards sold the property for a much larger sum than it had been assessed for. This is described as being "another of his hold-up games." Clearly this is not actionable per se.

What is complained of in the sixth paragraph is a statement that the plaintiff desired "to get back into the council so

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that he could sell the town some more of his dry goods, as he did in the past. He sold the town all the goods they needed for the Elks' celebration and decorations for the King's funeral, at handsome profits, and now he wants to be mayor."

It may well be that this charges the plaintiff with misfeasance in office; but the plaintiff's own evidence discloses that what is charged is substantially true. The municipal council voted a certain sum to be used for the purpose of decoration. The plaintiff was in charge on behalf of the municipality. He made a contract with a third person. That third person purchased certain of the goods used for the decoration from the plaintiff. This is the very thing prohibited by sec. 80 of the Municipal Act; and it is quite immaterial whether the plaintiff made a profit or not; although it appears from his own evidence that he did sell at a profit."

The truth of the statement complained of being thus established by the plaintiff's own evidence, this count ought not to have been allowed to go to the jury.

The seventh paragraph charges the making on another occasion of substantially the same statement as that already referred to with reference to the street opening.

For these reasons, we think that the learned Judge ought not to have allowed the action to go to the jury except upon the first slander charged—that contained in the third paragraph—and that as to the slander charges in paragraphs 4, 5, 6, and 7, the action should be dismissed; and, as the damages were not separately assessed, there must be a new trial with reference to the remaining charge.

The defendant should have the costs of this appeal in any event, and there should be no costs of the abortive hearing. The other costs of the issues upon which the defendant has now succeeded will be reserved for the trial Judge.

It is to be hoped that the parties will now see the wisdom of adjusting their differences and avoiding the necessity of any further hearing.

Appeal allowed and new trial ordered.

TORONTO CARPET CO. v. WRIGHT.

MAN.

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1912

May 13.

Manitoba King's Bench, Robson, J., May 13, 1912.

1. INJUNCTION (§ I C—32)—RESTRAINING DISPOSAL OF SHARES BY WIFE OF JUDGMENT DEBTOR.

Upon an application by a judgment creditor for an interlocutory injunction to prevent the disposal of shares of stock by the wife of the judgment debtor, to whom it is alleged the latter transferred them in his lifetime with intent to defraud his creditors, the judgment debtor's examination in the suit in which the judgment was rendered cannot be considered.

[*Clinton* v. *Sellers*, 1 Alta. L.R. 135, specially referred to.]

2. EVIDENCE (§ X M—755)—USE OF DEPOSITION OF ANOTHER PARTY IN ANOTHER ACTION.

Notwithstanding certain departures from the rules of evidence are permitted in the interlocutory stages of a proceeding, the reading therein of depositions of another party taken in a different action is not thereby authorized.

3. EVIDENCE (§ X C—696)—AFFIDAVIT MADE IN ACTION—USE ON MOTION FOR INJUNCTION.

The rule that permits the use of affidavits based upon information and belief cannot be made the means of introducing, on an application for an interlocutory injunction in a suit to set aside a fraudulent transfer of property, the evidence of the judgment debtor taken in the suit in which the judgment was rendered.

4. GUARANTY (§ I—7)—CONTINUING LIABILITY—VOLUNTARY TRANSFER BY GUARANTOR.

As a contract of guaranty creates a continuing liability from its inception a subsequent voluntary transfer of the guarantor's property without consideration will be set aside where a liability afterwards arose on such guaranty.

[*Re Ridler*, 22 Ch. D. 74, and May on Fraud. Conv., 3rd ed. 36, specially referred to.]

5. HUSBAND AND WIFE (§ II D—74)—PURCHASE BY HUSBAND IN HIS OWN NAME OF SHARES—PROCEEDS FROM LAND BELONGING TO WIFE.

Where there is no contradiction of the defendant's evidence that shares of stock which were transferred to her by her husband after a judgment had been rendered against him, were purchased by the latter in his own name with the proceeds of lands owned by her, in an action against her by the judgment creditor to set aside such transfer, an interlocutory injunction restraining the disposal of such shares will be denied.

6. GIFT (§ III—16)—DELIVERY BY HUSBAND TO WIFE OF SHARES—CORROBORATION WHEN NECESSARY.

An interlocutory injunction to restrain the transfer of shares of stock will be granted where it appears that the defendant's husband transferred them to her after he had given a guaranty, on which a liability subsequently arose, where, on the trial, it would be a question whether the transaction was a gift, and whether there was a sufficient delivery of possession to effectuate the gift, as such circumstances justify the application of the rule that corroboration is necessary where such a transaction affects third parties.

7. INJUNCTION (§ III—139)—DELAY IN APPLYING—SATISFACTORY EXPLANATION.

Where delay in applying for an interlocutory injunction is satisfactorily explained the writ will not be denied.

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8. INJUNCTION (§ I C—32)—TRANSFER BY HUSBAND TO WIFE—INTERLOCUTORY INJUNCTION—FRAUDULENT TRANSFER OF SHARES.

As shares of stock may be easily lost to judgment creditors the Court will, as an exercise of discretion, grant an interlocutory injunction restraining their transfer by one to whom it was alleged they were fraudulently transferred, notwithstanding it did not appear on the application that there was imminent danger that they would be transferred and lost to the judgment creditor if the writ were denied.

Statement

AN application by the plaintiffs, who are suing on behalf of themselves and all other creditors of Archibald Wright, for an injunction restraining the defendant Mary Wright from disposing of certain shares of stock.

The application was dismissed except as to the shares in the Winnipeg Saddlery Company.

H. M. Hannesson, for the plaintiffs.

Messrs. *W. R. Mulock*, K.C., and *J. W. E. Armstrong*, for the defendants.

Robson, J.

ROBSON, J.:—Plaintiffs recovered a judgment in his lifetime against the late Archibald Wright. They allege that he assigned certain company shares to his wife, the defendant Mary Wright, with intent to defeat his creditors. Plaintiffs seek in this action the setting aside of the assignments under 13 Eliz. ch. 5. The action was brought on behalf of themselves and other creditors of Wright. They so proceeded although they had recovered judgment against Wright. They now apply for an injunction till trial restraining defendant Mary Wright from disposing of the shares. Archibald Wright was also named as a defendant. He died since action. No step has yet been taken thereupon. Although apparently the statement of claim had been served, defendant Mary Wright had not pleaded, this being by arrangement between solicitors. It is still quite open to plaintiffs to amend their statement of claim and constitute the cause as to parties as they may be advised. The question as to the interlocutory injunction is solely between plaintiffs and defendant Mary Wright. Her counsel oppose this application.

The evidence tendered in support of the application consists of two affidavits of plaintiffs' solicitor, the examinations of Archibald Wright as judgment debtor in suits of plaintiffs and other firms against him, and the examination of the present defendant.

I do not think the examination of Wright in other causes as judgment debtor may be referred to. In *Clinton* v. *Sellars*, 1 Alta. L.R. 135, at 153, Stuart, J., deals with the question. That was the trial of the action, but that, to my mind, does not affect the matter. Certain departures from the rules of evidence are permitted in interlocutory stages, but they do not go so far as to authorize the reading of depositions against another

party in another cause. I do not think the rule permitting affidavits of information and belief provides a means of introducing such testimony. The affidavit epitomizing the examinations does not even come within that exception or advance the proof at all.

It is alleged in the statement of claim that Wright was given credit by plaintiffs on the faith of his owning the shares. There is no evidence to support this on this application.

That judgment was recovered on 11th October, 1911, by plaintiffs against Wright for $15,000, and interest as alleged in the statement of claim is shewn by one of the affidavits. This was not a ground of contention nor was the fact that the liability on which the judgment was founded was an agreement of guarantee of 6th October, 1906, as specified in the statement of claim. As I read clause 2 of the affidavit of 1st May, it proves that the obligation so sued on existed at the time of the stock transfers now impeached.

Mary Wright claims that all this property belonged to her and that her husband was a trustee for her, the transfers being made pursuant to her demand. That Wright certainly had nothing else clearly appears from Mary Wright's examination.

In May on Fraudulent Conveyances, 3rd edition, p. 36, appears the following:—

> A guarantee given by a person, who settles the bulk of his property, must be regarded as a contingent liability, against which available assets should be provided in order to support such settlement. For the guarantee must be viewed as if the event had already happened—the possibility of which the parties must have had in contemplation when the guarantee was given—of the debtor being unable to pay; and the fact that, when the settlement was made, the principal debtor had assets sufficient for payment of the debt cannot be regarded. The state of the assets of the guarantor is the question which the Court considers. The guarantee must not be regarded as a liability which might never become a debt.

and *Re Ridler*, 22 Ch. D. 74, is referred to.

I think that under the circumstances as they appear from even the meagre evidence adduced, if in fact Wright owned the property, it is more than possible that under *Re Ridler*, 22 Ch. D. 74, a trial Judge would infer an intention on Wright's part to defeat or delay creditors within the meaning of the statute.

While it is undesirable at this stage to enter into any discussion of the merits, nevertheless this application must be disposed of, and that necessarily involves some reference to the facts as revealed by the evidence adduced.

The shares other than those in the Winnipeg Saddlery Company stand in a different position from the latter.

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The only evidence of the circumstances of Mary Wright's interest in any of the shares is found in her examination. I have for present purposes to accept it equally for her as against her. I deal firstly with the shares other than those in the Saddlery Company.

Mary Wright asserts that these shares were bought with her money derived from the sale of certain land referred to by her. Her statement that she had owned the land for a long period prior to plaintiffs becoming creditors of Wright is not contradicted. Nor is it questioned that she herself received the consideration for the land in the form of a cheque payable to her. Thus I infer that the title was in Mary Wright. These allegations were readily open to contradiction by plaintiffs should the facts really have been otherwise, and on this application I therefore assume them to be true. From her evidence, and that is all there is to consider, it cannot be inferred that her handing over the cheque to her husband was a gift. On the present material it seems that she intrusted the money to her husband for investment in her behalf. As to the stocks purchased with the land moneys I do not think the plaintiffs have so far shewn such a reasonable probability of their succeeding in this action as to justify the Court in interfering with the property before trial.

The shares in the Winnipeg Saddlery Company stand in a different position.

It seems that the business which has developed into this company, was commenced years ago by Archibald Wright. His wife's claim is described by her as follows:—

> Well, I boarded the men in the shop and done their washing and I worked for the shop. I had a sewing machine and used to work for the shop, and he thought I was entitled to something for my work, and I got the shop and he took the Leland and the business up west, and I took the farm and the shop, and the shop was no good.

When the present company was formed the shares in question were recorded in the name of Archibald Wright. They were transferred by Wright to his wife after he had given plaintiffs the guarantee. There are no independent circumstances such as existed in reference to the other shares by which this claim can be tested. It is evidently as to the shares in the saddlery business a case for the application of the rule requiring corroboration in transactions between relatives where strangers are affected thereby, It will likely also be a serious question whether this was not an attempt at a gift and whether there was such a delivery of possession as would be necessary to effectuate it. I am of opinion that as to the shares in the saddlery company there are reasonable grounds for plaintiffs' action.

It was contended that owing to delay plaintiffs should fail on this application. An injunction had been obtained *ex parte*

in January last. The motion to continue it came before me recently. The injunction was dissolved by me and leave given to bring this application. Perhaps, instead of dissolving the injunction I should have given leave to supply material relatively unimportant. A portion of the period since plaintiffs recovered judgment is thereby accounted for. In any event I do not think it is a case in which it should be held that owing to any delay that has taken place this temporary relief should be denied.

It does not appear that there is imminent danger that the shares in the saddlery company will be disposed of and lost to plaintiffs if the injunction does not issue. In case of a continuing wrong or a threatened trespass it may be necessary to shew some overt act before resorting to this procedure. In circumstances such as the present nothing might be known till the act to be restrained were done and the shares irretrievably lost. It may be that these shares will be the only property available to the creditors, and if so it is important that they be preserved to them.

I would in this case exercise my discretion towards granting the injunction as to the shares in the saddlery company. Otherwise the application is dismissed. Costs reserved for disposition by the trial Judge.

Application dismissed except as to shares in The Winnipeg Saddlery Company.

Re GALLAGHER.

Ontario High Court, Britton, J. May 22, 1912.

1. WILLS (§ III K—187)—SALE OF LAND CHARGED WITH LEGACY—PAYMENT INTO COURT.

Where it was not known whether a legatee was living at the time of the sale of land upon which the payment of his legacy was charged, and the sale was made subject thereto, upon the amount of the legacy, together with interest thereon to the date of the sale, being paid into Court for the benefit of the legatee, a decree will pass discharging the land from such charge.

2. COSTS (§ I—16)—PAYMENT INTO COURT OF LEGACY CHARGED ON LAND—WHEREABOUTS OF LEGATEE UNKNOWN.

Where, upon the payment into Court, on the sale of land, charged with the payment of a legacy, of the amount thereof, costs will be deducted therefrom where no claim was made to the money and the whereabouts of the legatee, if living, were unknown.

Statement

APPLICATION by Martha O'Reilly and Elizabeth Waterston for an order declaring that part of lot 13 on the east side of Nicholas street, in the city of Ottawa, is free from a charge thereon, upon payment into Court of $300 and interest.

The application was allowed.

John R. Osborne, for the applicants.

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RE
GALLAGHER.

Britton, J.

BRITTON, J.:—Margaret Gallagher was the owner of the above-described land. She devised this land, particularly describing it by metes and bounds, to her daughter Anna Mary Gallagher, but subject to a charge of $300 in favour of each of her sons, namely, Philip, Stephen, and Ambrose. The will directed that these sums should be paid to the sons respectively at the expiration of five years from the death of the testatrix, if the property had not been sold in the meantime; but, if the property should be sold within five years from such death, then the sums mentioned should be paid forthwith after such sale. The will further provided that, in the event of the death of any one of the said sons before such sale, or before the expiration of the said term of five years, "the share hereinbefore devised to him out of the said lands shall not be payable and shall lapse."

The will was made on the 24th August, 1899, and the testatrix Margaret Gallagher died on the 19th July, 1900. No part of the land was sold by Anna Mary Gallagher within five years from the death of Margaret Gallagher. On the 30th April, 1904, Anna Mary Gallagher settled with Stephen Gallagher, and procured a release from him. On the 3rd May, 1904, she settled with Ambrose Gallagher, and procured a release from him. Both of these releases were duly registered. In 1906, Anna Mary Gallagher sold parts of these lands to the applicants. As Philip Gallagher could not be found—his relations not knowing whether he was then living or not—these parcels were sold subject to any claim Philip, if living, might have to the sum of $300.

These applicants now desire to sell, and the purchasers are not willing to accept the title unless the lands are freed from the charge mentioned in favour of Philip for the $300. If Philip Gallagher was alive on the 19th July, 1905, he would on that day have been entitled to receive the $300—and so he, as to his interest in the land, will be fully protected by the payment into Court by the applicants of the sum of $383.13. That sum is made up of the $300 charged, interest on that sum at five per cent. from the 19th July, 1905, say six years and ten and a half months to the 4th June, 1912, $103.13, less costs of this application and of payment in, which costs I fix at $20. Under the circumstances, no claim having been made for the money, and the owners of the land having no knowledge of where Philip Gallagher is, if living, I deem it right that the costs should be deducted from the full amount of the claim.

Upon payment of the said sum of $383.13 into Court in this matter on or before the 4th June, 1912, there will be a declaration that the said lands above-mentioned, being all the lands charged by Margaret Gallagher with the payment of $300 to Philip Gallagher, shall be freed from that charge and incumbrance.

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There will be reserved to the applicants, and to each of them, the right to make an application at any time for payment out of Court to them, or either of them, of the said money or any part thereof, whether by reason of the death of Philip Gallagher or for any other cause—upon such facts and material as they may be advised may warrant any such application.

Order made accordingly.

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Quebec Court of Review, Tellier, DeLorimier and Dunlop, JJ. May 23, 1912.

1. WILLS (§ I D—36)—DEGREE OF MENTAL CAPACITY.

Soundness of intellect required of a person making a will at the time of the making thereof consists in having sufficient understanding to appreciate the character and the effects of the document to be made and in having sufficient will power to manifest such understanding.

[*Harwood* v. *Baker*, 3 Moore P.C. 282, *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, and *Russell* v. *Lafrancois*, 2 Dorion C.A. (Que.) 245, specially referred to.]

2. EVIDENCE (§ II E 5—172)—TESTAMENTARY CAPACITY—BURDEN OF PROOF —SHIFTING ONUS.

As a general rule the onus of proving that a testator was of unsound mind at the time of the making of the will rests on the person attacking the validity of the will, although special circumstances (*e.g.*, intervals of unsoundness of mind) may shift such onus on the person defending such will.

3. EVIDENCE (§ II E 5—172)—TESTAMENTARY CAPACITY—ECCENTRIC ACTS —WEIGHT OF EVIDENCE.

Oddities of habits and eccentric acts are not *per se* sufficient to justify a conclusion of unsound mind, especially when the provisions of the will itself are perfectly rational and logical, and evidence based on purely theoretical assertions is most dangerous and should not carry much weight as against testimony of facts.

Statement

APPEAL from the decision of the Superior Court, Martineau, J., rendered at Montreal on April 21st, 1911, whereby the plaintiffs' action to set aside a will was dismissed with costs.

The appeal was dismissed.

J. A. Descarries, K.C., for plaintiff, appellant.

L. E. Beaulieu, for defendant, respondent.

The unanimous judgment of the Court of Review was rendered by DeLorimier, J.

DeLorimier, J.

DELORIMIER, J. (translated):—The plaintiff herein has inscribed in review from the judgment rendered herein on April 21, 1911, by the Superior Court, dismissing his action with costs.

By this action, brought on June 1st, 1910, the plaintiff prays for the cancellation of the holograph will of the late Gustave Aimé Madore, who departed this life about April 15th, 1910.

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The action is brought by one of the paternal uncles of the deceased against the universal legatee under this will, a maternal uncle by marriage of the testator.

The plaintiff relies on two grounds: Firstly, that the alleged will is not the will of the late C. A. Madore, as it is not in his handwriting; secondly, that if it is in the testator's handwriting, it was made when the latter was of unsound mind and when the defendant had succeeded by fraud and captious manoeuvres in obtaining the control of the testator's mind and consent so as to practically substitute his own thereto.

The trial Judge has come to the conclusion that the will was truly made by the testator, who was, at the time of the making thereof, in the full enjoyment of his mental faculties and has therefore dismissed the action.

[The learned Judge here went carefully into the handwriting question and reviewed the evidence and documents of record and came to the conclusion that the will was really made and signed by the *de cujus* and passed on to the second question.]

The second point raised by the appellant is that the testator was of unsound mind at the time he made this will.

It is most important to ascertain and define what constitutes soundness of mind or intellect required from one who disposes of his property by will. Art. 831 C.C. says: "Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favour of his consort, or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction or limitation; saving the prohibitions, restrictions and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals."

Art. 901 C.N. is not drawn like our art. 831, for it reads: "Pour faire une donation entrevifs ou un testament il faut être sain d'esprit." This article has been so drawn in France in order to enable interested parties to attack any gratuitous disposal of property made by a donor of unsound mind, and this, too, at any time subsequent to his decease notwithstanding art. 504 C.N., which our Quebec Civil Code has not reproduced. Marcadé under art. 901 C.N. explains these provisions: "Il n'y a pas un seul contrat, pas un seul acte civil, pour la validité duquel il ne faille être sain d'esprit; une vente aussi bien qu'un mariage, une concession d'hypothèque comme une reconnaissance d'enfant, seraient nécessairement déclarés nuls s'ils émanaient d'un fou. Que signifie donc notre article? Et à quoi bon nous dire que la raison est nécessaire pour disposer par titre gratuit? Cette règle se trouve avoir un sens, en ce que l'exercice des facultés intellectuelles est exigé avec plus de rigueur dans les dispositions gratuites, que dans les actes à titre onéreux. On

sait, en effet, que, d'après les dispositions de l'art. 504, les actes faits par une personne atteinte d'aliénation mentale ne peuvent plus être annulés après sa mort, quand l'interdiction de cette personne n'a été ni prononcée ni provoquée de son vivant (à moins que l'acte ne porte, en lui-même, la preuve de la folie). Ou, notre article fait exception à cette règle pour les actes gratuits (ou plutôt il soustrait ces actes gratuits à cette disposition vraiment exceptionnelle et les replace dans le droit commun) en déclarant, d'une manière absolue, que les donations et testaments ne pourront jamais être faits par celui qui ne serait pas absolument sain d'esprit. Ainsi, quoique un testateur ou donateur soit mort, sans que son interdiction ait été provoquée sa disposition n'en pourra pas moins être attaquée pour cause de démence, nonobstant l'article 504 qui ne s'applique point ici: Fenet 12, pp. 294 and 297.

Now, our Civil Code has not reproduced this article 504 C.N. and our codifiers have told us why: "Furthermore," they say, "the Acts passed before the interdiction may be annulled, according to circumstances, if, at the time when they were made or passed, the insanity or madness notoriously existed. One article copied from the Code Napoleon (C.N. 504) has been suppressed, because it was looked upon as offering, as a general proposition, great difficulties in its application, and because it has been thought better to leave each case to be decided according to general principles and the particular circumstances": 3 Bibl. C.C. 84.

It will be seen, therefore, that under our law all civil acts or contracts whatsoever are governed by one and the same general rule, to wit: that a person contracting, as well as a person making a will, must at the time of the act be of sound mind, whether such act be one under gratuitous or under onerous title.

What, now, is the true meaning of the words "of sound mind"? What does the law require of a person, not interdicted, in the shape of intellectual capacity that he may give a valid consent to a contract or civil act?

Demolombe sums up the doctrine on this point as follows:—

"Mais en quoi consiste cette condition? Et quel est le sens de ces mots 'sain d'esprit' ou, comme disaient nos anciennes coutumes, 'sain d'entendement,' de bon sens et d'entendement? (Art. 275, Coutume d'Orleans.) Voila ce que nous avons à préciser. Deux conditions nous paraissent necessaires pour constituer cette sanité d'esprit que le législateur exige; à savoir, l'intelligence et la volonte; comprendre et vouloir. Comprendre le caractère et les effets de l'acte dont il s'agit, donation entrevifs ou testament; vouloir faire cet acte, et pouvoir aussi, bien entendu, manifester cette volonte": Donations et testaments No. 333.

It would be useless for me to quote numerous authorities on the question. I shall content myself with referring to those

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which may be found, amongst others, in the case of *Russell v. Lefrancois and Morin*, 2 D.C.A. pp. 245, 266 *et seq.*

The principle that a testator must be of sound mind at the time of the making of the will presents really no difficulties.

Nevertheless, although it is admitted, in principle, both in England and in France, that the *onus* of proof lies on the party attacking the validity of a will on the ground of unsoundness of mind, yet it is recognized that this rule is not absolute. It may be modified according as to whether or not the testator was in a habitual state of soundness or unsoundness of mind at a period reasonably close to the date of the will, and, therefore, according to circumstances, the *onus* of proving the soundness of mind at the time of making of the will may fall on the party upholding the validity thereof: 3 Marcadé, p. 24; 7 Aubry and Rau, No. 15; 6 Hue, No. 70; 18 Demolombe, Nos. 360 *et seq.*; 11 Laurent, p. 116; 5 Toullier, No. 57; 4 Demante, No. 17.

In the present case it is well established that every one of the acts alleged against the testator occurred either several months before or several months after the date of the will.

The appreciation of evidence in a case where soundness of intellect is in issue, is as a rule a fairly difficult and delicate matter. For the witnesses often appreciate the same facts solely from an impression under which they have remained; often, too, it is necessary to scrutinize the competency of the witness and the greater or lesser degree of interest he may have in interpreting these facts in one way or the other as stated by Loranger, J., in *Royal Inst. for the Advancement of Learning* v. *Scott*, 26 L.C. J. 247, at p. 251: "Rien n'est fallacieux comme la preuve de faits qui servent de base à l'opinion que les témoins viennent exprimer sur la sanité d'esprit d'une personne. Chacun se place à son point de vue et celui de sa position sociale. Tel fait qui, dans l'opinion d'une personne, ne serait qu'une extravagance ou une excentricité, dans la pensée d'une autre, serait qualifié d'un acte de folie; un préjugé parfois reconnu par une certaine classe de la société, mais ignoré par une autre classe d'une condition différente, serait jugé de la démence."

When the proof does not disclose any positive, clear and unanswerable fact to establish lunacy, it becomes absolutely necessary to appreciate the evidence according to all the facts sworn to by the witnesses. Applying these principles to the examination of the evidence of record, I have come to the conclusion that the incidents referred to by the plaintiff's witnesses—and this by giving them an importance which is hardly warrantable—reveal certain oddities of character or acts of an excited, nervous temperament rather than an actual mental derangement.

The plan of the plaintiff seems to have been an endeavour to seek solely a series of facts which would indicate that the testator had, for a very long time, acted rather oddly or excitedly, and that these acts were the probable forerunners of the

precocious insanity to which he later fell a victim and which finally carried him off.

For instance, certain witnesses state that the testator had often complained, and even from childhood, of headaches. Others tell us he was subject to sudden changes of humour; sometimes he was of a loquacious mood, and at other times he was rather taciturn and apathetic. Others again state that now he was not very communicative and then was excessive in the manifestation of either pain or pleasure.

Then there is the medical evidence. Dr. Villeneuve and Dr. Gratton say that if the foregoing facts are true and have been correctly represented, then in their opinion the testator's illness must have begun long before the date of the will in question, to wit, September 20, 1908, and that the testator, therefore, was not of sound mind when he made the will. Yet, and this shews how dangerous are purely theoretical assertions, we find another witness of the plaintiff, Dr. Derome, who says that after the return of testator from New York, late in the spring of 1909, it would be very difficult for him to state whether the testator then shewed real symptoms of his disease.

It seems to me, therefore, that all these acts, apart from those which occurred during his illness, and these only began five or six months after the will was made, cannot be seriously regarded as establishing the insanity of the testator. . . . (The learned Judge then examined further the evidence in favour of the sanity of the testator prior to the making of the will and continued):

An examination of all the facts of the case leads us to the belief that the testator had been of habitually sound intellect for a long period previous and for a long period subsequent to the making of the will.

And we are confirmed in the opinion by the fact that this will is perfectly clear and contains only reasonable dispositions.

Demolombe at vol. 18, No. 362, says this: "La disposition testamentaire est-elle raisonnable, il sera naturel de supposer qu'elle a été faite dans un intervalle lucide. La disposition est-elle déraisonnable il sera, en sens inverse, naturel de penser qu'elle n'a pas été faite dans un intervalle lucide." And we may even add with Toullier (vol. 5, Nos. 56 and 58) that it is hard to suppose that a person of unsound mind would have enough patience and docility to write in his own hand a will which contains a lengthy series of dispositions, as this one does.

Another fact which confirms our opinion that the testator was of sound mind when he made his will is this: Sister Marie Archange had advised him to make his will before leaving for New York; he had replied that he would do so, and then he declared absolutely to the witness Méloche that he had made his will. This fact is of the utmost importance, in our opinion, and shews most

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clearly that his mind was sound when he made his will; *Harwood* v. *Baker*, 3 Moore P.C.C. 282, at p. 307; *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549; *Russell* v. *Lafrancois*, 2 Dorion C.A. 245, 269.

In his action the plaintiff alleges that the defendant had obtained the control of the will power and of the liberty of the testator, but the evidence establishes that the defendant had nothing to do with the making of this will. The testator himself declared to Sister Marie Archange, a few days before the will, that he never talked about his temporal affairs to anybody, and this shews clearly that he was under the influence of no one and would not submit to the influence of anybody. The large number of legacies contained in the will is the best proof of the testator's freedom. Had he been under the defendant's influence it is unlikely that he could have disposed of nearly his whole fortune in favour of his other relations.

For these reasons we confirm the judgment of the Court below with costs.

Appeal dismissed.

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SMITH v. ERNST.

(Decision No. 3.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. June 10, 1912.

1. SPECIFIC PERFORMANCE (§ II—42)—ENFORCEMENT AGAINST VENDOR WHERE TITLE INCOMPLETE—DAMAGES.

In an action to enforce specific performance of a contract for the sale of land which stipulated that the purchaser upon completing payment should have a Torrens title to the land, the Court has the power to decree a conveyance in respect of such title as the defendant has and also to award damages for breach of the agreement to give a Torrens title, even though the land is not within its jurisdiction and though the defendant did not own the land at the time the contract was entered into, if he took over the vendor's rights in the agreement and received the greater part of the purchase money with full knowledge that the plaintiff's contract with the owner called for a Torrens title.

[*Smith* v. *Ernst* (No. 2), 2 D.L.R. 213, affirmed on appeal.]

2. CONTRACTS (§ I E 4—90)—STATUTE OF FRAUDS—ORAL AGREEMENT FOR TORRENS TITLE—SPECIFIC PERFORMANCE.

Where the grantee of lands subject to an instalment contract of sale made by his grantor under which a Torrens title was to be given, orally agrees with the purchaser to furnish a Torrens title if the balance of the purchase money is paid directly to him instead of to the original vendor, such agreement is not a contract for the sale of lands or of an interest therein within the meaning of the Statute of Frauds, but for the performance of an act with reference to his own lands and title and it may be specifically enforced at the instance of the purchaser.

[*Angell* v. *Duke*, L.R. 10 Q.B. 174; *Jeakes* v. *White*, 6 Ex. 873, and *Boston* v. *Boston*, [1904] 1 K.B. 124, followed.]

3. COURTS (§ I B 3—32)—JURISDICTION—REAL PROPERTY IN OTHER PROVINCE—SPECIFIC PERFORMANCE.

A contract to convey land will be enforced by the Courts of one province where the parties are within its jurisdiction, notwithstanding that the land is located in a different province.

[*Smith* v. *Ernst* (No. 2), 2 D.L.R. 213, affirmed on appeal; see also Annotation thereto, 2 D.L.R. 215-218.]

Statement

APPEAL from decision of Mathers, C.J.K.B., in an action for specific performance, *Smith* v. *Ernst* (No. 2), 2 D.L.R. 213.

F. J. Sutton, for defendant Just.

W. H. Trueman, for plaintiff.

Howell, C.J.M.

HOWELL, C.J.M.:—It seems to me a clear agreement can be made out from the evidence between the plaintiff and the defendant Just after the latter became the holder of the legal estate in the land. When he (Just) took the conveyance from Ernst he knew that his grantor had, by an agreement sufficient under the Statute of Frauds, contracted and agreed to sell to the plaintiff, and, upon payment of the purchase money, to convey the land by way of a Torrens certificate. He knew, therefore, that the plaintiff was the equitable owner of the land and that he, the defendant (Just) would be compelled to convey the land upon the plaintiff performing his part of the contract.

In this state of the matter the parties met and made a bargain, and I think the evidence justifies the conclusion that the defendant (Just) agreed that if the plaintiff would pay the purchase money to him direct, instead of to Ernst, he, the defendant (Just) would take such proceedings with relation to his own title that when the time came to convey, the title which he then had would be one under the Torrens system.

In other words, the defendant agreed that if the plaintiff would make the payments, he, the defendant, would do something to his own title. It was an agreement that the defendant would do something to his own lands, as in *Angell* v. *Duke*, L.R. 10 Q.B. 174, where the defendant agreed that he would erect a building upon his own land, and it was held that this could be proved by parol evidence, although it greatly benefited the plaintiff.

In the case of *Jeakes* v. *White*, 6 Ex. 873, at 878, the defendant wished to borrow from the plaintiff the sum of £2,000 and it was verbally agreed that the plaintiff should search the defendant's title, and if not good, the defendant would pay the expenses. A search was made and the plaintiff claimed that the title was not good and sued for the expenses. The Court did not entertain a plea of the Statute of Frauds, and after evidence was given as to the title, decided that the plaintiff's contention was the correct one and granted relief on the parol agreement.

Although the point in dispute relates to land in another country, the proof required here for the enforcement of the contract must, under the principles laid down in *Rochefoucauld* v.

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Boustead, [1897] 1 Ch. 196, at p. 207, be practically the same as if the land was in this province; but I think it being a bargain merely to do something to his own title, a parol contract is sufficient.

The appeal must be dismissed with costs.

RICHARDS, J.A., concurred.

Perdue, J.A.

PERDUE, J.A.:—The defendant Ernst had entered into a written agreement to sell to the plaintiff a parcel of land in the town of Port Arthur, Ontario. The purchase money was payable in monthly instalments and the vendor covenanted to give the purchaser a Torrens title to the land. The negotiations for the sale and the execution of the agreement were carried out by the defendant Just acting on behalf of Ernst. The plaintiff and Ernst did not personally meet each other in the transaction. The payment of the instalments of purchase money were made by the plaintiff to the defendants, the Canadian German Realty Company, who acted therein as agents for Ernst. Just was at the time of the sale and afterwards an employee or official of the company, and he signed the receipts for the payments in the name of the company.

In May, 1908, after the plaintiff had made several payments under the agreement, Just obtained a conveyance of the land in question from Ernst. In his statement of defence Just claims that at the same time he obtained a verbal assignment from Ernst of the moneys payable under the plaintiff's agreement, but does not claim that he had any better title to them. The plaintiff continued paying his instalments to the company and the latter paid the money to Just.

In December, 1909, Just informed the plaintiff that he, Just, had taken over the agreement and that the plaintiff would have to look to him for the Torrens title. At that interview the plaintiff paid an instalment to Just. In March, 1910, the plaintiff paid to Just the final instalment and when making payment demanded a Torrens title, stating that he would take no other. Neither Ernst nor Just had obtained a Torrens title to the land and it would necessitate some expenditure to obtain one. Some negotiations took place between the parties with the object of arriving at a settlement by Just buying the plaintiff's interest, but these negotiations came to nothing.

In his statement of defence Just offers to convey to the plaintiff the title he has, but refuses to procure a Torrens title. He takes the ground that the covenant given by Ernst to furnish a Torrens title is not binding upon him.

I am satisfied that the plaintiff's evidence of what took place between him and Just should be accepted as the true account of the transaction. It is clear that Just told the plaintiff that he had taken the whole thing over from Ernst and that he would

give the plaintiff a Torrens title when the latter completed his payments. The plaintiff relying upon this, paid the remaining instalments to Just. At that time Just, being the holder of the ordinary title, was the proper person to apply for and obtain a Torrens title in order to carry out Ernst's covenant to furnish such form of title to the plaintiff. Ernst was at that time regarded as out of the transaction, and Just believed himself to be liable to carry out Ernst's covenant. He actually agreed with the plaintiff so to do, the plaintiff carrying out the purchase on his part. This is the case for the plaintiff as disclosed by the evidence. Such a case was not distinctly set up in the statement of claim, but the trial Judge gave the plaintiff general leave to amend. The result, however, of such amendments would be that Just should also have leave to amend his statement of defence, and to plead the fourth section of the Statute of Frauds in respect of the promise made by him to the plaintiff in regard to furnishing the Torrens title. We must, therefore, consider this case as if the amendments had been made and the statute set up as a defence.

Was the agreement by Just to carry out Ernst's obligation and furnish a Torrens title to the plaintiff "a contract or sale of lands, tenements or hereditaments, or any interest in or concerning them"? The plaintiff already had an agreement for purchase of the land sufficient to comply with the statute. Just had taken over the vendor's interest with the fullest notice of this agreement and was bound to convey to the plaintiff on the purchase money being paid.

It is clear that specific performance of the agreement for sale of the land can be enforced against Just as having obtained his title from Ernst subsequently to the plaintiff's agreement and with full notice of it: Dart on V. and P., 7th ed., p. 1030. The difficult question arises, Is Just not only bound to convey the land, but is he also compellable to furnish a Torrens title? Neither party can assign the burden of the contract. Equity enforces the contract as against a subsequent purchaser with notice on the ground of trusteeship and not on the ground that he has undertaken the performance of the contract: Dart on V. and P., 7th ed., p. 1030.

Where Just was already bound to convey, the promise to give a Torrens title was something collateral to his obligation. A Torrens title is one in which the title to land is registered in accordance with a statutory procedure. It does not give any estate or interest in land different from the ordinary title. It is something which the holder of a good title under the old system may procure for himself by making application under the statute. It is something which such owner may do in respect of his land which will have the effect of evidencing his title in a simple and

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effectual manner, but which in no way increases, diminishes or affects the estate or interest which he possesses in the land.

In *Jeakes* v. *White*, 6 Ex. 873, the declaration set up a contract whereby the defendant, in consideration of a promise to lend a sum of money on a mortgage of defendant's land, on his making a good title, promised to pay the expense of investigating the title, if the same should prove defective. It was held that the contract did not relate to an interest in land and was not within the statute.

In *Angell* v. *Duke*, L.R. 10 Q.B. 174, it was held that a collateral agreement that, in consideration of accepting a lease or tenancy upon certain terms, the landlord would do repairs and put in furniture, was not within the statute, because it did not import any obligation to take or give the lease or tenancy. This, it appears to me, is very close to the present case. The defendant Just does not agree to sell the land or any interest in it to the plaintiff. But Just does agree for a sufficient consideration that land now standing in his name shall be placed under the Torrens system. This does not create any obligation upon Just to sell or convey the land or any interest in it. Such obligation is created in another way through the equitable doctrines of the Court.

In *Boston* v. *Boston*, [1904] 1 K.B. 124, a request made by a wife to her husband to purchase the residue of a term of years in a house and a promise to repay him the money expended in making the purchase, was held by the Court of Appeal to be outside the statute. The ground of the decision was that the husband was not bound to buy and the agreement was not, therefore, one for the purchase of an interest in land.

All that the plaintiff seeks to enforce against Just under the agreement with the latter is damages for refusing to furnish a Torrens title. He does not seek to enforce any contract with Just for the sale of the land or of any interest in it. He seeks to enforce an agreement in which Just said in effect: "When you have paid to me all the purchase money you agreed to pay to Ernst and when I become, as I shall then become, liable to convey the land to you, I will give you a Torrens title." I think that such agreement was, under the circumstances, not within the fourth section of the Statute of Frauds. Upon the reasoning set out in the above cases this agreement did not bind Just to convey. He was, however, liable by reason of his trusteeship for the plaintiff to convey the land to the plaintiff. When the Court orders him so to convey the land, as it does in this case, he may be made liable also in damages for his refusal to give a Torrens title. Assuming, as we may, that the title to the land is good, the procuring of such a Torrens title is merely a matter of expense and the damages for refusing to furnish such a title would be simply the cost of bringing the land under the Act.

I think the objections raised to the jurisdiction of the Court to pronounce the judgment appealed from must fail. I would dismiss the appeal with costs.

CAMERON, J.A. (dissenting):—This is an action for specific performance of an agreement for the sale of lands situate in Port Arthur, Ontario, originally made between the plaintiff as purchaser and the defendant Ernst as vendor. This agreement contained a covenant on the part of Ernst to give a Torrens title to the lands. The lands mentioned in the agreement, after its date and before the payments thereunder were fully made, were sold and conveyed by Ernst to the defendant Just. This conveyance does not appear to be in evidence.

The action is really directed against Just to compel him specifically to perform the covenant made by Ernst (or the agreement made by himself) to give a Torrens title to the plaintiff. The learned Chief Justice, who tried the action, gave a judgment for specific performance against Just, and directed that all amendments to the statement of claim necessary to give the plaintiff relief should be made. It would follow from this that the defendant must be held at liberty to plead any appropriate defences, such as the Statute of Frauds, to such amendments.

There was no written agreement between the plaintiff and Just, signed by the latter, alleged or proved. When the plaintiff paid Just the final instalments on the agreement with Ernst Just told the plaintiff that he (the plaintiff) "would have to look to him (Just) for the Torrens title" and it was on this understanding, according to the plaintiff, that he made the payments to Just (p. 34). Later, on cross-examination, the plaintiff said:—

A. He (Just) has promised all along that he would give the Torrens title.

Q. He did?

A. Yes.

Q. When did he promise that?

A. Well, he promised when I made the different payments.

The Chief Justice does not directly find the existence of an oral agreement on the part of Just to give a Torrens title, but that, in his opinion, there was such, is the effect of his judgment.

Now, it being taken for granted that the defence of the Statute of Frauds is here pleaded by Just to the statement of claim, as amended (and that amendment must certainly be allowed him), what answer is there to it? The covenant or agreement to give a Torrens title to these lands is, to my mind, a covenant or agreement relating to land within the meaning of the statute. It follows, therefore, that Just having neither adopted Ernst's covenant over his own signature, nor entered into and

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signed a new and independent agreement similar thereto for himself, is not bound by either.

I have read the cases of *Angell* v. *Duke*, L.R. 10 Q.B. 174, and *Boston* v. *Boston*, [1904] 1 K.B. 124. I think these are clearly distinguishable.

In the former case the promise to repair and provide material on the part of the landlord was made as an inducement, or consideration, to the plaintiff to enter into the lease.

> It (the promise) is collateral and therefore I do not see, if the plaintiff had refused to become tenant, or the defendant had refused to let him the house, that either would have had a cause of action against the other. The defendant says, in order to induce the plaintiff to complete the tenancy, "When you have become tenant I will put the house in repair and buy in the furniture." No obligation arose until the consideration had been executed by the plaintiff entering and becoming tenant. (*Per* Lush, J., *Angell* v. *Duke*, L.R. 10 Q.B. 174.)

I cannot see how the promise here, either on Ernst's part or on the part of Just, who stepped into Ernst's shoes, can be considered collateral. It was a vital and essential term of the contract for the sale of the lands and not separate from it or collateral to it.

> If the contract alleged is a contract containing any material term which amounts to a sale of an interest in land, then all the other terms subordinate to it must stand or fall with it. (*Ibid.*)

The contract between Smith and Ernst was a contract for the sale of lands with the covenant for a Torrens title an essential subordinate of it. The position of the parties and the elements of the agreement were not altered by the conveyance of the lands by Ernst to Just, who is bound in law to convey his interest to the plaintiff, and who bound himself verbally to give the plaintiff a Torrens title.

In *Boston* v. *Boston*, [1904] 1 K.B. 124, *supra*, a wife requested her husband to buy the residue of the lease of a particular house, promising to pay him the amount of the purchase money. It was held that this was not a contract to which the Statute of Frauds applied. But the husband did not contract to acquire any interest in land, and the case is clearly outside the statute.

The view is taken that Just, on condition that the final payments of purchase money were made to him, in fact agreed to do more than secure a certificate of title to his own lands under the Torrens system, and that this agreement has the same legal effect as if he had agreed to make repairs to, or provide furniture for, a house. But I cannot see that that was really the agreement. The agreement, on Ernst's part, and afterwards, on the part of Just, was to convey to the plaintiff by a transfer under the Torrens system. That was the real agreement to convey, not to secure a certificate of title. And that this agreement was regarded as an essential element of the contract of sale clearly appears on the evidence.

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Cameron, J.A.

For another reason, I think it cannot be said that this case comes within *Angell* v. *Duke*, L.R. 10 Q.B. 174. There the landlord agreed to repair and provide furniture upon his own property. That is not the case here. Let us for the moment consider the securing of a certificate of title under the Torrens system as being of the same character as adding a bay window to a house. But here the land is not Just's. He did not make an agreement to improve the desirability or convenience or sightliness of his own property. This land was, in reality, the property of the plaintiff at the time of the conveyance to Just and is now.

In his defence Just declares his willingness and readiness to convey his interest in the land to the plaintiff. He admits he has no interest in it. The agreement to give a Torrens title to the land was not an agreement in respect of Just's land, but in respect of land the ownership of which was and is in the plaintiff. It seems to me, therefore, with all due respect, impossible to bring this case within the decision in *Angell* v. *Duke*, L.R. 10 Q.B. 174.

I am of opinion that the agreement in respect of which it is attempted here to hold Just liable is within the Statute of Frauds, and that the action must fail. This result is a plain hardship on the plaintiff, but, in my view, it is unavoidable.

Haggart, J.A.

HAGGART, J.A.:—The defendant Just on his appeal asks to have the judgment of the trial Judge varied by limiting the relief granted to a conveyance only of such interest as Just actually acquired from Ernst; and the grounds upon which he relies were that the land was outside the jurisdiction, that Ernst was outside the jurisdiction, that there was no privity of contract between the plaintiff and the defendant Just; that Just was not liable beyond the extent of the interest he acquired from Ernst, and that the lands were not taken subject to the plaintiff's agreement for purchase.

I agree with the learned Chief Justice of the King's Bench that the Court has jurisdiction to enforce specific performance against the vendor and against the vendor's alienees, if they purchased with notice of the prior contract: Dart on Vendors and Purchasers, 7th ed., p. 1030; *Daniels* v. *Davison*, 17 Ves. 433.

I also agree with the learned Chief Justice that the Court has power to enforce specific performance in respect of lands outside of the jurisdiction when the parties themselves reside in the Province.

It was urged by the defendant Just that the covenant in the original agreement to furnish to the purchaser a Torrens title was not binding on the vendor's alienee; that covenants only restricting the mode of using the lands will be enforced; but that covenants to do positive acts, that impose a burden, that can only be complied with by the expenditure of money, are not binding on the alienee, and authorities were cited to shew that

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in actions for breach of such covenants such was held; but the circumstances here are different from those in the several cases cited in support of the foregoing proposition.

The facts here are that Just negotiated the sale with the plaintiff, arranged the terms, inserted in the writing the provision for a Torrens title as insisted upon by the plaintiff, witnessed the execution of the agreement by both parties, closed the sale, received the first payment, and either personally or as an officer of the Canada German Realty Co. received all the subsequent payments, and signed the receipts for all of the purchase money. Just was really the only person whom the plaintiff knew in the transaction. Just told Smith of his taking over the property from Ernst. He admitted to Smith that he, Smith, was to get a Torrens title and he accepted the last payment reluctantly after a discussion between them as to this very stipulation, and even made an offer in money to be relieved from carrying out the sale.

In common fairness there ought to be some remedy for the plaintiff other than an action against Ernst, who has left the country and who might be considered non-existent so far as this transaction is concerned.

Now, not only did Just became alienee of the interest of Ernst in the land, but he became a trustee for the purchaser and accepted and assumed the burden of that trust relationship which exists between the vendor and purchaser of real estate. The simple transfer of the interest he acquired from Ernst which he offers would not be an execution of that trust. The $130 mentioned in the agreement and which has been paid by the plaintiff in full was the consideration, not for Ernst's interest or title, but for the land with a Torrens title. It was a lump sum, and Just collected that money with full knowledge as to what was bargained for.

Dart on Vendors and Purchasers, 7th ed., p. 1030, above cited, lays down this proposition:—

> Equity will enforce specific performance of the contract for sale against the vendor and also (on the footing, not of contract, but of trusteeship) against the vendor's alienees for value if they purchased with notice of the prior contract.

Now, as the plaintiff is asserting the existence of a trust and asking relief as a beneficiary, we are called upon to consider the effect of secs. 7 and 9 of the Statute of Frauds. Sec. 7 enacts that all declarations or creations of trusts in lands must be manifested and proved by writing. Sec. 9 limits this by enacting that where any conveyance shall be made of any lands or tenements by which "a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then such trust or confidence shall be of like force and effect as the same would have been if this Act had not been made."

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It is not sufficient to say that it is unfortunate for the plaintiff that he is placed in the position of having paid what he bargained for without any hope of his getting what was agreed to, and that Just can now take the benefit of what he never would have received without assuming the burden. We must assume that Just contemplated and designed the results of the transaction and that result is a fraud upon the plaintiff which this Court will relieve against.

If, then, this is a fraud, the dictum of Lindley, L.J., in *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, at 206, is in point:

> It is a fraud upon the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming the land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of the conveyance and the statute, in order to keep the land himself.

As also the words of Sir W. M. James, L.J., in *Haigh* v. *Kaye*, L.R. 7 Ch. 469, at p. 474:—

> I apprehend it is clear that the Statute of Frauds was never intended to prevent the Court of Equity from giving relief in a case of plain, clear and deliberate fraud.

And Lord Justice Turner, in *Lincoln* v. *Wright*, 4 DeG. & J. 16, at p. 22:—

> The principle of this Court is that the Statute of Frauds was not made to cover fraud.

Again, is not this the substance of the transaction? The consideration in the agreement $130 is for the land, and for the procuring of a title evidenced by a Provincial certificate. It requires $55 of this money to procure this certificate. The vendor has received this $55. Is the purchaser not entitled to have this money so expended or to have it returned to him? The 4th, 7th and 9th sections of the Statute of Frauds do not take away that right. See *Angell* v. *Duke*, L.R. 10 Q.B. 174; *Boston* v. *Boston*, [1904] 1 K.B. 124; *Morgan* v. *Griffith*, L.R. 6 Ex. 70.

I would dismiss the appeal and affirm the judgment of the Chief Justice of the King's Bench.

Appeal dismissed.

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April 24.

THE JOHN DEERE PLOW CO. v. SHANNON.

Saskatchewan Supreme Court, Wetmore, C.J. April 24, 1912.

1. SALE (§ I C—15)—UNCONDITIONAL WRITTEN ORDER—NOTES COLLATERAL —ACTION ON NOTES.

Where an unconditional written order was given for the purchase of a plow, accompanied by promissory notes for the price thereof, the purchaser cannot, in an action on the notes, shew that the sale was not an absolute and unconditional one, but that it was binding only in a certain event.

Statement

THIS is an action brought to recover the amount claimed to be due on five lien notes dated 4th October, 1911, which were given to secure the price of a John Deere Junior Gang Plow.

Judgment was given for the plaintiff.

F. P. Morton, for plaintiffs.
J. L. Jordan, for defendants.

Wetmore, C.J.

WETMORE, C.J.:—The defendant just prior to the purchase of the plow had made advances to purchase an engine and separator from the Rumely Co., and had left an order with them at their office at Saskatoon, but the manager of that company would not accept it until he had submitted it to the head office and received its approval. Immediately after this, and on the same day, the defendant went to the plaintiffs' office in Saskatoon, and proposed to Mr. Beve, the manager there, to purchase a plow. The proposition resulted in a written memorandum of purchase being drawn up and signed by the defendant. According to the terms of that memorandum the plow was to be shipped to the defendant from Saskatoon *at once* via "Car wg (sic) Rumely separator." It was admitted at the trial that this "wg" meant "with." Immediately after this document was signed the notes sued on were signed by the defendant. This is another instance where a party who has signed a written document wishes the Court to find and hold that the writing was not the agreement but that the real agreement was a verbal one entirely different. No fraud is charged in this case. The defendant swore that at the interview between him and the plaintiffs' manager he informed him as to the deal with the manager of the Rumely Company and the position it was in, that his order had not been accepted, and he did not know that it would be, and that it was understood and agreed between him and Mr. Beve that the deal with the plaintiffs regarding the plow was subject to the deal with the Rumely people going through; and he also swore that to protect him after signing the notes and the agreement (his memorandum of purchase) a clause was written across the face of the agreement "that the plow was to be shipped only with the Rumely engine and separator." There was no such clause written across the face of the memorandum or anywhere else on it.

I have hereinbefore stated all that appears on that document respecting the shipping of the plow. Mr. Beve, on the other hand, swore that the defendant asked him if it was agreeable to him in order to save freight to load the plow with a Rumely separator which he had purchased from the Rumely Company and which was to be shipped the next day, and he agreed, if possible, to load it with the separator, to do so for the purpose of saving the defendant the freight from Saskatoon to Rosetown, and he also swore that no mention whatever was made that the plow was not to be shipped if the Rumely order did not go through. It was conceded at the trial practically that it was to be shipped to Rosetown.

I find that the defendant did inform Mr. Beve that the deal with the Rumely Company was not closed, but nevertheless I find that the request to ship the plow with the Rumely separator and engine was for the purpose of saving freight. I find that because the weight of evidence is in that direction. Beve is corroborated by the witness Douglas, who was present at the interview. I find also that it was not a part of the agreement that the deal with the plaintiffs was subject to the deal with the Rumely people going through, or in other words, that the plow was not to be shipped if the Rumely order did not go through. Beve is also corroborated as to that by Douglas. Moreover, such an arrangement would be altogether at variance with the memorandum of purchase and the notes. The memorandum provides for an absolute unconditional sale, and the whole matter is beyond doubt by the defendant giving the notes sued on.

I am now asked to read into these documents that it was a conditional sale, only to take effect on the Rumely people accepting the order given to them, and I am also practically to read that these notes, payable for stated sums and at specified times and places, were only to be payable when the Rumely order was accepted. Again, the memorandum states that the plow was to be shipped "at once." I am asked to eradicate that and put in its place "when an order given this day to the Rumely Co. is accepted." A plow was shipped freight paid by the plaintiffs to Rosetown to the defendant, not from Saskatoon but from Kerrobert, who refused to accept it, not because it was shipped from Kerrobert, but because he considered the deal with the plaintiffs off by reason of the Rumely order not having been accepted. The plow shipped was in all respects the same as the one ordered. No objection was raised at the trial that the plow was shipped from Kerrobert. I may add that it does not seem to be raised by the pleadings that the plow ordered was a specified plow and was not the one shipped. None of the notes sued on were due on their face at the time of action brought or even at this date, but they each contain a provision that if the plaintiffs should consider the note insecure they should have full power to declare the same due and payable even before

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maturity. The plaintiffs gave notice stating that they considered the notes insecure, and declared them due and payable forthwith. No question was raised as to this.

Judgment for the plaintiffs for the full amount of their claim with costs. The local registrar will calculate the amount due on the respective notes and enter judgment accordingly.

Judgment for plaintiff.

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April 23.

NICHOLSON v. DREW, as Registrar for the West Saskatchewan Land District of Battleford, Sask., and JAMES W. NORTON.

Saskatchewan Supreme Court, Newlands, J. April 23, 1912.

1. COURTS (§ II A 4—165)—JURISDICTION OF DISTRICT JUDGE—CONFIRMATION OF TAX SALE—TOWN ACT, R.S.S., CH. 85, SEC. 357.

Under sec. 357 of the Town Act, R.S.S. 1909, ch. 85, a Judge of a District Court is without jurisdiction to confirm a tax sale.

2. TAXES (§ III F—146)—CONFIRMATION OF DEED—STATUTORY REQUIREMENTS.

The provisions of sec. 357 and sub-sec. 10 of sec. 2 of the Town Act, R.S.S., ch. 85, that a Judge of the District Court may confirm tax sales "unless the context otherwise requires" is controlled by statute R.S.S. 1909, ch. 49, which requires such confirmation to be made by a Judge of the Supreme Court.

3. LAND TITLES (§ VII—71)—CERTIFICATE UPON A TAX SALE—CONFIRMATION BY JUDGE WITHOUT JURISDICTION.

A registrar cannot under sec. 124 of the Land Titles Act, R.S.S. 1909, ch. 41, register a tax transfer and issue a certificate of title upon a tax sale that was confirmed by a Judge of the District Court.

4. LAND TITLES (§ VIII—81)—CLAIM AGAINST ASSURANCE FUND—REGISTERING VOID TRANSFER.

Under sub-sec. 3 of sec. 137 of the Land Titles Act, R.S.S. 1909, ch. 41, damages for the registration of a void tax transfer may be recovered out of the assurance fund by the owner of the property, but not against the tax purchaser who had obtained registration of such tax title and had taken out a certificate of ownership which was transferred *bonâ fide* for value to a third party to whom a certificate of title had been issued.

Statement

THE plaintiff was the owner of lot 14, block 11, North Battleford, but not having paid his taxes on same, it was sold for taxes to the defendant James W. Norton, who obtained a transfer therefor and had the same confirmed by the Judge of the District Court for the judicial district of Battleford after the expiration of the time for redeeming said lot, the same not having been redeemed in the meantime. On the 19th October, 1910, this transfer was registered and a certificate of title issued to Norton by the registrar of the West Saskatchewan land registration district.

This action was brought against the registrar by the plaintiff to obtain damages out of the assurance fund for the loss of

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his said property, upon the ground that the tax transfer could not be confirmed by a Judge of the District Court, and that therefore the registrar had no authority to cancel the plaintiff's certificate of title and issue a new certificate of title to the defendant Norton.

The action was dismissed against defendant Norton with costs, judgment for plaintiff against the assurance fund.

R. R. Earle, for plaintiff.

E. T. Bucke, for defendant Drew.

A. Brehaut, for defendant Norton.

Newlands, J.

NEWLANDS, J.:—This contention is, in my opinion, correct. The Land Titles Act, sec. 124, requires a tax transfer to be accompanied by an order of a Judge of the Supreme Court before the registrar can register the same, and the Act respecting the confirmation of sales of land for taxes provides that the order for the confirmation of a sale of land for taxes shall be obtained from a Judge of the Supreme Court.

Section 357 of the Towns Act provides for the vesting of the land in the purchaser upon the confirming of the same by a Judge, and this section, the defendant claims, gives a Judge of the District Court the power to confirm this tax sale, sub-sec. 10 of sec. 2 of the Towns Act, providing that "Judge" means a Judge of the District Court. As sec. 2 only gives this meaning to the word "Judge" "unless the context otherwise requires," and sec. 357 is referring to the effect of the confirmation of a sale for taxes, and as confirmation proceedings can only be taken before a Judge of the Supreme Court under the Act for that purpose, ch. 49 of the Revised Statutes of Saskatchewan, 1909, it follows that the context in this case requires the meaning to be attached to the word "Judge" in said sec. 357 to be a Judge of the Supreme Court. The registrar, therefore, made a mistake when he registered the transfer in the defendant Norton.

Is the assurance fund liable for this mistake?

The plaintiff brought this action against the registrar, and in the alternative against Norton, alleging in his statement of claim that the defendant Norton could not be found within the Province, in which case, by sec. 139 of the Land Titles Act, the action can be brought against the registrar alone. The registrar, in his defence, denied that the defendant Norton resided outside the jurisdiction of this Court at the commencement of this action, and at the trial it was proved that he resided at North Battleford when the action was commenced.

Section 137 of the Land Titles Act provides against whom the action is to be brought:—

> Any person deprived of land . . . by the registration of any other person as owner of such land . . . may bring and prosecute an action at law for the recovery of damages against the person upon

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whose application the erroneous registration was made . . . (2) . . . . Such person shall upon a transfer of such land *bonâ fide* for value, cease to be liable for the payment of any damages which but for the transfer might have been recovered from him under the provisions hereinbefore contained. (3) Such damages, with costs, may in such last mentioned case be recovered out of the assurance fund hereinafter provided for by action against the registrar as nominal defendant.

The defendant Norton was therefore the proper person against whom to bring this action, unless he had transferred the land to a *bonâ fide* purchaser for value before action, in which case the registrar was the proper person against whom to bring the action.

Paragraph 4 of the statement of claim alleges that Norton transferred the land *bonâ fide* and for value, and that a certificate of title had been issued to such third party. This statement is not denied in the defence, and therefore by sec. 137 sub-sec. (3), of the Land Titles Act, the registrar is the proper person against whom to bring the action, and not the defendant Norton.

I fix the damages at $400, which I find to be the value of the land at the time of the registration of the tax transfer to Norton, the same to be payable out of the assurance fund to the plaintiff with his costs of action after taxation.

The action to be dismissed against the defendant Norton and the plaintiff to pay him the costs of action.

Judgment against assurance fund; action dismissed against defendant Norton.

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June 11.

NOVA SCOTIA COAL & STEEL CO. v. CITY OF MONTREAL.

Quebec Superior Court, Montreal, Charbonneau, J. June 11, 1912.

1. TAXES (§ III D—136)—CORRECTION OF ASSESSMENT—OBJECTS NOT ASSESSABLE—WHEN TO BE MADE.

Objections to the imposition of taxes by municipal assessors may be made at any time if the objects assessed are not taxable by law, as this would constitute an *ultra vires* assessment, radically null.

2. FIXTURES (§ II—8)—WHAT ARE IMMOVABLES—COAL TOWERS—C. C. QUEBEC 379.

Coal towers forming part of a coal plant and dependent on the power house for power, are immoveable objects by destination, although they may be moved over a short distance on tracks built for the purpose, seeing they were placed on the property for a permanency and incorporated therewith: C.C. 379.

3. TAXES (§ I E—48)—COAL TOWERS FORMING PART OF COAL PLANT—LIABILITY FOR TAXATION UNDER MONTREAL CHARTER.

Coal towers forming part of a coal plant, and depending on the power house for power, may be said to form part of the business premises of the owner thereof and are therefore liable to taxation under the provisions of the charter of the city of Montreal.

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NOVA SCOTIA COAL & STEEL CO. v. CITY OF MONTREAL.

Charbonneau, J.

APPEAL by *certiorari* from a decision of the recorder of the city of Montreal affirming the validity of an assessment on part of the petitioner's realty by the city respondent.

The writ of *certiorari* was quashed.

Messrs. *F. E. Meredith*, K.C., and *S. L. Dale Harris*, for petitioner.

J. A. Jarry, for respondent.

CHARBONNEAU, J.:—The Court having heard the parties on the merits of the writ of *certiorari* issued in this case, putting in question the validity of the judgment rendered by the recorder of the city of Montreal, on the 9th of June, 1911, condemning the petitioner to pay $30 and costs for a business tax of 7½ per cent. on an annual valuation of some premises occupied by the defendant on the harbour front, the property of the harbour commissioners, and described on the perception rolls as coal towers, renders the following judgment:—

The recorder in this case decided that the tax was duly imposed, notwithstanding the pretension of the coal company, which alleges that the coal towers in question were of their nature moveable property and could not be made immoveable by destination, as the company was not the owner of the ground which ground was an untaxable property.

It was decided, further, that even if the taxes were not duly imposed, the objections thereto were taken too late, according to art. 380 of the city charter.

I do not think that this latter ground is well founded. All objections to the roll have to be made within a certain delay, but evidently art. 380 would only cover objections to the *quantum* of the valuation and was not intended to cover, and does not cover, the *ultra vires* act of the valuators who put on the roll properties that cannot be assessed for such taxes. If in this case the coal towers cannot be construed to mean the business premises of the company, the valuators have acted *ultra vires*, and the judgment of the recorder, based on their roll, is also *ultra vires* and therefore subject to the inquiries of the writ of *certiorari*. So that the whole question left to be decided is the definition of those coal towers.

It has been said at the hearing that these coal towers are on wheels and moved at the will of the engineer in charge; that they are nothing, therefore, but a sort of wheel-barrow for carting, unloading and reloading coal.

It is true that these coal towers, although limited to a certain space on the wharves by the length of their tracks, may be moved somewhere else if these tracks are extended, but they were built to work within that special surface of ground and are attached

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to that surface by a power house, on which they depend for their power and therefore for their utilization. There is no doubt that they have been made immoveable by destination as a part of the fixed plant and placed on the real property for a permanency and incorporated therewith: art. 379 C.C. The only objection in this case would be that the company is not proprietor of the ground on which these tracks are laid. But art. 262A of the city charter (7 Edw. VII. ch. 63, sec. 19) was evidently enacted to cover that kind of exception. It is provided in that article that the exemption given to the harbour commissioners and other privileged bodies shall not apply to persons occupying for commercial or industrial purposes buildings or lands belonging to the board of harbour commissioners, who shall be taxed as if they were the actual owners of such immoveables. Therefore, in this case, the Coal Company, for the purposes of all taxation, must be considered as the actual owners of the part of the wharves occupied by it for its coal business, and as a consequence the coal towers installed and working on that space of ground, as well as the power house erected thereon, must be considered as incorporated thereto, and are immoveable property as long as they remain there, according to the article of the code above mentioned.

There is, therefore, no objection to calling that part of the wharf rented for the coal towers and the power house, the business premises of the company.

It has been objected that the valuators only put in their rolls the coal towers, valuating them at a rental of $400; that a coal tower, being only a tool or a sort of vehicle, can not be called premises; but this objection cannot stand. It is self-evident that the valuators intended to tax the whole of the occupation. They called it coal towers because it was the most prominent, the most apparent part of the premises; this is a mere metonymy and cannot oust them of their jurisdiction. The *certiorari* is certainly not given to improve or reform the literary or grammatical education of the civic employees.

I must, therefore, find that there was no *ultra vires* either in the valuation or the perception roll, and that the judgment of the recorder was rendered in full jurisdiction for the above-mentioned reasons.

The writ of *certiorari* issued in this case is quashed, with costs against the petitioner.

Certiorari quashed.

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CASES REPORTED, VOL. III., PART V.

REX v. HARRAN.

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April 18.

Ontario High Court, Middleton, J., in Chambers. April 18, 1912.

1. GAME LAWS (§ I—5)—JURISDICTION OF MAGISTRATE—GAME AND FISHERIES ACT, 7 EDW. VII. (ONT.) CH. 49.

The jurisdiction of the magistrate under the Ontario Game and Fisheries Act, 7 Edw. VII. ch. 49, is not ousted unless the accused acted under a claim of right, which is reasonable as well as *bonâ fide;* it is not enough that the claim is honestly made, if it be in fact merely fanciful and imaginary.

[*Cornwall* v. *Sanders*, 3 B. & S. 206, followed.]

2. TRESPASS (§ I A—5)—WHAT CONSTITUTES—TITLE IN COMPLAINANT—OUSTER OF JURISDICTION.

A claim of title, to oust the jurisdiction of the magistrate in a case of trespass, must be a claim of title in the party charged, and not a mere allegation of a *jus tertii* or of a defect in the complainant's title.

[*Cornwall* v. *Sanders*, 3 B. & S. 206, followed.]

3. TRESPASS (§ I A—5)—WHAT CONSTITUTES—RIGHT TO HUNT AND FISH.

The fact that part of patented land is covered with navigable water gives no right to third persons to hunt and fish thereon.

Statement

MOTION by the defendant to quash a magistrate's conviction for an offence against the Ontario Game and Fisheries Act, 7 Edw. VII. ch. 49, sec. 25.

The application was dismissed.

G. P. Deacon, for the defendant.

D. L. McCarthy, K.C., for the prosecutor.

Middleton, J.

MIDDLETON, J.:—There is no doubt, upon the evidence, that the accused entered upon the lands in question for the purpose of hunting and fishing thereon; and the Justices have found, upon ample evidence to justify the finding, that the lands were enclosed in the manner pointed out by sec. 25, sub-sec. 5, and that sign-boards forbidding hunting and shooting were placed, as required by sub-sec. 2 (b) and (c).

Upon the motion it was argued that the jurisdiction of the Justices was ousted by reason of what was done by the accused being a bona fide assertion of right to hunt and fish, and the title to lands having been brought into question.

The Ontario statute under which this prosecution is taken contains no such provision as that found in the Petty Trespass Act, R.S.O. 1897 ch. 120, sec. 1, which excepts from its penal provisions "any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of," as well as any case falling under the provisions of the Criminal Code.

The Criminal Code, sec. 540, provides that its penal provisions with respect to injury to property shall not apply to "any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of," and "any trespass, not being wilful and malicious, committed in hunting and fishing or the pursuit of game."

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In many of the cases cited, the determination was under statutes containing some similar provision. But, quite apart from any statutory provision, the Courts have uniformly held that the jurisdiction of the magistrate is ousted where there is shewn to be a bonâ fide claim or dispute, and where the action of the accused is in assertion of a colourable claim. But in these cases, as said by Cockburn, C.J., in *Cornwall* v. *Sanders*, 3 B. & S. 206, "there must be some show of reason in the claim, and it is not sufficient unless the defendant satisfies the Justices that there is some reasonable ground for his assertion of title;" and, a fortiori, upon a motion for a prohibition it is incumbent upon the applicant to satisfy the Court that he has at least a colourable claim of right, and that there is some real question. The jurisdiction of the Justices cannot be defeated by the mere assertion of some fanciful or imaginary claim. See also *Regina* v. *Davy*, 27 A.R. 508.

Counsel for the accused, in his elaborate argument, based his case upon two main contentions: first, that there was some defect in the prosecutor's title to the lands; and, secondly, that there was a colourable claim of right to fish and to shoot upon the navigable water which covers a portion of the lands patented.

The Cartwright Game Preserve is an incorporation under the laws of Ontario, and has the paper title to the lands, and is in possession. The suggested defect arises from the fact that there was some dispute at one time as to the township in which the lands were actually situated; a dispute which was ultimately placed at rest by the Legislature. It is said that this invalidated the sale for taxes, because the effect of this legislation was to declare that the land was not situated in Cartwright, which imposed the assessment, but in the township of Reach.

The other suggested defect arose from an entire misunderstanding of the facts. The accused thought that a registrar's abstract proved the title. It turned out that, at the date of the abstract, some of the title deeds had not been registered. I think this contention is completely covered by the case already referred to, *Cornwall* v. *Sanders*, 3 B. & S. 206, which determines that the claim of title to oust the jurisdiction of the Justices must be a claim of title in the party charged, and that the suggestion of a *jus tertii*, or of a mere defect in the complainant's title, is quite beside the mark.

The other objection seems to be equally unavailing. The Crown has patented the land. Part of the land is covered with water. This undoubtedly makes the land subject to the right of navigation; but, subject to this right, the ownership of the land is absolute. See *McDonald* v. *Lake Simcoe and Cold Storage Ice Co.*, 31 Can. S.C.R. 130. The fact that others have

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the right to navigate does not confer any title upon the accused to shoot in this game preserve.

The accused, also, before the magistrate, sought to shew a right to hunt and fish by reason of the fact that others had hunted and fished there for many years, and that he had also done so for a long time. This brings the case very close to the case already cited, where it was held "that the jurisdiction of the Justices was not ousted by the claim of a prescriptive right in gross to kill game upon the land, there being no colour for such a claim." The same view appears to have been taken in *Reece* v. *Miller*, 8 Q.B.D. 626. The Irish decision, *Johnston* v. *Meldon*, 30 L.R. Ir. 15, is entirely consistent with this view. It is there held that the jurisdiction of the magistrates is ousted if there is a bonâ fide claim, but it is the duty of the magistrates to determine whether the claim is *bonâ fide*; and, upon finding upon this question, they should then decline to proceed farther. It may well be that they will not give themselves jurisdiction by an erroneous decision; but in this case the applicant has not satisfied me that he has a bonâ fide claim within the cases.

I quite believe that the accused is honest in making his claim. That, as I understand the rule, is not enough. There must be some shew of reason.

This case is not at all like *Rex* v. *Lansing*, 1 O.W.N. 186; as here it is shewn that the land was enclosed, and that signboards, as required by the statute, were placed, and that there is no doubt of the offence having been committed. While Mr. Justice Britton states that the title to land was brought into question, this was not essential to his judgment, nor does he deal at all with the aspect of the matter above indicated.

The application fails, and must be dismissed with costs.

Application dismissed.

MALOUF v. LABAD.

(Decision No. 2.)

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May 9.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute and Riddell, JJ. May 9, 1912.

1. WRIT AND PROCESS (§ II B—28)—SEIZURE OF SHARES—CHANGE OF PLACE OF HEAD OFFICE—NOTICE BY SHERIFF—EXECUTION ACT (ONT.), 9 EDW. VII. CH. 47.

Where the directors of a company passed a resolution authorizing a transfer of its head office to another place and appointed a representative there to receive legal notice addressed to the company and went no further, failing to pass the by-law required by sec. 88, Ontario Corporation Act, and to comply with other requirements of that section, there was no place in the bailiwick of the sheriff of the district to which the head office was attempted to be moved at which service of process could be made under the Ontario Execution Act,

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9 Edw. VII. ch. 47, providing that upon an execution being directed against the shares in a company owned by a debtor a notice that the shares are to be seized thereunder must be given by the sheriff if the company has within his bailiwick a place at which service of process could be made.

[*Malouf* v. *Labad* (No. 1) 2 D.L.R. 226, 3 O.W.N. 796, 21 O.W.R. 575, affirmed on appeal.]

2. WRIT AND PROCESS (§ II B—28)—SEIZURE OF SHARES—HEAD OFFICE AND A PLACE FOR SERVICE.

Under the Execution Act, 9 Edw. VII. (Ont.) ch. 47, a sheriff can seize shares in an incorporated company only (1) if the head office of the company be within his county, or (2) if the company have, within his bailiwick, a place at which service of process may be made.

[*Malouf* v. *Labad* (No. 1), 2 D.L.R. 226, 3 O.W.N. 796, 21 O.W.R. 575, affirmed on appeal.]

3. STATUTES (§ II B—112)—CONSTRUCTION OF STATUTES IN DEROGATION OF COMMON LAW—STRICT OR LIBERAL.

In applying a statute making exigible what was not exigible at common law, attention must be paid to the exact wording of the statute; and, when the statute prescribes a method of procedure, that method must be followed, at least in substance. (*Per* Riddell, J.)

[*Goodwin* v. *Ottawa and Prescott Railway Co.*, 22 U.C.R. 186, followed.]

4. SHERIFF (§ I—1)—LIMIT OF TERRITORY IN WHICH SHERIFFS HAVE AUTHORITY TO PERFORM OFFICIAL ACTS.

The authority of a sheriff as to official acts, that is, acts which a private individual could not do, is confined to the county of which he is sheriff. (*Per* Riddell, J.).

Statement

APPEAL by the defendants other than the defendant Varin (Sheriff) from the judgment of Kelly, J., *Malouf* v. *Labad*, 2 D.L.R. 226, 3 O.W.N. 796.

The appeal was dismissed.

E. Meek, K.C., for the appellants.

R. McKay, K.C., for the plaintiffs.

Mulock, C.J.

MULOCK, C.J.Ex.D., agreed in dismissing the appeal.

Clute, J.

CLUTE, J., agreed in dismissing the appeal.

Riddell, J.

RIDDELL, J.:—In the view I take of this case, I do not think it necessary to consider the effect of the alleged collusion, etc.—but I would rest the judgment upon the simple ground that the stock was never legally seized.

In the application of a statute making exigible what was not exigible at the common law, we must attend to the exact wording of the statute; and, where the statute prescribes a method of procedure, that method must be followed at least in substance: *Goodwin* v. *Ottawa and Prescott R.W. Co.*, 22 U.C.R. 186.

There can be no doubt that the stock would not have been exigible at the common law: *Morton* v. *Cowan*, 25 O.R. 525. The first statute in Upper Canada is that of 1831, 2 Wm. IV. ch. 6; and the original of all the subsequent legislation is in 1849, 12 Vict. ch. 23. The statute now in force, and so often

referred to in the course of the argument, *i.e.*, the statute of 1909, 9 Edw. VII. ch. 47, sec. 11 (1), is the same (with mere verbal differences) as the original Act of 1849, 12 Viet. ch. 23, sec. 2—it indeed makes a definite provision that the seizure shall be deemed to be made from the time of the service of writ and notice, which had been judicially decided as being the effect of the former statute: *Hatch* v. *Rowland*, 5 P.R. 223.

Sub-section (2) of sec. 11 appears for the first time in the statute of 1909; and I do not think it at all limits the effect or generality of sub-sec. 1, which contains the old law. But I think it is of the greatest importance as shewing what the old law was. If it were the law that the Sheriff could go outside of his county and serve a company, or could serve by sending a letter outside the county, there would be no necessity of any such provision—it is indeed only if the Sheriff cannot find the company within his county, and cannot serve in any other way than within his county, and by a real "service," not by sending a letter.

The result is, I think, that the statute means that the Sheriff may seize: (1) if the company, *i.e.*, the head office of the company, be within his county; or (2), if the company has within his bailiwick a place at which service of process may be made.

And this accords with the well-known limitation of the powers of a Sheriff. Like the vice-comes whose place he has taken, his authority is confined to the county of which he is Sheriff; if he executed a writ out of his county, he was a trespasser: Watson on Sheriffs, pp. 74, 121; Churchill on Sheriffs; Murfree on Sheriffs, sec. 114, and cases cited: *Hothet* v. *Bessy*, Sir T. Jones 214; *State* v. *Harrell* (1842), Geo. Dec. 130; *Dederich* v. *Brandt* (1896), 16 Ind. App. 264; *Morrell* v. *Ingle* (1879), 23 Kan. 32; *Baker* v. *Casey* (1869), 19 Mich. 220; *Worboe* v. *Humboldt* (1879), 14 Nev. 123, at p. 131; *Jones* v. *State* (1888), 26 Tex. App. 1, at p. 12; *Re Tilton* (1865), 19 Abb. Pr. 50.

I do not, of course, suggest that a Sheriff may not do any act out of his county which a private individual may do, as *e.g.*, serve a writ of summons, etc.; what is meant is, that he cannot act officially out of his county.

In none of the cases in our Courts in which the matter has come up was there a seizure by a Sheriff except when the head office of the company was in his bailiwick: *Robinson* v. *Grange*, 18 U.C.R. 260; *Goodwin* v. *Ottawa and Prescott R.W. Co.*, 22 U.C.R. 186; *In re Goodwin*, 13 C.P. 254; *Hatch* v. *Rowland*, 5 P.R. 223; *Brown* v. *Nelson*, 10 P.R. 421; *Morton* v. *Cowan*, 25 O.R. 218; *Brock* v. *Ruttan*, 1 U.C.C.P. 218. In the first-named case, which was an action against the Sheriff of Brant for not seizing certain stock, Sir John Robinson, C.J., says:—

> As the plaintiff only attempted to prove that there were goods belonging to Banks (the debtor) by shewing that there was some stock

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in a building society in the county of Brant which might have been used to pay Banks's debt, although it was not stock standing in his name, it was incumbent on him to shew that the Sheriff had notice of this stock so situated in time to levy upon it; for, this not being, like goods, visible in the possession of the debtor, the Sheriff could not be presumed to have knowledge of it.

This, of course, is not conclusive that the head office of the company must (before the amendment of 1909) have been within the bailiwick, as that point was not in question, but it is suggestive.

So too, in *Nickle* v. *Douglas* (1874), 35 U.C.R. 126, when it was argued that stock in the Merchants Bank, whose chief place of business was Montreal, the stock being owned by a resident of Kingston, was exigible in Kingston by virtue of C.S.C. ch. 70 (the same as 12 Vict., in substance), the Court of Queen's Bench said (p. 143): "Although it was argued that the Sheriff could seize and sell the bank stock of a resident of this Province which he held in a bank in Quebec, the statutes, which were referred to for the purpose, by no means bear out that argument." This also is not conclusive, as the real point in the case was whether such stock could be assessed.

Nowhere, however, can I find any suggestion that the Sheriff's power in the case of stock is any greater than in the case of visible chattels.

The legislature, recognizing the limitations of the Sheriff's power, and that the service by him required by the statute is an official service, have given him power to serve, not only when the company is within his bailiwick, but also when there is a place within his bailiwick where he can serve upon the company as though the company were there domiciled. But this is the whole extent of his power.

The company had its head office in Ottawa, but did most of its work in Montreal. Assuming that the appointment of Mr. S. White as agent for service was wholly valid, he was not served. Service on MacFie was ineffective—*delegatus non potest delegare*. No other act was done by the Sheriff within his bailiwick; and I think the statute had not been complied with.

For this reason only, I think no valid seizure was made and no valid sale effected.

The appeal should be dismissed with costs.

Appeal dismissed.

CADWELL v. STEPHENSON.

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April 29.

Saskatchewan Supreme Court, Wetmore, C.J. April 29, 1912.

1. BROKERS (§ II B—12)—COMPENSATION—SUFFICIENCY OF SERVICE—MISREPRESENTATION.

Where the defendant, a woman, refused to give the plaintiff an exclusive right to sell a piece of property for her, but, on the representations of the plaintiff that she would still have the right to sell it without becoming liable to him for commissions, she was induced to sign a written agreement prepared by the plaintiff which in fact gave him for thirty days the exclusive right of selling the property for an agreed compensation, the plaintiff cannot, upon the defendant making a sale of the property within such period, recover the agreed compensation where all he did towards making a sale was to advertise the property in a newspaper.

[*Hart-Parr* v. *Eberle*, 3 Sask. L.R. 386, referred to.]

2. PRINCIPAL AND AGENT (§ I—2)—REVOCATION OF AUTHORITY—LIABILITY OF PRINCIPLE—QUANTUM MERUIT.

Where all that a real estate broker, who had an exclusive right to sell property, did towards making a sale was to advertise it in a newspaper before the owner effected a sale thereof, the agency was revoked, and the agent could recover on a *quantum meruit* only for the services actually performed, and not the compensation agreed upon in case he should make a sale.

[*Aldous* v. *Swanson*, 20 Man. L.R. 101, referred to.]

3. DAMAGES (§ III A 1—51)—MEASURE OF COMPENSATION—AGENT HAVING EXCLUSIVE RIGHT TO SELL.

The damages recoverable for the breach of an agreement by which an exclusive right of sale of property was given for thirty days, cannot be based upon the conjecture that the agent would have made a sale within that time; and the fact that he had money of a client in his hands and that he might have induced him to purchase the property, will not change the rule.

Statement

TRIAL of an action by real estate brokers for compensation or commission on the sale of land.

The action was dismissed.

J. Milden for plaintiffs.

A. M. McIntyre, for defendant.

Wetmore, C.J.

WETMORE, C.J.:—The defendant was the owner of lots 13, 14, 15 and 16 in block 160, plan Q. 2, in Saskatoon, on which she was living. She desired to sell them, and had a notice posted on the premises to that effect. The plaintiff J. W. Cadwell called upon her at her house, clearly with the object of obtaining authority to sell the lots, thereby receiving a commission. The interview resulted in a document being signed by her. The following is a copy of the material part of that document:—

> I hereby place lots 13, 14, 15, 16, block 160, Saskatoon, with J. W. Cadwell and Company, giving them exclusive sale for the next thirty days. Price $20,000.00. Cash payment, $6,000. Terms for the balance in six or ten annual payments with interest at 7 per cent. per annum, privilege of paying off total amount at any time. I agree to pay as commission Five Hundred dollars ($500.00).
>
> Date, March 22, 1911.

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Cadwell having obtained this writing, the plaintiffs on the 23rd March, put a notice offering the property for sale in a daily newspaper published in Saskatoon, and kept it there until the 29th March, when Cadwell was informed by the defendant that she had sold the property herself. I cannot find under the evidence that the plaintiffs did anything else towards obtaining a purchaser or making a sale. Cadwell swore that the plaintiffs had money of Eastern clients in their possession with which they could have purchased the property, that they could have sold it within the thirty days and found a purchaser, and that they had negotiations in sight, but that was all; apart from the advertising everything was prospective; they had done nothing whatever. The defendant sold the property herself on the 29th March, to one Brearly for $19,500 cash. This sale was not brought about by the plaintiffs; they had nothing whatever to do with it.. Nor was it brought about by any land broker. Apparently a sister-in-law of Brearly, who had previously boarded with the defendant, recommended the house to him, and he was attracted by the notice of sale posted on the premises. There is no evidence that any commission had been charged or paid in respect to such sale. The statement of claim sets up several grounds for relief:—

(1) $500 by way of commission and for services rendered, and $500 for breach of agreement.

(2) $500 by reason of the sale to Brearly having been brought about through the efforts of the plaintiffs.

(3) On a *quantum meruit* for the work done and performed by them under the listing.

(4) $250 under an alleged agreement with the defendant by which she was to allow the plaintiffs half the commission of $500 if she sold the land herself.

As to the second ground for relief above specified, there was no evidence whatever to support it, as I have hereinbefore in effect stated.

At the interview between Cadwell and the defendant at her house on the 22nd March, quite a discussion took place between them as to the effect of giving the plaintiffs an exclusive right to sell the property. The testimony of these two persons is most conflicting. Cadwell brought the written document to the house all prepared ready to be signed, and it was not altered in any way. The defendant swore that Cadwell asked her to let him list the property, to which she consented. He then produced the document in question, and asked her to give them the exclusive right to sell for thirty days, which she refused to do, stating that she wished to reserve the right to sell her own property; and that Cadwell thereupon told her that that had nothing to do with him, it was only to protect him against other agents

that he wanted the paper; that he stated this repeatedly; and that he pointed out that without such a document if another agent got ahead of him and sold the property he could collect the commission in full; that she still refused to sign the document unless, as she put it, she was free to handle her own property, when Cadwell assured her that she would be free to handle her own property, and thereupon she signed it. It is clear from the testimony of Cadwell that she made enquiry as to what was meant by giving to the plaintiffs the exclusive right to sell, and according to his testimony he told her if she gave him the exclusive listing he would advertise the property and make a special effort to make a sale, and that the defendant inquired (I think with a good deal of point) why he could not do that under an ordinary listing, and he replied that property was changing hands so quickly that it would not be worth his while to make any special effort on an ordinary listing; that she then wanted to know if she could sell the property, to which he replied that she certainly could, but she would have to pay his commission (by which I understand the whole $500) if she did, and that she then expressed her surprise that she could not sell her own property or could not handle her own property as she pleased. Cadwell also swore that he told her that the custom was if the owner sold the property himself during an exclusive listing the agent received the full commission, but in her case, if she made the sale herself he would allow her half the commission, and that she then signed the paper. The defendant impressed me as a very keen, intelligent woman. Cadwell's own testimony shewed very clearly that all through the interview she shewed a very strong desire to retain the right to dispose of the property herself if she got an opportunity, and to do so without payment of any commission. A good many of Cadwell's answers to her do not impress me very much; I think they were somewhat frothy. I am of the opinion that he was over-zealous in endeavouring to obtain the exclusive listing of the property; and I think that some further force is lent to this conclusion when I consider that he took the writing all prepared to her house. Moreover, while Cadwell and the defendant were alone during nearly the whole time, William Stephenson, the defendant's husband, swore he came to the door of the hall and heard his wife say that she reserved the right to sell the property herself, and that Cadwell replied that it was all right. I am of opinion that the weight of evidence establishes, and I find, that Cadwell, in his zeal, misled the defendant, and that she signed the writing under the idea induced by his representations that in signing it she was not depriving herself of the right to sell the property herself, and that if she did sell it she would not be liable for any commission. The defendant denied that she ever agreed to give the plaintiff half

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the commission if she sold the property herself. I find that to be the fact. The defendant, therefore, is not liable upon any of the grounds set forth in the statement of claim. This conclusion is in my opinion in accord with what was laid down by the Supreme Court of this Province in *Hart-Parr* v. *Eberle*, 3 Sask. L. R. 386.

I may just state further that even supposing I am in error in that conclusion and that there was an exclusive right of sale to the plaintiffs, in view of my findings they could recover but a very small amount. That question is very well threshed out by a Judgment of Metcalfe J. in *Aldous* v. *Swanson* and affirmed by the Court of Appeal in Manitoba, *Aldous* v. *Swanson*, 20 Man. L.R. 101. I have nothing to add to that judgment, in which I quite agree. That learned Judge held that under a listing in effect very similar to that in this case that the sale by the owner amounted to a revocation of the authority to the broker or agent and that he could not recover under the express agreement but he could recover on a *quantum meruit* for the services performed up to the time of the revocation. In that case the broker had practically found a purchaser who was ready and willing to buy the property, and a very substantial amount was awarded. In this case the plaintiff, as I have stated, did nothing except insert the advertisement in the paper, and that formed a very small portion (three lines) of a much larger advertisement in which it was included. I am of opinion that $20 would be ample compensation for all they did. As to the question of damages, if an action for damages would lie, I cannot see that the plaintiff could recover any more. All the damages proved were entirely prospective. Cadwell swore he would have been able to effect a sale on the terms proposed within the thirty days. That was all conjecture; perhaps he would, perhaps he would not. The fact that he had money of Eastern clients does not help the matter. They might not have invested in this property or the plaintiffs might have found other investments for it.

Judgment for the defendant, with costs.

Action dismissed.

JARRETT v. CAMPBELL.

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March 18, March 25.

Ontario High Court, Falconbridge, C.J.K.B. March 18, 1912; Boyd, C. March 25, 1912.

1. JURY (§ I B—18)—RIGHT TO TRIAL BY JURY—CASE TRANSFERRED FROM SURROGATE COURT.

Whether a jury will be granted in a contest of the probate of a will transferred from the Surrogate Court to the High Court, is a matter within the discretion of the latter Court or a Judge thereof, under secs. 22 and 35, of chapter 59 R.S.O. (1897), as there is no vested or absolute right to have such an issue tried by jury.

[*Re Lewis*, 11 P.R. 107; *White* v. *Wilson*, (1806), 13 Ves. 87, and *Waters* v. *Waters* (1848), 2 De G. & Sm. 591, referred to.]

2. JURY (§ I D—31)—JUDICIAL DISCRETION TO DENY RIGHT TO TRIAL BY JURY.

It is a proper exercise of discretion to deny a trial by jury in a cause that will require at least two weeks to try and in which many witnesses will be examined, in an action attacking the validity of a will.

Statement

MOTION by the defendant Campbell for an order directing that the issues in this action be tried by a jury.

The motion was dismissed by Falconbridge, C.J.K.B., and a subsequent application for leave to appeal was also dismissed by Boyd, C.

R. McKay, K.C., for the defendant Campbell.

E. C. Cattanach, for the plaintiffs.

J. R. Meredith, for the infant defendants.

Falconbridge, C.J.

March 18. FALCONBRIDGE, C.J.:—The action concerns the validity of the will of the late Charles Bugg. The plaintiffs, the executors named in it, propounded it for probate in the Surrogate Court of the County of York. The defendant Campbell, the only surviving child and heir-at-law of the deceased, contested probate, upon the ground that the will was not duly executed, and that the testator had not testamentary capacity; also upon the ground that the execution of the will was obtained by the undue influence of the plaintiffs' who are not only executrices but residuary legatees under the will, and who beneficially take the greater portion of the testator's estate, which is very large. The proceedings were transferred from the Surrogate Court to the High Court, and the order of transfer reserved to any party the right to apply for a trial with a jury.

In *Re Lewis* (1885), 11 P.R. 107, Ferguson, J., determined that a probate action, transferred from a Surrogate Court to the High Court, was a matter over which the Court of Chancery had, at the time of the passing of the Judicature Act, exclusive jurisdiction; this being at that time the criterion upon which the right to demand a jury by a mere jury notice depended, as well as the criterion as to the mode of trial pointed out by sec. 45 of the Judicature Act of 1881.

Prior to that statute, Surrogate Court proceedings could be transferred to the Court of Chancery, and became subject to the

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general provisions of the Chancery Act, which contained a provision authorizing an order directing a trial by jury.

By the section in question, in cases in which the Court of Chancery had exclusive jurisdiction, "the mode of trial shall be according to the present practice of the Court of Chancery."

In the revision of 1887 (R.S.O. 1887, ch. 44, sec. 77) this section was recast, and assumed the form in which it is now found, as sec. 103 of the Judicature Act, R.S.O. 1897, ch. 51, which provides that "all causes, matters, and issues, over the subject of which prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered." The change of date from 1881 to 1873 is in this case immaterial, because the provision of the Surrogate Courts Act relating to transfer of causes to the Court of Chancery is found in the Consolidated Statutes of 1859.

As is pointed out in *Re Lewis*, the legislation here and in England upon this point has proceeded upon widely differing lines. The right of the heir-at-law in England to have the issue *devisavit vel non* tried by a jury was long carefully preserved to him; but here the result of our legislation is, that *primâ facie* the action "shall be tried without a jury," and the onus is upon the party seeking to have a jury to shew a case justifying it being "otherwise ordered."

In this case everything points to the desirability of a trial without a jury. There will be many witnesses—it is said some 125—and as many experts as the law or the trial Judge may allow to be called. The trial, it is said, will take two weeks. The circumstances of the case are such as to make it unlikely that the mind of the jury can be concentrated upon the real issue. As said in the case already referred to, "the cause can properly and fitly be disposed of in the ordinary way without the intervention of a jury."

Motion dismissed—costs in the cause.

The defendant Campbell moved for leave to appeal to a Divisional Court from the order of FALCONBRIDGE, C.J.K.B.

March 22. The motion was heard by BOYD, C., in Chambers.

G. Grant, for the applicant.

I. F. Hellmuth, K.C., for the plaintiffs.

J. R. Meredith, for the infant defendants.

Boyd, C.

March 25. BOYD, C.:—This application seeks to unsettle the practice and course of procedure by going back to one of the earliest statutes of old Upper Canada. Yet, even in England, the statute law of which was, so far as applicable to the condition of this Province, adopted in 1791, the course of practice was not to regard the claim of the heir-at-law to have an issue tried

before a jury as an absolute right, but one to be dealt with according to the circumstances. Thus in *Man* v. *Ricketts* (1844), 7 Beav. 93, 101, Lord Langdale declined to direct such an issue, the will having been otherwise sufficiently proved as against the heir. Indeed, the real reason why the trial at law, and therefore by a jury, was granted in England, was because of "the frail and imperfect manner of examining into facts" then possessed by the Court of Chancery. The words are those of Lord Erskine in *White* v. *Wilson* (1806), 13 Ves. 87, at p. 91. This case is cited by Ferguson, J., and the wrong volume given in *Re Lewis*, 11 P.R. 107, at p. 108; and it is now not to be questioned that such a reason does not exist in Ontario, where all Courts alike have the fullest power and the most searching method of investigating facts. The old course in England was to file a bill for the purpose of establishing the will as against the heir with regard to realty. Then there would be a hearing of such evidence as was admissible in equity practice; and, if a sufficient *primâ facie* case of proof was made out, then an issue would be directed (*devisavit vel non*) in order to establish conclusively as against the heir the fact of a valid will made by a competent testator. See the course pursued in *Waters* v. *Waters* (1848), 2 DeG. & Sm. 591, 599.

The English practice grew out of historical reasons. Until the Probate Court Act of 1857, 20 & 21 Vict. ch. 77, there was no jurisdiction to admit a will of land to probate. The only mode of testing the validity of such will was by an action of ejectment between the heir and the devisee. But in our practice the probate of will includes realty and personalty: realty is becoming more and more assimilated to personalty: with us the unique distinction of heir-at-law never obtained, for all children shared equally. All the reasons which necessitated (almost) a jury trial as against the heir-at-law in England, never existed here; and our practice is settled, whether the contest be in the lower Court or upon the removal of the contention to the High Court, that the trial of fact by jury is a matter for the sound discretion of the Court or a Judge: R.S.O. 1897, ch. 59, sec. 22* and sec. 35.† These sections are conclusive as against any vested and absolute right of the heir to insist on a trial by jury.

*See now 10 Edw. VII. ch. 31, sec. 28.

†Sec. 35 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, is as follows:—lows:—

Upon any cause or proceeding being so removed, the High Court shall have full power to determine the same, and may cause any question of fact arising therein to be tried by a jury, and otherwise deal with the same as with any cause or claim originally entered in the said Court; and the final order or judgment made by the said Court in any cause or proceeding removed as aforesaid, shall, for the guidance of the Surrogate Court, be transmitted by the Surrogate clerk to the registrar of the Surrogate Court from which the cause or proceeding was removed. R.S.O. 1887, ch. 50, sec. 32.

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The practice was well settled by a very careful Judge in 1885, in *Re Lewis*, 11 P.R. 107; and I see no reason to doubt the correctness of the order of the Chief Justice of the King's Bench, or to doubt that he wisely exercised his discretion, having regard to the issues raised and their magnitude and the complexity likely to arise in trying to sever the methods of trial in investigating the facts of this controversy.

I disallow leave to appeal; and costs of the executors and other beneficiaries opposing should be paid out of the estate.

Leave refused.

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CHINA MUTUAL INSURANCE CO. v. SMITH.

Supreme Court of Nova Scotia, Graham, E.J., Russell, and Drysdale, JJ. May 10, 1912.

1. INSURANCE (§ I C—19)—INVOLUNTARY LIQUIDATION—LIABILITY OF INSURED ON PREMIUM NOTES.

Upon the involuntary liquidation of a mutual insurance company a member thereof is liable for the full amount of notes given by him for the premium on a policy of insurance; and he is not entitled to a deduction for the amount of the unearned premium for the unexpired portion of the life of such policy.

[*Hill* v. *Baker*, 205 Mass. 303, followed.]

2. INSURANCE (§ III C—56)—NOTICE OF CANCELLATION BY RECEIVER—EFFECT OF ON POLICY.

A statement in a notice sent a policy holder of a mutual insurance company by the receiver thereof in involuntary liquidation, that he understood the legal effect of such proceedings to amount to a cancellation of outstanding policies of insurance, does not in fact amount to a cancellation so as to entitle a member to a deduction of the unearned premium for the unexpired portion of the policy, from the amount due on a premium note given by him to the company.

3. INSURANCE (§ I C—17)—RIGHTS OF POLICYHOLDERS ON INVOLUNTARY LIQUIDATION.

As a policy of insurance is not *ipso facto* cancelled by the involuntary liquidation of the mutual insurance company that issued it, a member thereof is not entitled to a deduction of the unearned premium for the unexpired portion of the policy from the amount due on a premium note given by him to the company, notwithstanding that the policy stipulated what proportion of the premium the company should retain upon its cancellation, as such stipulation applied only to voluntary cancellations by the parties to the contract.

4. INSOLVENCY (§ III—11)—WHAT PASSES TO RECEIVER—LIABILITY OF INSURED ON PREMIUM NOTES.

The fact that a permanent fund required by the charter of a mutual insurance company to be maintained for the security of its policyholders was depleted and non-existent when a policy of insurance was issued, does not render the contract null and void so as to relieve the insured from liability on a note given for the premium thereon.

Statement

APPEAL from the decision at the trial in favour of the plaintiff.

The appeal was dismissed, Drysdale, J., dissenting.

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The action was on a number of promissory notes given by defendants to the plaintiff company in payment of premiums on certain policies of marine insurance issued by the plaintiff company to defendants.

The action came on for trial before Meagher, J., without a jury at Halifax.

The judgment of Meagher, J., now appealed from, is as follows:—

MEAGHER, J.:—I shall, for brevity, refer to the respective cases by their numbers.

The plaintiff is a mutual insurance company created by the laws of Massachusetts, and for a time had an agency in Halifax, managed by John Strachan.

The notes sued on were given to cover premiums of insurance upon policies issued to the respective defendants. By an order of the Supreme Court in Equity at Boston (the home of the company) it was put into liquidation at the instance of an official of the State, and its assets placed in the hands of a receiver, who instituted this suit. The temporary order is dated the 19th day of March, 1908, and was made at an early hour, probably before ten o'clock a.m. It was a judicial act, and may, therefore, be regarded as operating from the earliest hour of that day.

The notes in No. 1 were dated at New York, but payable in Nova Scotia. Those in Nos. 2 and 3 were dated in this Province and payable there. The policies of insurance were issued in Boston.

The defences in No. 1 as pleaded are:—

1. Their making was induced by fraud of the company.

2. The company was insolvent and unable to meet any losses which might arise under the policies when the notes were made, and has been so ever since. It knew of such insolvency and inability, and the defendant did not.

3. The company falsely and fraudulently held itself out to the defendant as solvent and able to respond to all losses under said policies and the defendant relying upon the promises accepted said policies and gave said notes, which otherwise they would not have done.

4. Want of consideration is alleged.

5. Alternatively, and while denying liability, that the notes were given for premiums, etc., and the company became insolvent on the 19th of March, 1908, and was put into liquidation on that date, and a receiver appointed who at once informed the defendant of his appointment, and that its effect was to cancel all outstanding policies of the company. The defendant accepted such notice as cancellation, and thereafter the consideration for the notes failed, and defendant had no protection under his policies. This is followed by a payment into Court of $1,257 alleged to be sufficient to cover premiums and interest up to the liquidation order.

6. The remaining defences are that under its charter the company was required to keep not less than $200,000 invested as a permanent

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fund, and it was not entitled without such fund being kept up to said sum to issue policies or receive premiums; that such fund was not kept up, and there was no such fund when the policies were issued, and the notes given, and they were, therefore, null and void, and finally that the company in the absence of such fund was prohibited from issuing policies or accepting premium notes.

There is a reply, but I need not refer to it further than to say that it avers the company was a mutual one, and did business on the mutual principle, and under its charter and by-laws all persons having property insured with the company became members thereof, and the defendant as a policyholder became a member thereof and subject to the liabilities imposed upon him as such member, and, therefore, liable and obliged to pay his notes, they being funds to meet the liabilities of the company.

There is an additional defence in No. 2 that before the notes became due the plaintiff exonerated the defendant from payment thereof by a verbal cancellation of the policy under which the defendant agreed to pay, and the company to accept in full satisfaction and discharge of the notes the amount due for earned premiums up to the 18th of March, viz., $208, and he accordingly paid said sum and delivered the policies up to be cancelled before action.

The defence in No. 3 is the same as in No. 2, except that the sum agreed upon at the alleged cancellation, viz., $112.50, is paid into Court.

The Court in *Williams* v. *Cheney* (1855), 3 Gray, at 221, defined the status of mutual companies thus:—

> Strictly speaking they (that is, mutual insurance companies) have no capital stock belonging to the corporation and forming a permanent fund out of which losses are to be paid. Their resources or funds usually consist only of deposit notes and premiums on policies of insurance which fluctuate from time to time according to the amount at risk, and the larger portion of which is never realized by the corporation in money, unless required for the payment of losses. Dealing with the particular company in that case the Court said: It was organized solely for the purpose of making contracts on the mutual principle. Its members consist only of persons holding policies in the company; its capital is to consist of premium notes, and its losses and expenses are to be borne and paid by assessments on such notes in proportion to their amount. These constitute the main and essential features of a mutual insurance company as generally known under the laws of this Commonwealth and elsewhere.

It was contended for the defence:—

> 1. The company had no legal right to commence business because the $200,000 fund was not provided as required by law. It was ultimately conceded that this fund was provided in the first instance, but had not been maintained, and was not in existence when these policies were issued. It was, therefore, an illegal contract.

I am unable to accept this argument. The result of not maintaining the fund to the sum named is not to disable the company from doing business, nor to render the contracts, made during

the existence of such deficiency, invalid, but to make the directors liable for losses made meanwhile, which losses would, of course, be ascertained and governed by the terms of the policies covering the risks, thus, it seems to me, recognizing the force and validity of such contracts. It is too plain to admit of serious argument.

2. It was fraudulent for the company, knowing its insolvency, to make these contracts. It was at the several times in question insolvent and the officials knew it.

This was relied on as the strongest ground available to the defendants. The company was put into liquidation not because it was insolvent in fact, but because it had failed to comply with certain provisions of the statute governing it. Ample grounds no doubt exist to justify the action of the public official in seeking to have the company put into liquidation, and of the Court in ordering it without reference to the fact whether it was insolvent in fact. The decree or order of the Court in that behalf is not evidence of insolvency as that term is understood in its ordinary commercial and legal sense in relation to insolvency in fact.

The defence in this view is rested not on the ground merely of insolvency, but because its insolvency was such as to render the respective contracts of insurance practically valueless as means of protection against losses. In estimating position and possible results from that standpoint, it would, I apprehend, be necessary to take into account the directors' liability above mentioned as an available asset. If the conditions relied on existed, the defendants in case of loss would be entitled to recover against the directors.

The defence of want of consideration was not urged, and could not be successfully, but it was argued there was a partial failure of consideration which had been met by payment into Court up to the time of liquidation. I may recur to this point again if necessary.

I find there was no cancellation except in so far as it may have been effected by the order or decree of liquidation, and the appointment of the receiver.

There is not sufficient evidence, I might, I think, fairly put it higher, to shew that the company was actually insolvent; but assuming it was, it has not been shewn the officials or any of them so regarded its situation. It was a class of company in which many things would have to be taken into consideration before its actual insolvency could be reasonably determined. The defence of fraud is entirely out of the question unless, at least, it is shewn that the company was actually insolvent, and some, at least, of the more responsible officials knew it. This was not done. *Re Whittaker*, 10 Ch. at p. 449, is an instructive case on this branch.

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No active representations are shewn to have been made in respect to the company or its affairs before or when the contracts in controversy were made. There was no holding of solvency unless it is implied from the mere act of the company in assuming to do business, and that, I confidently submit, cannot be done.

No active representations, as I have said, were made; it was, in all instances before me, merely a case of applying for an insurance and obtaining it, without any reference to or discussion over the standing of the company.

The defendant is declared by the policy to be a member of the company; and he no doubt became such by entering into the contracts before me, and is, therefore, subject to the liabilities and entitled to the benefits attaching thereto under the company's constitution and by-laws.

It may well be, indeed it is highly probable, the company has creditors, not members of the company, whose claims, such, for example, as banks who loaned it money, arose wholly outside of insurance contracts and business.

The premium notes sued on, and all others of a like kind, form the principal fund out of which losses and other legitimate claims against the company, such as loans from banks, must be paid; and if the defences relied on were allowed to prevail in these and other similar cases, the fund referred to would be materially diminished, perhaps wholly destroyed, and this through the action of members of the company, who, I submit, should have inquired into its situation before becoming such members. I say nothing as to the effect of positive fraud which may have induced the contracts and consequent membership in other cases. In the view I take of the questions calling for determination it makes no difference whether they are regarded in the light of the law of Massachusetts or Nova Scotia, subject to this, that the relations between the company and the defendants springing from the transactions between them depend upon the charter, constitution and by-laws of the company regarded in the light of the Massachusetts statutes controlling or affecting them.

The form of the order herein and the amounts recoverable will be determined upon further motion.

Argument

H. Mellish, K.C., for defendant (appellant):—The policy was cancelled without any agreement and without any mutual rescission. When the company went into liquidation and notice to that effect was sent to the policyholders, that to govern themselves accordingly the policies were at an end. The sum of $200,000 called for by the company's charter and the Massachusetts statute had not been kept up and there was no such fund in existence when the policies were issued and the notes given. The policies were therefore null and void: *National Mutual Ins. Co.* v. *Purcell*, 10 Allen 231; *Washington Co. Mutual*

Ins. Co. v. *Dawes*, 6 Gray 376; *Washington Co. Mutual Ins. Co.* v. *Hastings*, 2 Allen 398; *Roche* v. *Ladd*, 1 Allen 436; *Reliance Mutual Ins. Co.* v. *Sawyer*, 160 Mass. 413; *Claflin* v. *U. S. Credit Co.*, 165 Mass. 501.

T. S. Rogers, K.C., for plaintiff (respondent):—The Massachusetts law must govern in this case in any event, it being incorporated in the contract. Every policyholder is a member of the company and is bound by the statutes and by-laws, as well as by the rules of the company. In *Hill* v. *Baker*, 205 Mass. 305, the question involved here was settled by the Supreme Court of Massachusetts, the makers of the premium notes being held liable for the full amount. The words in the policy "if this policy be cancelled" refer to a cancellation or rescission by mutual agreement and not to a cessation of legal liability brought about by the insolvency of the company: *Lion Mutual Ins. Co.* v. *Tucker*, 12 Q.B.D. 176; *Commonwealth* v. *Massachusetts Ins. Co.*, 112 Mass. 125 and 119 Mass. 51; May on Insurance, 4th ed., sec. 596; Arnould on Marine Insurance, 8th ed., sec. 80; Palmer on Winding Companies, 10th ed., pt. II. 486; *Doane* v. *Millville Mutual Ins. Co.*, 43 N.J. (Eq.) 522; Dicey on Conflict of Laws, 2nd ed., 556. There is no penalty or prohibition in regard to the fund; there is therefore no illegality. The statute contemplates the possibility of the continuance of the business and provides for personal liability of the directors if the fund is not maintained: *American Hotel Supply Co.* v. *Fairbanks*, 41 N.S.R. 444.

Mellish, K.C., replied.

RUSSELL, J.:—The question in this case is whether the defendant is liable to pay the whole amount of his note given for premium on a policy of marine insurance, or is entitled to a deduction because of the fact that the company went into liquidation before the expiration of the period for which defendant was insured.

Russell, J.

The company is a mutual one, and it was decided by the Supreme Court of Massachusetts in a number of actions arising out of similar policies in the same company, *Hill* v. *Baker*, 205 Mass. 303, that the insured were liable for the whole amount of the premium notes by virtue of the principle that "each member is at the same time insurer and insured." The reasoning of the Massachusetts Court is, to my mind, convincing, and I am unable to see any distinction between the cases there decided and the one presented here.

The insured under such a policy becomes entitled to a dividend if the business of the company is profitable and it might happen that his premium note would be more than half paid for, conceivably even almost wholly paid by the dividends to which he would become entitled. It is simply the other side of such a contract that in the event of the business being unprofitable, his

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premium note becomes when realized a contribution to the fund from which the claims of policyholders and other creditors are to be liquidated.

In the present case the receiver notified the holders of the policies that the company had gone into liquidation and added the following words:—

> It is understood that the legal effect of these proceedings is to cancel all outstanding policies in the said China Mutual Insurance Company, and this notice is therefore sent you in order that you may govern yourselves accordingly.

It is contended that this was a cancellation of the policy within the meaning of the clause which is as follows:—

> The consideration for this insurance is hereby fixed at the rate of eight and a half per cent.; to return 63¾ per cent. for every 30 days of unexpired time if this policy be cancelled.

There is a provision in the policy that, "if the premium is not paid, or if a premium note given for the premium is not paid at maturity, or if the person liable for the premium or the maker or endorser of the premium note shall become bankrupt the company shall have the right to cancel the policy at any time, but such proportional part of any such premium or note as shall have been earned up to the date of the cancellation shall remain and become immediately due and payable."

It is not easy to say whether the provision as to cancellation just above referred to applies or does not apply to the cancellation by the company, for the reasons mentioned in the latter provision. If it does so apply one must understand the rate mentioned in the first provision as the measure by which to determine "the proportional part" earned up to the date of the cancellation in the latter provision; and I see no necessary inconsistence between the two provisions as thus understood. But I do not think that either of these provisions has any applicability to the case in hand. I do not understand the cancellation referred to in either of these clauses as the event that has happened in this case. I read the notification from the liquidator as the expression of his understanding and judgment in regard to the position of the policyholders. Their position is defined in exact terms in the judgment of Sheldon, J., in the case mentioned, where he says:—

> The cases go on the general rule that there is no liability on the part of the insurance company for failing to continue the performance of their agreement when that performance has been made impossible by the action of the State under existing laws.

I doubt if it can with strict propriety be said that the policy has ever been cancelled. The insurance company has been discharged by the supervening legal impossibility from the obligation to pay the assured for any loss. They are legally bound to use their assets otherwise in a ratable distribution among their creditors, and the law has therefore discharged them from the

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obligation they would otherwise owe the policyholders. The cancellation referred to in the policy is, I think, a cancellation under the terms of the policy or by agreement of the parties to the policy, and probably rather the former than the latter, because I do not see why the amount to be returned need have been mentioned if the whole matter was to be one of mutual agreement. In either case the provision as to cancellation cannot have been intended to apply to a cancellation brought about by the operation of law under the circumstances that have occurred, if cancellation it can properly be called.

If this view is correct it disposes of this branch of the argument as it relates to all the policies in question. In one of these policies there is no amount mentioned as the percentage to be returned. Of course it makes no difference in the view I have taken, or in any other view, so far as I can see, whether the effect of the blank is to strike out altogether the clause about return of premium or to insert a cypher in the blank.

As to the defence that the contract was wholly void for illegality, I agree entirely with the trial Judge. The point is that the company could not legally do business, because although the fund required as security to policyholders had been provided in the first instance, it had become depleted by losses occurring later and was non-existent when the policies in question here were issued. If this argument were pushed to an extreme it would follow that the moment the permanent fund fell below $200,000 the business of the company would become an illegal one, and all policies thereafter issued would be null and void. I agree with the learned trial Judge for the reasons given that this consequence does not follow from the depletion of the fund. The statutes of Massachusetts applicable to this company provide that no policies shall be issued until the proper officials have certified as to the subscription of the permanent fund. This provision was complied with. The consequence of insuring beyond the permissible amount having regard to the cash fund, legal investments, premium notes and subscription notes, is that the president and directors, knowing the condition of the company, are personally liable for the losses occurring on insurances effected under these circumstances. The transaction is not, I think, thereby avoided for illegality.

In my opinion the appeal must be dismissed.

GRAHAM, E.J., concurred.

Graham, E.J.

DRYSDALE, J. (dissenting):—The real point involved in this case is the effect to be given to the following clause in the contract of insurance:—

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> The consideration for this insurance is hereby fixed at the rate of 10 per cent., to return 75 per cent. for every 30 days of unexpired time if this policy be cancelled.

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The policy was not cancelled by act or agreement of the parties, but by operation of law. It seems that under the laws of Massachusetts insolvency and the appointment of a receiver cancels the policy (this is common ground) and the question is whether the term of the contract above quoted applies to the cancellation of the kind that happened here, viz., cancellation by appointment of a receiver, or is to be limited to cancellation by act of the parties. I do not regard the Massachusetts cases cited on the argument as of much assistance, because they are dealing with a different form of policy, and if the above quoted clause was intended by the parties to apply to cancellation from any cause, no matter how brought about, then the defendant's position was well taken and the return premium stipulated for must be allowed.

It will be noted that further down in the body of the policy adverse cancellation at the instance of the company is specially provided for, and I am inclined to the opinion that the general clause respecting cancellation herein first quoted was deliberately intended as an agreement respecting all other modes of cancellation, no matter how brought about. Why should it be construed as limited to cancellation by act of the parties? It does not say so and it must be borne in mind it was made in the light of the settled jurisprudence of Massachusetts that a receivership makes cancellation. I see no reason for limiting the reading of the clause to cancellation by act of the parties. It was obviously intended to provide for return premium in the event of the insurance protection ceasing, and on its face I regard it as a provision intended for a return or reduction of the premium from the time the policy ceases, and I think this, to me, very plain provision of the contract must be given effect to and the defendant's position maintained.

I would allow the appeal.

The other cases, the J. W. Smith case as well as the Pickles case, are, I think, in the same position.

Appeal dismissed, DRYSDALE, J., *dissenting.*

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May 31.

LAMB v. NORTH et al.

Manitoba King's Bench. Trial before Robson, J. May 31, 1912.

1. PARTNERSHIP (§ VII—31)—ACTION BY ONE PARTNER AGAINST CO-PARTNERS —PROPORTIONATE SHARE OF MONEY EXPENDED FOR BENEFIT OF PARTNERSHIP.

Where the amount that one partner has expended for the benefit of the partnership is ascertained, he may maintain an action therefor against his co-partners, and recover from each their proportionate share thereof.

2. PARTNERSHIP (§ V—22)—LIABILITY OF CO-PARTNERS TO ONE WHO MAKES ADVANCES FOR BENEFIT OF FIRM—INSOLVENCY OF SOME OF THE CO-PARTNERS—ONUS OF PROVING.

A partner who has paid money for the benefit of a partnership cannot hold a co-partner for more than his proportionate share thereof.

on the ground of the insolvency of other partners, without shewing such insolvency.

[*Dering* v. *Winchelsea*, 1 Cox 318, 1 White and Tudor Eq. Cases 539, and *Lowe* v. *Dixon*, 16 Q.B.D. 455, specially referred to.]

3. PARTNERSHIP (§ V—22)—LIABILITY TO PARTNER MAKING ADVANCE—REMAINING CO-PARTNERS—ABSENCE FROM PROVINCE OF OTHERS.

A partner who has paid money for the benefit of the partnership cannot, on the ground that some of the partners have left the province, hold other partners liable for more than their proportionate shares thereof.

ACTION to recover amount claimed to be due on notes. Statement

Judgment was given against defendant Convery only for $177.92.

A. Leighton, for plaintiff.

H. F. Maulson, for defendant Convery.

ROBSON, J.:—Trial at Minnedosa sittings, 21st May, 1912. Robson, J.

Plaintiff and defendants in 1902 in partnership purchased a stallion, giving four promissory notes of $937.50 each as the price.

The venture was not a success, and the horse was returned in satisfaction of two of the notes. Plaintiff paid the other two notes, his outlay in this connection being, he says, about $2,680.

The plaintiff brings this action to obtain contribution from the fourteen defendants. One defendant, William Convery, has defended.

As I read the statement of claim, it may be treated as a demand for payment of the proper shares of the burden or for an accounting of the partnership, the desired relief being reached in that way.

It did not appear in evidence that the defendants, other than Convery, had been served and ignored the suit, or if so, what the nature of the default judgment, if any, against them was, so that a general accounting cannot be decreed on present materials.

The plaintiff says the horse did not pay expenses. There is no evidence to charge him with any moneys against his payment of the notes. The amount of this payment is not in doubt. I think I can apply the principle stated in Lindley on Partnership, 7th ed., p. 501, as follows:—

> But although in an action for obtaining payment of a proportion of an unascertained sum, all the persons interested in that sum must, as a general rule, be parties, yet, where the sum to be divided is ascertained, and the shares into which it is to be divided are also ascertained, an action for the payment of one of those shares may be maintained without making the persons interested in the other shares parties.

The statement of claim alleges payment by plaintiff of $2,135.13. Allowing interest to plaintiff, the common burden at the commencement of the action was $2,668.88, as computed in the statement of claim. This is within the amount plaintiff says

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he paid. *Primâ facie* each of the fifteen partners should bear one-fifteenth of the $2,668.88.

Plaintiff, however, seeks to recover from the contesting defendant a greater proportion than one-fifteenth. He alleges that some of the partners are insolvent. The principle in equity is shewn in *Dering* v. *Earl of Winchelsea*, 1 Cox 318, one of the White & Tudor's collection of Equity Cases (7th ed., vol. 1, p. 535) at page 539 of the latter volume. The judgment deals with the question. See also *Lowe* v. *Dixon*, 16 Q.B.D. 455. These authorities support plaintiff's contention, if the facts are as alleged.

There was no evidence of the insolvency of the other defendants. Statements were made by counsel, but these did not supply the want. The fact that a number of the other defendants have left the Province has no bearing on the question.

I was asked to refer the question of the solvency of the others.

Primâ facie the proportion of the burden is according to the number of those liable. A plaintiff wishing to impose a greater burden upon any one of his partners is to that extent varying the cause of action, and should, I think, make out his case accordingly both by pleading and evidence. I do not think a precedent should be created for imposing upon a Local Master the duty of such an inquiry. This is a case in which the plaintiff is entitled to every legitimate assistance, but that would be going too far.

There will be judgment for the plaintiff against the defendant Convery for $177.92 and interest from the commencement of the action with costs as against that defendant on the King's Bench scale without set-off.

Judgment against defendant Convery for $177.92.

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May 9.

DART v. TORONTO R. CO.

Ontario Court of Appeal, Moss, C.J.O., in Chambers. May 9, 1912.

1. APPEAL (§ XI—721)—GRANTING LEAVE TO APPEAL—DIVISIONAL COURT ORDER GRANTING NEW TRIAL—TERMS.

Where a party appeals to a Divisional Court from a judgment after trial with a jury, and contends that he is entitled to judgment upon the findings of the jury, but does not ask for a new trial, and the Divisional Court nevertheless grants a new trial without disposing of the motion for judgment, it is a proper case for granting leave to appeal to the Court of Appeal, but such leave should be upon the terms that the party appealing shall abandon his right to a new trial.

Statement

MOTION on behalf of the defendants for leave to appeal to the Court of Appeal from an order of a Divisional Court setting

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aside the judgment entered at the trial in favour of the plaintiff and directing a new trial.

Leave was granted on terms.

D. L. McCarthy, K.C., for the defendants.
D. Inglis Grant, for the plaintiff.

MOSS, C.J.O.:—The plaintiff was driving in a sleigh along Wilton avenue going west, and, while crossing Church street at its intersection with Wilton avenue, his sleigh was struck by a trolley-car of the defendants coming south on Church street, and he was severely injured, and the sleigh completely demolished.

The plaintiff seeks to recover damages from the defendants, on the ground of negligence of the defendants' servants operating the car in approaching the crossing at an excessive rate of speed with the car not under proper control, without sounding the gong or giving any warning.

At the trial, the jury, in answer to questions, found the defendants guilty of negligence in these respects. But to another question, viz., "Could Dart, by the exercise of reasonable care, have avoided the accident?" they answered, "Yes, to a reasonable extent." And to the further question, "If Dart could have avoided the accident, in what did his want of reasonable care consist?" they answered, "By lack of judgment."

The jury assessed the damages at $800, for which sum judgment was entered in the plaintiff's favour. From this judgment the defendants appealed to a Divisional Court, upon the ground, as set forth in their notice of appeal, that, upon the findings of the jury, the defendants were entitled to judgment dismissing the action—the answers to the questions above set forth amounting to a sufficient finding of contributory negligence. They did not ask for a new trial.

The Divisional Court was of opinion that these answers were so unsatisfactory that the judgment for the plaintiff could not be maintained; the Court did not deal with the question raised by the defendants that they were entitled to judgment; but, instead, directed a new trial. The defendants say that what they desire is a decision upon the question of their right to have the action dismissed, and they do not desire a new trial.

In this view of the case, the defendants have not obtained a pronouncement upon the question they raised. And, as that is all they seek, it seems proper to give them an opportunity of obtaining a decision one way or the other upon the point.

But, inasmuch as they repudiate any desire for a new trial, it is only reasonable that, as preliminary to accepting leave to appeal, they should undertake and agree to abandon the new trial, and agree that in the event of the Court deciding that

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they are not entitled to judgment in their favour, the judgment entered in favour of the plaintiff at the trial shall stand, and that they will pay the costs of the appeal to the Divisional Court. It would not be just to the plaintiff to permit the defendants to try the experiment of a further appeal while adhering to their new trial in case of non-success upon the appeal.

If the defendants accept these terms, an order for leave to appeal will issue; the costs of this motion to be in the appeal.

If not accepted within two weeks, the motion will stand dismissed with costs.

Leave to appeal on terms.

Annotation

Appeals from discretionary orders

Annotation—Appeal (§VII I—345)—Judicial discretion—Appeals from discretionary orders.

"Judicial discretion" is a certain latitude or liberty accorded by statutes or rules to a Judge as distinguished from a ministerial or administrative official in adjudicating on matters brought before him. The use of the word "judicial" limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious or exempt from review. But the presence of the word "discretion" permits the Judge to consider, as a Judge, what are vaguely termed all the circumstances of the case and the purposes for which he is invested with the discretion and to make his order by reference to considerations of convenience or utility—or saving of expense rather than on considerations of strict law or technicalities. Such discretion is usually given on matters of procedure, or punishment, or costs of administration rather than with reference to vested substantial rights: Encyclopaedia of the Laws of England, vol. IV., p. 609.

When under the Companies Clauses Act, 1845, a discretion is conferred on the Judge, this discretion is meant to be a judicial discretion exercised according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet: Willes, J., in *Lee* v. *Bude and Torrington R.*, L.R. 6 C.P. 576, 40 L.J.C.P. 285. And see *Morgan* v. *Morgan*, L.R. 1 P.M. 644, 647.

The Court has a discretion as to allowing a *scire facias* to issue: *Shrumpton* v. *Sidmouth R. Co.*, L.R. 3 C.P. 80.

Bowen, L.J., in the case of *Gardner* v. *Jay*, 29 Ch. D. 50, at p. 58, says:—

> That discretion like all other judicial discretions must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed; but still it is a discretion and for my own part I think that when a tribunal is invested by Act of Parliament, or by rules with a discretion, without any indication in the Act or rules of the grounds on which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion would run, for if the Act or rules did not fetter the discretion of the Judge, why should the Court do so?

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Annotation.

Appeals from discretionary orders

Annotation (*continued*) — **Appeal** (§ VII I—345) — **Judicial discretion— Appeals from discretionary orders.**

And at p. 59, the same Judge says:—

> Nor can one Judge, by enunciating the mode in which he proposes as a general rule to exercise his discretion, fetter either himself or other Judges of co-ordinate authority where the Act or rules do not fetter the judicial discretion.

In other words, while caprice is excluded, Judges must exercise their own discretion with regard to its object and the relevant rules of law, and not merely copy the decision of others. See also Bowen, L.J., in the case of *Knowles* v. *Roberts*, 38 Ch. D. 263, at p. 271.

This question of judicial discretion most usually arises on appeal or review.

The policy of appellate Courts is not to encourage appeals on matters within the discretion of the Judge below or matters of procedure: *Watson* v. *Rodwell*, 3 Ch. D. 380; *Davy* v. *Garrett*, 7 Ch. D. 473. Where the Judge below has discretionary powers as to any matter the appellate Court if appeal is not prohibited, has the like discretion and the like duty to exercise it: *Davy* v. *Garrett*, 7 Ch. D. 473; *Jarmain* v. *Chatterson*, 20 Ch. D. 494, 499; *Crowther* v. *Elgood*, 34 Ch. D. 691, 697; *Knowles* v. *Roberts*, 38 Ch. D. 263, 271, but the appellate Court usually refrains from exercising its discretionary power except in a strong case, *i.e.*, unless the Judge below has declined to exercise his discretion, or has manifestly proceeded on a wrong principle or on an erroneous point of law: *In re Martin*, 20 Ch. D. 365.

The decision below is treated somewhat as a verdict of a jury on motion for a new trial,, *i.e.*, is not set aside unless it is perverse or manifestly founded on misconception of the law or facts, and not merely because the appellate Court would not itself have taken the same view of the facts or the appropriate order therein: *Macdonald* v. *Foster*, (1877), 6 Ch. D. 193, 195.

Under the old practice, in England the exercise of the discretion of the Court was not the subject of appeal: *Read* v. *Hodgens*, 2 Moll. 381; *Schneider* v. *Shrubsole*, 4 DeG. F. & J. 32; *Sheffield Waterworks* v. *Yeomans*, L.R. 2 Ch. 8; *Ley* v. *Ley*, 25 L.J. Ch. 600; *In re Agriculture Cattle Insurance Co.*, 3 DeG. J. & S. 425.

The House of Lords will not ordinarily interfere with the discretion of the Judges below: *The Republic of Liberia* v. *Royne*, 1 App. Cas. 139, 45 L.J. Ch. 297.

In a question arising on orders or rules made under the Judicature Acts in matters where Courts or Judges are to exercise a discretion, the House of Lords is unwilling to disturb the orders made unless for strong substantial reasons; but the principle upon which such orders ought to be made may furnish those reasons: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 50 L.J. Q.B. 49.

A Court of Appeal is not disposed to disturb a decree which depends on the discretion of the Court below, and not upon principle: *Ironmongers' Co.* v. *Atty.-Gen.*, 10 Ch. & F. 908.

No appeal lies to the House of Lords from the refusal by the Court of Appeal to grant special leave to appeal, when the time limited for appealing has expired. Such a refusal is not an "order or judgment," within the meaning of sec. 3, of the Appellate Jurisdiction Act, 1876: *Lane* v. *Esdaile*, 60 L.J. Ch. 644; [1891] A.C. 210. In Ontario the following cases

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Annotation.

Appeals from discretionary orders

Annotation (*continued*) — **Appeal** (§ VII I—345) — **Judicial discretion— Appeals from discretionary orders.**

follow the principle that no appeal lies from an order granting or refusing leave to appeal: *Re Sarnia Oil Co.*, 15 P.R. 348; *Re Central Bank*, 17 P.R. 395; *Farquharson* v. *Imperial Oil Co.*, 95 C.L.J. 230, 30 Can. S.C.R. 188.

An appeal lies to the Court of Appeal from the exercise of a discretion by the Judge of a Court below, yet the Court of Appeal will only interfere:—

1. When the Judge has decided on a matter not within his discretion;
2. When his assumed discretion has been exercised on wrong principles;
3. When some great loss will be occasioned by a clearly erroneous exercise of discretion: *In re Oriental Bank Corporation*, 56 L.T. 868.

Even though leave to appeal has been given the Court of Appeal will not review the discretion of the Judge in the Court below, unless there has been a disregard of principle or misapprehension of facts: *Young* v. *Thomas*, [1892] 2 Ch. 134, 61 L.J. Ch. 496. In the case at p. 137, Lindley, L.J., says:—

> "If the Judge in the Court below had not really exercised his discretion at all, there is no doubt that we could review his decision as to costs, even without leave being given to appeal, as was shewn in a recent case in the Divorce Division: *Robertson* v. *Robertson*, 6 P.D. 119, but that is not the case here. The Judge has exercised his discretion, and, there being no error in point of law, we must decline to review his decision."

It has been held that if the matter was before the Judicature Act, entirely one of discretion there is no appeal: *The Amstel*, 2 P.D. 186, but this has been questioned.

Leave to defend "on security to satisfaction of Master," where the master fixed the security, no appeal lay on the sufficiency of the security: *Hoare* v. *Horshead*, [1903] 2 K.B. 359.

The Court of Appeal ought not to interfere with the exercise of the discretion of the Judge in the Court below, there being no reason to expect a failure of justice by reason of the order made: *Mangan* v. *Metropolitan Electric Supply Co.*, [1891] 2 Ch. 551, 65 L.T. 202.

When a Judge has exercised his discretion, the Court of Appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip: *In re Terrell*, 22 Ch. D. 473; *In re Moordaff*, *Burgoine* v. *Moordaff*, 52 L.J.P. 77, 8 P.D. 205.

There must a plain and clear case to justify the Court of Appeal in interfering with the discretion of the Judge below, but the Court of Appeal will review the discretion if it be exercised in consequence of an opinion on a point of law which is wrong: *In re Martin*, *Hart* v. *Chambers*, 51 L.J. Ch. 683, 20 Ch. D. 369; *Ormerod* v. *Todmorden Mill Co.*, 8 Q.B.D. 664, 51 L.J. Q.B. 348; *Gilder* v. *Morrison*, 30 W.R. 815; and, *In re Amor*, *Ex parte Mark*, 31 W.R. 101.

In *Wigney* v. *Wigney*, 7 P.D. 182, 51 L.J.P. 62, it was decided that a case of miscarriage must be shewn. It is not sufficient for the appellant to convince the Judges of the Court of Appeal that the order is one which they would not in the first instance have made but he must shew that the Judge had gone wrong in his law or made a mistake of fact, or ordered something so utterly unreasonable that the Court of Appeal is obliged to say there has not been a reasonable exercise of his discretion. See also *Berdan* v. *Greenwood*, 20 Ch. D. 767*n*.

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Annotation.

Appeals from discretionary orders

Annotation (*continued*) — **Appeal** (§ VII I—345) — **Judicial discretion— Appeals from discretionary orders.**

By the Supreme Court of Judicature Acts, 1873, 1875 (Eng.), power to review the exercise of judicial discretion is given and the Court of Appeal must ascertain whether the discretion has been properly exercised: *Reg.* v. *Maidenhead Corporation*, 9 Q.B.D. 503, 51 L.J. Q.B. 448.

The exercise of the discretion by a Judge is subject to appeal but the Court of Appeal ought not to interfere unless it is clearly shewn that the Judge has exercised his discretion wrongly: *Merchants Banking Co. of London, Ex parte Durham*, 16 Ch. D. 623, 50 L.J. Ch. 606; *Hayter* v. *Beall*, 44 L.T. 131; *In re Sheard, Ex parte Pooley*, 16 Ch. D. 107, 44 L.T. 259; *In re Silkstone & Co.*, 45 L.T. 449.

When a winding-up order is made on two petitions, there is no rule which absolutely binds the Judge making the order to give the carriage of it to the petitioner who presented the first petition. He has a discretion as to which of the petitioners shall have it. An order made in exercise of that discretion is an appealable one, but the Court of Appeal will not encourage such appeals: *In re Cunningham & Co.*, 53 L.J. Ch. 246, 50 L.T. 246 C.A.

When pleadings are such as should be struck out, they ought to be struck out by the Judge, and not left to be dealt with as a question of costs; but when the Judge has exercised his discretion on the subject, the Court of Appeal will not interfere, unless he has acted on a wrong principle: *Watson* v. *Rodwell*, 45 L.J. Ch. 744, 3 Ch. D. 380, 35 L.T. 86, 24 W.R. 1009.

Although the Court of Appeal will not readily interfere with the discretion of the Court of first instance in a matter of procedure, it is its duty to exercise its own discretion as to whether a pleading is so framed as to embarrass the opposite party. In a case, therefore, where a statement of claim was in the opinion of the Court of Appeal calculated to embarrass the defendant by reason of its stating immaterial facts, and setting out at a great length documents which could not be material except as evidence by way of admission, it was ordered to be struck out, though a motion for that purpose had been dismissed with costs by the Court below: *Davy* v. *Garrett*, 47 L.T. Ch. 218, 7 Ch. D. 473, 38 L.T. 77, 26 W.R. 225.

The conduct of a suit is a matter entirely within the discretion of the Judge in whose Court the suit has been instituted, and the Court of Appeal will not entertain an appeal on such a matter: *Dowbiggin* v. *Trotter*, 27 L.T. 731, 20 W.R. 1024—L.J.J.

When a matter is left by the Legislatures as a pure matter of discretion in a Vice-Chancellor, the Court of Appeal will not interfere with the exercise of that discretion, unless it is apparent that he has gone very clearly wrong: *In re Land and Sea Telegraph Co.*, L.R. 6 Ch. 643, 25 L.T. 236, 19 W.R. 764—L.J.J.

The making of an order to dismiss a bill for want of prosecution is a matter within the discretion of the Judge to whose Court the cause is attached, and his refusal to make such an order ought not to be made the subject of an appeal: *Sheffield* v. *Sheffield*, 44 L.J. Ch. 304, L.R. 10 Ch. 206, 23 W.R. 378.

An appeal will lie from an order of a Judge of the Court of Chancery directing an issue before a jury; but if the Court of Appeal is of opinion

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Annotation.

Appeals from discretionary orders

Annotation (*continued*) — **Appeal (§ VII I—345) — Judicial discretion— Appeals from discretionary orders.**

that there is really a conflict of evidence, it will not interfere with the discretion of the Judge in directing an issue: *Williams* v. *Guest*, 44 L.J. Ch. 559, L.R. 10 Ch. 467, 33 L.T. 291, 23 W.R. 822.

When, on a motion in arrest of judgment, the Court below has amended a declaration, the Court of error will not consider the propriety of the amendment, but will decide upon the sufficiency of the declaration as amended: *Indermaur* v. *Dames*, 36 L.J. Ex. 181, L.R. 2 Ex. 311, 16 L.T. 293, 15 W.R. 434—Ex. Ch.

A Court of error will not consider whether a Judge, who has jurisdiction to amend, has exercised his jurisdiction rightly or wrongly: *Emery* v. *Webster*, 10 Ex. 901, 3 C.L.R. 713, 24 L.J., Ex. 186, 1 Jur. (N.S.) 381, 3 W.R. 250—Ex. Ch.

Where costs are in the discretion of the Judge, the Court of Appeal will assume that he has exercised his discretion unless it is satisfied that he had not in fact exercised his discretion, but has applied some rule which excluded the exercise of his discretion: *Bew* v. *Bew*, [1899] 2 Ch. 467, followed; the dicta in *King* v. *Gillard*, [1905] 2 Ch. 7, dissented from; *Rotch* v. *Crosbie*, 54 Sol. Jo. 30—C.A.

The plaintiff claimed damages from the defendant in respect of an alleged libel and slander. The defendant counterclaimed in respect of statements made about him by the plaintiff. At the trial of the action the jury found for the plaintiff on the claim with one farthing damages and for the defendant on the counterclaim with 48s. damages; it was decided that the plaintiff should be deprived of his costs, and that the defendant was entitled to the costs of his counterclaim: *Nicholas* v. *Atkinson*, 25 T.L.R. 568—Phillimore, J.

In an action for slander the jury found the main issue in favour of the plaintiff, but returned a verdict for one farthing damages only. It was held that the plaintiff was entitled to the costs of the action: *Macalister* v. *Steedman*, 27 T.L.R. 217, affirmed on appeal (1911), W.N. 119.

The plaintiffs claimed damages for a statement published by the defendants alleging, as the plaintiffs averred, that the plaintiff company had no chance of success. The defendants denied that the words used bore the meaning attributed to them by the plaintiffs, and pleaded that they were true in their ordinary signification. The plaintiffs filed an affidavit of documents to which they scheduled their balance sheets and reports. Upon the application of the defendants an order was made for a further and better affidavit of documents, upon the ground that the plaintiffs had not disclosed the books from which the balance sheet were made up, it was *held* that the order had been rightly made, and that in any case the House would be slow to interfere with it, as the question involved was whether the discretion of the Master and Judge at Chambers had been rightly exercised in making the order.

Decision of C.A., [1910] 1 K.B. 904, 79 L.J. K.B. 423, affirmed; *Kent Coal Concessions, Ltd.* v. *Duguid and Others*, [1910] A.C. 452, 79 L.J.K.B. 872.

Where the person interested in licensed premises successfully appeals to the High Court against the amount awarded by the Commissioners of Inland Revenue as compensation, under the Licensing Act, 1904, for the

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Appeals from discretionary orders

Annotation (*continued*) — **Appeal** (§ VII I—345) — **Judicial discretion— Appeals from discretionary orders.**

non-renewal of the license, the Court has a discretion to order the Commissioners to pay the appellant's costs. Decisions of Bray, J. (1910), W.N. 76, 102 L.T. 284, 26 T.L.R. 350, on this point affirmed; but it was held, that in this case the Judge had not applied the right test, as the mere fact that the appeal had been successful to a substantial extent did not *per se* conclusively shew that the case must be remitted back to him to exercise his discretion afresh upon the matter.

[*In re Hardy's Crown Brewery, Ltd., and St. Philip's Tavern, Manchester*, [1910] 2 K.B. 257, 79 L.J.K.B. 806.]

Where the parties interested in licensed premises successfully appealed to the High Court against the amount awarded by the Commissioners of Inland Revenue as compensation under the Licensing Act, 1904, for the non-renewal of the license, Bray, J., being of opinion that in the circumstances of the case the Commissioners had acted unreasonably and that their conduct had led to the appeal, ordered the Commissioners to pay the appellants' costs. It was decided that there were reasonable grounds on which Bray, J., could so find, and that the Court of Appeal could not interfere with the exercise of his discretion. Decision of Bray, J., 103 L.T. 308, 26 T.L.R. 605, affirmed.

Semble (*per* Bray, J.) the duty of the Commissioners is to make reasonable inquiries as to the amount of compensation money payable, and not to fix the amount without giving the parties interested full opportunity of meeting any objection and of doing what can be done to avoid an appeal: *In re Hardy's Crown Brewery, Ltd., and St. Phillip's Tavern, Manchester* (*No.* 2), 103 L.T. 520, 27 T.L.R. 25, 55 Sol. Jo. 11.

The striking out of pleadings as embarrassing is a matter of discretion in the Judge, and, as a general rule, no appeal from this order will be entertained: *Golding* v. *Wharton Salt Works Co.*, 1 Q.B.D. 374, 34 L.T. 474.

An appeal will not lie from a decision resting only upon the discretion of the Court below, and not upon matters of law: *Cinq. Mars* v. *Moodie*, 15 U.C.R. 601*n*.

There is no appeal from a decision on a question which is by the practice purely within the discretion of the Judge: *Chard* v. *Meyers*, 3 Ch. Ch. 120.

An action was brought against two defendants, one of whom suffered judgment by default; the plaintiff proceeded against the other, claiming by virtue of an assignment from the first of his cause of action against the second, which was in the nature of a claim for indemnity against liability for the claim for indemnity against liability for the claim on which the judgment by default had been suffered. At the trial the action was dismissed against the second on the ground that the assignment was inoperative. Upon an appeal by the plaintiff to a Divisional Court an order was made directing that, notwithstanding the assignment, the first defendant should be allowed to amend the pleadings by claiming over against the second defendant, who was to be allowed also to amend and further evidence was to be taken if necessary:—*Held*, not a mere discretionary order, but one from which an appeal lay. *Hately* v. *Merchants' Despatch Transportation Co.*, 12 A.R. 640, followed. *Boultbee* v. *Cochran*, 17 P.R. 9. See *Williams* v. *Leonard*, 26 Can. S.C.R. 406.

It is not intended by Rule 1,170 that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from: *Campbell* v. *Weler*, 17 P.R. 289.

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Annotation

Appeals from discretionary orders

Annotation (*continued*) — **Appeal** (§ VII I—345) — **Judicial discretion—Appeals from discretionary orders.**

In an action of damages, if the amount awarded in the Court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the Judge (the exercise of a discretion on his part being in the nature of the case required), an appellate Court will not interfere with the discretion such Judge has exercised in determining the amount of damages: *Levi* v. *Reed*, 6 Can. S.C.R. 482.

A Court of appeal should not interfere with damages awarded by a judgment under consideration in appeal unless they appear to have been calculated upon a wrong principle or arrived at without regard to considerations which ought to govern a tribunal in awarding damages. It is not sufficient if the Judges in appeal sitting as Judges in the first instance might have given as some of the Judges in the Court below in this case were disposed to give, larger damages: *Mayor of City of Montreal* v. *Hall*, 12 Can. S.C.R. 74.

Where witnesses residing out of Ontario come within the jurisdiction and are about to return to their homes, an order may be made for their examination here before their departure.

Such an order is a discretionary one, and where the witnesses have been examined under it, will not be reversed on appeal unless a very claimant case of error appears: *Delap* v. *Charlebois*, 15 P.R. 142.

As to interfering with discretion of Judge on an application for an interlocutory injunction, see *Hathaway* v. *Doig*, 6 A.R. 264.

Semble, that whether the Court or a Judge before whom the relator brings his case, will go further than declare the election of the defendant void, and will proceed as well to seat the relator is a matter of discretion not to be interfered with on appeal: *Regina ex rel. Clarke* v. *McMullen*, 9 U.C.R. 467.

Under C.S.U.C., ch. 13, sec. 26, there was no appeal to the Court of Error and Appeal, where a new trial was granted in the Court below on a matter of discretion only; and an appeal in such case, was, under sec. 10 quashed with costs: *Hall* v. *Hamilton*, 24 U.C.C.P. 302.

The plaintiff, being in possession of land as tenant of H. was evicted by the defendant who claimed under an overdue mortgage. A non-suit was entered at the trial on the ground that the defendant was at law entitled to possession, evidence of equitable right to possession in the plaintiff having been refused. The Court of Queen's Bench in its discretion granted a new trial:—*Held*, that the Court of Appeal could not interfere: *Robinson* v. *Hall*, 6 A.R. 534.

The Court will not hear an appeal where the Court below in the exercise of its discretion, has ordered a new trial on the ground that the verdict is against the weight of evidence: *Eureka Woollen Mills Co.* v. *Moss*, 11 Can. S.C.R. 91.

A writ issued from the High Court of Justice for Ontario in June, 1887, was renewed by order of a Master in Chambers three times, the last order being made in May, 1890. In May, 1891, it was served on defendants, who thereupon applied to the Master to have the service and last renewal set aside, which application was granted and the order setting aside said service and renewal was affirmed on appeal by a Judge in Chambers and by the Divisional Court. Special leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal, which also affirmed the order of the Master, holding that the Master had jurisdiction to review his own order; that plaintiffs had not shewn good

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Appeals from discretionary orders

Annotation (*continued*) — Appeal (§ VII I—345) — Judicial discretion— Appeals from discretionary orders.

reasons, under Rule 238 (*a*) for extending the time for service; and the ruling of the Master having been approved by a Judge in Chambers and a Divisional Court, the Court of Appeal could not say that all the tribunals below were wrong in so holding:—It was held that for the same reason as was given in the Court of Appeal a further appeal to the Supreme Court of Canada must fail and be dismissed. *Howland* v. *Dominion Bank*, 22 Can. S.C.R. 130.

The renewal of a writ of summons after its expiration is matter of judicial discretion and when a County Court Judge had so renewed such a writ as to defeat the operation of the Statute of Limitations and the defendant made no attempt to appeal from his order, but appeared to the writ without objection, a Divisional Court, on appeal from the judgment in the action, refused to entertain an objection to the validity of the writ: *Butler* v. *McMicken*, 32 O.R. 422.

It appeared that the plaintiffs acquired knowledge of the particular defect in the obliteration of the stamps on the note sued on during the argument in the Court below, but that no application to re-stamp the note had been made until after the judgment of the Court had been pronounced, when it was refused. *Semble*, that the judgment of the Court below on such a question is not appealable: *Banque Nationale* v. *Sparks*, 2 A.R. 112.

The Supreme Court of Canada, on appeal from a decision affirming the report of a referee in a suit to remove executors and trustees, which report disallowed items in accounts previously passed by the Probate Court, will not reconsider the items so dealt with, two Courts having previously exercised a judicial discretion as to the amounts and no question of principle being involved: *Grant* v. *Maclaren*, 23 Can. S.C.R. 310.

What is proper compensation to be allowed to a trustee for his management of a trust estate is a matter of opinion, and even if, in granting the allowance, the Court below may have erred on the side of liberality, that alone is not sufficient ground for reversing the judgment. Where the Master had allowed $125 which the Court, on appeal, increased to $250, the Court of Appeal refused to interfere: *McDonald* v. *Davidson*, 6 A.R. 320.

A Court of Appeal ought not to differ from a Court below on matters of discretion unless it is made absolutely clear that such discretion has been wrongly exercised: *Jones* v. *Tuck*, 11 Can. S.C.R. 197.

But where a Judge had by law the jurisdiction at his discretion to refuse an order for costs on good cause being shewn and he refuses to exercise this discretion, upon an erroneous view of the law that he had no such jurisdiction, an appeal will lie from his decision. *Young Hong* v. *Macdonald*, 15 B.C.R. 303, 17 W.L.R. 417.

SASK.

S. C.

1912

May 13.

DELBRIDGE et al. v. PICKERSGILL et al.

Saskatchewan Supreme Court. Trial before Johnstone, J. May 13, 1912.

1. TROVER (§ I B—10)—LOCKING A GRANARY DOOR—WHAT AMOUNTS TO CONVERSION.

The placing of a lock upon the door of a granary with the intent to exercise control over grain contained therein, inconsistent with the real owner's right of possession, amounts to a conversion of the grain sufficient to permit the latter to maintain an action of trover against the wrongdoer.

[*Burroughes* v. *Bayne*, 5 H. & N. 296; *Fouldes* v. *Willoughby*, 8 M. & W. 538, referred to.]

2. LIENS (§ I—2*a*)—ABSENCE OF AGREEMENT—RIGHT OF LIEN—THRESHERS' LIEN ACT (SASK.).

The owner of a threshing outfit cannot claim a lien on grain threshed under the Threshers' Lien Act, for compensation for threshing it at a certain rate per bushel, where there was no definite agreement thereto, but the rate was to be determined by the yield per acre.

3. DAMAGES (§ III J—203)—MEASURE OF DAMAGES FOR TROVER—PLAINTIFF REPOSSESSING GOODS—NOMINAL DAMAGES.

Where the plaintiff in an action for trover, has repossessed himself of the goods and chattels alleged to have been converted, without it appearing that he had suffered any appreciable damages, he is entitled to nominal damages only.

Statement

THE plaintiffs are farmers, carrying on farming operations in the Moose Jaw Judicial District. The defendants owned and operated a threshing outfit in the same district during the season of 1911, and during such season threshed for the plaintiffs 3,718 bushels of flax. The defendants claimed $1,041.04 on account of threshing, being at the rate of 28 cents per bushel for the said number of bushels. The plaintiffs having refused to pay this sum, the defendants seized 866 bags of the flax threshed, purporting to be acting within the powers conferred by the provisions of the Act respecting Threshers' Liens. The seizure was effected through the bailiff of the defendants placing a lock upon the door of the granary containing the flax. The plaintiffs sued in trover and for what, perhaps, might be termed as trespass.

Judgment was given for the plaintiff.

S. F. Dunn, for plaintiff.

N. R. Craig, for defendant.

Johnstone, J.

JOHNSTONE, J.:—I had some little doubt at the trial owing to the difficulty which I then felt in defining what constituted a sufficient act of ownership over chattels to amount to a conversion so as to support an action of that character, as distinguished from such an act of interference with the flax as would only afford ground for an action of trespass.

As there was in the seizure, however, a taking with the intent of exercising over the flax a control in the circumstances of this case inconsistent with the real owners' right of possession, I have decided the action is well laid. See *Burroughes* v. *Bayne*, 5 H. & N. 296, 29 L.J. Ex. 185, 2 L.T. 16; *Fouldes* v. *Willoughby*, 8 M. & W. 540, 5 Jur. 534.

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There was no agreement, I find as a fact, to pay 28 cents a bushel as claimed by the defendants, and they had no right or power under the Act to make the seizure they did nor for the amount they did. I can arrive at no other conclusion on the evidence than that there was a contract to thresh, but in so far as the rate per bushel was concerned, there was no definite arrangement. It was agreed that the rate should be determined by the yield per acre, namely sixteen cents per bushel should the yield be as much as ten bushels per acre but twenty cents per bushel should the yield be less than ten. The yield was greater than ten bushels per acre, and the defendants were entitled to be paid only at the rate of sixteen cents per bushel on 3,718 bushels, or $594.88.

It transpired incidentally during the trial that the plaintiffs had become repossessed of the flax after action brought through a sheriff's officer, but there was no legal evidence to shew how or under what process the sheriff's officer acted. The plaintiffs, nevertheless, got their flax, without, so far as the evidence shews, having suffered any appreciable damage. The plaintiffs will be entitled to nominal damages, $1, and to their costs of suit.

The defendants counterclaimed for the threshing of 3,718 bushels at 28 cents per bushel. The plaintiffs paid into Court $595.00, being at the rate of sixteen cents per bushel, the rate to which I have found the defendants entitled. The defendants will, therefore, have judgment on their counterclaim for $594.88, but without costs. The moneys in Court to be paid out to the defendants less the plaintiffs' damages and taxed costs which are to be first paid to them out of such moneys.

Judgment for plaintiffs.

CARLSON v. McEWEN.

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March 22.

Quebec Court of Review, Tellier, DeLorimier and Dunlop, JJ.
March 22, 1912.

1. ANIMALS (§ I C 2—32)—LIABILITY OF OWNER OF DOG FOR INJURIES—KNOWLEDGE OF HABIT OF RUNNING AFTER AND BARKING AT PASSERS-BY.

One who owns a dog that was in the habit of running out and barking at passers-by on the highway, is liable for injuries sustained by a skilled horsewomen, who, while exercising care, was thrown from her horse by reason of its becoming frightened and unmanageable at the barking of the dog which ran into the highway as she was passing.

Statement

APPEAL by way of inscription in review from the judgment of the Superior Court, Mercier, J., delivered on April 24, 1911.

The appeal was dismissed and the judgment in the Court below was affirmed.

J. G. Laurendeau, K.C., for the plaintiff.

Messrs. *D. McCormick* and *S. A. Lebourveau*, for the defendant.

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Montreal, March 22, 1912. The opinion of the Court was delivered by

DUNLOP, J.:—The defendant inscribes in review from the judgment rendered by the Superior Court for the district of Beauharnois, on the 24th April, 1911, maintaining the plaintiff's action and condemning him to pay her the sum of $1,468.05, with interest and costs. This is an action in damages taken by the plaintiff against the defendant for injuries suffered by her in an accident, caused as she claims, through the fault of the defendant.

The plaintiff, by her action, in effect, alleged that on the 2nd June, 1902, she was married to Olof Oberg, from whom she was divorced on the 15th November, 1907; that on 5th of May, 1910, she was riding on horseback on one of the roads in the parish of St. Louis de Gonzague, in which was situated the defendant's property, and when opposite it the defendant's dog ran at the horse she was riding, barking in such a manner that the horse became frightened, wheeled round and ran away, and the plaintiff was thrown to the ground, and she claims that, in the fall, the joint of her left shoulder was fractured and dislocated to such an extent that she had to be taken to the hospital in Montreal, where the head of the bone had to be removed, causing her permanent deformity and serious loss and damage, which, for the purpose of avoiding costs, she reduces to $1,200. The plaintiff further claims that she had to incur expense to the amount of $282.50 in consequence of the accident. She alleges that it was caused by the defendant's dog running out at the horse; that she was an expert horsewoman; that at the time of the accident she was riding the horse with care; that the horse was a quiet one, easily managed, and that the defendant was responsible for the accident by reason of his imprudence in allowing his dog to run loose, when he knew the dog had the habit of running out at people and horses.

By the conclusions of her declaration the plaintiff claims from the defendant $1,482.50, to wit, $1,200 and $282.50.

The defendant, by his plea, besides putting in issue the other allegations of the declaration, expressly denied that the accident in question was caused by his dog, or that his dog was vicious, as alleged; and further, specially pleaded that in any event the plaintiff's claim was grossly exaggerated.

The trial Judge maintained the plaintiff's action as above mentioned, and found that she had proved beyond all doubt; that the accident of which she was the victim on the 5th May, 1910, had been caused by the defendant's dog; that she had established by the evidence of disinterested witnesses that her version, as given at the trial, was true; that the proof made by the plaintiff, as well as by the numerous witnesses examined on her behalf, in support of her case, is amply confirmed by that

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which she has also made regarding the antecedents of the dog in question, and that the proof which the defendant had attempted to make, that the accident was due to other causes than that alleged by the plaintiff, and that his dog had nothing to do with the accident, was not conclusive, taking into consideration the contradictions between the evidence of the plaintiff's witnesses and those of the defendant, and that, moreover, the witnesses of the defendant were interested either by relationship or by marriage or from the fact of being in the employ of the defendant.

The trial Judge further held that it had been proved that the accident was not caused by the plaintiff, who was an expert rider, nor by any action of the well-trained horse which she rode, and that it had been clearly established that the defendant's dog alone caused the accident and the damage which resulted from it, and that, as was incontestably the fact, the injuries suffered by the plaintiff were very serious, and rendered judgment for the sum above mentioned with costs.

The principal question in this case is this, whether the dog was really on the road when the accident occurred. The defendant pretended that the dog was in the house, and that it only left the house after the accident. If the dog was on the road and the plaintiff's version of the accident is true, in my opinion, there is no question that the action of the dog in running after and barking at the horse was the cause of the accident.

It is established that, shortly after the accident, the plaintiff was asked by one Mad. Barrington what had happened and if the accident was caused by the horse, and she answered: "No, it was the fault of the dog." An important fact is that when the defendant's wife arrived on the road, after the accident with her dog, it commenced barking, and the plaintiff said to her: "For God's sake, take that dog off me"; this certainly shews that she had reason to complain of the dog.

It is of the utmost importance that the Court should see the witnesses and hear their version of the facts, and the trial Judge came to the conclusion, after carefully considering the facts, that the witnesses for the plaintiff were to be believed in preference to those for the defendant, inasmuch as the plaintiff's witnesses were strangers, who have had no possible interest in the case.

Another important point in this case is that it is conclusively proved the defendant's dog was in the habit of running out and of barking at pedestrians and vehicles passing.

After careful consideration I am inclined to agree with the learned Judge in giving more credence to the plaintiff's witnesses than to those of the defendant. There are, no doubt, many contradictions in the evidence. It is quite possible that the dog might have been there, though not seen by some of the witnesses. As to the damages, there is no question as to the sum of $268.50,

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for expenses incurred by the plaintiff, and I would not feel inclined under the circumstances of this case and taking into consideration the very serious injuries suffered by the plaintiff, to disturb the judgment in any respect, unless it had been clearly shewn that the trial Judge had failed to appreciate the evidence properly.

As I said before, I am of opinion that the trial Judge properly appreciated the evidence, and I am of opinion that the Superior Court should be confirmed with costs of both Courts against the defendant.

Appeal dismissed.

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STEVENSON v. SANDERS.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 1, 1912.

1. BROKERS (§ II A—7)—PURCHASE BY REAL ESTATE AGENT SUBSEQUENT TO AGREEMENT TO SELL—DIFFERENCE IN PRICE—FIDUCIARY RELATIONSHIP.

Where the plaintiff, a stranger in the locality, went to the defendant under the impression that he was in the real estate business and discussed with him the advisability of buying land in that locality, and a certain lot was mentioned upon which the defendant fixed a price which the plaintiff agreed to pay, whereupon he paid to the defendant a deposit and later a further sum on account and received an agreement of sale from the defendant to himself; and it appeared that the defendant in the meantime had purchased the lot at a much lower price than that at which he had agreed to sell it to the plaintiff, and thereafter the plaintiff complained to the defendant that he had sold him his own property when he thought he was only an agent, and the defendant made him an offer of his money back, which the plaintiff did not at that time accept, but on afterwards writing the defendant that he would take back his money the defendant refused to refund it; the defendant is not, by these circumstances, shewn to have been the plaintiff's agent so as to entitle the plaintiff to have the land at the price paid therefor by the defendant, nor to owe any fiduciary duty to the plaintiff to disclose, at or prior to the sale to the plaintiff, the price at which he, the defendant, had bought from the owner.

Statement

AN appeal by the plaintiff from the judgment of Gregory, J., dismissing plaintiff's action for the recovery of the difference between the price of land which the defendant had paid and the price which the plaintiff had agreed to pay, and in the alternative to set aside the agreement.

The appeal was dismissed, MACDONALD, C.J.A., dissenting.

W. J. Taylor, K.C., for appellant.

W. A. Jackson, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A. (dissenting):—The defendant was at the time of the sale in question in this action a real estate broker, although in his defence he denied that he was such. His sign was that of a person engaged in the real estate business, and as he himself says, "The principal part of my business in any sale

on commission is the re-sale of something I have already sold to a man and he comes to me and asks me to find a buyer for him again." And again:—

> Q. Have you ever recommended persons to buy property and handled the transaction for purchase and possibly the sale?
>
> A. I may have done, I cannot tell you.

But in any case it is perfectly clear that when the plaintiff went to his office he understood him to be a real estate broker, and that defendant's conversation and conduct was calculated to confirm that understanding. The plaintiff was a newcomer in Victoria, and unacquainted with the real estate market, and this he explained to defendant.

The defendant says:—

> We discussed things generally. In the course of the discussion I mentioned to him (plaintiff) this particular corner of Bay and Cook. I told him why, in my opinion, it was likely to have a good increase in value.

And again:—

> Q. Do you remember telling him it was safe for him to take it, you would buy it yourself at that figure ($2,500)?
>
> A. Yes, that is perfectly correct.

The plaintiff then went to lunch, and returning about an hour later, said he would take the lot if defendant could get it for him. A deposit of $50 was then paid on account of the purchase money, and it was arranged that a further sum amounting in all to one third of the purchase money should be paid in a few days. After making the sale at $2,500, and after receipt of this deposit, defendant went to the owner of the property, and purchased it in his own name for $2,000 less $100 allowed to him by the owner as commission, being the usual 5 per cent. In this way defendant made unknown to plaintiff a profit of $500 besides his commission on a lot which he had represented to plaintiff was good value, and which he (defendant) himself would be willing to buy at that price, knowing as he did that plaintiff was relying entirely on his integrity in the transaction. A few days thereafter, and after the one-third of the purchase money had been paid, the plaintiff called on defendant and said that he had learned that defendant had sold him his own property, and complained that he had at the time of the purchase not so understood the transaction. The defendant admitted this, but led plaintiff to believe that he had owned it previous to selling it to plaintiff, but defendant said: "If you have been under a misapprehension you can have your money back." The evidence is not very definite as to how this interview ended. It appears though that plaintiff was not willing at that time to accept his money back owing to a question of commission, and there was a suggestion by one Sherwood, an acquaintance of the plaintiff and a sub-agent of the defendants, that plaintiff should think it over for a few days. This interview occurred on the 28th of the

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month. On the 30th the plaintiff went to see the lot, and seeing the sign boards of other agents upon it, went to one of these and asked the price. This agent told him that he had sold it only a few days previously to defendant Sanders at a price which plaintiff understood to be $1,400. He then wrote a letter dated on that day to the defendant, referring to defendant's offer to give him his money back, and saying that he could not help thinking that he had paid an excessive price and, therefore, would accept the offer to have his money back. On the 1st of April defendant wrote declining to pay back the money. The plaintiff then brought the action claiming to recover from the defendant the difference between the price the defendant had paid for the property and the price which plaintiff had agreed to pay, and in the alternative to set aside the agreement, and for the return of all moneys paid by the plaintiff in respect thereof, together with interest thereon. The learned trial Judge dismissed the action, and from that judgment the plaintiff appealed to this Court.

I think the appeal should be allowed. On the 28th when the plaintiff neglected to accept defendant's offer to pay back his money, the plaintiff was not acquainted with all the circumstances of the case, while he then knew that defendant was the owner, he did not know that defendant had after receiving his deposit gone out and purchased it at a much lower price than defendant had advised him to pay for it, he had not ascertained this until the 30th. When he did ascertain it, he then promptly demanded back his purchase money. Had he then demanded the difference between the price paid by the defendant and the price charged him he would have been entitled to succeed on his principal claim, but with a full knowledge of the facts then for the first time in his possession, he elected to take back his purchase money, and that is the relief to which he is entitled. I am unable to agree that plaintiff is precluded from claiming relief now because he did not on the 28th accept the offer of the return of his money. He then knew nothing of the defendant's secret profit of $500, nor of the underhand and deceitful manner in which it had been obtained. A party is not estopped because he does not repudiate fraud before he discovers it.

I would, therefore, direct that judgment be entered in the Court below for the amount of the plaintiff's alternative claim. He should have the costs of this appeal, and of the action.

Irving, J.A.

IRVING, J.A.:—Plaintiff alleges that he was induced to enter into a contract to buy a lot for $2,500 on a representation by the defendant that he would act as plaintiff's agent, and would procure the lot for him upon the most favourable terms, and he charges that the defendant in violation of his duty bought the lot for himself at $2,000, and was selling it to him (plaintiff) for $2,500.

He claims payment of the difference between $2,000 and $2,500, or, in the alternative, that the agreement into which he entered with the defendant be set aside, and the moneys paid by him thereunder be returned to him.

The learned trial Judge after hearing the plaintiff, came to the conclusion that there was no evidence to support the contention that the defendant had agreed to act as plaintiff's agent.

The appeal is against that holding.

The evidence shews that the plaintiff, with a Mr. Sherwood, called on the defendant and discussed the question of the plaintiff buying some real estate in Victoria. The defendant pointed out what he considered would be a good point at which the plaintiff could buy; he said he would not advise the plaintiff to buy anything that he himself would not buy. A particular lot was mentioned, and the defendant said the price was $2,500. The plaintiff says (p. 27):—

> I do not think the defendant said he would go and buy it for him; nor did he say he owned it. He just recommended it.

The defendant says the word commission was not mentioned between them, but the plaintiff says (p. 25), "I naturally thought he was selling on commission."

The plaintiff and Mr. Sherwood went to lunch, and afterwards the plaintiff returned to the defendant's office and said: "I will take that lot. I will pay $50 down and pay the balance in a few days."

The defendant then wrote and signed a receipt—unfortunately, this has been lost or it might on its face shew what the true relation was. The plaintiff paid the balance of the first instalment of $833.33 and received from defendant an agreement for sale in which defendant agreed to sell him lot 15.

The plaintiff having heard from his friends that the price at which he had bought was too high, went to the defendant. The plaintiff and defendant give very much the same accounts as to what took place at that interview. The defendant says:—

> Captain Stevenson told me that he thought I had acted as a broker, and not as a principal in the transaction.

The plaintiff says:—

> I told Mr. Sanders that I thought I had paid too much, and that I was not satisfied, and that I thought he was acting as agent and not as principal (p. 30).

The defendant then said he was not acting as agent, and was not carrying on business on a commission basis, and that if he (plaintiff) was not satisfied with the transaction he could have his money back.

The plaintiff declined this offer, and went away. At that time there can be no doubt that he knew that the defendant was not acting as his agent, but was selling his own land. Two days later, *i.e.*, on 30th March, the plaintiff wrote that he still felt that he had paid too much for the lot, and that he would now

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be glad to have his money back (p. 46), but the defendant said (p. 47) that the matter could not be re-opened now. In this letter he pointed out that the reason he had made the offer to cancel was because the plaintiff seemed to be under the mistaken impression that he was acting as a broker, whereas he was the vendor and was paying Sherwood a commission upon the sale.

It is a curious thing that the point that the plaintiff now seeks to make against the defendant, viz., that he was the plaintiff's agent, was not advanced in the letter of 30th March. The explanation of this is that the plaintiff's chief grievance was that the defendant had bought the property for $1,400 and was selling it to him at $2,500. In this he was mistaken; as a matter of fact, the defendant had bought it at $2,000.

The plaintiff says he thought the defendant was to act as his agent, but that he (defendant) was to get his commission from the vendors; nevertheless, and this seems to me somewhat inconsistent, he thought his friend, Mr. Sherwood, was entitled to receive from Sanders one half the commission he was to receive from the other side because he (Sherwood) had introduced him to the defendant.

It is owing to the intervention of Mr. Sherwood that the mistake has arisen.

Mr. Stevenson entered the defendant's office with a preconceived idea that he could secure the defendant's services, advice and assistance, and that the defendant should obtain his reward for these services by taking a commission from the vendor.

The defendant, on the other hand, thought the plaintiff came to buy land from him, and his evidence and conduct is consistent with that view throughout. When he discovered the plaintiff's mistaken idea, he did, in my opinion, all that could be expected from him, he offered to restore things to their original position, but the plaintiff said, in effect, "No, knowing the mistake I was under, I will now affirm the contract" (p. 33).

I think there was some carelessness on the part of the plaintiff in assuming that the defendant would give him the benefit of his service and advice and look to the vendor for his reward. Perhaps, carelessness is too strong a word, but it was the plaintiff's loose way of taking too much for granted. An agent may get his remuneration from the other side, as in *Lowenburg* v. *Wolley*, 25 Can. S.C.R. 51, but that was a very different sort of agency. I do not think that there is any evidence of fraud or misconduct on the part of Sanders. If Sanders had been employed to buy, it would have been a fraud on his part to have sold his own property to the plaintiff, who was under the belief that he was dealing with a third party: see *Brookman* v. *Rothschild*, 3 Sim. 153, on appeal, *sub nom. Rothschild* v. *Brookman*, 5 Bligh, N.S. 165; *Gillett* v. *Peppercorne*, 3 Beav. 78; and *Kimber* v. *Barber*, L.R. 8 Ch. 56. Now, we should not lightly reach the conclusion that

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a man has been guilty of a dishonourable act. If we start the consideration of the testimony with this presumption in mind, a variance in testimony is more readily attributed to misconception of the facts by an innocent witness than to wilful and corrupt misrepresentations. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject matters.

Assuming that this was a case of mistake—as I believe it was—there was no true contract of agency (or of sale) between them. The plaintiff then might recover back his money on common law principles: *Kelly* v. *Solari*, 9 M. & W. 54, at p. 58, or he might apply in equity to get the contract set aside and to be freed from his liabilities as in *Paget* v. *Marshall*, 28 Ch.D. 255.

But the plaintiff declined both these remedies, when the defendant said he might have them, but later on elected to pursue a remedy, viz., to have the property at the price paid for it, a remedy which he would undoubtedly be entitled to if the agency were established. As he has failed to establish that relationship his action fails.

The plaintiff's counsel on the appeal abandoned that portion of the prayer for relief which asked to set aside the contract.

It appears that the defendant did not acquire his title to the property until after he had received from the plaintiff the deposit of $50. Much was made of this—and if the relationship of principal and agent existed, it would be a very serious thing, but as that relationship did not exist, there was no harm in it. A man may undertake to sell property he does not own. He does so at his own risk, but if he secures a title to the property before the purchaser rescinds, the latter has no ground of complaint.

GALLIHER, J.A., concurred with IRVING, J.A.

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

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Annotation.

Vendor without title at time of sale

Annotation—Vendor and purchaser (§ I—25)—Sale by vendor without title—Right of purchaser to rescind.

It may be laid down as a well-established rule in English and Canadian law that, if the vendor in a contract for the sale of land has no title in himself and is not in a position where he can compel other parties to supply him with a title, the purchaser may, as soon as he becomes aware of that fact, repudiate the contract and need not give the vendor time to secure the title: *Wrayton* v. *Naylor*, 24 Can. S.C.R. 295; *Clark* v. *Everett*, 1 Man. R. 229; *Johnson* v. *Henry*, 21 Man. R. 347, 18 W.L.R. 583; *Parkes* v. *Sanderson*, 2 O.W.N. 586, 18 O.W.R. 368; *Bannerman* v. *Green*, 1 Sask. R. 394; *Wirth* v. *Cook*, 2 Sask. R. 423; *Weston* v. *Savage*, 10 Ch. D. 736; *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Re Bryant & Barningham's Contract*, 44 Ch. D. 218; *Re Head's Trustees and Macdonald*, 45

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Annotation.

Vendor without title at time of sale

Annotation (*continued*)—**Vendor and purchaser (§ I—25)—Sale by vendor without title—Right of purchaser to rescind.**

Ch. D. 310; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412; *Want* v. *Stallibrass*, L.R. 8 Ex. 175; *Lee* v. *Soames*, 59 L.T.R. N.S. 366; *Re Cooke and Holland's Contract*, 78 L.T.R. N.S. 106.

Thus, where one of two parties who had agreed to exchange lands had at the time the agreement was entered into, no title to the property he was to transfer, but was negotiating for it, and the other party became aware of this fact almost immediately after the agreement was entered into, but continued in the negotiations for nearly four months before he repudiated the contract, specific performance of the contract was refused the vendor, though he had secured the title before bringing action but after the repudiation by the other party. Mr. Justice Strong, in delivering the opinion of the majority of the Court, declared that the authorities were clear that when the vendor had no title whatever to the property he assumed to sell when he entered into the agreement, as distinguished from the cases in which he had some, though an imperfect title, the purchaser in the first case might peremptorily put an end to the bargain, and was not bound to give that reasonable notice considered proper to require from him when the title was merely imperfect: *Harris* v. *Robinson*, 21 Can. S.C.R. 390, reversing *Robinson* v. *Harris*, 19 O.A.R. 134, which affirmed, by an equal division of the Judges, *Robinson* v. *Harris*, 21 O.R. 43.

Where a person sells property, which he is able neither to convey himself nor to compel any other person to convey, the purchaser, as soon as he finds that to be the case, may repudiate the contract; he is not bound to wait to see if the vendor can induce some third person to join in making a good title: *Forrer* v. *Nash*, 35 Beav. 167, 6 N.R. 361, 11 Jur. N.S. 789, 41 W.R. 8.

There is a case frequently cited to support this rule of law in which the specific holding was that a condition in a contract for the sale of land that if the purchaser should make any objection or requisition which the vendor would be unwilling to comply with, the vendor might annul the sale, did not enable a vendor to rescind the contract where he failed to shew any title whatever to the property contracted to be sold: *Bowman* v. *Hyland*, 8 Ch. D. 588.

This rule, that the purchaser may rescind the contract upon learning that the vendor holds no title to the land purchased, does not, however, apply to cases where the vendor, though he has no title in himself, has the power at the time of the contract to compel a conveyance to himself: *Foot* v. *Mason*, 3 B.C.R. 377; *Guthrie* v. *Clark*, 3 Man. R. 318; *Hart* v. *Wishard Langan Co.*, 18 Man. R. 376; *Mayberry* v. *Williams*, 3 Sask. R. 125; *Re Baker and Selmon's Contract* (1907), 1 Ch. 240; *Re Hucklesby and Atkinson's Contract*, 102 L.T. N.S. 214.

Some of the cases hold that it is the duty of the purchaser, when he finds out that the vendor has no title, to repudiate the contract at once if he wishes to escape therefrom on that ground. Thus, where a person agreed to sell an estate to which, at the time of the contract, he had no legal or equitable title, and the purchaser learned this but did not, till after some months of negotiation, repudiate the contract, specific performance was granted the vendor who, pending the investigation of the title in the Master's office, obtained title: *Eyston* v. *Simonds*, 1 Y. & C. C.C. 608, 11 L.J. Ch. 376, 6 Jur. 817.

Annotation (*continued*)—Vendor and purchaser (§ I—25)—Sale by vendor without title—Right of purchaser to rescind.

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Annotation

Vendor without title at time of sale

And the same rule was laid down in the following cases, though it did not seem necessary to the decisions therein since the purchaser apparently made no attempt to repudiate the contract on the ground that the vendor had no title, when the contract was entered into, until the hearing of the case when the vendor shewed title: *Williams* v. *Wilson*, 3 B.C.R. 613; *Salisbury* v. *Hatcher*, 2 Y. & J. C.C.C. 54, 12 L.J. Ch. 68, 6 Jur. 1051; *Hoggart* v. *Scott*, 1 Russ. and M. 293, Tamlyn 500, 9 L.J. Ch. (O.S.) 54.

A month before the trial of an action for the specific performance of a contract of the exchange of lands to which the only defence offered was that the defendant had repudiated the agreement because of the plaintiff's fraud, the defendant first ascertained that the plaintiff was not the owner of the land to be exchanged by him, and the defendant thereupon, because of that fact, obtained an order for security for costs, but made no attempt to rescind the contract on that ground. It was held that the defendant could not, at the trial, repudiate the contract because of the want of title in the plaintiff and that it would be sufficient ground upon which to grant the relief asked for by the plaintiff if he shewed title to the land on the reference: *Paisley* v. *Wills*, 18 O.A.R. 210, affirming *Paisley* v. *Wills*, 19 O.R. 303.

In *St. Denis* v. *Higgins*, 24 Ont. R. 230, it was held that where the purchaser in a contract for the sale of land knew, at the time of making the agreement, that the vendor had no title he could not repudiate the contract on that ground, disapproving of a dictum of Kekewich, J., in *Wylson* v. *Dunn*, 34 Ch. Div. 569, at p. 578, that a purchaser knowing that the vendor had no title at the time the contract was entered into, might nevertheless repudiate the same at any time before the vendor put himself in a position to complete the contract.

The rule of law here discussed does not, of course, apply to cases where the vendor has some title to the land he contracted to sell but the same is defective; therefore such cases are not included in this annotation.

AUTHIER v. DRISCOLL et al.

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May 2.

Quebec Court of Review, Lemieux, A.C.J., Cimon and Dorion, JJ.
May 2, 1912.

1. COVENANTS AND CONDITIONS (§ III C—35)—EXCLUSIVE RIGHT TO SELL REFRESHMENTS—ENFORCEMENT AGAINST ASSIGNEE OF LESSOR.

Where a lessor has made an agreement with a tenant, giving him the exclusive privilege of selling refreshments, etc., in a theatre for a fixed period, and such agreement stipulates that in case of sale, lease or transfer of the said theatre, the rights and privileges of the lessee will be protected, and the theatre is transferred by the lessor and the assigns undertake to respect all the obligations entered into by the lessor, and the assigns transfer their rights, the lessee has a direct action against the assigns first mentioned to compel the fulfilment of obligations entered into in his favour by the lessor, and need not direct his suit against such lessor.

2. ASSIGNMENT (§ III—29)—ASSIGNMENT BY LESSOR—RIGHTS OF LESSEE—IMPLIED AGENCY.

The lessor in making an agreement with the assigns under which the rights and obligations entered into by the lessor are to be respected,

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acts both personally and in the quality of agent of the lessee whom he had bound himself to protect, and the lessee is therefore a party to such transfer, even though he do not personally intervene in the deed of transfer.

THIS was an appeal by the plaintiff from the decision of the Superior Court for the district of Quebec, McCorkill, J., on February 29th, 1912, whereby the appellant's action in damages for illegal ejectment from a theatre of which he was a lessee was dismissed.

The appeal was allowed.

Alfred Savard, for plaintiff, appellant.

Charles Frémont, for defendant, respondent.

The facts of the case were stated by Lemieux, A.C.J., and the reasons of reversal by Cimon, J.

Lemieux, A.C.J.

LEMIEUX, A.C.J. (translated):—The Compagnie du Théâtre National de Québec had just been formed into a corporation and held as lessee from the city of Quebec a theatre hall situated above the Jacques-Cartier market.

On September 8th, 1910, in consideration of certain services rendered by the plaintiff Authier, the company entered into a written agreement with him, whereby it granted unto him for a period of three years the exclusive right and privilege of selling or giving out for sale in the theatre plays, librettos, theatrical reviews, photographs, refreshments, tobacco and chocolate, according to the ordinary usage of the theatre. "Cette vente," says the agreement, "sera au bénéfice de M. Authier ou de toute personne à qui il pourrait céder son privilège." And by this same writing the plaintiff agreed to supply to the theatre the necessary number of employees for the cloak room service; he was to look after his own stores, but was to have the use of the chest, show windows and of the space of the theatre store. Moreover, the writing stipulated that if the company sold, leased or transferred its theatre in any way the purchaser or possessor, whosoever he might be, "shall be bound to respect the present agreement until the expiry of three years from the date hereof."

The Compagnie du Théâtre National begun to operate this theatre and the plaintiff immediately exercised his privileges and rights until October 1st, 1911, at which time he was ejected, as will be seen later on.

But on May 24th, 1911, by deed before Baillargeon, N.P., the company leased for a period of some two years and a half (from October 1st, 1911, to May 1st, 1914) their theatre to the three defendants Driscoll, Taschereau and Murchison, together with all improvements, scenery, chairs, seats, etc. And the tenth clause read as follows:—

Les dits locataires s'engagent conjointment and solidairement. Les dits locataires respecteront l'entente qui existe avec M. Hector Authier

au sujet de la vente des journaux, chocolat, rafraîchissements de tempérance, sucreries, pendant leurs représentations.

It would appear that, on August 8th, 1911, Driscoll, Taschereau and Murchison offered to transfer their lease to a company called "The Parisian Company, Limited," and on August 23rd, 1911, this company accepted the offer in the following terms:—

> The company hereby accepts the offer of George F. Driscoll, Alleyn Taschereau and William A. Murchison of their interest in the lease and the terms specified therein . . .

but naturally the Parisian Co., Ltd., could not have greater rights under this lease than had its transferors, Driscoll et al., and the lease only came into effect on October 1st, 1911. This transfer does not seem to ever have been served on Authier, the plaintiff, who was not a party thereto.

The plaintiff was in the exercise of his rights and privileges when on October 1st, 1911, Georges Marié, who was managing the theatre affairs, ejected him from the theatre and prevented him from exercising these rights and privileges. The plaintiff believed (and he had reason to so believe) that Marié managed the theatre on behalf of Driscoll, et al., as he did not know anything about the Parisian Company, Limited. The very next day, October 2nd, through Huard, N.P., he protested against this ejectment of Driscoll, Taschereau and Murchison by speaking to Georges Marié, whom the protest described as their manager, in the theatre itself. Driscoll et al. had no place of business other than this hall. In his action instituted on October 20th, 1911, against Driscoll, Taschereau and Murchison and the Parisian Company, Limited, the plaintiff alleges his contract with the Compagnie du Théâtre National, the lease of May 24th, 1911, from the company to Driscoll et al., and he states that since October 1st, 1911,

> il s'est vu refuser l'usage de son droit et l'exercice de son privilège par les possesseurs de la salle du Théâtre National et, en particulier, par Georges Marié, le gérant de l'exploitation, M. Alleyn Taschereau, l'un des administrateurs, et la Compagnie Parisian Company, Limited . . . . et en vertu de certains arrangements entre les défendeurs Driscoll, Taschereau et Murchison et ladite compagnie, dont la nature est inconnue au demandeur, occupante de la salle du Théâtre National, le 1er octobre dernier et depuis, et ayant pour gérant le dit Georges Marié;

and the plaintiff then alleges the protest and adds that the Parisian Company, Limited, is responsible for his ejectment and damages suffered jointly and severally with the defendants Driscoll et al. He claims $200 as damages and asks for reinstatement into his rights and privileges.

As the theatre has since been destroyed by fire, the plaintiff has reduced his action to a claim for damages only. Driscoll is the only defendant who has contested. The others made default.

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Driscoll pleads that the Parisian Company, Limited, by its contract with him, Driscoll and his associates, had assumed all the obligations of the latter towards the plaintiff, and that on October 1st, 1911, it was the Parisian Company which was in possession of the theatre and that Geo. Marié had acted on its behalf.

Lemieux, A.C.J.

Mr. Justice McCorkill dismissed the action for the following reasons:—

> Considering that the plaintiff was not a party to the lease between La Compagnie du Théâtre National and Driscoll and his associates; considering that the Parisian Company had acquired possession of the said premises together with the rights and privileges of La Compagnie du Théâtre National, through the intermediary of Driscoll and his associates, and was carrying on a theatrical business in said premises on and after the first of October, 1911; considering that the plaintiff has failed to prove that he ever legally put the Parisian Co. in default to deliver said premises to him.

The plaintiff has inscribed in review from this judgment, the inscription being as against the defendant Driscoll only.

Cimon, J.

CIMON, J. (translated):—The Compagnie du Théâtre National, although the principal tenant of the city of Quebec, has to be considered here, in its relation to Authier, as principal lessor and owner of the theatre: 1 Guillouard, Louage, No. 334. In any event this company was in possession of the theatre and it leased to the plaintiff a certain space in order that he might carry on his little trade. It granted him the exclusive privilege of carrying on this trade and on the other hand the plaintiff assumed certain obligations towards the company . . . and in the contract it was specially stipulated that in case of sale, lease or transfer the company would be obliged to have the purchasers, transferees or assigns respect the rights and privileges of the plaintiff until three years had gone by. By this clause the plaintiff invested the Compagnie du Théâtre National with a mandate to protect his rights in case of sale, lease or transfer: 1 Guillouard, Louage, No. 339.

Now, by the lease of May 24th, 1911, this company leased the theatre to Driscoll and his associates. Driscoll admits this lease, but in his factum he says: "It is true that the company transferred or assigned its lease to Driscoll, Taschereau and Murchison. But the obligation of the latter to respect the understanding with Hector Authier is as towards the Compagnie du Théâtre National and as regards the company only. The plaintiff was not a party to the deed. The defendants Driscoll et al. do not recognize any creditor other than the company with which they contracted. The only claim the plaintiff might possibly have was one against the company. . . . And then the company might perhaps have called in Driscoll et al. in warranty. And Driscoll concludes there is no legal connecting link (*lien de droit*) be-

tween the plaintiff and himself. This is precisely where the defendant Driscoll is in error. The plaintiff was really a party to the lease of May 24th, 1911, in this sense, that he was represented therein by the Compagnie du Théâtre, which he had entrusted with the duty of seeing that his rights and privileges were respected in case such lease was assigned. In this lease of May 24th the company was stipulating, not for a third party, but for itself, when it obliged Driscoll et al. to fulfil its obligations towards the plaintiff, it was a stipulation in its own interest; and furthermore it was stipulating as agent of the plaintiff who had entrusted it with the duty of protecting his interests. The company, to use Guillouard's expressions (Louage, vol. 1, No. 339) was not managing its own affairs only, but also those of the plaintiff, from whom it held its mandate; there is therefore between Driscoll and Authier a direct *lien de droit* as Guillouard says not only as regards the obligations in favour of the plaintiff, but as regards those he had assumed. The plaintiff, therefore, had a direct right of action against Driscoll et al. to compel the fulfilment of obligations in his favour, and Driscoll et al. themselves had a direct right of action against Authier to compel the fulfilment of his obligations assumed by him under the said lease in favour of the Compagnie du Théâtre National. This is also the doctrine as laid down by Pothier, Louage, No. 299. *Vide* Guillouard, vol. 1, Louage, No. 369; 25 Laurent, No. 392, *in fine*.

> Le preneur (in this case the plaintiff) continue sa jouissance; il devient créancier et débiteur de l'acquéreur (Driscoll et al.); celui-ci, de son côté, profite du bail et a une action directe contre le preneur qui occupe sa chose.

Driscoll, Taschereau and Murchison obliged themselves jointly and severally to fulfil all the obligations contained in the lease of May 24th, 1911; the lease contains a special clause to that effect. They are therefore bound jointly to maintain the plaintiff in his rights and privileges. Hence the plaintiff could sue but one of them for the performance of the entire obligation. There can, therefore, be judgment against Driscoll for the whole.

But, says Driscoll, my associates and myself have never, as a matter of fact, occupied the said theatre; we were merely go-betweens between the Compagnie du Théâtre National and the Parisian Company, Limited, which assumed our rights and obligations and which occupied the theatre from and after October 1st, 1911.

Even admitting this to be true, there certainly was no novation as to the direct *lien de droit* formed by the lease of May 24th between the plaintiff and Driscoll et al.; hence it follows that if the plaintiff has any rights as against the Parisian Company, Limited, it cannot be to the prejudice of those he has against

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Driscoll, Taschereau and Murchison, he may have one more debtor, that is all.

We are of opinion to reverse and to allow the plaintiff $125 damages with interest and costs.

Appeal allowed and action maintained.

ONT.
H. C. J.
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May 6.

MORGAN v. MORGAN.

Ontario High Court. Trial before Riddell, J. May 6, 1912.

1. DIVORCE AND SEPARATION (§ V C—56)—ALIMONY—PREVIOUS AGREEMENT AS TO.

An agreement for the settlement of an action for alimony, providing for the transfer to the wife of an undivided half interest in certain lands and chattels, but containing no provision for her maintenance by means thereof, nor any other arrangement to maintain her beyond a covenant by the husband to do so, is not a bar to a subsequent action for alimony, though regard will be had thereto in fixing the amount of alimony to be awarded.

[*Gandy* v. *Gandy*, 7 P.D. 168, and *Atwood* v. *Atwood*, 15 P.R. (Ont.) 425, distinguished.]

2. DIVORCE AND SEPARATION (§ V C—58)—ALIMONY—MANNER OF FIXING AMOUNT—HUSBAND'S INCOME.

The rule often followed in England of allotting to the wife as alimony one-third of the joint income will not usually be satisfactory in Ontario, but the Court will look to what is just and reasonable, having regard to the amount and yearly value of the property of both husband and wife.

Statement

ACTION for alimony, tried at the London non-jury sittings.

Judgment was given for the plaintiff.

T. G. Meredith, K.C., for the plaintiff.

J. M. McEvoy, for the defendant.

Riddell, J.

RIDDELL, J.:—The parties intermarried in 1875; in 1894, the plaintiff brought an action for alimony, which was settled by a written agreement. This provides that the plaintiff will "withdraw or settle" the action, and return to the defendant's home, on condition that he agree to support her properly and treat her in a fit and proper manner, pay all the costs of the action, and also convey to her an undivided one-half interest in certain land mentioned. It was further agreed that, in case she should be compelled to leave his home "for such just cause as would entitle her to obtain alimony" from him "for her support and maintenance while living separate and apart from him," she should "be entitled to obtain the custody and possession of all the infant children of the . . . parties."

A deed was made, reciting the pending action, "and whereas the said party of the second part has agreed with the said party of the first part to withdraw and settle the said suit or action in consideration of the said party of the first part

conveying to her an undivided one-half interest in the lands hereinafter mentioned."

At the same time, a bill of sale was made by the defendant to the plaintiff of an undivided half interest in certain chattels. This bill of sale has recitals similar to those in the deed—although nothing is said in the written agreement as to the chattels. The bill of sale was not recorded; it contains, indeed, on its face, a stipulation that it is not to be recorded.

The defendant has remained in possession of the land and taken all the rents and profits; also of the chattels.

The plaintiff went back to live with the defendant; but he broke out again; his conduct is admittedly such as to justify the plaintiff leaving him; it is of a disgusting character, and I do not enlarge upon it.

An action for alimony was again brought, and came on for trial at the non-jury sittings at London.

The defence is based upon the agreement whereby the former action was to be withdrawn or settled.

Most of the argument was founded upon the hypothesis that the agreement was a sort of an arrangement for the wife's future support and maintenance by means of the lands and chattels conveyed to her. But that is not the case at all. There was an action pending; the defendant desired that it should be settled, and offered pecuniary inducements to the plaintiff in that view; the land and chattel interests were conveyed to her as part consideration of her settling the action and returning to the home of the plaintiff.

This is wholly different from a provision for maintenance in a separation deed, such as that in question in *Gandy* v. *Gandy* (1882), 7 P.D. 168—in which, moreover, there was a covenant not to sue for more—or that in *Atwood* v. *Atwood* (1893), 15 P.R. 425—and the like cases.

The effect of the arrangement, agreement, deed, etc., between the parties, was simply that the plaintiff withdrew her action, went back to live with the defendant as his wife, and he made an express covenant to do what the law held him bound to do, i.e., "to support and maintain" her "as his wife, and to treat her in a fit and proper manner as a wife should be treated." She became the owner of certain real and personal property—and, in view of the anticipated possibility of her being compelled to leave his home for such just cause as would entitle her to obtain alimony from him, for her support and maintenance, she was to have the children.

There is no provision here for future support and maintenance beyond that which is contained in his promise already implied by law; there is no suggestion that land or chattels or both are to be for maintenance, etc.; no covenant not to sue for alimony; and it is clearly contemplated that she may

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receive alimony in case of future misconduct compelling her to leave his house.

The agreement then is not a bar to the action. But it is not wholly without effect. In considering the amount of alimony to be awarded, regard must be had not only to the station in life and position of the parties, but also to the amount and nature of the property of which each is possessed. In England a rule which is often followed—and, speaking generally, considered as a reasonable one—is to allot to the wife an annual payment equivalent to one-third the joint income. This will not as a rule be satisfactory in Ontario. In England, in most instances, those ordered to pay alimony are in circumstances of greater affluence than those in Ontario—and the relative amount supposed to be necessary for the support of a man and a woman widely differ in the two countries. The Court, nevertheless, in proceeding upon the sound principle of looking to what is just and reasonable, does not neglect to take into consideration the amount, yearly value, etc., of the property of both husband and wife.

In fixing the alimony, some attention will be paid to the fact that she has a half interest in the land and chattels. In the present action, of course, no order can be made (except on consent) that the husband is to pay to the wife half the rental of the property, and half the value of the chattels—but he must understand that at any time an action may be brought by the wife for a declaration of her rights and appropriate relief. I do not give any specific direction to the Master as to what effect to give to the condition of ownership and control of land and chattels; he will, however, in making his report give reasons for his decision.

There will be a reference to the Master at London to determine the amount of alimony to which the plaintiff is entitled, looking to what is just and reasonable under all the circumstances—the defendant will pay the costs of action and reference.

It may, perhaps, be assented to by all parties that the alimony be fixed at $300 per annum, the defendant also to pay to the plaintiff one-half the rent of the farm—I suggest this amount; and, if all parties agree, the judgment may go accordingly.

The defendant has bettered his condition substantially since the agreement; but that fact does not influence me.

Judgment for plaintiff.

LUCYK v. GOSKI.

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June 17.

Saskatchewan Supreme Court. Trial before Newlands, J. June 17, 1912.

1 COSTS (§ I—2)—SUCCESSFUL DEFENDANT—SLANDER ACTION.

Costs of defence may be refused in an action for slander to a successful defendant who is found not to have used the alleged slanderous words, if by his pleading he has set up not only a denial of the use of the words but also a plea that if he had used them they are true, if the evidence shews that they were not true.

Statement

THE plaintiff, an infant, sued the defendant, a neighbouring farmer, for having made in the Russian language a false and malicious statement imputing to her unchastity, such statement, as she alleged, having been spoken in the presence of several bystanders who understood the meaning of the words used. The defendant in his statement of defence set up, among other pleas,

if the defendant did speak or publish the said words, which he denies, the said words complained of are true in substance and in fact.

Judgment was given for the defendant.

H. M. Allan, for plaintiff.

R. E. Turnbull, for defendant.

Newlands, J.

NEWLANDS, J.:—I am of the opinion that the defendant did not use the words complained of. Judgment for the defendant. I, however, refuse the defendant costs on account of his pleading that the words alleged to have been spoken by the defendant were true in substance and in fact. They were not true, and the defendant had no right to put such a plea on the record.

Judgment for defendant.

GREAT WEST LAND CO. v. STEWART.

ONT.

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April 23.

Ontario High Court. Trial before Middleton, J. April 23, 1912.

1. VENDOR AND PURCHASER (§ III—39)—PURCHASE PRICE PAYABLE IN INSTALMENTS—ASSIGNMENT BY PURCHASER.

Where an agreement for the sale of land provides for the payment of the purchase price by instalments, with interest on the unpaid portion thereof at a specified rate, which is also the rate payable by the vendor under a mortgage of the land made by him, and the land is resold by the purchaser under a similar agreement calling for the same rate of interest, which is then assigned by him to the original vendor as security for the purchase price remaining unpaid upon the original agreement of sale, the fact that the original vendor is subsequently compelled to pay a higher rate of interest to his mortgagee does not enable him to exact such higher rate from the ultimate purchaser whose agreement has been assigned to him.

2. VENDOR AND PURCHASER (§ II—33)—ASSIGNMENT OF RE-SALE CONTRACT TO VENDOR—EQUITIES.

Where an agreement for the sale of land provides that, upon a re-sale of the land, the re-sale agreement may be assigned to the original vendor as security for the purchase price remaining due to him

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and, without any intention to mislead the original vendor, the re-sale agreement is so drawn that a larger sum appears thereby to be owing thereunder than is in fact so owing, the original vendor cannot, as assignee of the re-sale agreement, exact payment of such larger sum, but must take the re-sale agreement subject to the true state of the accounts between the parties thereto.

Statement

ACTION by the Great West Land Company Limited and the Union Trust Company Limited against James Stewart and others for a declaration of the plaintiffs' rights and the rights and responsibilities of the defendants under certain agreements, and for an injunction.

Matthew Wilson, K.C., for the plaintiffs.

R. T. Harding, for the defendants.

Middleton, J.

MIDDLETON, J.:—On the 3rd March, 1906, the Great West Land Company agreed to sell to Messrs. Leitch et al. 100,000 acres of land in Saskatchewan, at $6.50 per acre. It was not intended that the purchasers should themselves pay for these lands; and the agreement contains clauses dealing with the rights of those to whom the purchasers might sell portions of the land. Under the agreement, the title is to remain in the vendors until the land is paid for or until the amount paid reduces the unpaid balance to one-half of the value of the land, when a mortgage is to be given to the vendors or to the Union Trust Company for half the value of the land, with interest at six per cent.

Land sold by the purchasers or paid for is to be discharged from mortgages, upon receipt by the vendors of a fair price, either in land or purchase-agreements or mortgages; which lands, purchase-agreements, and mortgages are to be held as security for the purchase-price; and any individual purchaser of a parcel is to be entitled to have his parcel clear and to receive a conveyance when he has paid one-half of his purchase-price and reduced the amount so that the remainder will represent not more than half of the balance of the land, when the vendors will take, and procure the Union Trust Company to take, a mortgage of the purchaser as cash. All contracts of sale to individual purchasers shall be assigned to the vendors as security.

On the 25th April, 1906, Leitch et al. sold to Panton and Macbeth 60,000 acres, a portion of the lands covered by the above-mentioned agreement, at $8 per acre; the Union Trust Company, who had a mortgage upon the property, joining in this agreement. The lands sold are described in a schedule. This agreement, again, contemplated a sale by the purchasers before the completion of the contract, and it provides that the purchasers shall be entitled to sell the lands or any portion, all money and contracts of sale being turned over to the trust company.

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By an agreement of the 14th July, 1906, the Battleford Saskatchewan Farm Lands Company—who had succeeded to the title of Panton and Macbeth—agreed to sell 11,550 acres to the defendants, at $9 per acre. The lands covered by this agreement are set forth in a schedule.

Some time subsequent to this agreement, and about the 8th August, 1906, it was discovered that the vendors therein were unable to make title to some of the lands mentioned in the schedule; and negotiations took place by which another agreement, similar in its terms save as to the lands described in the schedule, was substituted. As part of the same agreement, and as compensation for the difference in value between the substituted and the original lands, it was agreed that $2,000 should be abated from the purchase-price; but, instead of modifying the terms of the contract, a duplicate of the original agreement of the 14th July was prepared, with an amended schedule. This was executed; and contemporaneously the Battleford Company signed a memorandum agreeing to credit, and crediting, $2,000 upon the first payment falling due under the terms of the substituted agreement.

Without disclosing the existence of this "crediting agreement," the Battleford Saskatchewan Farm Lands Company assigned the substituted agreement of the 14th July, 1906, to the original vendors, as collateral security for the purchase-price.

The first question arising is this: Are the vendors bound to credit upon the purchase-price this $2,000?

In the agreement between the Great West Land Company and Leitch et al. is contained a provision calling for interest at the rate of six per cent. per annum, payable half-yearly, upon the purchase-price, after maturity and upon arrears of interest; this being the same rate as stipulated in the agreement, before maturity. In the agreement between Leitch and Panton, interest is to be paid at six per cent. per annum, both before and after maturity; but there is no provision that such payment is to be made half-yearly.

In the agreement between the Battleford Land Company and Stewart, interest is also payable at six per cent. per annum, and there is no provision for payment half-yearly. Indorsed upon this agreement is a covenant of Macbeth by which he agrees to pay every alternate instalment of interest; this to be refunded to him at the end of the year by the Stewarts.

The Great West Land Company, by three collateral mortgages, dated the 5th February, 1907, mortgaged the lands in question, with other lands, to the Union Trust Company, with interest payable at six per cent. annually.

On the 11th December, 1910, an agreement was made between the Great West Land Company and the Union Trust

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Company, reciting these mortgages and the desire that the time for payment should be extended, and the assent of the mortgagees thereto upon the terms stipulated. In this agreement the land company covenant to pay interest at the rate of seven per cent. per annum, payable half-yearly, both before and after maturity.

The second question for determination is this: Are the plaintiffs entitled to claim interest against the defendants at any higher rate than six per cent. per annum, payable half-yearly? The plaintiffs contend that they are entitled to interest at the rate of six per cent. half-yearly until they were compelled to pay a higher rate to the mortgagees, when they should be allowed the amount actually paid, seven per cent. half-yearly.

The following facts are also material:—

On the 26th February, 1907, an agreement was made between the Great West Land Company— in which the trust company joined,—and Leitch—who had acquired the title of his co-adventurers under the original agreement—reciting the original agreement, the sales made under it, and the agreement of the land company, with the consent of the trust company, to cancel the agreement with Leitch and to take over the contracts of sale made by Leitch; the unsold lands reverting to the land company.

In pursuance of this, on the 18th March, 1907, a list was furnished of the sales made, which included, among others, the sale to the defendants of the 11,550 acres. By virtue of this title, the Union Trust Company made claim against the defendants in respect of the money due under this purchase. On the 2nd May, 1908, the defendants assigned certain mortgages upon lands quite apart from the parcel in question, as security for what was due under the purchase-agreement and as security for a collateral note of $25,000 given in respect of the purchase-money.

Certain questions arose between the parties other than those indicated, and litigation has been pending between them for some time; but ultimately the matters in dispute have narrowed themselves to the two questions above-indicated; and by an agreement of the 10th April, 1912, it was agreed that these questions should be submitted to me for adjudication.

I have heard the evidence and the argument of counsel; and, after giving the matter careful consideration, I have arrived at the following conclusions:—

The right of the plaintiffs, regarding them simply as vendors, is to receive the price stipulated by the agreement of the 3rd March, 1906—i.e., $6.50 per acre—and the interest thereby stipulated—i.e., six per cent. before maturity and six

per cent. on arrears of principal, with interest half-yearly (not six per cent. compounded, as this makes interest upon interest bear interest, which the bond does not call for).

If regarded from the standpoint of the purchasers (the defendants), their right, having purchased for what the agreement calls a "fair price," is to receive the lands on payment of the amount due under their purchase-agreement. This agreement provides for payment of interest at six per cent. per annum upon all payments in default, both of principal and interest; and I cannot see any way by which the rate can be increased.

In either aspect, the interest cannot be made more than six per cent. upon the principal and interest in arrear; and I think this must be computed annually, as the agreement of the 14th July is the measure of the purchasers' liability. There is no provision for compound interest.

Then as to the $2,000. It is not contended that the price, even after the abatement, is not a "fair price;" and the vendors have treated the agreement of the 14th July as one authorised by the terms of the original agreement. I cannot find any way of placing the plaintiffs, as to this, in any higher position than the Battleford company. They take the agreement subject to the true state of accounts between the parties. Had any case been made indicating that the substituted agreement of the 14th July had been made for a larger sum than really due, for the purpose of misleading the plaintiffs, then the case would be different; but, as it is, the assignee can take no more than the assignor could give.

As to costs. The defendants have succeeded in the two matters argued; but the plaintiffs have a balance due to them, and the form of the agreement was well calculated to mislead; so I leave each party to bear his own.

The case is a hard one upon the vendors, as the interest payable upon the mortgage is seven per cent.; but at the time of the agreement this was six per cent. and the contracts provide for the rate payable after maturity.

I find upon the matters submitted: (1) the defendants are entitled to have the $2,000 credited; (2) the plaintiffs are entitled to interest at per cent. annually on all arrears of principal and interest not compounded; (3) no costs.

(See terms of agreement of the 10th April, 1912.)

Judgment accordingly.

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June 7.

THE CANADA LIFE ASSURANCE CO. v. THE REGISTRAR OF THE ASSINIBOIA LAND REGISTRATION DISTRICT.

Saskatchewan Supreme Court. Trial before Newlands, J. June 7, 1912.

1. LAND TITLES (§ VIII—80)—ASSURANCE FUND—NEGLECT TO NOTE SEED GRAIN LIEN.

Where, on the faith of an abstract of title which, by reason of the failure of the registrar to note on the certificate of title the filing of a seed grain lien under the Seed Grain Act of 1908, shewed a clear title, the plaintiff purchased land at a mortgage foreclosure sale and received from the Court a clear certificate of title thereto, the fact that he did not make a special search for liens of such nature, which became binding on the land from the time they were filed, does not amount to negligence sufficient to prevent him recovering from the assurance fund the amount he was compelled to pay to free the land from such lien.

Statement

THIS is an action against the Assurance Fund under the Land Titles Act.

Judgment was given for the plaintiffs.

H. V. Bigelow, for plaintiffs.

E. T. Bucke, for defendant.

Newlands, J.

NEWLANDS, J.:—The facts are that the plaintiffs were mortgagees of the south-west quarter of 34-23-13 W. 2nd, of which one Simon Naiman was the registered owner. The mortgage was foreclosed, and the land bought in by the plaintiffs. This sale was confirmed by the Court and a clear certificate of title issued to the plaintiffs therefor. Twice during the foreclosure proceedings the plaintiffs obtained an abstract of the title to the said quarter section, and upon the faith of such abstract they purchased this property and had the sale to them confirmed. On August 11th, 1909, the plaintiffs sold this quarter section to one Moses Naiman. Subsequent to this sale it was ascertained that there were two seed grain liens upon this land amounting together to $202.54, which the plaintiffs paid off on the 15th September, 1911. These seed grain liens were given under the Seed Grain Act of 1908, and were published in the *Saskatchewan Gazette* and sent to the land titles office for registration on the 16th day of October, 1908, but were not put on the certificate of title for the said land until after the issue of the certificate of title to the plaintiffs, and consequently did not appear on the abstracts issued to the plaintiffs by the registrar.

It was argued by Mr. Bucke that because, by section 4 of the said Seed Grain Act, chapter 8, of 1908, seed grain was from the date of application a lien on the land, that it was negligence on the part of the plaintiffs not to have searched for

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THE CANADA LIFE ASSURANCE CO. v. THE REGISTRAR OF THE ASSINIBOIA LAND REGISTRATION DISTRICT.

Newlands, J.

seed grain liens, but I am of the opinion that, as section 5* of that Act provides that upon receipt of the same the registrar shall enter a memo. thereof upon the certificate of title, and as the registrar had received these seed grain liens prior to the date of the issue of these abstracts, that the plaintiffs were justified in believing that the registrar had performed the duty required of him by that Act, and that they could, therefore, rely upon the abstract as shewing the state of the title on the date they received the same. There was in my opinion no negligence on the part of the plaintiffs in relying upon this abstract and not making a special search for seed grain liens.

As to the amount of damages. The plaintiffs sold the land for what I find was its fair value at the time they bought the same, and as this amount was just about what it had cost them, they lost the amount they had to pay out to free the land from these seed grain liens, and they are, therefore, entitled to recover from the Assurance Fund the amount they paid, with interest at five per cent. from such payment.

Judgment for plaintiff.

*The Seed Grain Act (Sask.) 1908, ch. 8, sec. 5, is as follows:—

The Commissioner of Agriculture shall, as soon as conveniently may be, send to the registrar of land titles for each land registration district a statement shewing in alphabetical order the name of each applicant for seed grain as aforesaid and shewing the land for cultivation of which seed grain has been furnished, the amount agreed to be paid by each applicant for seed grain as aforesaid and the date for which interest is payable and if the said land was on such date owned by the applicant or if the said land is shewn in the records of the land titles office by caveat or otherwise to be held under an agreement for sale in favour of the applicant the registrar shall upon receipt of such statement enter in the register against such land and shall indorse the same upon any duplicate certificate of title thereafter issued therefor a memorandum as follows: "This land is subject to a seed grain lien in favour of His Majesty as represented by the Commissioner of Agriculture for the Province of Saskatchewan for the sum of . . . dollars and interest thereon at five per centum per annum from the . . . day of . . . 1908"; and in respect of any other land in his land registration district the registrar shall treat each item in the statement as if it were a writ of execution against the lands of the applicant for seed grain as aforesaid for the amount shewn thereby to be owing by the applicant and may use the form herein provided in making the memorandum required to be made by the section 129 of the Land Titles Act.

(2) Instead of entering a memorandum in the execution docket the registrar may use a separate docket to be known as the "seed grain docket."

(3) The Commissioner of Agriculture shall also cause the said statement to be published in the Saskatchewan Gazette.

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MONTREAL STREET RAILWAY CO. v. THE CITY OF MONTREAL.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. June 15, 1912.

1. MUNICIPAL CORPORATIONS (§ II B—41)—RIGHTS OF CITY OF MONTREAL UNDER CHARTER—GRANT OF RIGHTS BEYOND DELEGATED POWER.

The rights of the city of Montreal by its charter are not proprietary rights, but are merely delegated rights conferred by the Legislature; hence the city cannot grant privileges or rights beyond what are delegated to it.

2. STATUTES (§ II B—113*a*)—STATUTORY GRANT—STRICT COMPLIANCE WITH ACT.

Where the Legislature requires that privileges shall be granted by by-law, they cannot be granted or acquired in any other manner, e.g., by overt act, waiver or acquiescence either by a committee of the council or by the whole municipal council itself.

3. APPEAL (§ II C—50)—JURISDICTION OF KING'S BENCH OF QUEBEC—CONVICTION OF RECORDER'S COURT—BREACH OF CITY BY-LAW.

No appeal lies to the Court of King's Bench in Quebec from a conviction of the Recorder's Court imposing a fine of $25 for breach of a city by-law.

Statement

APPEAL from a decision of Mr. Recorder Weir, rendered on December 1st, 1909, condemning the appellant to pay a fine of $25 for breach of a by-law whereby the appellant is empowered to carry passengers only. The appeal was dismissed.

Recorder Weir.

WEIR, RECORDER:—Defendant is sued for having used its cars on St. Catherine and Alexander streets for the conveyance of building materials in contravention of the by-law which requires that they should be used exclusively for the conveyance of passengers.

The action is based upon by-law 210 of the city's by-law, which enacts that the company's cars shall be exclusively used for the conveyance of passengers.

The plea is general:—Not guilty.

Proof that defendant did on the day mentioned in the complaint convey building materials for certain persons has been made and is not disputed.

But it also established for the defence that divers materials were conveyed by defendants for use in certain street repairs in Montreal at the request of the road committee of the city council acting by and through the city surveyor, and that the service thus done was duly paid for. In two years (1908-9) the quantities hauled amounted to 44,755 tons. Even since the institution of the present action the defendant has been employed in the same service by the road committee. It is also established that the defendant has at different times paid to the city a certain proportion of its earnings in the carriage of freight; that the city has through its finance committee and treasurer received and used and still holds the moneys thus paid over, albeit under reserve.

On the 22nd October, 1908, the city notarially protested the company defendant in respect of its carrying freight.

The argument of the defendant is that the city, by itself, repeatedly requesting the company to haul freight and by accept-

ing a proportion of the company's earnings in hauling freight in general, is completely estopped from now enforcing the by-law.

It certainly does seem gravely inconsistent that one of the city departments should appear to cause a violation of the by-law for its own convenience, and that the city retains monies under the circumstances mentioned, but I do not think the case can be decided by application of the well-known doctrines as to waiver or acquiescence. The rights of these two corporations are restricted by statute and the city cannot grant rights beyond what it is empowered to grant. Beyond this its acts are simply null. The city of Montreal was authorized by 52 Vict. ch. 70, secs. 140-153, to permit under such conditions and restrictions as the council might impose by by-law, the laying of a street railway in the city, to regulate the number of passengers, the speed of the cars, etc. As to whether this clause enables the city to pass a by-law dealing with the carriage of freight, I am not called upon to say, but it is at least clear that it can only do so, if at all, by by-law. It cannot do so by overt acts, waiver or acquiescement. It must be remembered that although the city has very large powers with respect to its streets, it has not sovereign or proprietory powers. The city of Montreal, a legal body corporate, does not own the real city of Montreal. It has powers of administration which are merely delegated to it by the Legislature, and can only be exercised in the way required by the Legislature. The analogy drawn from the enlarging of the sphere of a contract by two proprietors who acquiesce in one another's acts fails here because the city is not a proprietor. It is a fiduciary corporation. It cannot act beyond the scope of its authority; and cannot do by resolution or tolerance or waiver what it is required to do by by-law. It is manifestly of great importance that statutes relating to public franchises be strictly construed. In this way the residue of unexploited public utilities can be safeguarded. (See Dillon, Municipal Corporations, 5th ed., sec. 719 *et seq.*) The street railway has shewn no legal warrant for widening the scope of its operations in hauling freight. It can only do so, if at all, in virtue of a by-law passed by the city.

No such by-law has yet been passed.

I am, therefore, of opinion that an offence against or breach of the by-law 210 has been committed, and impose a fine of $25 with costs.

The defendant appealed from the above judgment.

Messrs. *F. E. Meredith*, K.C., and *J. L. Perron*, K.C., for the appellant.

Messrs. *A. W. Atwater*, K.C., and *P. O. Lavallée*, K.C., for the respondent.

Montreal, April 15, 1912. The opinion of the majority of the Court was delivered by

CARROLL, J.:—This is an appeal from a judgment of the Recorder of the city of Montreal, condemning the appellant to

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a penalty of $25 for having carried freight in its vehicles, on the 17th of September, 1909.

The conviction is based on secs. 1 and 21 of by-law No. 210 of the city of Montreal, which decree that the company shall carry passengers only in the streets of the city.

The appeal is instituted in virtue of 9 Edw. VII. ch. 72, art. 1, which reads as follows:—

> In all cases or proceedings in which the amount in dispute relates to one or more muncipal or school taxes or assessments or fines or penalties, imposed by any municipal by-law, exceeding in all the sum of five hundred dollars, or to the interpretation of a contract to which the municipality is a party, the subject matter whereof is of the value of at least five hundred dollars, there shall be an appeal from the final decision of any Recorder or Recorder's Court to the Court of Review or the Court of King's Bench.

The appellant says that this penalty of $25 is incurred for each day, so that the total penalty that he might be called upon to pay exceeds $500. This contention cannot prevail, for here we are dealing with a condemnation to a penalty of $25.

On the question of jurisdiction I declared I would express my opinion on the merits of the case. I am alone in saying that this Court has no jurisdiction to hear this case, but I agree with the majority in deciding that the appeal should be dismissed.

The appellant says that we are dealing here with the interpretation of a contract between it and the city. Yet it appears on the face of the proceedings that the company is proceeded against in virtue of by-law No. 210, and not by virtue of its contract, which was not even invoked before the Recorder's Court where the company contented itself with pleading "not guilty" in answer to the complaint laid against them.

Although the question has not been discussed, I am asking myself whether the Recorder's Court has jurisdiction to interpret the contract passed between the city of Montreal and the Montreal Street Railway Company. For, if the city has jurisdiction to interpret this contract, it could annul the same.

And yet that is a civil matter, essentially of the jurisdiction of the ordinary civil Courts.

If we refer to the charter of the city of Montreal, 52 Vict. ch. 79, we shall see that the Recorder's Court has a most limited jurisdiction in civil matters. It has jurisdiction to adjudicate summarily on actions in recovery of any sum of money due to the corporation for taxes or assessments imposed by a by-law or resolution of the council for the leasing of butcher stalls, or for taxes imposed on public markets, or on private butcher stalls within the city, and also on actions for the price of water, and for the wages of servants. It also has concurrent jurisdiction with the Circuit Court and Superior Court (sec. 151) in actions concerning the relations between lessors and lessees, provided in this latter case that the annual value or consideration of the immoveables occupied does not exceed the sum of $100. In

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short, it is an inferior Court which has only the special jurisdiction laid down by the statute. It has no other.

Where can we find a jurisdiction to interpret contracts as the one passed between the company appellant and the city of Montreal, where the value in issue mounts up in the millions? It is quite true that it is declared there is a right of appeal where the interpretation of a contract of a value of more than $500 is involved. But this refers to contracts which may be entered into relatively to the matters hereinabove mentioned. But where is the law authorizing the Recorder's Court to interpret civil contracts of the nature of the present one? I cannot find it, and consequently I come to the conclusion that the Recorder's Court had no jurisdiction to interpret this contract, for it is impossible to confer jurisdiction upon an inferior Court by an incidental declaration which apparently covers all these contracts, when such Court does not, as a matter of fact, possess this jurisdiction for the case specified.

But leaving aside this aspect of the question, it seems to me that the carriage of freight is an offence foreseen by the by-law; that there is no appeal from the decision of the Recorder inflicting a penalty of $25, and that we are not called upon to deal here with the interpretation of the contract, but with the interpretation of the by-law.

The statute 52 Vict. ch. 79, art. 143, p. 53, authorizes the municipal council of Montreal to pass by-laws in order to sanction and allow under the conditions, and with the restrictions which the council may impose, the establishment of any street railway or other railway within the city, and to impose penalties which are not to exceed $400 from the companies which shall operate these railways, or from their employees, for every and each violation of this by-law. The Recorder has exclusive jurisdiction to decide all contraventions against this by-law 210.

The council is authorized by the Legislature to insert in this by-law all the conditions which it may seem advisable relatively to the granting of such franchise. One of these conditions is that passengers alone shall be carried. Therefore, if freight is carried, one of the provisions of the by-law is contravened.

The city council had the power to impose this condition. We are not called upon here to interpret a contract, but to interpret by-law No. 210, which is a law which obtains within the limits of the territory to which it applies.

But the appellant argues that the city has no right of action because it has acquiesced in the illegal act of the company.

It is established, it is true, that the city, by its sub-committee on roads, requested the company to carry and acquiesced in the carriage of 44,000 tons of stone. The sub-committee approved of this illegality.

It is strange, seeing that certain representatives of the city of Montreal have acquiesced in an illegal act which has profited

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the city, to now see the city suing the company which has committed an illegal act by carrying freight for third parties.

But we cannot deal with the relations between a municipal corporation and a carrier company in the same manner as with the relations between individuals. Individuals are masters of their actions. Officers of corporations are not master of theirs. The municipal councils themselves, in full meeting, only exercise the powers delegated by the Legislature. They cannot exercise any others; so that neither the councils nor the officers of a corporation can acquiesce in an illegal act or one not authorized by law. The appeal is dismissed with costs.

Cross, J.

CROSS, J. (dissenting):—At the hearing the objection was made that neither the complaint nor the conviction disclosed an offence.

The charge, of which the appellant was convicted, as recited in the city's factum, is:—

> Pour s'être le 17 du même mois (septembre 1909) en la dite cité, illégalement servie de ses chars, sur les rues Ste. Catherine et Alexandre, pour transporter des matériaux de construction, savoir de la pierre, du sable et du ciment, alors qu'elle ne pouvait en faire usage que pour le transport exclusif des passagers, et ce, contrairement au Règlement No. 210 de la cité.

It is therefore necessary to verify if what is so charged has been validly made an offence punishable by fine.

It is enacted in sec. 41 of the ordinance that the company's cars shall be exclusively used for the conveyance of passengers.

As authority for the making of such an enactment, we were referred in the respondent's factum to 52 Vict. ch. 79, art. 140, par. 53, but on looking at that paragraph (or at par. 98 of 62 Vict. ch. 53, sec. 300, which seems to be to the same effect), I find power there given to sanction by by-law four specified things, none of which have to do with the use which may be made of tram-cars except in the matter of number of passengers per car and speed of cars.

At the hearing we were, however, referred to 6 Edw. VII. ch. 67, sec. 5, which provides that "(c) The company may carry freight, provided always that the company shall not haul freight upon the streets of any municipal corporation except with the consent of such municipal corporation first had and obtained by by-law thereof." The Act just quoted from is an Act to amend the Acts relating to the Montreal Street Railway Company.

Though not cited to us, I take it that there are statutory enactments which gave the respondent's council power by by-law to regulate the use of the streets, to prohibit the depositing of building materials thereon, and to license and regulate street railway companies engaged in carrying passengers, baggage or freight in the city: 62 Vict. ch. 53, sec. 300, pars. 1, 4 and 29, *ibid.*, sec. 299, item 3.

The question thus comes to be: Is it a valid exercise of such

powers for the city council to enact that a street railway company shall use its cars exclusively for carriage of passengers?

The question would have been much simpler if there had been a by-law enactment prohibiting the carrying of goods for hire and if the charge had been for the carrying of goods for hire in breach of the by-law. We have to do with a charge of use of cars to carry stone, sand and cement, and it is said that this is a violation of an ordinance enacting that the cars shall be used exclusively for carriage of passengers.

It is thus only by inference that the carriage of goods can be said to have been forbidden. Now there are multitudes of uses to which tram-cars can be put which the city council has no authority to forbid. If the company chose to have its directors use them as dwelling houses, the city council has no authority to prohibit such use, and yet that use is just as much forbidden by the by-law as is carrying stone or lime or cement.

It was, of course, quite competent for the city council and the appellant to agree by civil law covenant that the cars would be used only for the single purpose of carriage of passengers, and I consider that that is what it did do and that the civil law remedy is open to have such a covenant carried out and observed unless something has happened which would amount to a tacit renunciation by the creditor of the civil law right arising out of the obligation.

The ordinance in question (No. 210) is made up of contractual covenants and of penal provisions. Breach of the latter is made punishable by penalty, but breach of the former is not so punishable. For example, the appellant could not be fined under the by-law for failing to pay over to the respondent the stipulated proportion of earnings.

The council might have made the matter of the charge here in question one of the penal provisions by inserting in the by-law a prohibition of carriage of goods for hire, but, instead of doing that, it covenanted for a limited use of the cars, a covenant which may be required to be fulfilled on the one hand or may be waived on the other hand by the city though not by its council or officers from time to time in whole or in part, just as performance of an ordinary civil law obligation may be required or waived at the will of the creditor.

The city appears to have so understood the matter, as it has not repudiated the acts of its aldermen and surveyor who have had over 40,000 tons of stone carried for the city itself, and has even applied to the Superior Court to stop the appellant from carrying freight "excepté lorsque ce fret sera transporté pour la réquisition spéciale" of the city itself. The business could not well be lawful when done for the city and punishable by fine when done for anybody else.

It may be added that the right of the appellant, regarded simply as one of the public, to carry goods upon the King's

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highway, is abridged in the city of Montreal only in so far that it is not to "haul freight upon the streets," which I take to mean carry goods for hire, an abridgment which would not apply to carriage of goods otherwise than for "freight" or hire, for example, carriage of ties or rails to mend the tracks. The complaint does not charge carriage of stone, sand or cement for freight or hire.

Appeal dismissed, CROSS, J., *dissenting.*

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May 15.

JACOB v. TORONTO R. CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. May 15, 1912.

1. APPEAL (§ VIII L—476)—FINDING OF JURY—NEGLIGENCE—INJURY TO PASSENGER ALIGHTING FROM STREET CAR.

A verdict for the plaintiff for injuries sustained by the starting of a car with a jerk as he was about to alight therefrom will not be disturbed where there was sufficient evidence, although conflicting, to go to the jury that the plaintiff had not time to alight in safety before the car started.

Statement

APPEAL by the defendants from the judgment of Sutherland, J., upon the findings of a jury, in favour of the plaintiff, in an action for damages for injuries sustained in alighting from a car of the defendants. The plaintiff alleged and the jury found negligence of the defendants in starting the car with a jerk when he was in the act of alighting or about to alight. He was thrown under the car, and his foot was so crushed that it was necessary to amputate it. The jury awarded the plaintiff $2,000 damages.

The appeal was dismissed.

D. L. McCarthy, K.C., for the defendants.

J. E. Jones, for the plaintiff.

Meredith, J.A.

The judgment of the Court was delivered by MEREDITH, J.A.:—This case was, I think, one for the jury: and whether they have well or ill done their duty in it is not for this Court to determine, there being evidence adduced in it upon which reasonable men might find as they have found.

The weight of the testimony favours the defendants' contention that the plaintiff did not attempt to get off the car until it was running at considerable speed, after leaving the place where his companions got off without injury.

But the plaintiff very positively testified that such was not the case; that the car was started again with a jerk just as he was in the act of getting off; and there is other evidence that the car was started with a jerk before time had been given for passengers to alight.

Again, it seems to have been well proved that the plaintiff and one of his companions started at the same time with the purpose of alighting from the rear platform, but were directed by the conductor to go to the front platform and alight there, and that they thereupon proceeded to obey that direction, his companion alighting in that way before the car was put in motion. No reason is given, or reasonable suggestion made, which would account for the very considerable delay of the plaintiff in following his companion, if the defendants' contention be true that the plaintiff did not attempt to get off until after the car had started again and had gone some distance and acquired such speed that it would be very dangerous to attempt to alight from it then: the strong probability is that he closely followed his companion; and, if so, his story of the occurrence is quite probable. All the incontrovertible circumstances are in accord with the plaintiff's story, though it may be that they are not inconsistent with the defendants' contention.

The testimony that some person pushed his way to the front of the car, as if with the intention of alighting, after the car was put in motion, is very strong; but there is, of course, the possibility—however slight or otherwise—that this person was not the plaintiff; possibly some one getting to the front of a crowded car so as to be able to alight quickly at the next stopping place; a possibility gaining weight from the fact that not one person, but two—the plaintiff and his companion—went to the front together, the companion alighting before the car was put in motion; and no attempt was made to identify this pushing person as the plaintiff.

I am unable to say that the verdict can in any way be disturbed here.

Appeal dismissed with costs.

RE GRAND TRUNK PACIFIC RAILWAY CO.
(File 2236.72.)

The Board of Railway Commissioners. March 18, 1912.

1. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—COMPULSORY OPERATION OF NEWLY CONSTRUCTED RAILWAY.

The Board of Railway Commissioners cannot compel a railway company to open and operate for passenger and freight traffic a newly constructed road, as the determination as to when it shall be opened for traffic rests solely with the railway company.

2. CARRIERS (§ III B—384)—RAILWAY IN COURSE OF CONSTRUCTION—CAMP SUPPLIES—CONTRACTORS—LABOURERS—RAILWAY ACT, SEC. 261.

A railway company may rightfully carry as freight over a road that is in course of construction, for an independent contractor, who was building it, ordinary construction and camp supplies necessary to such work and, as passengers, it may also carry labourers for employment thereon, notwithstanding the road has not been opened for general traffic by an order of the Board of Railway Commissioners under sec. 261 of the Railway Act.

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3. CARRIERS (§ II A—12*a*)—DUTY TO TRANSPORT PASSENGERS—NOT OPENED FOR TRAFFIC—RAILWAY ACT, SEC. 261.

A railway company cannot lawfully carry passengers over a road that has not been opened for traffic by an order of the Board of Railway Commissioners under sec. 261 of the Railway Act, except labourers employed in the construction thereof.

4. CARRIERS (§ IV C 4—542*a*)—DISCRIMINATION—RAILWAY NOT OPENED FOR TRAFFIC—SUPPLIES NOT NECESSARY FOR CONSTRUCTION—RAILWAY ACT, SEC. 317.

It constitutes an unlawful preference and discrimination, under sec. 317 of the Railway Act, for a railway company to carry for an independent contractor over a road he is constructing which had not yet been opened to the public for traffic by an order of the Board of Railway Commissioners under sec. 261 of the Railway Act, camp and contractor's supplies other than those actually necessary for the construction of the road, to be sold by the contractor for his own benefit.

5. CARRIERS (§ IV C 4—542*a*)—DISCRIMINATION—ABSENCE OF KNOWLEDGE ON PART OF RAILWAY COMPANY—NO ATTEMPT TO ASCERTAIN FACT—RAILWAY ACT, SEC. 317.

The fact that the officers of a railway company that gave a contractor, who was building it, a preference in the transportation of freight over the road before it was opened for traffic to the public by an order of the Board of Railway Commissioners, under sec. 261 of the Railway Act, did not have knowledge that the goods transported were being sold by the contractor for his own benefit, or that they were not camp and contractor's supplies necessary for the construction of the road, will not relieve the company from the charge of giving an unlawful preference under sec. 317 of the Act, where no attempt was made by them to ascertain if the goods transported were actually necessary to the construction of the road.

6. CARRIERS (§ IV A—519)—GOVERNMENTAL CONTROL—ORDERS OF BOARD OF RAILWAY COMMISSIONERS.

Where a railway company had been carrying passengers over a newly constructed road that had not been opened for traffic by an order of the Board of Railway Commissioners under sec. 261 of the Railway Act, the Board will refuse to make any order directing the company to open the road for traffic on that account, but will forbid the company from continuing to carry passengers except under the provisions of the Railway Act.

Statement

HEARING of petitions of the residents of Resplendent, B.C.; Fitzhugh, Alberta; Moose Lake, B.C.; Prairie Creek, Alberta; Edmonton, Alberta; Edson, Alberta; and Hinton, Alberta, for an order directing that the Grand Trunk Pacific Railway Company be compelled to open for traffic its line from Prairie Creek west. Heard at Edmonton, Alta., March 18, 1912.

Mr. Mabee.

The Chief Commissioner, Hon. J. P. MABEE (oral):—Under section 261 provision is made as follows:—

> No railway, or any portion thereof, shall be opened for the carriage of traffic, other than for the purposes of the construction of the railway by the company, until leave therefor has been obtained from the Board, as hereinafter provided.

Then the following sub-sections of section 261 make provision for the formalities necessary for the opening of a railway for traffic, and the initial requisite is that the company should be desirous of so opening this railway for traffic.

Now, the law gives the company the right to say, and the company only, when that railway is in the condition physically

and otherwise to be opened for traffic. Then, when the company is desirous, that is, when the company is of opinion that its railway is ready to be opened for traffic, the law provides that an official of the railway, defined in sub-section 2, should make an affidavit stating that that railway, or some portion of it, was, in his opinion, sufficiently completed for the safe carriage of traffic, and ready for inspection.

Then it is inspected by one of the Board's engineers, and upon that engineer's report the Board is authorized to open it for traffic. The Board, even, has no jurisdiction to open it for traffic after the application is made by the railway, unless one of its inspecting engineers has reported, after examining it, that, in his opinion, the opening of that road, or that portion, for the carriage of traffic, will be reasonably free from danger to the public using the same.

Now, those provisions are all perfectly reasonable. It is perfectly reasonable, it seems to us, that the railway company should, in the first place, have the sole right to say when it wants to open its road for traffic, and it is perfectly reasonable that the law should require an engineer, or some official of the railway company who is in authority, to make an affidavit that the road was, in his opinion, sufficiently completed for the safe carriage of traffic. Then, it is reasonable that that road should be inspected by an independent engineer before the Board could authorize the carriage of traffic.

Those provisions, of course, are all for the safety of the general public, as regards both the transportation of passengers and freight.

From those sections it is perfectly clear that we would have no authority to require this railway company to open its railway west of Hinton for traffic. It has applied for in the past and it has obtained orders for opening as far as Hinton. Beyond that no application has been made, and beyond that this Board is powerless to require the railway to open its road for traffic, or to carry passengers or freight.

What I have said disposes of any suggestion that we should or could require it to be opened for traffic. But that does not end the situation. The evidence here discloses that, under some arrangement with Foley, Welsh & Stewart, who are building the road, the railway is carrying, or understands it is carrying, freight for Foley, Welsh & Stewart, and labourers either having entered their employ, or intending to enter their employ when they reach the proper point.

As I have said during the discussion, I do not know of any clause in the Railway Act that forces a railway company to carry either freight or passengers for its contractor during construction. Section 261 provides that the railway should not be open for traffic other than for the purposes of the construction of the railway by the company. The railway here is not being

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Mr. Mabee.

constructed by the company; it is being constructed by independent contractors. But, as I have said, it seems entirely reasonable that a railway company should carry freight and labourers (by freight I mean ordinary supplies, camp utensils, and so on), where its road is being built by a contractor. It would be absurd if a railway company could not do that legally.

So let us assume for the sake of the discussion that this railway company is entirely within its right in carrying contractors' supplies and labourers for the building of the railway by its contractors. It is reasonable that it should do that; but if it is reasonable that it should do that, it is equally unreasonable that it should go any farther. They have no right to carry passengers other than those labourers, and they have no right to carry freight other than the contractors' supplies.

In this case, it has been established, and we find as a fact, that they have carried general passengers other than the labourers of their contractors; and it has been established, and we find as a fact, whether managing officials of the railway company knew it or not we say nothing, because the evidence discloses nothing upon the point, but it remains as a fact that it has carried contractors' supplies that were sold by the contractors and were not used in the maintenance of their camps.

To that extent the railway company has violated the provisions of the law, it seems to us, under the first head clearly, in putting on a general passenger coach, accepting fares from the general public, and putting forth to the public a time table that it was operating trains upon the main line of their railway, between Edmonton and Fitzhugh, carrying day coaches. Under that head it has clearly violated the statute.

Under the second head it may in one feature of it be a hardship upon the railway, if it understands it is carrying only contractors' supplies, to be held responsible for what that contractor does with those supplies after they are delivered over to the contractor; but there is no evidence here that the railway company has made any effort whatever either to find out that all of the supplies that were being taken in for Foley, Welsh & Stewart were necessarily contractors' supplies, nor has there been any evidence given here that the railway company made any attempt to distinguish between the passengers riding upon its trains, as to whether they were labourers or employees of the contractors, or whether it was the general public which were being carried.

The order, it seems to us, we are at liberty to make is this:—

Under section 317 a railway company is prohibited from making or giving any undue or unreasonable preference or advantage to or in favour of any particular person or company, of any particular description of traffic, in any respect whatsoever.

We find that the railway company here has discriminated in favour of its contractors, Foley, Welsh & Stewart. It has carried passengers who were not labourers, and it has carried camp supplies that were sold by Foley, Welsh & Stewart, which came in competition with other merchants who were carrying on their business at a disadvantage, namely, in being required to haul their supplies long distances over roads that made the haulage extremely expensive, and that expensive transportation made the cost of their product entirely out of proportion to that which the contractors of this railway company (by reason of their goods being hauled in by the railway company), cost them.

We make an order:

1st. That the Grand Trunk Pacific Railway Company shall cease discriminating in the carriage of freight traffic in favour of its contractors as against the general public over the section of the road in question; and that for any and every case of default or continuation of the discrimination the Grand Trunk Pacific Railway Company shall be subject to a fine of one hundred dollars.

2nd. We make no order with reference to the carriage of passengers. The railway company may or may not continue to carry passengers, or it may or may not continue to carry freight. It need not do either. We are saying nothing about that. We cannot require it to carry either passengers or freight. All we can do is to say, if it does carry freight and passengers, it has to carry them under the provisions of the statute.

Order accordingly.

WALSH v. HENNESSEY.

Manitoba King's Bench. Trial before Prendergast, J. June 12, 1912.

1. EVIDENCE (§ II K—318)—PROMISSORY NOTE—RENEWABLE ON PAYMENT OF STATED SUM—REBUTTAL OF CLAIM THAT GIVEN FOR ACCOMMODATION ONLY.

The fact that a promissory note bore conspicuously the words "renewable on payment of $50.00 cash" is some evidence that the note was not given for accommodation only.

Statement

ACTION on promissory note for $4,200, the defence being accommodation.

Judgment was given for the plaintiff.

W. J. Moran and *R. D. Guy*, for plaintiff.
M. G. Macneil and *B. L. Deacon*, for defendant.

Prendergast, J.

PRENDERGAST, J.:—The defendant admits that when he signed the note, it was in the same state as when produced at the trial,—that is to say, bearing most conspicuously the words "Renewable on payment of $50.00 cash."

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Then, the evidence of Emmons, called by the defendant, is decidedly favourable to the plaintiff, in that he swears that the next day after the defendant signed the note, he met him and asked him why he should have done so, as he (Emmons) was not signing any note. This shews distinctly that Emmons, who had heard the previous day what the plaintiff told the defendant about using the note in the bank, understood the import of the conversation to be that the note was being given, not merely as accommodation paper as set up by the defendant, but as an unconditional promise to pay as contended by the plaintiff.

As to paragraph 5 of the statement of defence, which was also made ground for counterclaim, I find that the plaintiff undertook to pay the debts set out in schedule, exhibit 4, on the representation that with taxes and wages they were all the debts due by Walsh and Hennessey, the whole amounting to $8,400 (on which figure the amount of the note was based), and that his obligation was discharged by paying debts of the said firm up to $8,400, even if two items on the schedule were left unpaid.

There will be judgment for the plaintiff as claimed, and the counterclaim will be dismissed—with costs to the plaintiff, including those of defendant's examination for discovery.

Judgment for plaintiff.

B.C.

C. C.
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May 30.

RIRIAZES v. LANGTRY.

Vancouver County Court, British Columbia, His Honour Judge Grant presiding. May 30, 1912.

1. ALIENS (§ I—3)—CONSENT OF JUDGE—REQUISITES—RECOVERY OF PENALTY—R.S.C. 1906, CH. 97, SEC. 4.

The written consent of the Judge of the Court in which it is intended to bring an action to recover a penalty under the Act respecting the Importation and Employment of Aliens, as required by sec. 4 of ch. 97, R.S.C. 1906, must shew the name of the person in respect of whom the offence is alleged to have been committed, give the time and place thereof, and shew also that such person was an alien or foreigner, with sufficient certainty to identify the particular offence intended to be charged, although not in the same technical form required in an information.

[*Rex* v. *Breckenridge*, 10 O.L.R. 459, followed; *Rex* v. *Johnson & Carey Co., Limited*, 2 O.W.N. 1011, 18 O.W.R. 985, specially referred to.]

Statement

MOTION by defendant to set aside the summons and plaint served on him on the following grounds :(1) that there was no jurisdiction on the face of the proceedings; (2) that the order for leave to sue was insufficient and was made without jurisdiction; (3) that the plaintiff was not competent to bring an action for a penalty under the Alien Labour Act, R.S.C. ch. 97.

E. M. N. Woods, for the applicant (defendant).

F. B. Hill, for plaintiff (*contra*).

GRANT, COUNTY JUDGE:—The statute under the authority of which this action was brought is ch. 97, R.S.C. 1906, intituled "An Act respecting the Importation and Employment of Aliens."

In the view I take of objections 1 and 2, it will be unnecessary for me to consider any other objection.

By sec. 2 of the Act it shall be unlawful for any person . . . . in any way to assist, encourage or solicit the importation or immigration of any alien or foreigner into Canada under contract or agreement . . . . made previous to the importation or immigration of such alien or foreigner to perform labour . . . . of any kind in Canada.

Sec. 3 provides that for every violation of any of the provisions of the last preceding section the person . . . . violating it . . . . shall forfeit and pay a sum not exceeding $1,000 and not less than $50.

For the recovery of the above penalty sec. 4 provides:—

> The sum so forfeited may, with the written consent of any Judge of the Court in which the action is intended to be brought, be sued for and recovered as a debt by any person who first brings his action therefor in any Court of competent jurisdiction in which debts of like amount are now recovered.

The consent referred to in the plaint is in the following form:—

> In the County Court of Vancouver, holden at Vancouver: In the matter of the Alien Labour Act, being R.S.C. ch. 97, and in the matter of intended proceedings to recover a penalty. Between Deimetrios Ririazes, plaintiff, and M. Langtry, defendant. In Chambers, before his Honour Judge Grant, Friday, the 22nd day of March, A.D. 1912.
>
> Upon hearing Mr. F. B. Hill, of counsel for the proposed plaintiff, and upon hearing the affidavit of Deimetrios Ririazes filed herein on the 22nd day of March, A.D. 1912: [This is an error, as no affidavit has been filed in connection with such consent.]
>
> It is ordered that the said Deimetrios Ririazes be at liberty to sue for and recover as a debt a sum not exceeding $1,000, provided as a penalty pursuant to the Revised Statutes of Canada, 1906, ch. 97.
>
> The consent of the undersigned, a Judge of this Court, is hereby granted to the bringing of the proposed action in this Court.
>
> It is further ordered that the costs incidental hereto be costs in the cause.
>
> DAVIS GRANT, J.J.C.C.

It will be observed that in the body of the above consent there is no reference to the person in respect of whom the violation of the Act is alleged to have been committed, or of the time and place when and where committed, nor is there anything to shew that the person alleged to have been hired or assisted to come to Canada was an alien or foreigner.

I am of the opinion that the consent obtained herein has not within it the elements that are required under sec. 4 of the Act to give jurisdiction to the Court.

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Judge Grant.

I adopt the words of Meredith, C.J., in *Rex* v. *Breckenridge*, 10 O.L.R. 459, at p. 461:—

> The written consent should, in my opinion, at the least, contain a general statement of the offence alleged to have been committed, not necessary in the technical form that would be required in an information or conviction, but mentioning the name of the person in respect of whom the offence is alleged to have been committed and the time and place with sufficient certainty to identify the particular offence intended to be charged.

To the above I would add that it must appear by the consent that the person alleged to have been assisted, encouraged or solicited to immigrate to Canada, in violation of the Act, was an alien or foreigner, as that is the very kernel of the offence.

Under the consent signed herein, it would be possible for the plaintiff to prosecute the defendant for the assisting of any person to enter Canada in violation of the Act at any time within the statute of limitation of actions of this nature. This, in my judgment, was never intended by the Act, nor the Judge in granting leave herein. See also *Rex* v. *Johnson & Carey Co., Limited*, 2 O.W.N. 1011, 18 O.W.R. 985.

The consent, plaint and summons herein will be set aside with costs.

Summons vacated.

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April 24.

IMRIE v. WILSON.

Ontario High Court. Trial before Clute, J. April 24, 1912.

1. BROKERS (§ II B—12)—COMMISSION OF REAL ESTATE AGENT—INTRODUCTION BY AGENT OF PARTY WHO INTRODUCES PURCHASER.

An introduction by an agent for the sale of land of one who does not in fact purchase the land, but himself introduces a purchaser to the owner, though it may be a *causa sine qua non*, is not the *causa causans* of the sale, and the agent is not entitled to commission.

[*Stratton* v. *Vachon*, 44 Can. S.C.R. 395, distinguished; see also *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614.]

2. BROKERS (§ II B—13*a*)—PERSON FRAUDULENTLY ACTING AS OWNER—LIABILITY FOR COMMISSION.

One who, in dealing with an agent for the sale of land, acts as the owner thereof and as the person liable for commission, cannot, in the event of a sale, escape liability for such commission on the ground that he is not in fact the owner.

[*Jones* v. *Littledale*, 6 A. & E. 490, referred to.]

Statement

ACTION for a commission on the sale of land.

The action was dismissed but without costs.

J. R. Roaf, for the plaintiffs.

F. Arnoldi, K.C., for the defendant.

CLUTE, J.:—All the parties to this action are land brokers, residing in Toronto. In November or the beginning of December, 1911, the defendant Wilson stated to the plaintiff Graham that he was interested in two properties on Broadway and Eglington avenues, immediately east of North Toronto, and that the price of the one property, known as the Wilson lot, would be about $2,000 an acre, and the other, the Atkinson lot, about $1,000 an acre; and that, if Graham's firm (Imrie & Graham) could make a sale of the property, he would pay two and a half per cent. commission. The property was then visited by Graham and Wilson, and a blue print of the Wilson property was given to Graham. The person whom Graham had in view did not care for the property, and thereupon he brought it to the attention of the plaintiff Stinson, with whom the plaintiffs Imrie & Graham agreed to share the commission, if Stinson could find a purchaser. Stinson introduced to Wilson one Kligensmith, as a probable purchaser of one or the other of the properties in question. Kligensmith, at this time, was a member of a syndicate who desired to buy property in that locality. He opened negotiations with Wilson for the Atkinson property, and the deal would probably have gone through but for the death of Mrs. Atkinson. While the negotiations for the Atkinson property were pending, but suspended owing to the illness of Mrs. Atkinson, Kligensmith inquired of Wilson about the other property, and Wilson shewed him over it. The other members of Kligensmith's syndicate, not caring for the Wilson property, withdrew; and thereupon, Kligensmith states, he could not take the matter up alone, and told Wilson that, if he (Kligensmith) could get an offer, he would submit it to Wilson. Wilson received from the plaintiff Graham the blue print which he had given him, and gave it to Kligensmith.

Kligensmith obtained a purchaser; and, at the time the agreement for purchase was being closed, Wilson asked Kligensmith if he would be satisfied with two and a half per cent. commission. He stated that he would; and, in his letter transmitting the offer to Wilson, he states that the offer is conditional upon his being paid two and a half per cent. commission.

As throwing light upon the transaction and the motives of the parties, it may be stated that Wilson was desirous of putting through the Atkinson deal, because he would receive, out of that, two and a half per cent. commission upon a sale representing probably $100,000. Whereas, in the sale of the Wilson property he was not interested, and did not seek a commission, owing to the fact that the owners were friends of his, and had permitted him to occupy the premises as a summer residence.

On cross-examination, Wilson states that, when Kligensmith was introduced to him by Stinson, neither of the properties was especially mentioned. This is also corroborated by Stinson.

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I was favourably impressed with the evidence of Wilson, as far as his recollection served him. On certain points he would not contradict the plaintiffs. As to his express agreement to safeguard the plaintiffs in respect of their commission upon a sale of either of the properties, I think that the conversation referred to had, at that time, special reference to the Atkinson property. It may well be that the plaintiffs had in mind both or either of the properties; but Wilson had in mind, I think, the property in respect of which the deal was at that time likely to go through; and that, as I understand the evidence, was the Atkinson property. The result is, that the case is reduced to this simple statement. The plaintiffs were authorised to obtain a purchaser for the property in question. They introduced a probable purchaser, who retired from that position while the negotiations were pending for the Atkinson property, and himself introduced a purchaser. Wilson, however, frankly states in his evidence that he would "never have met Kligensmith had it not been for the plaintiffs." The question is, whether, under this statement of facts, the plaintiffs are entitled to recover.

The fact that Wilson did not own the property and was not interested in any way in the property further than acting as agent for and on behalf of the owner, does not relieve him from personal liability, if, in fact, he engaged the plaintiffs to find a purchaser.

In dealing with the plaintiffs he acted as owner, as the person liable, and he cannot afterwards relieve himself from such responsibility. Lord Denman said in *Jones* v. *Littledale*, 6 A. & E. 490:—

> If the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility.

It further remains to inquire whether, having been introduced by the plaintiffs to a person who procured him a purchaser, he is liable to them for the commission, though such person did not in fact become the purchaser.

The plaintiffs' counsel relied strongly on *Stratton* v. *Vachon*, 44 Can. S.C.R. 395. That case differs somewhat from the present one. There, one Moore was the person introduced as probable purchaser. He associated with himself certain other persons. After the negotiations had proceeded and some changes made in the terms, Moore for one cause or another withdrew and his associates carried out the purchase, and it was held that the agents who had introduced Moore were, notwithstanding, entitled to a commission upon the ground as put by Duff, J., that the relation of buyer and seller was really brought about by the act of the plaintiff. He says:—

> The determination of Moore and his associates to purchase, if suitable terms respecting the mode of payment could be obtained, was the

direct and normal consequence of the introduction of the property to Moore. It is impossible to maintain the position that Moore's act in associating Millar and Robinson with him in the adventure must be regarded as *novus actus intervenions* . . . How then is the matter affected by the withdrawal of Moore? That is clearly not a new and independent instrumentality. Nobody suggests that the fact of his withdrawal had any effect in forwarding the transaction.

Anglin, J., says:—

Had the property been bought by Moore to whom the defendant directly introduced it, or by any syndicate in which Moore was personally interested, the defendant's right to his commission would appear to be incontrovertible: *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.*, [1910] A.C. 614. The difficulty in the defendant's way is that, although Moore was originally interested with Millar and Robinson, he did not eventually become a co-purchaser with them. That the property was brought to their attention by Moore is not questioned; that Moore became interested in it through the introduction of the defendant is equally clear; the question is whether, in bringing the property to the attention of Millar and Robinson, Moore, though in one sense actuated by a wish to subserve his own personal interest, should, nevertheless, not be held to have done so under circumstances which entitled the defendant to a commission from the vendor.

He refers to a finding of the trial Judge,

That Moore had told the defendant he would either take the property himself or obtain a purchaser for him,

and says that

the evidence establishes that the defendant informed Flanagan of his interview with Moore and of Moore's proposal to interest friends of his from Lloydminster in the purchase.

He agrees with the trial Judge,

that the circumstances warrant an inference, if that be necessary, that Flanagan had constructive if not actual notice that his purchasers were the Lloydminster friends whom the defendant told him that Moore had proposed to interest in the purchase.

He then states that had Moore, Millar and Robinson become the purchasers it would be too clear for controversy that his introduction of the property to Moore would have been the "efficient cause" of the vendor obtaining his purchasers. He proceeds:—

I cannot see that this introduction ceased to be the efficient cause of Flanagan obtaining his purchasers and became merely a *causa sine qua non* simply because Moore, owing to other business entanglements, found himself unable to resume or proceed with the negotiations with Flanagan which resulted in Millar and Robinson buying the property.

Kligensmith states that, after the Atkinson deal fell through, he intended to make an offer for the Wilson property; but his associates would not go in with him; and that he then obtained a purchaser for the property, which was quite distinct from the first deal. No doubt, the introduction by Stinson of Kligensmith

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to Wilson was the cause without which the sale would not have been effected; but was it the causa causans, or was there a new and distinct act which intervened which really brought about the sale? If it be true, as stated by Kligensmith, and which I see no reason to doubt, that, although he intended and desired to have his syndicate join him in purchasing the Wilson property, yet, they having refused, he from that time had no further interest as proposed purchaser, and in the sale which he procured took no interest whatever beyond his commission, then, I think, this was a new and distinct transaction. It required a new act to procure a purchaser; in short, the plaintiffs' acts were not the effective cause of the sale which actually took place. The most that can be said is, that the introduction was merely a causa sine qua non.

If Kligensmith had at any time been associated with the purchaser, and then retired, or retained an interest, directly or indirectly, in the purchase, that would have been a continuing of the original negotiations brought about by his introduction to Wilson. It would have been the immediate cause of the sale. Or, if there had been any evidence of collusion, shewing that the name of the purchaser was merely changed in order to avoid liability for commission, the result might have been different; but, after a careful consideration of the evidence, I cannot find anything to support such a view. Kligensmith sought for and obtained a purchaser, who had not formerly been interested in his syndicate, and with whom he now retained no interest. That, I think, was a distinct act intervening between the introduction of Kligensmith and the sale, the real causa causans of the purchase, a new transaction attributable to Kligensmith's finding a purchaser and not to the original introduction, although that was the causa sine qua non which resulted in the sale.

While the plaintiffs cannot, I think, succeed, it is not unreasonable, under all the circumstances, that they should be relieved from the defendant's costs. The action is dismissed without costs.

Action dismissed without costs.

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April 6.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ.
April 6, 1912.

1. COVENANTS AND CONDITIONS (§ III C—38)—WHO MAY ENFORCE—SECOND MORTGAGEE RELEASING TO FIRST MORTGAGEE—RECOVERY ON COVENANT FROM MORTGAGOR.

A second mortgagee, releasing his security to a first mortgagee claiming for default in payments due under the first mortgage, but reserving his rights under the covenant to pay the mortgage money, has a good cause of action upon the covenant against the mortgagor. [*In re Richardson*, L.R. 12 Eq. 398; *Bell* v. *Rowe* (1901), 26 Vict. L.R. 511, followed.]

2. LIMITATION OF ACTIONS (§ II B—42)—COVENANT IN MORTGAGE—IMPLIED STATUTORY OBLIGATION—SPECIALTY.

The obligation to pay the mortgage moneys, imposed by a covenant implied by statute, is a specialty, and is not barred by lapse of time less than twenty years from the date of default.
[*Essery* v. *Grand Trunk R. Co.*, 21 O.R. 224.]

3. LIMITATION OF ACTIONS (§ II B—42)—MORTGAGE NOT UNDER SEAL—LAND TITLES ACT, 1 GEO. V. (ONT.) CH. 28, SEC. 102.

The covenant to repay mortgage moneys implied by the Land Titles Act, even though imported into an instrument not under seal, is a specialty debt, and the applicable period of the Statute of Limitations is twenty years, by virtue of 1 Geo. V. ch. 28, sec. 102, Ontario, being an amendment to the Ontario Land Titles Act, providing that any charge or transfer not under seal, shall operate the same as if they were under seal, being the substance of section 107 of the former Act, R.S.O. (1897) ch. 138.

4. COVENANTS AND CONDITIONS (§ III D—46)—WHO LIABLE—MORTGAGOR IN DEFAULT—LIABILITY ON COVENANT.

Inability of a mortgagee to reconvey the mortgaged premises will not bar the mortgagee's right of action upon the covenant if such inability arises from any default of the mortgagor.
[See Coote's Law of Mortgages, 7th ed., vol. 2, page 982; and *In re Burrell, Burrell* v. *Smith* (1869), L.R. 7 Eq. 399-466.]

Statement

AN appeal by the plaintiff from the judgment of DENTON, Jun. Co. C.J., dismissing an action brought in the County Court of York for the recovery of $797.20, for principal and interest, upon the covenant implied in an instrument executed and registered for the purpose of creating a mortgage or charge upon land made subject to the Land Titles Act, R.S.O. 1897, ch. 138, now 1 Geo. V. ch. 28.

Judge Denton.

The following reasons for judgment were given by DENTON, Jun. Co. C.J.:—The facts of this case are not in dispute. On the 26th August, 1891, the defendant executed a charge under the Land Titles Act in favour of the plaintiff and one Boulton, for the sum of $350 and interest, on property in Melbourne avenue, Toronto. This was a second mortgage; the first mortgage, for $1,350, being at that time held by one Ferguson. On the 9th October, 1891, Boulton transferred his interest in the said charge to the plaintiff, who thereby became the sole owner of the charge. The defendant, on the 27th August, 1891, conveyed his equity of redemption to one Sarah Morrison, who continued for a short time

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to pay the interest on the mortgages. On the 1st November, 1892, Ferguson transferred his first mortgage to Janet Harvey. No interest or principal was paid on either of these mortgages subsequent to 1894. In 1903, Janet Harvey, the first mortgagee, sold the property, for a sum which was as much as could be got for the property at that time, but which was considerably less than her mortgage debt. In order to give a title, she had either to foreclose or obtain a release of the equity of redemption from Morrison and a discharge from the plaintiff, the second mortgagee. She chose the latter course; and, on the 30th March, 1903, Sarah Morrison transferred her equity of redemption to the first mortgagee. The plaintiff then executed a cessation or discharge of his mortgage, dated the 11th May, 1903.

This cessation contains the following clause: "Now, therefore, I hereby authorize the Master of Titles to notify on the register the cessation of the said charge as to the lands described therein, it being expressly understood that I, nevertheless, reserve all my rights, claims, and demands against the said George Bailey and Alexander Claude Foster Roulton and either of them, his heirs, executors, administrators, and assigns, both for payment of the moneys secured by the said charge and upon the covenants contained in said charge and in the transfer thereof, and that this authority shall not release, prejudice, waive, or affect any other security or securities which I now have or which I may at any time hereafter obtain for the payment of the moneys secured by the said charge, it being my intention to retain all my rights, save the right to look to the said lands for the payment of the moneys secured by the said charge."

This action is brought on the covenant in the second mortgage to recover the principal and the interest that has accrued since 1894.

A discussion took place at the trial as to whether or not the action was barred by the Statute of Limitations. But, in the view I take of the case, it is unnecessary to consider that point.

It seems to me that the plaintiff cannot recover, and that for the reason that every mortgagor has a right to have a reconveyance of the mortgaged property, upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such reconveyance upon such payment being made. *Walker* v. *Jones* (1866), L.R. 1 P.C. 50, is, I think, conclusive against the plaintiff's contention. In that case, as here, the mortgagee discharged the lands and premises from the security which he held, but purported to reserve to himself any other remedy or security which he had on promissory notes which the mortgage in question was given to secure. That is upon all fours with this case. Other cases upon the same line are: *Allison* v. *McDonald* (1893), 20 A.R. 695*; *Rourke* v. *Robinson*, [1911] 1 Ch. 480; *Palmer* v. *Hendrie* (1859), 27 Beav. 349;

*Allison v. McDonald, 20 A.R. (Ont.) 695, affirmed by the Supreme Court of Canada, Allison v. McDonald, 23 Can. S.C.R. 635.

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Perry v. *Barker* (1806), 13 Ves. 198; *Gowland* v. *Garbutt* (1867), 13 Gr. 578; *Munsen* v. *Hauss* (1875), 22 Gr. 279; *In re Thuresson* (1902), 3 O.L.R. 271; *Mendels* v. *Gibson* (1905), 9 O.L.R. 94. These cases, it is true, are first mortgage cases, and it may be contended (though it was not dwelt upon in argument) that this rule does not apply to the case of a second mortgage. But, while there is, of course, a vast difference between a first and second mortgagee as regards the legal estate and the tenure and value of his security, is there any valid reason for refusing to apply this principle of law to each? A second mortgagee has vested in him an equity of redemption which he holds, as it were, in pledge. Upon repayment, the second mortgagee, by his discharge, revests in, or reconveys to, the person then entitled to it, his interest in the mortgaged premises, which is the equity of redemption. If the interest of the second mortgagee has been extinguished by the foreclosure of the first mortgage, then manifestly he has, through no fault of his own, nothing to reconvey; but where he voluntarily discharges his interest in the lands from his second mortgage, even although this is done to assist the first mortgagee to obtain a clear title, it is not plain to me that the same rule of law ought not to apply.

In this case the plaintiff, by discharging the lands from the security which he held, voluntarily and effectually put it out of his power to reconvey his interest in the mortgaged premises. By that act, on the authorities cited, he has precluded himself from recovering against the mortgagor on the covenant.

The action will be dismissed with costs.

The appeal was allowed.

W. J. Elliott, for the plaintiff. No defence arises by reason of the Statute of Limitations. When the defendant released the land, he expressly reserved his rights under the covenant in respect of the moneys to be paid: *In re Richardson* (1871), L.R. 12 Eq. 398. The mortgagor was still bound under the covenant to pay imposed by statute; and the action is, therefore, one founded on a specialty, and is not barred until after twenty years from default: *Essery* v. *Grand Trunk R.W. Co.* (1891), 21 O.R. 224. See also R.S.O. 1897, ch. 138, sec. 107; and see the same section, as amended, 1 Geo. V. ch. 28, sec. 102, as to a seal being unnecessary. The learned County Court Judge has held that the plaintiff cannot recover, because every mortgagor has a right to have a reconveyance of the mortgaged property on payment of the money due upon the mortgage. But the inability of the mortgagee to reconvey will not bar the right of action on the covenant if such inability arises from any default of the mortgagor: Coote's Law of Mortgages, 7th ed., vol. 2, p. 982. If the mortgagor had paid off the first mortgage, the property would

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not have been sold under the power: *In re Burrell, Burrell* v. *Smith* (1869), L.R. 7 Eq. 399; *Driffill* v. *McFall* (1877), 41 U.C.R. 313.

W. C. Chisholm, K.C., for the defendant. The claim is barred by the Statute of Limitations, R.S.O. 1897, ch. 72, the debt not being a specialty debt. The judgment of the learned County Court Judge is right and should be affirmed. The mortgagee must always be in a position to reconvey the land upon payment being made by the mortgagor. Here the plaintiff, by discharging the lands from the security which he held, negatived the possibility of reconveying. (Reference to the cases cited by the learned Junior Judge, *supra*.)

Elliott, in reply.

Boyd, C.

April 6. BOYD, C.:—The Land Titles Act was expressly designed to simplify titles and to facilitate the transfer of land; it is not intended to change or destroy civil rights and remedies. True it is that "seals" were in effect abolished as a necessary part of any instrument affecting land, and the forms given in the Act or approved by the Act for the transfer and the mortgaging or charging of land are to be without seals. This is intended to emphasise the fact that the virtue of the Act does not rest on the technical form and execution of the conveyance, but upon the fact of the instrument (whatever it is) being registered under the Act. It is the certificate of this registration held by the owner which corresponds to the ordinary possession of title deeds: R.S.O. 1897, ch. 138, sec. 101.

Section 13 provides that the first registration of any person as owner of land with an absolute title shall vest in that person an estate in fee simple. Section 33 provides for the mortgaging of registered land thus: every owner may charge the land with the payment at an appointed time of any principal sum, which charge shall be completed by entering on the register the person in whose favour the charge is made as the owner of the charge. Section 34 provides that, where such a registered charge is created on land, there shall be implied on the part of the owner of the land, his heirs, executors, etc., a covenant with the owner of the charge to pay the principal sum charged. And, by sub-sec. 2, where any charge, whether under seal or not, is expressed to be made in pursuance of the Act respecting short forms of mortgages, or refers thereto, then the form of words therein (according to the clauses numbered) shall have the same meaning and effect as are provided for in the Act as to short forms.

By sec. 40 (3), on the certificate of the owner of a charge authorising the discharge of any part of the land therefrom or any part of the money secured thereby, the Master may note on the register the discharge of such land from the charge or the discharge of such part of the money.

By sec. 41, every transfer of land under the Act is completed by entering on the register the transferee as owner; and till such entry the transferor shall be deemed to remain owner of the land.

Section 101 provides for the creation of a lien on the land, that is, in equity such as would arise out of a deposit of the title deeds.

Section 107 is thus expressed: "Notwithstanding the provisions of any statute, or any rule of law, any charge or transfer of land registered under this Act may be duly made under a charge or transfer without seal." By amendment made after and not affecting this transaction, this section is remodelled by declaring that the charge or transfer may be duly made by an instrument not under seal, and if so made, the instrument and every agreement, stipulation and condition therein shall have the same effect for all purposes as if it were made under seal (Land Titles Act, 1 Geo. V. ch. 28, sec. 102).

By the rules annexed to the Act, No. 71 directs the use of the forms given in the schedule, and form No. 28 is the form (not under seal) used in this case by the owner, Bailey, when he mortgaged to Beatty in August, 1891. That mortgage was to be paid in June, 1894, and in the case of an ordinary mortgage under seal the Statute of Limitations would bar at the end of twenty years —the mortgage being made before the 1st July, 1894 (R.S.O. 1897, ch. 72, sec. 1, sub-secs. (*b*) and (*h*)). In the form given by the Land Titles Act and in the instrument which was registered in this case there is nothing as to a covenant to pay: that term is supplied by the statute, in sec. 34, already quoted, *i.e.*, such a covenant shall be implied as against the owner of the land who creates the charge which is completed by the fact of registration. So that the obligation to pay, as by and under a covenant to pay, is to be regarded as a statutory obligation placed upon the owner for the benefit of the lender or chargee.

The additions to sec. 107 made by the amendment now appearing in 1 Geo. V. ch. 28, sec. 102, may prove useful in litigation arising upon the instrument in other jurisdictions; but do not seem to be needed in the present case.

The registered charge which is created *uno flatu* with the covenant to pay included or implied by virtue of the statute, is to be regarded as the effective and completed instrument, binding both land and person so far as security for the money advanced is concerned; and, though the land may be discharged by an act of grace on the part of the chargee, that does not *per se* relieve the covenantor from the payment of the debt till after twenty years have elapsed without action to recover the claim.

The release given by Beatty was limited to the land in question, and he expressly reserves his rights in respect of the moneys secured and to be paid. The effect is to free the land for the benefit of the first chargee, and so enable him to realise more

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speedily by sale of the estate, which was not worth what was due on the first charge. The effect of the registration of this cessation was, upon sale, to give the purchaser an absolute ownership as to the land, but to leave unimpaired the right of the plaintiff to proceed for the recovery of the amount due by the mortgagor, Bailey: *In re Richardson*, L.R. 12 Eq. 398; *Bell* v. *Rowe* (1901), 26 Vict. L.R. 511, *per* Madden, C.J.

The obligation to pay rests upon the covenant or contract imposed by statute; and is, therefore, an action founded upon a specialty, within the meaning of the Statute of Limitations, and is not barred by lapse of time less than twenty years from the date of default (which at the earliest was in this case 1894): *Cork and Bandon R.W. Co* v. *Goode* (1853), 13 C.B. 826; *Essery* v. *Grand Trunk R.W. Co.*, 21 O.R. 224, following *Ross* v. *Grand Trunk R.W. Co.* (1886), 10 O.R. 447.

No defence, therefore, arises by virtue of any Statute of Limitations or lapse of time.

The judgment below, therefore, should be entered against the defendant on this issue.

The next defence, and the one to which effect was given by the County Court Judge, rests upon the equitable situation of the parties, which I proceed to consider.

The first mortgagee had a power of sale by the terms of the mortgage and the statutory charge, and could enforce a sale against the mortgagor. It may be that the concurrence of the then owner of the equity of redemption and the second mortgagee assisted in the more inexpensive way of realising upon the property; but it is undoubted that the land was disposed of by the paramount act of the first mortgagee; and the law is, that, if a surplus remains unpaid after the exercise of a power of sale, the mortgagee may sue for its recovery by action on the covenant: *Rudge* v. *Richens* (1873), L.R. 8 C.P. 358. The release of the land by the second chargee was only to facilitate either the foreclosure or the sale of the property by the first mortgagee—as it appeared then that the land was not of value to satisfy even the first mortgage. Had the land been foreclosed by the first mortgagee, that change of the property would not have interfered with the right of the second mortgagee (who was not to blame) to sue upon the covenant. No doubt the rule is, that the mortgagee suing on a covenant in the mortgage must ordinarily be in a position to reconvey the land upon payment of what is due. But that does not necessarily apply to the case of a second mortgagee whose rights against the land have been extinguished by the act of the first mortgagee. The law is summarised in Coote thus, that the inability of the mortgagee to reconvey will not bar the right of action on the covenant if such inability arises from any default of the mortgagor: 7th ed., vol. 2, p. 982. The mortgagor's duty was, here, to pay off the first mortgage, and so prevent the exercise of the power of sale by which the equity

of redemption was extinguished. I think the principles of decision acted on in *In re Burrell, Burrell* v. *Smith*, L.R. 7 Eq. 399, 466, apply to this case and go to invalidate the judgment pronounced by the learned County Court Judge.

I think judgment should be entered for the amount claimed with costs and costs of appeal.

LATCHFORD, J.:—I agree. Latchford, J.

MIDDLETON, J.:—I entirely agree with my Lord the Chancellor, and only desire to add a few words out of respect to the learned Judge whose decision we are reversing. Middleton, J.

The right of the mortgagor, when sued upon a covenant, to demand a reconveyance of the mortgaged property, discussed in *Kinnaird* v. *Trollope* (1888), 39 Ch.D. 636, and the cases there cited, and the equitable right to restrain such action when the mortgagee has put it out of his power to convey, cannot, it seems to me, be invoked where the inability to reconvey arises from the default of the mortgagor himself. Here the non-payment of the first mortgage made the estate of the mortgagee absolute at law, and made the right of the plaintiff, as second mortgagee, liable to foreclosure in equity.

I do not think that the consent given by the plaintiff to the immediate exercise by the first mortgagee of his right to sell the lands operates to release the covenant. He has at most waived the taking of formal legal proceedings by the first mortgagee, which would not be to the advantage of any one; and, moreover, in his waiver he has expressly reserved his rights against the mortgagor.

It is clear, to me at least, that the loss of the property was occasioned, not by the action of the plaintiff, but by the rights conferred upon the first mortgagee by his security, and by the default of the defendant himself. This brings the case within the principle enunciated in *In re Burrell, Burrell* v. *Smith*, L.R. 7 Eq. 399.

In *Palmer* v. *Hendrie* (1860), 28 Beav. 341, the plaintiff failed to recover because he assented to the purchase-money being paid to the owner of the equity of redemption, instead of insisting upon it being applied in discharge of the mortgage debt. It was this, and not the concurrence in the sale, that was deemed improper.

Appeal allowed.

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April 3.

SCHRADER MITCHELL & WEIR v. ROBSON LEATHER CO.

Ontario High Court. Trial before Middleton, J. April 3, 1912.

1. DAMAGES (§ III A 4—83)—MEASURE OF COMPENSATION—DEFECTIVE GOODS.

Damages may be recovered upon a vendor's agreement made after the completion of a contract of sale upon the discovery that a portion of the goods sold were defective, to compensate the vendee for any loss resulting therefrom.

2. DAMAGES (§ III P 2—343)—MEASURE OF COMPENSATION—LOSS OF PROFITS—PURCHASER MANUFACTURING DEFECTIVE MATERIAL.

The damages for breach of warranty on the sale of goods which were not returned, is the difference between their value and the value which they would have borne without the defect warranted against; and it is no answer to shew that by reason of advantageous re-sales the purchaser made a profit on the transaction, notwithstanding the defect.

3. CONTRACTS (§ I E—67)—SALE OF PERSONAL PROPERTY—OMISSION OF DATE OF DELIVERY.

The validity of a contract for the sale of goods is not affected by the omission therefrom of the date of their delivery.

4. DAMAGES (§ III P 2—343)—MEASURE OF COMPENSATION—MARKET PRICE IN UNITED STATES.

Damages for the failure to deliver goods sold in Canada for shipment to Scotland, the purchasers paying the transportation charges, will be based on the Canadian market price, and not on the prices ruling in Scotland.

[See also Leake on Contracts, 6th ed., p. 778, 785.]

5. SALE (§ II—31)—TRADE DESIGNATION—WARRANTY.

On a contract for the supply of a certain quantity of a factory product, under its trade name (*ex. gr.* waxed splits of leather) to a dealer in the same trade, there is a presumption that the contract is for goods of a quality which will answer the trade designation under which they were sold, and the vendor is liable, as for breach of warranty, in respect of any portion which is so inferior in grade, either from a defect in the material itself or in the process of manufacture, as not to be merchantable goods under the trade designation.

6. DAMAGES (§ III P 2—343)—BREACH OF CONTRACT—EXPENSES OF REPLACING GOODS.

Where it would have been necessary for the plaintiff to have sent a man from Scotland to Canada in order to have purchased goods similar to those the defendant failed to deliver under a contract of sale, the expenses of such trip will be awarded as damages in an action for breach of the contract.

[See also Leake on Contracts, 6th ed., p. 776, 778.]

Statement

ACTION for two independent money claims. The first was upon an alleged agreement by the defendants to compensate the plaintiffs for loss sustained by the defective condition of waxed splits sold by the defendants to the plaintiffs, or for damages; and the second was for damages for breach of a contract for a supply of hides.

There was judgment on both claims for the plaintiffs with costs.

Glyn Osler, for the plaintiffs.

M. H. Ludwig, K.C., for the defendants.

Middleton, J.

MIDDLETON, J.:—First, it is said that the defendant company—who are tanners carrying on business at Oshawa—sold to the

plaintiffs—a partnership firm at Glasgow, Scotland—certain waxed splits, and that the goods delivered were not merchantable and saleable as waxed splits, as warranted, but that a large portion thereof were so tender as to be unmerchantable and unsaleable as waxed splits; and that, upon the discovery of the quality of the goods sent, the defendants agreed to reimburse the plaintiffs for allowances they might have to make to their customers or for loss otherwise sustained by reason of the defective condition of the goods in question.

The evidence of the parties is conflicting, and it is convenient to summarise the correspondence before dealing with the oral testimony.

The position taken by the defendants is, that there was no warranty of the splits upon which they are liable; that splits are a low and inferior grade of leather, and that there is no such thing as a difference in quality; that, so long as the leather is not so frail that it cannot with skill be manufactured into a boot, it is still a waxed split; and that there never was any undertaking to answer to the plaintiffs for any loss they might sustain; and a counterclaim is made for the recovery of $202 which had been paid on account of the loss.

The defendant's statement that a split does not cease to be a waxed split because it is tender was corroborated by the evidence of several witnesses at the trial.

There is no doubt that a split—cut as it is from the inside of the hide—is an inferior grade of leather; but it is clear to me, not merely from the evidence as a whole, but from the defendants' own correspondence, that there is a difference between a satisfactory merchantable waxed split and a waxed split which, by reason of some defect, either in the hide itself or the process of manufacture, is so tender, short-fibred and unsubstantial as to be entirely unfit for the market. I do not say that some use might not be found for even the poorest split; but certainly it is quite possible that a split may be so inferior that it fails to answer the designation "waxed split," as understood by the trade.

It is a very significant thing that throughout the correspondence there is not from beginning to end any suggestion that the plaintiffs were not justified in the statements made as to the poor quality of the goods sent. The defendants' attitude throughout is: "We accept your statement, we assume responsibility; adjust the claims as best you can, and we will stand the loss." The plaintiffs' attitude is, as far as I can see, quite straightforward and honest from first to last. When the defective goods are returned, they forward samples to the defendants. The defendants do not even trouble to inspect the samples which reached them at Oshawa. They do not repudiate the charge of inferiority, nor even seek to evade responsibility; and

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I accept the evidence of the plaintiffs upon commission, that the defendants' attitude was in the interviews apologetic and conciliatory, and that they then fully assumed the responsibility. This is quite in keeping with the letters.

Upon the whole evidence, I find for the plaintiffs, both upon the ground of the inferior grade of goods supplied and upon the ground of the agreement alleged by the plaintiffs.

Upon the commission an endeavour was made to shew that the plaintiffs had not sustained any damage, by starting with the assumption as to the profit that ought to have been made from the goods if they had been manufactured in accordance with the contract, and comparing that with the net profit made upon the whole contract. I do not think that this is the way in which the question should be approached. There is nothing in the evidence to suggest that the plaintiffs culled the goods and sold the best quality at an advanced price by reason of the culling, and that they now seek to charge the loss upon the culls against the defendants. It may be that they fortunately made a large profit upon some of the goods; but they were entitled to have all the goods approach the standard, and the loss claimed appears to me to be reasonably attributed to the inferior quality of the goods supplied.

I cannot follow the particulars in all respects. Some claims are made which I do not think are justified. The claims which I think ought to be allowed, as taken from the particulars, total $2,354.79, from which I have deducted $280.61, leaving a net balance of $2,074.18.

In view of the correspondence and what took place upon the interview in England, I do not think that a claim should be made for the loss of profits upon the cancelled order to Watson. The loss on reselling these goods, as far as I can make out, is already covered by the items for which allowance has been made.

The second branch of the plaintiffs' claim is based upon the contract made when the two Messrs. Weir were in Canada, in September. An order in writing for these goods was placed with the defendants; and I think that the letter of the 16th September, 1910, refers to and identifies this order sufficiently to get over any defence based upon the Statute of Frauds.

It is argued that this memorandum and letter do not contain the whole contract, because the date of delivery is not mentioned. I do not think that the date of delivery forms any part of the contract. No doubt, there was an expression of intention as to the probable date of shipment; but this falls far short of making it any part of the agreement.

Greater difficulty exists as to the measure of damages applicable to this branch of the case. Much of the evidence given on commission approaches the matter from the wrong standpoint.

The goods were purchased on the Canadian market, and were to be shipped from Canada, the purchasers paying the freight Although the conduct of Robson, even taking his own version of what he did, is entirely reprehensible, the defendants are not liable to pay damages unless the plaintiffs have made a case bringing themselves within the recognised rules. Their theory is, that the measure of damage is to be determined by the market-price ruling in Scotland or England. I do not think that this is correct. Not only were the goods purchased in Canada, but the market where probably eighty per cent. of splits is to be had is American; and the only evidence as to the American market is that given by the defendants.

I think that, upon this evidence, I should find that the price remained practically unchanged, and that the plaintiffs, if they had desired, could have purchased a corresponding quantity of hides in Canada without paying any increased price. When they purchased before, they found it necessary and expedient to send some one to Canada to arrange the purchase; and I think they should not be expected to purchase the substituted hides without taking the same precaution. I, therefore, allow them, as damages for the breach of the contract, what it would have cost them to send a representative to Canada to purchase. No evidence was given before me of what these expenses would have been; but I am probably not far wrong in fixing these damages at $500.

The plaintiffs, therefore, recover against the defendants a total of $2,574.18, together with their costs of action.

Judgment for plaintiff.

GREECE v. GREECE.

Quebec Court of Review, Guerin, Martineau, and Weir, JJ.
January 27, 1912.

1. WILLS (§ III A—92)—DEVISE—DESCRIPTION OF BENEFICIARY—"ELDEST CHILD."

The word "eldest child," as used in a devise of land, is not restricted to male child, and the eldest child of a family, although a female, will take thereunder to the exclusion of the oldest male who is her junior.

2. EVIDENCE (§ II K—317)—ONUS OF PROVING LEGATEE NOT INTERESTED IN ANOTHER WILL.

Where there was an evident doubt in the mind of a testator whether one of his sons or a daughter would inherit under a devise in their grandfather's will, and the testator declared in his will that no provision was thereby made for such son because of his being a devisee under his grandfather's will, but that in case such daughter, instead of such son, should take thereunder, that the latter should replace the daughter as one of the testator's universal legatees, then in order that such son, who, as a fact, did not take under his grandfather's will, may take as universal legatee to the exclusion of his sister, he must

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shew that he was not provided for by the will of his grandfather, and that the property he was supposed to take thereunder was a part of his father's estate.

3. COSTS (§ I—16*a*)—GIVING EFFECT TO TERMS OF WILL—PARTY OPPOSING —LIABILITY FOR COSTS.

Where a daughter was by the terms of her father's will displaced as one of his universal legatees by her brother by her inheritance of land supposed to belong to her brother under their grandfather's will, it is their duty to give active effect to the terms of their father's will, and where she remained passive after the brother had served upon her a notarial notice to sign a deed establishing his rights upon replacing her as such legatee under their father's will, and had provided for the costs thereof, if it became necessary for him to resort to an action to establish such rights the sister must pay the costs incurred by him.

[*Greece* v. *Greece*, 39 Que. S.C. 233, affirmed upon other grounds.]

Statement

APPEAL by way of inscription in review from the judgment of the Superior Court, *Greece* v. *Greece*, 39 Que. S.C. 233, in an action brought for a judicial declaration of plaintiff's proprietary rights in property of which the defendant was alleged to have become the holder of the title through error of law.

A. R. Angers, K.C., *A. E. deLorimier*, and *E. H. Godin*, for the plaintiff.

H. J. Elliott, K.C., and *L. A. David*, for the defendant.

Montreal, January 27, 1912. The opinion of the Court of Review was delivered by

Guerin, J.

GUERIN, J.:—On the 26th day of February, 1842, the plaintiff's grandfather, Charles Frederick Greece, by a donation *inter vivos*, gave to the plaintiff's father, Frederick Cornelius Greece, a farm at Longue Pointe, but with the following special stipulation:—

> The said Frederick Cornelius Greece shall enjoy the same during his lifetime, as a prudent administrator ought to do, and, at his death, will descend to his eldest child and his issue, failing issue, to the next eldest, and so on, in each succeeding child, the eldest and second eldest, and so on, until the extinction of the third generation, the heirs of the last child in that generation will divide the whole of the said real estate together, etc.

On the 8th of September, 1857, the plaintiff's father, Frederick Cornelius Greece, by his last will and testament, gave his whole estate to his three daughters, the defendant, and two *mises en cause*, as his universal legatees, but with the following stipulation:—

> The said testator does not hereby provide for Charles Frederick Greece, another of his lawful children, as he is, and will otherwise be, provided for by his late grandfather, the late Charles Frederick Greece, for in the event of the said Charles Frederick Greece not being, as intended, provided for by his late grandfather, he, the said Charles Frederick Greece, will with his said above-named sisters, or the survivor or survivors of them, share equally with them in the said testator's estate above bequeathed. And his sister, one of the above-

named children, who might be substituted in his, the said Charles Frederick Greece's place, and inherit the farm supposed to be intended for him, will be excluded from the above-bequeathed property and estate, and she shall not share or inherit with her said brother and sisters, or the survivor or survivors of them, in the hereby bequeathed property and estate.

After the death of the plaintiff's grandfather and father he took proceedings against his mother, who was in possession of the farm donated by his grandfather, contending that he, the plaintiff, inherited the same as the eldest male heir.

His sister, Eliza Greece, the present defendant, intervened, claiming the farm as her inheritance.

On 16th January, 1892, by judgment of this Court, it was ruled that the expression "child," in the grandfather's donation *inter vivos*, was not restricted to *male child*, and the plaintiff's sister, Eliza Greece, the present defendant, was put in possession of the farm.

The plaintiff, not inheriting as the eldest child under the special clause in his grandfather's donation, inherits under the special clause of his father's will. But, in the meantime, his father's will is registered, and his three sisters, the defendant, and the *mises en cause*, appear, at first sight, to be universal legatees.

To establish his rights to inherit under his father's will, the plaintiff must make it manifest: First, that he was not provided for by his grandfather; second, that the farm left by his grandfather was contained in the estate left by his father.

By establishing these facts he will replace his sister, Eliza Greece, the defendant, as one of the universal legatees, but not otherwise. He can do this effectively by a deed signed by his sister whom he replaces, or else by a judgment of the Court.

But there is evidently friction between the parties. The plaintiff has put the defendant regularly in default by a notarial notice, requesting her to sign a deed establishing his right to replace her, as one of the universal legatees under their father's will, and when doing so, he made provision for the payment of the cost of the writings required.

The defendant has taken no notice of the notarial requisition; she has simply remained passive, with the result that the plaintiff has been obliged to institute the present action.

If under a special clause of their father's will, the plaintiff and defendant should replace each other, it is encumbent on them both to give active effect to the terms of the will. The defendant's passive acquiescence at the eleventh hour should not relieve her from the obligation of paying the costs incurred by her refusal to comply with a reasonable request. Such obstinacy on her part was inexcusable.

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I am not of opinion that article 1047 C.C. cited in the judgment governs any right of the plaintiff in this case, but I concur in the decision which concludes the judgment appealed from and I am of opinion that the inscription in review should be dismissed with costs.

WEIR, J. (dissenting):—I am of opinion, with all respect, that the judgment of the Court below should be modified.

It is clear, from the statements even of the declaration and judgment that the defendant benefited by her grandfather's donation and was therefore, by the condition expressed in her father's will, excluded from any rights thereunder, her place being taken by the plaintiff. Or, to put it otherwise, the defendant never had any rights under her father's will as, from its very date, it was apparent that she would benefit from her grandfather's donation, and thus, from the terms of her father's will, could have no share in his estate.

The plaintiff, under the conditions of the will, inherited thereunder.

It is true that his inheritance appears to be made subject to a condition, and the difficulty that presents itself to him is to prove, that that condition happened in his favour. With that difficulty, the defendant has nothing to do. She is not obstructing him in any way. She simply refuses to help him to make the proof he wants. I do not see that this Court should penalize her for that attitude.

The defendant has the *seisin* of the property in question (Civil Code, art. 891), but finds that a mere registration of the will cannot alone be satisfactory. This arises from no act, claim, right or fault of the defendant. She is not his debtor. He had no right to protest her, as he has done. She is not in possession of anything that is his. She has not received anything which is not her due—as a matter of fact, has received nothing at all, and, therefore, is not bound to restore anything.

The plaintiff has no legal claim whatever upon the defendant. He should have accepted the defendant's offer to allow him to proceed to judgment *ex parte* without costs as to her.

In view of that offer, I see no objection to the plaintiff's rights being established by a judgment, but with costs in both Courts against him.

Appeal dismissed.

SERLING v. OLSEN.

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Quebec Court of Review, Tellier, DeLorimier and Dunlop, JJ.
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1. FALSE IMPRISONMENT (§ II A—8)—WHO LIABLE—STENOGRAPHER IN LAW OFFICE—ABSENCE OF MALICE—AMENDMENT.

Where the plaintiff, in an action for false arrest on a *capias* from which he was discharged upon the quashing of the writ, alleged that the defendant acted with malice and as the result of fraud and conspiracy, there is such a failure of proof as to the material allegations of the declaration which prevent a recovery by the plaintiff, where the evidence shewed that the defendant, a stenographer in the employ of a member of the Bar, took the action in which the *capias* issued in her own name in the usual course of her employment, and, no doubt, without the slightest malice, signed the affidavit for the writ on the strength of fact explained by her employer, and possibly acted on the strength of what she had heard in the former's office regarding the circumstances of the plaintiff's claim, as, under such circumstances, the plaintiff should have amended his declaration by substituting for the allegation of malice, fraud and conspiracy one of mere imprudence on the part of the defendant, as well as want of probable cause for suing out the writ.

Statement

APPEAL, on inscription for review, of the judgment rendered by the Superior Court, Guerin, J., on July 28, 1911, in favour of the plaintiff.

The appeal was allowed and the action dismissed but without costs.

Jacobs, Hall, and *Couture,* for the plaintiff.

H. Weinfield, for the defendant; *E. F. Surveyer,* K.C., counsel.

The plaintiff, by his declaration, claimed from the defendant $2,500 as damages, and alleged that he was a resident of Syracuse, N.Y., U.S., where he carried on a large business as a junk and metal dealer; that the defendant was a stenographer in the office of Mr. Weinfield, an attorney practising in the city of Montreal; that, in August, 1908, the plaintiff received a letter signed by William Levin, inviting him to come to Sainte Anne de Bellevue to purchase a quantity of copper, brass and junk, alleging that the same was for sale and formed part of the salvage of a distillery, which had been destroyed by fire; that the object of the letter was to bring the plaintiff to the Province of Quebec to have him capiased; that the writer of the letter was the brother-in-law of Louis Sapery, a member of the firm known as the Syracuse Smelting Works of Montreal, which, for a number of years, had had various transactions with the plaintiff, including their mutual accommodation in discounting their respective negotiable paper, at their respective banks, in Syracuse and in Montreal; that the plaintiff, as the result of this letter, came to Ste. Anne de Bellevue, and was immediately arrested on a *capias* at the instance of the defendant and through the office of Henry Weinfield; that, at the time this

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correspondence was sent to the plaintiff, Louis Sapery and William Levin were living at Ste. Anne de Bellevue; that the arrest of the plaintiff was made on an affidavit asserting an indebtedness due the defendant, and alleging secretion and the intention of the plaintiff to immediately abscond from the Provinces of Quebec and Ontario; that the plaintiff was not indebted to defendant, who was unknown to him, that the capias was quashed on the 9th of September, 1908; that subsequently, the defendant filed a *désistement* from the action against the plaintiff, with costs; that the plaintiff was from his arrest until his liberation, confined in gaol in Montreal; that his expenses in defending himself, absence from his business, loss to his reputation, suffering in his feelings, caused him serious damage and he claims from the defendant the sum of $2,500, as a portion thereof, for which he asks a condemnation.

The defendant, by her plea alleged in substance that she was a stenographer in the employ of Henry Weinfield; that the plaintiff was arrested on a *capias* issued at her instance; that she is ignorant of the other allegations or denies the same; that the damages claimed are not a direct consequence of the arrest alleged; that the taxed costs of the plaintiff's attorney in the case of *Olsen* v. *Serling*, were paid long prior to the present action; that the defendant acted in good faith without malice and with reasonable and probable cause, and solely with a view of collecting what was justly due her; moreover, the same is more than compensated by the claim she has against the plaintiff for $3,780.51, represented by four past due promissory notes which she files and she prays that the plaintiff's action be dismissed, and, subsidiarily, that, if the Court should find that the defendant is indebted to the plaintiff in any sum of money whatever, that such sum be declared compensated and extinguished by the sum of $3,780.51, due by the plaintiff to the defendant, and that the plaintiff's action should be dismissed.

The judgment in review was delivered by

Dunlop, J.

DUNLOP, J:—By the judgment of the Superior Court, rendered on the 29th of July, 1911, the defendant was condemned to pay the plaintiff $100, with interest, and costs of an action as instituted, and the defendant inscribes in review against the judgment.

The defendant objects to the judgment on two grounds; first, that the plaintiff has not proved the essential allegations of his declaration, and particularly that the plaintiff has not proved that the defendant acted with malice and was a party to a conspiracy against him; secondly that in any event, the Court should have admitted the plea of compensation and dismissed the action.

I am of opinion that the defendant must succeed on the first ground and that the plaintiff's action against her should be dismissed.

It is an elementary principle that judgment must be given *secundum allegata et probata*. If the plaintiff does not prove what he alleges or if he has not alleged what he eventually proves, his action must fail. Now, the accusation alleged by the plaintiff against the defendant is contained in his declaration already cited, and in the extracts from the other paragraphs which are contained in the judgment dismissing the defendant's demurrer.

It is sufficient to compare the declaration and the judgment to see that the trial Judge, to maintain the plaintiff's action, was obliged to substitute some allegations to those urged by the plaintiff. The judgment first states that the defendant acted with malice and was a party to a conspiracy and, ultimately, declares that the defendant is a young girl, who was the victim of other people of seasoned experience, who would have reaped the whole benefit of her proceedings, had they succeeded. But it seems to me that the defendant cannot be, at the same time, a malicious party to a fraudulent conspiracy, and, on the other hand, an innocent victim used as a scape-goat by people of seasoned experience.

By the defendant's own deposition, it would appear that the second alternative was the true one. The defendant knew nothing of the manœuvres which brought the plaintiff to Canada. She took an action in her own name in the usual course of her employment as stenographer, and, no doubt, without the slightest malice, signed the affidavit for a *capias* on the strength of facts explained to her by her employer, a member of the Bar, and possibly on the strength of what she had overheard in her employer's office about the circumstances connected with the plaintiff's bankruptcy.

Such being the case, it was the plaintiff's duty to amend his declaration by substituting for the allegations of malice, fraud and conspiracy, allegations of mere imprudence and want of probable cause.

After a careful consideration of the evidence in this case, I am of opinion that the plaintiff has failed to establish the material allegations of his declaration and that the judgment should be reversed and the plaintiff's action dismissed, but without costs, inasmuch as the defendant appears to me to have been ill-advised in the proceedings which she took against the plaintiff.

Under these circumstances, I think that each party should pay their own costs in both Courts.

Appeal allowed and action dismissed.

CAN.

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April 16.

STOCKTON AND MALLINSON v. DOMINION EXPRESS COMPANY. (File No. 4214.183).

The Board of Railway Commissioners. April 16, 1912.

1. CARRIERS (§ IV B—522)—JURISDICTION OF BOARD OF RAILWAY COMMISSIONERS TO FIX THROUGH RATES—TRAFFIC ORIGINATING IN UNITED STATES.

The Board of Railway Commissioners is without jurisdiction to require carriers of express from points within the United States to Canadian points to join with a Canadian express carrier in the establishment of joint through tariffs on traffic originating in such foreign country.

2. CARRIERS (§ IV C—527)—FILING TARIFFS—FOREIGN CARRIER—THE RAILWAY ACT, SEC. 336.

Notwithstanding sec. 336 of the Railway Act requires joint tariffs to be filed covering all traffic carried from foreign countries into Canada, the Board of Railway Commissioners cannot require the initial carrier to file such tariffs.

3. CARRIERS (§ IV C 3—535)—REASONABLENESS OF RATES—CONCURRENCE OF CANADIAN AND FOREIGN CARRIER—FILING TARIFF.

Notwithstanding the Board of Railway Commissioners cannot require a foreign express company to file or concur in a joint tariff on traffic originating in the United States for Canadian points, if they do concur with a Canadian express carrier in a joint through tariff that is fair and reasonable, the latter may be required to file it.

4. CARRIERS (§ IV B—522)—THROUGH RATES—BOARD OF RAILWAY COMMISSIONERS—ABSENCE OF CONCURRENCE OF FOREIGN CARRIER.

The Board of Railway Commissioners cannot, without the concurrence of the foreign express company, require the re-establishment of a joint through tariff on express traffic between points in United States and Canadian points.

5. CARRIERS (§ IV B—522)—RE-INSTATEMENT OF FORMER RATE—ABSENCE OF PROOF OF REASONABLENESS—FOREIGN CARRIER NOT CONCURRING.

The Board of Railway Commissioners cannot require the re-instatement of a joint through tariff that formerly existed on express traffic from points in the United States to Canadian points, so as to apply to points in Canada to which it was not formerly applicable, where the reasonableness of the rate to the new point is not shewn and the foreign carrier did not concur therein, as, in order to do so, it would be necessary to impose the cost of the additional haul upon the Canadian carrier, which would be unfair, as no portion thereof could be imposed by the Board upon the foreign carrier.

6. CARRIERS (§ IV B—522)—EXTENSION BY BOARD OF RAILWAY COMMISSIONERS OF TARIFF—NEW POINTS IN FOREIGN COUNTRY.

The Board of Railway Commissioners is without jurisdiction to extend a formerly existing tariff on express traffic between points in the United States and Canada so as to apply to points in the United States to which it was not formerly applicable.

Statement

APPLICATION to the Railway Board to fix a through express rate on certain imported fruits and vegetables.

Mr. *Walker*, for applicants.

Mr. *Burr*, for the Express Company.

Mr. Mabee.

THE CHIEF COMMISSIONER, HON. J. P. MABEE:—At the hearing at Regina the applicants alleged that they were applying for a rate on berries, small fruit, and vegetables, from Lewiston, Idaho; Hood River, Oregon; and Riparia and Walla Walla, Washington, to Regina.

It was stated that the American carriers by express were "most anxious to make tariffs with the Dominion Express Company." It was further stated that it was only a matter for the Dominion Express Company's concurrence. These features are, of course, most material, because the Board has no jurisdiction over either the carriers by express from the points mentioned within the United States, or the traffic originating thereat. It will be obvious that the Board could not require these carriers to join with the respondents in establishing a through rate of $2.00, with a 15,000 lb. minimum as asked from these foreign points, because no means exists for enforcing any such direction.

Section 336 of the Railway Act* requires joint tariffs to be filed covering all traffic carried into Canada from a foreign country; but no order of this Board could properly be made directing that such tariff should be filed by the initial carrier, and, if made, no such order could be enforced.

The case closed upon the understanding that the applicants would obtain from the Great Northern Express Company a letter signifying its consent or willingness to join in such joint through tariffs, setting forth the divisions and other material matter, or expressing its willingness to file such tariffs. While the Board could not require this foreign carrier to either file or concur, it might require the respondents to file, if the foreign carrier concurred, or concur if the foreign carrier were willing to file tariffs of the kind asked for, if they were thought by the Board to be fair and reasonable.

Instead of being able to get the concurrence or consent of the Great Northern Express Company, it now appears that the traffic manager of that company has refused to join in a $2 rate, with division upon the usual basis of local rates to and from Spokane.

In a subsequent letter to a representative of the applicants, the Great Northern Express Company states that it is willing to accept 80 cents per 100 lbs. out of whatever rate the applicants might make with the respondents based upon 20,000 lbs. minimum. The local rates to Spokane are $1.10 per 100 lbs. upon a 15,000 lb. minimum. This reduction proposed by the Great Northern Express Company would then be about $5 per car, and in no way meets the claims advanced by the applicants. The rate covered by respondents' tariffs on these fruits and vegetables, from Spokane to Calgary, Regina and Medicine Hat, is $2 per 100 lbs., minimum 20,000 lbs., and to Strathcona and

*Section 336 of the Railway Act, R.S.C. 1906, ch. 37, is as follows:—
As respects all traffic which shall be carried from any point in a foreign country into Canada, or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board.

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Saskatoon, $2.25 per 100 lbs. This added to the Great Northern Express Company's local to Spokane makes through rates of $3.10 and $3.35 respectively.

The Board has no information before it upon which it could say that $2 would be a reasonable joint through rate from these points, even if it had any jurisdiction over the haul in the foreign country.

It was contended at the hearing that, inasmuch as the respondents, in 1908, had a joint through tariff of the kind now claimed in effect with the Great Northern Express Company, the Board might require them to reinstate that tariff.

It was contended at the hearing that the present application was on all fours with the application in 1909 of Stockton and Mallinson in regard to freight rates on citrus fruits, and that a similar disposition might be made by the Board. However, in that case the Canadian Pacific Railway Company had specifically admitted that the rate of $1.60 therein referred to was reasonable. It further developed that the portion of the rate received by the American carriers concerned was a combination of the full local for one carrier, and a percentage for another. When the new rate was established these carriers insisted on having exactly the same amounts under the new rate as they had under the old. Actually, therefore, the only change made was in the proportion of the through rate received by the Canadian Pacific. In the present case the reinstatement of a rate is required as to certain points to which it formerly applied; its extension is also asked for to points to which it was not formerly applicable. In regard to re-establishing the rate, the American carriers by express have not concurred, and the difference in rates is such that would be unfair to require the Dominion Express Company to accept all the shrinkage necessary to bring the through rate down to $2. The Board has no power to require the express companies operating in American territory to bear any part of this necessary shrinkage. As to the extension of the rate to points in United States to which it did not formerly apply, the Board has no jurisdiction so to order.

Difficulties of this character regarding international traffic are continually arising; no tribunal now exists that can deal with them, and until such body is established, shippers and others must be left to work their disputes out with the carriers as best they can.

Mr. Mabee.

Mr. McLean.

COMMISSIONER MCLEAN concurred.

Application dismissed.

MARCOTTE v. DAVIS et al.

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Quebec Court of Review, Lemieux, A.C.J., Malouin and Tessier, JJ. February 29, 1912.

1. RELEASE (§ II B—12)—RIGHT TO DAMAGES—SALE TO RAILWAY—WHAT INCLUDED IN RELEASE.

Where a vendor of a portion of land for the construction of a railway renounces the right to damages which may result therefrom, the renunciation only extends to those damages which are the necessary consequence of the work and not to those which can be avoided.

2. DAMAGES (§ III L 4—265)—DEPRECIATION—RAILWAY CONSTRUCTION—ABUTTING OWNERS.

A contractor who constructs a railway is responsible for the damages caused to the adjoining proprietors by the works, even though these latter are indispensable and are provided for in the plans and specifications.

Statement

APPEAL by defendants by way of inscription in review.

THE judgment inscribed for review and which is confirmed was rendered by the Superior Court, Dorion, J., on June 30, 1911.

Messrs. *Moreau* and *Savard*, for the plaintiff.

Messrs. *Taschereau*, *Roy*, *Cannon*, *Parent* and *Fitzpatrick*, for defendants.

Quebec, February 29, 1912. The judgment of the Court of Review was delivered by

Lemieux, A.C.J.

LEMIEUX, A.C.J.:—Davis and others are railway contractors, and as such, by a contract between them and the Transcontinental Railway Commission, they undertook the construction of a portion of the eastern section of this railway. This portion of the railway crosses and cuts the property of Marcotte situated at Port-neuf. During the course of the work of construction by Davis in 1909 and 1910, opposite or in front of Marcotte's property, the ditches or drains of his property were closed and obstructed by the method of constructing the railway embankment, which was at a higher elevation than Marcotte's land, and also by the fall of earth or sand into and along the ditches as a result of the construction work. The consequence was that as the water in the ditches had no outlet, it was held back on Marcotte's land and poured over it, flooding it for an area of 5 or 6 arpents, and the flooding rendered Marcotte's land unproductive and made its cultivation more difficult, causing the plaintiff damages which the Court of first instance has adjudged at the sum of $160.

Davis' defence and his grounds of appeal are based on questions of law which have been argued with much ingenuity by his attorney.

The *résumé* of them is as follows:—

Marcotte under the deed of sale to the commission of the land required for the railway across his property, renounced

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his recourse in damages resulting from the construction of the railway. The work of constructing the railway upon the commission's property was carried out by Davis according to law and under the contract entered into between himself and the commission, following the plans and specifications and also in accordance with the instructions from the engineers of the commission of the railway. As these works were done according to law, Davis is not responsible for the consequence as regards Marcotte.

Davis adds that these works were done exclusively on the property of the Transcontinental Railway; that the construction of this railway was a lawful act; that the commission had the right to have these works done; that in the execution of the work Davis had not gone off the land which belonged to the commission and had not entered upon Marcotte's land; that as long as Davis was working upon the property of the commission and as long as he was carrying on lawful works there, he was not obliged to satisfy himself whether the commission was complying with its obligations with regard to its neighbours or whether it had entered into an agreement with Marcotte to derogate either temporarily or permanently from the obligations imposed by certain servitudes.

The defence also sets up prescription of the action.

The Court of first instance disposed of Davis' points of law by the following reasons:—

> The builders of a railway are responsible for the damages resulting from the execution of the works done by them if these works are done in contravention of the law and of the rights resulting from vicinage or otherwise, and they cannot in order to cover their responsibility invoke the instructions or orders which they have received from the owner.
>
> Clause 24 of the contract between Davis and the Commission (the judgment continues) for the undertaking of the construction of the Transcontinental Railway, stipulates that Davis shall be responsible for any damage caused to persons or property as a result of the violation of any rights whatever through negligence, by acts of commission or omission, and that he shall be held to perform such provisional and temporary work as may be necessary for the protection of property and to assure the uninterrupted enjoyment of all rights whatsoever pending the execution of the works.
>
> The Transcontinental Railway Commission (adds the Judge) is bound by sec. 250 of the Railway Act of Canada to make and maintain the necessary drains to carry off the water, so that the natural or artificial drainage existing upon the neighbouring lands shall not be obstructed by the railway, and consequently Davis cannot claim pretended rights or immunities which the Transcontinental Railway Commission itself has not got.
>
> The clause of the deed which Davis invokes (concludes the Judge) provides for renunciation by Marcotte to his recourse in damages when the damages result necessarily from the construction of the railway, but not when they can be avoided.

Before dealing with the question of law which Davis raises, we may say that the question of fact is not contested, nor is the amount of damages awarded by the first Judge.

The law governing the construction of the Transcontinental Railway (3 Edw. VII. (Can.) ch. 71, sec. 15) and which also governs the commission which has charge of the construction of the eastern part of this road, gives the commission all the rights and powers conferred on railway companies by the Railway Act, and sec. 16 provides that all works of construction must be done and awarded by tender and contract after the plans and specifications have been duly advertised.

The Railway Act of Canada in force at the time in question (3 Edw. VII. ch. 58, sec. 118) gave to railway companies for the purposes of their undertaking considerable rights and powers over and above the law, among others those to:—

> (*l*) Divert or alter, as well temporarily as permanently, the course of any such river, stream, watercourse or highway, or raise or sink the level thereof, in order the more conveniently to carry the same over, under or by the side of the railway;
>
> (*m*) Make drains or conduits into, through or under any lands adjoining the railway, for the purpose of conveying water from or to the railway;
>
> (*n*) Divert or alter the position of any water pipe . . . drain, etc. . .

But this law provides a restraint, without which it would be arbitrary and ruinous especially for agricultural industry, by providing in sec. 119 that "The company shall restore as nearly as possible to its former state any river, stream, watercourse, highway, water pipe, which it diverts or alters, or it shall put the same in such a state as not materially to impair the usefulness thereof."

The law also provides by sec. 120 that "The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers."

The reason for this law is evident. It is one of necessity. For what would happen to those farmers whose lands were crossed or traversed by railways if their ditches or drains were blocked by the construction of these railways.

Sec. 196 completes the thought of the legislator who has wished to protect properties crossed by a railway.

> The company shall in constructing the railway make and maintain suitable ditches and drains along each side of, and across and under the railway, to connect with ditches, drains, drainage works and watercourses upon the lands through which the railway runs, so as to afford sufficient outlet to drain and carry off the water, and so that the then natural, artificial or existing drainage of the said lands shall not be obstructed or impeded by the railway.

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Sub-sec. 2 reserves to the proprietor who is injured or whose property is damaged his recourse in damages. This statutory protection is met with in all our legislation relating to the construction of railways either by the State or by railway companies.

Thus, the law provides (R.S.C. 1906, ch. 36, sec. 5) in regard to Government railways, that the Minister may construct a railway along or upon any stream of water, watercourse, canal, etc., upon the condition of restoring such watercourse to its former state or to such a state as not to impair its usefulness.

The Railway Act (R.S.C. 1906, ch. 37, secs. 151, 154 and 155) gives to companies the same powers as those indicated above upon the same conditions.

We may notice that the law permits the Minister of Railways, railway companies, and the Transcontinental Railway Commission, to divert a stream or watercourse for the purpose of constructing a railway, but the law does not at any time and in any case allow these streams or watercourses to be closed or blocked.

Having set out the different laws in regard to the construction of railways, it remains to examine the contract which Davis has made with the Transcontinental Railway Commission.

Davis entered into two obligations with the Commission which are quite distinct: First, that of doing upon the lands of the Commission the work of construction of the railway under the conditions of the contract, according to the plans and specifications and in accordance with the instructions of the Commission's engineers, who for the purposes of the work were the judges of the work and had the right to modify it.

The second obligation, and the one which caused the Court of first instance to maintain Marcotte's recourse against Davis, is as follows: Davis became responsible under the contract not only for the damages caused by his negligence or omission or that of his employees, but furthermore he undertook to respect the rights of third parties and to pay all damages caused to the property of others as a result of his transgression or encroachment on the rights of third parties, and he, moreover, undertook to do at his own expense all the preparatory and temporary works which were necessary to protect the property of third parties and to prevent the interruption of their enjoyment of such property.

Davis is presumed to know the law and the obligations of railway companies in regard to third parties, obligations which we have briefly related above. It is with such knowledge of the case, therefore, that he undertook not to trouble the owners of lands situated along the railway in the enjoyment of their property. This obligation was certainly onerous, as it subjected him to considerable expense for preparatory and temporary works which were necessary for the maintenance and protection of the

rights of others. But it must be admitted that these expenses must have entered into his calculation in determining the price of the whole work which he undertook.

How then could Davis avoid such explicit obligations by putting forward the pretension that if in constructing the railway he has blocked the ditches on the plaintiff's land he was unable to do otherwise and that the thing was unavoidable? How can he avoid the obligations he has taken by setting up the reason that the works he has done were done in accordance with the plans and specifications and under the engineer's instructions, and that if these works have caused damage, the damage was unavoidable and that he is not responsible for it?

Certainly Davis was obliged to build the railway, according to his contract and in accordance with the plans and specifications and the engineer's instructions, but how did this obligation relieve him from the other obligation which is so clear not to do anything which would injure the right of third parties and not to deprive these third parties who were owners of lands, whether adjacent to the railway or not, of the free enjoyment of their property.

The engineers, we have no doubt, required from Davis that the works should be done in accordance with the rules of the art and the plans, but they never forbade him, and it would have been arbitrary and senseless on their part to do so, to do the necessary preparatory works to allow the water to flow freely in Marcotte's streams or ditches.

Davis has not shewn, and the contrary was evident, that preparatory or temporary works could not have been made to prevent the flooding of the plaintiff's lands.

In any case if the engineers had intervened and had wished to force him to do work which would block the plaintiff's ditches he had a reply already in his contract with the Commission of which the engineers were the employees, that is to say, his formal obligation to prevent all damage to the lands of third parties and not to trouble them in their possession.

If by chance the engineers had forced Davis to do work without taking into account the ditches which drained the lands adjacent to the railway, their conduct might have given him recourse against the Commission, but we have not to consider that.

We are told that the engineer was the sole judge of Davis' work. That is true, but of the works of the railway. How and in virtue of that would Davis be freed from his obligation towards third parties, by the fact that the engineer was master of the works?

It has been put forward that Marcotte's action was ill founded because in Davis' contract with the Commission it was provided that if Davis had any recourse to exercise against the Commission he must do so before the Exchequer Court, and that Davis

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could not call the Commission in warranty before the Superior Court. Evidently this clause speaks of Davis' direct recourse against the Commission and in which he would take the initiative, but it does not affect Marcotte or third parties.

The statutes cited above, which subject railway companies to the obligation assumed by Davis in his contract of indemnifying third parties for damages caused in the course of the works, only repeat the doctrine of common law in regard to contractors, a doctrine which confirms us in the conclusions to which we come against Davis in accordance with the decision of the first Judge.

This is what Beaudry-Lacantinerie says upon this subject under the title "Obligations of Contractors towards Third Parties" (2 *Contrat de Louage*, sec. 1914):—

> L'entrepreneur n'est pas seulement responsable de sa faute vis-à-vis du maître; il encourt également une responsabilité envers les propriétaires d'immeubles voisins, s'il cause un dommage à ces immeubles, ce dommage fût-il la conséquence indispensable des travaux. La responsabilité à l'égard du voisin est fondée sur les principes de l'action délictuelle.

Guillouard (2 *Contrat de Louage*, No. 817) says the same thing:—

> L'entrepreneur doit, dans l'exécution de son travail, causer le moins de dommage possible, soit à l'immeuble sur lequel il travaille, soit à l'immeuble voisin, et il serait responsable, vis-à-vis du proprietaire ou des voisins, du dommage qu'il aurait occasionné ou aggravé par sa négligence, soit aux bâtiments, soit aux arbres, soit aux constructions contiguës.

Ravon (*Responsabilité des Constructeurs*, p. 16) says:—

> Il ne suffit pas, à l'architecte, ni à l'entrepreneur, pour se mettre à l'abri de la responsabilité, de construire la maison ou l'édifice habilement et solidement; il faut encore que les servitudes naturelles, que les servitudes de droit commun, que les lois, que les arrêts, que les ordonnances de police et que les règlements de voirie soient rigoureusement observés, de manière que l'administration, ni les voisins, ne puissant avec droit élever des réclamations contre le proprietaire.

Rendu (*Dictionnaire des Constructions*, p. 324, Nos. 1728 and 1726):—

> L'entrepreneur sous la surveillance ou direction d'un architecte (here an engineer), doit, sauf pour ce qui serait contraire aux lois de voisinage, à l'ordre publie et aux réglements de police, se conformer exactement aux ordres de l'architecte pour l'exécution des plans et devis.
>
> Mais (No. 1726) il importe de remarquer que l'entrepreneur est dans tous les cas, et sans aucune distinction personnellement responsable des contraventions qu'il commet aux réglements ou arrêtés de police, et cela encore, bien que le fait constitutif de la contravention lui serait prescrit par son plan, ou aurait été autorisé ou commandé par le propriétaire ou par l'architecte chargé de la direction ou de la surveillance. Un ordre écrit du proprietaire ou de l'architecte ne déchargerait pas même, en ce cas, l'entrepreneur de la responsabilité pénale.

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The Court of Appeal decided in this same sense on the 26th February, 1912, in an identical case taken by a man named Marcotte, who was a neighbour of the plaintiff.

For these reasons the judgment of the Court of first instance should be confirmed with costs.

Appeal dismissed.

Re BOEHMER.

Ontario High Court. Motion before Kelly, J. June 7, 1912.

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June 7.

1. WILLS (§ III G 6—145)—CONDITIONAL LIMITATION—ADVANCES TO LEGATEE—CHARGES IN "FAMILY BOOK"—DEDUCTION FROM SHARE.

A provision of a will that a designated sum which had been received by a son from the testator in his lifetime was to be deducted from the former's share of his father's estate, will be controlled by a further provision that the amount of all advancement, as well as that represented by notes of his children held by him, or charged against them on the testator's "family book," should be deducted from their respective shares in such estate, so that from the share of such son, in addition to the amount stated in the foregoing provision of the will, there will be deducted the amount shewn by such "family book" to have been paid or advanced him by his father in his lifetime.

2. EVIDENCE (§ XII F—954)—SUFFICIENCY OF PROOF OF INTENTION—TESTATOR'S EXPRESSION AFTER MAKING WILL.

Evidence is inadmissible to shew that the intention of a testator, as expressed after making a will, was to thereby benefit one child to a greater extent than other members of his family.

Statement

AN application by Norman Boehmer, under Con. Rule 938, for an order determining certain questions arising upon the construction of the will of August Boehmer.

J. A. Scellen, for the applicant and his infant children.

E. P. Clement, K.C., for the executors and the other adult beneficiaries and for Emma Boehmer, an infant.

Kelly, J.

KELLY, J.:—The first question submitted here is, whether the executors, in fixing the amount of Norman Boehmer's indebtedness to the estate, should be guided by the "family book" in their possession, or by paragraph 20 of the will, which directed the $2,782 therein mentioned to be deducted from Norman Boehmer's share.

It is contended on behalf of the applicant that, in arriving at the amount to be deducted from his share of his father's estate, the terms of paragraph 7 should be disregarded, and that only $2,782, mentioned in paragraph 20, should be deducted, notwithstanding that, at the date of the will, the "family book" shews that more than that sum (including the $575 received from his brother George) had been advanced prior to the making of the will, and that the will provided for a charge against each

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child's share of any further amounts which the testator might charge in the "family book" against such child.

These paragraphs are as follows:—

7. Whatever moneys or stocks I have given or advanced to any of my children during my lifetime, whether charged in my family book or not, and any further amounts for which I shall hold notes against any of my children or which I shall have charged against any of my children in my family book, shall be deducted from their respective shares in my estate.

20. My son Norman has received from me the sum of $2,207, and he has received from my son George $575; therefore, I direct my executors to pay to my son George $575 and interest at five per cent. from April 26, 1904, and to deduct from the share of my son Norman in my estate $2,782, but without interest.

The evident intention of the testator, to be drawn from the whole of the will, was to treat all his children as nearly as possible alike, and to have them benefit equally from his estate, regard being had to advances made to them during his lifetime.

An illustration of this is shewn in paragraph 8 of the will, where he directed that each of his unmarried children should, on his or her marriage, receive the same amount of cash ($500) and the same "wedding outfit of bedding, clothes," etc., which each of the children then married had received at the time of his or her marriage.

On this view of the intention, the question arises: are paragraphs 7 and 20 inconsistent to the extent that paragraph 20 excludes the application of paragraph 7 to the bequest made to Norman?

If this question can be answered in the affirmative, I would feel bound to hold that paragraph 20 should prevail: *Sims* v. *Doughty*, 5 Ves. 243; *Constantine* v. *Constantine*, 6 Ves. 100.

My view, however, is, that this is not a case of an inconsistency, with a direction in one clause and a different one in another. I think the two clauses can be read together, the meaning to be taken from them, when so read, being that, so far as Norman is concerned, whatever moneys or stocks the testator had given or advanced to him during his (the testator's) lifetime, and any further amounts for which the testator would hold notes against Norman, or which he should charge against Norman in the "family book," would be deducted from Norman's share; and that whatever sum these deductions amounted to would include the $2,782; or, in other words, that the $2,782 is part of the total to be deducted.

Paragraph 20 does not say that the $2,207 therein mentioned is the only amount Norman has received, or that $2,782 is the only amount that is to be deducted. The direction that the $2,782 is to be charged "without interest" was made, to my mind, to exclude the possibility of Norman being charged with the interest on the $575 which that paragraph directed the

estate to pay to George; and does not shew an intention to limit the charges against Norman's share to the $2,782.

From the language of paragraph 7, it is evident that the testator contemplated the possibility of his making further advances to one or other of his children after the making of his will; and, as it is unlikely that he knew what such further advances would be, it is not reasonable to suppose that he intended to limit the deductions to be made against Norman to the amount mentioned in paragraph 20, while there was the possibility of further advances being made to him. This is not in keeping with the general spirit and intention of the will.

While I have come to the conclusion, on consideration of the language and general intention of the will, that paragraph 7 is to apply to Norman's share in the same manner as to the shares of the other children, certain circumstances in connection with the will confirm the view I have taken.

Evidence was tendered of the intention expressed by the testator after the will, tending to shew that he intended to benefit Norman to a greater extent than the other members of his family. This evidence, however, is not admissible. In Jarman on Wills, 5th ed., p. 384, it is stated that parol evidence of the actual intention of the testator being inadmissible for the purpose of controlling or influencing the construction of the written will, the language of the will must be interpreted according to its ordinary acceptation, or with as near an approach to it as the context of the instrument and the state of the circumstances will admit of.

The "family book" shewed that in April, 1904, the amount to be chargeable against Norman was $2,207, and that between that time and the making of the will further advances were made to him and charged in the book. It appears that in April, 1904, the testator made a will which contained in exact words the provisions of paragraphs 7 and 20 of the present will. The circumstances that the amount chargeable in 1904, against Norman, as shewn by the "family book," corresponded with the amount of the deduction to be made from his share by the terms of the earlier will, and that the paragraph referring to it had been copied into the new will, helps to confirm the view which I have expressed, but which I have arrived at altogether apart from that circumstance.

The answer to the first question submitted being that the executor ought to be guided by and to act on paragraph 7 and not paragraph 20, no further answer is necessary to the second question.

The costs of all parties will be out of the estate; those of the executors to be as between solicitor and client.

Declaration accordingly.

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HAMEL v. ROSS.

Quebec Court of Review, Lemieux, A.C.J., Cimon and Malouin, JJ.
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1. VENDOR AND PURCHASER (§ I D—20)—DEFICIENCY IN QUANTITY—DIFFERENCE BETWEEN OFFICIAL PLAN AND TITLE DEEDS—C. C. 2168.

A vendor who acquires immoveables under the cadastral system, i.e., where the land dealt with is described by its cadastral numbers, buys the cadastral lots as they appear on the official plan and book of reference, and, should the area indicated in the title deed not correspond with that on the official plan, it is the latter which must prevail: C.C. 2168.

2. ADVERSE POSSESSION (§ II—61)—POSSESSION UNDER DEED OUTSIDE OF ACTUAL OFFICIAL LOTS—TIME REQUIRED TO OBTAIN TITLE.

Where certain cadastral lots are acquired by deed of sale the owner cannot acquire territory beyond such lots by alleging that his deed gives him a larger area, by a ten years' acquisitive prescription, as this would constitute acquiring beyond his title. In such case he could only acquire the ownership of territory beyond such lots by a possession as owner for thirty years.

3. ADVERSE POSSESSION (§ II—62)—ADDING POSSESSION OF PREDECESSORS IN TITLE.

A buyer cannot add the possession of his predecessors in title to arrive at a thirty years' prescription unless he be their *ayant-cause* by universal or particular title.

[*Butler* v. *Légaré*, 8 Que. L.R. 307, and *Stoddart* v. *Lefebvre*, 11 L.C.R. 481, followed.]

Statement

APPEAL by the plaintiff from the judgment of the Superior Court, Dorion, J., for the district of Quebec, rendered on December 28th, 1911, dismissing the plaintiff's claim to the ownership of a lot of land held by the defendant.

The appeal was dismissed.

L. A. Cannon, K.C., for plaintiff, appellant.

G. G. Stuart, K.C., for defendant, respondent.

Quebec, April 30, 1912. The judgment of the Court of Review was delivered by

Lemieux, A.C.J.

LEMIEUX, A.C.J. (translated):—This is an action of boundary and in revendication. The plaintiff contends he is entitled to have the boundaries drawn, but at a precise, fixed and determined place, in virtue of his titles and of a ten-year and thirty-year possession.

The defendant Ross agreed to the drawing of boundary lines, but contested that portion of the action revendicating a certain strip of land as belonging to the plaintiff by virtue of titles and of prescriptive possession.

The Court below, after seeing the report of the surveyor and the plan produced by him, as well as the titles filed by the parties, and after hearing witnesses as to the possession invoked by Hamel, came to the conclusion that the pretensions of Hamel were unfounded on this point, and condemned him to the costs

of contestation, and ordered the fixing of the boundaries between the contiguous lands of the parties herein at their common expense.

Hamel prays for the modification of this judgment. He alleges that in May, 1909, he acquired from Dame Delage lots Nos. 209 and 210 on the cadastral plan of St. Gilles, containing four arpents in front by 32 arpents in depth, bounded on the north by Louis Delage, on the south by Jean Baptiste Gagné, on the south-west by the Gosford road, and on the south-east by the Beaurivage River.

Hamel's contention is that he is the owner by good title and by acquisitive prescription of all the land extending from the Beaurivage River, on which it fronts, to the Gosford road, or in other words, that lots Nos. 209 and 210 are forty arpents deep and extend to the Gosford road.

On the other hand, the defendant maintains that the plaintiff's lots are only 32 arpents deep from Beaurivage River; that this depth does not extend to the Gosford road; that between the back of these lots 209 and 210 and the Gosford road there is a lot known as No. 211, belonging to her, the defendant, and that this lot No. 211 is separate and distinct from lots Nos. 209 and 210.

The defendant further contends, and this she has established, that it was her author (*auteur*) who originally sold to Hamel's authors lots Nos. 209 and 210, and that according to the original title deeds the depth of these lots was only 30 arpents from the Beaurivage River. She denies that lot No. 211 was ever acquired through possession or prescription; on the contrary, she says she has always had the peaceful and public possession of the said lot No. 211.

The defendant Ross consented to the boundaries being fixed and in order to buy her peace consented to allow a depth of 32 arpents to lots Nos. 209 and 210.

The reasoning of the Court below in disposing of this case may be summarized as follows:—

The plaintiff's title shews that, according to the original deed of concession, his property had but 30 arpents, beginning at Beaurivage River, and no mention was made of Gosford road as bounding it on the south-east. In subsequent deeds, but prior to the coming into force of the official cadastre of the parish of St. Gilles, this property (Nos. 209 and 210) is described as being bounded in the rear by the Gosford road, but as having 30 arpents in depth (in a few deeds 32 arpents) and as being bounded on one side by Louis Delage and on the other by J. B. Gagné, whose properties only extend 30 arpents from the river and do not stretch to Gosford road. Now, in the deeds transferring the property since the coming into force of the St. Gilles cadastre, dated 1882, 1891, 1905 and 1909, the last deed by that

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of Hamel himself, the property is described as being lots Nos. 209 and 210 on such cadastre, being 4 arpents in front by 32 arpents in depth, and bounded . . . . and on the south-east by the Gosford road. These last deeds transfer only lots Nos. 209 and 210, and cannot serve as good titles for a ten years' prescription in good faith of any portion of lot No. 211. Lots Nos. 209 and 210, as described on the official plan and of book of reference of the cadastre, contain in reality only 30 arpents in depth and are bounded in the rear by lot No. 211. The judgment then concludes, seeing the consent of Dame Ross, that the boundary shall be drawn so as to give Hamel lots Nos. 209 and 210 with a depth of 32 arpents, and whatever part of lot No. 211 will be necessary to give Hamel's property a depth of 32 arpents.

We concur in this judgment and approve of the reasons given in support thereof.

I shall only add a few remarks. The claims of the plaintiff to lot No. 211 between the rear of lots Nos. 209 and 210 and the Gosford road are contradictory, at least as formulated in his action.

The plaintiff's claim is that he is the owner up to Gosford road and therefore of lot No. 211, which, according to the cadastre and the surveyor's plan, is situate between the rear of lots Nos. 209 and 210 and the Gosford road.

Now, in his declaration, the plaintiff admits that the defendant is the owner of lot 211. If this be so, how then can Hamel claim as his own this lot No. 211. This anomaly shews clearly how baseless are Hamel's claims. According to the series of titles of plaintiff's *auteurs* and of his immediate *auteur*, lots 209 and 210 only were sold, and these deeds give these lots a depth of 30 or of 32 arpents, whereas they would require 40 arpents if they extended as far back as the Gosford road.

The description of these lots as extending to the Gosford road is a palpable error, by which error the owner of lot No. 211 cannot be prejudiced unless the acquirers had, besides their title, held possession of territory up to Gosford road so as to allow of prescription. This error is all the more evident when one reads Hamel's title deed, which indicates as tenants of lots 209 and 210 lots which are only 30 arpents deed.

The fact that, in the title deeds of Hamel and of his predecessors, this property is described as extending to the Gosford road, cannot in any way be of help to Hamel.

In each and every one of these title deeds the lots were described by their cadastral numbers, to wit, lots Nos. 209 and 210. Now, article 2168 C.C. enacts that when a copy of the plans and books of reference for the whole of a registration division has been deposited in the office for such division, the number given to a lot upon the plan and in the book of reference is the true description of such lot, and any part of such lot is sufficiently

designated by stating that it is a part of such lot and mentioning who is the owner thereof, and, adds the article, in default of such designation in notarial deeds the registration does not affect the lot in question.

It will be seen, therefore, that the only description whereby a lot may or can be designated is that given by the cadastre. A lot may have but the one description given by the cadastre. Therefore Hamel knew, or should have known, that lots Nos. 209 and 210 had, according to the cadastre, only 30 arpents in depth, and were bounded in the rear, to the south-east, by lot No. 211.

So that if, apart from lots 209 and 210, he possessed part or all of lot 211, he possessed an immoveable over and beyond that which he had acquired and which was described in the cadastre as being bounded by lot 211, and hence any such possession of territory beyond that covered by his title cannot avail for a ten years' acquisitive prescription. For no one can prescribe against his title (C.C. 2208) in this sense, that no one can change the cause and nature of his own possession. In order to prescribe by ten years in virtue of a title and of possession, it is necessary that the possession should be within the limits and according to the terms of the title. To possess beyond one's title is not to possess by virtue of such title; hence, in the present case, an essential element is lacking to allow of ten years' prescription, to wit, a just translatory title. In order to become owner by acquisitive prescription beyond one's title, then a thirty years' possession is necessary, provided also it have the characteristics required by law, as it is possible to possess and acquire beyond the limits fixed by a deed of sale.

Nor, as was found by the judgment of the Court below, can Hamel set up a thirty years' prescription; for, if he ever possessed part of lot 211, it could only be since 1909, at the time when he acquired lots 209 and 210, and he cannot invoke as in his favour the possession of lots 209 and 210 by his *auteurs*, seeing he is not their successor either by particular or universal title as required by law. Article 2200 says:—

> A successor by particular title may join to his possession that of his author in order to complete prescription. Heirs and other successors by universal title continue the possession of their author. . . .

Hamel has not shewn he was the heir or *ayant-cause* of any one as to the possession of lot No. 211. His vendor sold him lots 209 and 210 only and never transferred any rights or possession he had or might have had to obtain lot 211 by prescription.

This was the holding of Meredith, C.J., in *Butler* v. *Légaré*, 8 Q.L.R. 307:—

> A defendant who has pleaded the prescription of thirty years cannot avail himself of the possession of the previous possessor, unless he shews that there was some legal connecting link between them.

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The learned Chief Justice was simply reaffirming his holding in the appeal case of *Stoddart* v. *Lefebvre*, 11 L.C.R. 481, wherein he had quoted Troplong and Dunod, who lay down the doctrine as follows:—

> Il faut qu'il y ait entre le possesseur actuel et le précédent possesseur une relation jurisdique, car s'ils se trouvaient juxtaposés et sans lien de droit (and this is the present case) l'union ne pourrait s'opérer.

Modern authors teach the same doctrine. Beaudry-Lacantinerie, De la Prescription, No. 342, says:—

> L'auteur ne peut pas transmettre à son ayant-cause plus de droits qu'il n'en a, mais il peut transmettre le droit qui lui appartient: droit de propriété, s'il est proprietaire, droits attachés à la possession, s'il est simplement possesseur. Dans ce dernier cas, il transmet avec la possession les avantages qui y sont attachés et notamment le droit de prescrire *causam usu capionis*. De là la règle consacrée par notre article qui permet au possesseur de joindre à sa propre possession celle de son auteur pour compléter la prescription.

The person giving a title to a property transmits the ownership and the possession attached to such ownership, whereas he who has only the possession, which is a simple fact, can only transmit this by a manifestation of his will and by a deed to this effect.

I shall add but a few words to shew that even if we conceded the right of Hamel to add the possession of his predecessors to his own possession of lot No. 211, such possession is too indefinite, equivocal and uncertain to be of any use to him.

Prior to 1906 lot No. 211 and the parts of lots Nos. 209 and 210 contiguous thereto, as well as the neighbouring lots, were without boundaries. Nearly all this land was covered with standing timber. It will be understood immediately how difficult it was for the plaintiff to prove a possession clear, unequivocal, sufficient for prescription purposes.

Hamel attempted to shew that he and his predecessors, owners of lots 209 and 210, had cut timber on lot 211. This fact is only partially proven. The cutting of timber on No. 211 was rather accidental; it was not public and was done without the knowledge of the true proprietors, Dame Ross and her predecessors. The defendant's agent established that those who had cut timber on lot 211 had, in most cases, done so with his permission and that of the defendant. Moreover, the defendant has proven she always had the public possession of this lot, which always appeared on the assessment roll as belonging to her and on which she always paid the municipal assessments.

Under such conditions the possession invoked by Hamel has no legal characteristics to allow him to prescribe.

For these reasons this Court is of the opinion to confirm the judgment *a quo* with costs in both Courts.

Appeal dismissed with costs.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

Re KRUEGER.

Ontario High Court, Meredith, C.J.C.P. May 14, 1912.

WILLS (§ III 5—180)—*Sale of Land—Order Authorising Terms—Disposition of Purchase-money—Payment into Court—Maintenance of Beneficiary.*]—Motion by Mary Krueger, a beneficiary under the will of Christian Krueger, for an order declaring the true construction of the will, and authorising a proposed sale of the lands of the testator. At the hearing of the motion, the Chief Justice decided and declared that the whole of the land of the testator passed under the will, and that the sale should be authorised. He reserved judgment as to the disposition of the purchase-money; and, after consideration, made the following memorandum: An order may go authorising the proposed sale to Benjamin Rody and Ephraim Rody for $6,150. Of the purchase-money, $1,000 must be paid into Court, to be applied for the maintenance of Annie Krueger during her life, and any surplus of the fund remaining at her death will be paid to John C. Krueger, if living at her death, and in the event of her surviving him to his executors, administrators, or assigns at her death. The residue of the purchase-money will be paid to the widow and John C. Krueger; and a discharge for it signed by them and by the executors must be filed in Court. Costs of the application out of the estate. C. J. Holman, K.C., for the applicant. E. C. Cattanach, for the Official Guardian. T. H. Peine, for the executors.

CAMPBELL v. SOVEREIGN BANK OF CANADA.

Ontario High Court, Cartwright, M.C. May 14, 1912.

TRIAL (§ VI—320)—*Motion to Expedite — Jurisdiction of Master in Chambers — Plaintiffs not in Default.*]—In four actions, which were proceeding together, the defendants moved for an order directing the plaintiffs to set the actions down for trial and proceed to trial at the current Toronto non-jury sittings, and for an order fixing the date of trial, and dispensing with the three weeks' notice required under the Rules before a case can be

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put on the peremptory list. The notice of motion was served on the 8th May. It appeared that the actions were begun in August, 1911; that the statements of claim were delivered in December, and statements of defence and counterclaims on the 19th or 20th March. The Master said that, assuming that the cases were at issue, there was nothing to prevent the defendants from setting them down if they wished to be in a position to speed the trial. This, however, they did not see fit to do. The defendants had not up to the present time been much in haste to have the matter disposed of. It was well known that these same parties were all concerned in a test case now pending before the Judicial Committee and to be argued in July. It also appeared that negotiations for a settlement of all matters in controversy between the parties had been in progress and were only finally terminated unsuccessfully on the 11th May. One result of this had been that the plaintiffs had not made the necessary preparations to go to trial. For these reasons, the motion should be dismissed—with costs to the plaintiffs in the cause. The Master added that, had he arrived at a different conclusion, it would have been necessary to consider if he had any power to make such an order as was asked for. If the plaintiffs were in default under Con. Rule 434, they, no doubt, could be put on terms to expedite the trial. But was not the notice served too soon, as the counterclaim was delivered only on the 20th March? W. J. Boland, for the defendants. F. Arnoldi, K.C., and F. McCarthy, for the plaintiffs.

ONTARIO AND MINNESOTA POWER CO v. RAT PORTAGE LUMBER CO.

Ontario High Court, Cartwright, M.C. May 14, 1912.

DISCOVERY AND INSPECTION (§ IV—31)—*Examination of Officers of Plaintiff Company—Con. Rule 439 (a)—Production of Documents — Better Affidavit.*]—Motion by the defendants for an order for a further affidavit on production from the plaintiffs, to include all the books of account and other records of the plaintiffs, and for the examination of three persons alleged to be in some way, either as directors or otherwise, connected with the plaintiffs, as well as of an officer or officers of the company, at Toronto, where the plaintiffs' head office was situated. As to the examination of an officer of the company, the Master said that a reference to Hees Co. v. Ontario Wind Engine Co., 12 O.W.R. 774, shewed that no such order could now be made, because, on the 3rd April, an order was obtained by the defendants for the examination of the president of the plaintiffs; and this examination had not yet taken place. No order could be made for the

examination of another officer as long as that order was in force. As the three persons referred to as directors or in some way connected with the company could not be examined otherwise than under the same Rule, Con. Rule 439(a), clause 2, it followed that that part of the motion must also be refused—at least for the present. If any occasion should arise for a renewal of this branch of the motion, it could then be dealt with on its merits. The other branch of the motion was supported only by affidavits, and argument that the books, etc., of the plaintiff company should be produced, because they *must* be relevant, as they must shew the plaintiffs' dealings with the Minnesota company, and other facts alleged in the statement of defence (see 3 O.W.N. 1078, 1182). All this, however, was at present only a matter of surmise and conjecture, so far as appeared on the material; and it was stated on the argument that there were no such dealings as alleged. The affidavit already made was sufficient on its face. It might be that, on examination for discovery, some ground would be shewn to justify an order for a further affidavit. But until this had been done in some of the ways pointed out in Swaisland v. Grand Trunk R.W. Co., 3 O.W.N. 960, no further affidavit was required. The conclusion of the whole matter was, that the motion was wholly premature and should be dismissed, but without prejudice to its being renewed, in whole or in part, as the defendants might be advised. The costs of the motion to be to the plaintiffs in the cause. N. Sinclair, for the defendants. Glyn Osler, for the plaintiffs.

BROWN v. ORDE.

Ontario High Court, Riddell, J., in Chambers. May 20, 1912.

APPEAL (§ XI—720)—*Leave to Appeal to Divisional Court from Order of Judge in Chambers — Discovery — Slander.*]—Motion by the plaintiff for leave to appeal from the order of Middleton, J., 2 D.L.R. 562, dismissing an appeal from the order of MacTavish, Local Judge at Ottawa, directing the plaintiff to answer certain questions which he had refused to answer upon his examination for discovery. RIDDELL, J., said that, upon a careful consideration of the whole case, he could see no reason to doubt the soundness of the judgment from which it was desired to appeal; and he refused the application with costs. An unreported case in the Queen's Bench Division, McDonald v. Sheppard, was nearly in point; but he did not think any authority was necessary. The order to be without prejudice to any motion the plaintiff may be advised to make for the amendment of the pleadings, etc., etc. J. King, K.C., for the plaintiff. H. M. Mowat, K.C., for the defendant.

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GRICE v. BARTRAM.

Ontario High Court, Kelly, J. May 20, 1912.

CONTRACT (§ II D—164*a*) — *Construction — Purchase of Assets of Company — Assumption of Liabilities — Liabilities Assumed "without Corresponding Value" — Surrounding Circumstances and Object — Transfer of Shares — Rectification of Contract — Damages — Loss of Dividends — Counterclaim.*]—Two actions were brought by the plaintiff against the defendant in respect of transactions arising out of agreements relating to dredging operations, and were consolidated. The consolidated action was tried before KELLY, J., without a jury, at Toronto. The defendant was interested in a company known as the Cape Breton Dredging Company Limited. On the 26th April, 1909, the plaintiff and defendant made an agreement to the effect that the defendant was to organise and incorporate a new company, to be known as the General Construction and Dredging Company Limited, and to have transferred to it the assets of the Cape Breton company, the plaintiff agreeing to invest money in the enterprise, for which he was to receive shares in the new company. On the 1st May, 1909, this agreement was cancelled and a new agreement of that date substituted therefor, the purport of which was the same, but the terms different. The General Construction and Dredging Company Limited was incorporated on the 4th May, 1909. On the 11th May, 1909, the defendant and the Cape Breton company made an agreement for the purchase by the defendant of that company's plant and dredging contracts with the Dominion Government, the consideration being the transfer by the defendant to that company of 1,455 fully paid-up shares in the new company and the assumption by the defendant of all existing liabilities of the Cape Breton company. On the same day an agreement was made between the defendant and the new company for the sale by the defendant to that company of what the defendant had acquired from the Cape Breton company, in consideration of the transfer by the new company to the defendant of 2,500 fully paid-up shares and the assumption by the new company of the old company's liabilities. During the season of 1909, dredging operations were carried on by the new company with the plants so purchased. Misunderstandings arose between the plaintiff and defendant relating to the liabilities of the old company; and, in order to settle the differences, an agreement was made between the plaintiff and defendant on the 23rd February, 1910, by which, among other things, the defendant agreed that the assets referred to in the agreement of the 1st May, 1909, should be turned into the new company fully paid and free from all incumbrances, and that any liabilities of the old company "assumed by the (new) company without corres-

ponding value" should be paid by the defendant and should not fall on the company. In the first action the plaintiff alleged that liabilities of the old company to the amount of $34,436.83 were paid by the new company, which, under the agreement of the 23rd February, 1910, the defendant should pay to the new company; and the plaintiff claimed a judgment directing the defendant to make such payment, and $50,000 damages for breach of the agreement. KELLY, J., said that the language of the last agreement ("without corresponding value") was not of itself such as to make it possible to arrive at the intention of the parties; and it was proper to consider the circumstances and the object which the parties had in view: River Wear Commissioners v. Adamson (1877), 2 App. Cas. 743, 763. Upon consideration, he was of opinion that, if any effect or meaning was to be given to the words "without corresponding value," it might reasonably be held that it was contemplated that the liabilities from the time Thompson's inspection was completed (that is, the 18th March, 1909, before the agreement of April, 1909), would be assumed by the new company, and that the liabilities down to that time were liabilities assumed "without corresponding value," and which should be paid and discharged by the defendant. On this basis, and allowing certain credits to the defendant, the learned Judge find that what the defendant should pay to the new company is the amount sued for, less $22,875.65, and less such parts of the accounts and liabilities of the old company (included in the $34,436.83) as, under a proper apportionment and adjustment, are applicable to the period beginning on the 18th March, 1909. The defendant should also pay interest from the 23rd February, 1910, on any amount payable by him, until the respective times of payment. If the parties fail to make a proper division and apportionment as of the 18th March, 1909, and to arrive at the amount of interest payable by the defendant, there will be a reference to the Master in Ordinary for that purpose.—In the second action, the plaintiff asked for an order directing the defendant to transfer to him 100 shares of $100 each, fully paid-up, of the capital stock of the new company, under a clause in the agreement of the 23rd February, 1910. The defendant asked for a rectification of that clause. The learned Judge said that the defendant had not shewn that there was mutual mistake or misrepresentation or any other ground for having the contract rectified or modified; nor had he established any right to be relieved from the obligation to transfer the 100 shares. The plaintiff was, therefore, entitled to a judgment directing that they be transferred to him.—The learned Judge also said that the only damage that the plaintiff had suffered by reason of the defendant's non-payment of the liabilities was in the loss of dividends; and that would be satisfied, so far as the defendant was responsible for it, by the pay-

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ment of principal and interest as before directed.—By counterclaim, the defendant made certain claims, one being from an injunction restraining a sale by the plaintiff of shares of the new company. This claim was the subject of another action between the same parties (Bartram v. Grice, 3 O.W.N. 1296), and was therein disposed of. Counterclaim dismissed. Further directions and costs reserved until after the Master's report. W. M. Douglas, K.C., and J. R. L. Starr, for the plaintiff. F. E. Hodgins, K.C., and W. R. Wadsworth, for the defendant.

RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO.

Ontario High Court, Cartwright, M.C. May 21, 1912.

WRIT AND PROCESS (§ II B—26a)—*Service on Foreign Company — Motion to Set aside — Assets in Ontario — Con. Rule* 162—*Leave to Enter Conditional Appearance.*]—In an action against two companies, the Ontario and Minnesota Power Company and the Minnesota and Ontario Power Company, the latter, being a foreign company, moved to set aside service upon it of the writ of summons and statement of claim and order therefor. The order was made on the ground that the Minnesota company was a necessary party to the action against it and the Ontario company. The argument on the motion was confined to the question of whether the Minnesota company had any assets in Ontario, either as being part owner of the dam or doing business in this province. In confirmation of the latter ground, a letter was exhibited from the Minnesota company, dated the 5th March, 1912, on which was found the following heading: "Plants Located. International Falls, Minnesota, Fort Frances, Ontario." That letter was signed by Mr. Backus as president, he being admittedly also the president of the Ontario company. That the dam and the works served thereby were to any extent the property of the Minnesota company was denied by its solicitor, speaking from information given to him by Mr. Backus. The Master said that, even if that were so, there remained the fact that the Minnesota company held itself out as having a plant located at Fort Frances. How far this was true, and whether, if true, it would justify the order now sought to be set aside, could not be decided at this stage, on conflicting affidavits. Following the decision in Farmers Bank of Canada v. Heath, 3 O.W.N. 682, 805, an order was made dismissing the motion (costs in the cause) and allowing the Minnesota company to enter a conditional appearance. The Master said that it was not improbable that, when the matter had been further elucidated, the action, as against the Minnesota company, might be discontinued. It might then appear that the foreign company

was not a necessary party to the action (nor within any other provisions of Con. Rule 162). That was the ground on which the order was made, and one which, if true, would support that order, apart from any question of clause (*h*) of Con. Rule 162. Glyn Osler, for the applicant. Featherston Aylesworth, for the plaintiffs.

GROCOCK v. EDGAR ALLEN & CO., Limited.

Ontario High Court, Cartwright, M.C. May 21, 1912.

PLEADINGS (§ I J—65)—*Particulars—Statement of Claim—Discovery.*]—This action was brought to recover $15,000 damages for alleged breach of a contract made in September, 1910, at Sheffield, England, where the defendants had their head-office—also carrying on business in Ontario. The defendants moved, before pleading, for particulars of the statement of claim in certain respects, after a request therefor had been refused. The statement of claim set out, in paragraph 2, that the plaintiff was appointed representative of the defendants for Ontario, on the terms set out in a letter from the defendants to the plaintiff dated the 16th September, 1910. In paragraph 3, however, it was said that the plaintiff accepted the engagement "upon the representations made by the directors of the defendant company that the company then had a very large number of customers in Ontario . . . which was untrue, as the directors knew . . . and that the commission to be allowed him on sales in Ontario would, with the monthly salary of $85, amount to such a substantial sum as to warrant the plaintiff accepting the engagement, which he accordingly did." The Master said that, as the plaintiff by this paragraph sought to enlarge and vary the terms of the letter of the 16th September, the plaintiff should state: (1) who were the directors who made the representations; (2) whether verbally or in writing; (3) what minimum was stated which would increase the salary to a substantial sum, and what that was. In paragraph 4 it was alleged that on the plaintiff's arrival in Ontario the defendants' manager (1) refused to allow the plaintiff to act as their representative in or over a large part of Ontario; (2) interfered with him in his negotiations for business; (3) refused and delayed to fill orders which he procured; (4) finally ordered him to cease work for the defendants, and, seven and a half weeks thereafter, dismissed the plaintiff from their employ. Particulars should be given under this paragraph as to the various alleged wrongdoings of the defendants' manager, to shew: (1) if the refusal was in writing or verbal—if the latter what was said and where it was spoken; (2) this may be left for discovery; (3) one or two at least of the

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most important instances should be given; (4) if this dismissal was in writing or by parol, and, if the latter, then where and in what terms. In paragraph 5 it was said that the defendants had not accounted to the plaintiff for all sales made or contracts taken in Ontario for which the plaintiff was entitled to commission, and had refused to pay to the plaintiff the amount due him. Of this paragraph, the Master said, particulars should be given such as were ordered in the similar case of Blackley v. Rougier, 4 O.W.R. 153. In paragraph 6 it was said that the defendants, in breach of their agreement, did not give the plaintiff the necessary assistance and support which he was to have in order to make sales of the defendants' goods. Particulars of this (if really required) could be had on examination for discovery. An order should go as above set forth, to be complied with in two weeks; costs in the cause; time for delivery of statement of defence to run only from the delivery of the particulars ordered. H. E. Rose, K.C., for the defendants. C. A. Moss, for the plaintiff.

KEARNS v. KEARNS.

Ontario High Court, Cartwright, M.C. April 18, 1912.

SET-OFF AND COUNTERCLAIM (§ I—1)—*Relation to Subject-matter—Embarrassment—Delay.*]—The plaintiff sued his son to recover a sum of about $1,260, made up chiefly of three promissory notes, all overdue, and interest thereon for about five years. The statement of defence set out, first, a contemporaneous verbal agreement shewing that these notes were given only to secure the interest thereon at 4 per cent. to the plaintiff as long as he lived, and were then to be cancelled. Then in the 7th and three following paragraphs, as well as in part of the counterclaim, it was alleged that the plaintiff received $1,400 in September, 1896, under the will of his wife, the defendant's mother, which sum was to be held by the plaintiff as trustee for three of the children, who were then minors, till they should become of age; that all of the three died intestate and unmarried; that the plaintiff took and kept possession of this $1,400, and also of all their other property, and had never paid any part thereof to the defendant or accounted in any way for the same, though frequently asked to do so. The defendant counterclaimed for his share of the estates of his deceased brothers and sister. The plaintiff moved to have all this part of the statement of defence expunged as (1) embarrassing, (2) having no relation to the subject-matter of the action, and (3) because the trial thereof would unduly delay the trial of the plaintiff's claim. The Master said that a cardinal principle of the Judicature

Act is, that all matters in controversy between the same parties should, as far as possible, be disposed of in one action. It is for this purpose that the right to counterclaim is given. That the defendant was now bringing in effect a cross-action was, therefore, not in itself objectionable. It is the very object aimed at by the present procedure that the accounts between the plaintiff and defendant should all be investigated and disposed of at the same time, so that the ultimate balance may be awarded to the party found entitled thereto, whatever may be the amount. The statement of defence alleged that one brother died over fifteen years ago, the other over six years ago, and the sister over five years ago. It was not said whether any administration of these estates had been granted. If this was necessary, it could be set up as a defence to the counterclaim. Con. Rule 196 seems to shew that the appointment of a personal representative is not always a condition precedent to an action in respect of the estate of a deceased person. The argument as to delay is not very cogent. The non-jury sittings at Lindsay was five weeks off, so that there was time enough to have everything ready for trial at that time. Motion dismissed; the plaintiff to have a week to plead to the counterclaim. Costs of the motion to the defendant in the counterclaim. L. V. O'Connor, for the plaintiff. E. B. Ryckman, K.C., for the defendant.

SCOTT v. BRITTON.

Ontario High Court, Middleton, J., in Chambers. January 12, 1912.

JURY (§ I D—38)—*Motion to Strike out—Order—Rule 1322.*]—Motion by the defendant to strike out the plaintiff's jury notice. MIDDLETON, J., made an order, under the new Con. Rule 1322, for trial without a jury; costs in the cause. C. A. Moss, for the defendant. D. O. Cameron, for the plaintiff.

CANADIAN OIL CO v. CLARKSON.

Ontario High Court, Cartwright, M.C. May 25, 1912.

DISCOVERY AND INSPECTION (§ IV—20)—*Action for Price of Goods—Counterclaim—Inferior Quality of Goods—Particulars of Sales and Return of Goods by Customers.*]—The plaintiffs claimed $1,130 for goods (chiefly oil) sold and delivered to the defendant. In the statement of defence it was alleged that the oil supplied was not in accordance with the plaintiffs' contract, and that the defendant had sustained damages on this account to the amount of over $3,000, of which $165 was loss of profit on sales and $2,000 for injury to his business. In paragraph 7

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of the statement of defence it was said that, after the defendant had sold large quantities of the oil so supplied, to numerous customers, he was obliged to take back a large portion of the oil and make a large reduction on the price of what was kept by the customers. On examination for discovery the defendant was asked to give particulars of these sales, but declined to do so, on the advice of counsel. The plaintiffs moved for an order requiring the defendant to answer these questions. The Master said that, no doubt, the general rule was that parties were not required to give the names of their witnesses; but here it seemed that the defendant was claiming about $1,000 as damages arising out of the rejection of the oil supplied by the plaintiffs after it had been sold by the defendant to his customers, on the assumption that it was of the quality to be supplied by the plaintiffs. The point seemed to be covered by the decision in Ontario and Western Co-operative Fruit Co. v. Hamilton Grimsby and Beamsville R.W. Co., 3 O.W.N. 589, at p. 591; Scott v. Membery, 3 O.L.R. 252. Here the defendant counterclaiming was really a plaintiff asking damages from his vendors, who were entitled to information such as was ordered in the case first cited. Order made as asked; costs to the plaintiffs in the cause. W. N. Tilley, for the plaintiffs. R. B. Henderson, for the defendant.

TEAGLE & SON v. TORONTO BOARD OF EDUCATION.

Ontario High Court. Trial before Sutherland, J. May 27, 1912.

CONTRACTS (§ II D 4 — 188) — *Extras — Refusal of Contractors to Execute Contract for another Building—Contract Let at Higher Rate—Neglect to Re-advertise after Rejecting Lower Tenders—Tender not Accepted by Corporation under Corporate Seal—Costs.*]—Action by contractors to recover a balance of $1,194 on a contract for the mason work upon the school-building of the Harbord Collegiate Institute, and $561.20 for extras. Included in the extras was an item for $150 for "additional thickness to reinforced concrete floor and alterations made by City Architect before granting permit." The defendants conceded the plaintiffs' claim for $1,194; but counterclaimed for $1,161 in respect of a contract for the mason work on the Earlscourt school-building. The plaintiffs tendered for that work at $13,200, and their tender was accepted, but they refused to execute a contract or do the work; and the defendants said that they were compelled to make a contract at $14,361 with Hewitt & Son. The $1,161 was the difference. The defendants admitted the plaintiffs' claim for extras to the extent of $414.26, being the whole claim, less the $150 item, which was in dispute;

and, pending the action, paid the plaintiffs $414.26 and $33 for the difference between $1,194 and $1,161.—The plaintiffs at or before the trial sought leave to amend by increasing the $150 item to $684. They said that they did not know, when tendering, that the work was to be done on the Kahn system, which was more expensive. Upon the evidence, the learned Judge came to the conclusion that the plaintiffs did know that the Kahn system was being required, or should have known in time to make a complaint before going on with the work; and, having allowed it to proceed without doing so, they could not now be heard to make the claim.—The plaintiffs, in reply to the counterclaim, alleged that the tender for the Earlscourt school-building was put in as part of the tender for the Brown school-building, and that by reason of the defendants' course of dealing with the Brown school tender (which was said to have been unfair to the plaintiffs) they were relieved from any liability with respect to the Earlscourt school tender. As to this, the learned Judge said that the tenders were not combined, but separate; and refused to give effect to the plaintiffs' contention in this regard.—Another contention of the plaintiffs in regard to the counterclaim was, that the tender accepted by the defendants for the Earlscourt building, after the plaintiffs had refused to sign the contract, was not the lowest tender, and that there was improper conduct and irregularity on the part of the property committee of the defendants in giving the contract to Hewitt & Son. As to this the learned Judge said that he was unable to find, upon the evidence, that the members of the property committee were guilty of any actual impropriety. But, after the plaintiffs refused to execute the contract, the defendants had made up their minds to endeavour to hold the plaintiffs good for any loss sustained, and it was the duty of the defendants to treat the matter with proper care and consideration; and, after new tenders were asked and received, and when they saw fit to reject two of them, each lower than the plaintiffs' original tender, it would have been only fair, before accepting that of Hewitt & Son, which was $1,161 higher than the plaintiffs', to advertise again; and upon this ground the defendants' counterclaim failed.—The plaintiffs also contended that their tender was never accepted by the defendants under seal, as it should have been to make it binding. The learned Judge said that this was an executory contract, and the acceptance of the tender was not under seal, nor was the contract tendered to the plaintiffs for execution executed by the defendants under their corporate seal. The plaintiffs declined to execute the contract so tendered, and thus in effect withdrew their tender before any binding acceptance. There was no contract which the defendants could enforce or respect of which they could seek to recover damages either by way of counterclaim or of deduction from moneys due by them

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to the plaintiffs upon another contract. Reference to Halsbury's Laws of England, vol. 3, p. 168; Garland Manufacturing Co. v. Northumberland Paper and Electric Co., 31 O.R. 40.—Judgment for the plaintiffs for $1,161, with interest from the 6th February, 1912, and costs of the action down to the time when they received from the defendants a cheque for $414.26. The plaintiffs' claim for additional extras dismissed without costs; and the defendants' counterclaim dismissed without costs. Shirley Denison, K.C., for the plaintiffs. F. E. Hodgins, K.C., for the defendants.

RAWLINGS v. TOMIKO MILLS, LIMITED.

Ontario High Court. Trial before Britton, J. May 30, 1912.

MASTER AND SERVANT (§ II A 4—67)—*Safety as to Appliances—Findings of Trial Judge.*]—Action for damages for personal injuries sustained by the plaintiff while working for the defendants, piling lumber in a mill-yard. The lumber was being transported from one place to another upon a car running on a tramway. Lumber was precipitated from the car upon the plaintiff, and he was badly injured. There were charges of negligence and contributory negligence. BRITTON, J., who tried the action without a jury, at North Bay, reviewed the evidence, in a written opinion of some length, and stated his conclusion that the injury was due to a mere accident, not necessarily attributable to negligence; and so the plaintiff could not recover. To provide for the possible event of an appeal, the learned Judge assessed the damages at $1,000. Action dismissed without costs. G. A. McGaughey, for the plaintiff. A. E. Fripp, K.C., for the defendants.

MADILL v. GRAND TRUNK R. CO.

Ontario High Court, Cartwright, M.C. May 28, 1912.

PLEADINGS (§ I J—65)—*Particulars—Negligence—Death in Railway Accident—Res Ipsa Loquitur—Discovery.*]—This was an action for damages for the death of the plaintiff's husband through an accident on the defendants' railway on the 16th June, 1911. In the 4th and 5th paragraphs of the statement of claim the accident was alleged to have been caused by the negligence of the defendants' servants or agents. The defendants moved, before pleading, for particulars of the negligence alleged. The deceased was killed by the car in which he was seated running off the track and falling on its side—he was so seriously injured that he died almost immediately. It was stated on the argument by their counsel that the defendants had not been able to ascertain the cause of the accident. And the

plaintiff made affidavit that she was unaware of the cause. Her counsel relied on Smith v. Reid, 17 O.L.R. 265; Young v. Scottish Union and National Insurance Co., 24 Times L.R. 73; McCallum v. Reid, 11 O.W.R. 571. The Master said that the conclusion to be derived from these cases was, that the motion was at least premature. The defendants could safely plead as was done in Smith v. Reid, supra. On examination for discovery, they could find out whether the plaintiff intended to rely solely on the principle of res ipsa loquitur. If not, she could be required to give particulars of any specific acts of negligence to be adduced at the trial. Motion dismissed, without prejudice to its renewal later if desired. Costs to the plaintiff in the cause. Frank McCarthy, for the defendants. J. A. Paterson, K.C., for the plaintiff.

SHAPTER v. GRAND TRUNK R. CO.

Ontario High Court, Cartwright, M.C. May 29, 1912.

DEPOSITIONS (§ III—11)—*Affidavit on Production—Claim of Privilege — Sufficiency — Reports for Information of Solicitor — Absence of Special Direction — Reports Made to Board of Railway Commissioners—Examination of Servants of Company.*] —In this case an affidavit on production was filed by the defendants, which admittedly was not adequate. Another affidavit was then filed. It, also, was objected to; and the plaintiff moved for a better affidavit. The second part of the first schedule, shewing documents which the defendants objected to produce, mentioned two reports made to their solicitor by their claims agents. In the affidavit privilege was claimed, because "the reports were made solely for the information of the defendants' solicitor and his advice thereon and under a reasonable apprehension of an action or claim being made." It was objected to this that it should have said that these reports were made after a special direction to that effect from the solicitor, and that a general order to that effect was not sufficient to make such reports privileged. The Master said that no authority was cited for this proposition, which seemed to go further than any decided case. The decision in the analogous case of Swaisland v. Grand Trunk R.W. Co., 3 O.W.N. 960 (see judgment of Riddell, J., 3 O.W.N. 1083, 2 D.L.R. 898, where leave to appeal was granted), seemed to approve of the claim of privilege made as in the present case: 3 O.W.N. 962.—The second schedule, shewing documents at one time in the defendants' possession, mentioned only reports of the engineer and conductor of the train on which the plaintiff's husband was killed, "made for the purpose of obtaining necessary details for information of the Board of Railway Commissioners, under section

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292 of the Railway Act, and subsequently destroyed." Section 292(2) says that the Board "may declare any such information so given to be privileged." There was nothing in the material to shew whether any such declaration, either general or special, has been made by the Board. Counsel for the defendants seemed to think that, if this had not been done, then the reports could be seen at the office of the Board. In any case, he conceded that the engineer or the conductor, or both if necessary, and if still in the service of the defendants, could be examined for discovery, when they would have to make full disclosure as to their knowledge, recollection, information, and belief as to the cause of the fatal accident in question. The Master said that this would give the plaintiff all that could be of any service at this stage. Motion dismissed, but with costs to the plaintiff in the cause, as the first affidavit was admittedly irregular. A. Ogden, for the plaintiff. Frank McCarthy, for the defendants.

FOX v. ROSS.

Ontario High Court. Trial before Mulock, C.J.Ex.D. May 31, 1912.

ADVERSE POSSESSION (§ I K—55)—*Description—Plans—Evidence—Title by Possession—Limitations Act—Act of Ownership—Cultivation and Cropping.*]—The plaintiff claimed to be the owner in possession of the westerly part of Cotter's Island (or Bernhardt's Island) in the Bay of Quinté, in the county of Prince Edward, and complained that the defendant had trespassed and threatened to continue to trespass thereon, and asked for an injunction and damages. The plaintiff contended that the land in dispute was included in grants from the Crown to James Cotter, Wait Ross, and R. B. Conger in 1808, 1833, 1834, and 1845. The learned Chief Justice, after stating the description in the patents, and referring to plans and other evidence, stated his conclusion that the land in dispute was not covered by the patents referred to, and that the plaintiff had no paper title thereto.—The plaintiff also asserted title by possession. The evidence shewed that from 1834 until 1911 the plaintiff, by himself and others of whose possession he was entitled to the benefit, had each season cultivated the land in dispute. No one ever resided upon it, and no buildings were ever erected upon it. There was some vague evidence as to fencing; but the only fence of which there was any proof was one running northerly across the island to the north side, intended to prevent persons who used the east part of the island from trespassing on the west part. The user of the land was limited to cultivating and cropping during the summer season. For at least one half of each year no one was in possession. The

learned Chief Justice said that during the winter seasons throughout the whole period there was at most only constructive possession, not "actual, exclusive, continuous, open or visible and notorious possession:" Sherren v. Pearson, 14 Can. S.C.R. 585. The lawful owner was not prevented from taking peaceable possession, and there was no trespasser against whom he could have maintained an action to recover the land. For about one-half of each year the possession was vacant, and on each such occasion the right of the true owner would attach and the Statute of Limitations cease to run, beginning again, but only from a new starting-point, when the plaintiff took possession each spring. His withdrawal during each winter lost to him the benefit of his possession up to the time of such withdrawal: Coffin v. North American Land Co., 21 O.R. 81. The action was dismissed with costs. M. R. Allison and P. C. MacNee, for the plaintiff. E. G. Porter, K.C., for the defendant.

POWELL-REES, LIMITED v. ANGLO-CANADIAN MORTGAGE CO.

(Decision No. 2.)

Ontario High Court, Cartwright, M.C. June 8, 1912.

EXECUTION (§ II—15)—*Examination of Director.*]—After the motion noted in 1 D.L.R. 920, 3 O.W.N. 844, the plaintiffs signed judgment on default of appearance. They afterwards made a motion for the examination under Con. Rule 903 of Mr. Reynolds. He filed an affidavit to the same effect as on the previous motion, and was cross-examined. The motion was then argued. The Master said that the facts were the same as when the judgment was signed. The defendant company had never been authorised to do business in this Province, because sufficient stock had not been subscribed and paid. But a charter was issued by the Lieutenant-Governor on the 29th November, 1910. In it Mr. Reynolds was the first-named of six elected provisional directors; and the head office of the company was fixed at Toronto. It was also proved that in the prospectus issued by the company in England, and filed with the Provincial Secretary here, Reynolds was named as first of the Canadian directors, and was also called president—also the head offices were stated to be at 77 Victoria street, Toronto. These facts seemed sufficient to support an order for the examination of Mr. Reynolds, if the plaintiffs still thought it would be of any service to them. If they elected to proceed, costs would be reserved. If they took the other course, the motion would be dismissed without costs. M. C. Cameron, for the plaintiffs. John MacGregor, for Mr. Reynolds.

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BALDWIN v. TOWNSHIP OF WIDDIFIELD.

Ontario High Court. Trial before Britton, J. June 1, 1912.

WATERS (§ II C—83) — *Construction of Road Ditch — Surface Water—Flooding Lands—Absence of Negligence.*]—The plaintiff, the owner of part of lot 19 in concession B. of the township of Widdifield, comprising $4\frac{95}{100}$ acres, complained that the defendants, about the year 1899, diverted the water from a certain stream or creek which ran across another part of lot 19, and, for the purpose of carrying off the water so diverted, constructed a ditch running easterly along the old Trout Lake road, which ditch was entirely unfit and inadequate for the purpose intended, and so the water flowed from it over the plaintiff's land, to her damage. The learned Judge, in his written reasons for judgment, stated the facts briefly; and then said that there was no sufficient evidence to establish the existence of any creek, properly so-called. All the water that was diverted was surface water, and would, had the road ditch not been made, have flowed upon lot 19, and would in great part have found its way to the place where the flooding complained of occurred. The defendants were not guilty of any negligence. Action dismissed without costs. G. L. T. Bull, for the plaintiff. G. H. Kilmer, K.C, for the defendants.

LLOYD v. STRONACH.

Ontario High Court, Cartwright, M.C. June 6, 1912.

VENUE (§ II A—15)—*County Court Action—Witnesses—Convenience.*]—Motion by the defendants to transfer the action from the County Court of the County of Huron to the County Court of the County of York. The action was for an account of sales of apples by the defendants for the plaintiff. The defendants swore to ten witnesses in Toronto, besides themselves, giving names and what the witnesses would be called to prove. The plaintiff swore to six witnesses in the county of Huron, but did not give names nor indicate what the witnesses would testify. All the transactions between the parties took place at Toronto. The Master said that, having regard to all the facts appearing, it seemed right to grant the motion and transfer the action. Order made as asked. Costs in the cause. D. D. Grierson, for the defendants. C. M. Garvey, for the plaintiffs.

EDGEWORTH v. ALLEN.

Ontario High Court, Cartwright, M.C. June 10, 1912.

WRIT AND PROCESS (§ II A—16)—*Service—Non-resident—Motion to Set aside—Irregularities.*]—Motion by the defendants to set aside the service of the copy of the writ of summons. The

defendants resided in Alberta; and an order was made for service under Con. Rule 162. The writ, however, was issued as if for service in this Province; and the copy served gave only ten days for appearance, instead of twenty, as directed by the order. The copy served was also unsigned and undated, though the original was correctly made out as to this. The Master said that these very serious irregularities could not be now cured by amendment. There was no explanation of how they came to be made. The first error seemed fatal. Motion granted, with costs, fixed at $25—unless either party should desire a taxation. Featherston Aylesworth, for the defendants. W. H. Bourdon, for the plaintiff.

McLAREN v. TEW.

Ontario High Court, Cartwright, M.C. June 11, 1912.

MOTIONS AND ORDERS (§ I—2)—*Examination of Party as Witness on "Pending" Motion—No Notice of Motion Served.*]—This was an action to set aside as fraudulent a sale of assets by the defendant Wilson to the defendant Graham, and for an injunction and a receiver. Tew was made a party defendant as assignee of Wilson for the benefit of creditors. Before being served with the writ of summons, Tew was served by the plaintiffs with an appointment for his examination as a witness on a pending motion for an interim injunction and receiver, under Con. Rule 491. On this he attended on the 5th June, with counsel, but refused to be sworn, on counsel's advice, on the ground that there was no motion pending. The examination was thereupon enlarged, and the defendant Tew moved to set aside the appointment. The Master referred to the cases under Con. Rule 491 collected in Holmested and Langton's Judicature Act, 3rd ed., p. 713, saying that none of them was exactly in point. The nearest and the one on which the plaintiffs relied was Dunlop v. Dunlop, 9 O.L.R. 372. It was there decided that an ex parte motion was within the Rule; and the argument of the plaintiffs' counsel was, that it was not necessary that a notice of motion should be served in this case, unless there was a distinction between a party to an action and a stranger. In answer, it was pointed out that such a proceeding was hitherto unknown—that it would enable a plaintiff to do indirectly what cannot be done directly—and there was a clear and vital distinction between the facts of the Dunlop case and the present. It was conceded that, as soon as a motion for an injunction and receiver was served, the defendants could be examined in support if the plaintiffs thought it advantageous. The difference between the facts of this case and

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those of the Dunlop case was plain. In the Dunlop case, there was no one on whom a notice of motion could have been served, as the whole object was to find out some way of serving the defendant. Here, if the examination was to be of any use, a notice must be served later, and upon the person sought to be examined. To apply the decision in the Dunlop case as decisive here would seem to violate the well known dictum in Quinn v. Leathem, [1901] A.C. 510. In the same way it was lately pointed out that unforeseen and unlooked for consequences arise from case B being decided because it is like case A; then C follows because it is like B; and thereafter D from its likeness to C—though, if D had come up, instead of B, it would not have been thought to be within the same principle. The present course would not have been followed by the plaintiffs if it had not been for the Dunlop judgment. Motion granted, with costs to the defendant Tew in the cause, leaving the plaintiffs to carry the matter further if deemed of sufficient importance. H. S. White, for the defendant Tew. A. C. McMaster, for the plaintiffs.

Re PIPER.

(Decision No. 2.)

Ontario High Court, Middleton, J. June 12, 1912.

DESCENT AND DISTRIBUTION (§ III—32)—*Payment of Debts—Resort to Undisposed of Personalty.*]—A question was asked which was not raised on the former motion (see 2 D.L.R. 132, 3 O.W.N. 912, 1243): Should the executors first resort to the residual estate as to which no disposition is made for payment of debts, before touching the property given to the widow? MIDDLETON, J., said that the asset to be first resorted to was undisposed of personalty, and the question should be so answered. No costs, as the question might have been raised on the former motion, and there did not seem to be any contest over this question. W. E. Raney, K.C., for the executors. I. F. Hellmuth, K.C., for David H. Piper.

STRONG v. CROWN FIRE INSURANCE CO.

(Decision No. 2.)

Ontario High Court, Sutherland, J. June 12, 1912.

JUDGMENT (§ VII C—289)—*Motion to Vary—Further Evidence—Erroneous Recital in Judgment Settled and Entered—Motion to Strike out, Made after Hearing of Appeal.*]—These actions were tried before SUTHERLAND, J., without a jury, and judgment was reserved and given on the 2nd January, 1912 (1

D.L.R. 111, 3 O.W.N. 481). Before judgment was given, an application was made to SUTHERLAND, J., for an order consolidating each of the original actions with others in which the writs of summons for similar claims had been issued since the trial. The point involved was, whether the original actions were brought prematurely; and, if so, what course it was proper to pursue under sec. 172 of the Insurance Act. In the learned Judge's reasons for judgment, he stated that an order would be made for consolidation of the actions; and in the formal judgment settled and entered on the 17th January, 1912, that order was embodied. The formal judgment also contained the following words: "This Court having been pleased further to direct that the defendants be at liberty, if they so elect, to tender further evidence in the consolidated action in support of their defence, and the defendants having elected not to tender further evidence." The defendants moved to strike these words out of the judgment. The learned Judge said that, as no intimation had been given to him in the argument of counsel for the defendants that, if the order for consolidation were made, further evidence would be offered, he assumed that it was not intended to offer any; and he gave no direction such as that quoted above from the formal judgment; but, as an appeal from his judgment had been heard by the Court of Appeal, and judgment thereon was pending, he refused to make any order now. F. E. Hodgins, K.C., for the defendants. N. W. Rowell, K.C., and George Kerr, for the plaintiffs.

IMRIE v. WILSON.

Ontario Divisonal Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. June 12, 1912.

BROKERS (§ II B—12) — *Agent's Commission on Sale of Land.*]—Appeal by the plaintiffs from the judgment of CLUTE, J., 3 O.W.N. 1145, dismissing the action without costs; and cross-appeal by the defendant as to costs. The Court dismissed the plaintiffs' appeal with costs and the defendant's appeal without costs. The Chief Justice said: We all agree that, for the reasons stated in the judgment of the trial Judge, the appeal cannot succeed. The continuity of events was broken; a new and distinct act intervened, by reason of Klingensmith changing his position from that of probable purchaser to that of agent; and this element distinguishes the case in hand from Wilkinson v. Alston (1879), 48 L.J.Q.B. 733, Wilkinson v. Martin (1837), 8 C. & P. 1, and the other authorities. The appeal will be dismissed with costs. We cannot interfere with the learned trial Judge's disposition of the costs. The defendant's cross-appeal will be dismissed without costs. J. R. Roaf, for the plaintiffs. F. Arnoldi, K.C., for the defendant.

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FEE v. MacDONALD MANUFACTURING CO.

Ontario High Court. Trial before Sutherland, J. June 13, 1912.

MORTGAGE (§ I D—18*a*)—*Charge on Land—Absence of Interest in Creator of Charge—Cloud on Title—Damages.*]—Action for a declaration that a certain agreement between the defendant company and the defendant Henry Lang, registered by the company against lot 3 in the 7th concession of the township of Collingwood, was a cloud upon the title of the plaintiffs to that lot, and that the registration should be vacated, and for damages for the loss and inconvenience sustained by the defendant company's refusal to vacate the registration. The agreement purported to give the defendant company a lien on the land for the price of machinery sold to Henry Lang. The learned Judge, after stating the facts and reviewing the evidence, said that it was fairly well established that, at the time Henry Lang purchased the machinery, he no longer had any interest in the land in respect of which he could give any lien to the defendant company. Judgment for the plaintiffs as asked, declaring that the agreement registered by the defendant company is a cloud upon the title and must be removed; and awarding the plaintiff $50 damages and costs of action. If either party is dissatisfied with the amount of damages, there will be a reference as to damages, at the risk of that party. A. E. H. Creswicke, K.C., for the plaintiffs and defendant Henry Lang. J. J. Coughlin, for the defendant company.

CANADIAN ELECTRIC AND WATER POWER CO. v. TOWN OF PERTH.

Ontario High Court. Trial before Britton, J. June 14, 1912.

CONTRACTS (§ II D 4—185)—*Construction—Municipal Corporation—Compliance with Contract—Acceptance—Counterclaim—Default—Damages.*]—There were three actions between the same parties. The first was for the recovery of $3,000 and interest for the use of hydrants in supplying the defendants with water for the years 1905, 1906, and 1907; the second, for the same service in the years 1908, 1909, and 1910; and the third, for the same service for 1911. The actions were tried together. The defence to the three actions was, that the plaintiffs had failed to comply with the agreement set out in the schedule to 62 Viet. ch. 70 (O.), between one Charlebois and the defendants, the plaintiffs now standing in the place of Charlebois, by virtue of assignments ratified and confirmed by the Act. The learned Judge, after referring to the agreement and to the facts and the evidence, said that, in his opinion, the contract, as to the construction of the waterworks system, was reasonably com-

plied with—the evidence was overwhelming that the defendants had accepted the work as a compliance with the contract as to buildings, pumps, engines, and all the plant and apparatus necessary to do the work required of the plaintiffs.—The defendants alleged that, whatever was the condition in prior years, it was such on the 9th May, 1905, that they had the right to complain and to deduct $25 for each day the plaintiffs were in default after the expiration of three days from the giving of notice under clause 25 of the agreement. The defendants counterclaimed for damages generally, and for the per diem liquidated damages as above. As to this, the learned Judge found that the clauses in the contract as to maintaining the water system created conditions subsequent to the acceptance by the defendants of the construction and installation work, and that the covenant of the plaintiffs was a continuing one, protecting the defendants from payment of hydrant rents, if the plaintiffs made default under clause 25, according to the proper construction of that clause. He also found that the plaintiffs were not, on the 9th May, 1905, in default in maintaining the system so as to give reasonably the best results for fire purposes; and that there was on the part of the plaintiffs a substantial compliance with the contract. Judgments for the plaintiffs in all three actions, with costs, and counterclaims dismissed with costs. G. H. Watson, K.C., and J. A. Stewart for the plaintiffs. G. F. Henderson, K.C., and J. A. Hutcheson, K.C., for the defendants.

NADEAU v. CITY OF COBALT MINING CO.

(Decision No. 2.)

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. June 13, 1912.

ANIMALS (§ I A—8)—*Injury to Servant by Kick of Master's Horse—Habit of Kicking—Scienter—Imputed Knowledge of Master—Incorporated Company—Negligence.*]—Appeal by the defendants from the judgment of MIDDLETON, J., 3 D.L.R. 495, 3 O.W.N. 1126. The Court dismissed the appeal with costs. A. E. Fripp, K.C., for the defendants. A. G. Slaght, for the plaintiff.

REX v. HARRAN.

Ontario High Court, Kelly, J., in Chambers. June 17, 1912.

APPEAL (§ XI—720)—*Leave to Appeal Order Refusing to Quash Conviction.*]—Motion by the defendant for leave to appeal from the order of MIDDLETON, J., 3 O.W.N. 1107. Motion refused with costs. G. P. Deacon, for the defendant. D. L. McCarthy, K.C., for the prosecutor.

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O'HEARN v. RICHARDSON.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Kelly, JJ. June 17, 1912.

CONTRACTS (§ IV F—371)—*Sale of Land—Default by Purchaser—Time made of Essence—Termination of Contract—Absence of Fraud or Waiver.*]—Appeal by the plaintiff from the judgment of SUTHERLAND, J., 3 O.W.N. 945. The Court, being of opinion that the case was governed by Labelle v. O'Connor, 15 O.L.R. 528, dismissed the appeal with costs; giving the plaintiff leave to appeal to the Court of Appeal. J. E. Day, for the plaintiff. J. W. Mitchell, for the defendant.

JEWER v. THOMPSON.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Kelly, JJ. June 18, 1912.

VENDOR AND PURCHASER (§ I E—29)—*Sale of Land—Objections to Title—Right of Way—Admission by Vendor of Validity of Objections—Termination of Contract—Registration—Discharge.*]—Appeal by the defendant from the judgment of BRITTON, J., 3 O.W.N. 1122. The Court dismissed the appeal with costs. J. J. Maclennan, for the defendant. F. E. Hodgins, K.C., for the plaintiffs.

KEENAN WOODWARE CO. v. FOSTER.

Ontario High Court, Cartwright, M.C. June 19, 1912.

VENUE (§ II A—15)—*Change—County Court Action—Witnesses—Convenience.*]—Motion by the defendant to transfer the action from the County Court of the County of Grey to the District Court of the District of Sault Ste. Marie. The action was brought in respect of a sale of poplar bolts by the defendant to the plaintiffs; and the main question was, whether there was a compliance by the defendant with the terms of the written agreement as to the place of delivery. The defendant swore to seven witnesses in the district of Sault Ste. Marie, and the plaintiffs to twelve in the county of Grey. The Master said that it would be a matter of surprise if either party called half the number of witnesses named: Sturgeon v. Port Burwell Fish Co., 7 O.W.R. 359, 360, 380. An action reasonably brought in one county cannot be transferred to another, without proof of at least a considerable, if not an overwhelming, preponderance of convenience. It could not be said this had been shewn here. Motion dismissed; any extra costs of a trial at Owen Sound to be to the defendant in any event. Costs of the motion to be costs in the cause. H. S. White, for the defendant. Featherston Aylesworth, for the plaintiffs.

BENEDICT v. BRANDON.

Ontario High Court, Cartwright, M.C. June 19, 1912.

COSTS (§ I—2a)—*Settlement—Costs of one Defendant Unprovided for—Remedy—Practice.*]—This action was brought against three defendants, and was set down for trial on the 21st February, 1912. On the 11th March, an order was made dismissing it without costs, upon a consent signed by the plaintiff's solicitor. The consent was given on the receipt of a letter, dated the 29th February, written by the solicitor of two of the defendant to the plaintiff's solicitor, in which it was stated that the action had been settled between the plaintiff and one of the two defendants referred to. The plaintiff confirmed this, on being referred to by his solicitor. Nothing was said about the third defendant, Anderson; who, after some correspondence, moved for an order for payment of his costs by the plaintiff or to set aside or vary the order of dismissal. Anderson's costs of the action, exclusive of the costs of this motion, amounted to $68.26 (as taxed by agreement). The Master said that either the plaintiff must pay Anderson's costs as taxed, with a reasonable additional sum for the costs of this motion (say $20), or else the order must be varied by confining the dismissal to the other two defendants—leaving the plaintiff in either case to take such steps as he might think best to be indemnified by those defendants. Costs of the motion as between the plaintiff and the two defendants to be part of the plaintiff's claim for indemnity if pressed—otherwise no costs. D. C. Ross, for the defendant Anderson. H. S. White, for the other defendants. A. D. Armour, for the plaintiff.

COWIE v. COWIE.

Ontario High Court, Riddell, J., in Chambers. June 21, 1912.

DIVORCE AND SEPARATION (§ V—46)—*Judgment—Enforcement by Sale—Executions.*]—A petition by the plaintiff for sale of the defendant's land to satisfy a judgment for alimony. The defendant appeared in person and said that it was impossible for him to pay the amount of alimony awarded. RIDDELL, J., said that, following Abbott v. Abbott, 3 O.W.N. 683, 1 D.L.R. 697, he must hold the petition regular; and, if the applicant filed a sheriff's certificate of no executions covering this land, the order might go; costs of procuring the certificate and of the petition to be paid by the defendant—or the plaintiff might add the amount to her claim. If executions were found affecting the lands, the case might be mentioned again. J. W. McCullough, for the petitioner.

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WALLBERG v. JENCKES MACHINE CO.

Ontario High Court, Cartwright, M.C. June 20, 1912.

COSTS (§ I—14)—*Plaintiff out of Jurisdiction—Property in Jurisdiction—Company-shares—Undertaking.*]—Motion by the plaintiff, who resided at Montreal, to set aside a præcipe order for security for costs. The plaintiff made affidavit that he had assets within the jurisdiction exceeding in value $400, and instanced 1,000 fully-paid up shares of the Canada Wire and Cable Company Limited. He was not cross-examined on this; but, in reply, the defendants' solicitor made an affidavit that he could not find any facts about these shares, "other than the fact that the said company has at the present time no known market value." The Master was of opinion that, as nothing was said of the nature of the inquiries made by the defendants, the plaintiff's unimpeached affidavit was entitled to prevail—and, on his undertaking not to deal with the shares without notice to the defendants, the motion should be granted; costs in the cause. See Wooster v. Canada Brass Co., 7 O.W.R. 748, 807; American Street Lamp and Supply Co. v. Ontario Pipe Line Co., 11 O.W.R. 734. M. L. Gordon, for the plaintiff. W. H. Garvey, for the defendants.

FOSTER v. MITCHELL.

Ontario Divisional Court, Clute, Sutherland and Lennox, JJ. June 20, 1912.

PARTNERSHIP (§ VII—30)—*Valuation of Assets—Goodwill—Interest—Assets of Former Firm—Right of User—Costs.*]—Appeal by the plaintiff and cross-appeal by the defendant from the order of TEETZEL, J., 3 O.W.N. 425, varying the report of a Special Referee in a partnership action. The judgment of the Court was delivered by CLUTE, J., who said that the principal point argued on behalf of the plaintiff was with reference to the item of interest upon $5,000 charged as a valuation of the goodwill of the business. In valuing the assets which were handed over to the partnership, the goodwill was included, and properly included, inasmuch as it formed a part of the property from which the profits were to arise. Upon this question, the Court agreed with TEETZEL, J. Reference to Hibben v. Collister, 30 Can. S.C.R. 459. The plaintiff's appeal should be dismissed, except as to the declaration that the assets of the former firm had passed to the new firm. As to this, there should be a declaration that there was no sale of the assets, but only a right of user, for which interest was to be paid during the continuance of the partnership. The cross-appeal should be dismissed, except as to the declaration above-referred to,

from which the defendant also appealed. As both parties had failed in their appeals, except upon a point as to which they practically agreed, there should be no costs. Reference back to the Referee to make his final report and dispose of the question of costs under the original order of reference. F. E. Hodgins, K.C., for the plaintiff. I. F. Hellmuth, K.C., and C. L. Dunbar, for the defendant.

Re CAMPBELLFORD, LAKE ONTARIO AND WESTERN R. CO.

Ontario High Court, Riddell, J., in Chambers. June 22, 1912.

EMINENT DOMAIN (§ II C—93) — *Warrants for Possession —Sums to be Paid into Court.*]—Applications by the railway company for warrants for possession of lands taken. The sole question was as to the amounts to be paid into Court. RIDDELL, J., after perusal of the material, ordered that there should be paid in: for C. A. Annis, $2,000; for James Stanley, $4,000; for J. D. Stevens, $2,500; for R. R. Stevens, $2,500. J. D. Spence, for the railway company. James Pearson, for the landowners.

McFARLANE v. COLLIER.

Ontario High Court. Trial before Britton, J. June 21, 1912.

EVIDENCE (§ II K—311) — *Burden of Proof — Failure of Plaintiff to Satisfy.*]—Action to recover the sum of $4,300, upon an alleged oral contract made between the plaintiff and the defendant, at the Oriental Hotel, in Peterborough, on or about the 15th January, 1910, to the effect that the plaintiff would remain as superintendent with the Wm. Hamilton Company Limited until the end of the current year, and on the basis of a yearly hiring, and, in consideration therefor, the defendant would pay to the plaintiff the sum of $4,300. BRITTON, J., said that the whole question was one of fact. No person other than the plaintiff and defendant was present to hear what was said when the alleged bargain was made. The learned Judge then reviewed at length the facts and circumstances and the testimony given at the trial; and concluded:—The onus of establishing this contract is upon the plaintiff. If there is any reasonable doubt, that doubt must be resolved in favour of the defendant. I am not free from doubt. No doubt, the defendant made a very large amount of money out of these transactions, and the plaintiff assisted the defendant to make it. It may be that the defendant promised to pay out of these profits something that would be fair. It might be that the defendant

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was lulled into security and silence by something the defendant said, in the way of promising to do what would be fair between them—I cannot say—but all this would fall short of the contract which the plaintiff, to succeed, must establish. In the view I take of the evidence, the action must be dismissed; but, in the circumstances, it will be without costs. F. D. Kerr and A. D. Meldrum, for the plaintiff. R. R. Hall, K.C., and S. T. Medd, for the defendant.

RICKERT v. BRITTON.

Ontario High Court, Cartwright, M.C. June 22, 1912.

COSTS (§ I—14) — *Nominal Plaintiff — Former Application —Res Judicata—Costs of Interlocutory Motion Unpaid.*]— Motion by the defendants for an order for security for costs. After the previous motion, 3 O.W.N. 1008, the plaintiffs made a motion which is noted 3 O.W.N. 1272, sub nom. Rickart v. Britton Manufacturing Co., which was dismissed with costs to be paid by the plaintiffs forthwith after taxation. Execution issued for these costs against Carroll and the other plaintiffs, and was returned nulla bona. The defendants now moved for security, on the ground that Carroll was only a nominal plaintiff, and had no cause of action. The Master said that he still thought that this ground could be taken only on a motion made under Con. Rule 261: Knapp v. Carley, 7 O.L.R. 409. No inquiry as to this could be entertained by the Master—he could not do indirectly what there was no power to do directly. The present motion seemed also in effect an appeal from the order made on the 11th April (3 O.W.N. 1272). Upon the motion then made it was held that Carroll was not "a merely nominal plaintiff," but, "as a member of the Union, had an interest in the action." That order was not appealed from, and, so far as the Master was concerned, this point was res judicata. The Master further said that the objection that a plaintiff has merely a nominal interest must be supported by "very clear proof—before the Court should intercept it at the outset by an order for security for costs:" Pritchard v. Pattison, 1 O.L.R. 37; and referred also to Wright v. Wright, 12 P.R. 42, following Stewart v. Sullivan, 11 P.R. 529, as shewing that the Master, not having the inherent jurisdiction of the Court, cannot stay an action for non-payment by the plaintiff of interlocutory costs. Motion dismissed, with costs to the plaintiffs in any event, without prejudice to a substantive application to the Court as in Stewart v. Sullivan, supra. Casey Wood, for the defendants. J. G. O'Donoghue, for the plaintiffs.

YATES v. CITY OF WINDSOR.

Ontario High Court. Trial before Falconbridge, C.J.K.B. June 22, 1912.

HIGHWAYS (§ IV A 5—154)—*Snow and Ice—Injury to Pedestrian—Gross Negligence—Damages.*]—Action by Thomas H. Yates for damages for injuries sustained by falling on ice that had been allowed to accumulate, as alleged, by negligence of the defendants, on the sidewalk on Goyeau street, Windsor, on the 25th January, 1912. The learned Chief Justice reviews the evidence and finds that the defendants were guilty of that gross negligence causing the accident which the statute requires to render the defendants liable therefor. He assesses the plaintiff's damages at $1,250, and gives judgment in his favour for that sum, with costs. O. E. Fleming, K.C., for the plaintiff. A. St. George Ellis, for the defendants.

DENNEEN v. WALLBERG.

Ontario High Court, Cartwright, M.C. June 22, 1912.

DISCOVERY AND INSPECTION (§ IV—20)—*Place for Examination—Residence of Defendant—Con. Rules* 447, 477.]—Motion by the plaintiff for an order requiring the defendant to attend at Toronto for examination for discovery, pursuant to Con. Rule 447, on the ground that he is resident in this Province. The Master said that Wallberg had in several cases been a plaintiff or defendant, and had always given his residence as at Montreal. See Standard Construction Co. v. Wallberg, 20 O.L.R. 646, as an instance. He made affidavit that his residence was still there; on this he had not been cross-examined. An affidavit was made, in support of the motion, that the defendant rented apartments in Toronto, for which he had paid rent up to the 1st July prox. Dryden v. Smith, 17 P.R. 500, and cases there cited, shew that a person "may have several residences." In Ex p. Breull, 16 Ch.D. at p. 88, Lush, L.J., said on this point, as to what constitutes residence: "The words in question are susceptible of a wider or a narrower interpretation, and in order to interpret them we must have regard to the object and intent of the Rule." Applying that principle to the present case, it seemed that Con. Rule 477 should be resorted to, following Cox v. Prior, 18 P.R. 492; Lefurgey v. Great West Land Co., 11 O.L.R. 617; as well as Dryden v. Smith, 17 P.R. 500. It was said by the learned Chancellor in Pritchard v. Pattison, 1 O.L.R. at p. 42, that, though "there may be strong suspicion or even probable inference that" the view of the moving party is correct, yet, where the contrary is sworn, "one hesitates to find perjury for the purpose of" making an interlocutory order. Here, however, there was neither suspicion

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nor probable inference. The defendant, like many other residents outside the Province, had many business interests here, and was, no doubt, often in Toronto. Still that did not make him a resident so as to make Con. Rule 447 applicable, even though he might have permanent lodgings here. Motion dismissed. No costs of this motion, nor of that made on the 10th instant, the costs of which were reserved in anticipation of the present motion, as one might fairly be set off against the other. The plaintiff to have an order under Con. Rule 477 for examination of the defendant at Montreal, unless it may be arranged to be taken here. W. T. J. Lee, for the plaintiff. R. W. Hart, for the defendant.

MacMAHON v. RAILWAY PASSENGERS ASSURANCE CO.

Ontario High Court, Cartwright, M.C. June 24, 1912.

DISCOVERY AND INSPECTION (§ IV—20)—*Order for Further Examination—Stay of Proceedings until Plaintiff's Return from Abroad.*]—By an order of the Master made on the 6th May, 1912 (3 O.W.N. 1239), the plaintiff was required to attend for further examination for discovery; and this was affirmed by RIDDELL, J. (3 O.W.N. 1301). The defendants then served an appointment for the plaintiff's examination on the 7th June. The plaintiff, being absent in Europe, did not attend. The defendants then asked for a consent from his solicitors to have the action stayed until his return and examination. This being refused, the defendants now moved for such an order. Upon the motion it appeared that, since the order of RIDDELL, J., the marriage certificate of the plaintiff's mother had been produced, and a copy taken by the defendants' solicitors. It had been previously stated that this would satisfy them. It now appeared that, as they could get no satisfaction about admitting the marriage certificate, in such form as would enable them to treat it as part of the examination for discovery, they intended to withdraw the offer. The Master said that the case was similar to that of Maclean v. James Bay R.W. Co., 5 O.W.R. 440, 495. There the action was stayed for a month, and the defendants were directed to examine the plaintiff on commission. Here there could not be any trial for nearly three months. In the opinion of the Master, unless some arrangement could yet be made, as by making the certificate part of the plaintiff's productions, which seemed a reasonable course to adopt, an order must go to stay the action until the return of the plaintiff or until the 31st August, if it should be necessary to issue a commission. Costs of this motion to be costs in the cause. Shirley Denison, K.C., for the defendants. G. H. Sedgewick, for the plaintiff.

McLEAN v. DOWNEY.

Ontario High Court. Trial before Sutherland, J. July 9, 1912.

DAMAGES (§ III E—143)—*Injury to Scow.*]—Action for damages for injury to the plaintiffs' sand-scow by the defendants' negligence, as alleged. The plaintiffs delivered sand in their scow at the defendants' dock on the St. Mary's river, under a contract with the defendants. While the scow was at the dock in the course of unloading, she listed to one side, and was left in that position when the defendants' men who had been unloading stopped work at 6 in the evening. The next morning she was found to be taking in water, and she ultimately sank, and so was badly damaged, and was taken to a dry-dock in the State of Michigan for repairs. SUTHERLAND, J., reviewed the evidence, and found that the damage was caused by the negligence of the defendants; and he allowed as damages: $488.15, paid for repairs; $121.25, paid for customs duty on the repairs; $105.40, for the use of the plaintiffs' tug while engaged in pumping the scow out, taking her to the dry-dock, bringing her back, etc.; and $500 for permanent injury to the scow—$1,211.80 in all—with interest from the date of the writ of summons and costs of the action. He declined to allow anything for the loss of the use of the scow while undergoing repairs. J. E. Irving, for the plaintiffs. J. L. O'Flynn, for the defendants.

McDONALD v. EDEY.

Ontario High Court. Trial before Middleton, J. June 25, 1912.

ARCHITECTS (§ I—5) — *Negligence—Counterclaim—Commission — Costs.*]—The plaintiffs alleged that the defendant, who was employed by them as an architect in the erection of a house, was liable for damages by reason of his careless, negligent, and unskilful conduct in and about the building in question. The damages claimed were $2,500. The defendant, denying the plaintiff's allegations, counterclaimed to recover his commission. MIDDLETON, J., said that most of the specific claims put forward by the plaintiffs were negatived by the evidence at the trial; and all the claims were very much exaggerated; yet, in the result, he thought that there was some negligence on the part of the defendant. The two matters in which the defendant was to blame were: allowing the building to be so erected that the eave overlapped the eave of the adjoining building, also owned by the defendant; and his failure to compel the carpenters to use flooring in accordance with the specifications. It was said that the overlapping of the eaves would interfere with the selling value of the premises. This claim was very much exaggerated. The fact that the overlapping eave

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keeps the 18 inches of space between the houses dry and prevents the walls becoming wet and so injured, was not to be overlooked. The plaintiffs stood by and did not in any way complain of this when the building was located; and, while some allowance should be made upon this head, it should not be large. As to the flooring, the specifications called for flooring not exceeding 4-1/2 inches in width. About 30 per cent, of that actually lad down was 5-1/2 inches in width. This rendered the floor boards more liable to warp and to leave wider cracks in shrinking. The architect was to be allowed 5 per cent. commission upon the erection, or $200 in all; and he had received $50. The learned Judge said that, after giving the matter the best consideration he could, and having in view the exaggerated claims originally made—some of which were pressed at the trial—he had arrived at the conclusion that the best solution of the matter was, to direct the defendant to refund the $50 and to set off the plaintiffs' claim for damages against the defendant's claim for commission—in other words, to assess the damages at $200, the amount which would be payable for commission. No costs. J. J. O'Meara, K.C., for the plaintiffs. T. A. Beament, K.C., for the defendant.

M. HILTY LUMBER CO. v. THESSALON LUMBER CO.

Ontario High Court. Trial before Sutherland, J. July 9, 1912.

EVIDENCE (§ VI—517c) — *Representation or Guaranty — Oral Testimony — Admissibility — Fraud and Misrepresentation—Contemporaneous or Prior Oral Agreement—Discount on Price—Demurrage—Evidence—Counterclaim.*]—This action arose out of a written contract for the sale of lumber. The Traders Bank of Canada were made defendants, as well as the Thessalon Lumber Company. The contract was in this form: "The party of the first part" (the Thessalon Lumber Company) "does hereby sell to the party of the second part" (the M. Hilty Lumber Company) "all of the white pine No. 3 and better lumber, to be cut from the saw-logs now cut and owned by it in the woods, on skids, or in the streams and on the banks of the streams on the Little Thessalon and Mississauga rivers, in the district of Algoma." The plaintiffs alleged that they were induced to make the contract by certain verbal representations made to their president, one Forster, by one Bishop, the general manager of the defendant lumber company, on the truth and accuracy of which they relied, to the effect that the defendant lumber company would undertake to deliver all of the saw-logs owned by them at the time of the contract, then cut, and manufacture the same into lumber, upon specifications to be furnished by the plaintiffs, and that the Mississauga run would cut into at

least 5,000,000 feet of grade No. 3 and better. Upon the evidence, the plaintiffs asked for findings: (1) that there was a definite representation on the part of Bishop that there would be a cut of 5,000,000 feet at least on the Mississauga river of the kind of timber contracted for; (2) that there was an agreement that a discount of two per cent. should be allowed. The plaintiffs did not directly ask for a rectification of the agreement. They deducted $7,060 from the price, on the assumption that the agreement was entered into on the representation that the Mississauga run would cut into at least 5,000,000 feet, etc., and sought to treat the contract as though it contained a clause guaranteeing that. SUTHERLAND, J., said that he was not clear that it was open to the plaintiffs to shew by oral testimony that any such representation or guarantee had been made or given by Bishop prior to or at the time of making the contract—it was not the case of a collateral agreement about something not referred to in the document: Lindley v. Lacey (1870), 17 C.B. 578; LaSalle v. Guilford, [1901] 2 K.B. 215; Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L.T.R. 162. In any case, he was unable to find that there was any representation by Bishop that the Mississauga cut would run at least 5,000,000 feet; or that there was any false or fraudulent representation made by Bishop; or that there was any prior or contemporaneous oral agreement constituting a condition upon which performance of the written agreement was to depend; or that Bishop ever agreed that the two per cent. discount should be allowed. The plaintiffs claimed also $300 for demurrage. This, too, the learned Judge held, failed upon the evidence. The action was, therefore, dismissed as against the defendant lumber company. The defendant bank, under the terms of their letter, simply agreed to release their lien as the plaintiffs should from time to time, by paying for the lumber according to the terms of the contract, make their interest appear. The action failed also as against the bank. Judgment for the defendant lumber company, upon their counterclaim, for $7,060 and $1,360, with interest from the date when the former sum was first payable, and on the monthly sums making up the latter from the respective dates at which they should have been paid. As to the remainder of the lumber still in the possession of the defendants and available under the contract, the plaintiffs are to be at liberty to apply to the defendant lumber company and obtain it; but, in the circumstances, and to avoid further difficulty and possible litigation, they must first pay the $7,060 and $1,360 and interest and also pay for the remainder of the lumber in full as loaded on the boat. Both the defendants to have their costs against the plaintiffs. M. McFadden, K.C., and J. E. McEwen, for the plaintiffs. J. L. O'Flynn, for the defendant lumber company. P. T. Rowland, for the defendant bank.

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Re S.

Ontario High Court, Kelly, J. June 27, 1912.

DOWER (§ I C—27)—*Forfeiture — Adultery — R.S.O. 1897 ch. 164, sec. 12.*]—Application under section 12 of the Dower Act, R.S.O. 1897 ch. 164, to authorise the applicant to sell, free from the dower of his wife, certain lands described in the affidavits filed, and to declare that the wife had forfeited her right to dower. The facts, as shewn by the affidavits filed by the applicant, were that the applicant married his wife in 1856; that they lived together as husband and wife until 1871, there being then four children of the marriage; that in 1871 the wife left home with one R., taking with her the four children; and she continued to live with R. as his wife from that time; that she and the four children adopted the name of R.; that two children at least were born to her while living with R.; that, soon after she left her husband, he followed her to Montreal for the purpose of having her return, but she evaded him, and thereafter lived with R., at first in the Province of Quebec, then in Toronto, and later in British Columbia. In 1907 she called on the applicant and requested him to sign a writing declaring that he had not been properly married to her, the object being to establish that her son by R. was a legitimate son of R. and herself, so that he might inherit certain property of R., who was then dead. The applicant in his affidavit stated that she at that time admitted to him that she lived with R. as his wife down to the time of his death, and that she had a number of children by R. With the exception of this occasion, and perhaps at one other time prior thereto, the applicant had not since 1871 seen his wife, and he did not know whether she was living or dead. KELLY, J., said that on the facts as submitted, and for the reasons given in Re S., 14 O.L.R. 536, and the cases therein considered, it was quite clear that the wife of the applicant was not entitled to dower. The applicant was entitled to an order dispensing with the concurrence of the wife for the purpose of barring her dower. W. J. McLarty, for the applicant.

HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

Ontario High Court, Sutherland, J. July 11, 1912.

MORTGAGE (§ VI—90)—*Final Order of Sale — Motion to Open up Master's Report—Assignees of Equity of Redemption — Parties.*] — Application by the defendants Victoria McKillican and David A. Smith to open up a report of the Local Master at Cornwall in a mortgage action, upon the grounds that, by reason of the failure of the plaintiffs, the

mortgagees, to file a complete abstract of all lands covered by the mortgage, the applicants were not informed as to all the subsequent incumbrancers and other parties interested in the properties subsequent to the plaintiffs' mortgages; that the plaintiffs, at the time of the making of the report, concealed the fact that they had sold some of the properties and received a large amount of money therefor, and had been in possession of certain portions of the lands, and that no credits were given for the moneys so received, nor anything allowed for use and occupation; and that, since the date of the judgment and the making of the report, the plaintiffs had sold, without the consent of the Court, certain lands and premises and discharged the same from their mortgages, which properties were of greater value than the remaining mortgages. SUTHERLAND, J., after setting out the proceedings, said that, in his opinion, a case for opening up the report had not been made out. In the affidavit of the plaintiffs' manager filed on obtaining the final order for sale, he stated that no part of the money found due by the report had been paid, and that the plaintiffs had not been in possession of the lands or any part thereof. In a further affidavit, filed in answer to this motion, he cleared up in the main the material allegations contained therein. Rutherford v. Rutherford, 17 P.R. 228, applied to this motion. The applicants were assignees of the original mortgagor of the lands, and had ample opportunity during the progress of the reference to look after their interests. The solicitor for the applicants, in one of his affidavits filed on the application, stated that, in the presence of the Master, he asked the solicitor for the plaintiffs if he would, upon being given the amount found due by the report with subsequent costs to date, assign to the applicants the mortgages, including the properties which his clients had sold as set out in his (the applicants' solicitor's first affidavit), to which he replied that he would not do so, and would be willing to assign the mortgage only as to the properties which were undischarged at the time. No doubt, this latter offer would still be open to the applicants. Motion dismissed with costs. C. H. Cline, for the applicants. F. A. Magee, for the plaintiffs.

Re DOMINION MILLING CO.

Ontario High Court, Kelly, J., in Chambers. July 16, 1912.

CORPORATIONS AND COMPANIES (§ VI D—337)—*Winding-up—Sale by Mortgagee—Leave to Proceed with Sale after Winding-up Order—Terms—Costs.*]—On the 28th May, 1912, a liquidator of the Dominion Milling Company, Limited, was appointed. Proceedings for the sale of lands of the company by the applicant,

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under power of sale in a mortgage from the company to him, were then in progress, the sale having been advertised to take place on the 5th June. On that day, and a short time before the hour fixed for the sale, it came to the knowledge of the applicant's solicitor that the company had gone into liquidation, and the property was offered for sale and a sale made, "subject to the right that any liquidator may have in law, under winding-up proceedings, should it hereafter prove that he has any right to interfere with the sale, or that, under the circumstances, the mortgagee had not the right to go on with the sale on account of the winding-up proceedings." The applicant applied to be permitted to continue the proceedings for sale and to carry out the sale made on the 5th June. The motion came on for hearing on the 28th June, and was adjourned to the 4th July, to enable the liquidator to continue his inquiries about the sale, and the selling value of the property. On the 4th July, he was still unable to say what course he should pursue; and my decision upon the motion was reserved in order to allow him still further time. KELLY, J., said that the liquidator had had several weeks within which to inform himself; but, so far, there was nothing to indicate what course he intended to take in respect to this claim. The applicant appeared to have advertised the property extensively, and to have given reasonable opportunity to possible purchasers to appear at the sale; he was in danger of losing the benefit of the sale if there should be further delay; and the property was one not readily saleable. Unless the liquidator, not later than twelve o'clock noon on the 17th July, should pay the amount properly due to the applicant on this claim, including the costs and disbursements of the sale, and the costs of this application, or give the applicant satisfactory security for such payment, the applicant was to be at liberty forthwith thereafter to continue the sale proceedings and carry out the sale; and be entitled to add to his claim the costs of this application. B. N. Davis, for the applicant. D. Inglis Grant, for the liquidator.

DOUGLAS v. BULLEN.

Ontario High Court, Kelly, J. July 16, 1912.

INJUNCTION (§ I E—46)—*Trespass—Boundary.*]—Motion by the plaintiffs for an order continuing until the trial an interim injunction granted on the 10th June, 1912, restraining the defendant from trespassing upon the plaintiffs' lands on the south side of Braedalbane street, in the city of Toronto. The plaintiff lands run southerly to the lands of the defendant, which front on the north side of Grosvenor street. The plaintiffs alleged that the defendant, in preparation for the erection of an

apartment house on his lands, encroached to a small extent on their property, and that the proposed building would so encroach. KELLY, J., said that the amount of land in dispute was so small, and the value, having regard to its location at the rear of the two properties must be so insignificant, that it was surprising that an amicable arrangement had not been arrived at. It would be of service to neither party to continue the injunction as already granted, namely, restraining the defendant from entering upon the plaintiffs' lands, as the very matter in dispute was, what land at the place in question belonged to the plaintiffs. The final disposition of the dispute involved the settlement of the ownership of the disputed land and the fixing of the true boundary. This could not be done on the present application. Motion dismissed; costs to be disposed of by the trial Judge. A. McLean Macdonell, K.C., for the plaintiffs. F. C. Snider, for the defendant.

GRAY v. BUCHAN.

Ontario High Court. Trial before Kelly, J. July 16, 1912.

BROKERS (§ I—2)—*Purchase by Customer on Margin—Contract—Terms—Failure to Keep up Margin—Resale by Broker.*]—Action by customer against brokers for rescission of a contract or contracts for the purchase by the plaintiff of 3,000 shares of Dome Extension mining stock, and for a return of the moneys paid by the plaintiff on account of the purchase, or for damages for the wrongful resale of the shares. The total purchase-money of the 3,000 shares was $1,260, to which was added the defendants' brokerage of $15, making $1,275. The plaintiff bought on margin, and paid $300, and afterwards $95, when the stock fell in value and more margin was required. The full amount demanded for margin was not paid, and the defendants sold the stock at the market-price and realised sufficient with the $95 to pay all that was due to them, except $18.10, for which they counterclaimed. KELLY, J., said that, after a careful consideration of all the facts and circumstances, he had come to the conclusion that the plaintiff was not entitled to succeed. Dealing in stocks was not new to him. A full explanation of the defendants' methods, terms, conditions, and rules of business in dealing in such stocks, the amount of deposit required on the purchase, and the amount of margin required to be maintained, was given to him before he entered on the purchase. He knew the character of the stock he was dealing in; that it was subject to rapid and serious fluctuations in value; and that, unless the margin agreed upon was kept up, the stock was liable to be promptly sold. When the price of the

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stock declined, the defendants, by the means agreed upon between them and plaintiff, demanded as an additional payment a sum which, under the circumstances, they were entitled to demand. The plaintiff did not have the money necessary to make payment of the amount demanded. His efforts to induce the defendants to accept on account unmarked cheques for a smaller sum than he was bound by his bargain to pay, and they were entitled to receive, were unsuccessful. Had he promptly responded to the demand by forwarding the amount required to keep up the margin, as agreed upon, the stock, no doubt, would not have been sold, or if, after such payment, the defendants had sold it, he would have had a good cause of complaint against them. The plaintiff also set up that he had signed the orders for purchase without having read them, and on that ground sought to be relieved from the terms they contained. There is nothing in the evidence entitling him to escape liability on that ground. He failed to live up to the bargain which he made, and he knew or should have known its meaning, and the consequence of his failure to keep up the payments which, it had been made clear to him, he would have to make if the stock declined. Judgment dismissing the action with costs, and allowing the defendants the amount of their counterclaim, $18.10. The plaintiff, in person. A. G. Slaght, for the defendants.

CURRY v. WETTLAUFER.

Ontario High Court, Kelly, J. July 23, 1912.

INJUNCTION (§ I E—47)—*Mining Rights—Mandamus.*]—Motion by the plaintiff for an injunction restraining the defendants from mining, working, or extracting ores or minerals from a mining claim; and for a mandamus. The learned Judge made an order as follows: "The defendants by their counsel undertaking not to mine, work, or extract ores or minerals from the lands in question until the sale now pending or until further order, the injunction is refused: this without prejudice to the defendants, if so advised, applying to restrain the plaintiff from working the property pending sale. Motion for mandamus enlarged till first court-day after vacation." Britton Osler, for the plaintiff. W. M. Douglas, K.C., for the defendants.

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